

PRISON SERVICE JOURNAL

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The Editorial Board wishes to make clear that the views expressed by contributors are their own and do not necessarily reflect the official views or policies of the Prison Service.

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Editorial Comment

The peer review and production process of an academic journal are such that they cannot immediately respond to issues in the way that current affairs media does. They can however respond to contemporary issues and concerns and offer more thoughtful, in depth and evidence based analysis. This edition of *Prison Service Journal* speaks to a number of current issues in criminal justice and penal practice.

Iolo Madoc-Jones from Glyndwr University, and his co-authors, revisit the issue of prison size. This remains an important subject with the building and design of Berwyn prison continuing, with a planned opening in 2017, and with future plans to close older inner city prisons and replace them with new establishments. What are the challenges of operating larger prisons? Do the economic benefits come at a cost in terms of quality and everyday social relations? Using the findings of HM inspectorate of prisons, Madoc-Jones presents empirical evidence for the view that larger prisons come at a cost. The challenge for practitioners will be how to respond to this, ameliorate the risks, find ways of strengthening everyday relations and create means to make big feel small.

The incentives and earned privileges scheme has, since the 1990s been a central means through which order is managed in UK prisons. Zarek Khan reports in this edition his research into the ways in which the operation of IEP can shape prisoners' perceptions of the organisation. He argues that the impact upon compliance and order is not solely from the tangible benefits or deprivations that come from the privileges made available or withdrawn, but instead from the sense of fairness and legitimacy. This is a valuable article, particularly as this is an area of policy where governors may receive greater autonomy in the future. The article illuminates how IEP has a critically important and complex role in the everyday social world of the prison.

This edition is published three months after the European Union referendum in the UK. Indirectly, three articles comment upon the potential implications of the decision to leave the EU. French academics Gaëtan Cliquennois and Martine Herzog-Evans explore the impact of the Council of Europe and European Court of Human Rights on

prisons in three European jurisdictions. Without being polemical or evangelical, the article highlights how these institutions can have a defensive role in ameliorating poor conditions and can, in a modest way, promote progressive improvements. While the Council and the Court are distinct from the EU and their status is not directly affected by the EU referendum, one of the longer term questions that may arise is how the UK's relationship with those institutions evolves in the future. Australian academic Bronwyn Naylor, offers an overview of human rights practice in prisons. She draws attention to the structures in place including laws, rules, policies, external monitoring and remedies, but also pays attention to the development of staff so that human rights become embedded in everyday practice. As with the previous article, it highlights the international (and European) nature of much human rights documentation and invites reflection upon whether and how this might be affected by the UK's changing relationship with the EU. The third article to invite reflection is Michael Teague's on mass imprisonment in America. The United States are, by some way, the most extensive user of imprisonment in the world. Teague argues that there is evidence of a slow down or pause in the growth of the prison population, and even some tentative signs of reverse. The article directly suggests that the future direction may well be dependent upon who occupies the White House after the upcoming election. It also indirectly invites the question of whether the influence of European practice on the UK will wane and instead emulation of US practice might be an alternative. The outcome of the EU referendum is likely to have longer term implications for all aspects of public policy, large or small. While these articles do not offer any direct responses to this, they do contain material that invites reflection.

In her article, Fiona Hutton discusses legislative responses to legal highs or new psychoactive substances in New Zealand. This draws out the tension that has existed in recent years between regulation, in other words making access legal with appropriate medical controls, and prohibition, in other words a blanket ban. Hutton rightly illustrates that the public and political discourse does not solely draw upon evidence of risk and harms, but

instead draws upon wider, popular social and moral concerns. The New Zealand experience is one that has been drawn upon in the discussions leading up to the introduction of the Psychoactive Substances Act in the UK, and therefore this analysis has important learning points.

The edition closes with an interview of Moosa Gora, Imam and Managing Chaplain at HMP Full Sutton. This is a fascinating insight into the work of a prison chaplain and the complex dynamics within Islam and within the wider community. The interview gives a sense of the demands placed

upon chaplains and the ways in which they contribute towards creating a positive community and enabling individual change.

Prison Service Journal continues to offer a space for practitioners, academics and others with an interest to engage with the contemporary and enduring challenges of prison life. This is a discussion that resists the idea of prisons as hermetically sealed, isolated institutions, but clearly situates them within the wider social context in which they exist and which continually influences and shapes what happens within the walls.

Prison Building 'Does Size matter?'

A Re-Assessment

Dr Iolo Madoc-Jones is Reader in Criminology and Criminal Justice at Glyndwr University, *Dr Emyr Williams* is a Senior Lecturer in Psychology at Glyndwr University, and an Associate Fellow at the University of Warwick, *Dr Caroline Hughes* is Senior Lecturer in Criminal Justice at Glyndwr University, and *Joanne Turley* is currently GTA in the Psychology department at Glyndwr University.

Background

This paper synthesises existing work and extends empirical knowledge about the possibilities attendant on building bigger prisons in England and Wales. This follows on from an announcement in 2013 that a 2,100 inmate prison (HMP Berwyn) would be built in North Wales. Moreover a statement by the Justice Secretary, Michael Gove, that 'ageing and ineffective' Victorian jails would be sold off to fund larger replacement prisons.¹ To that end it is salutary to note that in 1980 44,000 people were held in prisons and young offender institutions in England and Wales and that this number was described by the sitting Home Secretary as dangerously high.² This is because by October 2015 a neo-liberal inspired popular penalty had gone on to inflate the prison population to 86,727.³ The social and economic costs attendant on imprisoning large numbers (and proportions) of people hardly needs further exploration. They have been amply poured over and debated in this and other journals as well as in media and political circles. Comparatively speaking, however, the practical management implications of the policy of mass incarceration has received less attention. As increasing numbers of people have been imprisoned, the prison estate has aged and

contestability between the public and private sector has become the norm, the question of how the prison estate should be structured and managed to ensure prisoners 'are treated humanely, decently and lawfully' has become more salient.

As Johnsen and Granheim note⁴ policy and academic literature has tended to ignore the issue of 'prison size'. After 2007, however, the question of whether prisoners should be accommodated in larger or smaller establishments became the subject of more intense debate. This was following recommendations made in the Carter report to build three new 'Titan' prisons to hold 2,500 inmates each.⁵ The proposal met with considerable opposition not only from the usual campaign groups, like the Howard League⁶ and the Prison Reform Trust,⁷ but politicians like David Cameron, then leader of the opposition Conservative Party. He reportedly said at the time 'The idea that big is beautiful with prisons is wrong... experience suggests to us these large prisons are dangerous and inefficient'.⁸ The Conservative Party⁹ went further, responding to the Titan prison proposal with a green paper calling for 'smaller, local prisons which provide better rehabilitation outcomes'. The Prison Reform Trust¹⁰ asserted there existed 'substantial research evidence and learned experience from England and Wales and worldwide that smaller prisons are more effective than larger prisons'. However the evidence base they referenced owed more

1. Gove, M (2015) Speech given at the prisoner learning alliance 17.7.2015. Available to view at <https://www.gov.uk/government/speeches/the-treasure-in-the-heart-of-man-making-prisons-work> (last accessed 24/11/15).
2. Dobson, G. (2010) 'New Labour's prison legacy', *Probation Journal*, Vol, 57 (3) pp. 322–328, London: Sage.
3. Ministry of Justice (2015) Population and capacity briefing for October 2015, London: Ministry of Justice.
4. Johnsen B and Granheim PK (2012) Prison size and the quality of life in Norwegian closed prisons in late modernity. In: Ugelvik T and Dullum J (eds) *Penal Exceptionalism? Nordic Prison Policy and Practice*. London: Routledge.
5. Carter, P (2007) *Securing the future Proposals for the efficient and sustainable use of custody in England and Wales*. London: Cabinet Office.
6. Howard League (2008) Submission to the Ministry of Justice on Titan Prisons: Consultation Paper CP10/08. Available to view at http://www.howardleague.org/fileadmin/howard_league/user/pdf/Consultations/Titan_prisons_July_08.pdf (last accessed 24/11/15).
7. Prison Reform Trust (2008) Titan prisons- A gigantic mistake; a Prison Reform Trust briefing. Available to view at <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Titan%20prisons%20-%20a%20gigantic%20mistake.pdf> (last accessed 24/11/15).
8. Guardian (2009) David Cameron calls for league tables to improve UK prisons. Tuesday 6th January 2009. Available to view at <http://www.theguardian.com/politics/2009/jan/06/cameron-conservatives-business-economy> (last accessed 24/11/15).
9. Conservative Party (2009) *Prisons with a Purpose: our sentencing and rehabilitation revolution to break the cycle of crime*. London. Conservative Party. p. 96.
10. Ibid 7.

to 'learned experience' than empirical research. As authority the PRT cited the oppositional stance taken towards large prisons by the Prison Governor's Association, Prison Officer's Association, HMI Chief Inspector of Probation, HMI Chief Inspector of Prisons, Independent Monitoring Boards and a cross Party representative of MPs. Two empirical sources were cited: a thematic report on the effects of prison size on inspectorial judgements by Her Majesty's Inspectorate of Prisons¹¹ and a paper exploring the effects of prison size on prison life in Norway.¹²

In 2009, HMIP explored which factors predicted prisons being assessed as performing 'well' by HMIP Inspectors against its four tests of a healthy prison — safety, respect, purposeful activity, and resettlement. By statistical analysis, it was concluded that size, rather than age, management (public or private) functional type, and the distance prisons were held from home were the most influential factors in how prisons performed against tests for safety and respect. Johnsen et al¹³ compared staff and prisoner evaluations of the quality of prison life in Norway. Using the 'Measuring the Quality of Prison Life' (MQPL) for prisoners and 'Staff Measuring the Quality of Prison Life' (SQL) for staff, the authors found prisoners and staff in smaller prisons were more positive about relationships with each other.

Such findings contradicted some existent academic research about the impact of prison size on aspects of prison performance. Reviewing the literature Farrington and Nuttall¹⁴ had found no empirical evidence that prison size influenced behaviour inside or after leaving prison. Summing up the state of literature about the impact of prison size on violence Homel and Thompson¹⁵ concluded 'Prison size alone is also not a reliable indicator of violence within the institution'. Conversely, a number of authors had argued that overcrowding was more important than numbers of inmates in terms of the stability of a prison.¹⁶ Other research had suggested living unit size, as opposed to institutional size, was the most crucial variable impacting on prison performance.¹⁷

In any case, in April 2009 the announcement was made that the Titan prison building programme would be halted. The stated reasons were that the complexity and costs of such builds rendered them uneconomical and, on review, it was believed they were unlikely to provide the correct environment in which to rehabilitate offenders.¹⁸ The 'does size matter' debate might have concluded at this point had not David Cameron performed a volte-face in 2013 by announcing that his government would proceed to build Europe's second biggest prison, holding 2,106 inmates, in Wrexham, North Wales. Unsurprisingly perhaps, the announcement attracted a level of hostility redolent of that expressed in 2007 towards Titan prisons.

In the ensuing years, commentators and politicians critical of the new prison have returned to the HMI Prisons research to make their case.^{19,20} However, a problem they have faced is that much has changed in the years since the report was published, not least of all that larger prisons have, by stealth, become more the norm. In 2009 the largest single prison in the UK was HMP Wandsworth, holding, on average 1,461 prisoners. By 2015 the prison with the largest population was HMP Oakwood with 1,557 inmates and several prisons, most notably HMP Parc are set to overtake that number. Back in 2009, 25 prisons held over 800 prisoners but presently 36 share that distinction. In addition to these changes, since 2009 the Prison Service has been experimenting with a 'cluster prison' design whereby two or three prisons have been grouped and managed together with some central services being shared. Moreover, over the last five years, English and Welsh prisons had been benchmarked against each other with a view to standardising aspects of how prisons are resourced and regimes operate. Such developments, arguably, lend credibility to claims that, seven years on from the 'Titan proposal' greater experience in managing larger prison populations exists and could provide a foundation for successfully building and operating larger establishments.²¹

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11. HM Inspectorate of Prisons. (2009) The prison characteristics that predict prisons being assessed as performing 'well': A thematic review by HM Chief Inspector of Prisons. London.
 12. Johnsen, B., Granheim, P. K. and Helgesen, J. (2011) 'Exceptional Prison Conditions and the Quality of Prison Life: Prison Size and Prison Culture in Norwegian Closed Prisons'. *European Journal of criminology*. Vol 8 (6) pp.515-529.
 13. Ibid 12.
 14. Farrington, D. P., and Nuttall, C. (1980). 'Prison Size, Overcrowding, Prison Violence, and Recidivism.' *Journal of Criminal Justice* 8: 221–231.
 15. Homel, R. & Thomson, C. (2005). Causes and prevention of violence in prisons. In Sean O'Toole & Simon Eyland (Eds.), *Corrections criminology* (pp. 101-108). Sydney: Hawkins Press p.106.
 16. Megargee, E. I. (1976) Population density and disruptive behavior in a prison setting. In A. Cohen, G. Cole, & R. Bailey (Eds.), *Prison violence* Lexington, Massachusetts. D. C. Heath pp.135–146.
 17. Roush, D.W (2008) The Relationship between Group Size and outcomes in Juvenile Corrections: a partial review of the literature. *Journal for Juvenile Justice and Detention Services* Volume 17, Number 1, Spring 2002.
 18. Ministry of Justice (2009) New Prisons Consultation Response, 27 April 2009. London: Ministry of Justice.
 19. Jones, R (2013) Spinning in favour of a north wales Jail. Institute of Welsh affairs <http://www.clickonwales.org/2013/12/spinning-in-favour-of-north-wales-titan-jail/> last accessed 24/11/15.
 20. Howard League (2013) Building Britain's biggest prison will be a titanic waste of money, 10 January 2013.
 21. Lockyear, K (2013) Future Prisons: A radical plan to reform the prison estate. London: Policy Exchange.

Methodology

Our intention in this paper is to explore afresh the effects of prison size on prison performance. As the 2009 HMIP study²² has been widely quoted in recent debates about the effects of size on prison performance, its methodology is replicated here. Accordingly it should not be imagined that what we are doing is methodologically novel. HMIP published their report in 2009 drawing on inspection data that in some cases was five years old. Our contribution refreshes the literature and adds value through an analysis of the impact of additional factors such as overcrowding. Like HMI Prisons we explore the issue of whether size matters by examining the characteristics that predict a prison being assessed as performing well or poorly by HMI Prisons' Inspectors.

HMIP reports on the conditions and treatment of prisoners by inspecting outcomes for prisoners against four tests of a healthy prison. Inspections occur in accordance with a cycle (about every five years) and inspectors are on-site for around a week at a time. Key sources of information for the judgments inspectors make are quantitative data for example on use of force, time out of cell, or prisoner surveys, and qualitative data gathered by interview, focus group, observation or case file readings. Inspections involve not only staff from HMIP but seconded staff for agencies such as Ofstead (education) Care Quality Commission (health) HMI Probation (rehabilitation).

Inspection reports are published and include judgements about outcomes for prisoners associated with Safety, Respect, Purposeful Activity and Resettlement. Outcomes for prisoners in these areas might be assessed as good (a score of 4), reasonably good (a score of 3) not sufficiently good (a score of 2) or poor (a score of 1). Inspectorial reports include data about the functional type of prison, year it opened, the gender of the population and the type of management (private or public). Data on three additional variables that might bear on performance are also published: actual occupancy at the time of the inspection, the certified normal occupancy of the prison and the occupational capacity of the prison. Access to this data allows the per cent of operational capacity, or overcrowding rate, to be determined. The publications of this data allows for the impact of these variables (henceforth predictor variables) on outcome variables (healthy prisons cores) to be interrogated.

In 2009 HMIP undertook such an exercise and here we replicate aspects of it. Working from September 2015 backwards we accessed the inspection reports for each prison in England and Wales. In relation to assembling the data set, split sites were included

separately where inspections had culminated in two sets of data being produced. Unique and untypical prisons were excluded for example foreign national and therapeutic prisons, and because our interest is with adult prisons, 17 YOIs. Available for inclusion in the final data set was descriptive and performance statistics from 124 reports, 16 concerned open prisons, 8 High Security prisons, 58 Cat C trainers and 42 were Cat B local prisons.

Subsequent to this the available predictor variables were categorised as follows:

Predictor variables	Coding of data
Functional type	1=Open 2=High security (HSE) 3=Trainer (cat C) 4= Local prison
Gender	1=Male 2=Female
Role	1=Young adults 2=Female 3=Adult males
Type of management	1=Private 2=State
Year prison opened	1= Before 1938 2=1939-1977 3=1978+
Size variable 1: Actual population at time of inspection	1= Under 400 2=400-800 3=801+ Also subject to median split
Size variable 2: Certified normal occupancy (i.e the normal and uncrowded) occupancy number	Continuous variable subject to median split
Size variable 3: Capacity (Maximum number of prisoners that can be safely held)	Continuous variable subject to median split
Overcrowding rate	1= Overcrowded 2= Not overcrowded

For data analysis purposes the outcome variables-inspectorial judgements, were collapsed so that score of 1 (good) and 2 (reasonably good), and 3 (not well enough) and 4 (poor), were combined to create two new categorical outcome variables indicating a prison was performing 'well' or 'poorly'. Additionally, the scores across the four healthy prison tests were aggregated to provide an overall healthy prison assessment ranging from four to 16. Thereafter that data was subject to a median split to create two categories of prisons performing well (score 11+) and those performing poorly (score <11) according to inspectorial judgements.

The above categorisation permitted logistical regression to create fitted models that identified which variables predicted inspectorial judgements and

22. Ibid 11.

odds ratio (Exp β) which indicate the likelihood of the differing categorisations achieving a score of 4 (good). The odds ratios were established so that a score below 1.0 indicated a decreased likelihood of achieving a 'good', a score of exactly 1.0 indicated that the categorical variable had no impact on the likelihood of achieving a 'good', and a score of 1.01 or above indicated an increased likelihood of achieving a 'good'.

Findings

Our presentation of the data focusses primarily on those odds ratios that achieved statistical significance (where probability was set at the 95 per cent level, or $p < .05$). Size variables, category of prison, overcrowding rate and the year a prison opened had predictive power at the level of statistical significance on inspectorial judgements of prisons against the four tests of a healthy prison and overall

Size

As the following tables show, in relation to actual population at time of inspection, smaller prisons were significantly more likely to achieve 'good' scores on safety, respect, and purposeful activity. Those prisons under 400 were seven times more likely to score 'good' on safety, almost five times more likely to score 'good' on respect, and they were over five times more likely to score 'good' on purposeful activity. As discussed, the scores across the four healthy prison tests were aggregated to provide an overall healthy prison assessment ranging from four to 16. A median split of this data was then effected. This demonstrated that those prisons with a population of under 400 were nearly 3 times more likely to be within the top category of 'good' with overall scores.

Size	β	SE	Exp(β)	P<
Safety				
Under 400	2.02	.63	7.5	.001
401-800	.36	.65	1.44	NS
801+ reference	-	-	-	-
Respect				
Under 400	1.60	.71	4.94	.05
401-800	.01	.77	1.01	NS
801+ reference	-	-	-	-
Purposeful Activity				
Under 400	1.73	.70	5.64	.05
401-800	.81	.70	2.25	NS
801+ reference	-	-	-	-
Overall				
Under 400	1.04	.50	2.83	.05
401-800	-.02	.43	1.00	NS
801+ reference	-	-	-	-

When the predictor variable 'prison size' was subject to a median split, prisons where the actual size of the population was below the median (500) were about four times more likely to achieve a score of 'good' on all four aspects of rating.

	β	SE	Exp(β)	P<
Safety				
Under median	1.32	.42	3.76	.01
Over median				
Respect				
Under median	1.34	.51	3.81	.01
Over median				
Purposeful Activity				
Under median	1.33	.45	3.78	.01
Over median				
Resettlement Scores				
Under median	1.49	.45	4.46	.001
Over median				

A median split of the data in relation to a prison's Certified Normal Occupancy indicated that for all four elements of inspection, having a certified normal occupancy below the median increases scores on safety, respect, purposeful activity and resettlement. Smaller prisons were around three times more likely to achieve a good score on each indicator

	β	SE	Exp(β)	P<
Safety				
Below median	1.14	.42	3.14	.01
Above median	-			
Respect				
Below median	1.03	.15	2.80	.05
Above median	-			
Purposeful Activity				
Below median	1.08	.45	2.96	.05
Above median				
Resettlement Scores				
Below median	1.36	.46	3.92	.03
Above median	-			

In relation to capacity a median split of that data demonstrated that being in a prison with a capacity of less than the median (500) was predictive of a 'good' rating on all for aspects of measurement. Prisons with smaller capacities were almost five times more likely to achieve a good score on each indicator.

	β	SE	Exp(β)	P<
Safety				
Under median	1.52	.42	4.55	.001
Over median				
Respect				
Under median	1.50	.50	4.49	.01
Over median				
Purposeful Activity				
Under median	1.59	.046	4.91	.001
Over median				
Resettlement Scores				
Under median	1.68	.46	5.34	.001
Over median				

Category of Prison

The category of prison had some predicative power, however, this reached the level of statistical significance only in relation to 'safety' judgements. As the following table shows open prisons were nine times

more likely achieve 'good' scores in safety. The remainder of the categories did not reach statistical significance, however, open prisons were also more likely to score 'good' on respect and purposeful activity, whereas HSE prisons are more likely to score 'good' on resettlement scores.

	β	SE	Exp(β)	P<
Safety				
Open	2.25	.69	9.51	.001
HSE	-19.20	14210.36	0.000	NS
Trainer	1.04	.56	2.82	NS
Local reference	-	-	-	-
Respect				
Open	.69	.73	2.00	NS
HSE	-.15	1.16	0.86	NS
Trainer	-.04	.58	0.96	NS
Local reference	-	-	-	-
Purposeful Activity				
Open	1.10	.66	3.00	NS
HSE	-.34	1.15	0.71	NS
Trainer	.16	.53	1.17	NS
Local reference	-	-	-	-
Resettlement Scores				
Open	-.50	.85	0.61	NS
HSE	.35	.10	1.42	NS
Trainer	-.39	.55	.68	NS
Local reference	-	-	-	-
Overall score				
Open	1.11	.81	3.03	NS
HSE	-1.59	1.17	4.90	NS
Trainer	0.11	.56	1.14	NS
Local reference	-	-	-	-

Overcrowding

Overcrowding had some predicative power, however, this reached the level of statistical significance only in relation to 'resettlement' scores where prisons which were not overcrowded were more than three times more likely to be assessed as performing well in terms of resettlement activity than overcrowded prisons:

Resettlement Scores	β	SE	Exp(β)	P<
Under crowded	1.17	.55	3.25	.05
Overcrowded	-	-	-	-

Year Prison Opened

The year a prison opened had some predictive power, however, this reached the level of statistical significance only in relation to the overall score for a prison. Prisons opened pre-1938 were statistically significantly more likely to be rated as performing below the median overall score.

	β	SE	Exp(β)	P<
Pre 1938	-1.13	.45	0.32	.05
1939-1977	.05	.48	1.05	NS
1978+ reference	-	-	-	-

Whilst not having predictive power, other findings in relation to the year the prison opened are of some

interest. As the following table shows, prisons opened before 1938 were less likely to score 'good' on safety whereas those opened 1939–1977 were twice as likely to score 'good'. Prisons opened prior to 1978 were more likely to score 'good' on respect. With reference to purposeful activity and resettlement scores, prisons opened prior to 1938 were less likely to score 'good' in these two categories whereas those opened 1939–1977 are more likely to score 'good'. In sum, the overall tendency was for older and much newer prisons to be outperformed by 'middle-aged' prisons on the 4 individual tests of a healthy prison.

Management

	β	SE	Exp(β)	P<
Safety				
Pre 1938	-.43	.59	0.65	NS
1939-1977	.75	.53	2.12	NS
1978+ reference	-	-	-	-
Respect				
Pre 1938	.24	.67	1.27	NS
1939-1977	.48	.66	1.61	NS
1978+ reference	-	-	-	-
Purposeful Activity				
Pre 1938	-.61	.61	.54	NS
1939-1977	.33	.54	1.39	NS
1978+ reference	-	-	-	-
Resettlement Scores				
Pre 1938	-.62	.65	.54	NS
1939-1977	.15	.59	1.16	NS
1978+ reference	-	-	-	-

The data in relation to management did not reach the level of statistical significance. That being said, publically managed prisons were over 1.5 times more likely to receive a 'good' rating in safety and three times more likely to score 'good' on purposeful activity. Prisons with a public management were less likely to score 'good' on resettlement scores and respect.

	β	SE	Exp(β)	P<
Safety				
Public	.51	.81	1.67	NS
Private reference	-	-	-	-
Respect				
Public	-.11	.82	0.90	NS
Private reference	-	-	-	-
Purposeful Activity				
Public	1.10	1.07	3.00	NS
Private reference	-	-	-	-
Resettlement Scores				
Public	-.62	.72	0.54	NS
Private reference	-	-	-	-
Overall				
Public	-.81	.68	0.45	NS
Private reference	-	-	-	-

Findings: Cat C Training Prisons

Because the category of prison had some predictive power, a Category C (training) prison is being

built in north Wales, and such an analysis might deliver a more complete picture, the impact of the predictor variables on assessments of performance of Category C (training) prisons was analysed separately.

Size

Such an analysis, perhaps unsurprisingly, yields findings of a similar nature to those for all prisons. In relation to training prisons, only size had any statistically significant power in relation to the assessments made by inspectors against HMI Prisons tests of a healthy prison. Statistical differences were demonstrated in terms of safety, respect and purposeful activity in prisons with under 400 inmates. With regards to safety, smaller prisons were 7 times as likely to record a good, in terms of respect smaller prisons were 5 times more likely to record a ‘good’, and in terms of purposeful activity smaller prisons were 6 times more likely to score a ‘good’ when compared with larger prisons.

	β	SE	Exp(β)	P<
<i>Safety</i>				
Under 400	1.98	.67	7.25	.01
401-800	-.05	.72	0.95	NS
801+ reference	-	-	-	-
<i>Respect</i>				
Under 400	1.61	.75	5.00	.05
401-800	-.29	.85	0.75	NS
801+ reference	-	-	-	-
<i>Purposeful Activity</i>				
Under 400	1.79	.74	6.00	.05
401-800	.48	.75	1.62	NS
801+ reference	-	-	-	-

Whilst other variables were not a statistically significant predictors of assessments of performance, here too the findings in relation to the year the prison opened are of interest. As the table below shows. Middle-aged prisons, that is those prison that were opened between 1939 and 1977 were more likely to receive a ‘good’ on the indicators of safety, respect, purposeful activity, and resettlement.

	β	SE	Exp(β)	P<
<i>Safety</i>				
Pre 1938	-.45	.64	0.63	NS
1939-1977	.41	.61	1.50	NS
1978+ reference	-	-	-	-
<i>Respect</i>				
Pre 1938	-.18	.72	0.83	NS
1939-1977	.14	.73	1.15	NS
1978+ reference	-	-	-	-
<i>Purposeful Activity</i>				
Pre 1938	-.68	.66	0.51	NS
1939-1977	.07	.63	1.07	NS
1978+ reference	-	-	-	-
<i>Resettlement Scores</i>				
Pre 1938	-.18	.72	0.83	NS
1939-1977	.56	.69	1.75	NS
1978+ reference	-	-	-	-

In addition, as the following data shows while none of these relationships demonstrate statistical significance, those prison that are run as public prisons were more likely to achieve ‘good’ in terms of safety, and are twice as likely to achieve ‘good’ in terms of purposeful activity.

	β	SE	Exp(β)	P<
<i>Safety</i>				
Public	.20	.82	1.22	NS
Private reference	-	-	-	-
<i>Respect</i>				
Public	-.36	.84	0.70	NS
Private reference	-	-	-	-
<i>Purposeful Activity</i>				
Public	.86	1.08	2.36	NS
Private reference	-	-	-	-
<i>Resettlement Scores</i>				
Public	-.79	.74	0.46	NS
Private reference	-	-	-	-

Conclusion

Our concern with this paper has been with refreshing and extending existent empirical data and to that end we have re-examined what predicts prisons being assessed by HMIP Inspectors as performing well against its tests of a healthy prison.

We found that size, more than any other factor, still predicted prison performance and that larger prisons were assessed by HMI Prison inspectors as being less safe, less respectful and less able to engage prisoners in purposeful activity. Apart for this, open prisons were more likely to be assessed as performing well against safety measures. Prisons built between 1939 and 1977, were more likely to be performing well that is to receive a ‘good’ rating by HMIP Inspectors on indicators of safety, respect, purposeful activity, and resettlement. An analysis of the data only as it related to Cat C prisons showed size alone predicted performance being assessed as good by HMIP Inspectors on indicators of safety, respect and purposeful activity.

The precise mechanisms through which size might matter in terms of how inspectors assess prison performance is not amenable to specification by analysis of the findings of this research. However, the issue of whether size matters and, if so, how is not unique to prisons. It has been explored in relation to the optimum size for nation states,²³ local authorities,²⁴ hospitals²⁵

23. Alesina, A and Enrico, S (2003) *The Size of Nations* (MIT Press: Cambridge).

24. Newton, K (1982) *Is Small Really So Beautiful? Is Big Really Ugly? Size, Effectiveness and Democracy in Local Government*. *Political Studies* 30 (2) pp.190–206.

25. osnett, J. (2002) ‘Are bigger hospitals better?’ in McKee, M. and Healy, J. (eds.) *Hospitals in a Changing Europe*, Buckingham: Open University Press.

schools,²⁶ shops^{27,28} and even families.²⁹ In these contexts, economies of scale have been associated with size. However such economies often attended per capita reductions in staff and/or exerting greater control over how staff use their time. As a result, increased size has also been associated with reduced contact and more formal relationships between service providers and service recipients. For example, Lavalley and Boyer,³⁰ suggest that in retail contexts, the move from small shop to supermarket based trade has meant that 'the people who know your name when you enter the store to shop' have been replaced by 'faceless, corporate providers of consumer goods'. In health contexts Van Teijlingen and Pitchforth³¹ suggest that the move from local to district hospital provision has supported the development of highly impersonalised forms of care wherein patients have become passive objects of medicalised interventions as opposed to individual care. As Goffman³² identifies, when an activity is directed towards human beings, some technically unnecessary standards of handling may always be done away with to save money. Thus a search for economies of scale may be associated with less frequent but more bureaucratic, uniform and formal relationships between service providers and service users. The development of such relationships could

have particular negative outcomes in prisons. This is because where exchanges are more restricted, or they are structured primarily around administrative functions, a destructive oppositional relationship may develop between staff and prisoners. Moreover opportunities to motivate and influence prisoners towards compliance will be reduced.

There is no necessary relationship between prison size and prison performance. Some larger prisons for example HMP Parc, perform well in HMIP Inspections and some smaller prisons perform poorly (e.g HMP Wolds). Most of Goffman's pains of imprisonment do not rest on the size of the prison and it is important not to promote an idyllic picture of smaller prisons. However, a growing number of authors place staff-prisoner relationships at the heart of their analysis of how prisons perform.^{33,34,35,36,37,38} Indeed the quality of this relationship is the subject of specific commentary within HMIP Inspection reports. Larger prisons are assessed less positively by HMI Prison Inspectors. One of the reasons for this could be that infrequent, bureaucratic and administrative involvement in the lives of troubled individuals is less likely to be associated with perceptions of safety and respect and prisoners being motivated to engage in purposeful activities and activities which promote rehabilitation.

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26. Pittman, R.B and Haughwout, P (1987) Educational Evaluation and policy Analysis vol. 9 (4) pp. 337–34.
27. Lavalley, T.M., Boyer, M.A. 2006. Globalization and local governance: Implications from Wal-Mart's expansion, *International Studies Perspectives* 7, 254–266.
28. Van Teijlingen, E.R. and Pitchforth, E. (2009) Rural Maternity Care: Can we learn from Wal-Mart? *Health Place* Vol 16(20) pp. 359–364.
29. Lawson DW & Mace R. (2011) Parental investment and the optimization of human family size. *Philosophical Transactions of the Royal Society B: Biological Sciences* 366: 333–343.
30. Ibid 27, p. 257.
31. Ibid 28.
32. Goffman, E (1968) *The Characteristics of Total Institutions in Asylums*, Harmondsworth, Penguin.
33. Liebling, A. (2004) *Prisons and their Moral Performance: A Study of Values, Quality and Prison Life*, Oxford: Oxford University Press.
34. Liebling, A (2008) Titan Prisons: do size, efficiency and legitimacy matter? in M.Hough, R.Allen and E.Solomon (eds) *Tackling Overcrowding*. Bristol: policy Press (pp. 63–80).
35. Crewe, B., Liebling, A. and Hulley, S (2011) Staff culture, use of authority and prisoner quality of life in public and private sector prisons. *Australian & New Zealand Journal of Criminology* pp. 44–94.
36. Warr, J. (2014, 'Expansion in an Age of Contraction: Does Size Matter?', *Prison Service Journal*, HMPS Vol.214 pp. 25–30.
37. Beijersbergen, K.A., AJE. Dirkzwager, van der Laan, PH. Nieuwbeerta, P (2014) A Social Building? Prison Architecture and Staff–Prisoner Relationships Karin A. *Crime & Delinquency* pp. 1–32.
38. Beijersbergen, K.A., Dirkzwager AJ., Molleman T., van der Laan PH., Nieuwbeerta, P (2015) Procedural justice in prison: the importance of staff characteristics. *International Journal of Offender Therapy Comparative Criminology*. Vol 59(4) pp. 337–58.

An exploration of prisoners' perceptions of the Incentives and Earned Privileges (IEP) scheme:

The role of legitimacy

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Introduction

Since its inception over two decades ago, the Incentives and Earned Privileges (IEP) scheme has become a central pillar in the daily functioning and understanding of prison life. Given the policy's integral part in determining prisoner progression within the prison system, its success is largely determined by 1) prisoners' perceived legitimacy of the scheme and 2) the manner in which IEP is implemented and enforced by staff authorities. At a time of increasing prison population, these two intimately linked components have become progressively pertinent to understanding the ways in which everyday prison practices, of which IEP is a major constituent, are routinely established and how the development of these interactions contribute to whether or not prisoner compliance to IEP is achieved. Drawing on data collected as part of a qualitative study of an English prison for men, this article examines prisoners' perceptions of the IEP scheme, paying specific attention to the perceived fairness of IEP implementation in light of the concept of legitimacy.

In 1995, a policy of Incentives and Earned Privileges (IEP) was introduced in England which sought 'to ensure that prisoners earn privileges by responsible behaviour and participation in hard work and other constructive activity'.¹ Within this overall purpose, five specific aims were outlined:

- 1) to provide that privileges generally are earned by prisoners through good behaviour and performance and are removable if prisoners fail to maintain acceptable standards;
- 2) to encourage responsible behaviour by prisoners;
- 3) to encourage hard work and other constructive activity by prisoners;
- 4) to encourage sentenced prisoners' progress through the prison system; and

- 5) to create a more disciplined, better controlled, and safer environment for prisoners and staff.²

This framework consisted of three broad privilege levels: basic, standard and enhanced. The 'key earnable privileges' comprised extra and improved visits, ability to earn more money in prison jobs, eligibility to participate in enhanced earning schemes, access to in-cell television, greater time out of cell and the opportunity to wear one's own clothes. However, it must be noted that, the Prison Service Instruction expressed that not all key earnables would apply to all prisons (for example, long-term prisoners in the confines of maximum security could not expect community visits; all women prisoners already wore their own clothes). Therefore, only two out of the six initial key earnables were included across all establishments; that of extra and improved visits and access to private cash.

In 2013, the National Offender Management Service revised the IEP scheme for prisoners – this was the first review of the policy for 10 years and has posed some of the most significant changes since the policy was first introduced. Under the revised IEP scheme, prisoners are expected to 'demonstrate a commitment towards their rehabilitation, engage in purposeful activity, reduce their risk of reoffending, behave well and help other prisoners and staff members'.³ Principal to this scheme was the belief that, given the rational model of human conduct, incentives were to encourage and reward 'good' prisoner behaviour and deter 'bad' behaviour by the loss of earnable privileges. The IEP scheme was therefore fundamentally designed to promote conforming behaviour based on the impetus for the access to material privileges and on a set of assumptions about the subjective value of these privileges. That is, given the rational choice theory foundations of an incentives-based approach, incentives were expected to have direct beneficial effects on prisoners' behaviour.

While the creation of the original IEP scheme was a seemingly plausible solution to the prisoner disturbances preceding the Strangeways riot,⁴ the Prison Service's

1. Bottoms, A.E. (2003) Theoretical reflections on the evaluation of a penal policy initiative. In L. Zednar and A. Ashworth (Eds.) *The Criminological Foundations of Penal Policy: Essays in Honour of Roger Hood* (pp. 107-194). New York: Oxford University Press.
2. Ibid.
3. Prison Reform Trust. (2014) Punishment without purpose. [Online] Available from: <http://www.prisonreformtrust.org.uk/Portals/0/Documents/punishment%20without%20purpose%20FINAL2941007.pdf> [Accessed January 2015].
4. see Woolf, H. and Tumin, S. (1991) *Prison Disturbances* (CM. 1456). London: HMSO.

oversimplified conception of the relationship between incentives and compliance in prison was subject to practical scrutiny. Bosworth and Liebling's⁵ examination of the concept of incentives suggested that the 'simple model' of incentives, based on the rational system of human behaviour, should be extended to a 'complex model', which took greater account of the various interconnecting features of prison life in which the rational choice model of behaviour is not the only factor at play.

Following the introduction of the IEP scheme, results of the Cambridge IEP evaluation found mainly negative effects on prisoner behaviour and perceptions of fairness and relationships.⁶ Findings showed that the majority of prisoners perceived the principles of IEP as fair but felt it was implemented unfairly. They were unclear as to what the rules and guidelines consisted of, especially their rights regarding appeals procedures. Staff found the discretion of IEP as a useful anchor to motivate prisoner behaviour and they felt more in control by the specific avenues they could adhere to if prisoners were not compliant. Two frequently cited themes which were observed in the Cambridge IEP study related to issues of fairness and (especially) unfairness.

An important consideration to bear in mind is that during the time of introducing IEP, 'the government was not only attempting to incentivise the prison system but was trying to rein in previous levels of privileges, and it believed it was politically and morally justified in promoting this change'.⁷ There were, therefore, two kinds of legitimacy at stake here: the *internal* legitimacy of the new penal policy initiatives (such as IEP) in relation to the subject group (the prisoners), and the *external* legitimacy of changing penal policies in relation to the societal audience at large.

Legitimacy and procedural justice

Much of the academic focus on the concept of legitimacy has been traditionally associated with explanations regarding compliance and cooperation with

legal authorities.⁸ The modern use of the phrase 'legitimacy' has its roots in classical sociological theory, and can most notably be traced back to the work of Weber.⁹ Weber argued that within advanced economies, the ability to conform to rules or commands is reliant on the ability of that ruler to enforce those rules legitimately and that 'every such system attempts to establish and to cultivate the belief in its legitimacy'.¹⁰ This conceptualisation is important as it provides the theoretical base for understanding contemporary analyses of legitimacy. For Weber, claims to legitimacy by external or political power-holders are universally concomitant; they are continuously negotiated through its practices in a kind of ongoing dialogue or speech,¹¹ 'to establish and to *cultivate*' legitimacy on a continuing basis. The plural use of the term 'power-holders' implies that more than one type of audience(s) is at stake and that there is a *continual relationship* between the power-holder and the stakeholders.

Thus, legitimacy is suggested to be central to the exercise of all forms of authority, whether in industrial or technological settings, and not simply concerned with the legitimate exercise of authority but to the manner of its application: 'the obligation to obey has some relation to the quality of the rules and the integrity of their administration'.¹² Implicit in these accounts of legitimacy concerns the beliefs individuals hold about the normative appropriateness or rightful conduct of governmental officials and the processes by which these actions are enacted and subsequently reinforced. This criterion of legitimacy is plausibly conceived to be typical across all societies,¹³ however their specific contents must be understood and determined in its given social environment.

Although most of the empirical work on legitimacy has been based on research on interactions with the police and court representatives, with an increasing emphasis on survey-based methodology,¹⁴ another branch of criminological research into legitimacy has surfaced in recent years, focusing on the everyday internal life of prisons. This began in the work of Sparks, Bottoms and

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5. Bosworth, M. and Liebling, A. (1994) *Incentives in prison regimes: A review of the literature*. Unpublished report: Cambridge Institute of Criminology.
 6. Liebling, A., Muir, G., Rose, G. and Bottoms, A.E. (1999) *An evaluation of incentives and earned privileges*. Unpublished report submitted to Home Office: London; Liebling, A. (2008) 'Incentives and earned privileges revisited: Fairness, discretion, and the quality of prison life', *Journal of Scandinavian Studies in Criminology and Crime Prevention*. 9(1): 25–41.
 7. Bottoms, A.E. (2003) Theoretical reflections on the evaluation of a penal policy initiative. In L. Zednar and A. Ashworth (Eds.) *The Criminological Foundations of Penal Policy: Essays in Honour of Roger Hood* (p. 186). New York: Oxford University Press.
 8. Sunshine, J. and Tyler, T.R. (2003) 'The role of procedural justice and legitimacy in shaping public support for policing', *Law & Society Review*. 37(3): 513–548; Tyler, T.R. (2001) 'Public trust and confidence in legal authorities: What do majority and minority group members want from the law and legal authorities?', *Behavioral Sciences & the Law*. 19(2): 215–235; Tyler, T.R. (2006) 'Psychological perspectives on legitimacy and legitimation', *Annual Review of Psychology*. 57: 375–400.
 9. Weber, M. (1968) *Economy and Society*. New York: Bedminster.
 10. *Ibid.*, p. 213.
 11. see Bottoms, A.E. and Tankebe, J. (2012) 'Viewing things differently: The dimensions of public perceptions of police legitimacy', *Criminology*. 51(1): 103–135.
 12. Selznick, P. (1969) *Law, Society, and Industrial Justice*. New York: Russell Sage. p. 29.
 13. see Beetham, D. (1991) *The Legitimation of Power*. London: Macmillan.
 14. Tyler, T.R. and Huo, Y.J. (2002) *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*. New York: Russell Sage; Tyler, T.R. and Wakslak, C.J. (2004) 'Profiling and police legitimacy: Procedural justice, attributions of motive, and acceptance of police authority', *Criminology*. 42(2): 253–282.

Hey's *Prisons and the Problem of Order*,¹⁵ to more recent studies which have advanced our understandings of legitimacy in the prisons context.¹⁶ Despite the different methodological approach in comparison to Tyler and colleagues, these various studies have drawn attention to the significance of procedural justice theory, which is fundamental to the understanding of legitimacy. Firstly, it shows that legal authorities sometimes have to consider their actions in relation to more than one type of audience and that these audiences may have significantly different priorities.¹⁷ Secondly, as the present research demonstrates, prisoners' perceived fairness of procedures and outcomes are of great importance to their acceptance of whether or not practices are deemed legitimate. The expanding literature of prison-based research on legitimacy has thus opened up important debates and questions in relation to criminal justice practice and policy that seek to go beyond the boundaries of the work on procedural justice which are at the forefront of contemporary criminology.

Of increasing importance to this study is the manner in which IEP is implemented and enforced by staff authorities and the perceived fairness of those actions in the eyes of prisoners. Therefore, in order to understand the complex dimensions of IEP and whether such practices or actions are considered legitimate or illegitimate, it is useful to turn to the interconnecting relationship between legitimacy and procedural justice theory.

At the heart of the rule of law are principles of due process and equality, with equality being secured through the generality of the law.¹⁸ In Tyler's¹⁹ procedural justice model, namely the dimensions of 'quality of decision making' and 'quality of treatment', there are two empirically interconnected facets of procedural justice as conceived by citizens. The first considers the judgements about provisions of honesty and representation and whether authorities have acted objectively; the emphasis here is on consistency and participation. The second aspect places value on the justice of authorities' behaviour and whether individual citizens have been treated with respect, dignity and courtesy.²⁰ There is empirical evidence suggesting that legitimacy tends to be treated as procedural justice plus respect, with research suggesting that these twin-concepts are closely linked to achieving legitimacy.²¹

In short, we can posit from Tyler's work — when we extrapolate from it into the prisons context — that ordinary everyday encounters between staff and offenders can have crucial implications for the nature of the power relations involved, and to the validity of staff claims and decision making — that is, to legitimacy. Beetham²² states that essentially all systems of power relations, whether despotic or impartial in nature, stand in need of legitimation. Thus, an analysis of this kind is particularly relevant to the everyday interactions between prison officers and prisoners; that is prisoners' perceptions as to whether staff are acting fairly and whether the decisions they make about IEP are regarded as legitimate. Tied to this belief are aspects of procedural justice which are therefore highly relevant to the study of IEP.

Methodology

The study was conducted in an adult Category B local prison, HMP Wandsworth, in the London region, England. The Trinity unit was specifically chosen to undertake my research due to the opportunity of interviewing Category C prisoners, rather than prisoners from the main landings; they would have spent a longer time in prison and therefore would be expected to have had more exposure to the IEP scheme. Established in 1851, initially as a Surrey House of Correction for those serving short sentences, Wandsworth is the largest prison in the United Kingdom, holding at the time of study around 1,650 prisoners. A stratified purposive sampling technique²³ was used in order to draw a representative sample from the Trinity unit. This sampling approach was the chosen method as it provided variation among prisoners on different IEP categories so that comparisons between each category could be drawn. Data collected consisted of 16 semi-structured interviews with prisoners, 8 of whom were on enhanced privilege levels, 3 on standard and 5 on basic. All respondents initially approached, and who agreed to take part in the interview, participated in the research study. Themes included in the interview schedule were drawn primarily from sociology of prison life literature and the criminological theories of legitimacy, procedural justice and compliance.

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15. Sparks, R., Bottoms, A.E. and Hay, W. (1996) *Prisons and the Problem of Order*. Oxford: Oxford University Press.
16. Liebling, A. (2004) *Prisons and Their Moral Performance: A Study of Values, Quality and Prison Life*. Oxford: Oxford University Press; Crewe, B. (2009) *The Prisoner Society: Power, Adaptation and Social Life in an English Prison*. Oxford: Oxford University Press.
17. Ibid.
18. Allan, T. (2001) *Constitutional Justice: A Liberal Theory of the Rule of Law*. Oxford: Oxford University Press.
19. Tyler, T.R. (1990) *Why People Obey the Law*. Connecticut: Yale University Press.
20. Tyler, T.R. (1988) 'What is procedural justice?: Criteria used by citizens to assess the fairness of legal procedures', *Law & Society Review*. 22(1): 103-136; Sunshine, J. and Tyler, T.R. (2003) 'The role of procedural justice and legitimacy in shaping public support for policing', *Law & Society Review*. 37(3): 513-548.
21. Butler, M. and Drake, D. (2007) 'Reconsidering respect: It's role in Her Majesty's Prison Service', *Howard Journal of Criminal Justice*. 46(2): 115-127; Hulley, S., Liebling, A. and Crewe, B. (2012) 'Respect in prisons: Prisoners' experiences of respect in public and private sector prisons', *Criminology and Criminal Justice*. 12(1): 3-23.
22. Beetham, D. (1991) *The Legitimation of Power*. London: Macmillan.
23. Patton, M.Q. (2002) *Qualitative Research and Evaluation Methods*. California: Sage; Ritchie, J., Lewis, J. and Elam, G. (2003) Designing and selecting samples. In J. Ritchie and J. Lewis (Eds.) *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (pp. 77-108). London: Sage.

This study has limitations that are important to acknowledge in order to guide future research in the field. Firstly, questions relating to various demographic factors, such as ethnicity, were not included in the interview schedule. As a result, the potential impact of cultural differences and linguistic expression may have been relevant to make demographic links, given the diverse nationalities of the respondents. A further limitation was the use of a purposive sample gained through collaboration with the Head of Residence. Consequently, sampling was hindered by the scarce number of participants on basic privilege levels which created practical and ethical difficulties in obtaining a representative sample. Before the final day of fieldwork, I had to gain permission from the relevant authorities to interview prisoners from the main landings, as opposed to where the sample was initially drawn, in Trinity unit, in order to obtain a more representative sample of prisoners on basic levels. Future studies that address these limitations, among many others, will contribute toward advancing our understanding of the role of legitimacy in shaping prisoner compliance to IEP.

Prisoner perceptions of IEP implementation

Findings indicated that IEP was a pervasive tool that had significant impact on prisoners' everyday lives. It was of priority amongst prisoners because of the direct effects IEP cast on them. All but one of the prisoners knew the scheme was in place, and most were aware of the different privilege levels and the distinction between them. Broadly speaking, prisoners reported that the IEP policy was unfair in its regulations. There was a general emphasis placed on the uncertainty of IEP boundaries, especially in relation to what types of behaviour and actions consisted of inappropriate conduct. As one red-band²⁴ prisoner expressed:

Looking on the IEP form, what you can get an IEP for is inappropriate conduct. There's about 15 or 20 things you can be done for inappropriate conduct [...] Is that me smoking on the landing? Is it me telling the officer to fuck off? So what's inappropriate conduct you know what I mean? (Prisoner, enhanced)

As this passage indicates, the IEP 'net' was largely inclusive and all-encompassing. It served to embrace actions perennially, and some prisoners resented this magnitude for it harnessed them into an 'unknown' domain:

Findings indicated that IEP was a pervasive tool that had significant impact on prisoners' everyday lives.

They should give you a little bit of a warning first coz half of the IEPs I didn't even know I had. It's just put through my door and I'm thinking what's that about, like they don't give you a warning. (Prisoner, basic)

The widened scale of actions worthy of negative entries pointed towards inconsistency of IEP rules which prisoners were to abide by. It remained unclear as to what consisted of 'petty' or 'serious' behaviour, apart from prior self-conceptions of what constituted misconduct, leaving the prisoner in a frame of instability. Prisoners viewed staff decisions as a primary indicator of whether or not they complied with IEP rules. This belief appeared only to manifest when prisoners perceived they were treated fairly through staff use and implementation of IEP. Some prisoners expressed that IEP decision making was unfair most of the time and that it had detrimental effects to their sentence. As one prisoner commented:

They keep threatening you with IEPs and basic. That's all you hear them shout so freely, IEP, IEP, IEP and all you hear him say 23 times a day [...] It's the same as outside. If you get on with someone and they treat you like a human then you'll treat 'em the same way back. If they treat you like shit, you're not gonna give 'em the time of day. (Prisoner, basic)

Prisoners placed value on their experiences of IEP in relation to perceived fairness of decision making and the exercise of discretionary power. If staff implementation of IEP was felt to be unjust or lacked legitimacy, then prisoners retreated from any attempt to demonstrate active commitment to the scheme. Linked to these accounts of perceived fairness is procedural justice theory which states that prisoners place great value on the justice of authority's behaviour. In this context, respect, being one of the focal components of procedural justice, was an important element in making claims about staff actions and decision making of IEP. There was a negative perception toward staff decision making and the manner in which they were implemented:

If they don't show you respect, you're not gonna want to show them respect. If people do certain things to you that you feel are not fair then you're not really gonna bother with them. You're just gonna tell 'em to fuck off and keep it movin. (Prisoner, basic)

24. 'Red-band' refers to prisoners who have a greater degree of trust and autonomy in the working positions available to them and is restricted to those on enhanced status.

*Most officers in here talk to you with authority, like they've got something against you [...] It's hard when you can't have an IEP or any negative entries for 3 months and then you get an officer who talks to you like a c*** [...] If they talk to you funny from the start you're not gonna be polite back coz it's not on is it? (Prisoner, basic)*

Respect was cited among prisoners to be a deciding factor of whether or not staff actions were perceived as legitimate. This mutual process often flowed cyclically and was perceived as a powerful instrument in determining prisoner compliance to IEP regulations. Furthermore, there was a lot of emphasis placed on the implementation of IEP, particularly in relation to how staff used IEP and the decision making involved. The majority of prisoners understood why the scheme was introduced but few agreed with its application. Prisoners felt that there was injustice in the way the scheme was being used against them.

IEP and procedural fairness

Prisoners who claimed that the scheme was implemented unfairly, adjusted their behaviour and attitudes accordingly towards those staff. There were prisoners who felt completely powerless to affect their position given the outcomes of IEP demotion and losing privileges:

The really annoying thing about the IEP system which isn't fair is if you get charged with an unauthorised item like a telephone, they immediately put you on basic [...] I haven't even been found guilty of that but they just take it away from you on the off-appending charge that you're gonna be judged for in a prison trial in a few weeks time coz this might be adjourned [...] So you end up getting punished twice. (Prisoner, basic)

As this excerpt suggests, there was a sense of perceived unfairness not only regarding loss of privileges but their consequences which prisoners had no scope to negotiate. This progressive effect IEP imposed on them had been described as a kind of 'double jeopardy' (Prisoner, basic), that punishment was exercised continuously; firstly, through adjudication and secondly, by loss of certain aspects of privileges which for some prisoners were of fundamental importance in getting through their sentence. This experience of negative treatment of IEP in turn reinforced a sense of perceived illegitimacy towards staff in that the power they exercised

through IEP decision making was seen as unfair. As one prisoner stated:

It's like a power flex with a lot of these people [...] Hiding behind your uniform, hiding behind these IEP scheme things to punish people [...] They abuse the IEP system left, right and centre. (Prisoner, basic)

Across all privilege levels, there was great emphasis placed on the illegitimacy of staff usage of IEP. Most prisoners reported that IEP was used as a mechanism of power to ensure compliant behaviour although it was reported that this implementation was often unjustified. There were, however, a few prisoners who felt that the policy was applied fairly. As a result, these prisoners perceived the IEP scheme and the staff enforcing this scheme as legitimate and this fostered positive attitudes towards both the policy and staff:

Prisoners placed great emphasis on perceptions of procedural justice, particularly in regards to the fairness of staff decision making of IEP.

I think it's a fair system. The teachers and the people who participate in the courses are amazing and it makes your life much easier if you're involved in that because time passes and you learn something [...] I think it's a system which ought to be in place and I support the enhanced system, the IEP system. (Prisoner, enhanced)

The way I've seen the IEP scheme, it seems quite fair. On Trinity, they genuinely treat everyone with respect. It's a good little system and I think it does keep prisoners on their toes as well. (Prisoner, enhanced)

Prisoners placed great emphasis on perceptions of procedural justice, particularly in regards to the fairness of staff decision making of IEP. It was found that these attitudes generally tended to be more positive among enhanced level prisoners compared to those on basic. One reason for this was due to the working opportunities IEP presented for enhanced level prisoners. Prisoners claimed that the Trinity unit made a positive difference to their sentence in terms of the respect they received from staff. On the other hand, prisoners on basic were often especially sensitive to injustices and to feelings of defiance and resentment and that these negative views, particularly of IEP and staff fairness, strengthened as prisoners' IEP levels declined, so that prisoners on standard and basic respectively were least convinced of the fairness of their treatment.

The mechanisms that contributed to this particular analysis — *perceived fairness of staff decision making for legitimacy* — underpin Tyler's²⁵ notion of procedural justice theory. The two most relevant factors here are 1) 'neutrality', (also referred to as fairness) placing emphasis on the application and consistency of fair practice and 2) 'respect', which is associated with courtesy, dignity and the recognition of human rights. According to Tyler,²⁶ both these elements, *fair and respectful treatment* — are more important to individuals than the outcomes they regard as either fair or favourable to themselves. As documented, prisoners often expressed that the processes in which staff made decisions about IEP (and the manner of implementation) reinforced their perceptions of whether staff practices were deemed legitimate. The primary emphasis here is twofold — the way in which these decisions are enforced and the outcome of IEP implementation. It was this dimension of the *perceived quality of IEP treatment* received which ultimately shaped prisoners' compliance to prison rules. In other words, the procedurally unfair experiences of IEP as claimed by prisoners eroded their perceived legitimacy of authority whereas positive IEP experiences heightened their perceptions of staff legitimacy. Tied to these aspects of perceived fairness of IEP implementation was the aforementioned element of 'respect' which was of particular relevance to understanding whether staff decisions about IEP were perceived legitimate. These perceptions of staff behaviour were mostly negative in terms of respectful encounters between prisoners and staff which generated multiple forms of non-compliance, the most common being detachment from IEP involvement. The definition of respect as observed by prisoners therefore represents a grounded understanding of what Tyler calls 'procedural justice'.

Furthermore, it must be acknowledged that the results in this study have reinforced findings from other accounts of prison research which are important to address in order to assist subsequent research in this area. The study echoes findings from the Cambridge IEP evaluation conducted by Liebling et al.²⁷ There were evident parallels in the inappropriate implementation of IEP and the ambiguity surrounding the policy's guidelines. Similarly, prisoners perceived a sense of grievance towards the consequences

of being punished twice, through adjudication and demotion with the advent of IEP increasing discretionary power of lower-level staff. One of the key theoretical lessons from this research which supports Liebling et al IEP evaluation is that staff decisions made about prisoners and the actions that support them, through policy initiatives such as IEP, shape prison life more than we realise and to a greater degree than official prison rules.

Concluding comments

This study has explored prisoners' perceptions of the IEP scheme using the concept of legitimacy as a primary site for analysis. Coupled with the notion of procedural justice theory, this research highlights why an examination of these two components is important; it serves to elucidate the impact of IEP on the daily interactions between prisoners and staff that are fundamental to understanding prison life; and how the quality of IEP implementation has great value for prisoners' perceived legitimacy of authority which in turn affect the likelihood of compliance to IEP rules. As illustrated, there is empirical support in this study for the intimate connection between legitimacy and procedural justice theory. The aspect of the *perceived procedural fairness of staff implementation of IEP* and the *perceived fairness of the outcome* of the prisoner's encounter with them was particularly important in shaping prisoner compliance. The manner in which staff decisions are made, then, is of significance to prisoners' perceptions of staff legitimacy.

Future research should explore the interactions between prisoners and staff in order to determine the influences of legitimacy and procedural justice in shaping prisoners' IEP experiences. An examination of this kind would benefit from highlighting the importance of staff-prisoner relationships to demonstrate prisoner perceptions of the legitimacy of IEP as well as ascertaining how these relationships shape prisoner compliance to IEP. Exploring this facet with an ethnographic scope would enable the researcher to temporarily occupy the point of view of the prisoner; to directly observe the realities and consequences of the multiple ways in which legitimacy, and thus compliance, flows among prisoners, as opposed to what they just say about them.

25. Tyler, T.R. (2010) 'Legitimacy in corrections: Policy implications', *Criminology & Public Policy*. 9(1): 127–134.

26. Ibid.

27. Liebling, A., Muir, G., Rose, G. and Bottoms, A.E. (1999) *An evaluation of incentives and earned privileges*. Unpublished report submitted to Home Office: London.

Human Rights and Their Application in Prisons

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Introduction

It is now formally accepted that, when people are imprisoned for committing a criminal offence, the loss of liberty is the punishment. They are not to be further punished by harsh conditions, humiliation or violence. This may not be universally acknowledged in the wider community but it is in principle and in law.¹ It is therefore also accepted, and spelt out in international instruments, that prisoners retain all their human rights other than rights the limitation of which is 'demonstrably necessitated by the fact of incarceration'.² What does this mean in practice? My research over a number of years on Australian and comparable jurisdictions has suggested that making 'human rights' operational in prisons requires three broad areas to be working together: having rights-based laws; having a culture which endorses rights and expects prisons to be operated in ways which respect rights; and having external monitoring of rights compliance and practices within prisons.³ This paper outlines how these three areas work, with most attention to the first and third given space limitations.

Human rights laws and prisons

The sources of human rights laws

The UN Basic Principles specify that rights are only lost where this is 'demonstrably necessitated'. This means, at least, that rights which jeopardise the security of the detention are probably lost or modified, but does it mean more than this? Detention raises rights issues about (eg) physical conditions, contact with family members, practices of control and restraint, access to

medical care or involuntary treatment, access to education, and abuses of power such as disrespect and violence. Overcrowding then exacerbates pressures on all services — accommodation, medical services, education, training — including access to mental health care, a serious issue across the board, in police cells and prisons and in overstretched forensic psychiatric facilities.

Rights relevant to detention are articulated in fairly general terms in international, regional and domestic human rights instruments, and in more detailed non-treaty or 'soft law' rules and standards developed to give the formal, more abstract, rights practical meaning specific to prisons.⁴ Some of the most important provisions for people held in detention spelt out in the international instruments are the negative right not to be subject to 'torture or cruel, inhuman or degrading treatment or punishment' and the positive right of people deprived of their liberty to be treated 'with humanity and with respect for the inherent dignity of the human person'.⁵ Other important and potentially challenging rights for people held in detention include the right to life, to liberty and security of the person, to equality before the law, to privacy, and the protection of family and children.⁶

The main international conventions relevant to rights in prisons are the International Convention on Civil and Political Rights (ICCPR), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1987 (CAT) and the Convention on the Rights of Persons with Disabilities 2006. Most countries in the world have ratified these UN Conventions.⁷ The equivalent civil and political rights — to life, to liberty, to equality, to privacy, to freedom from torture — are spelt out in the European context in the European Convention on Human Rights, which is also embodied in the UK *Human Rights Act* 1998.

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1. I will come back to the issue of community scepticism about rights in prisons briefly later.
 2. Principle 5 UN Basic Principles for the Treatment of Prisoners (1990).
 3. Naylor, B., Debeljak, J., & Mackay, A. (2015) 'A Strategic Framework For Implementing Human Rights In Closed Environments' 41(1) *Monash University Law Review* 218–270.
 4. They can also be spelt out in domestic corrections legislation and regulations.
 5. ICCPR art 7 and 10(1) respectively. The prohibition on torture and CIDT is also stated in the CAT (arts 1 and 16), and in the CRPD (art 15), which applies to people with physical, mental, intellectual or sensory impairments (art 1), and therefore extends to people in any CE (as the evidence shows that higher proportions of people in detention have MI, ID etc) — eg police custody and prisons as well as in forensic psychiatric facilities.
 6. Research with prisoners confirms the importance of these issues: Naylor, B (2014) Human rights and respect in prisons: The prisoners' perspective. *Law in Context* 31: 84–124; Liebling, Alison (with Helen Arnold) (2004) *Prisons and their Moral Performance: A Study of Values, Quality and Prison Life* (Oxford University Press).
 7. See <http://indicators.ohchr.org>

Non-treaty instruments important for prisons include the UN Basic Principles for the Treatment of Prisoners (1990) and the UN Standard Minimum Rules (SMRs), first developed in 1957 and newly reworked and renamed the Mandela Rules (Oct 2015).⁸ The SMRs provide guidelines on practicalities including accommodation, food, clothing, hygiene, health care, file management and security categories. Importantly for this discussion they also now expressly restate the fundamental prohibitions on torture and inhuman treatment and emphasise that imprisonment is itself the punishment and should not carry additional 'pains':

Rule 1 All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment,...

Rule 3 Imprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

There are also regional instruments giving practical application such as the European Prison Rules (2006) and codes of practice relevant to staff such as the UN Principles of Medical Ethics [for] Health personnel... in the protection of prisoners against torture⁹ (1982) and the Council of Europe's European Code of Ethics for Prison Staff (2012).¹⁰ The European Committee for the Prevention of Torture (CPT) established under the European Convention for the Prevention of Torture (1989) regularly visits places of detention and provides important guidance on the meaning of 'torture and inhuman or degrading treatment or punishment' through its reports.

For Australian prisoners, it is significant that Australia does not have formal human rights legislation at the national level. Whilst it has ratified all relevant UN conventions these do not have effect unless incorporated into Australian domestic legislation, leaving their effect unclear, although elements of the international treaties and guidelines have been adopted in the non-enforceable Australian Standard Guidelines for Corrections in Australia 2004 (updated 2012). Two Australian jurisdictions have however passed human rights legislation — the state of Victoria with its *Charter of Human Rights and Responsibilities Act 2006* and the Australian Capital Territory (ACT) with its *Human Rights Act 2004* — and these largely replicate the ICCPR rights.

Enforcing these rights

What do these statements of rights mean in practice for a prisoner or prison management? Rights obviously represent important values, but it is also fair to say that a right is only as good as any available remedy. Unless a country embodies rights into domestic legislation it can be difficult to people such as prisoners to challenge such violations. If a country is party to the ICCPR a person can bring a complaint to the UN Human Rights Committee, which can provide a 'view on the merits' of the complaint but cannot provide any further remedy.¹¹ The

Rights obviously represent important values, but it is also fair to say that a right is only as good as any available remedy.

equivalent civil and political rights embodied in the European Convention on Human Rights can be addressed by the European Court of Human Rights, or by UK courts under the UK *Human Rights Act 1998*. These courts can order redress if they find that there has been a violation. These are important powers but can take considerable time — often years — and therefore may be less directly useful for the individual prisoner. The very existence of the right and the potential for an order to be made to support that right can, however, influence policies and practice more generally.

Australian governments have tended to ratify international instruments but to have been less enthusiastic about practical implementation. Prisoners in Australia wishing to challenge an alleged violation of the ICCPR can seek a view on the merits from UN HRC but these cannot be enforced and there are obvious practical

8. United Nations Standard Minimum Rules for the Treatment of Prisoners http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/70/L.3 (Accessed on 18 December 2015).

9. Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Adopted by General Assembly resolution 37/194 of 18 December 1982.

10. <http://www.prisonstudies.org/resources/council-europe-code-ethics-prison-staff>

11. Complaint can also be made to the Committee against Torture for breaches of the CAT, and to the Committee on the Rights of Persons with Disabilities for breaches of the CRPD.

barriers to accessing a committee in the first place, especially for a person in detention. Further, Australian (national) governments have on the whole not accepted views adverse to their actions in relation to detention. The only complaint brought by a prisoner was one involving a 16-year-old Aboriginal boy with a mild ID, who was held for a period in isolation in harsh conditions. The UN HRC concluded that there had been violations of the right to humane treatment (ICCPR Art. 10) and of the rights of the child (Art. 24(1)) but the Australian government rejected the findings (Brough (2003)).¹²

As already mentioned, the ICCPR rights have been incorporated in Victoria and the ACT. The ACT legislation gives a right to seek a remedy in court but in Victoria a violation can only be redressed in court where it can be linked to a separate action. For example a prisoner's access to IVF was confirmed by the Victorian Supreme Court in a 2010 case based principally on the Victorian Corrections Act 1986 right to reasonable medical treatment, but read with the right to humane treatment under s.22 of the Charter.¹³

Limits on rights

Having identified some hurdles to the reliance on human rights laws for prisoners, it should also be noted that rights can be subject to lawful limits. The ICCPR permits limitations in the event of a 'public emergency' (ICCPR Art. 4(1)), and some individual rights have specific limitations. The European Convention on Human Rights permits limitations to specific rights 'in accordance with the law and [if] necessary in a democratic society' [eg articles 8, 9, 10, and 11] and generally in 'time of war or other public emergency' (Article 15(1)). The Victorian Charter has a particularly broad limitation provision, stating in s.7(2) that all rights may be subject to 'such reasonable limits as can be demonstrably justified...' The

application of those limitations by a court can be decisive of whether a right is recognised in a particular case.

Importantly however, the international instruments also identify some key rights, such as the right to life and the prohibitions on torture and slavery, as non-derogable (see Article 4(2) ICCPR; ECHR Article 15(2)) meaning that these rights that cannot be subject to restrictions.

Key rights

Where rights protections are available the prohibition on torture and cruel, inhuman and degrading treatment has been central to much international litigation around detention. The implementation of that prohibition in the European courts will be outlined here. But this jurisprudence also reminds us of the central question of how the idea of rights 'fits' with holding people in detention. We will see that the human rights

case law sees some loss of rights as inevitable (beyond mere liberty), and that rights can in practice be limited. Their application in prisons is therefore not straightforward.

To start with, the courts have recognised that imprisonment is, simply in itself, likely to be experienced as cruel, inhuman and degrading. The European Court of Human Rights has held that the prohibition on inhuman or degrading treatment¹⁴ is not breached in the prison context by suffering which is simply the

'inevitable' result of legitimate punishment, and that 'ill-treatment must also attain a minimum level of severity if it is to fall within the scope of Article 3'.¹⁵ Commentators point out that 'the ECHR is a 'living instrument'' and warn that the Court needs to be aware of the evolving nature of the standards and should itself reflect increasing understanding of human rights.¹⁶

So what conditions in detention have been held to constitute cruel or degrading treatment? Overcrowding, lack of access to air and light, and poor

... the courts have recognised that imprisonment is, simply in itself, likely to be experienced as cruel, inhuman and degrading.

12. Human Rights Committee, *Views: Communication No 1184/2003*, 86th sess, UN Doc CCPR/C/86/D/1184/2003 (27 April 2006) ('*Brough v Australia*'). The Australian Government's response is contained in *Response of the Australian Government to the Views of the Committee in Communication No 1184/2003 Brough v Australia* and includes: 'The Australian Government does not accept the Committee's view that the author's treatment amounted to a breach of articles 10 and 24 of the Covenant. Australia reiterates its submission that Mr Brough was dealt with in a manner appropriate to his age, indigenous status and intellectual disability, with due consideration to the challenges presented by his behaviour and the risk he presented to himself, other inmates and the security of the Parklea Correctional Centre': at [5].
13. *Castles v Secretary to the Department of Justice & Ors* [2010] VSC 310: see also discussion in Naylor, 2014.
14. Article 3 European Convention, equivalent to ICCPR Article 7.
15. *Frerot v France* 2007 para 35: 'The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim... In order for punishment or treatment to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.'
16. Van Zyl Smit, Dirk and Snacken, Sonja (2009) *Principles of European Prison Law and Policy: Penology and Human Rights* Oxford, England: Oxford University Press, 369.

sanitary arrangements have all been found to amount to inhuman or degrading treatment in breach of Article 3 of the ECHR. For example a prisoner in a Scottish prison who shared a 'cramped, stuffy and gloomy cell which is inadequate for the occupation of two people ... for at least 20 hours on average per day', without overnight access to a toilet, was found to have suffered a breach of Article 3. The conditions amounted to 'degrading treatment', that is, treatment which was 'such as to diminish his human dignity and to arouse in him feelings of anxiety, anguish, inferiority and humiliation'.¹⁷ Severe overcrowding has been held to amount to inhuman and degrading treatment, even in the absence of any intention to humiliate or debase the prisoners.¹⁸

On the other hand, individual instances of degradation alone tend not to be regarded as severe enough to amount to a rights breach. In the context of inadequate toilet arrangements, for example, there have been different outcomes depending whether there was one or more people in the cell, and the length of time the person was held in the poor conditions.¹⁹

The prison as 'total institution'²⁰ controls the physical and mental well-being of the detainee, and rights violations in prisons can arise from the failure to provide health care, or from the imposition of treatment, for example in a forensic psychiatric facility. Just as the courts have accepted some level of degradation as 'inevitable' in imprisonment, courts considering whether rights are violated by involuntary treatment similarly weigh up the therapeutic intention, and overall tend to defer to medical opinion about the necessity for the treatment. For example, a case against Austria involved the use of extensive and very forceful restraints against a violent prisoner who was being moved in and out of prisons and psychiatric care. The European Court of Human Rights

concluded that this did not amount to inhuman or degrading treatment. It accepted the evidence that the treatment was medically justified, saying that, while the Court must be satisfied of the medical necessity of forceful interventions and that these could be found to be cruel and inhuman:

The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading.²¹

Legal statements of human rights are therefore important at various levels but may at times provide limited protection to the individual prisoner. The second requirement for effective implementation of rights is embedding human rights values in correction practices and — ideally — in the values of the general community. When the UK parliament debated the Bill that became the *Human Rights Act* 1998 Lord Irvine said '[o]ur courts will develop human rights throughout society. A culture of awareness of human rights will develop'.²² Whether this has happened may be debatable.²³ How it can be achieved has been discussed by a number of commentators.²⁴ There is not space to develop this broader discussion; in this paper we will look briefly at ways of embedding human rights in the practice of the prison itself.

Legal statements of human rights are therefore important at various levels but may at times provide limited protection to the individual prisoner.

Changing cultures — incorporating rights into correctional practice

My research has included discussions with correctional management, with government agencies and with staff in Australia about the practicalities of

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17. *Napier, Re Petition for Judicial Review* [2004] ScotCS 100 [75]
 18. *Kalashnikov v Russia* 15 July 2002 no. 47095/99, §§ 96-97, ECHR 2002 VI; *Peers v Greece* 19 April 2001. No. 28524/95, §§ 70-72, ECHR 2001 III. Van Zyl Smit and Snacken (2009) outline the developments in ECtHR jurisprudence on this issue, and the importance of the development of standards for overcrowding, at pp. 31-33.
 19. *Grant v The Ministry of Justice* [2011]. EWHC 3379 (QB).
 20. Goffman, Erving (1961) 'On the characteristics of total institutions' in Cressey, Donald (ed), *The Prison: Studies in Institutional Organization and Change* (International Thomson Publishing), 15.
 21. *Herczegfalvy v Austria* [1993] 15 EHRR 437, para 82.
 22. United Kingdom, *Parliamentary Debates*, House of Lords, 3 November 1997, vol 582 col 1228.
 23. See Gies, Lieve (2011) 'The Hard Sell: Promoting Human Rights' 24 *International Journal for the Semiotics of Law* 405, 409; Bullock, Karen and Johnson, Paul (2012) 'The Impact of the Human Rights Act 1998 on Policing in England and Wales' 52 *British Journal of Criminology* 630.
 24. See for example Mackay, Anita (2014) 'Operationalising human rights law in Australia – establishing a human rights culture in the new Canberra prison and transforming the culture of Victoria Police' 31 *Law in Context* 261; Pierce, Natalia (2014) 'Implementing Human Rights in Closed Environments: The OPCAT Framework and the New Zealand Experience' (2014)31 *Law in Context* 154.

implementing human rights in prisons. Key findings included the need for comprehensive review of legislation and policies; the need for training and for access to practical human rights-based training manuals; and the importance of grappling with competing expectations and interests within the prison and in the general community.

Senior managers highlight the importance of ensuring all staff are well informed and are included in the implementation process, and of developing practical training related to day-to-day practices, based on international standards, and on realistic manuals, guides and audit instruments.²⁵ Director of the International Centre for Prison Studies and former UK prison governor Andrew Coyle endorses human rights as ‘the best model for prison management’, saying recently that he is confident in basing his training on international human rights standards, ‘because in so many countries, east and west, north and south, the response that I have had from first line staff has been, ‘That makes sense to us; we can relate that to our daily work’.²⁶

My research also highlighted the complex balancing issues that can be involved. Staff may be concerned that prisoners’ rights will be prioritised over the needs of staff, and a balance will be needed between maintaining safety of staff and other prisoners (for instance with blood testing in prisons) and protecting an individual prisoner’s rights. Infrastructure and resource limitations also necessitate choices being made about what services to provide, and to which prisoners.

Prison providers also face conflicting community expectations. Communities have positive expectations that prisons will release rehabilitated prisoners, and this motivates management and staff to support prisoners with education and training, and with appropriate treatments. At the same time there can be negative community expectations of prisons as a place of deprivation which should not provide greater ‘entitlement’ to people sentenced to custody.

Human rights-based legislation and related remedies, and establishing a culture responsive to human rights, are two important steps towards protecting rights in prisons. The third and last to be discussed here is the provision of independent external monitoring of prisons.

Monitoring is internationally regarded as vital to protecting rights.

External oversight of closed facilities such as prisons provides a separate form of rights protection. Monitoring is internationally regarded as vital to protecting rights. People held in prisons are among the most vulnerable groups in society. They are in ‘total institutions’ with almost no say in how they live and with whom, when they get up, when they go to bed, what medical services they can access: all aspects of their lives are controlled and ordered by others. This inevitably gives rise to serious risks of abuse, and of course many facilities such as prisons are currently overcrowded, which puts extra pressure on all aspects of life for those detained.

External monitoring provides a form of oversight, of opening the closed environment to the public gaze. Ideally having strong monitoring bodies means that people running places of detention such as prisons will make sure that detainees’ rights are always protected. But it also means that, if prisons are violating people’s rights, this will be publicly reported and will require correction.

Monitoring involves an independent body with appropriate expertise being able to inspect the facility, talk to all relevant people, and present a public report and recommendations. Most countries have forms of monitoring bodies, such as Ombudsman Offices, Human Rights Commissions, and Inspectorates. These bodies usually have no separate power of enforcement but are expected to prevent rights abuses, and to discover and report publicly on existing abuses.

Just as neither legislation nor ‘culture change’ in themselves guarantee rights protections, so a monitoring scheme can also be seen as necessary though not sufficient. The best practice model is that established under the Optional Protocol to the Convention Against Torture (OPCAT) to give practical effect to the UN Convention Against Torture. This will be outlined, and specific features/ issues noted in this last section of the paper.

The OPCAT came into force in 2006, covering all places where a person is deprived of liberty.²⁷ Countries that ratify OPCAT are guaranteeing effective monitoring regimes for all places of detention, including but not limited to prisons. Effective monitoring is monitoring that

25. See for example International Centre for Prison studies (2009) A Human Rights Approach to Prison Management: Handbook for Prison Staff http://www.prisonstudies.org/research-publications?shs_term_node_tid_depth=10
26. Coyle, Andrew (2013) Human Rights and Prison Staff Presentation on 11 December 2013, International Centre for Prison Studies: <http://www.prisonstudies.org/news/human-rights-training-course-launched-prison-staff>
27. Currently 80 countries had ratified OPCAT as reported by the Association for the Prevention of Torture: <http://www.ap.torture-database/> (accessed 24 December 2015).

is by a genuinely independent agency, with proper resourcing for staff and expertise for thorough investigations of places of detention, with all the powers to enter the place (with or without giving notice) and to interview people, review documents and so on, and to report what they find.

Countries ratifying OPCAT are committing to a two-tiered monitoring framework. At the national level they are to establish effective and robust domestic monitoring bodies to visit places of detention to investigate and report on the treatment and conditions of detention in closed environments (National Preventative Mechanisms (NPMs)). OPCAT specifies that these domestic NPMs must have statutory powers, be functionally independent, have unrestricted access to visit closed environments, have adequate resources to carry out their role, and have their reports publicly available.²⁸

As the second tier, signatories are also required to provide access for announced and unannounced visits from the international monitoring body the UN Subcommittee for the Prevention of Torture (SPT). The SPT provides reports and recommendations to the state. It only publishes the reports at the request of the state²⁹ but to date almost all states have agreed to publication. It is therefore potentially a major opportunity for the UN agency to work with countries collaboratively, bring comparative expertise from other countries and other forms of closed environment.

Most countries have identified one or more existing domestic monitoring bodies to fulfil the role of NPMs, rather than setting up new bodies. The UK was an early supporter of OPCAT, being involved in its drafting and ratifying the Optional Protocol in 2003; it came into force in 2006 and in 2009 the UK set up its NPM. This currently comprises 20 existing bodies, coordinated by HM Inspectorate of Prisons for England and Wales. Some of the member bodies already had monitoring roles in prisons: they include the Prisons Inspectorates of England and Wales, and of Scotland, and Independent Monitoring Boards and Custody Visitors whose lay visitors attend prisons, youth detention facilities, police custody facilities and court lockups.³⁰ The HMIP in the latest Annual Reports of the NPM reports hundreds of independent monitoring visits conducted each year, whilst also discussing challenges around coordination of the different bodies, establishing full coverage of all

places of detention, and ensuring all members of the NPM have the requisite powers to full realise the potential of the NPM.³¹ It is currently reviewing the use of solitary confinement and isolation across all places of detention, applying human rights-based criteria, and foreshadows the development of 'consistent standards and methodology for monitoring its use'.³²

Australia became a signatory to the OPCAT in May 2009 but has not to date ratified it; was heavily criticised in the recent UPR in Geneva and 28 countries recommended that Australia finally ratify the OPCAT. There are many monitoring bodies in Australia already. Some are very effective and provide important protections. But not all places of detention are monitored, or monitored to the same standards; some have multiple monitoring bodies with different powers, some have no monitoring at all, and some have very ineffective monitoring. If Australia takes the approach taken by the UK it can draw on an existing base of monitoring agencies but it will be necessary to review the existing bodies and to address any deficiencies in their structure and powers. For Australia, the next stages depend on political will, but if ratified and implemented, the OPCAT will provide a significant addition to the oversight of rights in prisons and other places of detention across Australia.

Conclusion

Prisons house some of the most vulnerable people in our communities, people most at risk of having their rights abused. I have argued that rights protections require a legislative and policy framework; the embedding of human rights values in prison practice and in the broader community; and effective external monitoring. All these are in train to a greater or lesser extent in the countries discussed, although the force of existing human rights legal frameworks in Europe (including the UK) offer potentially more advanced protections than currently in Australia. People held in prisons are now recognised to be rights holders despite being imprisoned. The challenge for governments, correctional agencies and communities is to ensure that — unless restrictions are unavoidably and demonstrably 'necessitated by the fact of incarceration' — prisoners' human rights are fully protected in practice.

28. OPCAT arts 18, 19, 20 and 23.

29. OPCAT Part III.

30. See *Monitoring places of detention: Sixth Annual Report of the United Kingdom's National Preventive Mechanism* 1 April 2014 – 31 March 2015 (December 2015) pp. 10–12 for structure.

31. *Fifth Annual Report of the United Kingdom's National Preventive Mechanism* 1 April 2013 – 31 March 2014; *Monitoring places of detention: Sixth Annual Report of the United Kingdom's National Preventive Mechanism* 1 April 2014 – 31 March 2015 (December 2015) <http://www.nationalpreventivemechanism.org.uk/wp-content/uploads/2015/12/NPM-Annual-Report-2014-15-web.pdf>

32. 6th Annual Report, p. 4.

European oversight of Belgian, French and British prison policies

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Our paper intends to examine the influence of the legal supervision exercised by the Council of Europe on the Belgian, British and French prison services. We show that the condemnations pronounced by the ECtHR against France for lack of healthcare, suicide prevention and its poor prison conditions has resulted in the Prison Act of 2009, the development of suicide prevention in custody, prison renovation and reforms of the medical and psychiatric care of prisoners. The Council of Europe has also extended the scope of its supervision over Belgium to cover suicides, illegal detention, healthcare and insanity. For its part, the UK seems to be reluctant to incorporate the ECtHR's caselaw into domestic legislation and jurisprudence due to long and persistent national tradition. However, the UK has begun complying with the positive obligations pronounced by the European Court of Human Rights in the field of death prevention and judicial reviews for prisoners serving life sentences.

Introduction

Contrary to legal scholars, when addressing human rights, prison sociologists exclusively focus on legal practices and prison law implementation, to the detriment of the oversight exerted by international bodies, international regulations and their impact on national prison laws. The bulk of research in prison sociology has instead been concerned with highlighting the contradictions between the authoritarian and arbitrary structure of prison and the principles of law, the effects of judicialisation on prison life and the increase of the prison population. Sociologist scholars have also

shown that appeals lodged by prisoners and prisoner advocacy groups have refocused prison relationships on the question of the exercise of rights¹ and the legitimacy of violence against inmates particularly in terms of discipline, confinement and transfers,² as well as the persisting ineffectiveness of law in prison. The latter is perceived as being the product both of the weakness of prison law, although it has been progressively — and quite considerably — reinforced³ and of the anti-democratic vocation of prison, seen as patently incompatible with human rights. Lastly, it has been emphasised that the legal appeals lodged by advocacy groups with a view to improving detention conditions⁴ or promoting the exercise of rights have had the adverse effect of legitimising and encouraging extensive recourse to imprisonment⁵ whilst not making a strong impact on prison conditions, and has in fact been counteracted by the prison services in the form of a 'disciplinary governance' backlash.⁶

There are in our opinion two main pitfalls of this sociological approach to prison: firstly, it underestimates the historical role played by international organisations and the content of the regulations they issue; secondly, it addresses litigation increase and judicialisation on a strictly national, actionalist and occupational level (with observation generally focusing on occupational groups, associations and detainees). Yet, a number of international bodies such as the UN, the Council of Europe and even the European Union, created after World War II to ensure compliance with human rights standards and to prevent inhumane and degrading treatments, tend to produce a monitoring of States based on increasingly numerous and influential regulations, standards, recommendations, and even

1. Jacobs, J.B. (1997) 'The Prisoners' Rights Movement and Its Impact', in: Marquart, J.W. and Sorensen, J.R. (Eds.), *Correctional contexts. Contemporary and classical readings*. Los Angeles: Roxbury, pp. 231–247.
2. Belbot, B. (1997) 'Prisoner Classification Litigation', in: Marquart, J. W. and Sorensen, J. R. (Eds.), *Correctional Contexts, Contemporary and Classical Readings*. Roxbury: Los Angeles, pp. 272-280; Crouch, B. and Marquart, J. 'Resolving the Paradox of Reform : Litigation, Prisoner Violence, and Perceptions of Risk', in: Marquart, J. and Sorensen, J. (Eds.), *Correctional Contexts. Contemporary and Classical Readings*. Los Angeles: Roxbury Publishing, pp. 258–271.
3. Herzog-Evans, M. (2012) *Droit pénitentiaire*. Paris : Dalloz.
4. Jacobs, J. B. (1997) *op. cit.*
5. Gottschalk, M. (2006) *The Prison and the gallows: the politics of mass incarceration in America*. New York: Cambridge University Press; Schoenfeld, H. (2010) 'Mass incarceration and the paradox of prison conditions litigation'. *Law and Society Review*, 44 (3-4): 731–768.
6. Herzog-Evans, M. (2012) *op. cit.* However the main reasons to this backlash are to be found in the punitive policies of the 'Sarkozy era'.

condemnations.⁷ The purpose of this monitoring is to govern and oversee correctional facilities, and international institutions, and to ensure that they are effective in domestic law. In particular, the judicial oversight exercised by the ECHR, the judicial organ of the Council of Europe, has significantly increased over time notably thanks to the evolution of its structure and jurisdiction towards a constitutional court and an increasing cooperation with the other organs of the Council of Europe, the Committee of Ministers, the Parliamentary Assembly and the Committee for the Prevention of Torture.⁸ More precisely, ECHR rulings regarding prisons have been mainly based on the violation of three articles of the European Convention on Human Rights: Articles 2, 3, and 5 and have made demands on these member states with regard to vulnerable prisoners, death and health in custody, prison conditions and coercive or disciplinary measures.

Because legal scholars have not fallen in the aforementioned pitfalls,⁹ the authors of this paper shall essentially draw upon legal analysis and literature, whilst endeavouring to maintain a socio-legal compass. This paper intends to examine the influence of the legal supervision exercised by the Council of Europe and its organisations (the ECtHR and the CPT) on the Belgian and French prison services with an additional focus on the UK. In order to study the concrete impact of the legal control exercised by the bodies on these countries, we shall rely on a socio-legal analysis of the Council of Europe's Recommendations, Prison Rules and ECHR rulings to study the impact of those norms on Belgian, British and French legislation and jurisprudence.

The right to life and the development of death and suicide prevention (article 2) in custody

The right to life constitutes one of the most important rights recognised by Article 2 of the European

Convention on Human Rights of 1950. The ECtHR's main priority is wider systemic issues rather than individual cases.¹⁰ This is also true with regard to Article 2 which is considered by the ECtHR as being 'one of the basic values of the democratic societies making up the Council of Europe'.¹¹ Accordingly, when faced with potential breaches of this provision, the Court must subject violation allegations to the most careful scrutiny.¹²

The jurisprudence on the right to life has developed in seven fields amongst which the prevention of deaths in prison in relation to healthcare, to prison suicide and homicides in prison, where sick or injured prisoners were denied adequate medical care. The right to life is considered by the ECHR as being a priority that provides not only a negative obligation of not endangering citizens' lives and refraining from the intentional and unlawful taking of life, but also positive obligations which oblige the State to protect human life by way of screening and preventive measures, and step actions.¹³

In this respect, states like France and the UK condemned by the ECHR on the basis of Article 2 and the Recommendation 98(7) of the Committee of Ministers of the Council of Europe have been obliged to develop and sustain death and suicide prevention within its prisons by establishing special procedure based on risk detection and risk management.¹⁴ More precisely, the Court requires from member States that in the case of a suicide risk that is known or must be known due to the prisoner's behaviour and/or to his personal and psychiatric history, they shall take all appropriate precautionary measures to detect and prevent this suicide by using risk calculation along with preventive measures adapted to this risk: constant supervision, placement in a completely bare cell and/or in an adequate block, removal of belts, shoelaces, and other blunt objects¹⁵ which could be used to commit suicide. The Court also requires that they should pay special attention to any sign of self-mutilation

... the authors of this paper shall essentially draw upon legal analysis and literature, whilst endeavouring to maintain a socio-legal compass.

7. Bond, M. (2011) *The Council of Europe: structure, history and issues in European politics*. New York: Routledge.
 8. Van Zyl-Smit, D. and Snacken, S. (2009) *Principles of European prison law and policy: penology and human rights*. Oxford, Oxford University Press.
 9. See e.g. Herzog-Evans, M. (2012) *op. cit.*
 10. Leach, P. (2013) 'No longer offering fine mantras to a parched child? The European Court's developing approach', in: Føllesdal, A., Peters, B. and Ulfstein, G., *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*. Cambridge: Cambridge University Press, p.165.
 11. ECHR, 20 December 2004, *Makaratzis v. Greece*, n° 50385/99, § 56.
 12. ECHR, 6 July 2005, *Nachova and Others v. Bulgaria*, n°43577/98 and 43579/98.
 13. Cliquenois, G., and Champetier, B. (2013) 'A new risk management for prisoners in France: The emergence of a death-avoidance approach'. *Theoretical Criminology*, 17(3): 397-415.
 14. *Ibid.* see also Cliquenois, G. (2010) 'Preventing suicide in French prisons'. *British Journal of Criminology* 50(6): 1023–1040. For the UK see ECHR, 3 April 2001, *Keenan v. United Kingdom*, n° 27229/95.
 15. ECHR, *Keenan v. United Kingdom*, *op. cit.*, § 88.

threat.¹⁶ For its part, Belgium was also found in violation of Article 2 in *De Donder and De Clippelle v. Belgium* (2012) for not having sufficiently considered suicide risk factors in the case of a mentally ill person interned several times, but ‘at the time of his suicide detained in an ordinary prison environment even as he was suffering from a mental disorder’.¹⁷ This ruling fits within the Court’s progressive jurisprudence on the obligation of detecting and preventing suicide risk for prison authorities.

This obligation has been applied previously to death prevention in cases involving the UK. This jurisdiction has been found guilty on several occasions for not having exerted sufficient surveillance and control over inmates who were killed by other inmates: ‘For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk’.¹⁸ Consequently, in the case of violent deaths, it belongs to the State to screen dangerous prisoners and to ensure that informations on dangerousness collected by different professionals and agencies such as medical professions, the police, prosecution and courts are relayed and passed on to the prison authorities¹⁹ (*Edwards v the UK*, 14 March 2002, §64). In the same manner, the ECtHR requires prison authorities to establish and put in place sufficient screening procedures for newly arrived prisoners with the aim of detecting high risk profiles: ‘the Court considers that it is self-evident that the screening process of the new arrivals in a prison should serve to identify effectively those prisoners who require for their own welfare or the welfare of other prisoners to be placed under medical supervision’.²⁰ The UK and France have effectively replied to these obligations.²¹

The prohibition of torture and inhuman treatment (article 3)

Article 3 of the Convention recognises one of the most fundamental values of democratic society and constitutes a priority for the European Court in its prioritisation and selection policy. Even in the most difficult of circumstances, such as the fight against terrorism or crime, and no matter what the victims’s behaviour is, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.

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Lack of healthcare

In terms of human rights and particularly of the legality of detention and of inhuman and degrading treatment, the right to health is also an especially important matter in the monitoring of detention conditions. In effect, both the UN Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules (EPR) of 2006 which follow Recommendation 98(7) of the Council of Europe concerning healthcare in prison²² require the establishment of a medical service within prisons, this in close collaboration with outside medical and hospital facilities operating under the authority of Health Ministries.²³ The ECtHR and the

CPT have both gradually come to exercise *external* control over the creation of healthcare services which should be independent from prison authorities. The *internal* control of healthcare in prison settings as exercised by medical services directly connected to national healthcare services is thus arguably reinforced by the external control exercised by European bodies.

This European principle was transcribed in the 2005 Belgian Prison Act, which now states that prisoners shall have access to quality healthcare that meets the standards defined by the general health system, this in close collaboration with external health structures (Article 88). In conformity with the EPR, the Belgian Prison Act — in a

16. *Ibid.*

17. ECHR, 6 December 2011, *De Donder and De Clippel v. Belgium*, n° 8595/06, §78.

18. ECHR, 28 October 1998, *Osman v. the UK*, n° 87/1997/871/1083.

19. ECHR, 14 March 2002, *Paul and Audrey Edwards v. the UK*, n° 46477/99, §64.

20. *Ibid.*, §62.

21. Cluquenois, G. and Champetier, B. (2015) *The development of a risk management approach to conditional release, healthcare and deaths in custody by the Council of Europe*. CARR Discussion Paper, London School of Economics, forthcoming.

22. Resolution 98(7) of the Committee of Ministers concerning the ethical and organisational aspects of healthcare in prison.

23. Rule 40.1 of the EPR.

similar vein to a French 1994 Public Health Act — requires that prisoners whose health requires a medical examination that cannot be conducted in prison be transferred to a health facility (Article 93). A Belgian circular released by prison authorities was published as a response to this obligation resulting from the EPR to create psychiatric services closely connected to psychiatric services provided as part of the general mental health network. The so-called '1800' circular of 7 June 2007 relating to the healthcare teams of psychiatric sections in Belgium prisons and social welfare facilities under the Ministry of Justice recommended the hiring of qualified personnel (psychiatrists, coordinating psychologists, occupational therapists...) which would remain independent from other prison staffers in order to maintain a 'scission between care and expertise'. It also asked for the creation of an Ethics Committee in order to ensure this independence. Studies pertaining to the implementation of the 1800 circular in several prison and social welfare facilities have however highlighted its weak effectiveness, the dependence of the mental health sections toward prison authorities and the circumventions of the principle of separation between care and expertise within these psychiatric sections.²⁴

In 1993, the CPT had already noted violations of the European Convention on Human Rights in these psychiatric sections, called in Belgium 'psychiatric annexes'. These included problematic transfers of patients to disciplinary blocks,²⁵ the complete lack of say of medical supervisors on admissions and discharges,²⁶ and the recurrent shortage of healthcare personnel attached to the annexes. These observations were shared by the Commissioner for Human Rights of the Council of Europe.²⁷ In light of these observations, the UN Human Rights Committee has asked the Belgian state to put an end to the psychiatric annex system, since they de facto

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constitute detention of mentally-ill people settings.²⁸ In a number of recent rulings the European Court of Human Rights has made up for this lack of supervision by reinforcing the pressure on Belgian authorities to radically reform the national prison system.

One of such rulings was *Claes v. Belgium* (2013), wherein the Court held that the applicant's continuous detention in a prison's psychiatric wing without adequate care constituted a degrading treatment resulting in a violation of Article 3.²⁹ Belgian prison authorities were blamed for not having provided sufficient onsite medical supervision or offered an alternative by reinforcing ties between the prison services and appropriate healthcare structures. The 'unsuitability of psychiatric wings for the

detention of persons with mental health problems, staff shortages, the poor standard of care, the dilapidated state of premises, overcrowding in prisons and a structural shortage of places in psychiatric facilities outside prison' was more broadly denounced.³⁰

This ECHR jurisprudence raised the more general question of the structural supervision of mentally ill offenders in need of medical treatment. The Belgian authorities partly responded to the Court by increasing the number of medical staff in prisons and psychiatric wings, by increasing the capacity of psychiatric institutions reserved for offenders, and by launching

the construction of three psychiatric units for medium-risk mentally ill defenders (Zelzate, Bierbeek et Rekem) along with two psychiatric detention centres for high-risk mentally ill offenders in Ghent and in the vicinity of Antwerp.³¹

In several ECtHR cases, and particularly in *Rivière*, France was also held in breach of Article 3 for not having placed vulnerable psychotic and mentally ill inmates in a psychiatric hospital as requested by medical doctor, and for not having transferred physically ill inmates to hospitals.³² Following these sanctions France reformed

24. Cartuyvels, Y., Champetier, B. and Wywekens, A. (2010) *Soigner ou punir ? Une approche critique de la défense sociale en Belgique*. Bruxelles : Publications de l'Université Saint-Louis Bruxelles.

25. Lantin's psychiatric wing, CPT report of 1993.

26. *Ibid.*

27. Commissioner for human rights- Council of Europe. Visit in Belgium, 15–19 December 2008 (ref. CommDH (2009)14).

28. United Nations Human Rights Committee (CCPR). Consideration of the report submitted by Belgium under the International Covenant on Civil and Political Rights (Draft concluding observations, November 2010).

29. CHR, 10 January 2013, *Claes v. Belgium*, n° 43418/09, §100 -102; ECtHR, 6 December 2011, *De Donder and De Clippel v. Belgium*; ECHR, 10 January 2013, *Duffort v. Belgium*; ECHR, 10 April 2013, *Sweenen v. Belgium*; ECHR, 9 January 2014, *Lankaster v. Belgium*; ECHR, 9 January 2014, *Van Meroye v. Belgium*, ; ECHR, 9 January 2014, *Plaisier v. Belgium*; ECHR, 9 January 2014, *Oukili v. Belgium*; ECHR, 9 January 2014, *Moreels v. Belgium*.

30. ECHR, 10 January 2013, *Claes v. Belgium*, n°43418/09, §98.

31. Belgian Senate, Session 2006–2007, 20 March 2007, legislative document n° 3-2094/3, Justice Commission Report, M. Mahoux.

32. ECHR, 14 November 2002, *Vincent and Mouisel v. France*, n° 67263/01.

prisoners' medical and psychiatric care. In 2002, a special early release measure for prisoners whose medical conditions is incompatible with their detention and for terminally ill prisoners was created (Penal Procedure Code, Art. 721–1), which has recently been extended to mentally ill offenders (Law of August 15, 214). Moreover, psychiatry units specially designed for inmates have gradually opened within psychiatric hospitals (Public Health Code, Art. L. 3214-1). In addition, whilst having existed since 1910, as of 2008, special psychiatric hospitals ('Difficult Patients Units' — *Unités pour malades difficiles*: UMD, Public Health Code, Article L3222-3) for severally mentally ill patients representing a danger to other people and who have thus often been incarcerated have seen a considerable increase in the number of their available beds. Lastly, a 'safety detention unit' has been created in 2008 in the Parisian prison of Fresnes (PPC, Art. 706-53-13 s.), which has however so far only hosted three highly dangerous offenders released from prison.³³

Poor conditions of detention
France has also been sanctioned for its extremely poor prison conditions, due to a large part to chronic overcrowding. Following the abundant jurisprudence pertaining to prison overcrowding and, in particular the 'pilot case' *Torreggiani and others v. Italy* in 2013,³⁴ where the ECHR ordered Italy to make the structural changes needed to prevent further violations of Article 3 due to prison poor conditions and overcrowding, it was only a matter of time before France, where the situation was quite similar, would also be found guilty of breaching Article 3.

In *Canali v. France*,³⁵ France was indeed held in violation of Article 3 because of the lack of basic hygiene and dignity, from which the applicant could only extirpate himself one hour a day for a promenade in a small 50 sq. meter courtyard (§53). With regard to prison

conditions, European court cases have been determinant agents in the legislative changes that have ensued. The passing of the Prison Act in 2009 — a rather conservative and, in some cases, retrograde reform, but for a few chosen topics — was in itself the result of the intense jurisprudential activity which had taken place in the previous years at both levels.³⁶

Whilst at the end of 2014, France has renewed for the fourth time, a five-year moratorium whereby the prison services have been authorised to delay the implementation of the 'one prisoner per cell' rule (PPC, art. 716), in practice, nothing has changed as many inmates are still sleeping on mattresses laid down on their cell floor, as France's prison population continues to rise.

The prison services have made consistent progress in a number of areas. For instance, toilets are now gradually being separated from the rest of the cells; new prisons are being built as the current government has not cancelled the construction plan that the previous had put in place. However, with regard to solitary confinement, the Prison Act has maintained the possibility for prison authorities and the Ministry of Justice to indefinitely keep prisoners under solitary confinement.³⁷

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The right to legal detention (article 5)

The third article on which the Court relied to condemn Belgium and the UK was Article 5 of the Convention which aims to protect individuals from all arbitrary deprivations of liberty.³⁸ With this in mind, and on the basis of subparagraph e) of paragraph 1 in Article 5 and of numerous CPT reports, the Court ruled in *Aerts* (1998), *De Donder and De Clippel* (2012), *Claes* (2013), *Dufoort* (2013), *L.B.* (2013), and *Swennen* (2013) that the imprisonment or continued detention of a mentally ill person³⁹ in the psychiatric

33. Herzog-Evans, M. and van der Wolf, M. (2015) 'Supervision and detention of dangerous offenders in France and the Netherlands: a comparative and Human rights' perspective', in: Herzog-Evans, M. (ed.), *Offender release and supervision: The role of Courts and the use of discretion*. Nijmegen: Wolf Legal Publishers, forthcoming.

34. ECHR, 8 Jan. 2013, *Torreggiani and others v. Italie*, n° 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, 37818/1043517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, and 37818/10.

35. ECHR, 25 April 2013, *Canalo v. France*, n° 40119/09.

36. Herzog-Evans, M. (2010) « Loi pénitentiaire no 2009-1436 du 24 novembre 2009 : changement de paradigme pénologique et toute puissance administrative ». *Recueil Dalloz. chronique*: 31-38.

37. Herzog-Evans M. (2015), 'Solitary Confinement and Convict Segregation in French Prisons, in Richards S. (ed.), *The Marion Experiment: Long-Term Solitary Confinement and the Supermax Movement*, Southern Illinois University Press.

38. ECHR, 4 April 2000, *Witold Litwa v. Poland*, n° 26629/95 and ECHR, 2 March 1987, *Weeks v. United Kingdom*, n° 9787/82.

39. According to the ECHR, an individual may be considered as being mentally ill, and consequently be deprived of his liberty, if his mental illness has been established conclusively, and if his disorder is serious enough to make internment a legitimate option. Internment cannot be validly extended if the disorder does not persist (ECHR, 24 October 1979, *Winterwerp v. Netherlands*; ECHR, 5 October 2000, *Varbanov c. Bulgaria*).

Conclusion

wing of a prison is illegal and irregular, as this detention takes place in inappropriate conditions, making deficient 'the relationship between the aim of detention and the conditions in which it took place'.⁴⁰ On the basis of article 5§1e), the ECHR therefore requires a relationship between the motive put forward to justify the deprivation of liberty and the prison conditions. On this basis, mentally ill prisoners must be transferred to a hospital, a clinic or another appropriate facility where their symptoms can be treated.

Likewise, and also on the basis of Article 5 (§4), the ECHR considers that in order for detention to be legal, the member state needs to ensure consistency between the offence committed and the reason for which the offender is sent to prison.⁴¹ The Court has distinguished two separate phases for prison sentences: the first phase aims at punishing; the second phase relates to the risk posed by the offender to society.⁴² As soon as this second phase of the sentence begins, member states are obligated to regularly evaluate the risks raised by prisoners.⁴³ It is on this basis that the Court has ruled against Belgium in *Van Droogenbroeck*, and considered that the lack of regular evaluation rendered the applicant detention illegal — even though he had committed numerous theft offences. According to the Court, the authorities should at least have made regular assessments of the prisoner's personality, which they had not.⁴⁴ It is noteworthy that the European Probation Rules (CM/Rec(2010)1) likewise recommend regular risk assessment of offenders (Art. 66–71).

British and Belgian authorities have partially replied to this obligation by developing and using risk management assessment more and more regularly.⁴⁵ In particular, the UK has been obliged by the ECtHR (notably since the *Vinter* case⁴⁶) to create a mechanism guaranteeing regular judicial reviews for prisoners serving life sentences.⁴⁷

We have shown that the condemnations pronounced by the ECtHR against France for lack of healthcare, suicide prevention and poor prison conditions has resulted in the Prison Act of 2009, the development of suicide prevention in custody, the renovation of prisons and reforms of medical and psychiatric care of prisoners. It has also recently contributed to the enactment of a law reform which endeavours — albeit by unfortunately reducing fair trial and respect for prisoners' agency⁴⁸ — to fast release more and more offenders, thereby instrumentalising early release⁴⁹ in order to solve overcrowding, the root cause of such problems. The Council of Europe has also extended the scope of its supervision for Belgium to cover suicides, illegal detention, healthcare and insanity. In this regard, this European oversight is increasingly tight, particularly regarding suicide and the detention of mentally ill individuals. For its part, the UK seems to be reluctant to incorporate the ECtHR's caselaw into domestic legislation and jurisprudence due to long and persistent national traditions. However, the UK has begun complying with the positive obligations imposed by the ECtHR with issues such as death prevention and judicial reviews for prisoners serving life sentences.

On the other hand, we could question whether these changes have really had a deep impact on prisoners' material conditions and on overcrowding. One could argue that both issues remain unchanged, due, to a great extent to the punitive legislations which have been enacted in the last decades in the three jurisdictions. Lastly, the prison services have resisted reforms and found new ways of disciplining prisoners and regaining some of the discretionary power they had lost over that period. While legal remedies cannot in themselves totally solve structural and penological issues, they can delay and contain the impact of long term negative trends as vividly shown by the European legal framework.⁵⁰

40. ECHR, 10 January 2013, *Claes v. Belgium*, §120.

41. ECHR, 25 October 1990, *Thynne, Wilson and Gunnell v. the UK*, n° 11787/85, 11978/86.

42. *Ibid.* and ECHR, *Weeks v. the UK*, op. cit.

43. *Ibid.*

44. ECHR, 24 June 1982, *Van Droogenbroeck v. Belgium*.

45. Cliquennois, G. and Champetier, B. (2015) *op.cit.*

46. ECtHR, *Vinter v. UK*, 9 July 2013, 66069/09.

47. *Ibid.*

48. On the very complex issue of balancing due process, prisoner agency, rehabilitation and reentry, whilst releasing enough inmates see: Herzog-Evans M. (ed.), *Offender release and supervision: The role of Courts and the use of discretion*. Nijmegen: Wolf Legal Publishers, forthcoming in 2015.

49. Snacken, S., Beyens, K. & Beernaert, M.A. (2010), 'Belgium', in Padfield, N., van Zyl Smit, D. & Dünkel, F. (Eds.) *Release from prison. European policy and practice*, Cullompton, Devon, Willan Publishing: 70–103.

50. Snacken, S. and Dumortier, S. (eds.) (2012). *Resisting Punitiveness in Europe? Welfare, human rights and democracy*, Routledge.

Legal highs and their use in New Zealand: a critical analysis of New Zealand Drug policy

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Introduction

This article will explore some of the issues surrounding drug policy and prohibition in New Zealand, focusing on the legislation surrounding 'legal highs', 'party pills' or new psychoactive substances (NSPs). The focus will be on exploring the concept of 'moral populism' developed in an earlier piece of work.² Consideration will be given to how 'we' arrived at 'moral populism', and the myths, stereotypes and stigma that infuse both contemporary drug legislation and the history of drug policy.

New Zealand Drug policy: historical context

The use of illicit drugs in colonial New Zealand in the 1800s and 1900s raised issues of morality, stigma and racism. While the use of opium was often governed by etiquette rather than the law (for example, 'respectable' women drank opium, as smoking opium was frowned upon), when legislation did arrive it was aimed more at the Chinese population rather than controlling the use of opium among other groups in society.³ Under the 1901 Opium Prohibition Act and the 1908 Opium Act, the police gained the power to search any Chinese premises without a warrant, but required a warrant if the occupants were not Chinese.⁴ Globally similar issues arose with the infamous 'Reefer madness' propaganda in the US in the 1930s and 1940s urging 'respectable' Americans to beware of 'marihuana' connected with Mexicans and other stigmatized groups. Cocaine use by

Black Americans was also historically raised as a concern with the *New York Times* noting that 'negro cocaine fiends are the new southern menace' in 1914.⁵ It must not be forgotten however that propaganda and sensationalist reporting like this had **consequences** for the groups concerned as well as for wider society. For example, a higher caliber gun was introduced in response to fears about cocaine affected Black men,

The following day, the Chief exchanged his revolver for one of heavier calibre.....And many other officers in the South; who appreciate the increased vitality of the cocaine-crazed negroes, have made a similar exchange for guns of greater shocking power for the express purpose of combating the 'fiend' when he runs amok.⁶

Similarly in Canada in the 1920s racialized debates focused on Chinese opium users resulting in punitive legislation such as; six months in prison for drug trafficking or possession; police gained the right to search premises without a warrant if they suspected drugs were present; the right to appeal trafficking sentences was abolished; the deportation of aliens convicted of drugs offences.⁷ More recently in the US the sentencing discrepancies for crack cocaine and powdered cocaine have been noted,⁸ as well as the 'three strikes' legislation that has driven US prison populations to unimaginable proportions.⁹

Contemporary UK research such as that by 'Release'¹⁰ has noted that although Black people use fewer drugs than

1. 'Legal highs' is the common New Zealand term for substances such as BZP that are or were legally available. Other terms for such substances are 'party pills', 'new psychoactive substances' or 'novel psychoactive substances'.
2. The research this article is based on first appeared in the *Australian and New Zealand Journal of Criminology* – See Hutton, F. (2016) BZP-PPs, Populism and Prohibition, *Australian and New Zealand Journal of Criminology*, DOI: 10.1177/0004865816638906. Consequently there is some overlap between the two texts.
3. Eldred-Grigg, S. (1984). *Pleasures of the Flesh: Sex and Drugs in Colonial New Zealand 1840–1915*. Wellington: Reed Ltd.
4. Eldred-Grigg, S. (1984). *Pleasures of the Flesh: Sex and Drugs in Colonial New Zealand 1840–1915*. Wellington: Reed Ltd.
5. Negro Cocaine 'Fiends' New Southern Menace, *New York Times*, Sunday February 8, 1914, available at http://www.druglibrary.org/schaffer/history/negro_cocaine_fiends.htm, accessed May 12th 2016.
6. Negro Cocaine 'Fiends' New Southern Menace, *New York Times*, Sunday February 8, 1914, available at http://www.druglibrary.org/schaffer/history/negro_cocaine_fiends.htm, accessed May 12th 2016.
7. Carstairs, C. (1999 p.66). Deporting 'Ah Sin' to Save the White Race: Moral Panic, Racialisation and the Extension of Canadian Drug Laws in the 1920s, *CBMH*, 116: 65–88.
8. The Sentencing Project. (n.d). Race and Class Penalties in Crack Cocaine Sentencing, available at <http://www.prisonpolicy.org/scans/sp/RaceandClass.Sentencing.pdf>, accessed May 11th 2016. 500 grams of powder cocaine triggers a 5-year mandatory sentence, 5 grams of crack cocaine are required to trigger the same 5-year mandatory sentence (The Sentencing Project n.d.)
9. On December 31, 2014, state and federal correctional authorities held 1,508,600 individuals sentenced to more than 1 year in prison. Half of males (50%) and more than half of females (59%) in federal prison were serving time for drug offenses on September 30, 2014 (Carson, Minton, Kaeble & Zeng, 2015).
10. Release. (2013). The numbers in Black and White: disparities in policing and prosecution of drugs offences, available at <http://www.release.org.uk/publications/numbers-black-and-white-ethnic-disparities-policing-and-prosecution-drug-offences> accessed May 11th 2016.

White people, they are six times more likely to be stopped and searched by police. In the US contemporary data demonstrates that Black people are 10.1 times more likely to be sent to prison for drugs offences than White people.¹¹ Additionally in every year from 1980 to 2007, Blacks were arrested nationwide on drug charges at rates relative to population that were 2.8 to 5.5 times higher than white arrest rates.¹² Further in New Zealand, Māori¹³ are three times more likely to be arrested and convicted for cannabis use than non-Māori,¹⁴ as well as being more likely to be prosecuted and convicted of possession and/or use of an illicit drug or drug utensil.¹⁵ The 2012—2013 New Zealand Health Survey into cannabis use also found Māori were nearly twice as likely as non-Māori to suffer legal problems as a result of using cannabis.¹⁶

New Zealand drug policy is embedded in this global context, as well as in a complex post-colonial context, which has affected the development of legislation surrounding illicit drugs. Growing international pressure to control drugs began in approximately the late 1800s and early 1900s. This international pressure culminated in the 1912 Hague convention which contained various provisions¹⁷ aimed at controlling particular substances, although it was not until 1927 that the New Zealand Dangerous Drugs Act 1927 was passed

*A Reform Government finally decide[d] that New Zealand law on narcotics was 'well behind the rest of the world' and pass [ed] a dangerous drugs Act outlawing all unlicensed sales of opium, morphine, heroin, coca, cocaine and cannabis.*¹⁸

However it is worth noting that New Zealand did not have a significant problem with any of the drugs listed in the 1927 Act, and that the first prosecution for cannabis use

was not until the 1950s. In common with many countries globally New Zealand's drug laws were also heavily influenced by the 1961 Single Convention on Narcotic Drugs. The Single Convention on narcotic drugs requires signatories to legislate against possession, supply and manufacture of illicit substances, often defined under national legislation for example the Misuse of Drugs Act 1971 in the UK and the Misuse of Drugs Act 1975 (hereafter MDA 1975) in New Zealand. Drugs in New Zealand are currently regulated under the MDA 1975. Graded penalties are applied for possession, supply and manufacture/cultivation of substances labelled as class A, B or C based on their levels of harm and opportunity for misuse (class A being the substances considered to be the most harmful).¹⁹

'Moral populism'

In considering the issues related to drug use and the historical development of legislation one of the key concepts, recently developed is 'moral populism' (Hutton 2016). This term, in part, refers to the idea that drug policy and law-making are firmly stuck in the past, wedded to outdated notions of both drug harms and drug users. The single convention was crafted in 1961, now 56 years old, while the 1975 MDA is 41 years old. Huge adjustments have been made in scientific thinking and social relations since 1961 and 1975 so why are governments and policy makers unable to move forward with drug legislation, despite overwhelming evidence that the 'war on drugs' is having catastrophic effects worldwide, whilst not deterring drug use?^{20,21}

One of the answers to this question is argued to be the rise of populist politics, and that populism is argued to influence political agendas in countries like New Zealand.²²

11. Human Rights Watch. (2008). *Targeting Blacks: Drug Law Enforcement in the US*, available at https://www.hrw.org/sites/default/files/reports/us0508_1.pdf accessed May 11th 2016.
12. Human rights Watch. (2009). *Decades of Disparity: Drug Arrests in the United States*, available at: https://www.hrw.org/sites/default/files/reports/us0309web_1.pdf accessed May 11th 2016.
13. Māori are the indigenous people of New Zealand. They are a diverse population affiliated to different iwi (tribes/tribal group). Māori make up 14.9% of the NZ population (Statistics New Zealand, 2013).
14. Fergusson D, Swain-Campbell N, Horwood L. (2003). Arrests and convictions for cannabis related offences in a New Zealand birth cohort. *Drug and Alcohol Dependence*, 70, 53–63.
15. Māori make up 15 percent of the population, and Māori aged 17–25 make up 37 percent of those convicted of possession and/or use of an illicit drug or drug utensil (New Zealand Drug Foundation 2013).
16. Ministry of Health. (2015). *Cannabis Use 2012/13: New Zealand Health Survey*. Wellington: Ministry of Health.
17. These provisions were: To be controlled by national legislation; Opium smoking to be gradually and effectively repressed; The manufacture, sale and consumption of morphine and cocaine and their salts to be limited by national legislation to medical and legitimate purposes, and to be controlled by a system of licensing; Statistics relating to the drug trade, and information about national laws and administrative arrangements, to be exchanged through the Netherlands government (Barton, 2003 p.15).
18. *Eldred-Grigg, S. 1984, p. 240. Pleasures of the Flesh: Sex and Drugs in Colonial New Zealand 1840–1915*. Wellington: Reed Ltd.
19. Nutt, King and Phillips (2010) have challenged the way drugs and their harms have been defined and categorised under the UK Misuse of Drugs Act 1971.
20. The Lancet Commissions. (2016). Public health and International Drug Policy, *The Lancet*, [http://dx.doi.org/10.1016/S0140-6736\(16\)00619-X](http://dx.doi.org/10.1016/S0140-6736(16)00619-X)
21. Drug prevalence statistics in New Zealand also bear this out with 1.2 million New Zealanders stating that they have tried cannabis in their lifetime. In the past year, one in six (16.6%) adults had used 'any drugs' for recreational purposes, equating to 438,200 people (Ministry of Health 2010).
22. Bottoms, A. (1995). 'The philosophy and politics of punishment and sentencing', in C. Clarkson and R. Morgan, eds., *The Politics of Sentencing Reform*, 15–49. Clarendon; Pratt, J. and Clarke, M. (2005), Penal populism in New Zealand, *Punishment and Society*, 7: 303–322; Pratt, J. (2008a), 'When penal populism stops: Legitimacy, scandal and the power to punish in New Zealand', *Australian and New Zealand Journal of Criminology*, 41: 364–383; Pratt, J. (2008b). 'Penal populism and the contemporary role of punishment', in Anthony, T and Cunneen C. eds. *The Critical Criminology Companion*. Hawkins Press, Sydney; Simon, J. (2007), *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. Oxford University Press; Sparks, R. (2003). 'States of insecurity: punishment, populism and contemporary political culture', in McConville, S. ed. *The Use of Punishment*. Willan publishing, Cullompton.

The term 'populist punitiveness' is used to convey the idea of politicians 'tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance'.²³ 'Populist punitive' strategies are argued to be adopted by politicians based on the belief that they will be popular with the voting public. It is further noted that drugs offences are one category of offending most likely to be subjected to 'populist punitiveness'.²⁴ Punitive populism is argued to be one of the key drivers of policy making in recent times which has resulted in increasingly harsh punishments **whether or not** they reduce crime or address issues related to offending behaviour.²⁵ Although punitiveness can recede as punishments are considered too harsh²⁶ drugs and drug users are still subject to '*moral populism*' as drug policy remains shrouded in 'ancient moral freight',²⁷ focused on harsh punitive responses towards drug use and drug users. A process of punitive '*moral populism*' has therefore occurred around drugs and drug users given the politicisation of substance use, and the historical legacy of harsh responses to particular drugs and groups of drug users.²⁸ Drug users have been viewed historically as 'containers of intolerable levels of risk',²⁹ a view that has continued to influence contemporary drug policy in the 2000s. Thus the discourses around drug use often focus on the social construction of particular groups as deviant or criminal, and as Khon notes

*The outlawing of drugs was the consequence not of their pharmacology but of their association with social groups that were perceived as potentially dangerous.*³⁰

'*Moral populism*' is also a legacy of the individualisation of drug use as well as the construction of addiction within narrowly defined terms,³¹ leading scholars to argue that drug use has 'indeed attained the status of being about morality'.³² It is also worth noting that the category of 'drugs' is a socially constructed one. How some substances became designated as 'drugs', and what substances are considered as 'drugs' is not necessarily based in pharmacology and is subject to change over time;

*The word 'drug' does not designate a set of chemicals based on their molecular structure (Becker 2001). There are no pharmacological categories of 'illicit drugs', 'licit drugs' and 'medications'. They are social categories constructed because as a political community we have come to treat some substances differently from others depending on who uses them, how and for what.*³³

Therefore responses to drugs and drug users are argued to be based on fears about particular groups,³⁴ and that drug policy should be considered as a reaction to the symbols related to drug use which take on an intense emotional significance.³⁵ Contemporary discourse about drugs is argued to be about **more than** the drugs themselves because '*drugs permit the terrors of the subconscious to be voiced*',³⁶ leading to punitive responses towards and punishment of drug users. Drug policy and prohibition are influenced by a wide range of issues, not necessarily evidence science and rationality.³⁷ The issues surrounding (im)morality and drug use were clearly demonstrated in the New Zealand debates about BZP-based

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23. Bottoms, A. (1995, p. 40). 'The philosophy and politics of punishment and sentencing', in C. Clarkson and R. Morgan, eds., *The Politics of Sentencing Reform*, 15–49. Clarendon.
24. Bottoms, A. (1995, p. 40). 'The philosophy and politics of punishment and sentencing', in C. Clarkson and R. Morgan, eds., *The Politics of Sentencing Reform*, 15–49. Clarendon.
25. Wood, R. (2013). 'Punitive Populism.' In Miller, D., and Hoboken, J. (2013) *Encyclopaedia of Theoretical Criminology*, NJ: Wiley-Blackwell.
26. Pratt, J. (2008a), 'When penal populism stops: Legitimacy, scandal and the power to punish in New Zealand', *Australian and New Zealand Journal of Criminology*, 41: 364–383.
27. Douglas 1992 cited in Sparks, R. (2003, p.159). 'States of insecurity: punishment, populism and contemporary political culture', in McConville, S. ed. *The Use of Punishment*. Willan publishing, Cullompton.
28. Barton, A. (2003). *Illicit Drugs Use and Control*, RoutledgeFalmer; Carstairs, C. (1999). Deporting 'Ah Sin' to Save the White Race: Moral Panic, Racialisation and the Extension of Canadian Drug Laws in the 1920s, *CBMH*, 116: 65–88; Eldred-Grigg, S. 1984, p. 240. *Pleasures of the Flesh: Sex and Drugs in Colonial New Zealand 1840-1915*. Wellington: Reed Ltd.; Lancaster, K., Hughes, C., Spicer, B., Matthew-Simmons, F. and Dillon, P. (2011). Curiosity Killed the M-Cat: an Examination of Illicit Drugs and Media, ANZCCC: *The Australian and New Zealand Critical Criminology Conference 2010*, Institute of Criminology, Sydney Law School, The University of Sydney.
29. Sparks, R. (2003, p.160). 'States of insecurity: punishment, populism and contemporary political culture', in McConville, S. ed. *The Use of Punishment*. Willan publishing, Cullompton.
30. Kohn, M. (1992). *Dope Girls: The Birth of the British Drug Underground*, Granta Publications, London.
31. Alexander, B. (2012). Addiction: The Urgent Need for a Paradigm Shift. *Substance Use & Misuse*, 47, 13–14, 1475–1482.
32. Silverman, J. (2010). Addicted to getting drugs wrong. *British Journalism Review*, 21, 4, 31–36.
33. Bancroft, A. (2009 p.8). *Drugs, Intoxication and Society*, Polity Press, Cambridge.
34. Coomber, R. (2013). Social Fear, Drug-Related Beliefs, and Drug Policy, in Bergeron, H., Hunt, G., Maitena, M (Eds.), *Drugs and Culture: Knowledge, Consumption and Policy*, Ashgate, Publishing Ltd., Farnham.
35. Manderson, D. (1995). Metamorphoses: Clashing symbols in the social construction of drugs. *The Journal of Drug Issues*, 25, 799–816.
36. Kohn, M. (1992 p.1). *Dope Girls: The Birth of the British Drug Underground*, Granta Publications, London.
37. Bennett, T. and Holloway, K. (2010). 'Is UK drug policy evidence-based?' *International Journal of Drug Policy*, 21: 411–417; Hallam, C. and Bewley-Taylor, D. (2010), 'Drug Use: knowledge culture and context', Briefing Paper 21, *The Beckley Foundation Drug Policy Programme*, 1–11; Stevens, A and Measham, F. (2014), 'The 'Drug Policy Ratchet': why do sanctions for new psychoactive drugs typically only go up?', *Addiction*, 109: 1226–1232.

party pills (BZP-PPs)³⁸ and other legal highs, and it is to a consideration of this specific context that this article now turns.

BZP-PPs in New Zealand

Legal highs such as BZP-PPs became popular in New Zealand from about 2000 onwards with a variety of party pills available in places like dairies (newsagents), garages, off licences and dedicated legal high outlets. There were approximately 120 different party pill brands available in New Zealand at this time.³⁹ They were marketed as a legal alternative to drugs such as amphetamine and ecstasy and became popular on the dance scene, with an estimated 8 million servings sold between 2000 and 2005.^{40,41} The legal high market in New Zealand developed particularly quickly, partly due to New Zealand's small population and geographic isolation. Consequently it has an underdeveloped illicit drug market compared to European countries.⁴² Illicit drugs are often poor quality and expensive, so legal alternatives that produce similar effects, more cheaply are highly attractive. New Zealand research demonstrates that BZP-PPs are often used as a substitute for ecstasy and other dance drugs such as amphetamine, usually when ecstasy or amphetamines are unavailable.⁴³

BZP-PPs are also used as one substance among a variety of illicit/licit drugs; they are another substance on the menu for poly-drug users.⁴⁴

However concerns arose about the unregulated nature of the party pill market with emergency doctors raising issues about party pill ingestion.⁴⁵ Such concerns paved the way for the 2005 Misuse of Drugs Amendment Act⁴⁶ (hereafter the 2005 Act) to try and impose some regulation on the market for legal highs. BZP-PPs were placed in this category until research could be carried out into their potential for toxicity and harm. Although the research evidence highlights some serious adverse effects related to BZP-PPs,⁴⁷ on balance they appear to be limited to a minority of users under particular circumstances, as well as related to a number of other factors.⁴⁸ Research has also noted a number of adverse effects related to taking BZP-PPs such as: headaches; tremors/shakes; stomach pains/nausea; sleeplessness; loss of energy; mood swings,⁴⁹ with more serious side effects, such as seizures,⁵⁰ noted as small in number. A qualitative study exploring BZP use by young people found that although there were some benefits to retaining a legal market for BZP-PPs such as the avoidance of the illicit market for users, there were also some negative impacts for example the assumption of quality control of BZP-PPs when the opposite was the case.⁵¹ Party pill users

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38. BZP is short for Benzylpiperazine, a substance that has stimulant properties similar to amphetamine, although about one tenth the strength (Cohen & Butler, 2011). Party pills often, though not always, contained trifluoromethylphenylpiperazine (TFMPP) which supposedly mimicked the empathetic and energetic effects of ecstasy.
 39. Gee, P. Richardson, S. Woltersdorf, W. and Moore, G. (2005) 'Toxic effects of BZP-based herbal party pills in humans: a prospective study in Christchurch New Zealand', *The New Zealand Medical Journal*, 118: 1–10.
 40. Social Tonics Association of New Zealand. (2005), *Submission of Social tonics Association of New Zealand to the Health Select Committee on the matter of Misuse of Drugs amendment Bill (No.3) and the Supplementary Order Paper*. Social Tonics Association of New Zealand.
 41. It is worth noting here that the population of New Zealand is approximately 4 million (Statistics New Zealand, 2013)
 42. Cohen, B. and Butler, R. (2011). 'BZP-party pills: A review of the research on benzylpiperazine as a recreational drug', *International Journal of Drug Policy*, 22: 95–101.
 43. Butler, R. and Sheridan, J. (2007), 'Highs and lows: patterns of use, positive and negative effects of benzylpiperazine-containing party pills (BZP-party pills) amongst young people in New Zealand', *Harm Reduction Journal*, 4:1–10; Hutton, F. (2010), 'Kiwis Clubs and Drugs: Club Cultures in Wellington New Zealand', *The Australian and New Zealand Journal of Criminology*, 43: 91–111.
 44. Hammond, K. (2008), *Recreational Drug Using Behaviour and Legal Benzylpiperazine Party Pills*, PHD Thesis, Victoria University, Wellington, New Zealand.
 45. Gee, P. Richardson, S. Woltersdorf, W. and Moore, G. (2005) 'Toxic effects of BZP-based herbal party pills in humans: a prospective study in Christchurch New Zealand', *The New Zealand Medical Journal*, 118: 1–10.
 46. The 2005 Misuse of Drugs Amendment Act(2005), <http://www.legislation.govt.nz/act/public/2005/0081/latest/DLM356224.html> ,created a 'restricted substances' or Class D category for psychoactive substances. Being placed under Class D meant a range of restrictions on the sale and marketing of BZP could be put in place: BZP-PPs could not be sold to under 18s, could not be given away free as promotions in bars and clubs and could not be advertised in print media, TV or radio.
 47. Gee, P. Richardson, S. Woltersdorf, W. and Moore, G. (2005) 'Toxic effects of BZP-based herbal party pills in humans: a prospective study in Christchurch New Zealand', *The New Zealand Medical Journal*, 118: 1-10; Thompson, I. Williams, G. Aldington, S. Williams, M. Caldwell, B. Dickson, S. Lucas, N. MacDowall, J. Weatherall, M. Frew, A. Robinson, G. and Beasley, R. (2006), *The benzylpiperazine (BZP)/trifluorophenylmethylpiperazine (TFMPP) and alcohol safety study*, Medical Research Institute of New Zealand.
 48. Gee, P. Richardson, S. Woltersdorf, W. and Moore, G. (2005) 'Toxic effects of BZP-based herbal party pills in humans: a prospective study in Christchurch New Zealand', *The New Zealand Medical Journal*; Nicolson, T. (2006). 'Prevalence of use, epidemiology and toxicity of 'herbal party pills' amongst those presenting to the emergency department', *Emergency Medicine Australasia*, 18: 180–184; Theron, L. Jansen, K. and Miles, J. (2007), 'Benzylpiperazine-based party pills' impact on the Auckland City hospital Emergency Department Overdose Database (2002-2004) compared with ecstasy (MDMA or methylene dioxymethamphetamine), gamma hydroxybutyrate 9GHB, amphetamines, cocaine, alcohol', *The New Zealand Medical Journal*, 120: 1–8; Thompson, I. Williams, G. Aldington, S. Williams, M. Caldwell, B. Dickson, S. Lucas, N. MacDowall, J. Weatherall, M. Frew, A. Robinson, G. and Beasley, R. (2006), *The benzylpiperazine (BZP)/trifluorophenylmethylpiperazine (TFMPP) and alcohol safety study*, Medical Research Institute of New Zealand.
 49. Wilkins, C. Girling, M. Sweetsur, P. Huckle, T. and Huakau, J. (2006), *'Legal party pill use in New Zealand: prevalence of use, availability, health harms and 'gateway effects' of benzylpiperazine (BZP) and trifluorophenylmethylpiperazine (TFMPP)'*, Massey University.
 50. However the EACD minutes (3 May 2007) noted that 'seizures' were inconsistently recorded, and a 'seizure' was anything from a slight twitch to a grand mal type episode.
 51. Butler, R. and Sheridan, J. (2007), 'Highs and lows: patterns of use, positive and negative effects of benzylpiperazine-containing party pills (BZP-party pills) amongst young people in New Zealand', *Harm Reduction Journal*, 4:1–10.

were also argued to put themselves at risk of adverse effects by consuming alcohol in conjunction with BZP-PPs, and taking more pills than recommended.⁵² However, consumers of legal highs such as BZP-PPs noted the legal status of BZP as a benefit of using 'party pills'. This enabled users to engage with the night time economy (NTE) and the club/dance scene without fear of criminalisation.⁵³ Furthermore identifying something as harmful does not necessarily mean that prohibiting it is the best way to address any issues that occur. For example, the decriminalisation of sex work in New Zealand, and the decriminalisation of all drugs in Portugal in 2001 exemplifies this alternative approach.

Under the 2008 Misuse of Drugs (Classification of BZP) Act⁵⁴ (hereafter the 2008 Act) BZP-PPs were banned in New Zealand. The decision to ban BZP-PPs was a genuine surprise to many (including myself) given that there was widespread support from respected agencies such as the New Zealand Drug Foundation as well as emergency doctors⁵⁵ for regulation rather than prohibition, and that there was provision to regulate legal highs such as BZP-PPs under the 2005 Act. Furthermore only 14 (22.95 per cent) of the submissions on the 2007 Bill supported the ban.⁵⁶ Nevertheless, BZP-PPs were banned despite the lack of evidence to be overly concerned about the risks they posed and the additional risks created by banning the drug (possession carries a maximum penalty of 3 months in prison, supply carries a maximum penalty of eight years in prison). Therefore what issues did influence the introduction of the 2008 Act and how evidence based were the arguments mobilised by politicians? Further what other influences might there have been that intruded into their debates?

To explore these questions and the wider assertions made by scholars in this area that 'evidence is only ever likely to be one of many factors that influence the policy process',⁵⁷ and that drug policy is notorious for the extent to which it has remained 'evidence free',⁵⁸ the following discussion presents the key themes from a thematic analysis⁵⁹ of the 2007 Bill readings⁶⁰ of the 2008 Act. The

following six key discourses were identified across all three Bill readings: prohibition is not an effective way to deal with drug use; BZP has a 'gateway effect'; availability and accessibility means young people can access BZP-PPs too readily; young people are at risk; BZP has contributed to establishing a pill popping culture in New Zealand; BZP has the potential for harm/has a moderate risk of harm.⁶¹ It is acknowledged that Bill readings take place in a specific social and cultural context and that MPs will also be affected by their embedded social and cultural contexts such as party political expectations. Therefore the thematic analysis discussed here may not be applicable to drug debates in other countries, although the results may be useful in considering political decision making surrounding drug policy in other social contexts.

Bill reading debates: key themes

A key theme contained within the bill reading debates was that 'prohibition was not an effective way to deal with drug use', and rather surprisingly **both** those in favour of **and** opposed to banning BZP-PPs put forward these kinds of points: that the ban would not achieve anything; and that the ban would not address the problems related to BZP-PPs and legal highs in New Zealand. MPs also noted that substitute pills without BZP in them would simply replace BZP-PPs, rendering the legislation ineffective. So MPs passed a Bill into law that they thought would not achieve its purpose, although there were several references to 'using drug issues for electioneering purposes' (2007 3rd Bill reading), echoing the argument that 'prohibition may have largely failed as a crime-control strategy but it has been spectacularly successful as a political project'.⁶² The issue of populism comes sharply into focus when exploring this theme from the analysis: prohibition is argued to be a political tool incorporated into 'tough on crime' stances in general elections. 2008 when BZP-PPs were banned was an election year, as was 2011 when synthetic cannabis was banned, as was 2014 when all legal highs were effectively

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52. Nicolson, T. (2006). 'Prevalence of use, epidemiology and toxicity of 'herbal party pills' amongst those presenting to the emergency department', *Emergency Medicine Australasia*, 18: 180–184.
53. Butler, R. and Sheridan, J. (2007), 'Highs and lows: patterns of use, positive and negative effects of benzylpiperazine-containing party pills (BZP-party pills) amongst young people in New Zealand', *Harm Reduction Journal*, 4:1–10; Green, J. (2008). Party on? Life after BZP-based party pills. *The New Zealand Medical Journal*, 121, 35–42; Sheridan, J. and Butler, R. (2010), "They're legal so they're safe right?" What did the legal status of BZP-party pills mean to young people in New Zealand?' *The International Journal of Drug Policy*, 21: 77–81.
54. Misuse of Drugs (Classification of BZP) Amendment Act. (2008), available online at, <http://www.legislation.govt.nz/act/public/2008/0005/latest/DLM1152221.html>, accessed 13th May 2016.
55. Allen and Clarke Policy and Regulatory Specialists Limited. (2007). *Analysis of submissions Proposal to Classify BZP and related substances as Class C controlled drugs under the Misuse of Drugs Act 1975 Final report*, Wellington, New Zealand.
56. Health Select Committee (2007), *Misuse of Drugs (Classification of BZP) Amendment Bill Report of the Health Committee 1–146*. Available online at http://www.parliament.nz/resource/enz/48DBSCH_SCR3903_1/f9c5d1a5d73016e5aa14667b54196200082af142, accessed 13th May 2016.
57. Bennett, T. and Holloway, K. (2010 p.42). 'Is UK drug policy evidence-based?' *International Journal of Drug Policy*, 21: 411–417.
58. Hallam, C. and Bewley-Taylor, D. (2010 p.1), 'Drug Use: knowledge culture and context', Briefing Paper 21, *The Beckley Foundation Drug Policy Programme*, 1–11.
59. Braun, V., & Clarke, V. (2006). Using Thematic Analysis in Psychology. *Qualitative Research in Psychology*, 3(2), 77–101.
60. Bill readings refer to the Parliamentary debates held during the three readings of the 2007 Bill.
61. Hutton, F. (2016). BZP-PPs, Populism and Prohibition, *Australian and New Zealand Journal of Criminology*, DOI: 10.1177/0004865816638906
62. Shiner, M. (2006 p.71), 'Drugs, law and the regulation of harm', in P. Higate, R. Hughes and R. Lart, eds., *Drugs: Policy and Politics*, 59–74. Open University Press.

banned under the 2014 Amendment to the 2013 Psychoactive Substances Act⁶³ (hereafter the 2013 Act).

In considering the (alleged) evidence based nature of drug policy and legislation, a concern in the analysis of the bill readings was that BZP-PPs were commonly cited as having a 'gateway effect'. However the gateway effect is a large, complex and wide ranging debate that focuses on cannabis **only** and has not come to any concrete conclusions about the existence of a gateway effect.⁶⁴ New Zealand research was cited by MPs as evidence of the gateway effect of BZP-PPs, while the authors⁶⁵ themselves concluded that more research needed to be done in this area. Further the expert advisory committee on drugs (EACD) noted that 'this study provides little support for the gateway theory'.⁶⁶ Other studies⁶⁷ were also referred to in Parliament as conclusively demonstrating a gateway effect. However their research simply stated that those who used BZP-PPs also used other drugs: **this is not a causal effect**, BZP use does not **cause** the use of other drugs. Therefore although MPs referred to evidence in their debates, the evidence was not fully explicated and the caveats discussed by the authors of the research used were not fully represented in Parliamentary debates. This was also true in another of the key themes: 'BZP has the potential for harm/has a moderate risk of harm'. Studies identified a number of adverse effects of BZP-PPs,⁶⁸ although these appear to be limited to a minority of users under particular circumstances, as well as related to a number of other factors.⁶⁹ It is also worth noting that 'harm' within the Parliamentary debates referred to harm from using the drug, and the wider effects and harms related to prohibition and drug policy were not considered. Further, as noted earlier, just because something may be harmful does not necessarily

mean banning it is the best response to reduce those perceived harms

The key themes 'availability and accessibility', 'young people are at risk' and 'BZP has contributed to a pill popping culture in New Zealand', are all interrelated. It was seen as an outrage that BZP-PPs were so easily available, intersecting with the 'young people at risk' theme, as the public debate surrounding legal highs in New Zealand often focused on their availability to under age youth.⁷⁰ As a 'vulnerable and morally innocent group'⁷¹ young people are seen as a group worthy of political and media attention. There was sustained media coverage of BZP-PPs in the months preceding the 2008 Act, including a documentary of the case of a young DJ who was in a coma after taking BZP-PPs (although he had also ingested alcohol, caffeine drinks and ecstasy)⁷². The notion of populism and fears of the corruption of vulnerable groups were evident in the analysis of these themes. MPs comments, that 13, 14 and 15-year-olds could access BZP-PPs easily, had resonance with parent's anxieties about their teenagers, further entrenching public sentiment regarding BZP-PPs. The words 'kids' and reference to preteens were also commonly used in emphasising the dangers of BZP-PPs throughout the 'young people are at risk' discourse evident in the Parliamentary bill readings.

Similar issues are raised by the 'BZP has contributed to establishing a pill popping culture in New Zealand' theme, where BZP use by young people was presented as beyond the comprehension of MPs, and that the availability and accessibility of BZP-PPs had caused a lamentable propensity on the part of young people to 'get blotto' (ACT⁷³ 2nd Bill reading). Young people were constructed simultaneously as a 'risky' group in terms of substance use and intoxication, as well as a vulnerable group in need of protection by the law.

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63. Psychoactive Substances Act. (2013), available online at, <http://www.legislation.govt.nz/act/public/2013/0053/latest/DLM5042921.html?src=qs>, accessed 13th May 2016.
64. Fergusson D, Swain-Campbell N, Horwood L. (2003). Arrests and convictions for cannabis related offences in a New Zealand birth cohort. *Drug and Alcohol Dependence*, 70, 53-63; Kenkel, D. Mathios, A. Pacula, R. (2001), 'Economics of youth drug use, addiction and gateway effects', *Addiction*, 96: 151-164; Morral, A. McCaffrey, D. Paddock, S. (2003), 'Reassessing the Marijuana Gateway Effect', *The Id*, 1:61-65; Van Gundy, K. and Rebellon, C. (2010), A Life-Course Perspective on the 'Gateway Hypothesis' *Journal of health and Social Behavior*, 51: 244-259.
65. Wilkins, C. Girling, M. Sweetsur, P. Huckle, T. and Huakau, J. (2006), 'Legal party pill use in New Zealand: prevalence of use, availability, health harms and 'gateway effects' of benzylpiperazine (BZP) and trifluorophenylmethylpiperazine (TFMPP)', Massey University.
66. Expert Advisory Committee on Drugs. (2006 p. 4). Meeting minutes, Wellington, New Zealand.
67. Bryson, K. and Wilson, M. (2007). *Recreational drug using behaviour and legal party pills*, Report submitted to the National Drug Policy Unit, Ministry of Health.
68. Gee, P. Richardson, S. Woltersdorf, W. and Moore, G. (2005) 'Toxic effects of BZP-based herbal party pills in humans: a prospective study in Christchurch New Zealand', *The New Zealand Medical Journal*; Thompson, I. Williams, G. Aldington, S. Williams, M. Caldwell, B. Dickson, S. Lucas, N. MacDowall, J. Weatherall, M. Frew, A. Robinson, G. and Beasley, R. (2006), 'The benzylpiperazine (BZP)/trifluorophenylmethylpiperazine (TFMPP) and alcohol safety study', Medical Research Institute of New Zealand.
69. Gee, P. Richardson, S. Woltersdorf, W. and Moore, G. (2005) 'Toxic effects of BZP-based herbal party pills in humans: a prospective study in Christchurch New Zealand', *The New Zealand Medical Journal*; Nicolson, T. (2006). 'Prevalence of use, epidemiology and toxicity of 'herbal party pills' amongst those presenting to the emergency department', *Emergency Medicine Australasia*, 18: 180-184; Theron, L. Jansen, K. and Miles, J. (2007), 'Benzylpiperazine-based party pills' impact on the Auckland City hospital Emergency Department Overdose Database (2002-2004) compared with ecstasy (MDMA or methylene dioxymethamphetamine), gamma hydroxybutyrate 9GHB, amphetamines, cocaine, alcohol', *The New Zealand Medical Journal*, 120: 1-8; Thompson, I. Williams, G. Aldington, S. Williams, M. Caldwell, B. Dickson, S. Lucas, N. MacDowall, J. Weatherall, M. Frew, A. Robinson, G. and Beasley, R. (2006), 'The benzylpiperazine (BZP)/trifluorophenylmethylpiperazine (TFMPP) and alcohol safety study', Medical Research Institute of New Zealand.
70. Barton, J. (2014). 'Kronic specifically attracts children': the construction of lay roles in New Zealand media reports on synthetic cannabis, *Journal of Sociology*, <http://jos.sagepub.com/content/early/2014/11/11/1440783314550514>
71. Barton, J. (2014 p.6). 'Kronic specifically attracts children': the construction of lay roles in New Zealand media reports on synthetic cannabis, *Journal of Sociology*, <http://jos.sagepub.com/content/early/2014/11/11/1440783314550514>
72. See Crewdson P. Party Pill ban good news for DJ's mum. *The Dominion Post*, 29 June 2007.
73. The ACT party is a free market political party.

Young people's reasons for taking BZP-PPs were absent from MPs (and public) debates, reflecting that the demand from substance users is often not addressed in drug legislation, despite that an understanding of the subjective motives for drug use, including pleasure, is an essential part of any coherent response to drug use.⁷⁴ There was also a clear moral tone identified throughout this discourse, with MPs referring to an imagined moral issue, that of young people and a (supposed) pill popping culture in New Zealand. 'Moral populism' is also evident in these themes and discourses, with MPs citing alarm at the behaviour of young people 'get[ting] blotto' (despite that no evidence for these alarms was presented). The historical construction of drug use is pertinent here: drug use is seen as damaging and destructive, with BZP-PP users tainted by the stereotypes associated with drug users over the past century.

It has been argued that throughout the debates surrounding BZP-PPs in the 2007 Bill readings the evidence was not fully explicated and that politicians relied on the appeal of emotive, sometimes misinformed, arguments to win support for the passing of the 2008 Act. In relation to the questions raised at the start of this discussion: what issues did influence the introduction of the 2008 Act; how evidence based were the arguments mobilised by politicians; what other influences might there have been that intruded into their debates?, it is clear that the wider social context that MPs operate within affected the debates and ultimately the banning of BZP-PPs, and that factors **other than** evidence intruded on their debates and decisions. Unproven academic constructs such as the gateway hypothesis were relied on and presented as concrete 'evidence' of the harms of BZP-PPs. Evidence about the harms of BZP were also not fully explored, with an extreme reluctance on the part of MPs to consider anything other than prohibition to tackle any harms related to the use of BZP-PPs. There was provision already in place in under the 2005 Act to regulate BZP-PPs and to address concerns over availability and accessibility, something noted in 38 out of the 61 (62.29 per cent) submissions on the 2007 Bill,⁷⁵ with researchers in the field also noting that using the full powers of the 2005 Act would have presented new opportunities to manage the harms

from psychoactive drug use.⁷⁶ Again the historical legacy of punitive responses to drug use has resonance in these contemporary debates, with drug policy still shackled to its 'ancient moral freight'.⁷⁷

MPs also cited their alarm at young people's substance use and intoxication which underpinned their debates. Therefore issues such as 'populist punitiveness' and '*moral populism*' would appear to have some relevance to this debate. The EACD stated that one of the key reasons for their recommendation of a ban on BZP-PPs in 2007 was the 'recreational context of BZP use',⁷⁸ so was the ban related to who was using BZP-PPs and for what purposes? Contemporary researchers⁷⁹ have pointed to a 'wave of criminalisation' that has focussed on particular groups of recreational drug users such as those engaging with the NTE. People's 'impermissible pleasures'⁸⁰ are legislated against which is significant in modern societies driven by populist agendas. However, although the public may not be as punitive as proponents of 'populist punitiveness' suggest,⁸¹ it would appear that on issues related to drugs, punitive '*moral populism*' is a significant issue, underpinning drug policy and political responses to drug use. It has also been noted that drug policy is **itself** a social construction, subject to diverse influences (including '*moral populism*'), meaning that only **some** policy avenues are followed, even though they may be ineffective.⁸²

What happened after the 2008 Act?

After the introduction of the 2008 Act BZP was made illegal, as a Class C substance with punishments for possession and supply (possession carries a maximum penalty of 3 months in prison, supply carries a maximum penalty of eight years in prison). However pills without BZP in them were still able to be marketed, with emergency doctors noting problems with new 'party pills' only a couple of months after the 2008 Act had been passed.⁸³ So it would seem that previous BZP-PP users had substituted them for other legal highs. Therefore prohibiting BZP-PPs did not reduce drug use, nor did it address the 'pill popping culture' that MPs argued existed in New Zealand, as they themselves

74. Moore, K., Measham, F., Griffin, C., Morey, Y. & Riley, S. (2008), *Addiction Research and Theory*, 16: 205–207.

75. Allen and Clarke Policy and Regulatory Specialists Limited. (2007). Analysis of submissions Proposal to Classify BZP and related substances as Class C controlled drugs under the Misuse of Drugs Act 1975 Final report, Wellington, New Zealand.

76. Sheridan, J. and Butler, R. (2010), "'They're legal so they're safe right?'" What did the legal status of BZP-party pills mean to young people in New Zealand?' *The International Journal of Drug Policy*, 21: 77–81.

77. Douglas 1992 cited in Sparks, R. (2003 p. 159). 'States of insecurity: punishment, populism and contemporary political culture', in McConville, S. ed. *The Use of Punishment*. Willan publishing, Cullompton.

78. Expert Advisory Committee on Drugs. (2006 p.13). Meeting minutes, Wellington, New Zealand.

79. Buchanan, J. (2009). Understanding and misunderstanding problem drug use. In R. Carnwell, & J. Buchanan (Eds.), *Effective Practice in health, social care & criminal justice: A partnership approach* (pp. 111–129). McGraw-Hill Education, Maidenhead: Open University Press; Measham, F., & Moore, K. (2008). The criminalisation of intoxication. In P. Squires (Ed.), *ASBO nation: The criminalisation of nuisance* (pp. 273–288). Cambridge, England: Polity Press.

80. Measham, F., & Moore, K. (2008 p. 284). The criminalisation of intoxication. In P. Squires (Ed.), *ASBO nation: The criminalisation of nuisance* (pp. 273–288). Cambridge, England: Polity Press.

81. Hutton, N. (2005). Beyond Populist punitiveness?, *Punishment and Society*, 7: 243–258.

82. Lancaster, K. (2014). Social construction and the evidence based policy endeavour, *The International Journal of Drug Policy*, 25:948-951

83. 'Next generation of Party Pills to Rollout' available online at, <http://www.stuff.co.nz/southland-times/news/340334/Next-generation-of-party-pills-to-roll-out>, accessed 13th February 2015.

MPs themselves from **both** sides of the debate also argued that the 2008 Act would not address any harms associated with legal high use, while the research on BZP-PPs did not provide robust evidence of significant harms. The harms imposed by prohibition such as net widening, and criminalisation of those people who use illicit drugs⁹⁵ were rarely referred to. Similarly the evidence that prohibition had not acted as a deterrent for drug users, that drugs were cheaper, more available and purer than ever before,⁹⁶ were lacking from the discourses surrounding the banning of BZP-PPs. The 'drug policy ratchet'⁹⁷ therefore appears to be set to continue unabated,⁹⁸ and this discussion has focused on why this should be the case, when there are other ways of approaching drug use such as regulation and decriminalisation which are successful at reducing harms without criminalising drug users. 'Moral populism' is argued to play a key part in societal responses to drug users with an historical legacy focussed on drug users as a dangerous, contaminating, morally reprehensible group who are in need of harsh punishment and control. The focus has also been on making transparent the processes through which legislation about issues such as drug use are enacted.

Therefore although it could be argued that MPs simply followed the EACD's recommendations, and that this is what the EACD is there for, to guide MPs who are not experts in the field in their decision making, it could equally be argued that there was enough doubt over processes and research evidence to recommend caution in banning BZP-PPs. This is especially so in the case of BZP-PPs in New Zealand where there were benefits identified in keeping a legal market,⁹⁹ and where an alternative to prohibition was already in place under the 2005 Act. It would appear that the assertion that 'evidence is only ever likely to be one of many factors that influence the policy process',¹⁰⁰ rings true in this instance, and that the banning of BZP-PPs in New Zealand was influenced by wider societal factors. Among them a 'moral populism' aimed at drug users who are constructed as 'containers of intolerable levels of risk',¹⁰¹ feeding into punitive policy and regulation. Furthermore, that the historical construction of drugs and drug users is underpinned by stereotypes of particular groups and infused with 'moral populism', makes it all the more urgent to respond to drug use in a different and more effective way.

95. Jurgens, R. Csete, J. Amon, J. Baral, S. and Beyrer, C. (2010). 'People who use drugs, HIV and human rights', *Lancet*, 376: 475-485.

96. The Lancet Commissions. (2016). Public health and International Drug Policy, *The Lancet*, [http://dx.doi.org/10.1016/S0140-6736\(16\)00619-X](http://dx.doi.org/10.1016/S0140-6736(16)00619-X)

97. Stevens, A and Measham, F. (2014 p. 1232), 'The 'Drug Policy Ratchet': why do sanctions for new psychoactive drugs typically only go up?', *Addiction*, 109: 1226-1232.

98. The 2016 United Nations General Assembly on drugs was hoped to be a catalyst for drug law reform. However despite some welcome shifts in emphasis and that many countries (including New Zealand) are stepping back from a 'war on drugs' rhetoric, prohibition remains firmly in place as a response to drugs in the document approved the UNGASS in April 2016 (Lohman 2016).

99. Sheridan, J. and Butler, R. (2010), "'They're legal so they're safe right?'" What did the legal status of BZP-party pills mean to young people in New Zealand?' *The International Journal of Drug Policy*, 21: 77-81.

100. Bennett, T. and Holloway, K. (2010 p.42). 'Is UK drug policy evidence-based?' *International Journal of Drug Policy*, 21: 411-417.

101. Sparks, R. (2003 p.160). 'States of insecurity: punishment, populism and contemporary political culture', in McConville, S. ed. *The Use of Punishment*. Willan publishing, Cullompton.

Mass incarceration: the juggernaut of American penal expansionism

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Introduction

A plethora of evidence confirms that America leads the world in imprisonment.¹ No serious commentator doubts mass incarceration has become a major issue for the nation. Though the United States accounts for just one in twenty of the global population, its penal industrial complex incarcerates close to a quarter of all the prisoners in the world. It is a criminological truism that the USA has the largest number of people behind bars of any nation on the planet,² with the number of inmates surpassing even the more populous nations of China and India.³ With almost one in every hundred adults behind bars, the American rate of incarceration remains stubbornly locked at a substantially higher level than those of comparable Western European and other parliamentary democracies. Proportionally speaking, the USA currently imprisons seven times as many of its citizens as France, over nine times as many as Germany, and almost five times as many as England and Wales.⁴

Until recently, the USA also held the dubious accolade of the world's highest per capita rate of imprisonment. It is now second only to the Seychelles, a tiny archipelago in the Indian Ocean, in per capita imprisonment. To put this in perspective, the Seychelles locks up a total of just 735 prisoners; a far cry from the 2,306,100 inmates currently incarcerated in the USA.⁵ In 2015, President Barack Obama cited an astonishing comparative statistic: the USA imprisons as many people as the 35 leading European nations combined.⁶ The US predilection for imprisonment was so entrenched that not even the combined incarcerated

populations of 35 countries at a comparable level of social and economic development could surpass the American prison population. Writing about the nature of American punitiveness, two academics unequivocally concluded that 'nowhere else in the democratic world, and at no other time in Western history, has there been the kind of relentless punitive spirit as has been ascendant in the United States for more than a generation'.⁷ On February 26, 2016, the Ministry of Justice confirmed that there were a total of 85,753 people in prison in England and Wales.⁸ If we incarcerated people at the same proportional rate as the USA, we would, by my calculation, have had a staggering total of 407,181 people behind bars in England and Wales on that very same day.

Mass incarceration: the history

Until the start of the 1970s, imprisonment had been widely perceived in America as a punishment of last resort. President Johnson told Congress in 1965 that nation would not endure 'an endless, self-defeating cycle of imprisonment, release and re-imprisonment which fails to alter undesirable attitudes and behaviour'.⁹ This underpinned the conviction, prevalent in 1960s America, that rehabilitative intervention, rather than incarceration, should be prioritised if criminality's root causes were to be successfully addressed. As trust in rehabilitation began to fade in 1970s America,¹⁰ the dash to carceral growth began.

The unrelenting growth of imprisonment was not primarily driven by escalating crime rates (or other wider social forces outwith governmental control).¹¹ Crime rates in the USA have not risen significantly higher than in other

1. See, for example, Travis, J., B. Western, et al., Eds. (2014). *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington DC, The National Academies Press. or Pratt, T. C. (2009). *Addicted to Incarceration: Corrections Policy and the Politics of Misinformation in the United States*. London, Sage.
2. This is the case when prisoners are counted in absolute terms.
3. International Centre for Prison Studies (2016). *World Prison Brief: Northern America*. Retrieved on Feb 1, 2016, from <http://www.prisonstudies.org/map/northern-america>.
4. International Centre for Prison Studies (2015). 'World Prison Brief.' Retrieved on 18 August 2015, from <http://www.prisonstudies.org/world-prison-brief>. Calculated from statistics from the named countries.
5. The Seychelles imprisons 799 citizens per 100,000 people in the general population, while the USA imprisons 698 people per 100,000. The US total includes those in both prisons and jails. International Centre for Prison Studies 'World Prison Brief' (2015), *Highest to Lowest - Prison Population Rate* London: Institute for Criminal Policy Research Retrieved on 12 Dec 2015.
6. Obama, B. (2015). 'Remarks by the President at the NAACP Conference.' Retrieved on 16 Dec 2015, from <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.
7. Clear, T. and N. Frost (2014). *The punishment imperative*. New York, New York University Press. p.1.
8. Ministry of Justice and NOMS (2016). *Population and Capacity Briefing for Friday 26th February 2016*. London, MoJ.
9. Johnson, L. B. (1965). '102 — Special Message to the Congress on Law Enforcement and the Administration of Justice, March 8, 1965.' Retrieved 12/12/2015, from <http://www.presidency.ucsb.edu/ws/?pid=26800>.
10. Garland, D. (2002). *The Culture of Control : Crime and Social Order in Contemporary Society*. Chicago, University Of Chicago.
11. Ruiz, R. (2010). Eyes on the Prize. *American Prospect*. Washington, Justice Policy Institute. p.3.

developed Western countries over the last four decades. Rather, the fast-growing penal population and the escalating length of sentences were boosted by a combination of populist politics, mandatory sentences, 'three strikes' policies, the privatization of imprisonment, and sentencing behaviour.¹² Both individual US states and the federal government engaged in policy initiatives which, whatever the justifications publicly advanced to support them, effectively guaranteed the relentless growth of the US population behind bars.

Though the prison population had risen by 105 percent¹³ over the half-century prior to 1973, this growth in prisoners had simply reflected the increase in the size of the American population.¹⁴ Between 1972 and 2010, the number of inmates in the US state prison system increased by no less than 708 percent.¹⁵ During the same period, the combined state and federal prison populations increased from a base point of approximately 200,000 inmates to over 1.5 million. The American sociologist Wacquant concisely characterised the years of burgeoning incarceration as 'the great penal leap backwards'.¹⁶ By 2008, the progress of the mass incarceration project led another academic observer to caustically observe that the USA has been fixated on a 'frenzied and brutal lockup binge' since 1981.¹⁷

After this unremitting growth, the number of people behind bars in the USA began to plateau in 2010. Attitudes on the ground were gradually beginning to soften. Some of those charged with the administration of a prison system that was bloated, prohibitively expensive, and heavily skewed in favour of punitiveness were expressing doubt about its utility. In 2010, for example, the Missouri Chief Justice William Ray Price informed the legislature of the futility of the state's pursuit of a policy of mass incarceration for nonviolent offenders:

We are following a broken strategy of cramming inmates into prisons and not providing the type of drug treatment and job training that is necessary to break their cycle of crime. Any normal business would have abandoned this failed practice years ago...¹⁸

Mass incarceration: the political context

This unrelenting exponential growth in incarceration was an extraordinary occurrence for a developed democratic country. The prestigious *Committee on Causes and Consequences of High Rates of Incarceration*, having carefully weighed the evidence, concluded in 2014 that the growth of mass imprisonment in the USA was both 'historically unprecedented and internationally unique'.¹⁹

President Barack Obama's election in 2008 as the 44th president of the USA engendered initial optimism amongst reformers campaigning for a radical transformation of the nation's hard-pressed penal system.²⁰ This was the case even though Obama's otherwise comprehensive pre-election policy document 'Blueprint for Change' had contrived to omit detailed discussion of penal issues.²¹ While his predecessor George W. Bush's retributive initiatives may be interpreted as the epitome of the traditional rightist 'tough on crime' approach favoured by Republicans, this is hardly a party political issue in the USA. The Democratic party, no less than their Republican counterparts, have a lengthy history of endorsing the US carceral state's remorseless enlargement. The doubling of the US prison population — and the biggest leap in incarceration during any presidency in history — occurred not under a Republican president, but during Bill Clinton's eight-year presidency.²²

Clinton later acknowledged that he bore responsibility for legislation to increase prison sentences, when he told the *National Association for the Advancement of Colored People's* annual conference: 'I signed a bill that made the problem worse. And I want to admit it.'²³ Clinton was referring to the Violent Crime Control and Law Enforcement Act of 1994 (commonly known as the 'Crime Bill'), an act of Congress which incentivised states by offering them a total of \$12.5 billion dollars (roughly equivalent to £13 million today) to increase imprisonment.²⁴ Grants were provided to construct or expand penal institutions through the Violent Offender Incarceration and Truth-in-Sentencing Incentive Formula Grant Program. Almost half of the money on offer was designated for those states which passed 'truth-in-sentencing' laws, which required convicted offenders to serve at least 85 percent of the sentence length imposed by

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12. Garland, D. (2001). 'Introduction : The Meaning of Mass Imprisonment.' *Punishment & Society* 3(1): 5-7. Pew Center on the States (2009). *1 in 31: The Long Reach of American Corrections*. Washington, Pew Charitable Trusts.
13. Between 1925 (when authoritative national prison statistics began to be compiled) and 1972, the number of state prisoners increased from 85,239 to 174,379. Pew Center on the States (2010): 'Prison Count 2010', Washington: PCOTS
14. This total fell slightly in subsequent years.
15. Tonry, M. (2009). 'Explanations of American punishment policies.' *Punishment & Society* 11(3): 377-394.
16. Wacquant, L. (2005). *The Great Penal Leap Backward: Incarceration in America from Nixon to Clinton*. In *The New Punitiveness*. J. Pratt, D. Brown, M. Brown, S. Hallsworth and W. Morrison. Cullompton, Willan: 3-26.
17. Parenti, C. (2008). *Lockdown America: Police and Prisons in the Age of Crisis*. London, Verso. P.163.
18. Kirchhoff, S. M. (2010). *Economic Impacts of Prison Growth*. Washington, Congressional Research Service. p.38.
19. Travis, J., B. Western, et al., Eds. (2014). *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington DC, The National Academies Press.
20. Teague, M. (2009). 'Barack Obama: changing American criminal justice?' *Criminal Justice Matters* 78(1): 4-5.
21. Obama, B. and J. Biden (2008). *Blueprint for change: Obama and Biden's Plan for America*. Chicago, Obama'08.
22. From 1993-2001. See Teague, M. (2008). 'America: The Great Prison Nation.' *Prison Service Journal* (176): 9-14.
23. Baker, P. (2015). Bill Clinton Disavows His Crime Law as Jailing Too Many for Too Long. July 16. *New York Times*. New York. p.A16.
24. Eisen, L.-B. and I. Chettiar (2015). *The Reverse Mass Incarceration Act*. New York, Brennan Center for Justice.

the courts.²⁵ This amount went to fund or offset the cost of increased imprisonment rates, and some 20 US states took advantage of these opportunities to increase their incarcerated populations. These incentives contributed to a boom in prison construction. The combined total of state and federal penal institutions increased from 1,277 in 1990 to 1,821 in 2015.²⁶ Life imprisonment became mandatory for a third violent felony ('three strikes and you're out'). Mandatory sentencing, in essence, prevented judges from exercising judgment in the sentencing process.

Clinton's justification for the 1994 legislation was variously 'a roaring decade of rising crime', 'gang warfare' and 'little children being shot dead on the streets'.²⁷ The former president argued that the increased rate of imprisonment was, to some extent, justified, as it had led to a reduction in recorded crime. Even so, he acknowledged the 'bad news' that 'we had a lot of people who were locked up, who were minor actors, for way too long'.²⁸ Clinton frankly admitted that:

*Our prisons and our jails are now our mental health institutions. And we wound up ... putting so many people in prison that there wasn't enough money left to educate them, train them for new jobs and increase the chances when they came out so they could live productive lives.*²⁹

However, the former president's candid confession about that damage wrought by mass incarceration was not made until 2015, some two decades after he implemented the policies in question.

In July 2015, President Obama visited the El Reno Federal Correctional Institution in Oklahoma. While his aim was to participate in a documentary film about the justice system, his visit was historically significant; it was the first time that a sitting US president had ever visited a federal prison.³⁰ During his visit, he met six prisoners, all convicted for drug-related offending. Obama chose this occasion to make the following observation:

Mandatory
sentencing, in
essence, prevented
judges from
exercising judgment
in the sentencing
process.

*Over the last 20 years, we've seen a shift in incarceration rates that is really unprecedented. We've seen a doubling of the prison population. A large percentage of that is for nonviolent drug offences... The war on drugs, the crack epidemic, it became, I think, a bipartisan cause to get tough on crime. Incarceration became an easy, simple recipe in the minds of a lot of folks.*³¹

This statement, made towards the end of his second and final term as President, offered a clear recognition of the scale of the problem. However, there is a world of difference between presidential aspirations — a penal reforming 'wish list' — and the pragmatic political realities of what can be achieved. As President, he was able to commute the sentences of 46 drug offenders, on the basis that they had already served sentences disproportionate to their offending.³² Root and branch reform of the entire penal system presents a much greater challenge.

The Jail System

The US penal system is not a homogenous or unified entity.³³ Much of the background material on the American prison system available in Europe conflates the

prison and jail systems. There are, in fact, three distinct categories of adult penal institutions in the USA:

- The Jail System
- The State Prison System
- The Federal Prison System

The jails system consists of locally run county or municipal confinement facilities, which are usually administered by the local sheriff or corrections department. Jails hold short-term prisoners and also those arrested and charged with a criminal offence, but not yet convicted. With around 12 million admissions to jail in the USA in a typical year, it is no surprise that the jail system has been labelled the 'front door' to mass incarceration.³⁴ They are the 'main feeders of people sentenced to a term of custody in state or

25. Ditton, P. M. and D. J. Wilson (1999). *Special Report: Truth in Sentencing in State Prisons*. Washington, DC, Bureau of Justice Statistics.

26. Eisen, L.-B. and I. Chettiar (2015). *The Reverse Mass Incarceration Act*. New York, Brennan Center for Justice.

27. See note 24.

28. Ibid.

29. Ibid.

30. Baker, P. (2015). President Visits Federal Prison. July 17. *New York Times*. New York. p.A1.

31. LoBianco, T. (2015, July 17). 'President Barack Obama makes historic trip to prison, pushes reform.' Retrieved on Aug 18, 2015, from <http://edition.cnn.com/2015/07/16/politics/obama-oklahoma-federal-prison-visit/>.

32. Horwitz, S. and J. Eilperin (2015). 'Obama commutes sentences of 46 nonviolent drug offenders.' Retrieved on Jan 4, 2016, from https://www.washingtonpost.com/world/national-security/obama-commutes-sentences-of-46-non-violent-drug-offenders/2015/07/13/b533f61e-2974-11e5-a250-42bd812efc09_story.html.

33. Teague, M. (2012). Neoliberalism, Prisons and Probation in the USA and England and Wales. *Organising Neoliberalism: Markets, Privatisation and Justice*. P. Whitehead and P. Crawshaw. London, Anthem: 44-80.

34. Subramanian, R., R. Delaney, et al. (2015). *Incarceration's Front Door: The Misuse of Jail in America*. New York, Vera Institute of Justice. p.1.

federal prisons'.³⁵ Although on a typical day state and federal prisons hold about twice the number of people as jails, jails nevertheless have nearly nineteen times the number of annual admissions as prisons. There are around 3,000 jails in the USA. The 159 largest jails hold over 1,000 inmates each, though the majority of jails have a much smaller capacity.³⁶

Since the great expansion of incarceration in the early 1970s, the jail population has increased at roughly the same pace as the inmate population in state prisons. It is mainly, though not exclusively, concentrated in large urban counties. In Los Angeles County alone, for example, there are eight jails holding up a total of around 17,000 prisoners. Around a fifth of those prisoners have been clinically diagnosed with mental health issues. On a recent visit to the Twin Towers Correctional Facility (the 'county jail') in downtown Los Angeles, I was struck by the sheer scale of its penal containment, and the brutal visibility of apparently unmet mental health needs. It is the world's largest jail, holding almost 4,500 prisoners, and requires some 2,400 staff to operate it. The visitor has a sense that it is effectively a psychiatric hospital, filling the vacuum created by the 1970s closure of state psychiatric hospitals.³⁷ Plans were recently approved to move 1,000 mentally ill prisoners out of other Los Angeles Jails into a modern jail designed to focus on the treatment of mental health issues.³⁸ A review of Los Angeles Jails had unequivocally declared that:

Of all the jails I have had the occasion to visit, tour, or conduct investigations within, domestically and internationally, I have never experienced any facility exhibiting the volume and repetitive patterns of violence, misfeasance, and malfeasance impacting the Los Angeles County jail system...³⁹

Confirming the scale of unmet mental health in the Los Angeles jail system, no fewer than 10 suicides were recorded in that system alone in 2013.⁴⁰ It is estimated that, nationally, 14.5 percent of men and 31 percent of women in currently in jails have serious clinical mental health problems, including psychotic illness. Those who are jailed are frequently from backgrounds reflecting extreme poverty and limited access to education, as well as experience of victimization. Over two thirds of those jailed have a history of either alcohol or drug abuse, or both.⁴¹ The impact of poverty should not be underestimated; an analysis of data from New York City jails concluded that over half of those held in jail would have been released had they been able to afford pay bail fees of \$2,500. This fee indicate that these were low-risk, misdemeanour offenders.

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The State Prison System

The administration of state prisons is a function of the executive branch of state governments, and state prisons are generally operated by one of the fifty state departments of corrections. This means that each state differs in terms of how they organise their system of imprisonment, and levels of imprisonment in different states vary hugely. While the national rate of incarceration rose almost five-fold between 1972 and 2010, in some states this rise was much lower (for example, in Massachusetts, Minnesota and Maine), while in other states it was significantly higher (for example, in the southern states of Mississippi and Louisiana).⁴² State prisons mainly incarcerate convicted prisoners serving sentences of a year or longer, and generally hold around 1.4 million prisoners. The states of Hawaii, Alaska, Connecticut, Delaware, Rhode Island and Vermont are exceptional in that they are they only US states which operate a system which combines jails and prisons.

Gangs are endemic in the state prison system. An authoritative survey indicates that there were 307,621 gang

35. Subramanian, R., C. Henrichson, et al. (2015). *In Our Own Backyard: Confronting Growth and Disparities in American Jails*. New York, Vera Institute. p.5.
36. Henrichson, C., J. Rinaldi, et al. (2015). *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, New York, Vera Institute of Justice.
37. The declared aim of the closures was to deinstitutionalise those with mental health issues.
38. Sewell, A. and C. Chang (2015). 'L.A. County to relocate some inmates, build jail to treat the mentally ill.' Aug 11, 2015. Retrieved on Jan 2, 2016, from <http://www.latimes.com/local/lanow/la-me-ln-jail-size-vote-20150811-story.html>.
39. Liebowitz, S., P. Eliasberg, et al. (2011). *Cruel and Usual Punishment: How a Savage Gang of Deputies Controls LA County Jails*. Southern California, ACLU. p.1.
40. Sewell, A. and C. Chang (2015). 'L.A. County to relocate some inmates, build jail to treat the mentally ill.' Aug 11, 2015. Retrieved on Jan 2, 2016, from <http://www.latimes.com/local/lanow/la-me-ln-jail-size-vote-20150811-story.html>.
41. Subramanian, R., R. Delaney, et al. (2015). *Incarceration's Front Door: The Misuse of Jail in America*. New York, Vera Institute of Justice, Subramanian, R., C. Henrichson, et al. (2015). *In Our Own Backyard: Confronting Growth and Disparities in American Jails*. New York, Vera Institute.
42. Travis, J., B. Western, et al., Eds. (2014). *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington DC, The National Academies Press.

members in prison at the beginning of 2009.⁴³ One academic, writing about California's prison system, felt compelled to conclude that 'the question of how to manage prisons has resolved itself into the question of how to manage gangs'.⁴⁴ The Californian state system, which has the USA's second highest inmate population, has attempted to manage gangs within prison in two different ways. Originally, the aim was to split up the gangs and distribute their members around the system in geographically distant prisons. This had the opposite effect to that which was intended, and enabled individual gangs to significantly grow their membership throughout the prison system. Subsequently, it became policy to incarcerate most of the key players in a single prison, Pelican Bay in California.

US prison gangs are now highly sophisticated organisations that perform essential functions within the prison system. They regulate the prison black market, work on conflict resolution with prisoners, and increase the stability of prisons and effectively provide essential extra-legal governance in the prison. Some even have constitutions, bureaucratic structures, and what are effectively business-development plans — far removed from the thuggish stereotype. Skarbek argues that the governance imposed by the gangs enables the prison system to operate in a more ordered and stable manner.⁴⁵

The Federal Prison System

Any offender sentenced to a term of imprisonment in a federal court is the responsibility of the Bureau of Prisons (BOP). The BOP currently incarcerates prisoners in 121 federal institutions under its jurisdiction. Since 1980, the federal prison population has grown more than eight-fold, rising from approximately 24,600 inmates in 1980 to almost 219,300 prisoners. By the end of 2014, however, the total federal prison population had dipped to 210,567. It held 13 per cent of the entire US prison population. Around four fifths of these inmates are held in federal-run correctional institutions or detention centres, and the remaining fifth are in secure privately managed or community-based facilities and local jails. A long standing problem with the federal prison system has been overcrowding federal institutions continue to be about 30 percent overcrowded.

The federal system includes United States Penitentiaries.⁴⁶ These are high-security institutions where all

prisoner movement is minutely controlled. They have the highest staff-to-prisoner ratio in the system. The most prominent federal penal institution, which holds those prisoners classified as posing the greatest risk and therefore requiring the tightest control, is the federal supermax prison in Florence, Colorado.

For almost fifty years, federal prisons mainly held bank robbers, extortionists and white-collar criminals, as the jurisdiction of federal law was limited to specific felonies such as bank robbery, extortion and offences committed on federal property. Now, almost half of the inmate population has been sentenced for drug offending.⁴⁷ The 'War on Drugs' exerted a significant impact not just on the total of offenders in the federal system, but also the type of offenders held. In addition, new federal sentencing guidelines introduced in 1987 significantly increased the probability of incarceration in federal penal institutions.

Race and Imprisonment in America

The fact that US imprisonment rates are disproportionately higher for African Americans⁴⁸ may come as little surprise in a country which was engaged in civil war to perpetuate slavery only two lifetimes ago. Race is a key analytic in US penalty, not least because black males in the USA are incarcerated at a rate of six times that of their white counterparts.⁴⁹ Over two million African Americans are currently under the control of the correctional system, whether in custody, on probation, or on parole. The penal system is riddled with racial disparities. There is a significant disproportionality in terms of race in the jail system; African Americans go to jail at almost four times the rate of their white peers. According to Alexander, the experience of African Americans within the US correctional system reflects, in essence, a 'comprehensive and well-disguised system of racialized social control'⁵⁰ which warehouses black people. It has been persuasively argued by Wacquant that

Slavery and mass imprisonment are genealogically linked and that one cannot understand the latter—its timing, composition, and smooth onset as well as the quiet ignorance or acceptance of its deleterious effects on those it affects—without returning to the former as historic starting point and functional analogue.⁵¹

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43. Winterdyk, J. and R. Ruddel (2010). 'Managing prison gangs: Results from a survey of US prisons.' *Journal of Criminal Justice Education* 38: 730-736. p.733.
44. John J. Dilulio Jr., cited in Skarbek, D. (2014). *The social order of the underworld: How prison gangs govern the American penal system*. Oxford, Oxford University Press.
45. Ibid.
46. The first prisons in USA were labelled 'penitentiaries' in order identify inmates as religious 'penitents', who were presumably atoning for their sins in prison.
47. Then and Now.
48. Alexander, M. (2010). *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York, The New Press.
49. Ruiz, R. (2010). Eyes on the Prize. *American Prospect*. Washington, Justice Policy Institute.
50. See note 49, p.20.
51. Wacquant, L. (2002). 'From Slavery to Mass Incarceration: Rethinking the 'race question' in the US.' *New Left Review* (13): 41-60. p.41-2.

Garland attests that there are two defining features of mass imprisonment. One is that a society imprisons more than the accepted norm for other comparable societies. He labels the second as 'the social concentration of imprisonment's effects'⁵² — the methodical and systematic incarceration of whole groups of the population. There is an abundance of evidence to confirm that African-Americans are disproportionately imprisoned.⁵³ The scale of this disproportionality is reflected in the shocking observation that the USA incarcerates a greater proportion of its black population than South Africa did at the zenith of apartheid.⁵⁴

Mass incarceration: a change in the direction of travel?

It is only now, after four decades, that American penal expansionism has finally begun to ease. At the start of 2010, the USA's state prison population for the first time in almost 40 years. A year-to-year drop (of just 0.3 percent) in the number of state prisoners was recorded.⁵⁵ The drop was not huge, but as the first fall in state prisoners since 1972,⁵⁶ it signalled a directional shift in the overall tide.⁵⁷ The unrestricted use of imprisonment was beginning to be questioned for a range of reasons. These included fiscal pressures and a decline in public revenues as economic austerity began to bite, though these were not the only arguments advanced. Political factors played a role, as did a burgeoning awareness of the growing empirical evidence that incarceration has a relatively limited impact on recidivism. It was becoming increasingly difficult to construct a credible argument that mass imprisonment made America feel safer.

It was also evident in some states (California, for example) that the social utility of mass incarceration was being reassessed and found wanting. California's Public

Safety Realignment policy⁵⁸ had ensured that newly sentenced prisoners whose offences were non-violent and non-sexual, and who were assessed as posing a relatively low risk, were diverted from state prison to serve time either in local jails or under community supervision by probation staff.

Conclusion

There is no doubt that America's penal institutions contain some individuals who pose a substantial public risk. Of the 1,325,305 sentenced inmates held by state prisons at the end of 2013, over half had committed a violent offence. No fewer than 165,600 were sentenced for murder. A further 166,200 prisoners had been sentenced for rape and sexual assault.⁵⁹ However, there is significant scope to limit

incarceration for a range of offenders, including those convicted of drug offences. President Obama has recognised the enormous impact of the 'War on Drugs' on the expanding penal population.⁶⁰ His administration boosted the drug court programme, with the aim of diverting non-violent drug offenders away from custody. There is a recognition the decades-long 'War' has ultimately been counterproductive, and that

incarcerating low-level drugs offenders not only destroys families, but may lead to further offending. The fiscal argument has also been made, citing research which demonstrates that every dollar spent on substance abuse treatment saves not just four dollars in healthcare costs, but also seven dollars in criminal justice costs.⁶¹

Even so, at the end of 2014, some six years into Obama's presidency, the United States held 1,561,500 prisoners in state and federal prisons and penal facilities.⁶² A further 744,600 inmates were imprisoned in local and county jails.⁶³ This means that USA's current total incarcerated population (including prisoners in state and

It is only now, after four decades, that American penal expansionism has finally begun to ease.

52. See note 10, p.6.

53. For example, Walker, S., C. Spohn, et al. (2006). *The Color of Justice: Race, Ethnicity, and Crime in America*. Belmont CA, Wadsworth Publishing Company, Alexander, M. (2010). *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York, The New Press, Miller, J. (2010). *Search and Destroy: African-American Males in the Criminal Justice System*. Cambridge, Cambridge University Press.

54. See note 49. p.7.

55. This applies only to the state prison population, which totalled 1,404,053 prisoners on January 1, 2010. This was 4,777 (0.3 percent) fewer than there were on December 31, 2008. Pew Center on the States (2010). *Prison Count 2010*. Washington, PCOTS.

56. Ibid.

57. In addition, the total of those supervised by community corrections fell by almost one percent during 2009 for the first time since annual recording began in 1980 (Glaze et al. , 2010).

58. Carson, E. A. (2015). *Prisoners in 2014*. Washington, US Department of Justice. p.2.

59. Ibid. p.30.

60. Obama, B. (2014). *National Drug Control Strategy*. Washington DC, Executive Office of the President of the USA.

61. Etner, S., Huang, D., Evans, E., Ash, D. R., Hardy, M., Jourabchi, M., & Yih-Ing, H. (2006) Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment 'Pay for Itself'? *Health Services Research*. 41(1): 192–213.

62. See note 59.

63. The most up-to-date figure is for mid-2014. See Minton, Todd D., and Zhen Zeng. 2015. 'Jail Inmates At Midyear 2014.' Washington DC: Bureau of Justice Statistics.

federal prisons, and also all those in the local and county jail system) is some 2,306,100 prisoners. However, this total represents a small annual decrease in the number of those behind bars. The state and federal prison population dropped by approximately one percent in 2014, and the jail population in mid-2014 was also significantly lower than the peak of 785,500 prisoners some six years earlier.

Is the juggernaut of American penal expansionism now grinding to a halt? The overall picture is of a pause, and even a slight reverse, in the race to incarcerate. There has also been a noticeable difference in the mood music surrounding imprisonment in America; there is now substantially more discussion, both academic and political, about whether it is now time to call a halt to imprisonment as a first resort in addressing offending. America may now be witnessing the end of an ill-starred forty year experiment with mass incarceration. However, it was never going to be easy to check the progress of the juggernaut of penal expansionism, and whether history will record that Obama's presidency signalled a change in the course of US penal justice remains to be seen. Amongst the reasons why a reversal of mass incarceration may not succeed are 'the enormous scale of imprisonment that must be confronted, limited mechanisms available to release inmates, (and) lack of quality alternative programs'.⁶⁴ At the same time, 'the waning legitimacy of the paradigm of mass incarceration'⁶⁵ means that if American policy on imprisonment is to change, the current climate may offer the best framework in which that change can be achieved. Has a major paradigm shift in the American approach to incarceration occurred? Overall, the growth of the mass incarceration may not have gone into sharp reverse, but — at the very least — it appears to have halted.

Will significant change in penal policy occur after the 2016 presidential election? There is much to suggest that other pressing economic and political issues have taken precedence. At the time of writing, the identity of the next president is unclear. The Democratic presidential hopeful Hillary Clinton has raised the issue of penal reform during her campaign, publicly pledging to end mass imprisonment, reform mandatory minimum sentences, and close down private prisons. To this end, she has vowed to provide treatment and rehabilitation, rather than incarceration, for low risk drug offenders.⁶⁶ Some American criminologists have interpreted her entreaty to halt the national experiment with mass incarceration as a refutation of the consensus on penal expansionism, which has been associated with previous administrations of all parties. Alternatively, a Donald Trump presidency would render radical penal reform improbable. His analysis is that:

'Criminals are often returned to society because of forgiving judges... The rest of us need to rethink prisons and punishment. The next time you hear someone saying there are too many people in prison, ask them how many thugs they're willing to relocate to their neighbourhood. The answer: None.'⁶⁷

When President Obama visited the federal prison in Oklahoma, his conclusion was one which may resonate in the mind of every politician who ever had to seek electoral approval, and speaks volumes about the politicisation of penal policy in America: 'Nobody ever lost an election because they were too tough on crime.'⁶⁸ While American government policy on the use of imprisonment may yet undergo radical change, much will depend on who succeeds Obama as president.

64. Petersilia, J. and F. T. Cullen (2015). 'Liberal but not stupid: meeting the promise of downsizing prisons.' *Stanford Journal of Criminal Law and Policy*. p.1.

65. Ibid.

66. Clinton, H. (2016). 'Hillary for America.' Retrieved on Jan 4, 2016, from <https://www.hillaryclinton.com/issues/criminal-justice-reform/>.

67. Trump, D. J. (2000). *The America We Deserve*. Los Angeles, Renaissance Books. p.106-7

68. LoBianco, T. (2015, July 17). 'President Barack Obama makes historic trip to prison, pushes reform.' Retrieved on Aug 18, 2015, from <http://edition.cnn.com/2015/07/16/politics/obama-oklahoma-federal-prison-visit/>.

Reviews

Book Review

The Working Lives of Prison Managers: Global Change, Local Culture and Individual Agency in the Late Modern Prison

by Jamie Bennett

Publisher: Palgrave Macmillan (2015)

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Price: £68.00 (hardback)

In the course of 2015 the Inspector of Prisons for Ireland carried out a review of the culture and organisation of the Irish Prison Service.¹ His subsequent report² has a number of resonances for the matters dealt with in this book. The Inspector noted a lack of corporate identity among staff in Irish prisons and a tendency for them to work in separate 'silos'. He described the Irish Prison Service as a remarkably closed organisation with staff being promoted mainly from within the organisation and competency at a lower grade being seen as indicating qualification for promotion to a higher grade. The report commented that while leadership and management are overlapping skills there has to be a distinction between them. The Inspector emphasised the need to underline the unique statutory position of the Governor of a prison and that he or she should lead a cohesive management team, each of whom had the necessary professional competences to manage the department or unit for which they were responsible. He was also concerned at the lack of clarity about responsibilities between different grades of staff:

What was not clear was where the definition of 'staff' ended and where 'management'

began, particularly since all those promoted into the senior grades had come through the ranks. This is an issue which has not yet been finally resolved. To some extent the uncertainty is a consequence of the overlapping middle management structure. It also reflects the fact that staff at all levels in prisons are required to be managers to a greater or lesser extent. (para 6.3)

This comment goes to the heart of the theme of Jamie Bennett's thought provoking new publication: How is a 'prison manager' to be defined and what are the essential characteristics of the role?

The book is based on field work carried out in two Category C prisons in 2008 and 2009 with later follow-up in one of the prisons. The author has written extensively and to good effect in recent years on the work of prison managers, making use of his personal practical knowledge and experience while at the same time applying academic rigour to his research. In this new book he paints a graphic picture of what it is like to manage prisons in England and Wales in the current political climate. He describes the changed demands and pressures which have been placed on those who manage prisons since the turn of the century and places these within the context of wider management theories. He charts changes in Prison Service managerial priorities since the early 1990s from the introduction of corporate objectives, through key performance targets and indicators, to audits and the rating systems so beloved by proponents of 'new public management'. He also discusses at length the more

recent movement from performance management to a focus on the importance of change management. Finally he examines prison management in 'the age of austerity' which he dates from 2010 and comments on the move from a compliance approach to one which is based on risk assessment. He describes how all of these developments have affected the culture of the Prison Service and have altered the manner in which prison managers operate, moving from what he calls a 'welfare orientation' to one of 'economic rationality', which involves a focus on process (what is being done) rather than outcomes (what is being achieved). The emphasis in prison management is now on implementing change through 'mobilisation, transition and transformation' by means of project plans and resource profiles. The task of prison managers is to ensure that these processes are implemented in line with national plans.

Writing in the Editorial of Issue No 222 of this Journal Bennett expressed the view that the 'role of prison managers is to navigate and negotiate between (the) various pressures and constraints, moulding them into a coherent sense of direction... (This) direction is one that is not solely technical nor is it entirely based upon compliance with central dictates, but it is also shaped by individual priorities and a sense of values.' This sums up the core arguments of his latest book and resonates with what Crewe and Liebling have to say in the same issue of the Journal, that one of the challenges for Governing Governors is to 'avoid being drawn too closely into matters of process

1. The author of this review assisted the Inspector of Prisons in his review.

2. Inspector of Prisons (2015) *Culture and Organisation in the Irish Prison Service*. Available at: www.inspectorofprisons.gov.ie

at the expense of moral issues and strategic concerns’.

Whereas the other two authors refer specifically to Governors who have charge of prisons, Bennett draws his definition of prison manager much wider, including what he describes as ‘operational, non-operational, uniformed and non-uniformed managers’, a total of 59 persons (19 per cent of staff) in one of his research prisons and 61 (almost 16 per cent) in the other. This takes us back to the issue raised by the Irish Inspector Prisons: where does the definition of ‘staff’ end and where does ‘management’ begin, particularly if one acknowledges that staff at all levels in prisons are required to be managers to a greater or lesser extent, not least those who work in daily contact with prisoners. The truth may well be that the management skill sets required at different levels and within different groupings are quite distinct. This may be something that the author will wish to examine in more detail in future writing.

The term ‘manager’ began to be used frequently in the prison setting in England and Wales following the absorption of HM Prison Service into the new National Offender Management Service which was intended to introduce, in the words of the Carter Report³ ‘end to end management of each offender’. The thrust of what subsequently became Government policy was that persons in prison (and on probation) should be treated first and foremost as offenders to be ‘managed’ and that all work with them should be seen through that prism. Bennett observes that this has led to ‘a quantification of prisoners’ (page 67) and has acted to dehumanise them, making them ‘business units’. He rightly regards this as a regressive development. Linked to a reduction in the Service’s budget of 24 per cent between

2011 and 2015, managers became increasingly ‘the objects of management at a distance’ and enmeshed by various apparatus of control (page 227). Judging by some of his recent statements the former Secretary of State for Justice has given indications that he wishes to change this emphasis and it may be that the author can take some consolation from the fact that the Minister has stated his intention to give Governors ‘more autonomy overall’.⁴

Dr Bennett ends his book with some personal comments about his experience as a Governor who became a prison researcher and notes with refreshing honesty that ‘by the end of the research, my perspective had shifted and instead I saw myself engaged in a messy set of compromises and challenges regarding values and beliefs...’. That is an observation with which anyone who has attempted that difficult balancing act will agree. Those who research prisons and those who manage prisons will find much food for thought in this book.

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Book Review

Punishment in Europe: A Critical Anatomy of Penal Systems

By Ruggiero, V. and Ryan, M. (eds.)
Published by Palgrave Macmillan (2013)
ISBN: 9781137028204 (hardback)
Price: £58.00 (hardback)

In this interesting collection of papers on European penal systems, Vincenzo Ruggiero and Mick Ryan return to a project started with Joe Sim two decades ago, with the publication of the ground-breaking

book *Western Penal Systems: A Critical Anatomy*.¹ Western Penal Systems contained chapters covering eight advanced industrial countries (the Netherlands, Sweden, England and Wales, Ireland, France, Germany, Italy and Spain). *Punishment in Europe* returns to these countries to explore more recent developments in, among other things, sentencing, prison conditions and community sentences, and discriminatory policies and practices relating to class, gender, race and nationality. It also includes four additional chapters, on Southern (Greece), Central (Poland) and Eastern Europe (Bulgaria and Russia). As the editors suggest in the preface, with its analysis of European rather than Anglo-Saxon countries, and its insistence on Europe rather than the United States as its primary reference point, the book will prove an important contribution to the emerging subject area of comparative penology. In spite of the obvious cultural and historical differences between European nations, it is quite remarkable that the two books remain among just a handful of social science texts to have attempted such a regional focus.

From the outset, the editors quite rightly point to the limitations of comparative analysis. Drawing on the work of Michael Cavadino and James Dignan,² Nicola Lacey,³ and Helen Mills and Rebecca Roberts,⁴ Ryan introduces the volume by explaining that the underlying purpose of the book is

1. Ruggiero, V., Ryan, M. and Sim, J. (1995) *Western Penal Systems: A Critical Anatomy*, London: SAGE.
2. Cavadino, M. and Dignan, J. (2006) *Penal Systems*, London: SAGE.
3. Lacey, N. (2008) *The Prisoners’ Dilemma: Political Economy and Punishment in Contemporary Democracies*, Cambridge: Cambridge University Press.
4. Mills, H. and Roberts, R. (2012) *Reducing the Numbers in Custody: Looking Beyond Criminal Justice Solutions*, London: Centre for Criminal Justice Studies.

3. Home Office (2003) *Managing Offenders, Reducing Crime – A New Approach*. London: Prime Minister’s Strategy Unit.

4. Hansard. 27 January 2016. Column 344.

to contribute to the development of a critical, public criminology that challenges the drift towards increasingly harsh and exclusionary penal policies, and works in collaboration with social movements. Ryan warns there 'can be no cherry picking' (p.4) of progressive policies and practices, however, as the penal system of any one country is likely to be shaped by a multiple of both local and structural factors. As such, the contributors to the book were asked to avoid cross-national comparisons, and to focus instead on the national contexts in which their countries' penal systems have developed and operate. Although some countries will have certain things in common, Ryan emphasises, 'in order to prepare the ground for effective strategic interventions, penal systems need to be first and foremost interrogated in their own terms . . . we should focus more on national *peculiarities* rather than across the board *commonalities*' (p.5).

The editors' brief to the authors of the volume was therefore designed to be less prescriptive as to allow themes to emerge from the collection. Criminal justice researchers and practitioners working within a positivist comparative framework might find the lack of symmetry across the chapters frustrating. However, a detailed reading of each reveals numerous commonalities that might form the basis for future comparative study. We learn, for example, that punitive and discriminatory sentencing policies and practices in the Anglo-Saxon world are also features of European nations. As for regimes of punishment, we learn of the persistence of inhumane prison conditions, and the gradual replacement of rehabilitation with incapacitation and public protection in sentencing and punishment regimes, both in prison (for instance, increasing resort to

cellular confinement) and in the community (in particular, the use of electronic tagging). Finally, regarding the underlying causes of European punitivism, we encounter varying degrees of political-economic explanation that again differ little in scope from those associated with analysis of trends in punishment in, for instance, the United States, Canada, New Zealand or Australia, from the replacement of welfare with criminal justice spending, to governments resorting to criminal justice as a means of being seen to be doing something about social problems that, as a result of globalisation, are increasingly out of their control. In the concluding chapter, Ruggiero picks up an area of convergence that might form the basis of progressive reforms: continuing leniency and importance attached to rehabilitation in many countries in the case of minor crime.

The critical audience to which the book is directed will find little of this surprising, but will gain valuable insight into the context in which these western trends are playing out in different parts of Europe. Moreover, in line with Ruggiero and Ryan's rationale for the book, it is not so much areas of European-wide convergence as divergence that makes the book such a fascinating read. Here we discover, for instance, that few other European countries have followed England and Wales in promoting community penalties as sentences in their own right as opposed to alternatives to prison, and that as many countries, including the Netherlands, Spain and again Ireland, have so far resisted as succumbed to the otherwise Anglo-Saxon trend towards prison privatisation. As for the types of people affected by penal policies, we find that Ireland appears to be bucking the trend towards discriminating against foreign-born offenders, and (a

second point highlighted in the concluding chapter) that white collar crimes are taken relatively seriously in countries such as Germany, where prosecutors and the judiciary operate largely independent from executive government, but enjoy high levels of impunity in countries like Italy and Bulgaria, where financial irregularities merge with organised crime. Particularly interesting are regional characteristics such as the legacies of war-time occupation on the (relatively progressive) post-war penal systems of northern Europe, the legacies of communism on the current (relatively punitive) penal systems of central and eastern Europe, and the relative absence of investment in penal institutions, even ideological attachment to particular policies, in parts of Southern and Eastern Europe. Related to this latter point, as Ruggiero emphasises in the conclusion, both punitive and humanitarian tendencies are likely to be held back by absences of public or practitioner consensus, as illustrated for instance in the chapters on Russia and Italy, as well as division or weaknesses in the power of political elites. Though there may be less for a bureaucratic, politically and culturally homogeneous country like England and Wales to learn from these examples, what they do point to in all cases is the potential for spaces to arise where progressive polices may take hold. Finally, readers are likely to be struck by the importance of individual actors/groups of actors and 'paradigmatic moments' in shaping penal policies, for example the role played by collaborative academic-prisoner organisations in countering punitive political discourses in Nordic countries such as Sweden, the murder of the controversially film-maker, Theo van Gogh, by a Dutch-Moroccan Muslim in 2004, which triggered an already emerging moral panic about Islam

and immigration, and conversely the progressive political climates in Russia and Poland that temporarily followed the collapse of the Soviet Union.

In all, this book will appeal to a wide audience, from criminal justice practitioners and students looking for data and analysis of the penal systems of individual European nations, to comparative criminology researchers exploring similarities and differences between European penal systems. It will also appeal to activists seeking to understand the conditions under which punitive policies and practices might be resisted, and how progressive penal policies and practices might be translated from one country to another.

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Book Review

Offender Supervision in Europe

By Fergus McNeill and Kristel Beyens (eds.)

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COST (a European Network to encourage cooperation in Science and Technology)¹ was established to drive a bottom up, light touch approach to research methodology within countries of interest from across the EU. It brings together academics from pan-European research backgrounds, with a focus on increasing the mobility of researchers across Europe and to foster the establishment of networks of excellence. COST —

the acronym for European Co-operation in Science and Technology — is the oldest and widest European intergovernmental network for co-operation in research.

The editors of *Offender Supervision in Europe*, are the chair and vice-chair of the COST Action on Offender Supervision in Europe. The introduction of the book brings us up to date on the use of supervision within the penal systems of Europe. It provides a focus on how much more widely supervision is being used than before and while statistics cannot be relied upon fully, Pan-European figures have shown a significant increase in the use of supervision, not just for those at the end of a custodial sentence but also for other more wide ranging considerations such as monitoring unpaid-work, exclusion orders and psychological or substance misuse treatment.

The introduction also tries to define Offender Supervision and importantly questions the primary use of it pan-Europe. Consideration is given to how Offender Supervision has developed and also considers what the authors describe as a 'sub-field' of penology that has not been researched fully. The book argues that the effectiveness and efficiency of Offender Supervision in the community has been considered by researchers but that the real benefits of Offender Supervision have perhaps been neglected by academics. The authors quote Tonry² who demands that research in this area needs to more formally consider its 'normative, primary and latent function, as well as studying its ancillary functions and effects',³ which has been the focus of research historically. This is an

important point and one that the contributors return to throughout.

The book is broken down into four chapters that look at the experiences of Offender Supervision across Europe: first Experiencing Supervision, second Decision Making and Offender Supervision, third, Practicing Offender Supervision and four European Norms, Policy and Practice. This approach picks up the challenge posed by Toney and attempts to provide a wider view of Offender Supervision on the grand scale that is Pan-European.

The second chapter — Experiencing Supervision — provides a consolidation of the knowledge available, from a pan-European literature review, of offender experiences of different forms of supervision and how others: friends, neighbours, employers and importantly families interact with this process. The chapter also considers the perspectives from both the victim and also the public, judiciary, media and politicians. Whilst a comprehensive review was undertaken it is clear that not all European jurisdictions have been represented with some countries, predominately from Southern and Eastern Europe not able to contribute. The overview provides a springboard to further analysis of the perceptions of offenders who are subject to supervision. It is clear from the work presented that the experience of supervision is variable depending on the jurisdiction in which the offender resides. It is also clear that supervision is seen as an 'effective practice'⁴ in the literature review but that more research is required to better understand the perceptions of offenders subjected to supervision of this nature.

The third chapter — Decision-Making and Offender Supervision

1. See <http://www.cost.eu/>

2. Tonry, M. (2006). Purposes and functions of sentencing. *Crime and Justice*, 34 (1), 1-52.

3. p.6.

4. p.41.

— considers not how different countries apply supervision sanctions but rather the practice of decision making around those sanctions. This focuses on three phases: pre-trial, sentencing and release. Each of the three phases considers the legal/judicial process and the empirical issues. The judicial sections consider the main judicial modalities in which the Offender Supervision measures can be applied in the different jurisdictions covered. There is also an overview of the different parties involved in this decision making process — this demonstrates a wide and varying approach to how these types of decisions are made. The empirical section provides an overview of the most important empirical studies on decision making and Offender Supervision in the different European jurisdictions. This analysis provides a wide ranging view on how decisions are made and by who, a clear deferential can be seen and provides the reader with a level of knowledge and sense of scale of this issue. In summary the literature in this area is scarce and is limited to the number of countries examined. The study has led to a broader understanding of the type of factors that influence decision-making in the three phases of the penal system which have been identified.

The fourth chapter — Practising Offender Supervision — could have listed the methodologies employed by different jurisdictions but instead focused on the 'collection and synthesis'⁵ of the available empirical research. There was a specific focus on the roles, characteristics, recruitment and training of practitioners as well as the interaction between practitioners and other professionals. There was also a focus on the delivery, practice and performance of Offender Supervision. The role of technology and the tools deployed in the

delivery of Offender Supervision and finally the management, supervision and regulation of practitioners and their practice. This chapter provides an assessment of the available literature, in summary it is difficult to identify empirical studies which could be said to have an impact on practice and policy. This suggests that there is much more research that could be conducted into this very important area, with a specific focus on the impact that those supervising offenders could have on them and the impact on recidivism rates across the European community. The chapter provides a summary on other future research projects including; a better understanding of practice and to better understand the relative neglect of Offender Supervision discourse within the public at large.

The fifth chapter — European Norms, Policy and Practice — considers how a pan-European approach to key aspects of punishment seems to have developed. With a rejection of the death penalty, a consistent approach to prisoners' rights and the Committee for the Prevention of Torture seen as a strong monitoring body, this chapter considers the extent of punishment and supervision enforced outside prison, which is the community sanctions as sentences and supervision measures before or instead of trial. As expected this chapter raises more questions than it answers. The chapter does provide a view from the Council of Europe who have disseminated a set of standards for this type of supervision, with a promise from the authors to further explore if this is the case. It also demonstrates that there is significant confusion over a pan-European approach to commonality in a criminal justice arena. It will be interesting to see how this work is followed up.

In conclusion this book provides a good introduction to the pan-European challenges to providing consistency to the supervision of offenders. The deployment, management and policy development are complex when 503 million citizens from 28 member states are subjected to one system that varies so widely. The book demonstrates the rapid scale of the development of offender supervision but it highlights significantly the issues that academics and researchers need to grasp to understand fully the impacts on the person and on wider society, the likelihood of reducing recidivism rates, especially as supervision is seen as a cheaper alternative to custody. This book would be suitable for those studying this field and those who are interested in the development of Offender Supervision, it also provides an insight for practitioners on what might be coming to the UK in the near future.

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Book Review

Preventing Violence in Australia: Policy, Practice and Solutions

By Andrew Day and Ephrem Fernandez (eds.)

Publisher: Federation Press, Australia (2015)

ISBN: 9781862879942

Price: \$69.90 (Australian) £30 (\$65 Australian dollars)

The book neatly describes its own purpose: for all of those who are interested in understanding and preventing violence in Australia (book cover). In reality the book is a broad collection of essays from leading academics in Australia and New Zealand examining the whole spectrum of violence which takes place in the home, in the

5. p. 98.

workplace, schools, Aboriginal communities, in the context of alcohol and substance abuse, mental illness, amongst youth, from a victim and perpetrator point of view and just about every other dimension one might consider. Whilst the writers are commenting on Australasia and its many faceted communities much of the work is relevant to the Western World in general.

The book is a rare attempt to draw together the various disciplinary and professional perspectives on how we might approach the task of preventing violence in one particular part of the world. Amongst the experts in violence prevention are forensic, clinical and developmental psychologists, criminologists and sociologists, social workers, specialists in public policy, law, and education. Important lessons are presented with relevance to almost any community. Whilst violence may seem a perpetual if not unstoppable aspect of human behaviour, the book not only offers hope in terms of drawing out what is current best practice it also explores some myths around the subject. The first three chapters focus on putting into context violence from the perspective of victim and perpetrator, and for society as a whole. For example homicide rates have been falling in Australia for more than three decades and seem to have settled at a level common to most European countries at about 1.2 per 100,000 population, albeit territorial differences exist with Northern Territory reaching 5.7. As is true with the rest of the world violence is largely a male phenomenon, particularly serious violence; males constitute 80 per

cent of the perpetrators of homicide and 60 per cent of the victims in Australia. Australia like many of its comparator countries with distinct Aboriginal populations has around 5 times the homicide rate amongst this group.

There is a fascinating chapter which follows the unique work of the Australian Homicide Project (AHP), which conducted interviews with 302 homicide offenders across all states over a three year period. Amongst the snap shop information: more than a quarter of perpetrators killed an intimate partner, a similar number killed a complete stranger. The median age of both perpetrators and victims was about 34 years. Perpetrators were likely to have unusually high scores in relation to attitudes to spousal abuse, trait jealousy and insecure attachment style. About 15 per cent of perpetrators had mental health issues in the 12 months prior to the homicide, and astoundingly 17 per cent of perpetrators who later killed an intimate partner attempted suicide in the 12 months prior, with 14 per cent having separated from their partner in the month just prior to the homicide. As with many crimes, alcohol and drugs play an important part: 81 per cent of strangers and 54 per cent of intimate partners died whilst the perpetrator was under the influence of drugs or alcohol. Equally victims were almost as likely to have been reported by the perpetrator as also using drugs or alcohol at the time of the homicide. Not surprisingly more than 80 per cent of perpetrators indicated no prior plans to kill the victim

A later chapter examines the close connection between alcohol and violence per se and looks at the

attempts of legislators to try and control for this particular risk factor, concluding that licensing restrictions, pricing and opening hours do in fact impact on alcohol consumption and its indirect impact on violent incidents. Interestingly female perpetrators of violence showed a 49 fold increase in risk whilst under the influence of alcohol in one study.¹ A further study² showed that blood alcohol content at 0.19 or higher, significantly increases levels of violent behaviour amongst men compared to men consuming moderate amounts (0.11 or less).

A further chapter examines the complex issue of indigenous family violence in the Torres Strait Islands. Again the impact of alcohol here is highly relevant and attempts by authorities to control this issue. The Torres Strait Islands are a series of very distinct almost unique communities that bridge the ancient anthropological and physical gap between Australia and Papua New Guinea. The islands have developed diverse and equally complex traditions to deal with personal conflict and violence. One study by Colman Brunton³ observed the use of elders as peace makers deriving their practice from a tribal tradition where aggrieved parties came together in a semi-mock public fight in front of families and relatives where blows were exchanged in a ritualistic manner but rarely resulted in serious physical injury. The islands in question report unusually low homicide rates compared with other aboriginal groups. This type of Restorative Justice is based on the principle of kinship, with the ultimate aim of restoring balance to the community by allowing parties to express a range of emotions,

1. Eronen, M (1995) 'Mental Disorders and Homicidal Behavior in Female Subjects'. *The American Journal of Psychiatry*, 152(8), 1216-1218.
2. Murphy, CM, O'Farrell, TJ, Fals-Stewart, W & Feehan, M (2001) 'Correlates of Intimate Partner Violence Among Male Alcoholics Patients'. *J Consult Clin Psychol*, 69(3), 528-540.
3. Colman Brunton (2014) Mornington Island Restorative Justice Evaluation, Draft Topline Pilot Fieldwork Results, [prepared for The Department of the Prime Minister and Cabinet, Canberra], Colman Brunton National Data Collection, Social Policy and Evaluation Research, Brisbane, View 23/04/14 [restricted circulation]. [Final Report pending, subject to approval by Dept of PMC].

seek restitution (sometimes monetary) through acts of acknowledgment of wrong doing by the perpetrator. Mediators made sure the proceedings were appropriately balanced and order maintained. Mediators were chosen because of their relative position or standing in the community. Expressions of anger and sadness were important parts of the process. The project and study concluded that the most effective method of reducing family and community violence was through investment in and strengthening of communities rather than external interference.

No book of this kind can avoid a discussion of what works to prevent violence, and so several chapters are dedicated to this theme. Australia like the rest of the Western World has experienced general declines in rates of crime, but less so violent crime. Toumbourou et al.⁴ explain this in terms of the different dynamic for Youth Violence. Australia seems to have seen a greater rise in Youth Violence and subsequent victimisation of the same group. The comparison is put into perspective: in the USA the rate is 400–500 per 100,000 youth population aged 15–24 compared with Australia's 711–880 per 100,000 in 2009.⁵ Part of the difference is explained by large declines in the USA which has not been matched in Australia and might be explained by rates of alcohol use in Australia⁶ relative to the USA. Four principle reasons are given for this difference: community inequality; family conflict and parenting risk factors; school risk factors; and alcohol availability and early age alcohol use. In all four areas Australia has seen a significant worsening in recent

years; recommendations are made for improvements and initiatives in all areas drawing on international best practice and local initiatives that have been found to work. One of the main conclusions is the lack of a cohesive national response; particularly for youth is a major deficit in Australia.

Two chapters worth noting examine New Zealand's (Chapter 10) experience of treating the seriously violent in custody and the disappointing lack of continuous support from New Zealand Authorities to fully complete the research associated with evaluating the effectiveness of such programmes which have suffered from a stop-start approach over the last 30 years, despite some strong lessons and promising results. The second (Chapter 14) is the inevitable examination of domestic violence against women — now a key (if not the biggest) driver of crime in both Australia and New Zealand. Despite significant growing awareness of the subject, helped by campaigns such as 'white ribbon', the chapter concludes that 'treatment for perpetrators are still in their infancy and evaluation results are mixed' (p. 214).

The final two chapters focus on future policy and opportunities using local and international examples with some useful illustrations for policy makers that highlight cost benefits of some sample early intervention programmes. One programme stands out: The US Nurse Family partnership (NFP) home visiting programme aimed at mothers which is reported to reduce crime by 38.2 per cent.

Overall I found the book accessible, succinct and well structured, allowing me to expand my knowledge in this important

area. The book is particularly relevant to Criminologists at Undergraduate level and above, but would also help practitioners and programme developers working in this space.

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Book review

Youth and Crime (4th Edition)

By John Muncie

Publisher: Sage

ISBN: 978-1-4462-7486-6

Price: £28.99

Youth and Crime aims to create an informed readership who can delve beyond the headlines of the almost constant information flow about young people and crime. It recognises that politics, intervention initiatives, the media and academics can provide a myriad of conflicting or misleading information about the propensity, severity and attitudes to crime of young people. Overall, however, the aim of the book is more about exploring adult reaction to how young people and crime is depicted in society, as opposed to the experience of young people per se. The author goes as far as stating that the most serious harms to society are not afflicted by young people at all. Yet despite this there remains parts of young people's behaviour that are singled out as significantly problematic. The key grey area regarding young people appears, according to the author, to be whether young people who engage in particular behaviour require a social welfare or criminal justice based response from society.

4. Chapter 4.

5. Australian Bureau of Statistics (2012a) *Crime Victimization, Australia 2010-2011*. Catalogue Number 4530.0. Australian Bureau of Statistics, Canberra, Australia.

6. Toumbourou, JW, Hemphill, SA, McMorris, BJ, Catalano, RF & Patton, GC (2009) 'Alcohol Use and Related Harms in School Students in the USA and Australia'. *Health promotion international*, 24(4), 373-382.

To highlight this, Professor John Muncie notes in his preface how each edition of this book has been rewritten during a different period of significant tension and national focus on how to manage young people that are engaged in criminal behaviour. The first edition in 1998 was released as the first secure training centres (for 12 to 15 year olds) were opened and there was concern about persistent young offenders. The second edition was released just as the Antisocial Behaviour Act was being given royal assent in 2003 and the third during a panic about hoodies, gangs and knife crime in 2008. As this edition is released, the country is experiencing a period of austerity and there seems to be less political focus and public furore around young people and crime.

The book comprises of ten highly detailed chapters. They are deliberately and explicitly set out as a series of lectures which will be familiar and comfortable for the academic and student readership. They include cross references to other chapters and a web based resource, study questions and 'boxed' pieces from original sources. The chapters cover the history and representation of youth crime, academic theories of youth crime, young people as victims, youth cultures, social policy and strategies towards youth crime and international comparisons.

The most interesting and challenging chapters include the first on representations of youth crime. The author's main argument in this chapter is that both youth and crime are social constructs that are perpetually changing, driven by an irrational fear of adults that is promulgated by media interests who use youth crime as a mainstay of their regular output. Not shying away from controversial topics, an analysis of the media furore surrounding the James Bulger murder is given early in the chapter. The chapter demonstrates how the

more unexpected and violent an incident is, the more likely it will provoke high profile and more news coverage, which in turn, encourages a widespread view that all young people pose a significant risk to society. This despite the fact that a child murdering another child is extremely rare. John Muncie quotes the estimation that there are only likely to have been 33 similar cases since 1748. However, the juxtaposition of childhood innocence and childhood evilness is just too tempting to the influential media and uncritical masses that consume it.

This challenging and persuasive style, where the social norm is turned on its head, is replicated throughout all of the chapters. Most powerfully this is presented in a convincing chapter regarding young people as victims. It highlights the abuse and violence young people are exposed to going beyond normal comparisons to include national and international neglect, such as child trafficking and soldiering. There are also two chapters on the welfare and justice responses to youth offending. These chapters highlight society's apparent obsession with punitiveness, despite most legislation over a significant period of time putting the welfare of the child at the centre of all intentions. The chapter also explores how the welfare response comes under fire from across all political persuasions, whether that be the criticisms of 'too soft on crime', misusing 'treatment' to restrict liberty or denying full 'due process' in normal justice procedures.

In conclusion, this book does achieve its aim of providing a sound basis for a critical readership of the information available about young people and crime. The book is very well set out to appeal to academics and students in particular, but the compelling style of writing, coupled with extensive references and examples for wider sources

throughout the book ensure that it will also appeal to practitioners.

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Book Review

Different Crimes Different Criminals. Understanding, treating and preventing criminal behavior

By Doris MacKenzie, Laure O'Neill, Wendy Povitsky and Summer Acevedo.

Publisher: Elsevier, Anderson Publishing (2006)

ISBN: 9781593453343

Price: £31.99

Different Crimes, Different Criminals opens by explaining its title is in recognition of the differences that exist among offenders and their crimes. As anyone who works in the Criminal Justice sector can confirm, our clients are far from a homogeneous group. The book is written on the premise that there is no singular classification system or theoretical perspective to adequately describe all types of crimes and criminals, and this message is clear throughout the book. Each chapter discusses offender characteristics, theories dominating the relevant research and aims to provide a critical analysis of the material. Although the foundation of the book is to highlight differences, each chapter is written in a reassuringly familiar format, allowing the reader to easily dip between different chapters or sections if they so wish. This is particularly helpful given the size of the book (over 300 pages) and makes the content more accessible to the reader.

Chapter One sets the scene and explains how the book grew out of a graduate course entitled 'Psychology and Crime' where students were asked to

Select one type of crime or criminal, and examine the literature. They were asked specifically to: (1) discuss the characteristics of the offender who commits this type of crime; (2) report on the theoretical perspective that is most helpful in understanding this type of offender; (3) review the research on prevention and/or treatment of this type of offender, and (4) evaluate research on effectiveness of treatment and prevention programs. (p. 2).

It is reported that the essays submitted were so 'outstanding' a decision was made to combine them into a book. Helpfully the chapters formed were also reviewed by experts in the field in order to ensure accuracy. In addition the book has been successfully edited to enable it to become more than just a selection of essays; it is a helpful resource and collection of information.

The book is predominantly founded as a criminology resource, however it takes a multi-disciplinary perspective by reviewing sociological, psychological and biological theories and research. It is split into six main sections: (1) relational crime, (2) sex crimes, (3) youth crimes, (4) complex motivations, (5) special offender population and (6) the conclusion reviewing what has been learnt and the future of criminology. Within these sections exist a series of essays, each given its own chapter. Within 'relational crime' chapters explore infanticide, domestic battery and stalking; within 'sex crimes' chapters explore child molestation and rape; within 'youth crime' chapters explore violent juvenile offenders, juvenile drug offenders and gangs; within 'complex motivations' chapters explore serial murder and arson and within 'special offender population' chapters explore violent offenders with schizophrenia and white-collar crime. The chapters in the book

were chosen by the editors as they are varied and of current interest to criminologists. Some chapters chosen, however, are possibly more focused towards the lay person and general public, for example Chapter 10 'serial murder'.

What I liked best about this book is that although it is predominantly an academic textbook, it is also user friendly and contains special features; such as 'In The News' examples, case studies and helpful boxes separate from the main text with breakdowns of theories or classifications, tables of the relevant research and even advice on what to do if you are a victim of certain crimes. The result is an easy to read book, peppered with examples. However, this does not dilute the information contained within the text, which takes a serious viewpoint on many topics. For example, promoting the need for evidence based treatments and evidence based decision making with Criminal Justice settings.

Although each chapter covers a different area there are some common themes throughout the text. For example, in reporting on evidence based treatment approaches, a general theme is that treatment based upon cognitive behavioural theory is frequently seen as most successful, several offender characteristics are common across chapters, and likewise for the theories explaining criminal behaviour.

As a UK based reader one point that must be noted is that this book was written and edited in the USA, and it is clear throughout it is based on the US Criminal Justice system. Examples used, terminology and studies referred to are predominantly American. Some information is, however, easily transferable to other countries and cultures, such as the UK. However, due to differences within Criminal Justice systems this is not true for all the content. Therefore, whilst the

book is an interesting and informative read, not all of the information contained is relevant to a UK Criminal Justice setting. This should not deter readers, but is important to note.

The overall message of the book is that whilst there may be some similarities between different crimes and criminals there are also many differences, urging that 'theories of crime and criminal behaviour, as well as prevention and treatment strategies, must be designed with an awareness of the wide variety of different crimes and different criminals' (p. 8). Parallel to this, authors acknowledge the 'ongoing discussion in the field of criminology over the specialization of offenders and whether individualized treatment programs are necessary based on crime type' (p. 313) and comment that they 'do not take a stringent stance on offender specialization' (p 314). The message of this book is not groundbreaking, but serves as a good reminder to those working in the field or a good introduction to those who are interested in this area.

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Book Review

Offending and Desistance — The Importance of Social Relations

By Beth Weaver

Publisher: Routledge (2015)

ISBN: 978-1-138-79972-1

Price: £90.00

Since the turn of the century, the study of how offenders move away from criminal behaviour and activity to an ultimately offence free lifestyle, or desistance, has been enjoying a surge of academic and political popularity. Acting as catalysts, the seminal works of

Shadd Maruna¹ and Laub and Sampson² have encouraged criminologists to research and scrutinize the termination of delinquency; rather than adopting the more traditional approach of the observation of the onset of crime. This shift in focus has led to some very interesting research projects and has helped academics and those in the criminal justice sectors to begin to understand the processes that offenders go through when they do eventually desist. These studies vary in subject and methodology, ranging from the study of life sentenced offenders in the community, the cultural aspects of desistance, the desistance of female offenders and (more rarely) the desistance of sex offenders.

With this book, Beth Weaver has significantly bridged a gap in the knowledge of how offenders begin, persist and desist from crime, whilst linking together the concepts of social relations, structures, the role of the individual, reflexivity and agency in this process. By adopting a life course methodology, Beth has explored the lives of six men who formed part of a notorious Scottish gang called 'the Del'. This unique exploration takes the reader through each of the men's histories and she affords every one of them a chapter in their own right. This allows for a full account of their story and a detailed analysis of every journey from onset to desistance. The reader is absorbed into the *underworld* of the gang and the men come alive on the pages as their individual personalities ring through and it becomes clear that the route of moving to an offence free life is a very individual one. Beth's use of splitting up the gang into their individual parts helps the reader to understand this individuality and it

makes the stories told all the more effective. *Offending and Desistance* really demonstrates how difficult it is for people with entrenched criminal behaviours, who come from deprived areas and who have to move away from their own town with the intention to create a clean slate for themselves, really is. Some of the men succeeded in their quest to move on whilst others were not so successful.

Ultimately, Beth Weaver's book has contributed more than just stories to the literature of desistance, as she set out to reveal 'the role of a co-offending peer group' (p.2) in the desistance process. Her conclusions show how the dynamics within the gang (trust, co-operation, looking out for each other, support etc) can be mirrored when they want to shift their lifestyle choices and move away from this type of life. The relationships they had whilst they offended acted as bonds in the desistance process. Weaver agrees that all of the men supported each other in different ways, at different times and to differing degrees, but the reciprocation of this support meant the men responded as a collective rather than individuals. This aspect of her work is purely inspirational, as she has introduced each man separately and then brings them together in the end. This allows the reader to appreciate how their individual lives, their own identities and their own journey's could not have been so, without the others. Each identity is shaped by each other, each interaction and every negative or positive experience affects the development of desistance and each case is unique. Even in a group as close as 'the Del', Beth Weaver's book allows practitioners to appreciate the difficulties people face when they want to work together to desist.

The unique nature of this book's methodology and the findings within, make it a useful addition to the desistance literature and is a must for those with an interest in this area. It is essential reading for criminology academics, criminal justice managers, students and those who want to understand more about desistance from crime and its multifaceted nature. Those people who work in the probation service, resettlement services or in a face to face role with offenders would also find it useful, as the book helps to give another side to the offender journey; a side which is rarely looked at and so often misunderstood.

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Book Review

Reconceptualising Penalty: A comparative perspective of punitiveness in Ireland, Scotland and New Zealand

By Claire Hamilton

Publisher: Ashgate (2014)

ISBN: 978-1-40-946316-0 (hardback)

Price: £70.00 (hardback)

One of the big issues in international criminology over recent years has been that of punitiveness. In particular, an identified global trend towards more emotional and expressive political and media discourse about crime, an expansion of prison populations, lengthening of prison sentences and even the intentional harshening of conditions and impoverishment of regimes. This has variously been

1. Maruna, S. (2001). *Making Good: How Ex-Convicts Reform and Rebuild Their Lives*. American Psychological Association: Washington DC.
2. Laub, J.H. and Sampson, R.J. (2003). *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70*. First Harvard University Press: Harvard.

described as 'new punitiveness',¹ 'penal populism',² 'the punitive turn'³ and even a 'culture of control'.⁴ Much of this work has taken a grand, macro-level perspective, shaping the contours of broad developments and themes. The 'lonely prophets'⁵ who have developed these ideas have sought to alert students, practitioners and others of the potentially illiberal nature of contemporary reform in crime and justice.

In this book, Claire Hamilton of Queen's University, Belfast offers an alternative perspective, attempting the ambitious task of building an empirically based framework for understanding punitiveness and applying this to a comparative study of three relatively small, developed nations: Ireland, Scotland and New Zealand. In doing so, she draws upon seven different aspects of criminal justice in which punitiveness can be observed: policing; procedural protection for defendants; use of imprisonment; juvenile justice; prison conditions; post release controls; and, death penalty. By taking such a wide, multi-dimensional view, a range of different policies and developments can be seen, which are sometimes conflicting and contradictory in their direction of travel. Hamilton also explores the distinctive features of each jurisdiction that may account for some of the variations in practices. These include factors that increase the risk of punitiveness including: political structures and practices; the role of expert and evidence-based policy; the history of race relations; and, national media characteristics. She also examines protective factors that ameliorate punitiveness,

including legal cultures and membership of the European polity.

Overall, this book offers an important expansion and corrective to the current body of work on punitiveness. Its first particular contribution is to offer a detailed, comparative, empirical account of the spread of punitiveness in criminal justice. This moves the subject area beyond macro-level theory into a more grounded account of practice. The second achievement is to give a proper emphasis to the importance of local history and culture. Global trends, including those in the criminal justice field, do not sweep away all that has gone before creating a homogenised world, but instead broad international trends interact and intersect dynamically with local practices. It is this process which is vividly brought to life in Hamilton's work.

This book will be a valuable addition to the field for those with an academic interest in the globalisation of criminal justice or in the 'punitive turn'. For the more general reader, this offers a means for critical reflection on developments in policy and practice, with all of the complexity and contradictions, opportunities and threats that entails.

Dr Jamie Bennett is Governor of HMP Grendon & Springhill.

Book Review

When the Innocent are Punished: The Children of Imprisoned Parents

By Peter Scharff Smith
Publisher: Palgrave Studies in Prisons and Penology, Palgrave-Macmillan, New York (2014)

ISBN: 978-1-137-27090-0

(hardback)

Price £61.75 Kindle edition,

£65.00 hardback

Against a background of penal populism the impact of incarcerated parents on their children has been largely overlooked. Thus, Scharff-Smith, a senior researcher at the Danish Institute for Human Rights makes an important contribution to knowledge on this issue. The main focus of the book is on Denmark, yet, other jurisdictions are occasionally mentioned including the UK, Norway and Sweden. Throughout, Scharff-Smith fills the gaps in our awareness on this topic, redressing the silences surrounding children, their rights, and how they cope physically, emotionally and mentally with the imprisonment of a parent.

The book is divided into three major sections (comprising 17 digestible chapters in all): Prison, Society and Prisoner's Children; Children of Imprisoned Parents: their Numbers, Problems and Human Rights, and, Prisoner's Children: From Arrest to Release of Their Imprisoned Parents; followed by a further section containing a brief conclusion.

In the first section (Prison, Society and Prisoner's Children) comprising of Chapters 1 — 3, the author evokes the anguish of children witnessing the arrest of a parent. The experiences of children when visiting parents in jail are also explored (Chp 1). The focus of chapter 2 concerns the human rights of these children, imploring that their best interests should be given paramount importance. In chapter 3 a brief historical perspective is given as to prison and its destructive effects on families. Overall the

1. Pratt, J. Brown, D., Brown, M., Hallsworth, S., and Morrison, W. (eds) (2005) *The new punitiveness: Trends, theories, perspectives* Cullompton: Willan.
2. Pratt, J. (2007) *Penal populism* Abingdon: Routledge.
3. Muncie, J. (2008) *the 'punitive' turn in juvenile justice: cultures of control and rights compliance in western Europe and the USA in Youth Justice* 8 (2) p.107-21.
4. Garland, D. (2001) *The culture of control: Crime and social order in contemporary society* Oxford: Oxford University Press.
5. Loader, I. and Sparks, R. (2011) *Public criminology?* Abingdon: Routledge.

chapter is concerned with the impact of stigmatisation on prisoners' families, an issue (states the author) begging further research which could perhaps lead to changes around sentencing policy.

Section two covers chapters 4–6. In chapter 4 Sharff-Smith reveals that we do not know how many children have parents in prison, yet, this issue could easily be amended. The author states that if we knew, then changes could be made to sentencing policy that could better fit the best interests of these children. Chapter 5 is concerned with the fact that in many cases (though not all) the incarceration of a parent has profound negative consequences for children, one example being behavioural problems. In fact, it is made clear that, as numerous prisoners have low levels of education, suffer from mental illness and have drug and alcohol issues and the majority are from the lowest income groups, many of the children of those incarcerated find themselves in a 'problematic family situation' (p.58). Moreover, several of these children are from single parent families (often with little or no familial support) prior to a parent being jailed and will then find themselves placed in care as a result of a parent's incarceration. In this section it is also revealed that when the children of prisoners experience separation from a parent it can affect them in a range of ways varying from beneficial (dependent on circumstances) to traumatic. However, 'Gender is believed to be a factor in how children handle parental imprisonment' (p. 59) and aside from the observation that in general children feel guilty for whatever their parents have been jailed for, boys are more likely to act up and show distress thereby attracting attention/help more easily whereas for girls, the opposite may be true, resulting in depression and anxiety. Scharff-Smith also underlines a surprising aspect of the Norwegian, Danish and Swedish

criminal justice systems (surprising given their alleged liberal stance) being that during the remand period solitary confinement is the norm 'for 22–24 hours every day, with minimal access to psychological, meaningful social contact...[exposing] people to a number of negative effects, including anxiety, depression...' (p. 61) therefore contact between children and 'parents can be extremely difficult.'

Chapter 6, one of the more substantial parts of the book, explores the rights of children and the impact of three specific processes on the children of incarcerated parents (specifically focussing on the rights of the child) beginning with arrest, followed by sentencing, finishing with an investigation into the impact of actual imprisonment. Articles within the UN Convention on the Rights of the Child, as well as other declarations, charters and conventions concerning human rights are examined here. Overall, the main thrust of this chapter is that diversion from prison be practiced to serve the best interests of the child and their primary care giver (usually a female, thereby underlining arguments around the pains of imprisonment for mothers).

Section three comprises the largest section of the book incorporating 10 chapters. In chapter 7 the author begins to focus in more detail on the arrest of parents through the eyes of children, police, and social services. Protocols relevant to arrests and the ways in which trauma can be reduced for children during these occasions is discussed. Chapter 8 explores the stress and disruption to families and individuals caused by remand imprisonment and uncertainty arising for all involved due to the situation, especially regarding long-term remand. Chapter 9 then investigates post sentencing issues, yet, this chapter is extremely brief and doesn't appear to add much to what has

already been stated in earlier chapters. In chapter 10 a range of potential problems concerned with children visiting parents in prison are explored; for example: safety, difficulties around transport, length of visits etc. The remaining chapters focus on the following issues: maintaining contact (especially via home leave for prisoners), use of mobile phones, texting and the internet (chp 11); what happens when visits do not take place (chp 12); when contact is undesirable (chp 13); the situation when dad or mum returns home (chp 14); children residing in prison with parents (chp 15) and, prior to a conclusion, the impact of penal populism on the children of imprisoned parents (chp 16).

Whilst thought provoking and insightful this research may have benefitted from investigation into the children of marginalised communities such as the Roma which (alongside other members of Gypsy Traveller communities across Europe) are known to be over represented in prisons. Moreover, throughout there is some repetition of facts without acknowledgement of this by the author/editors. Nevertheless, these shortcomings do not diminish the overarching argument here that if we continue to ignore the experiences of the children of incarcerated parents then as a consequence of what is referred to by Sharff-Smith as administrative exclusion we risk damaging children's perceptions of the State, justice and legitimacy. Moreover, these children remain 'forgotten victims': overlooked within societies that appear to place support for punitive measures against offenders above and beyond concerns for the best interests of the children concerned in this scenario.

Dr Anthony Donnelly-Drummond, is a Senior Lecturer at Leeds Beckett University.

Interview with Moosa Gora

Moosa Gora is Imam and Managing Chaplain at HMP Full Sutton, he is interviewed by Ray Taylor, Senior Regulation Manager of the Equality, Rights and Decency Group, NOMS.

Moosa Gora is Imam and Managing Chaplain at HMP Full Sutton. Graduating in 1990 from the Islamic Institute of Bury with an Islamic Scholar's degree, he started working in the Prison Service at HMP Wakefield in 1991. This was a temporary appointment to cover the holidays and absences of the Muslim Chaplain. He was then appointed Muslim Chaplain at Full Sutton in 1991, initially on a sessional basis, before being appointed full-time Chaplain and then Managing Chaplain. He was interviewed in November 2015.

RT: What do you enjoy most about your work and how does it compare with other work that you have done?

MG: I have been at the prison for over two decades, in which time I have built strong working relationships across the prison. In particular, the Multi-Faith department and all the colleagues that I work along gives me great strength in many of the things I do. I have not experienced anything on this scale in any other role and job I have been involved in. In particular, I cherish supporting my colleagues in fulfilling their faith and pastoral duties of prisoners and supporting staff in their work.

RT: Please compare your prison role with the community role of an Imam

MG: Although I am an Islamic scholar, I do not have time to hold the position of being an Imam in a local mosque. I actively support the activities that take place in the community, and have a particular interest in the after-school Islamic education of children in the community. There are vast differences between a community Imam and a prison Imam. Firstly, in prison there are all the security restrictions and prison rules which have to be followed. This in itself, presents a huge challenge.

Another challenge is the expectations from all different interested parties. For example, am I a chaplain to the staff, to the establishment, or to the prisoners? To try and find a balance between these roles is the key to success in this field. Even within the prison Muslim congregation there are Muslims from different denominations and in the community they would be able to go to the specific mosque from their denominational background, whereas here they have

only me, and I have to cater for all — something which community Imams don't have to do.

Working in a High Security prison means that I always have to be 'on top of my game.' Inevitably there will be some prisoners who are extremists, and will seek to challenge my knowledge as well as my authority.

Lastly, the prison environment can be stressful, as prisoners' issues and problems are often complex. Although there are many rewarding aspects to the role, it's not common that a Chaplain breaks 'good news' to a prisoner. Sadly, it is the bad news which often the Chaplain brings and follows up with assisting prisoners through those bad times. One needs good support mechanisms within Chaplaincy teams and externally to properly 'let go' of 'prison' issues.

RT: Can you tell me something about your background before joining the Prison Service and how you came to be a prison chaplain?

MG: I was born and bred in Yorkshire. Whilst I was still doing my secondary education, I took a keen interest in Islamic education, partly due to being from a religious family. I joined the Islamic Institute which is an Islamic sciences seminary based in Lancashire. The course lasted six years and I graduated in 1990. After completing my degree, I was looking for an opportunity in the area of Islamic teaching, and subsequently started teaching Theological studies in the local Islamic institute. During this time, an opportunity arose for an Imam's position in the Prison Service, where I had the prospect of contributing both pastorally and also teaching.

RT: Please describe the process of becoming an Imam.

MG: Although I did not, some start their career by memorising the Qur'an, which can take between one and four years, depending on the individual. The traditional route to become an Imam who also teaches the religion is a six-year course which initially involves an in-depth understanding of the classical Arabic language, phonetics, grammar and eloquence as well the disciplines of logic and philosophical analysis. These auxiliary sciences lead to the study of Islamic jurisprudence with applied sacred law, followed by the science of prophetic traditions (both the texts and authentication process of text). The final year is spent studying the primary classical books of prophetic

traditions (hadith) and also the study of Qur'anic interpretation of the classical commentators. Thus before one studies the Noble Qur'an he or she must have become an accomplished scholar or certainly highly proficient in the preparatory sciences.

After the generic Islamic sciences degree (bearing in mind the following is no order of importance or hierarchy) most return to society to become Imams offering legal advice on sacred law and spiritual counsel. Some continue with post graduate study in advanced legal studies before serving as a Mufti, who is considered to be an expert in offering legal advice and counsel.

RT: I understand that you worked at Head Office in London for a while. Can you tell me about your role, please? Were you able to contribute as much in this role as you do in your work in prison?

MG: Whilst the Muslim Advisor at the time was seconded to the Home Office, I was temporarily seconded for a year in his role whilst still maintaining my role as Imam at the prison. My role was to ensure that the Prison Service Instruction on Islam was being adopted, give advice to establishments around faith, recruitment, Halal food, responding to requests and complaints and providing support to prisoners, staff and establishments.

I also was seconded to High Security Area Office to help Chaplaincy Departments and in particular Muslim Chaplains with issues around how faith is practised in prisons and trying to standardise this across the estate.

I was part of the national committee that developed the Tarbiyah Course for Muslim prisoners — a feat that took us almost five years. In addition I was part of the Ibaana (Arabic for 'Clarification') Development Committee which devised a detailed theological intervention to challenge the Muslim extremist narratives. This was really interesting and exciting as we looked at how extremists twisted verses of the Qur'an and Hadiths and provided detailed rebuttals against them.

RT: Has your role as Managing Chaplain taken you away from some of your duties as an Imam?

MG: The role of Managing Chaplain is to ensure that the Chaplaincy Department fulfils its function in meeting the religious and pastoral needs of prisoners. My role is to enable the staff to fulfil this role and ensure facilities and opportunities are available for prisoners to practise their faith according to the instructions in the PSI. It also demands working across

departments and building links with volunteer and the community sector.

Alongside this, a Managing Chaplain also has as part of their role to be a chaplain to their own faith, and hence I still carry out a lot of the functions that a Muslim Chaplain would do including leading prayers, running classes, organising festivals and addressing requests and complaints. Although all the managerial duties have taken me away from some of the day-to-day Chaplain duties, I feel my knowledge, skills and experience now have the potential of being passed on to members of my team and they can also benefit and, in turn, it brings greater benefit to the establishment.

RT: As a prison chaplain, how would you say that the role is divided between religious and pastoral duties?

MG: My role as Managing Chaplain is different, and entails in the main ensuring that the department fulfils its function of delivering faith and pastoral services to prisoners of all faiths and no faith. But the role of a faith chaplain is split between carrying out faith services and pastoral services; faith services would include conducting weekly corporate services (daily at Full Sutton for the Muslim faith), running faith specific courses and attending to feasts, festivals and special days of celebrations, whilst pastoral services would include listening

... we looked at how extremists twisted verses of the Quran and Hadiths and provided detailed rebuttals against them.

to and providing support for all prisoners who want it, whether or not they are going through difficulties with illnesses, marriage, death, coping with prison life, bullying, etc. It also means writing reports and attending numerous meetings and engaging in their sentence planning process. Often, the pastoral provision of our work is carried out in a multi-faith manner and it would be normal for a Chaplain dealing with a prisoner's crisis to be of a different religion/faith.

RT: Do you see your work in prison as a 'mission' or 'calling'?

MG: Religious leaders of all faiths feel that they have a duty to serve people and will busy themselves with various activities in trying to achieve that; this duty is translated within different faiths with the use of different words. For a Muslim Scholar the duty to serve can be captured in the saying of the Prophet (peace and blessings be upon him), *'Each of you is a shepherd, and each one will be questioned about their flock.'* It is the duty of the Scholar to busy themselves in whatever capacity and industry/profession in ensuring that they are serving the religious and pastoral needs of the community.

RT: How do you accommodate the different faith strands at Full Sutton ?

MG: All faiths have various strands within their communities. For Muslims the main strands are Sunni and Shia; although coming from a specific strand, the role of the Muslim Chaplain is to serve all the Muslims without differentiation. They will try to ensure that their sermons and classes are generic as far as possible to serve all, and allow different practices for example facilitating the different special days for the different denominations from their flock.

RT: Do gang affiliations affect relations within the Muslim community in Full Sutton?

MG: Affiliation to gangs remains a serious concern for the service; various strategies are employed to keep this in check. More recently the term 'Muslim Gang' has appeared in the vocabulary of the Prison Service, I consider this to be for one of a number of reasons namely:

- I. More and more people are identifying themselves as Muslim and sometimes them coming together in a communal sense is seen as 'gang'
- II. Prisoners converting to Islamic faith for a number of reasons some of which are certainly dubious and thus more so for associations
- III. Different gang members putting their differences aside as they now belong to the 'Muslim community'
- IV. Prisoners carrying out wrong activities under the banner of Islam and thus for a number of staff it is convenient to identify these individuals as belonging to a 'Muslim gang' so that they can deal with them appropriately.

The Muslim faith (like all faiths) plays a role in the rehabilitation of offenders and there are hundreds of examples of those in prison who have found faith and bettered their lives as a direct result of this.

The use of the words 'Muslim' and 'gang' are two opposites. In every faith community, there are those who commit to their faith and better themselves and others who use the faith as a smoke screen or to have access to certain materials/people to further a criminal cause. I have found both positive and negative cases within the Muslim Community at Full Sutton. Having said this, it remains my goal, to continue to steer people away from criminal activity and assist them in leading righteous lives.

RT: How well do Muslims and non-Muslims integrate within the prison as a whole in Full Sutton?

MG: We have a strong multi-faith ethos in the Chaplaincy Department, this flows down to the prisoner group as well as the staffing group. As a community, living together in a confined area, prisoners generally get on well in the prison bearing in mind that Full Sutton is a long-term prison. That is not to say that issues do not happen but, when they arise, I feel they are managed well. There are a number of challenges that face our prisoners and staff on a daily basis and as a team I feel it is important to work out solutions and create a culture whereby everyone who works, lives or visits Full Sutton is safe and secure.

RT: Can you tell me anything about how you see your role in relation to prison discipline?

MG: All staff and volunteers that enter the prison walls have to abide by prison rules and this is no different for chaplains. We all contribute to the safety of the establishment. All staff must carry out their respective roles within certain boundaries and guidelines. Our job, as Chaplains, is to serve the pastoral and religious needs of prisoners and staff whilst respecting the same guidelines and within the same boundaries as any member of staff. Discussions that a prisoner has with a chaplain are

confidential and will not be shared unless there is a threat to the security and safety of the individual, others, the establishment or, indeed, the public generally.

RT: Can you tell me anything about how you see your role in relation to prison security and dealing with criminality in prison?

MG: Within any prison establishment, there are various different types of roles and it is the diversity within roles and the link between them all that maintain a healthy prison environment. Sometimes the use of force can limit or bring a stop to an incident and sometimes contact with Chaplaincy, healthcare, or a teacher can prevent an incident altogether. The correct balance assists in achieving positive results for all prisoners in our care.

RT: Please describe how your relationship with prisoners works. Is it the same kind of relationship that you would have as an Imam in the outside community?

The Muslim faith (like all faiths) plays a role in the rehabilitation of offenders and there are hundreds of examples of those in prison who have found faith and bettered their lives as a direct result of this.

MG: Most prisoners show great respect for the Imam as they do to all Chaplains. They see him as an example, and a person of integrity and honour. Prisoners regularly seek advice, guidance and religious instructions. They make requests for prayers for themselves, friends and families. They see the Chaplains as people they can speak to and confide in. Unlike the outside community, a prison community operates very differently and prisoners often have to rely, as it is outside their control or influence, on the chaplains for all kinds of help and support.

That said, a minority of prisoners may not see eye to eye with an imam, for a number of reasons. Sometimes it is a personality clash or sometimes because the imam is seen as 'part of the establishment.' I continue to remain professional and carry out my role and offer my services to all prisoners whilst continuing to show good character to all those who I meet and speak to.

RT: Do you spend much of your time supporting prisoners who are not Muslim? How do you find that these prisoners relate to you?

MG: As I said earlier, my role as Managing chaplain is to facilitate faith practice for all the faiths; this will include Muslim and non-Muslims. I support all the various chaplains across the board. As a team, much of our pastoral work is 'multi-faith'. I have found that prisoners (and people in general) treat you how you treat them regardless of faith, creed or other such factors.

RT: In your current role, do you support Muslim staff?

MG: Although the role of the department is supporting prisoners, chaplains are also available for prison staff; it is not uncommon to be involved in births, marriages, divorces, and deaths for staff and their families. A Chaplain would make themselves available as and when staff need their support. Other than the chaplains, there are very few Muslim staff at HMP Full Sutton, partly due to its geographical location and a number of other prisons being close by, however I do believe we all need to continue to work towards achieving greater diversity within the work force.

RT: Would you see part of your role as educating non-Muslims prisoners or staff?

MG: Yes. The Chaplaincy carry out training for staff on faith awareness as well as training on Islam. In the course of my work, I am regularly asked about world affairs, politics and other such matters. I always encourage these types of questions as it breaks down barriers and brings people together. A lot of learning

takes the form of informal discussions and getting to know each other and their culture, and see beyond the stereotypes that people hold about each other.

RT: Do many staff ask for your help, for instance, with a prisoner who needs support or with a prisoner who is presenting a problem to order and discipline?

MG: Staff are acutely aware of the position and respect that the chaplains hold and regularly seek their assistance. This may be to do with hardships that the prisoner is facing or with control or discipline issues. As indicated earlier a chaplain should hold their moral conscience and support everyone where possible. They are not there as an extension of any other department or as a conduit for prisoner complaint, rather their role is to meet the faith and pastoral needs of prisoners, and if that means supporting them in their time of difficulty or stopping them from misbehaviour then, both are needed.

RT: How closely do you work with prison officers and other prison staff? How well do staff support you and Muslim prisoners, for instance, during Ramadan?

MG: As a Chaplain you have to work closely with all departments and people to ensure that you are fulfilling your role and duty as a team. For example rehabilitation of prisoners cannot be provided

solitarily in isolation of other key players and thus everyone has to play their part. As mentioned earlier, like prisoners, staff also hold varying beliefs and attitudes about chaplains; most very positive and supportive, whilst a minority not so. Staff are not immune from world politics, media, their upbringing and life experience; but it is the duty of the member of staff to act professionally and not let personal views affect how they carry out their role in prison.

With regards to meeting the needs of Muslim prisoners, the prison has come a long way, from when I initially started, in meeting their diverse needs. Without going into too much detail, Ramadhan is a 'well-oiled machine', we hardly have any complaints from prisoners and sometimes we can be the envy of my other Muslim chaplains elsewhere who may be struggling.

RT: Do you have any views on prisoners who convert to Islam while in prison? How easily do converts fit into the community? Is their presence welcomed or resented?

MG: The Human rights legislation allows a prisoner to practice whichever faith they want. This in practice means that a prisoner can change their religion as often

As indicated earlier a chaplain should hold their moral conscience and support everyone where possible.

as they want without any hindrance from prison authorities. This is not an ideal situation from a chaplain's perspective as genuine conversion from one faith to another takes a long time and deep considerations, it has both emotional upheavals and family distresses involved. Indeed although one must be willing to welcome a person who converts to your faith, this nonetheless can be steeped in concerns about the motives and circumstances surrounding the conversion.

Recently there was a piece of research done on forced conversions in the High Security Estate, and what transpired was that conversions are taking place across all faiths and is not specific to the Islamic faith. Also people are converting for a number of reasons namely;

- I. Culmination of a genuine spiritual journey
- II. Ulterior motives such as a perceived perk
- III. Fear and thus need of 'protection'
- IV. Peer pressure of gang associations
- V. Sometimes, but rarely, forced conversion

Recently I had a conversion from Muslim to Mormon and the reason given is that I do not want to be tarnished as being an extremist.

In prisons, on the surface of it, converts fit in well in the community and are welcomed, but they tend to struggle with readjustment of their lives to the new faith and the emotional upheaval that they tend to go through. Unfortunately there is also the pressure some converts feel in that they must completely transform their lives now having arrived whereas in reality, and to be fair, the transformation can take many years.

RT: In 2012 you were awarded the MBE for services to faith and diversity in the Prison Service. Can you tell me how you felt when you were told of the award and what it was like to receive it.

MG: It was a humbling experience but I suppose any type of recognition is always going to be appreciated although one does not do it for the recognition in the first place.



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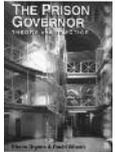
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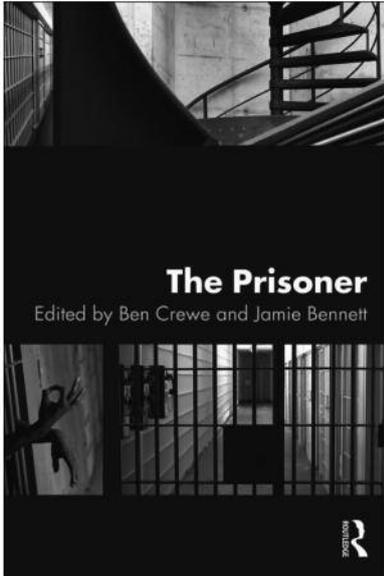
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