

## Responses to Phil's Presentation on The History of Punishment.

From Geoff Kennedy

I thought that I should get the ball rolling on the discussion on this month's topic of The History of Punishment. Thank you Phil for providing the introduction- it is a big subject

Reading through it reminded me a bit of the History of the Poor Law everything has changed and nothing has changed. The dilemmas remain the same and the public attitude, inconsistent as always, sums up the difficulties facing those trying to 'improve' the system. What we want from the justice system is, well, justice. Whose justice? We want perpetrators punished and victims to believe that justice has been done by them. At the same time, we want the punishment to fit the crime, whatever that means and not necessarily the victim's view on that (hanging is too good for them). We want to stop criminals reoffending, which means having graded punishments alongside support services before prison becomes an option. We want prisons to be places for reform and education, rather than a school for crime; this requires a humane approach, not a vengeful one, but, of course, we must not provide a holiday camp. Or do we, in fact, just want criminals out of the way for as long as possible, where they can do no harm and stop bothering us, not really caring how its done?

On top of all that, as Phil has laid out, there are more and more crimes; vehicle/road crime, hate crime, cyber crime; more crimes are rightly dealt with more seriously e.g. domestic abuse, child abuse, rape, modern slavery and much else besides. More legislation, more offences, longer sentences, more prisons, more courts, more police, rising prison population and, as far as I can see, we are still trying to resolve the same basic issues. The same arguments are taking place now as did in the 18th and 19th centuries. Have we made any real progress? Reoffending rates remain high; levels of literacy and general education amongst prisoners remain low; some prisoners are institutionalised or just 'wrong uns' who will not reform, but how do you separate the others? The justice system in general and the prison service in particular are not vote winners when it comes to committing extra resources and will always struggle for their share of the expenditure cake.

Perhaps the history suggests that we have to keep on trying, even if we feel we will never succeed

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From Ian Hedley

I came at this from a different angle.

I sang in Gilbert and Sullivan's Mikado when a university student in 1967 and was struck by their portrayal of punishment in 1885. As the Mikado says we should "let the punishment fit the crime".

The Mikado's view of the worst punishment was to make the offender play perpetual billiards on a cloth that's untrue with a twisted cue and elliptical billiard balls!

How middle class is that? Clearly late 19<sup>th</sup> century satire BUT!

What is punishment for?

Retributive justice is a theory of punishment that when an offender breaks the law, justice requires that s/he suffers in return.

It also requires that the response to a crime is proportional to the offence.

“Fit the crime”: But in whose purview does this lie?

The Judge, the victim, the offender or society?

Prevention of future crimes (deterrence) or rehabilitation of the offender are other purposes of punishment

The punishment should fit the crime - not the prior convictions of the person that committed the crime: An argument for less impact being accorded to previous convictions in sentencing.

The seriousness of the offense is the main consideration that should determine the severity of criminal punishment. This cardinal sentencing principle is undermined by the reality that often the criminal history of the offender is the most decisive sentencing consideration.

Recidivists are frequently sent to imprisonment for long periods for crimes, which, when committed by first offenders, are dealt with by a bond, probation or a fine. This makes sentencing more about an individual's profile than the harm caused by the offending and has contributed to a large increase in prison numbers.

Intuitively, it feels right to punish repeat offenders more harshly; however, the search for a sound doctrinal or normative reason to justify this approach has proven to be elusive — and there is certainly no demonstrated basis for according considerable weight to prior criminality in the sentencing calculation in relation to all offenses.

Moreover, the practice of punishing recidivists more harshly is potentially discriminatory because poor people are more likely to have prior convictions. Prior criminality should have far less relevance to sentencing. Previous convictions should only increase penalties in a meaningful sense when they relate to serious sexual or violent offenses. In such circumstances the premium should be in the order of no more than twenty to fifty percent. This reform would lower prison numbers, reduce the discriminatory effect of current sentencing practices, but not impair the efficacy of the sentencing system to achieve any of its key objectives.

A particular problem is in “white-collar crime”. What is the appropriate sentence for someone who 'usually' has an otherwise spotless record and poses no physical threat to the community? Though many have caused untold hardship, stress and strain on innocent people who are duped. Suicide amongst those duped is not unusual.

Recent cases show how hard it is to determine a just punishment for defendants who have so much going for them yet engaged in criminal conduct.

An American sentenced to four years in prison, seemed like the epitome of a success story. He came from a wealthy family and, armed with an Ivy League education, held a position at a private equity firm that put him near the upper tier of financial power.

Then he threw it all away by swindling family and friends out of more than \$38 million and was seeking more when he was arrested. This was to finance wildly speculative option trades that ultimately failed.

At the sentencing hearing, his lawyer portrayed the fraud as the product of a gambling addiction that drove his client to keep betting more and more on the market until he was broke.

4 years does not seem to fit the magnitude of the crime in human suffering.

Unlike those who commit street crimes, white-collar offenders are much more likely to be members of the middle class, and possibly even among the economic elite. They have the resources to present a sympathetic picture of their life while claiming that violations of the law were just aberrations from an otherwise exemplary life.

What tosh!

A criminal who destroyed lives. Much more serious than a street thief who may be stealing to keep his family alive not for sheer greed. But who do we treat more harshly? "punishment fit the crime"?

Society is the Judge of that and thereby we encounter the age-old conundrum, the circle cannot be squared.

Who would be a Judge? We all are with a small j.

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From Stephen Gill:

The difficulty I fear with the discussion of this subject is that it will veer into a combination of current affairs, philosophy and sociology, and away from social history if we are not careful. If I overstep that line with these remarks, my apologies in advance.

First, a couple of corrections, if I may. In the last para of page 1 Phil referring to Approved Schools wrote:

*In 1982 Approved Schools were closed down to be replaced by Youth Detention Centres with fixed term sentences and a much tougher regime (Short, Sharp, Shock).*

In fact, Approved Schools were abolished in 1969 in the Children and Young Persons Act, being replaced by CHEs (Children's Homes with Education), reflecting the Act's aim to provide a 'care' approach to juvenile crime as opposed to a punitive one. The 'short, sharp shock' was introduced into Detention Centres, (which were for shorter sentences than those typically served by Borstal trainees & had been part of the system since the late 40s), by the incoming Tory government in 1979. In 1982, both Detention Centres and Borstal Institutions were abolished and replaced by generic Youth Custody centres, themselves renamed and re-fashioned in 1992 as Young Offender Institutions.

Secondly, in respect of the age of criminal responsibility, the age when children could be prosecuted in England & Wales was raised from 7 to 8 in the 1930s and to 10 in the 1960s. Attempts to raise the age to 14 in the 1960s were unsuccessful, so the age remains at 10 in 2020. In Scotland, the age of criminal responsibility remained at 8 until it was raised to 12 by Act of the Scottish parliament in 2019, although in the 1990s it had been agreed as policy that children under 12 would not be prosecuted in the courts (see below for the separate Scottish system for dealing with youth crime).

Thirdly, in discussing the 1990s, the presentation talks of both Conservative and Labour governments embracing the 'prison works' movement. Although I believe it is true that successive New Labour Home Secretaries were as equally hard-line on crime issues as some of their Conservative predecessors, as I recall it was Michael Howard alone who championed the 'prison works' mantra.

It is with the subject of Young offenders, that the historic tension between a welfare/reformist approach to crime as opposed to a punitive approach has been played out. The social history of the UK has seen a number of 'moral panics' on the subject of children or young people as offenders, from the concerns at the turn of the century at the activities of gangs in the major cities (as depicted in the (fictional) TV series 'Peaky Blinders'); to huge public concerns about rising youth crime during the war years as a result, allegedly, of the removal of male influences in the family because of military service; to the classic 'moral panic' as documented by Stanley Cohen in the late 60s, the 'Mods and Rockers' phenomenon. Each in turn sharpened the calls for a harder, more punitive approach to these 'wild' children, and at the same time more 'liberal' approaches were advocated, based upon analysis of the causes of crime and a recognition that children were not fully mature, and therefore self-responsible people.

This debate came to a head in the 1960s when Roy Jenkins was Home Secretary with the groundwork laid for the 1969 Children & Young Persons Act, which, as written, envisaged removing children from the criminal justice system and treating juvenile crime as a care and education issue rather than a criminal justice one. However, as the backlash to this liberal legislation began even before it was implemented, certain key sections were not implemented, with the result that the juvenile, now youth court operates with young offenders in a mixed role combining punitive with welfare powers.

In Scotland, by contrast, the Juvenile court for young offenders was abolished in 1968 and replaced by Childrens Hearings to deal with all bar the most heinous and serious crime committed by children and young people. The system still in place though modified over the years, saw social work and education play the key role and explicitly gave the Hearings a principal responsibility to concern themselves with the welfare of the child.

The statistics on crime I found a little confusing, as it is not clear to me what the crime rate in the section on 20th century crime statistics refers. There have been historic difficulties in reporting trends in crime as there has been a documented difference, particularly over the past 40 years, between the recorded crime stats compiled by the police and the true crime figure, as experienced by the population at large. This phenomenon can I think be reliably assumed to have been just as true of the earlier part of the last century as the latter half. To be recorded a crime it needs to be reported - and we now know that many crimes are and were not reported to the police - including crimes of violence, theft, so-called white-collar crime and, in our own time, things like computer fraud. In addition, to be recorded, the police must record the report as a crime and we now know for example, that many things we now see as serious crimes, like sexual offences, especially where a child is the victim, and domestic violence, were in the past not treated as crimes worthy of investigation. Also, some crimes have been created or generated as society has changed, whilst others have declined e.g. as a result of technological changes. So, it remains an area where comparing crime rates over time is more complex than simply comparing police stats for bare numbers.

My overall thought is that crime has been an emotive subject in the public mind for at least a century or more, but has been more centre-stage over the past 40 years, in part because of media reporting and commentary, and in part because politicians have felt the need to respond in ever more direct ways to what they have perceived as public concern on this issue. This has invariably led to the pendulum effect in penal policy - moving from a liberal approach to crime and punishment to a more punitive approach sometimes even within the same parliament - e.g. under John Major, 1992 - 97. Even within the overtly 'welfare' body of the Probation Service, for which I worked from 1977-2015 this was clear. It has been further complicated since the 1980s as the whole criminal justice process has become more sensitive to the needs of victims of crime, through the court proceedings and thereafter as an important consideration in the application of penal policy.

Within the prison service this has also had an impact - particularly as it questions what is the purpose of the prison itself. Is it a means of reforming the offender, in which case there has been and continues to be a focus on education, training and behaviour change; a means of protecting the public by taking offenders out of circulation and giving communities a break from their behaviour; or a deterrent punishment in itself, making the institutions harsher more disciplined in much the same way as the 19th century workhouse was intended to deter the poor from entering. So, the Borstal system was established to emphasise the former purpose but ended up giving more emphasis on the second and third of these purposes, both in response to the pressures of public expectation and the realities of containing securely a large body of wayward, often violent, frequently damaged and difficult young men.

In my view, the problem remains in 2020 as it did for 19th century prison reformers and thinkers, such as Jeremy Bentham, and for the creators of the Borstal and Approved School systems. How do you 'reform' people whose behaviour reflects their often difficult family circumstances and background, educational failings, addictions and mental health difficulties, lack of employment or opportunity, physical and emotional poverty as well as distorted thinking, in a secure, closed institution removed from the society in which their underlying issues and problems need to be resolved, confronted and changed. For all the active policy changes and developments over the past century, these remain the critical questions of penal and social policy in the UK, now as they were at the turn of the 19th and 20th centuries.