CHAPTER 1

Prisons, Punishment and the Public

Many aspects of imprisonment are ineffective and inhumane. It isolates people from their families, and deprives them of their jobs, if they have any; the work provided in prison is frequently low-grade and insufficient to fill the working week, and sometimes there is none at all. Physical conditions are often deplorable and safeguards against ill-treatment unsatisfactory. There should be revulsion at the way millions of human beings are treated in prisons throughout the world (no one knows how many prisoners there are, but the number is probably at least five million, perhaps ten). Many are already poor and under-privileged, and prison makes them more so; many have committed only minor offences. Are there compensating advantages to explain why such a system has taken root so firmly? It is perhaps significant that those countries which have the best general records for welfare tend to make least use of imprisonment; but what has held them back from reducing it still further? Reformers have in the past set themselves the ideal of improving prisons, but it is time to ask more fundamental questions both about prisons and about the principles on which the penal system as a whole is based. This introductory chapter will consider some of the reasons why the public has not yet rejected imprisonment as a standard punishment; it will then briefly look at some of the punishments replaced by prisons, and at public attitudes to punishment in general.

Why are Prisons Tolerated?

Prisons are accepted and believed to be necessary partly for negative reasons: the public knows little about the kinds of people who are sent to them, or how they are treated in them. The number of people who have been 'inside', or know someone who has been, is much smaller than the number, say, questioned by the police; and those who have had the experience are not always ready to talk about it.

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So prison tends to be something that happens to somebody else. As La Rochefoucauld said, *'Nous avons tous assez de force pour supporter les maux d'autrui*': everyone can endure with equanimity the punishments inflicted on other people's husbands or sons. Relatives who contact the Howard League often say that they never imagined that people could be treated in such a way in British prisons until it happened to someone they knew—and to themselves when they started to come up against the regulations about such things as visits and letters. The theme, over and again, is: 'I know he (or she) has done wrong and deserves to be punished, but this is too much.' Although in some areas of big cities there is a higher proportion of people with direct or indirect knowledge of prisons, they tend not to believe that they can do anything about it; generally, it seems, they accept it as a fact of life, as one more reason for their cynicism towards the authorities.

It is difficult for the media to inform the public about what happens in prisons. In England, although the Home Office has recently adopted a slightly less restrictive policy toward access by journalists, prisoners are still restricted in what they may write for publication. It is consequently difficult to document, let alone prove, the malpractices and brutality which undoubtedly occur; and the other great scandal of prison, the stultifying boredom and waste of human lives, does not lend itself to making news stories. There have been some fictional representations of prison life. The comedy series 'Porridge' gave a somewhat cosy impression, though it did convey that one of the principal occupations of prisoners is outwitting the authorities; others, like the television programmes 'Law and Order' and the film 'Scum', although based on fact, presented such a one-sidedly brutal and corrupt picture as to undermine their own credibility. While some television features and serious newspapers have partly redressed the balance between these extremes (in particular, Rex Bloomstein's eight-part television documentary series 'Strangeways' in late 1980 gave a restrained and thorough picture of the pointlessness and injustice of prison life), in general the media have achieved little more than a slight and occasional public awareness that all is not well with the penal system. Some aspects of the public shortsightedness which results from this lack of information are described by a Canadian parliamentary committee:

> Many in the community have the misconception that, once the offenders are sentenced, that is the end of it; they are out of sight and out of life ...

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> The reality is that all—except those who die in prison—come out legally on expiration of their sentence.... When they come out they are the people who move into the house or apartment next door, who ride buses with you, eat in the next booth in restaurants, walk on the same streets, sell papers, deliver groceries, fill your gas tanks, and talk about the weather with you in the theatre line-up. Therefore it is apparent that the community is safer if the person who shares their freedom is not more dangerous when he joins them in life on the outside. Prisons, as they now exist, protect society only during the 2, 3, 10 or 20 years the inmate is in there; but if the institutions are boring, oppressive and lack programmes preparing the inmates for release, they come out angry, vindictive, frustrated ... Many are released onto the streets directly from maximum security institutions, unadjusted, unprepared, with fear, tension and paranoia that spell danger to the community.
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> (Canada 1977, paras. 75-78)

Nor is much research published which might percolate into the public consciousness to set the record straight. Part of the reason for this must surely be that social scientists, anxious to achieve some worthwhile research, tend to look to areas where there are not so many obstacles, raised by an over-cautious bureaucracy, to obtaining permission and the necessary access to institutions. What information we have tends therefore to come from the Prison Department and its staff (insofar as they are not inhibited by the Official Secrets Act and civil service rules) and from ex-prisoners, neither of whom can be regarded as impartial sources. Prison administrations have their own reasons for being secretive. Partly it is for the laudable purpose of protecting prisoners from the intrusion of the less scrupulous sections of the media (although the secrecy itself adds to the scarcity value of stories about prison life), but partly it is to protect the Prison Service and its staff against criticism—ostensibly against unjust criticism, but in fact it also serves to keep the volume of justified criticism down to manageable proportions.

In practice secrecy has the subsidiary result of enabling prisons to continue, for reasons explained by Bernard Shaw (1922) in his preface to the Webbs' *English Prisons Under Local Government*:

> The public conscience would be far more active if the punishment of imprisonment were abolished, and we went back to the rack, the stake, the pillory, and the lash at the cart's tail .... [People] can be shamed at last into recognizing that such exhibitions are degrading and demoralizing ... We

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> have then to find some form of torment which can give no sensual satisfaction to the tormentor, and which is hidden from public view. That is how imprisonment, being just such a torment, became the normal penalty .... It would be far better for [the prisoner] to suffer in the public eye; for among the crowd of sightseers there might be a Victor Hugo or a Dickens, able and willing to make the sightseers think of what they are doing and ashamed of it. The prisoner has no such chance.... the secrecy of his prison makes it hard to convince the public that he is suffering at all.

Obsolete Punishments

Thus as more primitive punishments have been done away with, prisons, as the next worst thing, are accepted *faute de pire.* The process was clearly seen in the case of corporal punishment: the legislators who drew up the Criminal Justice Act 1948 considered that the only way to secure its abolition as a judicial penalty was to introduce a new 'short, sharp' custodial sentence in institutions with a specially strict regime—detention centres. Some people remain unthinkingly in favour of corporal punishment as a 'solution'; others regretfully admit that it would be undesirable to reintroduce it, if only because the delay in bringing offenders to trial means that it cannot be inflicted promptly. A persistent mythology surrounds birching and flogging: it is asserted, for example, that no one ever risked a second dose of the cat o' nine tails. Comprehensive Home Office research over three decades showed, however, not merely that this is untrue but that those who had been flogged were if anything more likely to commit further violent offences; the Advisory Council on the Treatment of Offenders (1960) examined the records of 3,023 persons convicted from 1921 until abolition in 1948. Of offenders who had no previous serious convictions, 38.8% of those who were flogged were reconvicted for a major offence, including violence in some cases, but only 33.1% of those not flogged. Where offenders did have a serious criminal record, reconvictions of those flogged amounted to 68.5%, of those not flogged 66.9%. The degrading nature of the ceremony is described in the Advisory Council's report (pp.23-24):

> the victim was strapped to a triangular frame, with his hands above his head, with leather belts to protect sensitive parts of his body, for juveniles, sometimes one police constable would take the boy on his back, with another holding his feet.

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It is often assumed that flogging was imposed for a range of offences, but in fact since the Larceny Act of 1916, it had been permissible only for robbery with violence and related offences—and after abolition in 1948 the numbers sentenced for this offence declined for seven consecutive years (Howard League, 1961). Moreover, within penal establishments in this country corporal punishment was abolished in 1967, because it was found to be not merely ineffective but also counter-productive. Nevertheless, proponents of corporal punishment appear to ignore the possibility that any other response might be more appropriate and more effective. Speakers like Mr Teddy Taylor M.P, continue to call for 'the return of corporal punishment for crimes of violence and the imposition of sentences that strike fear into the hearts of potential offenders' (*Daily Telegraph,* 27 August 1975). Sir Keith Joseph, on the other hand, as a former minister for social services and home affairs spokesman, has considered the evidence and concluded that judicial beating is necessarily cold-blooded and would brutalize more than it cured.

The question is enmeshed in atavistic attitudes. In the 1970s it was still possible for a judge to say publicly that he would like to put football hooligans in the stocks (Judge Gwyn Morris, Q. C., in *The Times* 9 August 1975). Another (Judge Hill, 4 February 1978) spoke of cutting a persistent offender's ears off, but said afterwards that he had not been speaking seriously. And there seems to be a kind of horrified admiration for those Muslim countries which do not shrink from the painful task of cutting off the hands of thieves, although the fact that this penalty is accompanied by flogging for dealing in alcohol and public stoning to death or beheading by the sword for adultery conveys a hint that the Islamic code might after all be too rigorous for Western *mores.* Some Muslim writers, it should be noted, are at pains to stress that the injunction 'As for the thief, both male and female, cut off their hands' *(Koran,* 5:38) should be taken in conjunction with the insistence on the mercy of Allah, repeated for example in the very next verse; moreover, the phrase 'cut off their hands' can be interpreted figuratively as 'prohibit the use of their hands', i.e. restrict their free movement or activity (Khan, 1967, pp. 74-76). There is, however, nothing figurative about the penal code in, for example, Pakistan, which provides for amputation of the right hand from the joint of the wrist, by an authorized medical officer, unless the left hand or the left thumb or at least two fingers of the left hand are either missing or entirely unserviceable; and similarly, after a second conviction,

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for the left foot. (Offences Against Property (Enforcement of Hudood) Ordinance, 1979)

Public Attitudes to Punishment

Punishment is a very old and deep-rooted principle; this does not necessarily justify it, although it makes it hard to eradicate. Policy should not be based on badly thought out and ill-informed attitudes merely because they are widespread. As Sir Keith Joseph has said in another context, 'Ideas, generally yesterday's ideas, are the most powerful of all forces' (speech on 3 October 1974). Part of the folklore about punishment, for example, is the image of the village bobby who in the good old days gave delinquent youngsters a 'smart cuff' (see, for example, Lord Justice Lawton's Cambridge speech, *Guardian, 2* September 1978). The assumption here is that better behaviour was induced by the pain of the blow rather than by the talking-to which probably accompanied it. Often no doubt there was a talking-to without a cuff. In any case there is not a shred of evidence as to the relative effectiveness of using one or the other or both; it is astonishing that judges, who insist on evidence in determining guilt, so often disregard it in relation to the choice of punishment. If the legendary bobby had any effect it was probably produced by the fact that action was taken promptly by an adult whom the boy knew and quite possibly respected and who would be likely to catch him if he repeated his offence. The same applies to beatings at school, which ex-inmates of famous boarding schools often say 'didn't do them any harm'. Nor did they always do much good: the Old Etonian Marquess of Tweeddale told the House of Lords in a debate on law and authority in society *(Hansard* [H.L.) 1 March 1978, col. 511) that he was beaten 27 times and birched twice at school—clearly a case of juvenile recidivism.

While I was writing this I visited Leominster Priory, where a ducking stool is preserved, reputedly the last one used in this country (in 1809). It was used to punish not only scolding women but tradesmen who gave short measure or sold adulterated food. A jokey poem on a postcard gave away the *Schadenfreude* of the whole thing by describing it as 'the joy and terror of the town'. A local Christian gentleman came in; we spoke of penal reform and he summarized, without further prompting, the plain man's theory of penology: it might not be a bad thing if the ducking stool were used occasionally today, things were better when the village policeman etc., and he didn't resent the beatings he had received at school because he had

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probably deserved them. The assumption that when a person has done wrong he should be made to suffer is deeply ingrained. The prevailing orthodoxy has been lucidly stated by Lord Justice Lawton:

> When sentencing, judges should take into consideration the extent to which what they do is likely to accord with public opinion. If their sentences outrage public opinion by being too severe, the public will not benefit. A criminal who was deserving of punishment may be turned into a martyr overnight and the law will be lowered in the estimation of right-thinking people. This latter result tends to follow when sentences are thought by the public to be too lenient. A sentence is the expression of the community's disapproval of crime and if it is either too severe or too lenient the disapproval can shift from the crime to the law and the judges.
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> Judges, however, must not pander to public opinion which may be wrong-headed or sentimental ... In difficult cases the judge may have to lead public opinion to an understanding of what he has done. This he can do by giving reasons for his sentence. (Lawton, 1975.)

But this does not say how judges assess public opinion: by reading the newspapers? If so, which ones? The editorials or the correspondence columns? Listening to phone-ins? In conversation at clubs and dinner parties? If the relatives of a victim call for retribution, does that make it a sound basis for penal policy? Even supposing it could be shown that there was a clear majority of opinion in favour of a particular set of penal policies, and that the judges and magistrates collectively knew what it was, there are difficulties. Firstly, the public is not well educated on either the facts or the moral arguments relating to penal policy. Secondly, this lack of education is shared by judges, with the exception of some who have taken a special interest in criminology or have served on the Parole Board or the Advisory Council on the Penal System. Magistrates' horizons have probably been extended by training, though it is difficult to say how much, and it is to be hoped that the new Judicial Studies Board will do the same for judges. Statistics, which are issued almost daily on economic questions, are published quarterly for recorded crime but only annually for prisons and probation. The probation service is small (less than 6,000), decentralized and no longer has even a separate department within the Home Office which could spread information about the advantages of non-custodial sanctions. Until reformers succeed in getting a wider range of facts accepted into the 'conventional wisdom' it seems likely that a self-reinforcing process takes

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place: eminent people express conventional views, are supported by newspaper editorials, take these as a reflection of public opinion and reiterate their original statements. At the same time, some readers of the press also accept these authoritative pronouncements and reflect them back to the speakers personally or in resolutions at conferences, again strengthening their natural belief that they are right.

The question amounts to this: What is the reason for the persistent use of punishment in general and prisons in particular? But first it is necessary to ask: Why do certain types of activity continue to be considered criminal, while other harmful acts do not? Part of the reason, it has been suggested, is that these processes fit in very well with the interests of numerous people or groups within the community, including many who are articulate, influential or powerful. Many who regard themselves as law-abiding discount some offences (and some harmful acts which have not been defined as criminal) which they themselves commit and therefore tolerate: motoring offences and tax evasion are obvious examples. 'Crime' is thought of as comprising a much narrower range of offences, committed by 'them', not by 'people like us'. If individuals offend sufficiently seriously to be sent to prison, this imposes upon them the status of being 'criminals' and hence 'different' (or to use the sociologists' term 'deviant'); if the experience of prison and its aftermath drives them to offend again, they are more likely to be caught, and hence to be regarded as still more deviant. This way of looking at things obscures not only the lawbreaking of 'people like us', but also the fact that many of the legal things we do, including the way we order society, apportion resources and define crime, help to push other people into some of the types of behaviour which we condemn.

There are however some more positive reasons for the public's willingness to tolerate prisons. They will be outlined here and considered in more detail later. Firstly, the justification is often advanced that imprisonment deters individuals from committing crime. Lord Justice Lawton (1975) has expressed this view in all its deceptive simplicity:

> I am convinced that crime will continue to *increase as* long as the public are bamboozled into thinking that a prime cause of it is bad social conditions and not wickedness. Bad social conditions are contributory factors but the public should realize that criminals are human beings ... and that like all other human beings of sound mind they will probably respond to rewards and punishments. What may have gone wrong in the past severity years is

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> that the State has made the carrots more and more appetizing and the stick (figuratively of course) has been little used.

Almost every sentence of a statement like this contains assumptions, explicit or unspoken, which are open to question. If crime is ascribed to wickedness, that is not of itself a justification for sending people to prison. After jumping from a moralistic to a behaviouristic dimension, Lawton makes no reference to the basic findings of behaviourist psychology, in particular that punishment, to be effective, must be applied promptly, and that the effects of reward tend to be more long lasting. He assumes that criminals calculate the risks in advance, but many plainly do not; for those who do, the odds against detection may make the risk worthwhile, even if the punishment were doubled. Although environmental effects can be exaggerated, few criminologists would dismiss them so casually, especially since for many people today the rewards offered for law-abiding behaviour are small, and smaller still for most ex-prisoners. It is irrelevant that state benefits are greater than they were seventy years ago, since people compare their conditions with those of their contemporaries, not of their grandfathers.

Prison is, secondly, supposed to protect the public from certain offenders. Many people agree about the extreme cases: those whose violence is serious and likely to be repeated will have to be locked away (although there is less agreement about how they can be defined). But others are by any standards petty offenders, for whom any advantage from 'giving the public a rest from their activities' (in the time-worn judicial phrase) is outweighed by the adverse effects of the prison sentence. It is between these extremes that the problem becomes more difficult: the less serious violence and the more serious property offences. This is where it is most important to ensure that measures intended to protect the public do not, because of the hostility, violence and other effects engendered by prisons themselves, have the contrary result.

The third practical justification for prisons is that they are supposed to rehabilitate. The belief persists that it is possible to impose some form of treatment and training for prisoners during their incarceration, after which, if they offend again, the blame can be placed on them. They are assumed, particularly in the case of 'borstal training', to have been given a chance. It is true that some training does take place, some prisoners are helped by staff, and some do reflect on their misdeeds, regret them and resolve to change.

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But rehabilitative and educational facilities in prisons are generally limited and in some countries non-existent: not only do most prisoners receive little treatment or training, but when they do its effects are likely to be submerged by the other influences of prison, and by the person's experiences after his or her return to the community. To justify imprisonment primarily on grounds of education and welfare is specious, for if a person needs help of this kind it should be provided in the community and not combined with the severe punishment of imprisonment, unless such punishment is warranted by the seriousness of the offence. Help should of course be available in prison as well; but it should not form part of the reason for sending anyone there.

In addition to these practical justifications of imprisonment, however, there are deep-seated symbolic ones. As a method of punishment, graduated in periods of time, it marks and denounces the seriousness of the offence. Criminologists have recently focused their attention on the tariff aspect of this denunciation in an attempt to ensure greater consistency between crimes and the penalties they attract. Existing maximum penalties have, however, been fixed haphazardly by Parliament over the years. The Advisory Council on the Penal System (1978) suggested that the actual sentencing practice of the courts bears a closer relationship to seriousness, and should form the basis of a new scale of maxima, with a proviso that the maximum could be exceeded in certain defined cases of exceptional gravity. But if a change is to be made, there is a case for constructing a new tariff: the relative seriousness could be assessed by consultation or modern survey techniques, while the length of partial or total deprivation of liberty would be determined on a scale well below the current rate unless any practical reason could be shown for keeping it at its present level.

An entirely new scale, almost eliminating the judge's discretion in sentencing, was created in the Uniform Determinate Sentencing Act of 1976 in California. Apart from a few exceptionally serious crimes for which an indeterminate sentence of seven years to life is possible, there are 181 offences classified in four 'ranges'; for each of these there is a standard length of prison sentence, with a slightly shorter or longer one if there are mitigating or aggravating circumstances. The court may however impose probation instead of a prison term, except in seven cases where this power is restricted and two, involving firearms, where it is prohibited (McGee, 1978). The objectionable features of this law, however, are its rigidity and the fixed minimum sentence, which lead to greater use of imprisonment.

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The justifications of punishment will be further examined in Chapter Eight; meanwhile the effects of imprisonment in practice will be considered in more detail.

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