

Against Prison

by **Thomas Rodham** (February 2013)

Prison time is a very severe punishment. JS Mill likened it to being consigned to a living tomb.* Any society that employs it should do so with care and restraint. Yet we do not. Partly because we think that prison is a humane punishment, it is drastically over-used in many countries, to the point of cruelty. Aside from failing in humanity, prison does not even perform well at the specific functions of a criminal justice system, namely, deterrence, retribution, security, and rehabilitation. We need to reconsider our over-reliance on prison, and reconsider whether other types of punishment, even capital and corporal punishment, may sometimes be more effective and more humane.

The fundamental problem with prison time, as Mill notes, is that its severity is hard to imagine. After all, many of us frequently find that what with one thing and another we have spent the whole day indoors, and we don't find that we have really suffered for it. It is hard to imagine quite how it must be to be confined to a small space and narrow routine for periods of years, or even until death. There is no great drama to focus on. No particularly terrible things happen. Just more of the nothing. Attempting to multiply our feelings about spending one day indoors does not really get us there.

A punishment that is hard to imagine will not work very well. First, people contemplating breaking the law will not be especially deterred by dread of the punishment. In particular, though the concept of prison as an institution may be somewhat daunting, it is hard to contemplate the difference in severity of spending different lengths of time in one. Duration is a rather abstract dimension, and the difference between 5 years and 10 years, especially the cumulative difference, is hard to imagine. Thus, contrary to the influential 'law and economics' perspective, people are not able respond rationally to the schedule of prison time sentences for different crimes by making cost-benefit calculations for their actions that incorporate the 'price' of punishment. Nor do increases in

sentences have the deterrent effect one might expect (so sending armed robbers to prison for 40 years instead of 10 doesn't much reduce the incidence of armed robbery).

A punishment that is hard to imagine will also fail to satisfy the moral outrage of those who have been wronged. If a child is run down by a drunk driver, not only the parents but the society as a whole demands a severe punishment. Though a criminal justice system cannot be run on populist grounds in particular cases (that would just be mob rule), in order for justice to be seen to be done it does need to respond to popular demands and perceptions. Thus, even though the professionals staffing the justice system may understand the severity of prison time as a punishment, their judgement may be superseded by the pressures of popular opinion. This is most evident where populist politics is integrated into the justice system, such as in America where judges and prosecutors are often directly elected.

Where prison is the only severe punishment available, and length of time the only measure of severity, one will naturally find that very long sentences will be handed out in such cases. On an impartial view of the matter, the severity of the punishment often seems quite disproportionate. And yet the victims and those who sympathize with them often remain dissatisfied. After all, aren't some prisons like hotels, with TVs and private bathrooms no less! To many people even 10 years confinement to such a place hardly seems a just punishment for driving over an innocent child.

This dissatisfaction lies behind the dismaying popularity of inhumane prison conditions, seen most clearly in the pervasiveness of sly jokes and official winking about prison violence and rape. One can understand this phenomenon as a reaction to the imaginative shortcomings of simple prison time as a punishment. If prisons are understood as places of physical and sexual violence, then a prison sentence takes on a much more dramatic character that is easier to imagine for

both potential criminals (deterrence) and victims of crime (retribution).

But this is a very dissatisfactory fix. In effect the punishment of prison time comes in two parts. The term of imprisonment that society's justice institutions decide is right and proper. And an additional corporal punishment component outsourced to the most vicious and violent thugs in the relevant prison community to determine and administer. That corporal punishment regime is out of society's control, but remains our responsibility. It falls most heavily upon the weakest and most vulnerable prisoners, not the most wicked, and makes society into torturers by proxy.

Two criminal justice functions unrelated to punishment are also relevant to thinking about prison: *rehabilitation* and *security*. The rehabilitation argument is a humanitarian one. Dysfunctional people commit crimes, including terrible crimes, but many of them can be made better. Prison time appears to offer a way to impose rehabilitation on criminals, since they are a captive audience. This was an important argument by 19th century liberals for proposing prison as the best form of punishment and thus the only legitimate one. (Hence the rather optimistic terminology of 'correctional facilities' and 'penitentiaries'.)

Yet rehabilitation as an aim fits poorly with the punishment emphasis, as is clear from the generally high re-offending rates of ex-convicts in many countries (particularly the ones that use prison the most).