Punishing REGIME

The Left has always had a lot to say about prisons; mostly, it seems, wanting to abolish them. David Brown begs to differ. He argues that it's not good enough to relegate prisons to the chamber of horrors. A new politics of policy is needed.

The last three decades in Australia and elsewhere have seen the return to the public gaze of prisons and forms of punishment. In the 1960s and 1970s the increased visibility of the prison owed much to the upsurge in prison disturbances and prisoner militancy, and to the emergence of prisoners, along with second wave feminists, aborigines, students, environmentalists, psychiatric patients, and many others as 'new' political subjects—and to the intellectual and lifestyle ferment around the Vietnam war, feminism, anti-psychiatry, the marxism of the new left, and so on. In the 1980s prisons and penalty remained in the public domain but increasingly as signifiers of a new rhetoric of retribution, a retributivism of supposed 'untruthful' sentencing policies, and of the mythical 'motel conditions' in prisons. At another level, prisons were brought back into the public eye as the site of deaths in custody and as potential incubators of the HIV virus.

The 60s and 70s exposure of the brutality of the prison, its counter-productive, stigmatising and recidivist effects on the one hand, along with, on the other, the apparent failure of the rehabilitative ideal, the widespread view of community correction as merely 'netwidening'—extending social control into the community in more subtle and sinister ways, created a climate in which the prison was seen to have failed as an institution. These two trends—a leftist opposition to prisons *per se* as brutalising, and an apparent-
ly conservative reaction against the ideal of rehabilitation—might appear on the face of it antithetical. Yet both served to create the impression of a prison system perpetually 'in crisis', unable to fulfil its utilitarian functions, unable to protect the community from crime, to rehabilitate or to deter the individuals incarcerated from offending again when they were released.

Yet while there was considerable agreement over the failure of the prison, responses as to why this was so and as to what should be done were diverse and even opposed. Among Australian prison movement activists a strong abolitionist current emerged, drawing on Marx and the 'new' criminology. The prison was seen as fundamentally an instrument of class oppression, part of the repressive apparatus of the capitalist state protecting the existing distribution of property and disciplining labour. It was, like the capitalist system itself, to be condemned in general while in the particular a struggle was conducted for those 'negative' reforms which would break down the power of the prison and open it up to democratic scrutiny and a phased abolition.

A particular interpretation of Michel Foucault's influential work Discipline and Punish (1977) was later grated by left critics onto this class struggle explanation of the prison, producing a much more nuanced attention to the detail of specific disciplinary practices. For Foucault, the failure of the prison, evident almost from its inception, was rescued by the utility it provided in producing a delineated and identifiable group of delinquents. This group could be used to justify the creation of police forces, the expansion of state coercive powers, the differentiation of 'delinquent' from 'respectable' poor, and the neutralisation of popular illegitivities. In this account penal reform became the very project of the prison, the reformed, humane and efficient prison constantly being offered up as the solution to its own failure.

A quite different response emerged from populist politicians and those sections of the public convinced that any problems with the prison system had their origins in a loss of a discipline stemming from a process of reform, such as that undertaken in NSW in the aftermath of the Nagle Royal Commission of Inquiry. Penology's depressing message that "nothing works", the failure of the rehabilitative ideal, and high recidivist rates, all provided a better platform for a minister like Michael Yabsley (Corrective Services Minister in the first term of the NSW Greiner government) to argue that notions of failure were a product of misconceived objectives. The function of the prison was to punish and this fundamental objective had been obscured in the acceptance of the notion of prisoners' rights and in the meddling social work practices of parole, prisoner programs and 'alternatives'—what he calls "the hogwash of sociological dictum" promoted by "small groups of self-appointed society changers".

Yabsley's views are worth quoting at greater length:

We had the prisons crowded with counsellors, social workers, teachers and various representatives from a multitude of organisations, all intent on bringing a sudden and irreversible change in those who were considered to be unfortunate, disadvantaged, inadequate and who were in need of care, guidance, and understanding. They would baulk at the 'just deserts' model of punishment and have us adopt the 'rehabilitative model'. They would want to know what right the majority had to lock up the few. They would ask how is it that 'the incarcerated citizen should forfeit all of his rights along with the loss of his liberty'. 'Draconian' is the catchcry of this small group of self-appointed 'society changers'. 'Wrong' is the cry of the elected representatives of the community. 'Wrong' is the cry of the substantial majority of the community.

In this sense, then, constant talk of the failure of the prison in terms of some ends/means calculation derived from the utilitarian justifications for punishment, as Paul Hirst has argued, provided a fertile ground for the reassertion of retributivist responses. Yabsley again:

Punishment is synonymous with prison, punishment does have a deterrent value, so too must the prison. Punishment is a lesson. It may not always work, but it is the best, in fact, the most effective instrument we have which can be consistently and firmly applied to those who would attack us.
This is how we can understand Yabsley’s desire to be remembered as “someone who has put the value back in punishment”. The aim is, quite literally, to intensify the punitive force of the experience of imprisonment on prisoners. Hence the abolition of remissions, the intensification of penal discipline, the property confiscations policy, the slashing of welfare and rehabilitative programs, the removal of mechanisms of scrutiny and accountability, the reduction of parole to an afterthought, and the enactment of sentencing policies which are clearly having the effect of increasing the length of sentences and increasing the rate of imprisonment.

Unfortunately, the climate conducive to the rise of the new retributivism was fuelled by left-liberal reformers, who argued that the fundamental problem in sentencing and punishment was the confusion of and contradiction between the various aims or justifications for sentencing. The solution was therefore the adoption of a single and ‘coherent’ ‘predominating rationale’ for punishment and sentencing. Understandably disillusioned with utilitarian arguments, they looked for salvation to ‘just deserts’. In some cases the concern was to invoke the limiting effect of just deserts, to prevent incarceration for allegedly therapeutic purposes, to combat sentencing inconsistencies and promote certainty. In others, the concern was to use the sentencing battlefield to promote a particular philosophy of republican virtue in which punishment was seen as a right of the wrongdoer and centralised government and bureaucracy an enemy operating only to promote instrumental rationality over the authentic moral claims of the local polis.

Common to many of these arguments coming from a variety of seemingly opposed positions is that punishment can and should be analysed in terms of a single aim or function and that the prison is a singular and unitary institution. In contrast I want to argue the following propositions:

(i) As Paul Hirst has pointed out, means of punishment are not timeless or constant: rather they are “artifacts of social organisation, the products of definite institutional, technical and discursive conditions in the same way as other artifacts like technologies or built environments”.

(ii) As such they are not explicable in terms of some individual and singular ‘purpose’ but by the combination of conditions under which they become possible.

(iii) We need to acknowledge more clearly the diverse and differentiated nature of prisons, for example, as Mark Finnane has pointed out, the imprisonment of juveniles, of women, of Aborigines, or imprisonment in specific regimes such as prison farms or police lock-ups, are far from all of a piece. The histories, cultural meanings and material forms underlying these experiences are highly specific, and often highly localised.

(iv) Far from being purely sites for the exercise of an exclusively negative power to punish, prisons are also institutions for the “expression of social values, sensibility, and morality, rather than as an instrumental means to a penological end”.

(v) All of these considerations suggest a need to reconceptualise the power to punish, and specific penal practices and institutions such as prisons as forms of community resources, subject to political debate. In other words, prisons should be viewed not as the property of a technical penology, but as the subject of social policy debates of an allocational and distributive nature.

While the Australian rate of imprisonment is increasing nationally, the trends are very uneven across the states. In the period March 1988 to March 1991 (roughly the first term of the Greiner government) the number of people imprisoned in NSW increased by 44.5% while in Queensland over the same period it decreased by 4.8%. Both these states are subject to broadly similar sorts of macroeconomic forces and federal government policies while, clearly, the local political cultures are undergoing significant shifts. In other words, it is possible to reduce imprisonment rates through specific social, economic and legal policies tied to a reformist political program. But for that to happen we need to be able to think about imprisonment in different ways, to debate it in different terms to those stemming from a legacy of oppositionalism.

Prisons express a range of functions and values and have considerable social support; they are not going to go away. Nor are we likely to come up with many new forms of sentencing alternatives likely to replace completely the prison, at least as a backup for other less restrictive and totalising sanctions. And because prisons are not the effects of some singular logic or essence, there is no rationalist key by which they can be consigned to the chamber of horrors or abolished in thought by the adoption of the correct emancipatory logic.

Prospects for positive reform depend on an ability to undermine the new retributiveness where it is in the ascendency—as in NSW—or to improve the conditions for reform and innovation, where they are on the rise—as in Queensland. In order to do this we need to leave behind the particular sort of oppositionalism which sees all prisons as essentially the same, all penal practices as manifestations of repressive power and authority, the experience of imprisonment as given for everyone and as best evaluated according to the traditional legal criteria of time served.

The greater our understanding of the complexities and nuances of the penal system, its expressive and positive effects along with its negative ones, and its bases of social support and opposition, the better placed we are to bring about change, to move from the almost exclusive concentration on critique which has characterised the focus of liberal-Left critiques of the penal system to a preparedness to formulate policy.

DAVID BROWN teaches in law at the University of NSW.