

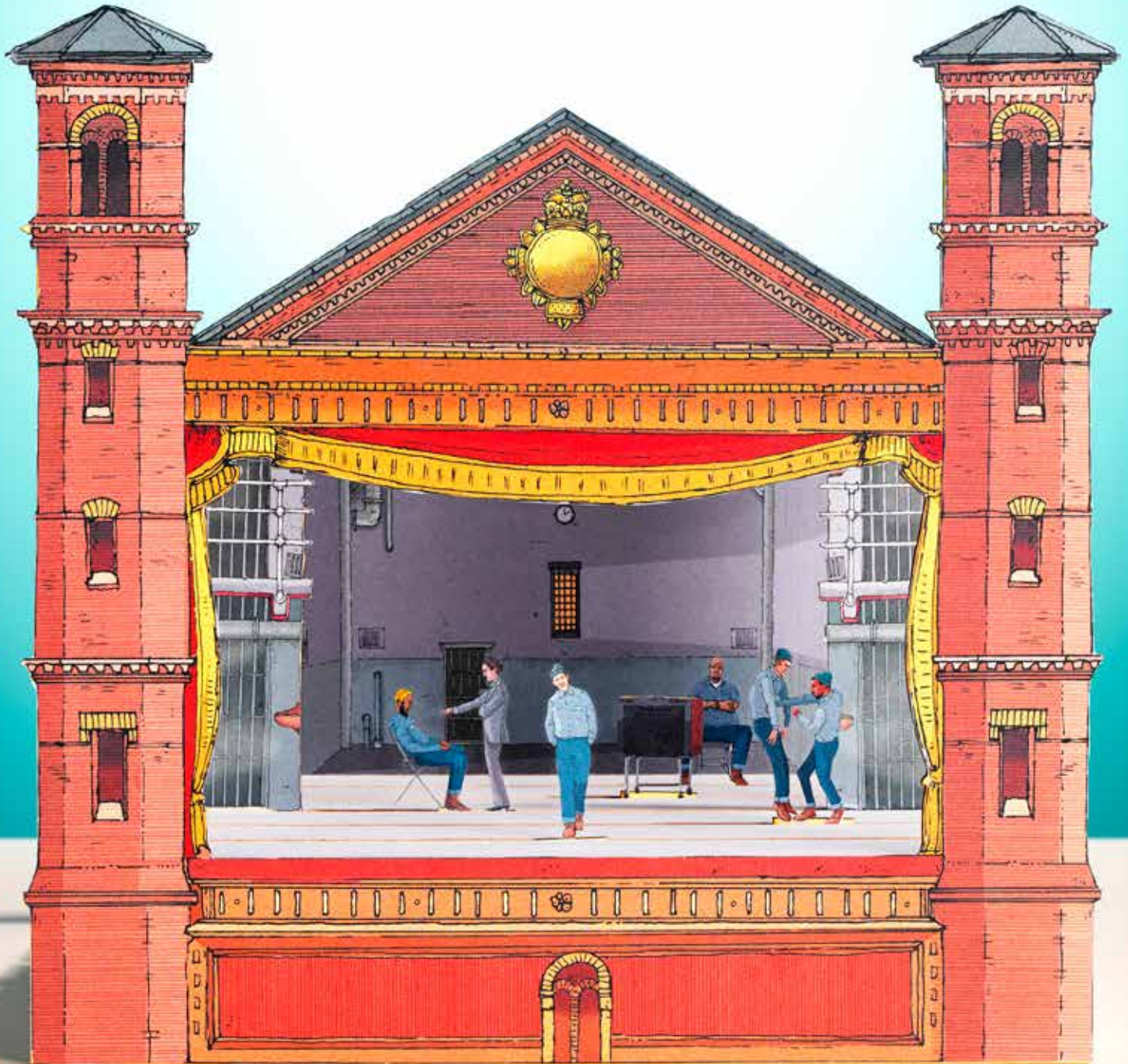
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Matters of conviction

Rachel O'Brien sets the stage for rethinking prisons

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ARRESTED DEVELOPMENT

Approaching criminal justice with a model rooted in public health ethics rather than retribution could prevent crime and breed rehabilitation

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Within criminal justice systems, incarceration is often seen as justified by the ‘desert’ of people who have committed crime; because they are guilty (morally, and not merely legally, guilty), we can impose significant sanctions on them. This retributivist justification for punishment maintains that punishment of a wrongdoer is justified for the reason that she deserves something bad to happen to her just because she has knowingly done wrong; this could include pain, deprivation or, in some systems, death. For the retributivist, it is the basic desert attached to the criminal’s immoral action that provides the justification for punishment. This means that the retributivist position is not reducible to consequentialist considerations nor in justifying punishment does it appeal to wider goods such as the safety of society or the moral improvement of those being punished.

While retributivism is one of the (if not the) main sources of justification for punishment within the criminal justice system, I contend that there are at least two good reasons for rejecting it. This first is that retributive punishment is often practically ineffective. Several studies, for example, now show that retributivism often leads to excessively punitive forms of punishment and that such punitiveness is often counterproductive from the perspective of public safety. Of course, there are many reasonable retributivists who acknowledge that we imprison far too many people, in far too harsh conditions, but the problem is that retributivism remains committed to the core belief that criminals >>

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deserve to be punished and suffer for the harms they have caused. This retributive impulse in actual practice – despite theoretical appeals to proportionality by its proponents – often leads to practices and policies that try to make life in prison as unpleasant as possible. It was this retributive impulse, for instance, that lay behind 2014 changes to the incentives and earned privileges (IEP) scheme in England and Wales and which resulted in an effective blanket ban on sending books to prisoners. Luckily, the high court declared the ban unlawful, reasoning that books are often essential to the rehabilitation of people in prison. It is also this retributive impulse that has led, at least in part, to the mass incarceration crisis in the US.

By now most people know the numbers. With only 5% of the world's population, the US imprisons 25% of the world's prisoners – far more than any other nation in the world. The US has more than 700 prisoners for every 100,000 people, whereas Scandinavian countries such as Sweden, Finland and Norway hover around 70 per 100,000. And not only does the US imprison at a much higher rate, it also imprisons in notoriously harsh conditions. American supermax prisons are often cruel places, using a number of harsh forms of

punishment, including extended solitary confinement. The watchdog organisation Solitary Watch estimates that up to 80,000 people in the US are currently in some form of solitary confinement. These prisoners are isolated in windowless, soundproof cubicles for 23 to 24 hours each day, sometimes for decades.

A DOWNWARD SPIRAL

Such excessively punitive punishment not only causes severe suffering and serious psychological problems, it does nothing to rehabilitate prisoners, nor does it reduce the rate of recidivism. In fact, the US has one of the highest rates of recidivism in the world, with 76.6% of prisoners being rearrested within five years of release. Norway, by contrast, averages around 20%. Looked at empirically, then, it seems nigh on impossible to defend the claim that commitment to just deserts and retributivism ensures proportional and humane punishment. In fact, the opposite seems to be the case – the problem of disproportionate punishment seems to grow more out of a desire for retribution and the belief that people justly deserve what they get.

In addition to these practical concerns, there is a further reason for rejecting retributivism. While there have always been those who have questioned the underlying justification for retributive punishment, there is now a growing number of prominent philosophers, scientists and lawyers who doubt or outright deny the existence of free will and moral responsibility. Such views are often referred to as sceptical views, or simply free will scepticism.

Some of the main arguments for free will scepticism can be found in my book *Free Will and Consciousness*, as well as in my edited collection *Exploring the Illusion of Free Will and Moral Responsibility*. Free will scepticism maintains that what we do and the way we are is ultimately the result of factors beyond our control and because of this we are never morally responsible for our actions in the basic desert sense; the sense that would make us truly deserving of praise and blame in a backward-looking, non-consequentialist sense. If free will scepticism is correct, as I believe it is, retributivism would be undermined, since if agents do not deserve blame just because they have knowingly done wrong, neither do they deserve punishment just because they have knowingly done wrong. Furthermore, even if one is not convinced by the arguments for free will scepticism, it is still unclear whether retributive punishment is justified. Punishment inflicts harm on individuals and the justification for such harm must meet a high epistemic standard. If it is significantly probable that one's justification for harming another is unsound, then, prima facie, that behaviour is seriously wrong. Yet the justification for retributive harm provided by both libertarians and compatibilists (who think that free will and determinism are compatible ideas) faces powerful and unresolved objections and as a result falls far short of the high epistemic bar needed to justify such harms.

Let us assume for the moment that free will scepticism is correct and retributive punishment is unjustified. Would adopting such a view leave us unable to deal with criminal behaviour? I contend that it would not. My proposed alternative to retributive punishment is the public health quarantine model. The model takes as its starting point an analogy with quarantine first proposed by Derk Pereboom, a philosopher at Cornell University, in his book *Living Without Free Will*. Simplifying a bit, the argument runs as follows. First, the free will sceptic claims that criminals are not morally responsible for their actions in the basic desert sense. Second, plainly, many carriers of dangerous diseases are not responsible for having contracted these diseases.

“MY ALTERNATIVE TO RETRIBUTIVE PUNISHMENT IS THE PUBLIC HEALTH QUARANTINE MODEL”

Third, yet, we generally agree that it is sometimes permissible to quarantine them, and the justification for doing so is the right to self-protection and the prevention of harm to others. And fourth, for similar reasons, even if a dangerous criminal is not morally responsible for his crimes in the basic desert sense (perhaps because no one is ever in this way morally responsible) it could be as legitimate to preventatively detain him as to quarantine the non-responsible carrier of a serious communicable disease. The resulting model is an incapacitation account built on the right to self-protection analogous to the justification for quarantine.

DUTY OF CARE

It is important to note that this approach places several important constraints on the treatment of those who break the law. First, as less dangerous diseases justify only preventative measures less restrictive than quarantine, so less dangerous criminal tendencies justify only more moderate restraints. In fact, for certain minor crimes perhaps only some degree of monitoring could be defended. Secondly, the incapacitation account that results from this analogy demands a degree of concern for the rehabilitation and well-being of the individual that would alter much of current practice. Just as fairness recommends that we seek to cure the diseased we quarantine, so fairness would counsel that we attempt to rehabilitate the criminals we detain. Finally, if a person cannot be rehabilitated, and our safety requires his indefinite confinement, this account provides no justification for making his life more miserable than would be required to guard against the danger he poses.

In addition to these restrictions, my public health quarantine model advocates for a broader approach to criminal behaviour that moves beyond the narrow focus on sanctions and prioritises prevention and social justice. By placing the quarantine analogy within the broad justificatory framework of public health ethics, my model not only justifies quarantining carriers of infectious diseases on the grounds that it is necessary to protect public health, it also requires that we take active steps to prevent such outbreaks from occurring in >>

“IT IS HARD TO SEE HOW WE CAN ADEQUATELY DEAL WITH CRIMINAL JUSTICE WITHOUT ADDRESSING ISSUES OF DISTRIBUTIVE JUSTICE”

the first place. In the US, for instance, public health agencies such as the Centers for Disease Control and Prevention, the Food and Drug Administration, the Environmental Protection Agency and the Consumer Protection Agency focus heavily on this preventive task. The primary function of these agencies is to prevent disease, food-borne illnesses, environmental destruction, injuries and the like. A non-retributive approach to criminal justice modelled on public health ethics would similarly focus on prevention. In a sense, quarantine is only needed when the public health system fails in its primary function. The same is true for incapacitation. Taking a public health approach to criminal behaviour would therefore allow us to justify the incapacitation of dangerous criminals when needed, but it would also make prevention a primary function of the criminal justice system.

Furthermore, a public health ethics framework sees social justice as a foundational cornerstone to public health and safety. In public health ethics, a failure on the part of public health institutions to ensure the social conditions necessary

to achieve a sufficient level of health is considered a grave injustice. An important task of public health ethics, then, is to identify which inequalities in health are the most egregious and thus which should be given priority in public health policy and practice. The public health approach to criminal behaviour likewise maintains that a core moral function of the criminal justice system is to identify and remedy social and economic inequalities responsible for crime. Just as public health is negatively affected by poverty, racism and systemic inequality, so too is public safety. This broader approach to criminal justice places issues of social justice at the forefront. It sees racism, sexism, poverty and systemic disadvantage as threats to public safety and it prioritises their reduction.

By placing social justice at the foundation of the public health approach, the realms of criminal justice and distributive justice are brought closer together. I see this as a virtue of the theory since it is hard to see how we can adequately deal with criminal justice without addressing issues of distributive justice. Retributivists tend to disagree since they approach criminal justice as an issue of individual responsibility and desert, not as an issue of collective responsibility. I believe it is a mistake to hold that the criteria of individual accountability can be settled apart from considerations of distributive justice. Making social justice foundational, as the public health quarantine model does, places on us a collective responsibility – which is forward-looking and perfectly consistent with free will scepticism – to redress unjust inequalities and to advance collective aims and priorities such as public health and safety.

To conclude, my public health quarantine model maintains that the right to harm in self-defence and defence of others justifies incapacitating the criminally dangerous with the minimum harm required for adequate protection. Since it would not justify the death penalty or confinement in the most common kinds of prisons in our society, major reform of the current system would be called for. Furthermore, my account would demand a certain level of care and attention to the well-being of those in prison, including a focus on rehabilitating those we incapacitate. Lastly, my model would prioritise prevention, address issues of social justice, and aim at altering the various social determinants of crime – for example, poverty, education inequity, lack of opportunities and the like. This combined approach to dealing with criminal behaviour is sufficient for dealing with dangerous individuals, leads to a more humane and effective social policy, and is preferable to the harsh and often excessively punitive forms of punishment that come with retributivism. ■

FELLOWSHIP IN ACTION COFFEE-POWERED ENTERPRISE

We Walk the Line helps ex-offenders, disadvantaged youth and rough sleepers in the UK to become entrepreneurs. By coaching them in how to run coffee carts, the social enterprise hopes to create self-sufficient businesspeople.

“To be an entrepreneur you have to take calculated risks. And this is something you’ve got to nurture in people,” says co-founder Mat Corbett. “I’d worked in community development all my life. You’d meet people who wanted to do things with their lives, but the goal was to just get them a job as quickly as possible because that’s how you were funded.” From this experience sprung We Walk the Line’s model.

The enterprise received £2,000 in Catalyst funding from the RSA, which it used to produce a Kickstarter video. “They also put us in touch with other Fellows who supported us. Eventually we raised just over £20,000 from nearly 200 people,” says Mat. Since then, the mayor of Colchester has invited them to open a café in the city and they have received interest in their model from as far afield as North Carolina.

■ For more information, visit www.wewalktheline.org