

Drugs: The Judicial Response

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Introduction¹

The tension in relation to a judicial response to crimes committed by drug addicts is increasingly that between moving towards treatment options or towards an even more rigorous imposition of penalties. Public opinion in Ireland about the evils of drug misuse has probably never been as strong as it is at the present time.²

Coupled with strident political calls to incarcerate drug traffickers are pleas for more resources to allow dependants to leave their habits behind them. Courts have traditionally looked into the background of offenders and paid particular attention to circumstances which mitigate a crime. Votes are available, however, for politicians who decry high crime rates and pretend that there is a panacea that can be applied to eradicate criminality. There is a wave of political thought moving from the United States that propounds that by declaring war on drugs and being merciless with offenders, patterns of behaviour which generate crime can be eradicated. This political movement is based upon political self interest.

It attempts to tie the hands of the judiciary in their dealing with drug offences so that sentences become ever larger and incarceration becomes the only available option. Courts in Ireland, in Canada and Australia have consistently expressed the view that drug traffickers must find out that they operate within a legal environment which is hostile to their trade.³ At the same time there is a growing realisation that warehousing offenders in institutions which merely maintain their habits, or in some cases reinforces them, does little against what should be an ultimate aim of attempting to turn offenders away from the disastrous pattern of addiction to drugs. In *The People (DPP) -v- MacEntee*⁴, for example, the Court of

Criminal Appeal accepted the fact that the defendant:

Was a person who, while he traded in misery, was a victim of the system himself in that he was a heroin addict and that his activities were at least in part directed towards feeding his habit.

Irish courts have struggled, as have courts everywhere in the western world, with the concept of drug addiction as mitigation. Differences have been drawn between the cold blooded non-user of drugs and those who commit various crimes in order to finance their needs.⁵ There is a sense, however, of the courts being overwhelmed with pleas of addiction as a mitigating factor.⁶ The following statement of principle, enunciated in Australia by King CJ, appears increasingly dominant:

There is a limit, and a very strict limit, to the extent to which leniency can be extended to an offender by reason of his own addiction.. however sympathetic one feels to a person who has allowed himself to get into that predicament, the duty to the community, to protect the community against the spread of the drug evil, must predominate...This court cannot allow a situation to develop in which the contracting of an expensive habit of drug addiction becomes a licence to commit crime.⁷

There is a feeling, in reading the law reports, of courts everywhere responding to the criminogenic effects of drugs from the point of view of the public, where the personal circumstances of the offender play a secondary role.⁸ Ireland has recently seen a twenty percent drop in the overall crime rate. In England and Wales the most recent statistics indicate a nine percent drop.⁹ The cause for the

drop in Ireland would be the subject of much speculation but as little informed debate as possible. A huge rise in economic prosperity leading to general building works which spread that prosperity into deprived areas may be one factor. Another factor may be Ireland's unique laws on the seizure of criminal assets. Another possible factor is the break-up of the gang which made the passage of this law easier. More on this later.

The purpose of this article is therefore to examine the opposing trends of the courts being used as deterrent weapons in the fight against crime and the belief that addiction, or dependency, is itself the engine that drives the crime trend.

Criminogenic Effect

Crime

Studies from the United States have indicated that in comparison to non drug using offenders, severe drug users tend to commit fifteen times as many robberies, twenty times as many burglaries and ten times as many thefts.¹⁰ Active drug use accelerates crime by a factor of between four and six, with a crime content that is at least as violent, or more so, than that of non-drug using counterparts. These studies were of heroin users, but such research as has been done on crack-crime statistics indicate a similarly high or even higher criminogenic effect than heroin related crime and a definite increase in violence.¹¹ Two leading American experts write:

Empirical studies of the association between drug use and crime provide an appreciation of the enormous impact drug abuse has on crime. Indeed, the extensive research on the relationship between drug abuse and crime provides convincing evidence

that a relatively few, severe substance abusers are responsible for an extraordinary proportion of crime... Drug-dependent offenders generally lead lifestyles manifested by hedonistic, self-destructive, and antisocial behaviours; they also have problems related to poor interpersonal skills, a lack of job skills, dependency on others, and frequent conflict with criminal justice authorities... Offenders involved in the regular use of hard drugs or polydrug abuse are typically at high risk for recidivating after release from the criminal justice system... Although a large proportion of the nation's offenders lead lifestyles associated with problems of drug abuse, only a small percentage receive treatment while in the criminal justice system.

In Ireland the prosecution rate for drug offences, such as possession of controlled drugs or possession for the purpose of supply, has increased ten fold since 1973 to date. The latest research

by the Garda Siochana has indicated that of approximately nineteen thousand indictable crimes (in our system essentially an indication that these are more serious) perpetrated between September of 1995 and August of 1996, twelve thousand were committed by drug addicts.

One addict was alleged to be responsible for one hundred and forty seven detected crimes with the corresponding highest non-drug using offender achieving only thirty three.¹² Experience indicates that the vast preponderance of this problem is due to heroin users or to people who are predominantly heroin users, but who may, in desperation, reach for a wide range of other drugs in substitution.

In the 1970's Dublin began to experience a heroin problem. Only the most foresighted warned against the consequences of ignoring it. They were ignored. In 1979 an explosion of street level crime was the consequence of the problem becoming an epidemic.¹³ Criminal activity in Dublin runs at a level approximately three times greater

than for the rest of the country.¹⁴ The result of this is that now one can reasonably estimate that between two thirds and four fifths of all street level crime is generated by drug addiction. The statistics show the results. In 1978 seven hundred and three robberies were recorded. This was an increase from five hundred and fifty in 1975. By 1983 the figure had shot to two thousand, one hundred and seventy eight and has only fallen, by about a fifth, in the last twelve months.

There were thirteen thousand burglaries committed in Dublin in 1975 and they are now running at around thirty thousand. Between 1973 and 1991 indictable crime increased by fifty six reported acts. Stealing, as an overall category of crime, has doubled over eighteen years. From 1973 over a period of eighteen years robbery has increased in levels of commission by more than four times and burglary by almost six times. There is a direct relationship between these increases and drug abuse. With the arrival of heroin in Dublin and its growth into an epidemic the sudden

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upward spiral in crime statistics indicates a parallel beyond argument.¹⁶

Poverty

A part from a connection between drugs and crime there is also a connection in Irish society, and in Dublin in particular, between drugs and poverty. For the first time setting has come centre stage in a consideration of the drug problem and Irish drug policy is moving away from regarding drugs as being an independent force for evil operating, more or less, in a social vacuum.¹⁷ In the first report of the Ministerial Task Force on measures to reduce the demand for drugs¹⁸ the authors noted that submissions from local groups consistently:

Underlined the same underlying causes of problem drug use as had already been identified by the group, i.e. social disadvantage/exclusion, characterised in high levels of unemployment, poor housing conditions, low educational attainment, lack of recreational facilities, etc.¹⁹

In Dublin, studies between 1971 and 1996, indicate that serious drug problems are not randomly distributed in geographic or socio-economic terms, but cluster in neighbourhoods characterised by poverty and general disadvantage. The complex package of personal difficulties including educational disadvantage and unemployment cannot reasonably be attributed to drug abuse alone.²⁰ In previous generations those excluded may have turned to alcohol. Experience indicates that this was probably so. It is a judgment value to say that cannabis abuse is one step up from this. Again, experience tends to indicate that this may be combined with alcohol abuse.

When one comes to heroin and cocaine and crack-cocaine one is, however, dealing with substances which have a capacity to enslave people beyond any other known power.²¹ In 1997 the Garda Research Unit carried out a survey of drug abusers in the Dublin area.²² The profile which emerged of the people who come most frequently before the courts on drug charges tends to support the Task Force conclusions. The first offence for the majority, sixty five percent, was a stealing offence of some kind. Ninety one percent of hard drug abusers had left

school before they were sixteen years old.

A typical drug user was male, addicted to heroin, aged between fifteen and twenty five, unemployed, single, living with his parents and had a criminal record. A substantial number of participants in the study had not sought any form of treatment in respect of their problem. One half of the respondents admitted to either having sold drugs, acted as couriers or lookouts, or assisted as tasters to check the purity of street drugs. All of these are activities in support of trafficking. Most said that they were involved to support their own drug habit. The Gardai estimate that a typical drug user in Ireland uses half a gram of heroin five days a week and will spend around ten thousand pounds on drugs during the course of a year.

No one knows the extent to which this pattern will continue. It may change radically. A recent survey in the United Kingdom entitled *Young People On Drugs* in 1998, produced by the School's Health Education Unit, shows that nearly a third of fourteen and fifteen year olds in rural regions have had some experience of trying drugs. The actual figure for rural regions is twenty five percent in comparison to twenty one percent for affluent regions and approximately just under eighteen percent for city dwellers. As with so many things in relation to drugs one wonders where these trends may lead us.²³

Legalisation

The Argument For

Judges can respond to various kinds of crime by a type of tacit legalisation. If, for example, after a hard fought trial in relation to a prostitution offence, brothel keeping or living off the earnings of prostitutes, an accused is convicted and then not imprisoned, but merely fined the equivalent of about one hour's earnings, legalisation has effectively taken place by judicial response.²⁴ The issue of legalisation should therefore be openly discussed especially within the context of sentencing responses which depend upon judicial discretion as to the view of the crime and the culpability of the offender. In Ireland it has recently been argued that we have been engaged in a war against drugs that has failed. The author of a recent polemic writes:

I am arguing that it is wrong. I regard prohibition as ineffectual, irrespon-

sible, and illegitimate. It is ineffectual because it is falling far short of its objectives; it is irresponsible because it is contributing directly and indirectly to the creation of greater social problems than those which it is directed against; and it is illegitimate because it employs incarceration and other criminal sanctions in an improper and excessive manner.²⁵

Tom Murphy, a lecturer in criminal and constitutional law in University College Cork, seems to believe that the heavy consumption of drugs arises from the criminal sanction imposed on it by society. No authority is cited for this view. He states that heavy consumption "is by no means an inevitable consequence of initial use". He claims it is due to the social 'setting' and the individual 'set' that will dictate whether initial drug use will lead eventually to addiction. He claims that heroin and cocaine are not dangerous per se, but can be consumed as 'lifestyle choices'. It is argued that destructive drug abuse is found only where there is prohibition. Explicitly, in the text, he states:

Further, Wilson is referring to a type or style of 'heavy consumption' found only under a prohibitionist regime, where regular users' lives are necessarily governed by their habit 'temperance, fidelity, duty, and sympathy' are under far greater threat when the law of the State criminalises otherwise voluntary activity.²⁶

The Argument Against

One is disturbed to find an absence of any studies which lend credence to this view. One tends to wonder how much in touch with the reality of drug abuse or indeed with commonsense its author is. Just look at his argument. Heroin is unlawful and therefore the price of heroin is high. People will choose, of their own free will, either to consume a lot of heroin or very little. It is up to them, and not a factor of their own personality and the relationship of physical interdependence which can grow up with use of this drug.

If drugs were legal, then heroin might be bought cheaply. This would induce people who use heroin to use it in a way so as not to become dependent. Because heroin is illegal it is expensive. Therefore people have to commit crimes to gain the money to fund their habit.

The argument is nonsense because if one chooses to commit crimes of violence to fund a drug habit, one therefore chooses the abuse of the drug over the normal dictates of conscience not to abuse other people in society. Yet that abuse by drug users continues to an extreme level.

No one we have come across in Circuit Court 24 in Dublin, with a dependency on these substances has been happy about it. We believe that that would be so whether or not they were being prosecuted for drug pushing or robbery or whether they were simply engaged legally in destroying their own lives and those of family members. Their unhappiness seems to us to stem from drug abuse. At the level of reportage the memoir of Christine F.²⁷ and the memoir left by the cocaine addict M. Ageyev entitled *Novel with Cocaine*²⁸ indicates the extraordinary depths to which the abusers of dependency inducing drugs are driven to uphold what Murphy would have us believe is a 'Ufestyle choice'. He quotes Krivanek as apparently disabusing us of the notion that cannabis can act as a gateway to the use of cocaine and heroin:

...What the general public and some professionals often overlook is the fact that involvement with one drug does not necessarily mean progression to the next one. Virtually all marijuana users had earlier tried alcohol or cigarettes, usually both; but only a percentage of alcohol and cigarette users [about forty five percent] go on to use marijuana. A tiny fraction of [marijuana users], some three percent, then go on to try heroin.²⁹

The Scale of the Problem

Figures which have been produced at the trial of three gang members so far sentenced, in relation to what has become known as the Greenmount Gang, indicate how enormous is the abuse of cannabis resin within Irish society.³⁰ Over a period from April, 1994 to October, 1996 the Greenmount gang imported approximately 41,000 kilos of illicit goods. Attempting, as best one can, to take away the weight of the armaments imported and the small quantity of cocaine included in the shipments, and the weight of the packing itself, one comes to a minimum figure of

around 15,000 kilos of cannabis resin imported by this gang alone per annum..

If one in thirty three, or thereabouts, of cannabis users go on to the abuse of cocaine and heroin it is perhaps a fair indication of why we continue to have a problem of the dimensions which we do in this country. Figures gathered over the last ten years from unsmoked hand-rolled cigarettes containing cannabis resin indicate that approximately .1 of a gram is the amount which a marijuana smoker will normally use.

These figures indicate an annual consumption from the Greenmount Gang alone of well over one hundred million cigarettes. Irish society already has tremendous problems with alcohol abuse. Marijuana abuse on a long term basis leads to an amotivational lifestyle syndrome which causes particular damage to the abuser and to his family. It is very difficult to argue against the use of any drug where it is of therapeutic benefit. One still awaits evidence of an increase in human happiness where such drugs are available.

The Imprisonment Binge

The latest available figures (1995) indicate that, per one hundred thousand of the population, Ireland has fifty five people in prison. This compares favourably with England and Wales (1997) at one hundred and twenty and remarkably favourably with the United States at six hundred and fifteen. The rate for Northern Ireland is one hundred and six per one hundred thousand (1995). Only Russia and Belarus have higher figures than the United States. Canada, sharing the North American continent, has only one hundred and nineteen persons per one hundred thousand of the population in imprisonment (1994).³¹

There is no room for complacency in Ireland. One major new prison is due to come on stream by the millennium. The pattern has been for such prison space as we have to remain full. Judges must not allow themselves to be pressurised into engaging in what would amount to merely a war of attrition against persons convicted of crime. Crime has become a political vote catcher.

With that phenomenon has come a responsibility among the judiciary in discussing it and in promoting responses:

designed to combat it. Most people convicted of a criminal offence in most Western countries do not go to prison.

The exception is the United States where seventy percent of all offenders convicted of a felony in State court amounting to around nine hundred thousand in 1992, are sentenced to some form of imprisonment.

These include four fifths of those convicted of violent crimes, two thirds of those convicted of property felonies three quarters of those found guilty of drug trafficking and sixty two percent of those convicted of drug possession.³² No figures are available for Ireland, but in England and Wales the 1995 figure disclose that of approximately three hundred thousand people sentenced for indictable offences about one fifth were sent to prison; about one third were fined; and about twenty eight percent were made serve some form of non custodial sentence.³³ Both the 'Cone of Europe' the Canadian and the United Kingdom approaches to sentencing in favour of the use of imprisonment only where the offence is so serious then it merits custody or where it is necessary, by reason of the violent sexual nature of the offence, to protect the public.³⁴ As a matter of practice has been the Irish approach to sentencing and the one recommended by the Whittaker Report after anxious consideration and wide consultation.

Lenient Judges?

There is a close alliance between media and political interest Surveys are propounded apparently as a view to showing that the general public regards judicial sentencing as too lenient. These are often predicated however, on the basis of crude loaded questions.³⁵ Where in-de surveys are used, and questions open-ended, the results differ. The more knowledgeable people are in relation to the exact circumstances of the offence and the background of the offender the possibility of reform, the more likely they are to agree with the sense passed by the court. In 1991 sentencing exercise was carried out in Delaware using a representative sample of four hundred and thirty two persons within the community. They were given twenty three hypothetical cases ranging from theft, to rape, to armed robbery.

On an initial view seventeen out of twenty three would have been indicated by the group with probation to the remaining six. After considering information on prison overcrowding

five alternative sentences (intensive probation, restitution, community service, house arrest and boot camp) they met in small groups to discuss the sentence. Only five out of twenty three offenders were then sent to prison, the other eighteen being given alternative sentencing options. Those sent to prison were four violent offenders and a drug dealer with prior convictions.³⁶

Other Options

Options available in this country, as alternatives to imprisonment, include a community service order involving people engaging in public works on behalf of the community (which usually benefits them as well as bringing them into contact with at least the fact of other people's lack of privilege) and worthwhile supervision from a probation officer. In addition, probation is an option, though a softer one.

During the time when Mr. Justice Moriarty was the main sentencing judge in the Circuit Court intensive probation modules were developed which involved close supervision and the requirement to attend work and educational courses. Statistics from England and Wales indicate that three quarters of community service orders are carried out successfully without a further conviction during the time of the order. Recidivism rates are certainly no worse than in the case of imprisonment and some are better.³⁷ Fining and restitution orders, based more on ability to pay and willingness to admit fault, than on the civil standard of compensation, are also options.

A Wave of the Future?

In the United States the prison population has increased about four fold since 1980 but, despite this incarceration binge, there has been no resultant diminution in crime figures. In 1980 the USA had around 0.4 million prisoners, now it is around 1.7 million with a further 3.5 million on some form of probation. The fact that crime has only dropped by 5% in the last five years has led to a re-think of incarceration in some states. Offenders who have committed less serious drug offences or Property offences motivated by a drug addiction are given the option early on 'n their appearances before the courts to attend before a Drug Court.

The range of offences and the type of offender chosen is problematic. Commercial or medium grade pushers have no place in such a programme. Addicts driven to crime by disadvantage and dependency are their target. Instead of pleading guilty or not guilty, the offender is given the option of a potential non-custodial disposal if they co-operate with probation, a drug treatment programme and remain free from other offences. Families are involved in the process. Court appearances are frequent with a judge positively congratulating the subject as, during the progress of their appearances, urine analysis shows them to remain drug free. A relapse into taking the non-prescribed drugs leading to the commission of offences, operates as an automatic exclusion from the programme. Exclusion means that the case then progresses in the ordinary adversarial way with the consequence of a custodial sentence waiting at its culmination.

Intensive probation, drug courts, community service and probation all require funds. Far less funds, however, than imprisonment. In Ireland the staff to prisoner ratio is extremely high and, including administration, tends almost towards a one to one basis.³⁸ In Russia and Belarus imprisonment traditionally has made money for the authorities as prisoners have been used as a source of labour. In the United States the costs of imprisonment are estimated at forty billion dollars a year³⁹, but staff to prison ratios are far less than in Western Europe.⁴⁰

Drugs have been central to the enormous growth in the United States prison population. During the period 1985-1995 the number of sentenced prisoners in State prisons more than doubled. The increase attributable to offences against drug laws was four hundred and seventy eight percent. The level of crime continued to creep upwards. Vivien Stern writes:

This has led to mandatory minimum sentence for drug offenders, however minor the offence. When federally prosecuted, a sentence of at least five years is required for possession of more than five grams of crack cocaine with intent to distribute. One year in prison without parole is the sentence for anyone convicted of selling drugs within one thousand feet of a school. In Michigan the

mandatory sentence for possession of less than a pound and a half of cocaine with intent to distribute, even for a non-violent first offender, is life without parole... In 1993 it was reported to the U.S. Congress that judges of every federal circuit had adopted Resolutions against the mandatory minimum sentences for drug offenders ... Recent developments in the United States penal policy suggests that the trend is not going to be reversed in the near future. The 'three strikes and you're out' policy means that anyone convicted of three serious or violent felonies will be sentenced to life imprisonment on the third. The expression comes from baseball. The law was first introduced in Washington State in 1993. In 1994 it became federal law and to date there are such laws in twenty four States.⁴¹

The Criminal Justice Bill, 1997, currently making its way through the Oireachtas, provides that where a person is found guilty of controlled drugs with the market value of ten thousand pounds or more with intent to supply these, he should be sentenced to a minimum period of ten years imprisonment. Judicial discretion is, however, retained by allowing for a sentence less than this period where the mandatory minimum would be unjust in all the circumstances,⁴² including an early indication of an intention to plead guilty and material assistance in the investigation by the accused. One wonders at a provision such as this. It makes a great deal of noise, but essentially changes nothing by allowing the court to 'have regard to any matters it considers appropriate' to reduce the sentence below the mandatory minimum.

Valuations are notoriously flexible and have led in England to a nationwide table of values.⁴³ Furthermore, politicians should be made to wake up to the fact that a person in possession of millions of pounds worth of drugs may be a pathetic donkey figure two or three steps removed from the criminal godfathers. An analysis based on realism is central to the judgment of McGuinness J. in *Gilligan -v- Ireland and the Attorney General*⁴⁴ in relation to the facts. Of course, the fact that the law upheld there, of which more later, seems to be a good idea, does not by any means mean that it is constitutional. There is at least a judicial wariness of copying the

mistakes made by other countries. We must be wary in Europe of copying the mistakes of other countries.

Is It Always A Sentencing Matter?

Good Intentions

The sentencing scheme of the 1977 Misuse of Drugs Act was completely different to that of any other criminal statute. People often wondered why probation and medical reports were necessary in respect of drug offenders. They were not called for in legislation dealing with any other criminal wrong. These reports were ordered automatically, and by statutory compulsion up to the implementation of the Misuse of Drugs Act, 1984. The reports then became an option for the trial judge. All of the medical reports given in practice between 1977 and 1984 were in short form, apparently prepared by a prison doctor, and simply stated that the prisoner did not suffer from a psychiatric illness and that apart from an addiction

problem, he would otherwise enjoy good health.

The probation reports went into considerable detail on the prisoner's background and suggested alternatives to incarceration. The true statutory basis for these reports, however, was that the medical report should have been a consideration of what treatment was appropriate for the individual convict's drug dependency. The probation report was designed to consider vocational and educational needs whereby rehabilitation might commence. On receipt of these reports the Legislature clearly contemplated that some form of treatment was to be considered as an alternative to simple incarceration. It is inherent in the scheme of the Act that there was abroad at this time a philosophy that drug dependency could be cured by appropriate treatment and that a prison setting for drug offenders was not necessarily the correct answer.

An order under section 28 of the Act could involve the court releasing the offender subject to conditions, including attending at a treatment centre or

remaining under the supervision of institutions or bodies which, the Act contemplated somewhat optimistically, might be available to persons in a home setting to assist in their cure and rehabilitation. Within section 28 was the possibility as well of sentencing a person to a custodial treatment centre for up to a maximum of one year. These sections remain in force, but over the period of the twenty one years that the 1977 Act has remained in force only two persons have been sentenced to custodial treatment by an Irish court.

By statutory instrument no. 30 of 1980 the Central Mental Hospital in Dundrum was designated the custodial treatment centre. In 1989 a judicial review forced Dundrum to declare that it was able to receive convicts for custodial treatment.⁴⁵ The lady applicant had been convicted of drug pushing by reason of drug dependency, was suffering from the AIDS Virus and therefore only had two years to live. Having spent a year in the Central Mental Hospital she then died. In 1990 Roe J. sentenced one other offender to

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Dundrum. There now follows a slightly edited version of section 28 which makes the policy of providing treatment as an option in addition to simple imprisonment apparent:

28(1)(a) Where a person is convicted of an offence under section 3 of this Act ... or an offence under section 15 or 16 of this Act, or of attempting to commit any such offence [Amd. s.14] [if, having regard to the circumstances of the case, the court considers it appropriate so to do, the court may] remand the person for such period as it considers necessary for the purposes of this section (being a period not exceeding eight days in the case of a remand in custody), and request a health board [Amd. s.14] [probation and welfare] officer or other body or person, considered by the court to be appropriate, to -

(i) cause to be furnished to the court a medical report ... with such recommendations (if any) as to medical treatment ... appropriate to the needs [Amd. s.14] [arising because of his being dependent on drugs] of the convicted person, and

(ii) furnish to the court a report in writing as to the vocational and educational circumstances and social background of the convicted person together with such recommendations (if any) as to care ...

(2) Having considered the reports furnished pursuant to subsection (1) of this section, the court shall, if in its opinion the welfare of the convicted person warrants its so doing, instead of imposing a penalty under section 27 of this Act, but subject to subsection (8) of this section either -

(a) permit the person concerned to enter into a recognisance containing such of the following conditions as the court considers appropriate having regard to the circumstances of the case and the welfare of the person, ... (involving) (i) supervision of a health board ... [(ia) to receive visits and permit visits by ... the supervision of a body, an officer of that body ...

(ii) medical treatment or other treatment recommended in the report, (iii) ... to attend or 'remain in a hospital clinic or other place specified ... for a period so specified, (iv) ... attend a specified course of education, instruction, or training,...

(b) order that the person be detained

in custody in a designated custodial treatment centre for a period not exceeding the maximum period of imprisonment which the court may impose in respect of the offence to which the conviction relates, or one year, whichever is the shorter.

Therapy Outside Prison

The idea of a therapeutic community as a means of rehabilitation and as an alternative to simple imprisonment is, at least within the criminal justice system in Europe and America, an entirely twentieth century one. The Boys' Republic set up by Homer Lane in 1907 seems to have been the first of these. This was a juvenile offenders institution where close supervision was replaced by an emphasis on individual responsibility, accomplishing tasks, with free choice and self expression developing the capabilities of the residents. In 1910, small group therapy as part of psychiatry was developed and promoted by the psychiatrist J.L. Moreno.

The model for many narcotics programmes. Alcoholics Anonymous, was started in 1935 by two alcoholics who started a three year process of self-recovery. In the same year the first of the narcotics farms was set up at Lexington, Kentucky, with another introduced at Fort Worth in Texas in 1938. In 1940 therapeutic community methods were introduced into institutional psychiatry and in 1958 the Californian Therapeutic Community, which led the way in the treatment of substance abusers, was begun. Its founder, Charles Dredrick, was an AA graduate who had discovered and developed techniques of therapy in discussion groups with both alcoholics and heroin addicts⁴⁶.

The Lexington and Fort Worth models experienced poor results with many voluntary patients failing to remain, high relapse rates (due perhaps in large part to an absence of transition programmes in moving from a custodial setting into freedom). The model for our Act seems to have been the Narcotic Addict Rehabilitation Act enacted by the Congress of the United States in 1966. This made Court treatment orders a specific alternative to incarceration. Screening was required in order to determine if the treatment could be of benefit. Similarly, under our 1977 Act, when a judge was minded to sentence an offender to custodial treatment a further report was required, this time from

sending the offender for a short time to the institution which would then report back on his or her suitability.

The statutory emphasis seems to have been on commitment to the programme and a lack of disruption. In the United States Professor Robert Martinson published a famous/infamous (depending on your point of view) paper in Public Interest entitled: What Works? Questions and Answers About Prison Reform. The conclusion of the author, on review of the literature of the hundreds of custodial treatment attempts in the United States was that, with few and isolated exceptions, nothing worked. For ten years this led to the down-grading and undermining of custodial treatment efforts.

It seems to have been the pressure of numbers of addicts coming into the prison system, uncontrolled recidivism and a basic belief that simply warehousing persons and ignoring the difficult challenge of rehabilitation was short-sighted, that has led to a resurgence of attempts to re-think treatment as a sentencing strategy in the United States.⁴⁷

In Ireland the Ministerial Task Force has made recommendations which include the development of state-run treatment facilities in institutions such as hospitals; the provision of additional state funding to voluntary agencies; and the involvement of local communities in the provision of treatment services. While the Task Force, optimistically, puts forward the view that a large proportion of drug misusing offenders would be likely to avail of treatment, if it was offered, this clashes directly with the finding of the Task Force that approximately half of drug takers in Mountjoy Prison are believed to have no desire to receive treatment for their addiction.

Does It Work?

The authors of this article cannot claim either the expertise or knowledge of the relevant literature which would enable anything other than tentative discussion material to be advanced. Within the expert literature there is a groping towards the identification of criteria which distinguishes a successful therapeutic community from one which can only show poor results. There is a call for a more solid theoretical grounding than is now available to explain successes and

failures and guidance as to the application of therapeutic communities in differing contexts, including voluntary admission and judicial incarceration.⁴⁸

Most treatment programmes tend to follow certain broad outlines. There is an initial programme of induction which assesses the genuineness of the addict's desire to participate in rehabilitation. If a sufficient commitment is shown the addict is admitted to the residential programmes. There is no uniformity as to the length of time that is needed for an optimum result. It seems to vary between six and fifteen months.

Within that time group therapy, unexpurgated confrontation with the addict and his behaviour, rewards and deficits based upon clear cut rules, and a transition with more individual responsibility coupled with screening programmes and an absolute prohibition on the consumption of narcotics, seem to be characteristic.

Family and support groups are closely involved. A final phase avoids sudden re-admission to the community in favour of a transition which seeks out residence (changing address can be very important) and work opportunities and which tries to put into place skills of coping learned within the community. If one is again, tentatively, to seek out factors which tend towards the success of a therapeutic community, one might offer the following. Indispensable to success is a desire for change in the addict. A realisation of the destructive nature of substance abuse, the harm done to others and an acknowledgement of the reality of current and past wrongs seems to clean the slate and prepare for a way forward. A rule of life based solely upon the truth seems central.

Many addicts appear to have moved away from reality based perceptions and into beliefs based upon their internally created self-justification. In the treatment modes, the role of former addicts seems to be a feature of the more successful community. Perhaps they bring a convert zeal while at the same time providing a concrete role model, the benefit of genuine experiences and what Carl Jung regarded as central to any form of psychotherapy: what you are is far more important than what you teach. Real leadership within the community provides the basis for the resolution of quarrels and a reference point for decision making.

The limited historical survey has

shown that it has been extraordinary individuals, overcoming extraordinary problems, and who may have repented of past wrongs, who have founded and directed movements that have been of enormous benefit in alleviating one of the great curses of the modern world:

If charismatic leaders are an integral part of the TC structure, the replication of effective TC's would be extremely difficult to achieve, since charisma is unique and idiosyncratic. If, however, particular TC structures generate charismatic leaders as an unavoidable feature of the TC experience, the objective would shift to copying those structures with charismatic leaders... these are significant issues, yet discussions that explicitly address them are scarce. The lack of theoretical grounding also leads to sharply divergent perceptions...⁴⁹

The studies in the United States indicate that the longer a person stays within a therapeutic community the higher becomes their chances of avoiding re-offending.⁵⁰ The Cool-mine Therapeutic Community claim a success rate of around forty five percent of those who have completed their induction programme and up to seventy percent of those who have completed the full two year programme.⁵¹ In this context, success is measured by freedom from drug abuse for life.

Treatment Within Prison

The movement of offenders who have been incarcerated into a prison-based treatment regime is, in this country, entirely a matter for the Executive. The pursuit of stringent rehabilitative measures and apparent success in following that course could, however, be a strong influencing factor for a sentencing review or could be a condition imposed on sentence upon which a review is predicated. In the United States a five year study of the 'Stay'n Out' Prison Therapeutic Community indicated that these can be effective in reducing recidivism rates for persons who stayed within a prison programme for the full nine to twelve months and were then released on parole. A figure of almost eighty percent for males and ninety two percent for females was achieved for no parole violations.⁵² Again, attempting to

grapple with factors which seem to influence success the authors of this study offer the following conclusions as to what can make for a successful in prison treatment programme:

Among the most important conditions are:

(i) An isolated treatment unit, (ii) motivated participants, (iii) a committed and competent staff, (iv) adequate treatment duration, (v) an array of treatment options, (vi) cooperative and supportive relationships with correctional staff and administration, and (vii) continuity of care that extends into the community. The guidelines above for successful correctional treatment, however, are merely suggestive because few studies have linked the nature of the treatment that clients receive to treatment outcomes...⁵³

In the United States the National Development and Research Institutes have evolved a set of guiding principles as to how to rehabilitate drug abusing offenders within a custodial setting.⁵⁴ In Ireland progress in this area was held back by what seems to have been a determination to ignore the problem of drug abuse within prisons. Our approach is now to confront this problem. Approximately seventy percent of inmates in Mountjoy Prison, at any given time, have a history of drug abuse.⁵⁵ Most prisoners enter the system with a developed habit. The number of those who commence taking drugs in prison is believed to be quite small.

A large amount of drugs are therefore smuggled into Mountjoy Prison to feed the habits of its inmates. Responses include increased screening of visits and the use of surveillance equipment and dogs. The 1997 Ministerial Task Force Report on Drugs rightly stated that a prerequisite to any successful treatment programme is for drug abusers to move into a drug free environment.³⁶

There is a move towards dealing with this problem. Current treatment arrangements in Mountjoy for prisoners who misuse drugs include: ;

- (a) A fourteen day detoxification programme, offered on all committals to prison.
- (b) An eight week intensive therapy programme which can deal with

twelve offenders at a time, and which is a follow on to the detoxification.

(c) A new drug free unit opened in Mountjoy in 1996 which can accommodate ninety six prisoners, at any one time. Proposals not yet introduced include a graduation system for prisoners who come off drugs, who might thereby go to a more open form of imprisonment with the potential for earlier release as long as they stay drug free. Regrettably, there are no structures in place to ensure that drug treatment services inside and outside the prison are properly co-ordinated. A prisoner, on release, is no longer the responsibility of prison authorities, as regards his welfare.

There must be a formal mechanism to ensure that persons who are released on extremely short term programmes have the follow up which is shown by all studies to be necessary. Drug abusers drift in and out of the criminal justice system and treatment programmes without being forced into a situation where monitoring, with effective sanctions for failure, and treatment backups continue.⁵⁷

A Way Forward

If there is a consensus in relation to the idea of reform of addicts within a prison setting it seems to emerge from the realisation that temporary warehousing of serious offenders with a drug problem leads inevitably to reoffending on release. The availability of therapeutic community within a prison has a motivation-based, as opposed to a control-based system of reform, of willingness to confront one's own wrong, true leadership and adequate to complete a worthwhile programme (six months seems to be a minimum) do offer a realistic possibility of reform.

Experienced practitioners have cautioned, however, that rapidly landing an existing programme can lead to undermining the quality of treatment. Throwing money at this problem and demanding that large numbers of offenders be admitted to treatment programmes is a recipe for failure. Too much is expected and it

cannot be delivered. Moving slowly forward with modest and realistic proposals and attempting to copy the best of the experiences of the models which have worked in other countries, particularly the United States is the way forward. Judges can perhaps respond by considering, in appropriate cases, the foreshortening of deservedly lengthy sentences based upon genuine rehabilitation.

The key without which nothing works is the willingness of the offender to admit that they have a problem, to confront themselves and their behaviour and above all to desire to change for the benefit of themselves and their families. One cannot speak of substance abuse as a disease. A disease will respond to antibiotics no matter what the state of mind of the patient. A substance abuse arises from the entire nature of the person, their involvement with others and their relationship to society as well as the nature of the substance being abused. • (continued in next issue)

1. A version of this paper was delivered by the first author to a recent conference held in Dublin Castle and involved judges from ten European countries, however, the views expressed are entirely and completely those of the author and were not in any way adopted or approved of by the conference or any element of it.
2. Definitions are taken from the Health Research Board. See O'Higgins and O'Brien - *Treated Drug Misuse in the Greater Dublin Area*, HRB, 1995.
3. *R -v- Brisson* 47 CCC (3d) 474; *The People (DPP) -v- Cannon* CCA, Unreported, 15 December, 1997; *The People (DPP) -v- Finlay* CCA, Unreported, 24 November, 1997; *Choon Sien Tee*, A Crim R 181 at 183 (1994).
4. CCA, Unreported, 10 November, 1997.
5. *R -v- Smith* 34 CCC (3d) 97 at 124. See also Fortson - *Misuse of Drugs and Drug Trafficking Offences* (3rd Edition, 1996) 8-21; and Rinaldi - *Drug Offences in Australia* (1986), Vol 1, p 20, who concludes that the main relevance of addiction in the sentencing process is in understanding the offender's prior convictions.
6. *R -v- Lawrence*, *The Limes Law Report*, 1 December, 1988; Drug Addiction as Mitigation 147 Scolag 189; *R -v- Gould* (1983)5CrAppR(S)72.
7. *Watson* (1981)3ACrimR254at255.
8. See in general *Bellissimo* (1996) 84 A Crim R 465 at 469; *Mangelsdorf* (1995)

83 A Crim R 272. In *R -v- Gervais* 75 CCC (3d) the Court of Appeal of Quebec noted that a drug trafficker may disguise himself as a legitimate business operator and so abuse the fact that he has no previous convictions.

9. See the *Guardian*, April 8th, 1998.
10. Chaiken and Chaiken - *Crime Rates and the Active Offender* in J.Q. Wilson - *Crime and Public Policy* pages 11-29, cited in Inciardi.
11. The relevant papers are cited in Inciardi at page 211.
12. The authors are grateful to Morris P. for drawing these statistics to our attention. The source is Keogh - *Illicit Drug Use and Related Criminal Activity In The Dublin Metropolitan Area* - (Garda Research Unit, 1977).
13. See O'Mahony - *Crime and Punishment - in Ireland* (Dublin 1993) 70 and Yates and Flynn - *Smack; The Criminal Drugs Racket in Ireland* (Duolin 1985) Chapter 1.
14. O'Mahony - *Crime and Punishment in Ireland* (Dublin) (1993) 70.
15. Mr. Justice Moriarty, Personal Communications. See the report of the Lord Mayor's Commission on Crime, Chaired by the Judge (December, 1994) 28.
16. Superintendent John McGroarty - Paper Presented to the Forensic Science Symposium on Drugs and Crime, 14 June, 1986, cited in P Charleton - *Criminal Law Cases and Materials* (Dublin 1992) 225.
17. Butler - *The War on Drugs: Reports from the Irish Front, The Economic and Social Review*, Volume 28 No. 2, April, 1997 165.
18. Department of the Taoiseach, 1996
19. Page 33.
20. Butler op cit 162 wherein the relevant papers are cited.
21. McGroarty op cit.
22. *Illicit Drug Use and Related Criminal Activity in the Dublin Metropolitan Area* 1997.
23. For an interesting review with an interview, see *The Guardian*, March 11, 1998.
24. Obviously such response would need to be consistent throughout the judiciary to operate as a kind of tacit legalisation.
25. Tom Murphy - *Re-Thinking the War on Drugs in Ireland* (Cork 1996) 33.
26. Murphy op cit. 42.
27. London, 1980 published as *H: The Autobiography of a Child Prostitute and Heroin Addict*.
28. London 1985, first published in Paris in Numbers in the 1930's.
29. The relevant sources are noted in Murphy - *Drugs, Drug Prohibition and*

- Crime: A Response to Peter Charleton - 6 (1996) Irish Criminal Law Journal 1 at 8. The article leading to this response is Drugs and Crime - Making the Connection: A Discussion Paper - 5 (1995) Irish Criminal Law Journal 220. 30'. We are grateful to Detective Inspector Tom O'Loughlin for giving us access to these figures which have not been fully or accurately reported in the media.*
31. Figures are taken from Vivien Stem - *A Sin Against the Future: Imprisonment in the World* (London, 1998) 31-32.
 32. Maguire and Pastore - *Source Book of Criminal Justice: Statistics* (1995) 166 quoted in Stem op cit. 319.
 33. Nacro - *Criminal Justice Digest*, 90, October, 1996 page 7 quoted in Stem op cit 319.
 34. The relevant sources are quoted in Stem op cit 310. See also *R -v- Brown* 119 CCC(3d) 147 at 161 (1997) where the Newfoundland Court of Appeal observed that, 'deterrence does not always have to be equated with incarceration, and those who struggle with addiction are unlikely to be deterred by imprisonment however long the sentence'.
 35. See in general Stem op cit, chapter 14.
 36. See Stem op cit 315-317.
 37. The relevant studies are quoted in Stem op cit 320.
 38. Source of this statistic is the media, and it therefore should be treated with enormous care. -
 39. Stern op cit 22 and 287. Interestingly drug courts in Texas and Oregon receive funding for treatment programmes from assets seized by the State from criminals.
 40. Stem op. cit, chapter 3.
 41. Stern op cit 61-63.
 42. In Canada a seven year sentence was recently introduced for importing narcotics. On appeal the Canadian Supreme Court held the legislation to be unconstitutional as it constituted a cruel and unusual punishment; *R -v- Smith* 34 CCC (3d) 97. A different view had previously been taken by the British Columbia Court of Appeal; *R -v- Smith* 8 DLR(4th)565.
 43. Fortson at 232; *Afzal - The Times*, June 25th 1991; Bucknell - *Misuse of Drugs* (1996) para 9.007. In Ireland attempts to appeal alleged over-valuation of drugs by the police have not proved successful; see e.g. *The People (DPP) -v- Cannon, CCA*, Unreported, 15 December, 1997.
 44. Unreported, High Court, 26 June, 1997.
 45. *ER -v- Ireland and the Attorney General*.
 46. Pan Scarpitti Inciardi and Lockwood Inciardi 30-35.
 47. *From Reform to Recovery* - Wexler and Lipton Inciardi Drug Treatment and Criminal Justice, 1993 209-215.
 48. Pan Scarpitti Inciardi and Lockwood op cit 39.
 49. Pan Scarpitti Inciardi and Lockwood op cit 40.
 50. Wexler and Lipton - *From Reform to Recovery*, Inciardi op cit. 213.
 51. Jim Comberton, Personal Communication. The figures have not been subject to an independent academic review; Shane Butler, Personal Communication
 52. The figures are stated in Wexler and Lipton op cit 213.
 53. Wexler and Lipton op cit Citing Hubbard, Marsden, Racal et al - *Drug Abuse Treatment - A National Study of Effectiveness* (Carolina, 1989).
 54. These are set out in Wexler and Lipton op cit 217-224.
 55. In a recent study of Mountjoy prisoner O'Mahony found that within a selective sample sixty six percent of six hundred and fifty inmates were heroin users O'Mahony - *Mountjoy Prisoners; Sociological and Criminological Profit* (Department of Justice, 1997).
 56. Second Report of the Ministerial Task Force on *Measures to Reduce the Demand for Drugs* (May, 1997) 63.
 57. As to the usefulness of this, which difficult to assess, see *Illicit Drug Use and Related Criminal Activity in the Dublin Metropolitan Area*, 1997, page 29.

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