Criminal Justice Alliance

Transforming Justice

New approaches to the criminal justice system

Edited by Jon Collins and Susanna Siddiqui

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The Criminal Justice Alliance (formerly the Penal Affairs Consortium) is a coalition of organisations committed to improving the criminal justice system. It has 46 members - including campaigning charities, voluntary sector service providers, research institutions, staff associations and trade unions - bringing together a wide range of organisations involved in policy and practice across the criminal justice system.

For more information on the Criminal Justice Alliance and our work visit **www.criminaljusticealliance.org**

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Douglas Carswell has been the MP for Harwich and Clacton since May 2005. He co-authored *The Plan: Twelve months to renew Britain* and *Direct Democracy; an agenda for a new model party,* which the *Spectator* magazine described as 'One of the founding texts for the new, revitalised Toryism... written by some of the brightest young Conservative thinkers'. He blogs each day at www.TalkCarswell.com.

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David Howarth is Shadow Secretary of State for Justice for the Liberal Democrats and MP for Cambridge. He gained his seat from Labour in the 2005 general election and was appointed Shadow Secretary of State for Justice in 2009. David is a Fellow of Clare College, Cambridge and taught Law and Economics at Cambridge University. He grew up on a council estate in Walsall, and went to a local state school, St Mary's, before going to Cambridge University to take a first class honours degree in Law. He then won a scholarship to Yale Law School and gained post-graduate Masters degrees in Law and Sociology from Yale University. David won the Butterworth's Prize for best new legal text book in 1995. He led Cambridge's city Liberal Democrat group through the 1990s and was a member of the Federal Policy Committee from 1989-2000. He is also a former Chair of the Economic Policy Working Group and a member of the European Liberal Democrat Council. David was a member of Cambridge City Council from 1987 until 2004, and led the party to take control of Cambridge City Council in May 2000, defending it in May 2004 with an increased majority. He stood for Parliament in Cambridge in 1992 and 2001 (Peterborough in 1997), and then succeeded in capturing the Cambridge seat at his third attempt in 2005. David served as Shadow Solicitor General from 2007, before becoming Shadow Secretary of State for Justice in January 2009. David Howarth has announced that he will stand down from Parliament at the next election.

Chris Igoe

Chris Igoe is Information and Policy Officer at the Restorative Justice Consortium. The Restorative Justice Consortium is the national voice for restorative justice in England and Wales. An independent third sector organisation, they support over 200 members in their restorative justice practice, research and publicise good practice, and provide information on restorative justice to Government, the public and the media. They advocate on behalf of their members for the widespread use of restorative approaches in criminal justice, in the community, in schools, and to resolve workplace disputes.

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Nicola Lacey is Professor of Criminal Law and Legal Theory at the London School of Economics. She is also a member of the Global Law School Faculty, New York University. Her other recent visiting positions include a Fellowship at the Wissenschaftskolleg zu Berlin (1999-2000) and a visiting Professorship at the Program in Ethics, Politics and Economics and Department of Political Science, Yale University (Spring Semester 2004). She was elected a Fellow of the British Academy in 2001. Her biography, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream,* was awarded the Swiney Prize and was shortlisted for the James Tait Black Memorial Prize for Biography and for the British Academy Book Prize. In 2007, she was elected an Honorary Fellow of New College, Oxford. Nicola is currently engaged in a long-term project analysing the development of ideas of responsibility for crime since the mid-eighteenth century, for which she has been awarded a Leverhulme Major Research Fellowship (2006-9).

Amelia Walker

Amelia Walker is the Head of Centre for Service Transformation at the Local Government Information Unit (LGiU), a leading think-tank for local democracy. She is also the co-ordinator of the LGiU's Democratic Health Network. Her most recent work is *Room to Move,* a new report on overcrowding and reform of social housing. Past publications include *Primary Justice*, a radical report on rethinking the criminal justice system, and *Never too Late for Living,* a comprehensive look at the future of services for older people. She is a regular commentator in the press on topics relating to the centre's work, and represents the perspective of local government to national bodies. In the past year this has included the Justice Committee, Oxford Policing Policy Forum, Marmot Review of Health Inequalities and the Commission on English Prisons Today. Before joining the LGiU she worked in London local government and the civil service.

Time for change

Jon Collins

As has been well documented, the prison population has grown dramatically in recent years, from 44,552 in 1993 to nearly 85,000 today. Yet this is only the most visible symptom of a criminal justice system bursting at the seams. The probation service is also facing overwhelming caseloads, which will be driven even higher by budget cuts resulting from a period of belt-tightening across Government. These cuts will have an impact across the criminal justice system, with legal aid and the courts also facing severe reductions in their funding.

Faced with an ongoing battle to provide enough prison places to contain the growing population, the most immediate and unavoidable crisis, the Government has been forced to introduce a number of technical fixes in an attempt to bring prison numbers under control. This has included the early release of 69,877 prisoners to date through the end of custody licence scheme, which sees prisoners serving sentences of between four weeks and four years released for the final 18 days of their sentence. The *Criminal Justice and Immigration Act 2008* also introduced changes to indeterminate sentences for public protection and to recall structures, with the intention of lessening demand for prison capacity. While this has relieved some pressure on the prison estate, it has increased pressure on the probation service, with more offenders requiring supervision in the community.

Yet despite these measures, the prison population has continued to rise. To address this, the Government has also begun a prison-building programme that is intended to increase prison capacity to 96,000 by 2014. This is not only expensive, it is also likely to be unsuccessful in managing the demand for prison places. No jurisdiction has successfully built its way out of a prison population crisis without accompanying any building programme with a more substantial programme of reform than has been introduced in England and Wales. In the meantime, this massive prison-building programme has so far barely kept pace with demand, giving the prison service minimal headroom in which to operate.

As a result, the prison system remains severely overcrowded. The Prison Service defines the maximum capacity for each prison at which it can sustain 'the good, decent standard of accommodation that it aspires to provide all prisoners', called the Certified Normal Accommodation (CNA) level. This is the level above which prisons become officially overcrowded. As of 30 June 2009 (Ministry of Justice, 2009a), the prison population was 111% of the CNA level, exceeding the CNA level by 8,605. 85 of the 139 prisons in England and Wales, 61%, are officially overcrowded, with 25% of prisoners in England and Wales held in overcrowded accommodation (Eagle, 2009).

Stretched to the seams, the criminal justice system is, not coincidentally, failing to operate effectively. Prison overcrowding is damaging to every aspect of the work of the prison system, reoffending rates remain extremely high, public confidence is low and there is a broad consensus amid experts, researchers and practitioners that the criminal justice system is failing. It is, however, not failing cheaply. Research has suggested that the criminal justice system had an annual cost of £22.7 billion in 2007/8, with the UK now spending a higher proportion of its gross domestic product on law and order than any other country in the OECD, including the US (Solomon et al, 2007). As a result of the soaring prison population, spending on prisons has increased in real terms by 42% since 1997 (p.8: Ministry of Justice, 2009b).

In the face of such a negative picture, a growing recognition has emerged among penal reformers that the criminal justice system needs transformation, not just tinkering around the edges. In addressing this, this collection of essays brings together experts on penal policy, including academics, campaigners and politicians, who put forward a selection of proposals that would radically change the criminal justice system. Some are complementary, others are contradictory, but they are all intended to stimulate new thinking on criminal justice policy, and to offer routes out of the current policy cul de sac.

Two major themes emerge. The first suggests that what is needed is a central mechanism that removes criminal justice policy-making from the national political arena, where it is a hostage to party political fortunes. To facilitate this, expert-led institutional buffers would be introduced to protect elements of the criminal justice system from the whims of its political overlords. In this vein, Nicola Lacey proposes a Royal Commission to identify a future direction for the criminal justice system. This would put distance between criminal justice policy and party political competition, and place expertise, informed debate and consensus at the centre of policy making.

Further national-level bodies are proposed by David Howarth and by Mike Hough and Jessica Jacobson. Putting evidence-led policy front and centre, Howarth advocates an independent agency that reports on the effectiveness of various types of sentence - an equivalent of the National Institute for Clinical Excellence for the criminal justice system. This would ensure that funding in the criminal justice system followed the evidence of what works, not the latest political gimmick. This should ensure that money currently being poured into the prison estate, for example, would instead be spent on more effective responses to crime. At the very least, it would provide an unbiased source of expertise in the political debate.

In a similar vein, Hough and Jacobson discuss the benefits of a Sentencing Council for England and Wales. This is already very much on the agenda, with proposals for a version of such a body contained in the recently passed, but not yet implemented, *Coroners and Justice Act*. Yet, the proposals made by Hough and Jacobson go further than the Government's current plans, in particular calling for a Sentencing Council that takes a more active role in informing the public about sentencing. This would

provide an expert, non-political source of information on sentencing, an issue on which the public are generally ill-informed.

The second, and not necessarily contradictory, theme that runs through a number of contributions is the call for a return of power to local communities. The Government's widely discredited National Offender Management Service, which has swallowed power and resources into an overly bureaucratic centre, has created a backlash, with a range of commentators calling for a more prominent role for local communities in tackling crime and disorder. Too often, to date, this has manifested itself in tokenistic proposals that would raise public expectations without having a significant impact in practice, which is likely to damage community confidence. Four contributors here, however, call for a radical change of direction to put real power in the hands of local communities.

The most radical proposals are contained in Douglas Carswell's essay, which calls for near-total decentralisation and democratisation of justice, putting full control of the criminal justice system in the hands of an elected local 'sheriff'. This would not only encompass policing, but also prosecution, offender management and even sentencing guidelines. This, it is argued, would return power to local communities and ensure that the justice system is both responsive to local needs and accountable to local people.

In her chapter, Amelia Walker discusses the concept of 'primary justice', through which, she argues, the criminal justice system could be recast to better tread a middle ground between the perceived poles of paternalistic professional unaccountability and unacceptable mob rule. It is, first and foremost, a local solution, putting a far greater degree of control over the justice system in the hands of local communities. This framework, Walker argues, would allow the justice system to better address the lower-level crime and disorder that cause a great deal of distress to communities and could help to restore public trust in the justice system.

The two subsequent chapters examine justice reinvestment and restorative justice, two of the components of primary justice explored by Amelia Walker, in greater detail. Rob Allen's chapter sets out the concept of justice reinvestment, a measure by which money which is currently spent on prison can be diverted to be more productively spent on locally-based initiatives that tackle the underlying problems which lead to crime. This would not only be a better use of scarce public funds, but would also help to build links between local communities and the criminal justice system.

Localism also features heavily in Chris Igoe's contribution, which discusses the benefits of restorative justice and examines how these benefits could be made more widely available to both victims and offenders in the criminal justice system. To this end he proposes a local restorative justice service in every area, responding to local needs and ensuring that local people can play an active role in the criminal justice system in a constructive, positive and meaningful way. If the results of the research

cited in this essay, which demonstrate high satisfaction among victims and some positive movement on reducing reoffending, could be more widely replicated, real progress could be made.

The final chapter takes a step back from the conventional terrain of penal reform. In it, Richard Garside reminds us that in order to have a significant impact on the prison population, something much more than criminal justice reform is needed. By demonstrating the link between inequality and prison populations internationally, Garside argues that in order to substantially reduce the prison population, much broader social reform is required.

Together, this collection of essays is intended to help stimulate new thinking on criminal justice policy. With a general election looming, politicians of all parties should be thinking now about how a route out of the current penal policy stalemate can be found. What is certain is that the status quo is not an option. A fresh approach is long overdue, and it is intended that the ideas contained in this volume will help to map out a better future for the criminal justice system and for the people caught up in it.

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CHAPTER 1

Escaping the prisoners' dilemma
Strategies for a moderated penal politics in England and Wales

Nicola Lacey

The prisoners' dilemma in England and Wales

Over the last three decades, an ever-increasing prison population, along with a continuous law and order bidding war between the two main parties, have come to seem almost inevitable features of our political world. As governments struggle to establish their credentials for taking effective policy action, the support for strong law and order policies among a growing group of 'floating' voters has led to an extreme politicisation of criminal justice policy. In the context of this politicisation, 'law and order' has become a salient electoral issue within our adversarial political system, and it has become impossible for even the left-of-centre party, Labour, to sustain a focus on the social and economic causes of crime, or a welfarist approach to responses to crime. On Tony Blair's accession to the position of shadow Home Secretary, Labour accordingly began to abandon its traditional analysis in favour of a 'tough on crime, tough on the causes of crime' platform (Downes and Morgan, 2007; Newburn, 2007).

However, in his understandable quest to make Labour electable Blair created a phenomenon whose dynamics were out of his control. As law and order has swept into the flow of party political competition, both sides have had little option but to strive to be the tougher on crime. Thus Blair as leader of the Labour party and then Prime Minister, and successive Labour Home Secretaries, have put the emphasis firmly on the first part of the two-part equation. Notwithstanding some hopeful early signs of a more measured approach, the Brown administration soon moved to adopt a similar posture. And though policies oriented to social inclusion – particularly in education, housing, social welfare and the introduction of the minimum wage – have formed an important object of Labour policy, and have had some impact (Machin and Hansen, 2003), it has been assumed that the stigmatising and exclusionary rhetoric and policy of the 'tough on crime' side of the criminal justice equation are entirely consistent with its inclusionary 'tough on the causes of crime' side.

It is tempting to deplore the impact of this policy stance as a straightforward breach of New Labour's vaunted commitment to defending both human rights and a more inclusive approach to citizenship. But it is important to acknowledge that the 'tough on crime' position had a clear place in the Government's democratic agenda. The rights of citizenship were argued to bring with them responsibilities which were breached by crime. And the rights of offenders were constantly pointed out to be in need of adjustment to accommodate proper recognition of the rights of victims and potential victims - groups whose interests had been marginalised in the tradition of penal welfarism. The Blair government accordingly defended its tough penal policy as evidence of its responsiveness and accountability to the needs of citizens.

The sad fact, however, is that the size and demographic structure of the prison population suggest that the socially exclusionary effects of the 'tough on crime' part of the criminal policy equation have systematically undermined the inclusionary 'tough on the causes of crime' aspiration. The rate of imprisonment has continued to rise inexorably even in a world of declining crime, increasing by 60% since the inception of the downturn in crime in the mid-1990s. This increase in imprisonment was unplanned. The fact that it formed no part of the Government's conscious strategy – notwithstanding the Home Office's own research unit's projections of the increase likely to result from prevailing policy (Councell and Simes, 2002) – is vividly and distressingly reflected in the inadequacy of prison capacity, which has become particularly evident in the last two years.

Where are politicians to turn for an escape from this counterproductive stalemate? Both parties are locked into a strategy of competition over the relative 'toughness' of their law and order policies; each is terrified of sustaining electoral defeat if it fails to reassure the 'floating voter' of its determination to promote security by tackling crime. On 16 November 2007, the day after the Lord Chief Justice, Lord Phillips of Worth Matravers, made a public statement describing the shortage of prison spaces as 'critical' and as a direct consequence of ministers' failure to build the impact of their sentencing policies into prison planning, the prison population in England and Wales stood at a record 81,547 (p. 2: Carter, 2007). Less than two years on, it stood at a further high of 84,622 (HM Prison Service, 2009). Yet the huge social and economic costs of an ever increasing penal establishment seem to have disappeared from the landscape of political debate, and along with them any informed and reasoned discussion of the real contribution of criminal punishment to reducing crime or improving public security. Unmediated penal populism leads, it seems, to a world for which perhaps few, even among the relatively advantaged, would choose, rationally, to vote.

The structure of this political prisoners' dilemma is not peculiar to Britain, but is rather a feature of adversarial, majoritarian political systems under contemporary economic conditions (Lacey, 2008). The focus on the supposed views of the median voter sets up a highly unstable and unsatisfactory dynamic in criminal justice policy-making. There is, of course, much evidence about the complexity of public opinion about crime, demonstrating among other things a less punitive response to more contextualised questions about crime and punishment, and the extent to which public opinion may itself be led by political posturing (p.67: Downes, 2001; Chapter 1: Beckett, 1997; Roberts and Hough, 2002; Beckett and Sasson, 2004). Recent examples of the latter in the UK are, unfortunately, plentiful. For instance, in November 2007 the Ministry of Justice issued a press statement publicising an ICM survey whose results illustrated the complexity and context-dependence of public attitudes to punishment, while reflecting relatively strong support for community sentences and a concern with prevention through rehabilitation and reparation as well as deterrence. Jack Straw, the Lord Chancellor and Secretary of State for Justice, contributed a statement supporting 'rigorous effective community sentences.' Yet the press release went out under the emotive heading 'Victims of crime want punishment'.

Even without this sort of political manipulation, the malleability of 'public opinion' makes it an unsound basis for policy development. To take just one example, recent empirical research in England and Wales found, within less than six months, the following apparently contradictory 'facts': first, that more than half those surveyed did not support an expansion of the prison estate and thought that government should find other means of punishment and deterrence; second, that 40% of those surveyed thought that sentencing was 'much too lenient', with a further 39% regarding sentences as 'too lenient' (Glover, 2007; Chapter 4: Jansson et al, 2007). Yet notwithstanding such evidence of the ambivalence of 'public opinion', it seems that politicians' fear of the electoral costs of moderate criminal justice policy remains acute. In this context, the relative lack of insulation of criminal policy development from popular electoral discipline in adversarial, majoritarian systems, and the lack of faith in an independent professional bureaucracy (p.72-75: Lacey, 2008) are major problems.

Yet this is not a tale of inevitability for liberal market countries with majoritarian political systems (Chapter 2: Lacey, 2008). Canada, for example, has seen a relatively stable imprisonment rate over the last twenty years (Doob and Webster, 2006) and the Australian state of Victoria, while participating in the national trend towards higher imprisonment rates, has maintained its low level relative to other states within the federation (Freiberg, 1999; p. 84: Cavadino and Dignan, 2006). In Canada's case, important factors seem to have included the checks and balances attendant on Canada's distinctive federal structure; the influence of Francophone culture, particularly in the large province of Quebec; a relatively robust consensus orientation in politics; and a conscious sense of the desirability of differentiating Canadian politics and society from those of the United States (Tonry, 2004). Victoria's historically low imprisonment rates – little more than half of those of its neighbour New South Wales over the last decade – have been bolstered, notwithstanding some increase in the 1990s, by state-level policies such as liberal use of the suspended sentence and the development of plentiful non-custodial sentencing options. Our understanding of these differences is as yet relatively shallow, and a thorough analysis would need to look closely at the circumstances and institutional features of particular countries which either buck, or lead, the general trend towards penal harshness.

An empirical study following up my analysis, in other words, would have to tackle the question of why it should be that the US and, to a somewhat lesser extent, Britain, most of Australia and New Zealand, are particularly strongly in the grip of the prisoners' dilemma of penal populism, notwithstanding their traditions of democratic freedoms and, hence, relatively robust histories of critical penal reformism. Some aspects of the challenge facing these countries are, however, clear, even pending this larger and much-needed empirical analysis. One of them has to do with the impoverished quality of the public debate about penal reform, dominated as it so often is by emotive rhetoric and a concern with short term political interest, rather than a careful and reasoned assessment of long term priorities in the light of the relevant evidence.

Debating the social and economic costs of imprisonment

How, then, might governments in liberal market economies like the UK help to generate a more expansive public debate about punishment? As the sub-title of the most recent report on imprisonment – 'Proposals for the efficient and sustainable use of custody in England and Wales' (Carter, 2007) – reminds us, public analysis tends to be as much preoccupied with economic efficiency as with victims' rights (as well as markedly more preoccupied with each of these than with fairness to offenders). This is hardly surprising given the salience of perceptions of economic competence to political credibility. But given that public money spent on criminal justice has a knock-on effect for resources available in areas such as health and education, there are reasons beyond purely economic ones for being concerned about the 30% increase in the proportion of GDP spent on 'public order and safety' between 1987 and 2005, or about a £2.7 billion prison expansion programme (Table 4.4, p.52: HM Treasury, 2007).

There is a substantial literature on the economics of mass imprisonment, much of it from the US. In a review of this literature, Marcellus Andrews has shown that, although on the most widely accepted calculations of the expected medium term benefits in crime reduction of incapacitative imprisonment the net costs outweigh the benefits, the policy is nonetheless economically sustainable in the medium term (p.116: Andrews, 2003). But sustainability is, of course, a different thing from optimal economic policy. Moreover, like criteria of macro-economic success, the way in which these economic calculations are made is highly contestable. In particular, the criminogenic effects of imprisonment, which decisively uncouples offenders from economic, family and social networks which could lead to reintegration, not to mention the damage to communities wrought by the mass imprisonment of certain groups, notably young black men, are inadequately acknowledged in many of these calculations. When we add in these social costs of mass imprisonment, the cost-benefit calculation looks fragile (Chapter 4: Pratt, 2006; Western, 2006).

In a world in which it is the case both that high rates of imprisonment make, at best, a modest difference to crime levels, and that politically feasible increases in the size of the prison system make either a marginal difference or possibly even have counter-productive effects (Freeman, 1996), it seems sheer economic irresponsibility to invest an ever growing proportion of GDP in the prison budget. In this country, it is high time for these arguments to be confronted directly by politicians and informed commentators. Given that governments' competence in managing the economy is key to their electability, even those of us who see the issue in terms other than the purely economic must surely acknowledge the importance of pressing home the message that increased prison spending is a form of fiscal mismanagement.

A further, baleful feature of the current public debate about the relative costs and benefits of punishment in the UK, as in several other liberal market economies, is its failure to set the social costs of crime in the context of the costs of other socially produced, and avoidable, harms. This point has been made forcefully by Hillyard and others in their focus on the costs of harms such as environmental

and corporate harms, and on the impact of social policies such as welfare cuts on harms – including harms associated with criminal victimisation – which find their impact disproportionately among the least socially advantaged (Hillyard et al, 2004; p. 30: Hillyard and Tombs, 2004). Only once our public debate is mature enough to compare the relative costs of crime as conventionally defined and of these broader harms will we be able to grasp the relative significance of punishment to social safety, and begin to assess rather than assume the relative contribution of punishment to the welfare of even victims of crime.

Taking the politics out of law and order: The bipartisan escape route

How are we to generate the sort of debate which is needed here? Clearly, it will not be an easy task. Happily, however, there is one major difference between the situation of political parties locked into the strategy of competitive penal populism in majoritarian electoral systems and the prisoners of game theory's dilemma. This is that they are able to co-ordinate with one another. And this, surely, is where the beginnings of an escape from the cell of penal populism can be glimpsed. But this will only be possible if the two main political parties can reach a framework agreement about the removal of criminal justice policy – or at least of key aspects of policy, such as the size of the prison system – from party political debate. This might be done by setting up something akin to a Royal Commission, in an effort to generate an expanded debate which takes in not only the widest possible range of social groups but also a broad range of the non-penal policies and institutions on which criminal justice practices bear. In committing themselves to act on the outcome of such a Commission, the two parties would distance the issue of crime control from the upward pressure created by electoral competition. Institutional initiatives which provide a buffer between electorally driven political decision-making and criminal justice decision-making – carefully structured sentencing commissions would be an obvious, and topical, example – would also be worth considering (Sentencing Commission Working Group, 2008; and see Chapter 3 of this volume).

But this would not be enough in itself to guarantee any success. A further important condition would be the re-constitution of some recognition of expertise in the field. It would be important not only to have any wide-ranging Commission serviced by an expert bureaucracy but also, following implementation of its conclusions, to consign the development of particular aspects of future criminal justice policy to institutions such as sentencing commissions encompassing both wide representation and expertise. In other words, the distancing of criminal justice policy from party political competition would open up the possibility of the kind of solution to fiscal policy implemented through the Monetary Policy Committee (MPC) – a policy which, notwithstanding the recent financial crisis, is widely regarded as one of the successes of the New Labour administration. By conferring the task of setting interest rates to an independent body of experts located in the Bank of England, making this body's deliberations transparent, and setting up robust mechanisms of accountability to parliament, Gordon Brown crafted a strategy which has commanded remarkable public and political support.

But is this strategy which Brown developed as Chancellor one which he should now, as Prime Minister, regard as broadly applicable to criminal justice policy? Significantly, both the bipartisan and the expert orientation of my suggestion here are prefigured in his creation of cross-party Task Forces in a number of areas, including security, since his selection as leader of the Labour Party. The early signs, however, are not encouraging. Lord West, chair of the Security Task Force, explained in introducing his first report that it did not propose lengthened periods of pre-charge detention for terrorist suspects because he had not seen a strong enough case for such a curtailment of civil liberties. The reaction from his political masters must have been swift. Within an hour, he was back on Radio 4's flagship news programme, *Today*, to tell listeners that he had misspoken. Since then, the evidence that the Brown administration will follow the Blair track on law and order has accumulated, notably in the decision to propose an expansion of pre-trial detention from 28 days – a period which is already significantly longer than that permitted in other comparable democracies (Russell, 2007) – to 42 days.

The publication at the end of 2007 of Lord Carter's Review of Prisons underlines the ambivalence of the messages emerging from the policy process. On the one hand, Lord Carter recommended that a working party be set up to consider the advantages of a sentencing commission, drawn broadly from the judiciary, the legal profession and those with statistical expertise as well as victims' representatives, with the goal of producing the sort of structured sentencing practice which is thought to have helped to moderate imprisonment levels in Minnesota. He further acknowledged the need for an informed public debate about sentencing, proposed the restriction of indefinite sentences for public protection, and hinted at the desirability of effecting some degree of insulation of sentencing policy from the political process (Chapter 3, paragraphs 39(b), pp.42-44: Carter, 2007). On the other hand, these recommendations were nested within a report whose main substantive proposal was to build a number of prisons so as to expand prison capacity by 6,500 by 2012. This was in addition to the existing programme for an expansion of 8,500, resulting in an overall increase in net capacity to 96,000 by 2014. Against this background, the more hopeful decision to establish a Sentencing Council seems unlikely to have much impact.

The idea of removing aspects of criminal policy from the arena of partisan competition along the lines of the MPC model may seem impossibly utopian. Why, after all, would politicians give up what has incontrovertibly become one of their favourite cards in the game of adversarial party politics? I would suggest, however, that it is entirely in their interests to do so. Under conditions in which both main parties have unambiguously adopted a 'tough on crime' stance, neither has very much to gain from pushing it. The inevitable result is a highly reactive environment in which short term policy development is the order of the day; in which the longer term effects and costs of criminal justice policy are far from the political agenda; and in which the interaction between criminal justice policy and other aspects of social and economic policy exist only in the rhetoric of 'joined-up policy making'.

This is not, of course, to underestimate the challenge which the existing dynamics of law and order in this country pose for politicians. These are challenges which reach deep into the political-economic structure of the country. The main keys to unlocking the dynamic towards ever greater inequality, social and political conflict and criminalisation lie in a bipartisan approach at the political level and in interventions at the level of the labour market, education and training with a view to economic integration. The economic aspects of this challenge will not be met merely by creating a new tier of low-skilled and low-paid jobs which do not generate the kind of income or welfare support which allows those who hold them to feel fully members of the polity (Young, 2003). And this, sadly, will be a tall order in Britain's political economy, whose competitive position has become increasingly dependent on low labour costs, low labour protections and job flexibility – implying a significant barrier to providing incentives to less skilled workers in the legitimate labour market capable of matching those in the illegitimate economy.

The political dimension of the prisoners' dilemma may, in short, be easier to escape than its economic counterpart. But since the prisoners' dilemma implies our being locked into a policy scenario for which, properly informed about its long-term implications and able to co-ordinate decision-making, it seems likely that a majority would not vote, an escape from its political dimension would itself be a worthwhile achievement.

The argument set out here is explored in greater detail in Lacey, N. (2008) 'The Prisoners' Dilemma in England and Wales' in M. Hough, R. Allen and E. Solomon (eds) Tackling Prison Overcrowding, *Bristol: Policy Press, pp.9-23.*

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CHAPTER 2

NICE for justice? Putting the evidence into criminal justice policy

David Howarth MP

There is a crisis in criminal justice policy in Britain. Record numbers of prisoners are behind bars, probation resources are being cut, reoffending rates are poor and crime rates, although they have followed the pattern of nearly every other developed country in having come down dramatically since 1995, are still among the highest in Europe. The prisons are too full, and too many prisoners are moved at short notice from prison to prison, for effective work to be done that might reduce reoffending after release. Disposals known to be more effective (and cheaper) than existing options - such as restorative justice - are confined to a few pilot schemes or not done at all, while the Government resorts to short term expedients such as early release schemes that only add to the impression of chaos and a lack of principle. Meanwhile, leading political figures find it almost impossible to resist the pressure put on them by tabloid newspapers to talk tough on crime, regardless of effectiveness, or to resist the temptation of accusing political opponents of being 'soft on crime' when they dare to take a line on sentencing other than the crudest form of retributivism.

Help might, however, be at hand from an unexpected, although unwelcome, source. The catastrophic state of the public finances has made all parties think again about their priorities. Is it really, the question will be asked, a wise use of public money, at a time when budgets for health and education are under threat, to spend billions on new prison building, in the form of the proposed 'mini-titans', when we know that the failure rates of prison, as measured by reconviction rates, are very bad, catastrophically so for short sentences imposed on young men? And beyond new prison-building, what about the vast amounts of public money - more than £40,000 per place per year - spent on the existing prison system, with such dire results in terms of public protection? Surely this is a way of doing things we can no longer afford. And surely now is the time to abandon the failed policies, and the failed politics, of the recent past and adopt a more rational, and inexpensive, approach based on evidence about what works to reduce reoffending?

But the silver lining for criminal justice policy to be found at the edge of the dark cloud of the collapse of the British Government's finances is not in itself enough to bring about permanent change. For as those finances recover, the temptation will presumably return to throw public money away on ineffective but popular schemes of punishment demanded by the media, whether it be old favourites, such as boot camps and short sharp shocks, or new schemes, such as attempting to scare young offenders into going straight by taking them on visits to adult prisons, which turns out to lead to more reoffending than doing nothing.

The question is how any short-term improvements in the rationality of criminal justice policy can be given more solid, institutional foundations. That is where the idea comes in of establishing a national body charged with assessing objectively the likely effectiveness of criminal justice policies in a way similar to how the National Institute for Clinical and Health Excellence (NICE) judges the effectiveness of medical treatments. The idea is that proposals for new policies - such as proposals for the public humiliation of those sentenced to unpaid work, or for violent offenders to be shown the consequences of violence at A&E departments - should be subjected to rigorous quantitative testing before being let out into the real world. Existing policies should also be tested in the same way, and compared with the likely results of adopting policies known to have the best prospects of success.

Critics of the proposal for a criminal justice NICE - let us call it the National Institute for Criminal Justice Excellence or NICJE - concentrate on two arguments: that it is a technocratic fix for a political problem at a time when experts are not particularly trusted (although they are still trusted more than politicians and journalists); and that there is no obvious way in which it can be operationalised so that it will have any discernible effect.

The force of the first argument is that criminal justice policy cannot in the end be isolated entirely from politics and it is not obviously entirely a good thing that it should be isolated even if it were possible. Criminal justice policy is not just a matter of technical expertise - of what, as a matter of fact, causes what - it is also a matter of values, and in a democracy questions of value should be settled through politics. But the NICJE would not be intended to resolve all questions of value. What it would do is take from the political system a remit that would include judgments of value and it would then establish, as objectively as possible, how those judgments of value could be put into practice. If a government of the type we have had for the past 12 years were to be in power, it might, for example, say to the NICJE that the main purpose of the criminal justice system was to satisfy the public's appetite for punishment. In that case, NICJE would collect or conduct empirical work on the degree to which various disposals do in fact satisfy that appetite and report accordingly. A different, more liberal, government might instead ask NICJE to report on the effectiveness of different types of sentence in reducing reoffending, in which case NICJE would concentrate on empirical testing of effectiveness. The beauty of the NICJE proposal is that it forces governments openly to say what they think is the main purpose of the criminal justice system and it holds governments to what they have said when it might be more convenient for them to shift their ground.

One problem might be that governments would try to avoid saying what they mean in advance, by issuing a contradictory or vague remit, but one might expect (and specifically provide for) the NICJE publicly to object to such attempts at evasion and to demand that it be given clear instructions. If clear instructions were not forthcoming, the government would not be in a strong position to complain if the NICJE interpreted its remit in the light of its own values.

The practical politics is that at a time of fiscal constraint, saying openly that the purpose of the criminal justice system is to satisfy public opinion will sound like saying that the purpose of the system is to provide votes for the governing party, which will in turn sound like spending taxpayers' money on political propaganda. In contrast, saying that the main purpose of the system is to prevent reoffending, and thus to prevent the enormous costs associated with crime, will sound entirely sensible, and in fact will be entirely sensible.

At a more abstract level, the NICJE will assist democratic debate rather than replace it, because it will require political parties to be more open in their views about the purposes of the criminal justice system and it will short-circuit debates about the facts, debates which can often obscure the underlying disagreements about values. The NICJE is not an attempt, as some critics claim, entirely to depoliticise criminal justice policy. It aims rather to make the political debate more transparent and less evasive.

The second criticism of the idea is that establishing the NICJE in itself will achieve very little. The NICJE cannot have a direct influence on sentencing in individual cases, because that is the job of the courts. All it could do is act as an advisory committee to the executive branch, which might choose to act on that advice when deciding what kinds of sentence to fund and to what degree, but, equally, it might not. It is difficult, the argument goes, to see how the system could be set up so that the government could not ignore that advice, except by externalising spending decisions to a degree that would not be acceptable in a democracy.

But there is a way through this objection, a way that depends on realising that the NICJE could play a role simultaneously in influencing sentencing and in influencing spending decisions. The crucial question is what should the relationship be between government policy on sentencing offenders and the sentences imposed by courts in individual cases? One version of the relationship is that the judges apply the law, as decided by parliament, to individual cases and the government picks up the bill for the consequences, whatever they are. In this model, if judges send more people to prison than the government expects, or if they require more offenders to be treated for addictions or to undergo restorative justice programmes, the government's job is to make sure that the resources are in place to make the relevant sentences happen. If the government does not like the results, it can change the law, but it should not interfere in any other way.

The trouble with this version of the relationship is that, although it maximises judicial independence, in practice judges are far from predictable, with the result that the only way to make sure that everything they require is available is to maintain a massive degree of over-capacity – for example empty cells and unused community sentence places.

Another version of the relationship is that the government should limit judicial discretion to such an extent that judges' decisions become predictable, so that the government can not only plan accurately but also change judicial practice whenever

it decides that it wants to change the mix of sentences being awarded. For example, if the government decided that it wanted more people to go to prison, it could first shift resources into prison building and then change the instructions to judges so that more offenders are sent to prison. This is the version of the relationship that leads, for example, to proposals for tight sentencing guidelines open to influence by government.

The objection to this second version of the relationship is that it results in unfairness. The obvious problem is that if the instructions to sentencers change merely to reflect the availability of prison places or community sentence places, people will end up receiving different sentences for precisely the same offence, just because they happened to be sentenced at different times. Sentences should be set a set of rules and any attempt by legislators to lay down in advance what is to happen in every case will end in disappointment, if not disaster.

The question is how to achieve co-ordination without creating a situation in which either the judiciary dictates spending decisions to the government or the government dictates sentencing decisions to the judiciary. This is precisely where the NICJE would come in. The NICJE could be given power not only to act as an advisory committee to the executive branch, but also to influence the sentencing guidelines. The effect would be that both sides, the judiciary and the executive, would be able to work from the same set of principles, but without either directly controlling what the other did. Crucially, the executive would have an incentive to accept the advice of the NICJE because it would know that if it did, it would probably find that its decisions would naturally co-ordinate with those of the judiciary. Both sides would be moving in roughly the same direction at the same time because they would both be using the same map. Such a solution could not guarantee co-ordination in every detail, but it is more likely to succeed than ignoring the problem completely or subordinating the courts to the executive, and it does provide a reason for believing that the NICJE would have a real effect on government policy.

Another associated criticism of the NICJE idea is that it is unclear whether its mode of operation would be merely advisory or it would have powers similar to those of the Monetary Policy Committee of the Bank of England over the rate of interest, in other words powers to make substantive decisions. The idea of giving the NICJE a dual role – feeding in both to the executive and to the judiciary – shows that the options are even greater than two, but also shows that the choices are not too difficult to make. The simplest structure would be for the NICJE to be advisory both to the executive and to the sentencing guidance council, and to rely on realisation of the advantages of co-ordination to bring about convergence. At the other end of the spectrum the NICJE could be given power both to allocate resources and to set sentencing guidelines itself. It is difficult to see how this second option could count as democratically acceptable – although one might be able to argue that the democratic element lies in the power of the executive, accountable to parliament, to set the NICJE's remit. Between the two lie two other options – direct power over resource allocation but an advisory-only role on sentencing guidelines and, conversely,

advisory-only on resources but direct power over the sentencing guidelines. It seems difficult to justify either intermediate option in a principled way. Initial analysis, therefore, seems to point to the first option, with the NICJE playing an advisory role on both sides.

One final objection to the NICJE proposal is that it is impractical to propose it so close to an election, since the parties will be seeking divergence and differentiation on criminal justice policy rather than convergence and consensus. Even if that might be true (although one can see circumstances in which every party comes to the conclusion that it has more to lose than to gain by campaigning on the theme that 'we are considerably tougher on crime than you'), that is no reason to hide away a proposal that sooner or later might become a crucial tool in moving criminal justice policy along a path down which it should have moved a long time ago and which might very soon come to be seen as indispensible for future progress.

CHAPTER 3

A Sentencing Council for England and Wales

Mike Hough and Jessica Jacobson

The Carter Review of the use of imprisonment, published in December 2007 (Carter, 2007), proposed that a permanent sentencing council be set up in England and Wales. The creation of a council was seen as a means of improving the transparency, predictability and consistency of sentencing, and thus bringing the demand for imprisonment and the supply of prison places into closer alignment. Carter favoured a guidelines system along the lines of that in Minnesota, where judicial discretion would be tightly curbed. The Ministry of Justice set up a working party, headed by Lord Justice Gage, to examine the various options open to the Government (Sentencing Commission Working Group, 2008).

The Esmée Fairbairn Foundation generously funded us to mount an independent review of the options, which ran in parallel to the Gage working group (Hough and Jacobson, 2008). This article summarises our findings, and discusses the Government's legislative plans that at the time of writing had just passed through Parliament, in the shape of the *Coroners and Justice Act 2009*, but had not yet come into force.

To anticipate the article's conclusions, we think that the Government has reached the right conclusions in revamping the existing arrangements for issuing sentencing guidelines: it makes sense to combine the Sentencing Guidelines Council (SGC) and the Sentencing Advisory Panel (SAP) into a single body. We also agree wholeheartedly with the Gage working party's recommendation to avoid US-style sentencing grids; this would have constricted sentencing discretion too tightly, and introduced the injustice of unjustified uniformity in sentencing. However, we think that the Government has missed an opportunity: they could have reshaped the proposed Council into a significant institutional device for imposing a brake on the penal populism that has so disfigured penal politics since the early 1990s.

The context

As is well-known, the prison population has grown in an uncontrolled way for almost two decades. This largely reflects increased severity of sentencing, at least until recently. Numbers of cases passing through the courts have changed little over this period.

Whilst there have been changes in sentencing severity over time, we know that there is also considerable geographical sentencing disparity – or 'justice by geography'. Any effective response to these problems needs to take into account *all* the factors that are driving up the prison population and leading to sentencing disparity.

In particular, it is important to see the uncontrolled growth of the prison population

first and foremost as a *political* problem. The interaction between politicians and the media is a critical factor in explaining this growth. And the quality of media coverage of law and order issues, public opinion about crime and punishment, and the associated penal populism which characterises political debate all need to be factored into any strategy for containing the prison population. Simply constraining sentencers' discretion, without addressing the underlying pressures for tougher sentencing, is not a viable, long-term solution to the prisons crisis.

How can a sentencing council address the prisons crisis?

Sentencing councils across the world generally serve one or more of three main functions: providing guidance to sentencers; gathering and providing information and statistics for monitoring, planning and policy development; and community engagement – to inform and to consult with the public. Most US councils combine the first two functions but not the third. Some Australian councils focus on the third but not the first two. The only jurisdiction to our knowledge which developed plans for a council that performs all three functions was New Zealand; however, this enlightened plan was shelved when the Government changed in 2008.

Following the recommendations of the Gage Working Group, the Government introduced legislation for a Sentencing Council for England and Wales that included the first two functions – guidance and monitoring – but not the third function of community engagement. This is a matter of regret because a council designed to discharge all three functions would help to address the current prison capacity crisis.

Function 1 Providing guidance for sentencers

Guidance for sentencers in England and Wales is currently provided by the SGC, which works in conjunction with the SAP. The existing SGC guidelines are quite loosely structured, and adherence to the guidelines has not to date been strictly enforced. Sentencers are required by statute simply to 'have regard to' the guidelines in passing sentence. We welcome the requirement set out in the *Coroners and Justice Act* for sentencers to follow the guidelines 'unless it would be contrary to the interests of justice to do so' (although the obligation on sentencers to follow the guidelines was weakened as the Bill passed through the House of Lords). The more explicit obligation to follow the guidelines is needed in order to increase consistency and stability in sentencing practice; also needed is the associated requirement placed on the new Council to monitor the extent to which sentencers actually remain within the guidelines. On the other hand, it is also helpful for there to be an explicit criterion against which departure from the guidelines can be assessed.

Carter's preference was for a more structured and mandatory guidelines system, based on the sentencing grids used in some states of the US. This would have rapidly yielded greater predictability and uniformity in sentencing practice. However, there would be many disadvantages to a highly structured and mandatory guidelines system: most offender-related factors would be excluded from sentencing decisions; it would lead to *unwarranted* uniformity even if it reduced unwarranted disparity;

and it would be likely to stimulate plea-bargaining. It would also prove unpalatable to sentencers and other criminal justice professionals in this jurisdiction. The Government's final decision was to retain the model of loosely structured guidance developed by the SGC, but to make the guidance more mandatory by restricting the statutory grounds for imposing a sentence outside the guidelines.

The existing SGC guidelines should thus provide the foundation for a comprehensive set of sentencing council guidance. Consistency, simplicity and clarity in the format and presentation of the guidance should be ensured. It remains to be seen precisely how the body of guidelines are reconciled with sentencing practice. Clearly there will be offences where practice and guidelines are already well-synchronised; for other offences there may be a significant degree of mismatch. We can envisage an iterative process of adjustment where guidelines and practice are progressively aligned, with adjustment to practice where this seems needed, and adjustment to the guidelines in cases where the Council's position seems inconsistent with its overall body of guidance.

Once guidance and practice have been brought broadly in kilter, there will be scope to use the guidelines to determine the courts' overall use of custody. It would be possible to adjust recommended sentence lengths or custody thresholds for various offences, with the express intent of reducing – or, of course, increasing – use of custody. Whether politicians should be entitled to do this is a contentious issue, of course – and it is far from clear whether, as it stands, the planned legislation would actually permit this. But in our view, there would be nothing improper in politicians being able to make general decisions about the overall severity of our sentencing system, provided that they remain excluded from consideration of specific cases. Parliament already has a device for signalling to courts how severely they should sentence categories of crime – by setting maximum sentences – and no-one to our knowledge has complained that this long-standing legislative practice represents an encroachment on judicial independence. In practice however, regardless of the outcome of the next election, it is most unlikely that any politicians will want to launch either an explicitly decarceral sentencing strategy targeting the new Council's guidelines, or indeed an initiative designed to extend the use of custody. The former would be electorally too costly, and the latter fiscally unthinkable in the current economic climate.

Function 2 Research and monitoring

Currently there is no monitoring of levels of judicial compliance with the SGC guidelines. This is understandable – as monitoring requires the collection of new statistics on each sentencing decision – but indefensible. It simply does not make sense to have a system of guidance whose impact remains totally unknown. We welcome the fact that the *Coroners and Justice Act* imposes a duty on the new Council to monitor the impact of its work, and in particular to assess how often sentencers depart from the guidelines.

The Council could undertake this task either on a routine basis or through periodic surveys. For effective monitoring of sentencing practice to be carried out, sentencers

would need to record how their sentencing decisions map on to the guidance. Minimally, they would need to record each case's level of seriousness (as they assessed it), and whether their sentence fell within the range of sentences stipulated for cases of that seriousness.

We also welcome the proposals in the Act that the Council should also carry out impact assessments of proposed reforms to sentencing policy. The history of recent sentencing legislation is a sorry one. The Government has a track-record of mis-costing on a heroic scale. The – sensible – 'custody plus' sentence introduced by the 2003 *Criminal Justice Act* had to be shelved for lack of resources to implement it. And the fiasco surrounding the introduction of Imprisonment for Public Protection (IPP) sentences might have been avoided – and some of the associated injustices reduced – if there had been an independent review of the likely demand for the sentence as originally proposed, and the likely cost.

Function 3 Community engagement

Thus far, we have sung the praises of the Government's proposals for a new Council. We think it sensible to *structure* sentencers' discretion, but not to *fetter* it. We think it sensible to monitor the impact of the guidelines, and to keep their impact under regular review. Where the Act falls short is in grasping the opportunity afforded by a restructuring of the Council to create a more outward-facing institution that will work to improve public trust in sentencers.

There are three arguments for giving the new Council a more explicit role of 'community engagement'. First, the courts currently face a particular crisis of trust, in that levels of public cynicism about sentencers is high, and yet public knowledge about sentencing practice – and about crime – is demonstrably low *(see Box 1)*. People vastly underestimate how tough sentences typically are. They believe that the courts are much more lenient than they in fact are, for a range of offences. Inaccurate media representations of sentencing feed into the public misconceptions. That these misperceptions damage the legitimacy of the institutions of justice is obvious.

The Government faces particular problems in responding effectively to public beliefs about sentencing. If people think that judges are out of touch and far too soft, at least they believe them to be fair and honest. This is in sharp contrast to public attitudes towards politicians. The latter are uniquely disqualified to correct these public misperceptions. A Sentencing Council that is a source of authoritative, trusted and accessible information about sentencing could almost certainly do better. It could help to correct public misconceptions, and create a more constructive climate of public and political debate about penal issues.

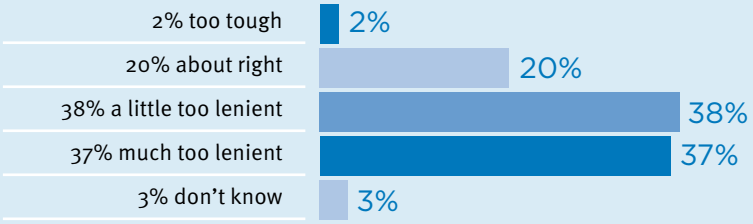
There is a second argument for the community engagement function, which might achieve more purchase on those politicians who harbour their own scepticism about judges. It is that it is simply perverse to have a system of deterrent threat ('If you do X, we shall do Y to you') in which the nature of the threat is not spelt out clearly to

Box 1

SOME FINDINGS FROM THE BRITISH CRIME SURVEY 2007-08

1 Are courts tough enough?

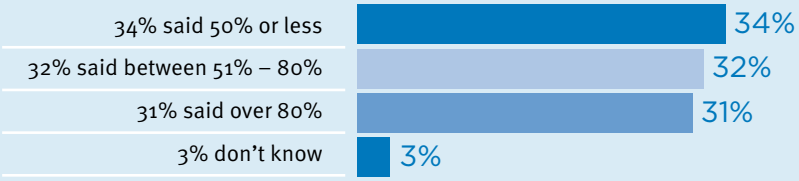
In general, would you say that sentences handed down by the courts, that is both the Crown Court and magistrates' courts, are too tough, about right, or too lenient?



2 Sentencing

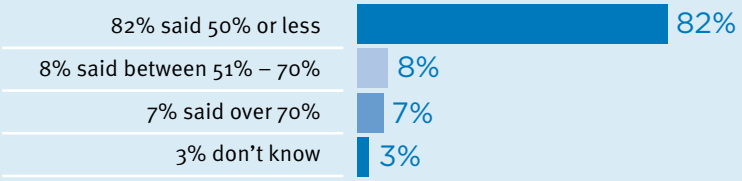
Out of every 100 men aged 21 or over who are tried and found guilty of rape, how many do you think are sent to prison?

In 2007, 97% of men aged 21 or over who were convicted of rape were imprisoned.



Out of every 100 men aged 21 or over who are tried and found guilty of house burglary, how many do you think are sent to prison?

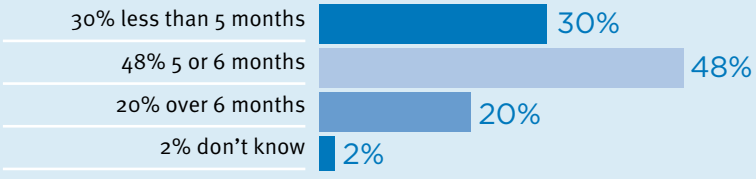
In fact, in 2007, 59% of men aged 21 and over found guilty of burglary in a dwelling were sent to prison.



3 Sentence served

If someone was sentenced to 12 months, how long on average would they actually spend in prison?

The average time served for this sentence is 46%, so the right answer is five or six months.



those who might contemplate doing X. The new Council has as its primary function communicating to sentencers what the 'going rate' should be for any given crime, specified in a fair amount of detail. There can be little justification for *not* publicising more widely what the various 'going rates' actually are, if one envisages judicial deterrent threat as quintessentially a system of communication between the courts and the citizenry. The Council should be communicating 'going rates' as reflected in its recommendations, plus some indication of the degree to which courts adopt its recommendations.

Third, the Council will need to check that its recommendations for sentencing are tolerable to the public. We take it as axiomatic that the Council's choice of guidelines should not be *driven* by public opinion, but it strikes us as totally defensible that the Council's recommendations should be regarded as acceptable, or at least tolerable, by a majority of the public. The legitimacy of the courts depends on a degree of alignment between sentencing practice and what people find tolerable or acceptable. In work that we have done for the SAP, we have asked samples of the public not only what their preferred sentences for a given offence are, but whether they regard as acceptable the Panel's sentencing proposals for that offence. Given the spread of public opinion, there will be many offences, particularly at the less serious end of the spectrum, where there is limited consensus about acceptable practice. However, it strikes us as sensible to aim for guidance where at least a bare majority of the population will regard the guidelines as tolerable, even if they do not reflect their first preference.

If the Council is to aim for some sort of loose alignment between public opinion and practice, this implies quite intensive engagement with the public – or at least with samples of the public. This is because it makes sense only to align practice with *considered opinion* – or with public judgement – rather than with 'saloon bar' views about dealing with offenders. This implies that the Council would have to explain and justify their guidance in some detail, before testing people's reactions to it.

We would like to see the Sentencing Council develop and implement a comprehensive public information, education and engagement strategy. The *Coroners and Justice Act* provides the Council with the powers needed to do this – though it falls short of imposing a duty on it to do this. How should it go about this? The central role must be to inform, and inevitably has to be done through publication. But the medium of publication is the key thing to get right.

It is becoming increasingly clear that just as the internet is the tool by which the Council will communicate to sentencers, so too it is the best method for reaching the public – and one which, crucially, is not mediated by the commercial news media. The only efficient way of telling people what you 'get' for different crimes is to have some form of interactive website where people specify the offence and get told the range of possible sentences that the Council advises. Hard-copy publication is secondary. There may also be strategies for face-to-face communication (as in the

Magistrates' Association's excellent Local Crime: Community Sentence programme). But it is hard to see how this will ever achieve the same reach as the internet. Effective *consultation* with the public – as opposed to the more straightforward process of *informing* the public – can only be achieved through structured research, as long as there is widespread ignorance about sentencing practice. (Professional researchers would say that, of course, but in this case it happens to be true.)

Conclusions

There is much to welcome in the Government's proposals to reshape the current arrangements for sentencing guidance. The new Council should be able to build on the work of the SAP and the SGC to offer sentencers clearer and simpler guidance. This guidance should structure sentencing discretion rather than eliminate it. Implicit in the proposals is a recognition that sentencing is a human process which cannot be accommodated within tightly defined grids.

So far, so good. However the Government needs encouragement to take its proposals a stage further, and ensure that the Council faces outwards to the public, as well as inwards to the courts. Something has to be done to ensure that the public is better educated about, and less cynical about, the work of the courts. Only an independent body can take on this task – and the new Sentencing Council may prove to have the necessary authority and means to do so.

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CHAPTER 4

Why we need directly elected sheriffs to run criminal justice

Douglas Carswell MP

What Home Secretary has not promised tough new measures against crime? When did we last have a government that did not announce headline grabbing initiatives to tackle antisocial behaviour? But it has not worked. The levers of central control are broken, no matter how shrill the politicians who promise to pull them. It is time for a radically new approach to fighting crime.

Rather than look to Home Secretaries or Westminster politicians to run the criminal justice system, we need to make it answerable to the local communities it is supposed to serve. In place of the quangocrats and officials who oversee policing, prosecution and offender management, we need direct democratic accountability.

Introduction

The political discussion about crime is often a numbingly boring argument about statistics. Overall crime recorded by the police seems to have risen (so the Conservatives rely on this statistic) while crime reported by the public seems, until very recently, to have fallen (so Labour rely on that). As far as we can tell, certain classes of crime have fallen, notably burglary and car crime, while others have risen, notably violence and antisocial behaviour.

The truth is that 'overall crime' (rather like overall GDP) is an irrelevance. What matters to people is local crime (or their own wealth). And here, the national trends are worrying. For while everyone must welcome the fall in acquisitive crime against homes and cars (a fall, by the way, which has been achieved more because of private investment in alarm technology rather than because of better policing), it is violence and antisocial behaviour which bothers people most.

Conventional policing – based on evidence and detection – is unable to address the problem of antisocial behaviour. This sort of crime is not, like acquisitive crime, a rational, if immoral, professional endeavour, which can be reduced by rational professional action by the authorities to alter the balance of risk and reward. The prevalence of low-level disorder and random violence is an inchoate, angry, irrational expression of social collapse.

This collapse is happening both 'internally' and 'externally'. The 'internal' collapse is the decline of healthy families and communities, the informal social networks which sustain decent behaviour among individuals. The 'external' collapse is the decline in the effective enforcement of the law by the agency responsible for it: the police. The two are linked, of course: families and communities suffer when the police do not do

their job, and the police's job is made harder when families and communities are not strong.

What the police are for

This essential link was once the founding principle of the police force. 'Police, at all times, should maintain a relationship with the public that gives reality to the historic tradition that the police are the public and the public are the police', said Sir Robert Peel in his statement of principles with which he established the Metropolitan Police Force in 1829.

Today, there is increasing lip-service paid to this principle – and decreasing actual implementation of it. 'Working together for a safer London', proclaims the Met's new, expensively redesigned logo at Scotland Yard. Yet behind the building's blank facade sit thousands of police officers doing precisely the opposite of 'working together' with the community. They are busy devising new processes to 'connect' with the public, but which in fact alienate them further.

There is no more illustrative example of the modern culture of British policing than the proposal in the Macpherson report – since implemented by this Government – that officers should fill in a form every time they stop a member of the public in the street. The pointless bureaucracy involved in this requirement is outrageous enough: it takes up seven minutes of an officer's time per person stopped, and thereby discourages him or her from engaging with the public or stopping suspicious individuals. More fundamental, though, is the assumption behind the requirement. This is that the police's relations with the community need to be monitored from above: that every contact between a police officer and a citizen must be mediated by an official process, so that the police's relations with society can be assessed on the basis of statistical returns. The form already contains a question on the individual's racial group, and it has recently been suggested that the individual's religion might be noted down too. Thus does an initiative intended to improve the police's relations with the London public – particularly ethnic minorities – end up in an intrusive and deeply illiberal attempt by the state to monitor the behaviour of its agents and peer into the personal circumstances of British citizens. The police and the public have never been more remote from each other.

How do you sack a Chief Constable?

The attempt to ensure the police and the public 'work together' has been enacted from precisely the wrong direction - from above. Local Strategic Partnerships, Crime and Disorder Reduction Partnerships and Community Safety Plans are just a few of the initiatives designed in Whitehall, implemented locally, to 'connect' the police with other 'stakeholders' in the community. In recent years the Home Secretary has assumed more and more powers over local forces, including the power to appoint and dismiss Chief Constables on a whim – as we saw when David Blunkett, responding to the public furore following the Soham murders, demanded the resignation of the Chief Constable of Norfolk, despite the local Police Authority supporting him.

Police Authorities are supposed to represent the community in the supervision of the police. They are one of the three pillars in the 'tripartite' structure implemented in 1964, the others being the Home Secretary and the Chief Constable. Over the years, and especially since 1997, the Police Authority has become by far the weakest of the pillars. Chief Constables are accountable in practice not to the representatives of the community but to the Home Office in Whitehall, which works to ensure – through targets, central funding streams, and bureaucratic audit and inspections – that local forces implement national policies designed to bring down national crime figures. The Home Office has imposed de facto national control of police forces.

If one reason for the impotence of Police Authorities is the encroaching power of the Home Office, another is their own lack of moral authority. Police Authorities are appointed bodies, comprising local councillors (on a party proportional basis), Home Office-appointed 'independent' members, and local magistrates. They are anonymous quangos made up of local worthies who, albeit with the best of intentions, generally see it as their job to support 'their' Chief Constable against attacks on his or her performance. It is widely understood that one of the key roles of a Chief Constable is to 'manage' the local Police Authority; that is, to ensure that no complaint or trouble comes from that quarter.

The 1964 tripartite system has failed to create effective local accountability. Chief Constables obey the Home Office, not the community. Few people know Police Authorities exist – even fewer know who sits on them; they are no longer effective (if they ever were) in establishing local policing priorities. People rightly feel alienated from their local police forces.

The unhappy saga of Sir Ian Blair

The total absence of accountability was made flesh in the unfortunate form of the most senior police officer in Britain, Sir Ian Blair. The former Met Commissioner lurched from crisis to crisis. At first, he had strong support from Labour politicians, who approved of his apparent belief that the primary purpose of a police force is not to prevent crime, but to promote anti-racism. Sir Ian was certainly an articulate proponent of this agenda. Indeed, if he had concentrated on doing his job, rather than on telling us what a good job he was doing, he might have avoided a good deal of trouble. His elevation of PR over actual policing was neatly symbolised by the fact that, virtually at the moment that the Tube bombers were detonating their devices, he was telling listeners of the Today Programme that his force 'set the gold standard for counter-terrorism'.

After the bombing, he was quick to assure everyone that the atrocity had nothing to do with Islam. A week later, he told us that his officers were going around with 'big grins'.

Then came news that a man had been slain at Stockwell underground station. Within hours, Sir Ian announced that the shooting had been in connection with the Tube bombing. Then, for several days, while the real Tube bombers remained on the

run, stories were circulated about Mr de Menezes having been an illegal immigrant and having jumped the ticket barrier. When Sir Ian was finally forced to admit that his officers had killed the wrong man, he insisted that police action was not 'the underlying cause' of Mr de Menezes's death. Not the underlying cause? It is hard to see how else we should describe holding someone down and loosing five bullets into the back of his skull.

In November 2007, the London Assembly passed a motion of no confidence in him. Sir Ian responded by taunting them with their powerlessness: 'I have stated my position, if you have the power to remove me, go on'. If a classical artist had wanted to use a single tableau to illustrate what was wrong with how contemporary Britain was run, how powers had shifted from the people to the permanent functionaries, he could have done no better than to depict that scene.

In July 2008, it emerged that the new London mayor, Boris Johnson, armed with the third largest mandate in Europe after the French and Portuguese presidents, also wanted Sir Ian to go. (There had been further scandals and pratfalls in the intervening months, notably a row about the award of a £3 million to one of Sir Ian's friends.) The lawyers made clear that the mayor had no such power. The Met Commissioner, using the last-ditch defence of every quangocrat, claimed that this position was becoming 'politicised'. But senior policemen – Sir Ian more than most – were already advancing a contentious political agenda, not least in their active lobbying for internment powers and other anti-terrorist legislation. The question is not whether the people running the police should be political – something they cannot avoid – but whether they should be elected.

A failing system

A brief look at the other aspects of the criminal justice system reveals the problems of remote accountability and poor performance. There is clear evidence that the Crown Prosecution Service (CPS) is proving ineffective. Seven per cent of cases each year are abandoned 'in error'. By 2000, the CPS was bringing 65% fewer prosecutions against offenders aged 14 to 18 than had been prosecuted in 1984, the year before the CPS was established, despite a significant increase in juvenile crime in the intervening years. Whereas the CPS was established to prevent the dishonesty with evidence which sometimes occurred when the police were the prosecutors, today the opposite problem is occurring. There is a failure of communication, and a culture of blame-passing, between the police and prosecutors, with the result that too many criminals fall between the cracks and victims are denied justice.

As for sentencing, judges and magistrates have responded in recent years to the clear public demand for stiffer sentences by sending criminals to prison earlier in their criminal career and for longer stretches. This is welcome, for it has significantly reduced potential crime through the incapacitation of criminals. And yet if prison works at this most fundamental purpose, it is failing in its secondary, but vital, role of rehabilitation. Over half of all prisoners are reconvicted within two years of their

release, including 75% of young offenders under 21 and nearly 90% of those under 18. Prisons are managed by the National Offender Management Service (NOMS), comprising the former Prison and Probation Services, under a director general accountable to the Justice Secretary. This new system has yet to be tested. However, it is again an upwardly-accountable system. It is likely that NOMS will be a top-heavy, top-down structure which will further estrange local communities from the public servants supposed to be protecting them against crime.

Send for the sheriff

Police Authorities should be scrapped. Instead a simple, effective and transparent system of local accountability should be introduced: directly elected individual Sheriffs. Initially, there would be one for each of the 43 police forces in England and Wales; in time, however, it would make sense to bring these forces in line with local government boundaries, thus giving voters a clearer idea of where responsibility lay. Chief Constables would retain operational independence but they would answer to the Sheriff for their performance – and the Sheriff would answer to the public.

Where there was a directly elected Mayor whose jurisdiction was congruent with a police force area (currently only London) the Mayor would exercise the functions of the Sheriff.

Sheriffs would appoint and dismiss Chief Constables. They would set their own targets for the force, make their own Policing Plans, and, crucially, control their own budgets. Each Sheriff would be allocated his or her funding as a block allocation, rather than as a series of micro-managed grants for specific purposes, and would be accountable to local voters for how effectively he or she spent the money in the fight against crime.

Restoring public confidence in the criminal justice system is not simply a question of making those responsible for pursuing criminals through the streets (i.e. the police) more democratically accountable. It is also about making those responsible for pursuing suspects through the courts answerable for their effectiveness in securing convictions, and making those responsible for supervising punishment accountable for their success in protecting the public by reducing reoffending.

We should reconstitute the CPS as a set of local Crown Prosecution Offices, answerable to the local Sheriff for their success in securing convictions. As in the US, the Sheriff should not be entitled to order a prosecution, but may order one to be dropped. In order to avoid miscarriages of justice the police and the public prosecution authority should remain distinct and separate entities. However, making them accountable to the same authority would ensure there is greater scope for co-ordination between the two institutions at the sharp end in the fight against crime.

The Sheriff should also be responsible for supervising sentenced criminals. The Government's National Offender Management Service is welcome insofar as it unites the two arms of the penal system. However, the accountability to the Justice

Secretary and the regional structure (there are ten regions, overseen by Directors of Offender Management or 'DOMs') should be scrapped.

Rather than amalgamating upwards, we should amalgamate downwards, and abolish the regional structure of the new system. Rather than DOMs, there should be LOMS: Local Offender Management Services accountable to the elected Sheriffs. There should be a local purchaser-provider split. Each LOMS – acting on the instructions of the Sheriff – should have responsibility for purchasing space in prisons and other 'disposals' (probation and community punishment capacity), with regard to local wishes. Criminals should serve their sentences – whether in prison or not – under the authority (i.e. as the 'guest') of the Sheriff in the area they committed their crime.

Finally, the Sheriff should have the power to set local sentencing guidelines. While granting an elected official the right to intervene in individual cases would plainly be at odds with the separation of powers, there is no reason why local voters should not have some say over which categories of crime to prioritise.

This may well lead to disparities: shop-lifting might lead to incarceration in Kent, but not in Surrey. I suspect that one of two things would then happen. Perhaps Kentish crooks (and crooks of Kent) might pour over the county border in such numbers that the voters of Surrey chose to elect a tougher Sheriff. Or perhaps the voters of Kent, who are also taxpayers, would tire of having to find all the prison places required by their Sheriff's hard line. At which point, the Sheriff of Kent, knowing that he was up for re-election, might try something different. He might rule, for example, that instead of facing jail, shoplifters would be forced to stand outside Bluewater with placards around their necks reading 'shoplifter'. The point is that we do not know what local people would choose. That is the essence of localism.

The Sheriff's discretionary power over prosecutions will lead to similar incongruities. Different parts of the country might end up with different guidelines on how far a homeowner could go in attacking intruders. It should be noted, however, that discrepancies already exist today: some Chief Constables, for example, decline to treat the possession of cannabis as an offence. The difference is that Chief Constables are not answerable to anybody.

These specific proposals, however, matter less than the philosophy that underlies them. People feel, and with reason, that the legal system no longer functions as the majority would like. John Locke's original compact has been broken: having contracted out our right to personal defence and enforcement, we find that the state no longer fulfils its part of the bargain. The legal system gives the appearance of reflecting the prejudices of an unrepresentative clique of experts in Whitehall, on the Bench and, not least, abroad.

The surest way to address that concern is to bring justice and policing under local democratic control.

CHAPTER 5

Primary justice - negotiating the narrow path

Amelia Walker

Earlier this year, the Local Government Information Unit (LGiU) collaborated with the All Party Parliamentary Local Government Group on an inquiry into justice in communities. The result of that work was a report which boldly set out a new conception of the justice system (LGiU/All Party Parliamentary Local Government Group, 2009a). We called this conception 'Primary Justice', and set out both the compelling need for change and our vision of what a primary justice system would look like.

In this essay I will not retread the arguments made in that report. Instead, I will set out a new argument as to why we need Primary Justice. I will argue that the unique character of justice in society means that the usual scope of public policy debate is inadequate to capture the insights we need to design a justice system that everyone can have confidence in. I will present a view of the diversity within society's conceptions of justice, and make a case that the strength of Primary Justice lies in its ability to balance the interests of these competing views[1].

When we undertook our inquiry into justice in communities, what pre-occupied me more than any other issue was the frequent irruption of tension on the topic of punishment. In virtually every session, at some stage there was an emotive disagreement about the role of punishment within the justice system, or whether it should have any role at all. I personally had to argue vociferously to include reference to punishment in the final report, facing opposition even to mentioning it.

The inflammatory effect of 'punishment' as a topic, however, is only a reflection of a wider tension latent in society. Perceptions of justice in society are often surprising when they emerge, because they can cut across usual divisions of class, ethnicity and religion. Longstanding, sometimes ancient, beliefs about right and wrong deeply colour the views of individuals, sometimes in surprising ways.

Justice and secularity

In this regard, justice is an anomaly. I have also recently published a report on social housing – an even more incendiary topic than justice, if such a thing is possible. Views on social housing diverge widely, but views are always firmly rooted

1 The picture of Primary Justice described in this essay replicates the vision of the original report, and the report's collaborators. But the argument presented here is entirely my own, and does not represent the view of either the LGiU or others involved in the original report.

in different conceptions about economics and politics. It is possible to encompass entirely the full range of views on housing issues in purely secular terms. While all public policy has an ethical dimension, I have encountered no views on housing issues which are intractably religious. The same is true of other areas of policy. Even in health, where debates can polarise along religious lines, the debate usually centres on whether actions such as euthanasia should be criminal or not, whether they should, in fact, be a matter for justice.

Justice is problematic for secular policy makers. While a secular state can provide law and order without any reference to religion, you cannot comprehend the diversity of views of justice in society without recourse to the reality that a significant proportion of these are fundamentally non-secular. If we are to debate the future of the justice system, and tackling the woes which currently plague it with a radical new vision, we cannot dodge this truth.

Moreover, it is not only a question of secularity. There are deeply divergent views within secular and religious camps themselves. The challenge is to understand them all.

I have tried to read between the lines and identify a paradigm behind each of the different views I have heard argued or expressed, drawing on recognisable philosophies to give them coherence. Of course all of the views described below are only illustrations, and most people will subscribe to a more nuanced, or vague, or mixed view than described.

Four identified views

The first view is Hobbesian – an essentially self-centred view focused on the impact of the system on oneself. Social rules are accepted and endorsed based on a judgement that not to do so – and live in a society in anarchy – would likely be a worse personal outcome, all things considered. This view focuses on balancing the advantages of transgression against the costs of punishment. Justice must be seen to offer an advantageous return for those who keep the law. There is little place for symbolism here – what matters is who benefits in real terms. If I am law abiding on the grounds that keeping the law offers benefits and breaking it disadvantages, then I will feel wronged if the system appears to advantage those who break the law in any way.

The second view is religious – though not necessarily the code of any specific religion. The 'religious' moral code has rules, and those who keep the rules are rewarded and those who break them, punished. What is core is personal choice. Everyone has full and free ability to choose to obey or stray, and reward and punishment are rightly apportioned to reflect the choices made. Whether the rules relate to the harm you have done is immaterial – rules exist to be followed, and when breaking a rule your punishment is just whether you have harmed others or not. The importance of punishment here is unavoidable. Punishment does not need to achieve any other aim, it is a necessary consequence of transgression.

The religious view of punishment is deeply problematic for the third view. This third view is utilitarian – that what matters is outcomes. The role of justice should be to improve lives by reducing the harm caused by crime. Though it is unlikely that proponents of this view would reject the role of choice, in practice choice fades into the background. If outcomes matter more than anything else, what rises to the fore is causation. People are a combination of nature and nurture, and to change their behaviour we need to understand how that combination of forces is affecting them. People who offend disproportionately come from disadvantaged backgrounds and lead disadvantaged lives. When people offend, there is a failure in society to have kept them from these circumstances, and to keep them from reoffending we must collectively find a way to change those personal and environmental factors that predispose them to a life of crime. Above all what matters in policy terms is effectiveness. Nothing matters that cannot be shown to have an impact on whether people are committing crimes. Punishment for punishment's sake is incoherent.

The fourth view is essentially Christian – though distinct from the religious view. The Christian view is that there are rules, but everyone transgresses them without exception. Choice is central, but not in that people can choose not to transgress, only that people can choose to be delivered from transgression by divine agency. This view also includes the idea of radical rehabilitation – that culpability can be entirely erased without punishment. This view conflicts with the others in a number of ways. It is not based on fairness, given that pardon can be granted without consideration for any other factors. Like the utilitarian view, it has a focus on addressing poverty, abuse and injustice, but does not accept that anyone is less culpable because of circumstance. Like the religious view it accepts that transgression should be punished – only it allows that transgressors can be completely pardoned and restored.

Views matter

The crucial point arising from these views is this – they are irreconcilable, and cannot be reduced to a single coherent view. In a pluralistic society, there should be no need for agreement. But in a democracy, we might be inclined to let the most prevalent view decide public policy.

This would be a mistake.

Arguably, we may in fact have arrived at the opposite situation – that the view of a governing minority has decided public policy. This is equally mistaken.

Though she sharply divides opinion and her conclusions and recommendations are not universally endorsed, nonetheless Louise Casey's review of public engagement and trust in criminal justice makes a powerful case that the system has developed a deep disconnect with the people it serves. Louise Casey, in her evidence to our inquiry, said the criminal justice system, in the eyes of the public, was "distant, unaccountable and unanswerable".

Majority or minority rule

Louise Casey went on to describe what she had heard the public say:

> 'The public want three very straightforward things. They want to know that there are consequences, and not pleasant ones, for people who break the law. Right and wrong, so that when somebody does something wrong something happens to them and it is a punishment. Second, they want to know very, very clearly that the organisations that they think are there to protect them are tackling the issues that matter to them…Third, they want a set of entitlements. They want to understand the service that is on offer… They are the three things' (LGiU/All Party Parliamentary Local Government Group, 2009b).

If this is true of the majority, then of my four views the first two seem to dominate. It may well be the majority view, but she argues that this view has not been adequately served in the justice system. She argued vociferously to our inquiry that professionals have found the public view distasteful and have therefore not given it heed.

Interestingly, comments made by others during the course of the inquiry (and borne out by my experience in the public sector) suggest that public servants may fall more readily into the third category. The following came from a senior police officer:

> 'The more we talk about punishment and revenge and the more we celebrate how good we are at punishing people we will never be able to invest in the schemes that you have heard about today. We have to celebrate two things: reducing reoffending and, secondly, reintegrating people positively back into their communities. The moment we all – and I mean all of us – collectively start celebrating those achievements will be the time we will be able to really invest in some of the schemes and some of the achievements we have heard about today' (LGiU/All Party Parliamentary Local Government Group, 2009c).

A similar sentiment, reflecting the fourth view, comes from a sermon made by the Archbishop of York:

> 'This practice of citing a mistaken idea of justice in the pursuit for vengeance was seen time and again in the case of Myra Hindley, the cold and merciless Moors Murderer, on whose behalf Lord Longford campaigned so tirelessly. Lord Longford recognised that traditional retributive justice was not necessarily the most healthy way forward for building a better society, and better relationships, because feelings of anger and revenge, however understandable, serve further to dislocate our ability to relate to one another as human beings' (Sentamu, 2007).

These two protests capture the dilemma nicely. Unless the system reflects how a majority of people actually think, the criminal justice system will continue to leach

credibility. The perception that the criminal justice system is run paternalistically by professionals who do not accept the general view is corrosive. And yet there are significant segments of society, secular and religious, often influential and appealing to a moral high ground, who would see a lurch in a majoritarian direction as a lurch towards a tyranny of damaging views.

As ever, we must tread a narrow middle road. All these veins of thought run through our society, and somehow we need to re-orient our justice system to respond to them all – without attempting to reconcile the irreconcilable. The temptation is to discount the views that we do not accept. But it cannot be the place of civil society to reject views that are legitimate, regardless of how distasteful, paternalistic or incoherent we might personally find them.

This is at the heart of my conception of Primary Justice. We must create a system that balances the concerns of all, without the appearance of weighting any.

Primary Justice

I recently had a helpful conversation with a senior criminal justice professional, in which I began to unpick the pieces of the Primary Justice model. He stopped me, pointing out that the virtue of Primary Justice is the whole – all the pieces, sitting together.

Reflecting now on the narrow road required to balance these views, the importance of this becomes apparent. What Primary Justice offers is a coherent whole in which the pieces of the whole are individually oriented to different views.

I would argue the four views present us with four key questions to be answered:

1. What is in it for me?
2. What is the consequence for those who break the law?
3. How do we address disadvantage to reduce offending?
4. How are offenders returned to a full place in society?

In what follows I explain how Primary Justice provides answers to each of these four questions and thus responds to each of the four views.

As it stands today we have one justice system. At the heart of the Primary Justice concept is this: while justice should still be blind, how we deliver justice should recognise that there are less serious offences that can and should be addressed differently, by the communities they affect. That difference should not be that they have less attention (which is essentially the impact of our current system) but being early on, they should have more attention. We need a new and distinct approach that catches and intervenes in a cycle of decline before it deteriorates too far.

Primary Justice is about prevention and getting in early. It is about dealing with things locally, giving a leading role to local politicians and professionals, so that communities take responsibility for themselves, and solve their own problems. It is

about getting the basic services right for everyone, whether victim, offender or both, so that no crime is ever committed or compounded by a lack of basic necessities.

Making this real is about moving money. We argued that a ring fenced fund should be held by the local authority to fund Primary Justice, and into that fund would be put 35% of the prison budget, and budgets for probation, administration of magistrates' courts and local policing. Local areas would take on full responsibility for offenders receiving sentences of 12 months or less, remand prisoners and offenders aged 18 years or younger.

Within this overarching framework, Primary Justice would have four key components, described below.

Justice reinvestment

The first piece of the Primary Justice whole is reinvestment. Justice reinvestment is a well established concept in the justice community, describing the process of delegating the costs of imprisonment down to a local level and giving the community the flexibility to 'reinvest' those funds in any activity needed to reduce crime. While there is considerable literature on the pragmatic and philosophical reasons for it, in this context there is one overriding benefit: by moving funds from the national to the local level, we open the door to moving investment out of services specific to offenders and into services that have wider benefit to the community. The evidence suggests that the impact of this is to reduce prisoner numbers (Allen and Stern, 2007).

This is a powerful response to the 'what's in it for me' camp. Speaking to a group of local politicians recently about the importance of services for offenders, one member of the group insisted that the impact on crime meant nothing – when you spend money on offenders, regardless of where it comes from it is the taxpayer's money and it could be better spent elsewhere. By moving 'the taxpayer's money' to the local level and removing the artificial accounting barriers that act as a chilling effect on attempts to move money into prevention, we open the doors to offering the public a simple deal. The deal is that, if the community can find new and creative ways to reduce the numbers of people going into prison, the community gets that money back. It's a simple reward system.

The critical thing is to ensure there is the potential to use the reward for things where community benefit is transparent. Ploughing everything back into the criminal justice system alone would be problematic. I believe the means to do this is through investment in prevention. Improving the prospects for groups at risk of offending, before they offend, is not money spent on offenders. But the impact is felt in the criminal justice system.

This is a deal that says – pay your taxes, and if you fall on hard times you will be helped; help people who keep the law and they will stay on the straight and narrow. This is significantly different to saying to the law-abiding taxpayer – pay your taxes,

and we will spend them on people who have broken the law. Justice reinvestment would significantly help make a deliberate shift from the latter to the former.

Meeting need to reduce crime

This leads onto the second piece of Primary Justice, which is about breaking the cycle of crime. Even if justice reinvestment enables a serious shift from prison to prevention, to reduce crime we will still need to do much better than to date at changing offenders into productive members of society on release.

In some ways the question of how we address disadvantage to reduce offending is the easiest to discuss and the most difficult to deliver. This is the kind of territory that many professionals feel comfortable in – focusing on what works. What professional experience says and statistics support, is that there is a clear relationship between disadvantage and offending. In our inquiry we advocated a focus on getting four key areas right: housing; mental health (including substance and alcohol abuse); employment, education and skills; and family and relationships.

The link to disadvantage is well recognised, and yet services of this kind are not being delivered to the critical group of short sentence prisoners, a group with the highest reoffending rate compared to any other length of sentence. Where resources are tight, it is understandable that offenders committing serious crimes are the focus for resettlement. This is where Primary Justice makes so much sense – short sentence prisoners are not a lower priority, they are our chance to catch people before the slide into more serious crimes. One of the best local authorities at resettlement noted:

> 'Non-statutory offenders do not receive the attention required, and do not appear at all in the priorities of the Director of Offender Management. Remand prisoners are not afforded the central position that their number in London ought to warrant. This is puzzling given both the well-documented needs profile and reoffending rates of these groups' (LGiU/All Party Parliamentary Local Government Group, 2009a).

Locating Primary Justice at the local level is also about effectiveness. The services that make the difference are delivered by local agencies and require local co-ordination.

Information, accountability and employment

The tension that arises, however, when focused on what works, comes from those interested in the consequences of crime. If crime is seen as a 'golden ticket' that secures housing, benefits or services, the reaction is outrage.

The first means to ensure consequences are at the forefront is to deliver better information and interaction between the system and the public. The criminal justice system *does* deliver punishment, but the public has too little awareness of this process. This is an argument already embraced by the Ministry of Justice and action is being taken to address it. But there could be a significantly greater shift in the context of Primary Justice.

Firstly, with a local focus there could be a drive to put criminal justice professionals far more into contact with the public. Face-to-face contact is expensive – the internet is cheap. Social media sounds frivolous, but could be a cheap and cheerful way to give people a constant stream of new information from professionals who develop a human face.

Secondly, local politics could re-enter the justice arena. Punishment and accountability go hand in hand – and for both you need authority. Justice should be a live political debate, but national politics is far too distant for most people to encounter in daily life. If you are concerned about consequences, you should be able to meet the people who deliver consequences.

There is a third point, which is not usually associated with the first two, but which I believe sits alongside them. Services for offenders should be overtly focused on employment and payback.

Recent polling from Ipsos MORI suggests that by far the most popular way to reduce costs in criminal justice (38% of those polled) would be to reduce education programmes in prisons (Ipsos MORI, 2009).

If your overarching concern is the consequences of crime, many support services will seem like rewards. Employment could be seen as a personal good, but it is also the definitive means by which people contribute towards society. Those who are concerned with consequences often do not see that someone merits help because their punishment has been served. There is still a distinction between those who transgress and those who do not. Receiving and being seen to receive punishment are not enough, offenders need to earn their way back into society. Employment is that route.

Employment is local – Primary Justice has the potential to build in an expectation that offenders will work in the community, and a commitment from employers that they will employ offenders from their community.

Restorative justice

The importance of restoring people to full esteem is the final piece of the Primary Justice whole. Restorative justice is already being practiced in many parts of the UK. Our inquiry heard from many advocates of the practice, often passionate about the results that can be achieved. Restorative justice answers those who want to see offenders redeemed – it requires admission of guilt and brings the offender and victim together to collectively agree actions to repair the damage caused by the crime. This act of repair can be tangible – returning lost items, repairing damaged property, or it can be intangible – giving assurance the victim was chosen at random, making an apology and expressing regret.

Restorative justice can be used for crimes of any severity, but linking it with the wider Primary Justice approach creates the potential to reduce the endless drive to criminalise disruptive behaviour. Low level disorder, disrespect and conflict

distress communities to a degree disproportionate to the level of criminality. If local communities were responsible for offenders committing less serious crimes and part of their response was restorative justice alongside criminal justice responses, there would be a means to publicly deal justice for all manner of disorder, without always reverting to the criminal justice system.

For those concerned with redemption, restorative justice has significantly greater potential to see offenders restored in the eyes of the community than anything in the criminal justice system. It also empowers victims to be able to choose to be merciful and demonstrate to offenders that they can be pardoned by admitting guilt and committing to make amends.

Negotiating the narrow path

These four pieces lock together as a coherent whole. But they also present a separate logic to each of the four camps I have identified. These four views may not resonate with everyone – the four elements of Primary Justice may not appeal to different perspectives in exactly the way I described. But there is a principle which remains: we must find a way forward that responds to more of us, and better.

There is one thing on which there does appear to be strong agreement, which is that it can often be the least serious crimes, disorder and brokenness that cause the greatest distress to communities. Primary Justice aims to create a system which places this distress at the centre of attention. It aims to provide a system in which everyone can find something to reassure them, and in doing so gain their support and trust. Our current system is characterised by disconnect and distrust. We will not move forward unless we can navigate the narrow path of consensus together.

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CHAPTER 6

Justice reinvestment - a new paradigm?

Rob Allen

Justice reinvestment has become something of a buzz phrase in criminal justice in the last few years. Originally coined by George Soros's Open Society Institute to describe a wide range of initiatives to divert spending on imprisonment into more productive community-based measures in various US states, justice reinvestment provides a new paradigm in the UK for thinking about prison policy.

The level of public spending on prisons in England and Wales does not yet approach that of the US, whose 2.5 million prisoners represent an imprisonment rate four times higher than the UK's. Nor has the 66% rise in prison numbers between 1995 and 2005 in England and Wales precipitated the kind of crisis which has forced California's governor Arnold Schwarzenegger to find ways of reducing prison numbers by a third in order to comply with federal court orders imposed in response to gross prison overcrowding. Yet the task of bringing down public debt, which will present the greatest challenge to whoever forms the new British Government next year, will inevitably raise questions about the cost-benefits of the current prison building programme predicated on the need for 13,000 more prison places, let alone the Conservatives' plans for a further 5,000 beds. Justice reinvestment provides a fresh lens through which to analyse the rising prison population and offers policymakers a set of tools through which it might be halted and reversed.

There are three key ways in which justice reinvestment is helping to shift thinking. First, it focuses attention not only on how much is being spent on imprisonment, but also to what alternative uses the public money consumed by prison could be put if demand for prison places could be reduced. Second, it draws attention to how people going to and returning from prison are disproportionately drawn from the poorest neighbourhoods and how targeted investment in these areas could help develop more initiatives both to prevent crime and improve reintegration of ex-prisoners. Third, the combination of concerns about the cost-effectiveness of prison and about 'places as well as cases' inevitably raises questions about what the most appropriate mechanisms for organising and funding criminal justice are. Justice reinvestment approaches encourage elements of financial responsibility to be devolved, with locally-based agencies able to make use of the resulting savings if they find ways of bringing down prison numbers.

What is exciting about the approach is that it promises to stimulate a range of feasible and practicable criminal justice policies which go beyond the emergency measures and technical wheezes which are sometimes proposed to reduce prison numbers (for example the End of Custody Licence scheme or introducing

a Scandinavian-style queuing system) but fall short of the laudable but grandly political calls for social justice and full employment, which are sometimes seen as prerequisites for a more sparing use of imprisonment.

The aim of this paper is to discuss what policy options might flow from adopting some of the principles of justice reinvestment in England and Wales.

Differences between the US and the UK

At the outset, it is important to recognise some important differences between the US and the UK, which make the idea of justice reinvestment more compelling across the Atlantic. The still vastly differing scale of imprisonment in the US has created a large pool of prisoners who, on any reasonable assessment, could safely be released from prison. As a result of the comparative harshness of sentencing and sentence execution policies, there is inevitably considerable scope for prison reduction measures. For example, mandatory and truth in sentencing policies have led to the long term incarceration of large numbers of non-violent prisoners. Reducing prison capacity potentially frees up sums for reinvestment (or indeed to translate into tax cuts) which are thus substantially higher across the Atlantic than in the UK. There are unlikely to be many 'million dollar blocks' – residential neighbourhoods where that amount is spent on imprisonment each year – in England and Wales, although analysis in the North East of England found that in 2005 magistrates in Gateshead incurred over half a million pounds worth of costs in sending just over a hundred individuals to prison, on average for a few weeks. Crown Court decisions generated substantially greater costs (Allen et al, 2007).

It is true too that the US's lack of welfare structures and its highly concentrated zones of urban deprivation mean that resources to strengthen housing, employment, substance misuse and other services aimed at ex-offenders are likely to yield a quicker and more visible impact than might be the case in the UK. Nonetheless, there is considerable scope for enhancing measures to rehabilitate offenders here. The National Audit Office found last year that 'some community order requirements, for example alcohol treatment, are not available or rarely used' – this despite strong links between alcohol and offending. They also found long waiting lists for some order requirements, in particular group programmes on domestic violence (National Audit Office, 2008).

It is also the case that aspects of the structure of American governance lend themselves to justice reinvestment approaches. The shared responsibilities exercised by counties, states and the federal government in running and financing imprisonment provide opportunities to introduce financial incentives to control, as well as (as has been the case) to expand, prison numbers. A variety of fiscal arrangements have been introduced which reward counties which develop measures that reduce demand for custodial places at state level. A virtuous circle is created in which state savings on incarceration are reinvested in local alternatives which in turn further reduce demand for expensive state placements. This process has most recently been seen in New York State, where four secure facilities for juveniles

have been closed, with resources invested in family therapy and other alternative programmes in New York City (Solomon and Allen, 2009), but the approach has a history going back to the California probation subsidy scheme in the 1970s. Federal grants have also been used to encourage reductions in custody, particularly in respect of disproportionate minority confinement. As argued below, an analogous process could relatively straightforwardly be introduced in respect of juveniles in England and Wales.

The system of American governance also gives the executive a greater say over the size of custodial populations than in the UK, where the courts play a more decisive role. In juvenile justice in the US, it is the executive which decides whether custodial placements are made in some states. In others, such placements are in large part made following recommendations by probation officers. This provides a straightforward lever to change rates of committal to custody. In the adult system, executives have often retained the right to adjust the proportion of time served and of course can determine the level of flexibility applied in cases of parole violations. Reintroducing, or making more generous, schemes for 'good time credits' (time off for good behaviour), and introducing a little more discretion in responses to parole violations can have substantial impacts. Legislative change is not always needed to reduce the actual lengths of sentences served or the rate of recalls to prison. In England and Wales these are the two key factors which lie behind the sharp rise in prison numbers since 1995.

In short, in the US the extraordinary rise in mass incarceration has made justice reinvestment a highly attractive proposition for cash-strapped states and provides numerous opportunities to scale back the use and cost of prison.

UK interest in justice reinvestment

Not withstanding these important differences, justice reinvestment has attracted growing interest in the UK, with a range of policy proposals produced in recent years drawing on its ideas. These include proposals for locally-driven primary justice (Local Government Information Unit/All Party Parliamentary Local Government Group, 2009 and see Chapter 5 of this volume; Commission on English Prisons Today, 2009); extending locally-based youth offending teams to adults (LGA, 2005; Allen and Stern, 2007); making local authorities responsible for meeting the costs of placements in the juvenile secure estate (Prison Reform Trust, 2008); localising the management of the prison system by abolishing the National Offender Management Service and replacing it with a network of Community Prison and Rehabilitation Trusts (Centre for Social Justice, 2009); and using funds earmarked for prison expansion to strengthen measures in the community such as restorative justice (Rethinking Crime and Punishment, 2008). The House of Commons Justice Committee has also been conducting a lengthy inquiry into justice reinvestment. At the time of writing its report has not yet been published but the weight of evidence it received argued that urgent changes are needed not only to the direction of criminal justice policy but also to the machinery which develops, sustains and implements it.

A number of practical initiatives have also drawn inspiration from aspects of justice reinvestment, most notably the Diamond Districts initiative in six London boroughs in which multi-agency teams are located in neighbourhoods with high numbers of people returning from short spells in prison in order to offer enhanced resettlement support. Although, should it prove successful in reducing reoffending, there is as yet no obvious mechanism by which savings to the prison system will be recouped into the community.

This paper will return to some of these proposals and, in particular, see how they might be linked in a more fully justice reinvestment-inspired system. Before that, however, it is necessary to review how we arrived at the current situation in respect of prison numbers.

How we got here

Between 1995 and 2009 the prison population grew by 32,500 or two-thirds. Three-quarters of the rise is accounted for by an increase in the numbers sentenced to immediate imprisonment and 16% by a rise in those recalled for breaching the terms of their release. A recent Ministry of Justice analysis (Ministry of Justice, 2009) suggests that the reasons lie in tougher sentencing and enforcement outcomes (which is not in question) and a more serious mix of offenders coming before the courts (for which the evidence is more contested). Rising prison numbers represent the costliest tip of a criminalisation iceberg which has seen a large extension of the reach of the criminal justice system, during a period of falling crime. The creation of 3,000 new criminal offences, the development of hybrid forms of social control such as Asbos, and the introduction of indeterminate sentences form a pattern in which social problems are increasingly treated by way of punishment and control. Overseas observers express surprise that this trend should have occurred under a Labour Government. Indeed as recently as 2002, in the White Paper *Justice for All,* Labour listed the record prison population, with its costs and poor outcomes, as something that 'is not working'.

Since then, record prison numbers have, like numbers of police officers, become something to be trumpeted. For its future strategy the Labour Government is relying on the analysis contained in Lord Carter's report *Securing the Future,* which offers a largely 'predict and provide' approach to the supply of prison places. Dismissed as 'deeply unimpressive' by the House of Commons Justice Committee, the report did contain one or two proposals to reduce or stabilise demand for imprisonment (see Chapter 3 for a discussion of sentencing commissions) but its scope was narrowly confined, ignoring entirely the case for a comprehensive and wide-ranging strategy to reduce the resort to imprisonment and to develop alternative ways of dealing with offenders. It is such a strategy that justice reinvestment could offer. Carter's report stands in sharp contrast to the report of the Scottish Prisons Commission established in Scotland in 2007, which set out a vision of reducing Scotland's prison population from 8,000 to 5,000 (Scottish Prisons Commission, 2008).

Carter had nothing to say about the social, educational and healthcare policies which are needed to prevent crime, rehabilitate offenders and reintegrate those leaving prison. There is evidence that these have remained underdeveloped, particularly in the most deprived areas and among the most excluded populations. Lord Bradley's review of people with mental health problems or learning disabilities in the criminal justice system concluded that for diversion to be introduced effectively there needs to be sufficient capacity in mainstream services, as well as confidence in those services among those making decisions about offenders. While he did not make an assessment of a shortfall in capacity, he tellingly noted that in 2006, only 725 of the 203,323 requirements commenced under Community Orders were Mental Health Treatment requirements (Bradley, 2009).

Similarly, despite considerable investment in drug treatment, the number of residential rehabilitation places is still low compared to other countries. There are about 2,500 beds in England with about 16,000 individuals accessing residential services for substance misuse each year. Given that half of male prisoners and two-thirds of women have used class A drugs in the six months prior to imprisonment, there is a strong prima facie case for increasing capacity significantly. Despite some progress following the Corston review, women are still receiving short prison sentences for want of constructive alternatives.

It is arguable too that the distorted priority given to increasing imprisonment has been encouraged by the costly centrally-driven system of offender management, which is the child of Lord Carter's earlier review of correctional services (Carter, 2003). The creation of NOMS (and to a lesser extent the Youth Justice Board) has produced a situation in which local health, education, employment and social services can slough off their responsibilities for people in the criminal justice system, safe in the knowledge that their needs will be addressed by a central government agency. This is most starkly illustrated in the juvenile system where local authorities can shunt the costs of meeting the needs of demanding teenagers onto central government; but it is more generally the case that local mainstream agencies have little incentive to address and absorb crime and delinquency problems in the way that they might.

What could justice reinvestment offer?

While justice reinvestment does not offer a detailed blueprint for criminal justice reform, it points to a major change of direction. Over the long term, it could create conditions and mechanisms to increase investment in local measures that prevent crime and thus reduce the numbers of people appearing or reappearing before the courts. In the medium term it promises to build up the infrastructure which can be used as alternatives to prison such as mental health facilities, drug and alcohol treatment and the so-called intermediate estate of hostels and half-way houses. In the short term, it helps to ensure that sentencers are much more comprehensively engaged with the communities they serve, confident in the range of alternative options available to them and involved in a process for developing a sustainable

scale of sentencing parameters based on restraint in the use of prison. What might this mean in practical terms?

First and foremost, there might be a target to reduce the prison population over time. This has been achieved in Scotland, where the Government accepted the recommendation of the Commission that the overall population should be reduced from 8,000 to 5,000. A similar target in England and Wales might be 50,000, similar to what has been proposed by Lords Woolf and Ramsbotham and which would place it in the mid stream of Western Europe.

Key to achieving this would be the shifting of responsibility for the prevention of crime and rehabilitation of offenders to a much more local level and requiring the educational, social, housing and healthcare agencies to give priority to these objectives, working alongside the police, probation and prison services. This would consolidate existing local machinery such as the multi-agency teams which supervise prolific and other priority offenders (PPO), high-risk sex and violent offenders (Multi-Agency Public Protection Arrangements), young offenders (youth offending teams) and substance misusers (Drug Action Teams), and could incorporate the criminal justice mental health teams proposed in the Bradley review. Local authorities and their partners would be responsible for developing detailed 'crime and justice plans', containing targets for reducing the numbers going to prison. Such plans would be developed and delivered with assistance from the centre – in the form of an advisory council on crime and justice – which would act as a clearing house for research and offer technical assistance, and even grants along the lines of the US probation subsidy model. The local bodies would also inform, engage and consult local people. The implementation of plans would be resourced through savings made by reductions in the use of custody and the scaling down of NOMS and the Youth Justice Board. Initial pump priming funds would be needed, but these could be provided by reallocating the £2.3 billion currently earmarked for expanding prison capacity.

The main question is how would this change deliver the reductions in order to kick start the virtuous cycle of less spending on prison and more on alternatives? As Jack Straw told the Justice Committee, 'so far I have seen no evidence that says if you spend this amount of money, then we can guarantee that there will be fewer crimes committed, and therefore the demand for prison places will drop accordingly'. But it is not a question of relying solely on more successful prevention and rehabilitation to reduce the candidates for prison. There are more direct ways of shrinking demand. The emphasis of justice reinvestment is on the development of locally-based strategies which would need to be informed by detailed local analysis of who is going to prison and why. It is likely that a local curriculum would contain measures that would reduce demand for imprisonment in a number of distinct ways.

The first is through increasing diversion from prosecution. In 2007, 40% of those either cautioned or convicted of offences were cautioned but the rate varied among police force areas from 55% to 22%. While justice reinvestment's emphasis on

local responsibility brings with it the scope for variations, better community based services would bring greater options for the police and Crown Prosecutors to divert cases from prosecution. There is particular scope for diverting young adults in the 18-21 age group and those with mental health and drug problems.

The second mechanism is by reducing the numbers remanded to custody for want of a place to live. The Government has contracted with private company Clear Springs to provide supported accommodation for those who cannot be bailed because they lack a place to live. Providing accommodation of this kind could sensibly be a function for local government and their partners who could also address the shortfall in appropriate mental health service provision identified in Lord Bradley's review to support individuals who might be housed in approved premises.

Providing suitably supported accommodation would also help in a third way – by enabling more prisoners to be released on home detention curfew (HDC). In October 2009 there were about 2,600 people subject to HDC, almost 1,000 fewer than five years earlier.

The fourth mechanism for reducing demand would be to bring down further the number of offenders given short prison sentences. There has been some progress in recent years, with the numbers sentenced to immediate custody for 12 months or less falling from more than 83,000 in 2002 to 69,000 in 2007. The type of offences leading to short sentences – mainly thefts, motoring offences and offences categorised as other (i.e. not sexual or violent, robbery, burglary or drugs) – suggest scope for robust and imaginative alternatives to bring this number down further.

Achieving effective replacements for short sentences requires the development of a more effective response to those who do not comply with their community sentences. This is the fifth way that justice reinvestment could impact on the use of prison. The number of people in prison for breach of a community sentence has risen by almost 500% since 1995. Although absolute numbers are relatively small (the increase amounts to about 800 prison places), increasing compliance through more effective community supervision – such as through tracker and other intensive support programmes – should help to reduce this number.

Greater dividends would be provided if such supervision led to reductions in the numbers of prisoners recalled for breaching parole, the sixth target for justice reinvestment population reduction. While the introduction of a fixed 28-day period of imprisonment for those who breach parole should reduce demand for prison places, investment in increasing compliance could bring down even further the numbers in prison as a result of recall – an extra 5,300 since 1995.

Substantial reductions too would result from reversing the year-on-year declines in the proportion of cases recommended for parole, which has fallen from a half to just over one-third over the last ten years. Success here – the seventh way in

which justice reinvestment could reduce imprisonment – would depend not only on enhancing arrangements in the community but on improving opportunities in prison. But starting to reduce prison numbers could mean that greater resources are available – both in and outside prison – for those for whom a period of incarceration is unavoidable.

Progress in these seven areas could be achieved without any legislative change. Focusing on increasing the availability of relevant services for particular types of offenders – women, young adults and the mentally ill – would produce results too.

For one group, juveniles under 18, there is an opportunity to implement a purer form of justice reinvestment by making local authorities responsible for meeting the costs of custodial sentences imposed on young people from their areas. Devolving custody budgets to a local level would enable the development of more effective and compelling alternatives to custody and incentivise investment in early prevention activities (Allen, 2008). If such a model worked, it could be extended to other groups. A strong case could be made for locally commissioned services for women offenders and perhaps for those in the young adult age range.

The package of measures outlined above could quickly start to reduce numbers in prison. The impact would not initially be huge on the number of prison places required. Prisoners serving 12 months or less, for example, represent only 10% of the total prison population, although of course they account for two-thirds of the receptions. Yet vigorous application of each of these initiatives at a local level could combine to prevent the projected rise in the prison population and sow the seeds for its long term reduction.

Conclusions

There remain some unanswered questions about the justice reinvestment approach. How, for example, do sentencers fit into the justice reinvestment equation? Community Justice Centres offer a model in which courts are encouraged and enabled to adopt a more problem solving role in partnership with community agencies. But the hard issue remains about whether their decision-making about individual offenders will lead to less use of prison via the provision of more persuasive alternatives; or whether this needs to be complemented by greater controls on their discretion (through more restrictive guidelines produced by a sentencing council) or reductions in their powers (by removing or reducing options for short prison sentences or reducing maximum sentence lengths).

A related issue is how much local variation should be allowed in criminal justice? Does it matter that custody rates vary in magistrates' courts from 6% to 16% and in Crown Courts from 45% to 68%? Without stronger guidelines from the centre, would a more localised system bring greater still variation depending on the priority and resources attached to the crime and justice agenda and the vigour with which the seven initiatives discussed above are pursued?

If the justice reinvestment approach is primarily designed to reallocate spending on prisons into more socially constructive channels, it is likely to be more effective if its practices are developed alongside changes in law and policy which effect a more sparing use of prison. But even without these, there is some reason for hoping that a more localised and cost-focused approach will over time make such changes more likely. Ministry of Justice research on local variations in sentencing found that one crucial factor was the relationship between sentencers and other agencies of the criminal justice system; another was the perception that not all options were available for community orders. Both of these elements could be addressed by a more locally-based structure. Moving the centre of gravity from central to local might help to take the political heat off the centre when mistakes or tragic cases arise and to build greater local ownership of and confidence in community-based measures. Jack Straw called the *Crime and Disorder Act* 'the triumph of community politics over detached metropolitan elites'. Justice reinvestment provides the opportunity to engage those community politics with the costs of prison policy and to create the conditions in which the penal inflation of recent years could be reversed and a process of restricting and recalibrating sentences could begin.

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CHAPTER 7

Restorative justice and the crisis in criminal justice

Chris Igoe

Introduction

Privately, many politicians from both sides of both Houses of Parliament recognise restorative justice as an effective remedy for some of the shortcomings of the criminal justice system. Recently the Ministry of Justice's own research found that restorative justice delivered 85% victim satisfaction and 27% reductions in the frequency of reoffending, leading to savings of £8 for every £1 spent on delivering it.

Why then has no action yet been taken to act on the findings of this research, with the creation of new guidance to agencies, new targets, new legislation, or resources to deliver new services? Why has no action even been taken to publicise these findings within the criminal justice system? The answer may be that until now fear of a critical response from the public – or at least some elements of the media – has paralysed legislators and policy makers, preventing constructive and cost-effective change in our justice system.

This essay examines how – in the light of the Government's research findings and the wealth of existing experience at local level – more victims, offenders and communities can be given access to local restorative justice services across England and Wales, so that the benefits of restorative practice can be delivered, both for the individuals involved and for wider society.

Restorative justice in England and Wales

Restorative justice is a process that brings victims of crime into communication, either directly (face-to-face) or indirectly (through a mediator), with the person who has offended against them. This process is facilitated by a trained practitioner, who can ensure the safety and support of all participants. Victims and offenders are often accompanied by a family member or supporter, someone who has been affected by the offence but is also able to provide support following the meeting. Members of the wider community affected by the crime may also take part.

At present, less than 1% of all victims of adult offenders have access to restorative justice and there is currently no statutory provision or funding for restorative justice within the adult criminal justice system. Despite this, voluntary sector projects or criminal justice agencies in a few areas have managed to attract funding to get restorative justice projects established. These projects exist on a knife-edge, with funding only ever secure for a few months at a time.

HMP Gloucester's restorative justice project exemplifies this problem. This new

scheme aims to give victims a voice and reduce reoffending using the techniques proven by the Ministry of Justice research to be effective and value for money. However, despite support from local partners including the Local Criminal Justice Board and the Police Integrated Offender Management Team, the project has so far struggled to obtain sufficient funding to enable the service to proceed. Without leadership, support and funding from central Government, we will see this pattern continue, with projects blazing brightly for a few years before being forced to close under the weight of financial pressures.

There are, however, some current examples of restorative justice in the adult criminal justice system.

For example, small numbers of cases are handled by Victim Liaison Officers in probation services, or by individual police or prison officers trained in restorative justice, in a few areas across the country. However, Probation Service Victim Liaison Officers with the training to deliver restorative justice are the exception to the rule rather than the norm, despite the unique access that their role provides to both victims and offenders. Even the work that is carried out is rarely celebrated due to a fear of attracting negative media attention or funding cuts.

Specialist Mediation Services also play an important role providing the skills to support statutory and voluntary sector partners in the delivery of restorative justice in some areas of the country. Mediation services may receive referrals from the police, voluntary sector partners, local prisons, housing associations or local community groups. However coverage is not universal, capacity without further funding is limited, and a low level of awareness within the statutory sector limits referrals.

In Somerset and Sheffield, Community Justice Panels use community volunteers to deliver restorative justice in cases of antisocial behaviour and low-level crime referred to them by the police. In structure, the panels are similar to a youth offending panel for delivering referral orders in the youth justice system. In addition, the growth of restorative policing in youth justice has been extended to some extent in some police forces to include adults, following success with under-18s. For example, Leicestershire Constabulary has taken the opportunity presented by their involvement in the piloting of the recommendations of the Flanagan Report to develop a community justice scheme based on restorative principles, while Devon and Cornwall Constabulary have been piloting an ‘Adult Restorative Disposal’ since June.

The above paints a picture of provision for restorative justice with adult offenders that is diverse and innovative but also inconsistent, insecure and not evidence-based. Adult restorative justice projects are struggling along under the radar, with no secure funding, no underpinning legislation, and no long term security. This is despite the strength of the Government’s research evidence for the use of restorative justice with adult offenders, which we turn to next.

What does the Government's own research tell us?

The University of Sheffield was commissioned by the Government to evaluate restorative justice in 2001. The 7-year, £1 million evaluation by Professor Joanna Shapland and her team evaluated the work of three restorative justice projects.

One of these projects, run by the Justice Research Consortium, provided face-to-face restorative justice conferencing in three geographical areas and had particularly positive results, with a sample size large enough and a methodology of sufficient rigour to allow for statistically significant findings. The research on this project, using a randomised control trial research design with a wide range of different types of offence, demonstrated a statistically significant drop in the frequency of reoffending following restorative justice conferencing, as well as proving that restorative justice conferencing satisfies victims and provides value for money.

The full results of the Sheffield University evaluation are contained in four reports published by the Home Office and the Ministry of Justice. The first report (Shapland et al, 2004) examined the setting up of restorative services and found that projects were set up more easily when they were based within criminal justice agencies and had access to established support services. It also showed that restorative justice should be put on a clear statutory footing to give criminal justice agencies the impetus to refer cases to restorative services.

The second report (Shapland et al, 2006) examined victim participation in restorative justice. It found that although victims tended to choose indirect mediation when offered the choice, participation did not fall when only a face-to-face conferencing option was offered. Victim participation rates were extremely high, with up to 77% victim participation in cases involving adult offenders and up to 89% victim participation in cases involving young offenders. Offender participation rates were similarly high. All the projects devoted significant time and resources to good preparation with both victims and offenders. The report also shows that restorative justice can be facilitated well by people from any professional or voluntary background, as long as they are trained and supervised appropriately.

The third report (Shapland et al, 2007) discusses the impact of the conferencing on victims. 85% of victims participating in the Justice Research Consortium-run conferences were very or quite satisfied with their experience of the restorative justice conference. 80% of offenders in Justice Research Consortium conferences also described themselves as very or quite satisfied. Although victims tended to opt for indirect restorative justice when this was offered, indirect processes tended to lead to lower levels of victim satisfaction after the event than face-to-face meetings. Later research with this same sample has shown that restorative justice had a statistically significant impact on reducing post traumatic stress symptoms suffered by victims (Angel et al, 2009).

The fourth and final report (Shapland et al, 2008) considers restorative justice's effect on reoffending and whether it can be said to provide value for money. This research shows that the Justice Research Consortium's restorative justice conferences led to a statistically significant reduction in the number of reconvictions over the two years after the original offence, compared to the control group. The research also indicates that 27% fewer crimes were committed by offenders who had experienced restorative justice conferencing, by comparison with those offenders who had not.

Professor Shapland's team also found no evidence of any criminogenic effects for adult offenders – put simply, contrary to some common myths, restorative justice does not make anybody 'worse' – and no differences in reconviction between types of offender or offence, so no evidence to support targeting restorative justice towards one group of offenders over another.

The research then turns to the cost savings that restorative justice delivers through the above reductions in reoffending. By comparing the cost of particular crimes to victims plus the costs to the criminal justice system with the cost of delivering restorative justice it was assessed whether restorative justice is value for money. All of the Justice Research Consortium's restorative justice conferencing sites showed a significantly lower cost of reconvictions compared to the control groups, delivering cost-savings on average of eight to one. Through reductions in the frequency of reoffending, restorative justice therefore saved eight times what it cost to deliver.

In summary, the Government's own research confirms that victims want to participate in restorative justice. It demonstrates that victims benefit from taking part, with high levels of victim satisfaction. It proves that restorative justice can reduce reoffending and that it can do it whilst providing value for money. These findings are corroborated by international research findings in both Australia and the US, summarised in a recent Smith Institute report (Sherman and Strang, 2007).

Restorative justice – what needs to happen now?

We now know that restorative justice produces cost-savings to the criminal justice system and thus delivers value for money for taxpayers, giving the Government a solid evidence-base for the delivery of new restorative services. So how can this be achieved in practice?

To begin to realise the potential of restorative justice, legislation is required to establish three things: a statutory base for local restorative justice services; a National Restorative Justice Agency to provide oversight; and a statutory requirement for restorative justice to be considered, and provided where appropriate, in all cases involving a personal victim.

To date projects providing restorative justice in the adult criminal justice system have come and gone, or managed to survive with the support of one or two key criminal justice system agencies or funders. As the Ministry of Justice research shows, to

realise the cost-savings that restorative justice could deliver, the Government needs to establish a local restorative justice service in every area, with statutory underpinning. Each local restorative justice service would consist of a manager, an administrator and between six and eight full-time facilitators, or have equivalent resources to train, support and co-ordinate volunteer facilitators.

It is essential that every local restorative justice service has long term stability to continue providing the service for the foreseeable future. We no longer need pilots or research trials, but sustainable services which can provide long-term, high-quality services to victims. To this end, the local restorative justice services should be set up as multi-agency partnerships. The value of multi-agency partnerships in providing long-term support for restorative services, as well as enabling joined up delivery of restorative justice across criminal justice agencies, is evidenced by the experience (and survival) of the Thames Valley Restorative Justice Service. Such multi-agency services could be based within a single statutory agency or in the third sector, if given a statutory underpinning and long-term, secured funding of core costs similar to that given to Victim Support. Restorative justice services based in the third sector and recruiting volunteer facilitators from the community, if properly funded, provide particular benefits in terms of community engagement.

To ensure long-term stability, funding for local restorative justice services should be ring-fenced and provided from the Office for Criminal Justice Reform, through the National Criminal Justice Board, perhaps with an element of match funding required from Local Criminal Justice Boards for the restorative justice service in their area.

Legislation is needed to give local restorative justice services the necessary legitimacy and mandate to ensure both their quantity and quality. This is particularly important for the services dealing with statutory partners and in areas without a tradition of restorative practice. A clear recommendation from Professor Shapland's first report is that, to reduce inefficiency, restorative justice must be put on a statutory footing, to give sentencers and criminal justice agencies the necessary incentive to refer cases. Recent work by leading think-tanks has also called for a new *Restorative Justice Act* to give legislative underpinning to restorative justice (Centre for Social Justice, 2009; Rethinking Crime and Punishment, 2008).

While primarily focussed on delivering restorative justice to victims and offenders in the adult criminal justice system, local restorative justice services should also become local centres of expertise for statutory and voluntary agencies working outside criminal justice, supporting them to work in partnership with and learn from one another. This wider remit would allow them to enable diversionary restorative justice initiatives such as Community Justice Panels and Restorative Policing Disposals, through provision of training and the sharing of facilitators. It would also support good practice within youth justice through partnership working with local youth offending teams, enhanced victim empathy programmes, and the use of restorative approaches to resolve disputes within prisons, schools and care homes.

To ensure that the positive impact of restorative justice found in the Ministry of Justice research is replicated and not watered down, a National Restorative Justice Agency or similar national centre is needed to provide oversight and guidance. This agency would be responsible for maintaining the quality of provision, continuing the development of research and best practice standards, and monitoring outcomes to provide firm guidance for local restorative justice services. Guidance to services should be based on the Ministry of Justice's research findings, the Restorative Justice Consortium's *Principles of Restorative Practice* and the Home Office's existing Best Practice Guidance (updated in the light of research evidence) and 2009 National Occupational Standards, and needs to be constantly updated in the light of research and the practical experience of the first local restorative justice services. Accreditation of practitioners and restorative justice services from the National Restorative Justice Agency would help to ensure high standards in the long term. The Restorative Justice Consortium, as the national third sector body for restorative practice in England and Wales, could provide strong and independent support and advice for local services.

Conclusion

It takes courage and vision to achieve real change, particularly in a system as large and complex as the criminal justice system. To an extent this has been achieved for youth justice by the introduction of restorative justice, but no such achievement can be claimed for the adult system. A perversity of the split between youth and adult justice is that the extent of a victim's involvement in the process is dependent on the age of the person who offended against them. Victims can hardly be said to be at the heart of the criminal justice system so long as this is the case.

The Government can congratulate itself on producing the evidence that introducing restorative justice for adults would mean that there would be fewer victims of crime in the future and would transform the way in which all victims are treated by the criminal justice system for the better. The case for embedding restorative justice within the adult criminal justice is now crystal clear. The Government does not need further consultation papers, evidence or information, but the political will to act on the findings of their own research.

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CHAPTER 8

Why does Britain have such a high prison population?

Richard Garside

Various explanations for Britain's high prison population do the rounds among campaigners, commentators and others concerned with our high incarceration rate. Among the more common explanations are:

1. Punitive public attitudes, due to ignorance about the ineffectiveness or cost of prison; and/or ignorance about the effectiveness of alternatives to custody; and/or a base desire for punishment and retribution.
2. Opportunistic politicians who seek to play to punitive public attitudes for electoral advantage.
3. Irresponsible media reporting that stirs up public sentiment, pushing even responsible politicians into ever more symbolic gestures of punitiveness.
4. A judiciary that lacks confidence in the efficacy of alternatives to custody and/or is not fully aware of the available options.

There is an element of truth in some or all of these explanations. Anecdotally, I have met plenty of journalists out to make the big splash headline that boosts circulation by stirring up public sentiment. Crime and punishment is rather more eye-catching than fisheries policy. Unsurprisingly, politicians out to make a name for themselves tend to chose criminal justice policy over cod. Some judges and magistrates probably do have doubts about alternatives to custody. There are some members of the public who probably would gleefully string up a burglar from the nearest lamp post.

But however plausible, in part or when combined, these explanations might be, there is something quite fundamental that is missing from them: any clear explanation for how we have ended up where we have. If punitive public attitudes have driven up prison numbers, why have the public become more punitive? If law and order is a party political issue in the way it used not to be, why is that? If irresponsible journalists have stirred things up, why do the often idiotic stories in our print and broadcast media have traction with the public and our politicians in a way that might not have been the case in the past?

In short, the common explanations for the state we are in might work as a commentary on some of the factors influencing contemporary criminal justice policy making. But they tell us little about the broad processes that got us to this depressing state of affairs. Understanding these processes is far from being a mere intellectual exercise. The failure of criminal justice reformism over years is in no small part down to its failure to integrate an understanding of these processes into campaigning strategies.

To shed light on this problem, I want to consider some recent research looking at the drivers of prison populations internationally. First is Michael Cavadino and James Dignan's comparative analysis, published in their book *Penal Systems* (Cavadino and Dignan, 2006). Their analysis is informed by the highly influential study of welfare state regimes by the Danish sociologist Gøsta Esping-Andersen, whose 1990 book, *The Three Worlds of Welfare Capitalism*, sought to analyse the different welfare state arrangements of advanced capitalist countries according to three 'regime-types': 'liberal', 'corporatist' and 'social democratic' (Esping-Andersen, 1990).

The 'liberal' welfare state regime is one in which welfare benefits are minimal and welfare recipients tend to be marginalised and stigmatised. Countries such as the US, Canada and Australia are exemplars of this type of welfare state regime, according to Esping-Andersen. The second regime-type is the 'corporatist' welfare state of countries such as Austria, France, Germany and Italy. Corporatist welfare-state regimes tend towards maintaining a dualism between the capitalist marketplace and the delivery of social rights through state institutions. The third regime-type is the 'social democratic' welfare state, characteristic of the Scandinavian countries. Policies pursued under social democratic welfare-state regimes have tended towards promoting equality and the provision of high quality welfare services. The broad terms of Esping-Andersen's typology do not correlate precisely to any existing country. Many will exhibit aspects of all of these types, to a greater or lesser degree. Moreover, much has changed since he first posited this typology. A number of Scandinavian countries have started to unpick aspects of the social democratic settlement in recent years, for instance. But as a general typology it is useful for understanding different welfare state configurations.

Cavadino and Dignan adapt Esping-Andersen's analysis, mapping the penal systems of 12 contemporary capitalist countries according to his welfare-state typology. They find a strong correlation. Countries with liberal welfare-state regimes have high imprisonment rates. The US is the exemplar in this regard, with an imprisonment rate of over 700 per 100,000 of its population. Other liberal countries, such as New Zealand, the UK, and Australia also have high imprisonment rates, sitting in the range of some 140 to 200 per 100,000 of the population.

Countries with corporatist welfare-state regimes, such as Italy, Germany, The Netherlands and France have mid-level imprisonment rates, ranging from around 75 to 115 prisoners per 100,000 of the population. Countries with social democratic welfare-state regimes, such as Finland and Sweden, have lower-level imprisonment rates at around 70 per 100,000 of the population.

David Downes and Kirstine Hansen also find a strong correlation between imprisonment rates and welfare state arrangements, although their analysis looks at the correlation between a country's imprisonment rate and the percentage of its gross domestic product (GDP) it spends on the welfare state (Downes and Hansen,

2006). Their figures relate to the situation in 1998 so are now a little out of date, but their conclusions reinforce those of Cavadino and Dignan. Countries that spent a small proportion of GDP on their welfare states — such as the US, New Zealand and the UK — had high rates of imprisonment relative to other countries. Those that devoted much larger proportions of their national wealth to the welfare state — such as Sweden, Finland, and Denmark — had, relative to other capitalist countries, much lower imprisonment rates. Japan is the main outlier here, having both a relatively low imprisonment rate and relatively low expenditure on its welfare state (similar, in fact to the US). This suggests that welfare state regimes or expenditure might not be the only, or indeed strongest, factor influencing prison numbers in capitalist societies.

In their 2007 study Richard Wilkinson and Kate Pickett take a different tack from Cavadino and Dignan and from Downes and Hansen, examining the correlation between levels of relative income inequality and a range of negative social outcomes, including the imprisonment rate (Wilkinson and Pickett, 2007). They find a strong correlation. Countries such as Japan, Sweden and Norway, which have low levels of income inequality, have correspondingly low imprisonment rates. Countries with high levels of income inequality - such as the US, Singapore, the UK, Portugal and New Zealand - have high rates of imprisonment.

A number of implications flow from these three studies. First of all, capitalist countries are not consistent in the degree to which they resort to imprisonment. But the resort to mass imprisonment does appear to be a consistent feature.

Second, where there is variation in the *degree* to which capitalist countries resort to imprisonment, this appears to be correlated with a wider array of a country's social, economic and political arrangements. Capitalist countries with strong welfare state arrangements have, generally speaking, lower prison populations. Those with weak welfare state arrangements have, generally speaking, higher prison populations. But the correlation is not precise, as the example of Japan makes clear. Though the role of welfare state arrangements as a means of addressing underlying inequalities is important, the stronger fit appears to be between levels of income inequality, rather than particular welfare state regimes *per se*. Countries that are less equal have higher rates of imprisonment.

Third, regardless of the variation in prison populations between capitalist countries, the general trend in the use of imprisonment within capitalist countries is an upward one. Most capitalist countries have witnessed significant growth in their prison populations. The US prison population has doubled in the past twenty years. The UK population has nearly doubled in the same period. Even those countries with historically low prison populations, such as Norway and The Netherlands, have seen marked growth over the past two decades. This suggests that the shift towards neo-liberal forms of governance that have reduced welfare support and led to increases in poverty and inequality — exemplified by Thatcherism and Blairism in the UK — is intimately linked to the rise prison population over recent years.

In many ways these observations are simply to restate the point, made many years ago by Rusche and Kirchheimer in their 1939 study *Punishment and Social Structure*, that the dominant economic and social relationships of any given society will determine the nature and scope of penal interventions (Rusche and Kirchheimer, 1939/2003). But it is an observation worth repeating if only because it seems to be a point so often forgotten.

So, what are the implications for contemporary criminal justice reform strategies? It means taking seriously the relationship between penal regimes and wider social structures and economic inequalities. Welfare-state regimes and penal regimes are ultimately different mechanisms for addressing (to a greater or lesser degree of success) underlying social antagonisms, inequalities and the problems that they give rise to.

Campaigning to control and reduce the prison population therefore requires serious thought being given the role of the welfare state in regulating and addressing social problems, as well as serious thought being given to the means by which poverty can be tackled and unequal societies be made more equal. Criminal justice reformers, in other words, need to articulate a vision for a broader range of social arrangements rather than merely digging around in the narrow terrain of penal policy. The cause of criminal justice reformism is intimately tied up with a wider set of social and political questions. Criminal justice reformists need to step out of their narrow and siloed frame of reference if they wish to be relevant and make an impact in the coming years.

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Conclusion

Jon Collins

If current policy paths are followed, by 2014 we will have a prison capacity of 96,000 if Labour remains in power or approximately 101,000 if the Conservative party wins the 2010 general election. This planned increase, which will come at huge financial cost, is on top of the 25,000 prison places already added since 1997. Yet this is not even the top of the mountain. It is almost inevitable that prison numbers will continue to rise beyond even these figures unless a new approach is taken to criminal justice policy.

This increase in capacity has, however, failed to keep pace with demand. As a result, the prison system is severely overcrowded, which not only compromises the safety and wellbeing of prisoners but also cripples rehabilitative work, increasing the risk of reoffending. The probation service is also suffering from its own overcrowding crisis, struggling under unrealistic caseloads and with long delays to start interventions not uncommon.

Against this background, budget cuts will have to be made as public spending contracts. It is hard to see where these cuts can be made within the current system.

As a result, whichever party wins the next general election will inevitably face a crisis in the criminal justice system with an unaffordable price tag attached. Action in this complex and unpopular area of public policy will be a priority. Yet this also presents an opportunity to go beyond the technical fixes and organisational rearrangements that have made so little progress in recent years and radically reform the system.

This collection of essays is not intended to provide a neatly-packaged set of answers to the questions posed by the failings of the criminal justice system. Indeed, some of its recommendations are contradictory. However, this volume is intended to raise some of the key questions that need to be addressed in trying to decide how to take forward long-overdue reform of the justice system. It is intended to stimulate the thinking of politicians, policy makers and penal reformers alike.

A thorough debate about the future direction of criminal justice policy is an essential forerunner to effective reform. This collection of essays is a contribution to that debate.

This collection of essays is intended to stimulate new thinking on criminal justice policy. The criminal justice system is in crisis, with severe funding cuts in both the prisons and probation services putting additional pressure on a system that is already functioning at the very edge of its capacity. Radical reform is long overdue, but the political debate on law and order has stagnated.

In response, expert authors propose a series of potential reforms that could have a significant impact on the criminal justice system, ranging from the introduction of justice reinvestment or restorative justice to creating an equivalent of the Monetary Policy Committee or the National Institute for Clinical Excellence for criminal justice policy.

With a general election due in 2010, this collection of essays is intended to provide fresh lines of thinking for politicians, policy makers and penal reformers alike.

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