The Smith Institute
The Smith Institute is an independent think tank that has been set up to look at issues which flow from the changing relationship between social values and economic imperatives.

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THE SMITH INSTITUTE

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Preface

Wilf Stevenson, Director, Smith Institute

The Smith Institute is an independent think tank, which has been set up to undertake research and education in issues that flow from the changing relationship between social values and economic imperatives. In recent years the institute has centred its work on the policy implications arising from the interactions of equality, enterprise and equity.

The Smith Institute is pleased to be publishing this collection of essays examining the linkages and tensions between criminal justice and social justice. Current debate around this issue tends to focus on the fairness or otherwise of criminal justice policies, rather than the positive role that a criminal justice system could have in promoting life chances and tackling social exclusion among some of Britain's most deprived groups. The essays in this collection offer a broad consideration of the extent to which the justice system as a whole can become more responsive to the communities with which it interacts, and more engaged with the national and local agencies that serve them.

As the breadth of opinions represented in this pamphlet makes clear, there is no single way of understanding the purpose, or measuring the effectiveness, of a criminal justice system. In drawing on the knowledge and experience of a wide range of experts involved with criminal justice, our aim was not to provide a comprehensive prescription for "a better justice system", but to offer a useful account of the complexity and nuance involved in any consideration of the future shape of criminal justice policy in Britain.

The Smith Institute thanks Liberty and Justice for their invaluable help and advice in bringing this collection together, and gratefully acknowledges the support of LogicaCMG towards this publication and the associated seminar.

Part I: What is criminal justice?

Chapter 1

What is criminal justice for?

Rt Hon Lord Falconer of Thoroton QC,
Secretary of State for Constitutional Affairs

What is criminal justice for?

Rt Hon Lord Falconer of Thoroton QC

In any society, the criminal justice system is one of the most important mechanisms for articulating and committing to a set of shared values. It sets limits on what we can and cannot do, and states common and agreed rules about what behaviour is acceptable and what behaviour will be policed and punished.

So it could be said that where a criminal justice system tries to limit or stop behaviour that most people think is acceptable, it fails in its objectives. Similarly, where a criminal justice system permits behaviour that most people think is unacceptable, not only does it fail in terms of stopping that behaviour but it also fails through loss of public confidence.

What is needed from our criminal justice system

With this in mind, we might suggest that a criminal justice system needs to be in line with the convictions and shared values of citizens – even where that involves overriding one set of shared values to give way to another set that are considered more fundamental. So, for example, in the interests of freedom of speech we allow people in certain circumstances to say things that perhaps are not true, or are against the interests of certain groups.

But just as fundamentally, people need to feel that the system not only defines justice in the right ways but that it is actually capable of delivering justice – and doing so speedily, fairly and efficiently.

We generally agree that a criminal justice system that works in this way helps to create the conditions for a tolerant, thriving and successful society. Put simply, it improves the incentives for us all to act well, because we know that those who do not act well will be identified and reprimanded. It provides assurance because we know that our good intentions will not be abused, and that playing by the rules will be rewarded.

This is tacit in our way of life: the way we conduct ourselves, our affairs and our business. However, these values do not exist in a vacuum, set apart from cultural, economic and social issues. For example, the importance of these values increases all the more for a society where there are real and well-founded concerns about security.

There is once again a threat of terrorism in the UK, and it is a threat of a new kind.

The effectiveness of our public institutions – and our criminal justice system – will be measured against our response. But more than this, terrorism makes us look again at our values. It does not make us question them or doubt them, but it does make us consider how we give them expression.

There are pressures from other areas. Society is now more complex than it has been. It would be wrong to say the traditional ties of place and of family have been broken, but they have changed in a way that must have an impact on the justice system. This relates in turn to the feeling that there is now less solidarity between different people and groups living in society, and the consequent impact this has on trust, tolerance and understanding.

This of course is a complex area in itself and is subject to much discourse. The simple reality is that the UK was never a homogenous society where all the people were the same, ethnically and culturally. Indeed our strength has often been borne out of differences; we are a union of four nations, after all.

And in modern society there are renewed and multifaceted differences in outlook and culture. There are differences in perspective between the old and the young; between the well-off and the socially excluded; between communities located in different parts of the country; between communities originating from different parts of the world.

What is vital is that, amid the inevitable changes our society will undergo, there remains a core set of values that unites people and promotes common understanding. There are a great many things that underpin our society: tolerance, democracy, enterprise, freedom and the rule of law.

It crucial that, at the core of society, we have a criminal justice system that reflects and upholds the core values shared by all. The justice system should provide the parameters within which we grow and develop as a nation: for it is these shared values that will see our criminal justice system through whatever new challenges arise in society, whether that be the threat of terrorism, the increasing diversity of our society, "new" technological crimes, or indeed any other issue of the day.

In this sense the criminal justice system should not just be seen as a negative process for punishing people after the event, but also a positive process, underpinning public confidence and ensuring people of all backgrounds have the confidence to participate and engage in our economic, social and cultural development.

New challenges to our ancient system

But if this is the purpose of criminal justice, what challenges does the criminal justice system of today face? What will the criminal justice system need to do if it is to serve and contribute to a diverse and shared culture and to retain public confidence?

Over a number of years, there has been increasing expectation that public services should be efficient, in the sense that they are run well and provide value for money and that they are responsive to the needs of local people. Undoubtedly – and quite rightly – there has been a rise in public expectations of the service provided by any state system, whether that is in terms of health, education or public safety.

We need to ensure that the criminal justice system meets, and even exceeds, public expectations. This of course means reducing crime and making people feel safer in their communities, but it also means looking at processing crimes in the most effective way, as well as issues such as the way victims and witnesses are treated when they interact with the justice system.

This of course is about increasing standards in all areas – in the time cases take to get to court, in the way they are dealt with, the way they arrive in court, and in the way facilities are provided for vulnerable victims and witnesses.

But it is not just about a rise in the standard expected; people also expect a much greater transparency. They want to know why a particular crime is dealt with in a particular way. They need to have confidence that we are dealing with offences and offenders in the right ways.

Across the public services, and in other areas of society and the economy, people have become used to the realisation that one size does not fit all. No one expects it to. And when it does, the assumption that people make is that the system has not been designed with sufficient care. We live in a time of customised services, where processes are judged by their fitness for purpose. We need to consider what implications this has for criminal justice.

Technology is obviously a key area. It has great potential to aid in the detection and prosecution of crimes, but also to simplify the process for victims and witnesses. We need to show that the criminal justice system is making the best use of technology – in detection, in investigation, and in the processing of cases through the system.

We need to understand that the criminal justice system has to deal with large numbers of new, 21st-century crimes. Some of these are regulatory in nature. When we first designed the basic principles of the criminal justice system in this country, we were not, for example, dealing with offences like non-payment of TV licence fees or driving without insurance. We do need to ask whether these offences, for which the evidence is documentary in nature, where there are no victim implications, need to be dealt with using the same process as offences such as burglary or assault.

I think that what all of this means is that we need a system that is focused on speed and simplicity. And that, as the most elementary principle of design, we need to ensure that the solutions we use are proportionate to the offence or behaviour being addressed.

Keep response proportionate to the crime

Looking at the criminal justice system from my perspective, as the minister responsible for the running of the courts, one of the most striking facts is that the highest volumes of offences that the system has to deal with are low-level. Not low-level in the sense that they are trivial, but that they are often straightforward in nature. We need to think carefully about whether they all really merit the use of the full apparatus of the criminal justice system.

In all categories of offence, we must ensure that the innocent go free and the guilty are convicted. That is the backbone of any justice system. But we increasingly recognise that using a single template for the disposal of the wide range of cases within the criminal justice system is neither sensible nor the best way to retain public confidence.

The TV licence cases do not need to be dealt with through a full trial, on the same basis as a much more complex case. The evidence in a TV licence case is documentary. You either bought a television set or you did not. You either paid the licence fee or you did not.

Some antisocial behaviour and other less serious crimes – such as some cases of criminal damage or theft or public order offences – similarly do not need to come to court, where the defendant admits guilt and is willing to accept a condition such as a fine, treatment or unpaid work.

The other factor is that we can deliver this simpler, more proportionate process quicker than a full court process. We can create a closer connection, in time and in the offender's mind, between the crime and the punishment. When this connection is not close enough,

the deterrent effect of the punishment is reduced and public confidence in how the crime has been dealt with is also reduced. Imagine if a year passed between the offence being committed and the case being concluded in court. And yet we know that this can happen – lawyers can prolong cases and there can be delays in court.

At the same time though, we need to ensure that where the same offender repeats these crimes, we respond differently. There do therefore need to be safeguards – but the ability to deal with these categories of cases in a speedy and clear way may well be both more effective in dealing with the problem and instil more confidence in the community.

A long, drawn-out process that, at the end of that process, treats the offence as minor and, quite possibly, imposes the same penalty as the defendant was willing to accept at the outset, does not carry confidence. We know that this happens. We know that trials for small-scale offences can take upwards of six months. We know that this racks up costs for the system, that it is a drain on court resources. All of this makes people feel that the system is being taken for a ride. It widens the gap between "us", the law-abiding, and "them", those who have committed an offence.

This is not helpful in order to promote confidence in the system – and it is not helpful in building a case for rehabilitating offenders, or attempting to solve problems when it is those problems that are the causes of crime.

There needs therefore to be an obvious connection between the seriousness and complexity of the case, the time it takes to come to court, and then, if there is a trial, the time it takes in court.

Design the system to maintain public confidence

I emphasise this point about proportionality of process because getting the process right for these low-level offences creates a base level of public confidence that the system is not over-engineered. When people see a system designed in this way, I believe that they will understand that the criminal justice system is not one in which one size is made to fit all. It is a system that is designed with more care and with a closer understanding of the variety of cases that it has to deal with.

Fundamentally, this approach also creates capacity in the justice system – in terms of court time, prosecutorial time, police time – to deal in a more nuanced and complex way with those crimes that require that treatment.

There is an analogy here to what this government is doing in terms of healthcare. There are vital aspects of cure and prevention that need not be dealt with in doctors' surgeries or hospitals. Community pharmacists can deal with more; we have created NHS Direct; and if we can successfully stream off low-level healthcare issues in these ways, this means that doctors and nurses have more capacity to deal with serious or systemic health problems.

Our aim in criminal justice is the same: to create more proportionate means of dealing with low-level offences and to deal with more of these outside of court, wherever that is appropriate. We also want to increase the use of summary justice. This will bolster public confidence that the system is responding well and swiftly to these minor breaches and that its resources are focused on dealing with more serious crimes, and on addressing the problems underlying those crimes.

To that end, specialist courts are an important innovation. I launched pilots of drug courts in December 2005, and we already have specialist domestic violence and antisocial behaviour courts. These courts deal with cases where a simple dispensation of justice, in the form of condemnation and punishment, is not suitable. In these cases, there is an underlying problem, and so we need specialist courts that are experienced in identifying and designing solutions to the underlying problems.

We also want to ensure that we spread to the rest of the country learning from the pioneering Liverpool Community Justice Centre – in particular the speed at which cases are dealt with and the way the judge engages with the local community.

Our agenda of using pre-court means is also relevant here. If the focus is on solving problems, it will not always be the case that this is best done in a court.

We are also looking at increasing the use of conditional cautions. These are tools for a prosecutor to use when, in her experienced judgment, taking the offender to court will not solve the underlying problem, and a different, tailored solution is required. And when, equally, in the prosecutor's judgment, society still needs an assurance that if the offender repeats the criminal behaviour, then there will be criminal consequences.

We do of course need to ensure that there are safeguards. If the defendant wants to contest the case, that option must be available. If the defendant is not prepared to accept the conditions offered by the prosecutor then, again, court must be available.

What we need to reconsider, however, is the assumption that court always provides the best solution. This is not a question of playing off a certain amount of due process against efficiency savings. It is a question of guaranteeing the rights of the accused while also trying to create a system in which low-level offences are dealt with in a proportionate way and underlying problems are tackled – whether this is best done through a specialist or through an earlier intervention, for example, by a prosecutor.

Conclusion

In answering the question "What is the criminal justice system for?" I have sought to argue that the system is about more than identifying and punishing offenders after the event – it is in fact a fundamental part of articulating and defending our shared values. The criminal justice system helps provide the foundations – perhaps more accurately, the parameters – within which we operate. This understanding is important to enable us not just to deal with crimes now, but also to respond to issues as they emerge, such as terrorism or crimes based on new technologies.

This understanding translates into practical, pragmatic reform. Since the government was elected in 1997, there has been unparalleled investment in public services, which has been matched with far-reaching reforms. This must continue – we need to continually evaluate how our shared values are expressed in practice.

For the criminal justice system, this means making best use of new technology, looking closely at whether some of the cases dealt with in court could in fact be dealt with more efficiently elsewhere, and also at how courts specialise and innovate in order to respond to the concerns of local people in areas such as drug misuse, antisocial behaviour and domestic violence.

In this way, the criminal justice system can play its full part in ensuring our society remains one based on tolerance, freedom and the rule of law.

Chapter 2

Blurring the lines between civil and criminal law

Shami Chakrabarti, Director of Liberty

Blurring the lines between civil and criminal law

Shami Chakrabarti

For eight years I have battered the criminal justice system to get it to change. And it was only when we started to introduce special antisocial behaviour laws we made a real difference. And now I understand why. The system itself is the problem. We are trying to fight 21st-century crime – antisocial behaviour, drug dealing, binge drinking, organised crime – with 19th-century methods, as if we still lived in the time of Dickens. The whole of our system starts from the proposition that its duty is to protect the innocent from being wrongly convicted. Don't misunderstand me. That must be the duty of any criminal justice system. But surely our primary duty should be to allow law-abiding people to live in safety. It doesn't mean abandoning human rights. It means deciding whose come first.
Tony Blair, conference speech, 2005

One of the incontrovertible observations that may be made about New Labour criminal jurisprudence to date is the consistent departure from traditional paradigms of legal process. The debate is not so much about the extent to which lines between traditional criminal, civil and administrative process have been blurred, but the constitutional wisdom of this general approach to legislative policy.

This often extremely creative blurring of categories of law can be observed in a number of manifestations on the statute book in recent years.

Criminal sanction has been adopted across Whitehall as a convenient lever for affecting public behaviour in a number of regulatory policy areas. This phenomenon began well before 1997. The approach has a certain clarity of message and outcome. (Most citizens wish to avoid criminalisation – even for road traffic, health and safety, or professional regulatory matters.) However, if used to the extreme and in circumstances widely believed to be disproportionate, it risks diminishing the potency of criminalisation as a lever in relation to classic criminal behaviour.

Administrative law (which in the hands of the judiciary had developed as a means of holding the executive to account in the postwar period) has become a legislative tool for diluting both parliamentary and judicial checks on executive power, police power in particular. Terror suspects were held without charge or trial for three years, on the premise that the enterprise in hand was not a matter of criminal justice but immigration detention. Parliament effectively delegates local legislative power to police and local

authorities, by extending police power relating both to anti-terror stop-and-search and to curfew regimes for children.

The birth of asbomania

Most pointed and controversial, however, has been the blurring of lines between civil and criminal procedure by a series of orders based upon the prototype quasi-injunctive or prohibitive orders developed for the Crime & Disorder Act 1998. It is this approach that Alvaro Gil-Robles (the Council of Europe commissioner for human rights) described as "asbomania" just last summer, and which I would like to consider in this chapter.

This approach is founded on the view that the Prime Minister set out in Brighton (and not for the first time): traditional criminal justice values, born in this country, exported around the world – equality of arms, the presumption of innocence and the proportionate and dispassionate meting out of punishment by the state (rather than the community) – these values, which preceded the postwar universal human rights consensus and became so central to it, simply will not do. They are neither fundamental nor inalienable, but disposable in pursuit of a greater good.

This has been the flagship policy adopted in support of the laudable aim of ensuring that social reformers need not retreat from real and perceived concerns about crime. The Labour Party's belief in social justice was no longer to be a bar to aggressive law and order policy, but the greatest justification for it. All sections of society might fear and loathe crime and nuisance, but it is often the poorest and most vulnerable who are most exposed to it. Did the chicken or the egg, the soundbites or the policies of antisocial behaviour, come first? Too much has passed for this to matter. They both, in any event, reveal an underlying philosophy.

The presumption of innocence – the golden thread, the paradigm of natural justice – is considered too cumbersome. The system built upon it is too slow, expensive and uncertain in outcome. As the Prime Minister told us in 2004, "the concern of a 19th-century criminal justice system was too many of the innocent being convicted". But in the 21st century, the greater concern is that too many of the guilty should go free.

The evidence base for such a bold contention has never been made clear. In particular, is it based on actual outcomes or public perceptions? Nonetheless, once the conclusion is settled that natural justice (or fair trial procedure) protects individual wrongdoers instead of their past and future victims, the unworthy from the worthy poor, we are a short hop

from placing natural and social justice at direct odds with each other as societal values. Criminal lawyers and judges are caricatured as vested interests who were fiddling while Rome or Swindon burned. A new communitarian view of criminal justice is born.

There is much talk of prevention (not least for the purposes of subverting human rights principles, as Professor Andrew Ashworth has so brilliantly described[1]). This talk of prevention and prohibition permits successful arguments in our highest courts that run directly counter to political pronouncements. In this parallel universe, judges have on occasion been persuaded that the presumption of innocence is not breached by legislation that is preventative rather than punitive in nature. In reality, however, and over time, the new antisocial behaviour justice system delivers swifter, easier and harsher accusation, proof and punishment.

Determining whose justice is being served

It seems to me that the pertinent questions that arise are as follows:

Is the Prime Minister's critique of traditional criminal justice principles correct? What are the strengths and weaknesses of the traditional system? Is justice for the few in inevitable tension with justice for the many? Is natural and social justice impossible?

If the ambition is to be tough on crime and its causes, does the antisocial behaviour approach succeed on its own terms? How does it improve on traditional methods? What, if any, are its drawbacks and dangers?

Finally, if past and present methods of addressing crime and nuisance of various kinds are inadequate or problematic, what is the scope for adaptation and improvement? What else is there?

Traditional fair trial principles were not always seen as running counter to social justice or community protection. Above the entrance to the Old Bailey (our central criminal court, erected upon the site of the infamous Newgate prison in 1907), we can still see the famous inscription: "Defend the children of the poor and punish the wrongdoer."

But who are the "children of the poor" encapsulated in this motto? Are they, as some might seek to argue, simply the victims of crime, seeking the protection and redress of the

1 Ashworth, A "Social Control & Antisocial Behaviour: The Subversion of Human Rights?" in *Law Quarterly Review* 120 (2004), pp263-291

criminal court? That is certainly one possible interpretation of a phrase that so obviously juxtaposes this vulnerable class of humanity against the perpetrators of crime. Alternatively, do we take the call to "defend" quite literally, so that the "children of the poor" are simply defendants or those who lack the means to defend themselves?

I prefer a third way of interpreting the inspirational slogan. For in 1907 as in 2006, the "children of the poor" are among victims and defendants (of both the innocent and guilty variety). Indeed, during a lifetime or even only lunchtime, a person can in fact be in all three categories.

This is one of my greatest difficulties with the Prime Minister's bold assertions about "whose human rights come first". How would he distinguish the decent majority from the criminal minority, even if the categories were hermetically sealed? Do the bad guys always wear hoodies? Generations of jurists struggled with this enterprise, and notwithstanding their noblest endeavours and aspirations sometimes sent innocents to the gallows or prison.

When one moves into the territory of collective liability or guilt by association, as political slogans about "bad parenting" and "problem families" appear to do, determinations of guilt become even more perilous. By contrast, the Old Bailey inscription – like the system it represents – promotes the best representation and justice for all, with the aim of punishing not the usual suspect or sometime offender, but the true perpetrator of a present and particular crime. This is the justice that both victim and defendant are entitled to. It is an exacting standard, based not on reputation or likelihood but on certainty of guilt (and usually guilt of mind as well as action).

There is no question that the standard is incredibly exacting, and notably different from that applied when private persons bring their own disputes before the civil courts. Why so exacting? Why so different? It seems necessary to revisit the very role of criminal justice in civilised society.

How asbomania breaks down criminal justice

The whole of our social existence is a series of relationships: at home, with our friends, neighbours, associates and others. Some are of our choosing and others not. They are long and short, simple and complex, simultaneous and sequential, evenly balanced or asymmetric in nature. To a greater or lesser extent, modern civilisations regulate these relationships with legal ties and obligations that for the most part seem almost invisible to the naked eye.

Of course, progressive societies tend to give particular regard to power imbalance and broader aspirations in the framing of such law. Often these relationships generate conflict or break down, with or without fault on either side. Where parties are unwilling or unable to reach their own resolution and have the means to seek the state's adjudication, they will come to the civil courts for redress. Sometimes there is simply uncertainty about mutual obligation. More often, there may be a sense of having been wronged by another person or party.

But some wrongs are thought to be special – so grave for the individual "victim" or counter to wider societal interests – that to breach the obligation and wrong one's neighbour is to wrong the whole of society, by departing from its non-negotiable core. This is the paradigm of crime, properly so called and framed. It is not best reflected or advanced by the host of minor and regulatory offences that have mushroomed in recent years.

The advent of antisocial behaviour law may be the greatest blurring of the boundaries of civil and criminal procedure. But this may have seemed less of a sin after regulatory law (in a whole host of public policy areas) had so effectively blurred the conceptual boundaries between civil and criminal obligation. Thus those whose only objection to asbomania is the blurring of two legal traditions might be advised to seek a more winnable or popular cause, like keeping Sunday special.

If the gravity of the wrong or danger and societal solidarity with a victim were the only factors, we could have the police bringing defendants to civil courts where legal aid lawyers helped victims conduct their civil cases against the accused.

The ultimate reason for special criminal procedure, with presumptive innocence at its heart, lies in the grave consequences for the accused of criminal conviction. By graver opprobrium and punitive sanction (up to and including imprisonment) for the offender, criminal law is graver. Further, the massive inequality of arms caused both by the baying mob outside the court door and the resources that the state may deploy within it – the risk of abuse and tyranny – cry out for special protection for the criminal accused.

Of course, there were never completely bright lines in terms of opprobrium or consequence for civil and criminal wrongdoers. Few baying mobs assemble for parking offenders, and some civil suits result in personal bankruptcy. Those who breach injunctions have long faced prison for contempt. Had the post-1997 philosophy been framed or applied differently, antisocial behaviour laws might be just another such minor blurring, a

hybrid attuned to deal with serious nuisance or petty crime. Instead, I will argue that whatever the original intentions – and notwithstanding the House of Lords decision in the McCann case of 2003[2] – the reality of asbomania in 2006 is reflected in the Prime Minister's statements and the history of its application: a new mutant strain of criminal law.

Why the frustration with criminal law?

But I should not leave the subject of traditional criminal law without reflecting upon the Prime Minister's exasperations with it. Whatever the efficiencies of modern technology and management, criminal due process is slow, or at least slower than the alternatives, in particular slower than arbitrary or police justice. The high standard of protection for the accused inevitably requires time and expense.

Further, both its tradition and the human rights values it protects make for a necessarily adversarial system, requiring an inevitable additional pressure or even anguish on the part of victims, whose veracity is to be scrutinised and judged in the process. In cases of crime of any degree of seriousness, an individual victim may perfectly rationally decide to stay away from court, thus allowing the wrongdoer's escape from justice and the wider community's loss of future protection.

The system will invariably lead to some acquittals, not least because of presumptive innocence and the evidential protections surrounding it. This makes for a potentially long and expensive process with an uncertain outcome (not an unfamiliar scenario in the context of public services more generally).

Uncertainty of outcome is the ultimate strength or weakness of the system, depending upon your worldview. Is it protection from injustice, even tyranny, or a fault on the conveyor belt? Human rights proponents can give only one answer. However, the all-important reality check is the fact that an overwhelming majority of criminal defendants plead guilty, and survey after survey suggests a massive discrepancy between perceived, or even reported, crime and that which ever reaches the courts.

Nonetheless, in the context of contested disputes, the statistics for antisocial behaviour order applications demonstrate breathtaking certainty of outcome. Of the 3,069 applications made in England and Wales between 1 April 1999 and 30 June 2004, only 42 were turned down by the courts.[3]

2 *Clingham v Kensington & Chelsea LBC; R (McCann) v Crown Court of Manchester* [2003] 1 AC 787
3 Home Office figures, cited at paragraph 115 of Gil-Robles report

Finally, from the prime ministerial perspective, the sanctions imposed by the criminal justice system must be both proportionate and inevitably require further state administration and cost. For the most part (and with limited exception), punishment looks to the past rather than the future, to proven deeds rather than future propensity, and may therefore seem particularly unsuited to affecting the future conduct of minor miscreants within the envelope of proportionality.

Protecting the victims – and the guilty

Of these various concerns, the need to protect immediate victims is most commonly shared by the human rights analysis of the criminal justice system. For too many years it seemed that the necessary procedural protections for an accused were accompanied by an almost gratuitous disregard for the dignity, worth and inevitable vulnerability of witnesses and victims. Procedural and substantive issues around the law of sexual offences were an obvious case in point.

To its credit, the early days of this government produced much complex and valuable work in this area and demonstrated the way in which the recasting of substantive criminal law – and more importantly, resources and support for victims within the criminal justice system – might improve the victim's experience and encourage participation without undermining the procedural protections of the accused. However, this kind of work is painstaking to conceive and often costly to implement. It lacks the quick fixes and robust rhetoric of summary police justice and community-imposed punishments.

In fairness, it must be remembered that human rights values bring their own additional concerns regarding criminal justice as the preferred mechanism for dealing with social problems – particularly in the context of the young. The stigma, opprobrium and sanction from which the accused is to be protected are not always the best way to improve the life chances and future societal participation of the convicted offender. Criminal procedure may provide Rolls-Royce protection for the innocent, but criminal sentencing has never provided the equivalent in rehabilitation for the guilty with which wider social policy must be concerned.

Further, the rush to criminal or even civil law can be an unnecessarily harsh, formal and dehumanising process for all concerned, particularly in the context of minor offences involving neighbours, the young and the otherwise vulnerable. Hence the proper continuation of informal resolution of minor disputes in even the most advanced societies and, sadly, in the context of our own society, the growth of mediation-type mechanisms.

The boundaries of "antisocial behaviour"

So much for traditional criminal justice. What of its mutant cousin – the "battered criminal justice system" of which the Prime Minister speaks?

The first observation to make about "antisocial behaviour" is the sheer breadth of its definition. At its lowest, the statutory definition provided in section 1 of the Crime & Disorder Act 1998 encompasses behaviour "likely to cause harassment, alarm and distress". In our informal private dealings with each other, we have long been used to extremely broad and evolving concepts of what is socially welcome, acceptable, inept and antisocial. Does such breadth and informal evolution make just or good law?

The guest who arrives late, hogs the conversation, lights a cigarette without permission in the close proximity of diners or children, proceeds to become drunk and obnoxious, makes an unwelcome pass at his hostess and a swing at his host has undoubtedly engaged in a range of bad behaviour according to cultural norms (depending on the context and times) and certainly within the statutory definition. But exactly how much of this behaviour should be regulated by the law, let alone mediated by police, local authority and court intervention?

It is the sheer breadth and flexibility of the definition that, while worrying its critics, excites its supporters. When asked in a television interview to clarify the parameters of antisocial behaviour, Minister of State Hazel Blears replied: "It means whatever the victim says it means."

The breadth of the definition is the key to understanding this populist communitarian philosophy, which places such absolute trust in both the police and other professionals and seems to have no trouble distinguishing between poor worthy complainants and false accusers (who incidentally have been given asbos themselves). It seems completely untroubled by the variety of ways and ease with which one may be "distressed" by those of another class, race or generation, by those who are irritating rather than threatening (in any objective sense), and those who are themselves vulnerable or just plain different.

The thinking behind this definition has become the driver for a range of summary police powers. However, the new paradigm (in both breadth and ripeness for replication), the law to end all laws, appears to be the antisocial behaviour order, or asbo.

Breadth of definition matched by breadth of application

The asbo is of course a civil order, made on the application of police, local authority, registered public landlord and possibly any one of a range of other authorities designated by statutory instrument. For the most part it will be made in the magistrates' court, sitting in its civil capacity (though it may be made in other contexts including that of criminal sentencing). The court must be satisfied to a high standard (in effect the criminal one) that the individual has engaged in past antisocial behaviour, but then has freer judgment about whether the prohibitions contained in the order are necessary for people in the locality (not specifically defined) to be protected from further antisocial acts.

The application for an asbo involves the more flexible civil procedure, crucially allowing a great deal of hearsay (including police and local authority witness statements) to replace the classic need for the live evidence and cross-examination of reluctant witnesses and victims.

The conditions imposed under the asbo are often extremely vague, broad and significant in impact on an offender's life. Breach is a serious criminal offence, carrying the penalty of up to five years in custody, though the breach proceedings (if not the proceedings which set the conditions themselves) take the form of a conventional criminal trial.

Finally, such orders are now often accompanied by wide-scale local publicity by way of local authority leafleting campaigns and press releases. Indeed Home Office guidance (which is a greater guide to the dangers of asbomania than the legislation) positively encourages this. The justification for this "naming and shaming" is of course that the policing of injunctions contained in an asbo (quite often including wide-scale restrictions on the offender's movements) requires a great deal of community vigilance. As Alvaro Gil-Robles has carefully observed, while traditional injunctions were designed to protect one or a small number of victims, asbos are supposed to protect entire communities from an individual – hence the desire for publicity.

However, stories of reprisal attacks against asboed families (including innocent and vulnerable relatives of offenders) highlight the fine line between vigilance and vigilantism in this context. We now read of a scheme in east London whereby CCTV camera feeds will connect directly to the television screens of certain members of the local community, to aid their do-it-yourself monitoring of those under asbos.

What the asbo system offers – and how it fails

One can certainly see obvious attractions of this policy. Specific victims are under less pressure to come forward and can be replaced by confident witnesses from the police, and so on, who may knock on a variety of local doors before coming up with the desired case against the troublemaker. Home Office guidance is careful to advise that court files be kept short and to the point in order to minimise the risk of challenge by defence lawyers (a far cry from the onerous disclosure obligations of criminal due process).

The whole system is capable of being cheaper, faster, more certain in outcome and flexible in content than conventional criminal law.

For the human rights proponent, in addition to the comfort of victims, asbos have the potential advantage of avoiding a criminal conviction for the first-time offender.

However, and whatever the good intentions, after six years on the statute book, the natural and social justice and constitutional concerns about how asbos have been designed and applied are almost endless.

The breathtaking breadth of behaviour deemed antisocial, as well as the conditions imposed, have blurred the constitutional divide between legislation and enforcement to the point where different "penal codes" may in effect apply in different communities or in respect of different individuals. Smoking may be profoundly unhealthy and on the way to becoming socially unacceptable, but is it right that without national parliamentary debate of any kind, local authorities and police would have the ability to use asbos to criminalise the practice of smoking on public streets?

This is not fanciful in a context where asbos have been made so as to prohibit people from begging, swearing, speaking sarcastically, wearing certain types of clothing or not enough of it. Inevitably, these "personalised penal codes" (as described by Gil-Robles) create a grave risk or arbitrary, discriminatory and unjust treatment.

The breadth of asbo conditions, combined with the ease with which they may be obtained, blurs the civil and criminal law – not to my legalistic, theoretical or aesthetic distaste, but in a way that offends the presumption of innocence and makes injustice more likely. I am not interested in contending that an asbo has never been properly or proportionately framed against an offender. I merely ask for consideration of the many ways in which the innocent and the vulnerable may be swept up with the guilty.

What of the kids with attention deficit disorder or Tourette's syndrome who are banned from swearing and set up for inevitable failure? The suicidal woman banned from bridges? What of the mentally ill and the homeless banned from begging under pain of criminal sanction? The examples multiply by the day and can no longer be completely ignored. When did these people move from the category of those worthy to those unworthy of respect? In an analysis that respects human rights, such a distinction is both unnecessary and wrong.

Even in relation to those asboed for recognisable low-level crime, the five-year breach penalty can lead to the inadvertent raising of custody tariffs for what was originally very low-level offending.

In 1998, asbos may have looked like a last chance for offenders to avoid a criminal conviction. Today they appear to provide a shortcut to getting one. Up to December 2003, 42% of all asbos had been breached, with 55% of breaches resulting in custody. This suggests that like the traditional criminal justice system, asbos are very good at achieving what has never been this government's stated objective: namely, higher levels of incarceration.

Further, the lack of definition and procedural protection, combined with police and local authority involvement, gives little regard to constitutional concerns about how such broad power might be used and abused by accident or design by central or local government for years to come.

Finally, one must ask the question whether the move to summary, arbitrary and loosely defined community justice is really improving the flavour of our society. Does it make a greater or lesser contribution to a culture of respect than traditional criminal justice principles?

I suggest that antisocial behaviour laws have to date been at best neutral and at worst positively damaging in this regard, and that it may be time to pause for reflection over the way in which home affairs solutions to complex and perennial social problems have enjoyed such apparent political primacy over education, health and housing under a reforming government.

Chapter 3

Fairness and the criminal justice system

Rt Hon John Denham MP, Chair of the Home Affairs Select Committee

Fairness and the criminal justice system

Rt Hon John Denham MP

Perhaps the most enduring symbol of the British criminal justice system is the statue of Justice atop the Old Bailey. Blindfold, dispassionate, objective, administering the sword of justice without fear or favour. Above all, it is a system that is fair; this is how we would like our system to be. The vast majority of those who work in the system strive to make it that way.

But MPs will tell you that few of our constituents feel the system is fair. The blindfold may represent not impartiality, but rather a system that is out of touch with what is really going on. All too often the public simply look at what happened to them and decide it wasn't fair.

This article suggests two ways in which the criminal justice system may be unfair. Unfair because it takes too little account of a pattern of criminality and victimisation that mirrors broader social and economic injustice, and unfair because its treatment of victims and witnesses appears, and often is, unfair. Neither observation is new. But I will argue that both problems have to be tackled together to be successful in tackling either.

Fairness and communities

To restore public confidence in the criminal justice system, the communities blighted by crime – particularly the most socially excluded communities – must become more fully involved in key parts of the criminal justice system. This will reduce crime, and make the system both fairer and perceived as fairer.

Both perpetrators and victims are more likely to come from disadvantaged communities. Burglary victims are more likely to have low household incomes, be unemployed or economically inactive, live on council estates or in areas of high physical disorder and lack home security. The same people are more likely to suffer criminal damage to vehicles or property as well as violence. A recent report from the Crime & Society Foundation suggested that the rise in murder in Britain over the past 20 years has been concentrated almost exclusively in men of working age living in the poorest parts of the country.

You are more likely to fear crime and antisocial behaviour if you are socially disadvantaged. The best predictor of high levels of perceived antisocial behaviour is living in an area classified as "hard-pressed" under the ACORN neighbourhood classification system;

another strong predictor is living in an area with a low proportion of economically active people in the local population.

Those convicted of crime are equally likely to be socially disadvantaged, being much more likely to be unqualified, be unemployed, have been excluded from school, have run away or have been taken into care as a child. The bulk of criminality brought in front of courts seems to come from the poorest and most excluded sections of the same poor communities who are the major victims of these crimes.

Labour has responded in a serious but partial way. On the one hand, very significant resources have been devoted to the regeneration of the poorest communities, policing of high-crime areas has been prioritised, community anti-crime campaigns supported, and antisocial behaviour targeted in the worst hit areas.

On the other hand, there are few signs that the government has tried to tailor other parts of the criminal justice system to the real patterns of crime and criminality. Few adjustments have been made to court procedures or patterns of punishment that reflect the reality of where most crime happens, who carries it out and who the victims are.

To an extent, courts and punishment have historically been remote from most communities. But the social, cultural and physical gap between the poorest communities and courts is surely the widest by far. In these communities you will find least confidence that the criminal justice system works for them, is owned by them or is designed to meet their needs. The next criminal justice system reforms must bridge that wide gap.

Fairness and individuals

The other "unfairness" of the criminal justice system seems, at first sight, quite different. It is the sense that the criminal justice system itself is unfair, and unfair to victims in particular. Only 43% of the public believe that the criminal justice system is effective in bringing people who commit crimes to justice; only 34% that the system is effective at reducing crime.

Victims and their families may feel let down. The vast majority of crimes go unpunished. Only a small proportion of recorded crimes (20%) are brought to justice. Effective targeting of the most prolific offenders and better use of DNA and other forensic technologies will increase this proportion, although with 5.17 million recorded crimes per year, there is a long way to go until improvements are felt on the ground.

New measures, including antisocial behaviour orders and fixed penalty notices, are also bringing a broader range of largely minor crimes within the ambit of law enforcement. The Criminal Justice Act 2003 changed long-standing rules on hearsay evidence, previous misconduct and other issues in an attempt to produce more convictions. The Prime Minister has now taken a drastic step in proposing dropping the presumption of innocence in relatively minor crimes.

On these policies more crimes will be detected and brought to justice over the coming years, but the outcome will not be dramatically transformed. The government's modest aim is to increase the cases brought to justice from 1.025 million in 2001/02 to just 1.25 million in 2005/06. Most crimes will still go unpunished. The feeling "it isn't worth reporting" will persist.

Victims, witnesses and the courts

This makes it all the more important that people have a positive experience when crimes are brought to court. Yet this is where much criticism is focused. People are more confident that the criminal justice system respects the rights of people accused of committing a crime (78% agree) than they are that it meets the needs of victims of crime (34% agree), a clear statement of perceived unfairness in the system.

Most people (77%) think that judges are too lenient in sentencing non-violent criminals and believe that, in general, courts should impose longer sentences. People report poor personal experiences of courts, with 47% of victim witnesses saying that they would not be prepared to be a witness again.

Again, the government has responded. Police performance and response to the public have been at the heart of police reform and performance management for at least three years. Support for victims and witnesses is being improved and a statutory code of practice for victims will be introduced later in 2006. The Sentencing Guidelines Council has been established to bring more transparency and consistency in sentencing. Serious efforts are being made to make a broad range of sentences more credible, including the effective collection of fines, community punishments tailored to individual offenders, and the promotion of visible "community payback" through community punishments. The oversight of offenders will be radically overhauled by the National Offender Management System.

Though these moves will have a positive impact, there are good reasons to believe they

will not transform public confidence in the fairness of the criminal justice system.

Despite crime rates falling by 44% since 1995, fear of crime and antisocial behaviour remain stubbornly high, probably because crime levels are still unacceptably high. (The chance of being a victim is still about one in three in any year.) The most visible violent crimes have risen. Antisocial behaviour persists. Furthermore, public confidence in the effectiveness and appropriateness of sentencing is far too low to suggest that modest improvements in the transparency and effectiveness of sentencing will lead to the corner being turned.

The new challenge is to connect the criminal justice system much more directly with the communities that it serves and, in particular, the high-crime communities in which most offenders and most victims are found. We need to strengthen the role of communities themselves in tackling crime and ensuring effective sentencing. And we need to give victims greater knowledge and oversight of sentences.

Fairness and offenders

Effective sentencing is important to crime reduction. There is a complex relationship between public concern about sentencing, the media and political pressure. One way or another, these have fed into court decisions, making sentences more severe. A first-time burglar was twice as likely to receive a custodial sentence in 2004 as in 1996. There seems to be a diminishing relationship between the sentences passed and the sentences that are most likely to reduce crime levels.

A substantial number of citizens will be offenders at some point in their lives. About 33% of men will have a criminal record by 30. Unfashionable it may be, but offenders (and their families) have some rights too. Less so than the victims, certainly, but it is a reasonable expectation that the punishment will be appropriate to the crime, and that their sentences will help them become people whose "duty to society" has been discharged and who are not likely to offend again. By bringing communities and courts closer together, and re-establishing a sense of fairness in the system, there is a greater chance of meeting this need too.

The other key elements in preventing offending are pretty well recognised too – dealing with drug and alcohol problems, helping people to find work and secure accommodation, and supporting families. Over the longer term, preventing young people's entry into crime through family support and youth interventions is critical. Community-based campaigns

as varied as the anti-gun Not Another Drop campaign and Neighbourhood Watch have shown the important role of empowered local communities.

Where we are now

Some government policies speak this language. And the government should be proud that its social and economic policies have made a big dent in crime rates. But the much-needed step change in effectiveness requires a more radical rethink of both the content and the delivery of policy.

In practice, prevention schemes are delivered by professional agencies that are socially and geographically remote from the high-crime communities in which they work. Poor communities are "done to". There is usually little local understanding of what, how or why agencies work. Relatively little sustained progress has been made in enabling deprived communities to take greater control and responsibility for tackling criminality in their areas.

This is all the more true of the court system. Despite the efforts of some magistrates, the court system has little contact and identity with the communities where most crime takes place. It is not only criminals, but victims too, who feel alienated from the criminal justice system.

There are a number of ways we could overcome this alienation. There is a strong case for developing a formal "citizens' jury" input into the work of the Sentencing Guidelines Council at national level, to ensure that public values are properly reflected in national sentencing guidance. In parallel, local panels could build on this work and adjust the advice to local circumstances.

Those who might be fearful of the punitive instincts of the public should take comfort from the *Rethinking Crime & Punishment* report. Focus groups in this report confirmed the public's initial demand for harsher sentencing. But this was combined with very low levels of knowledge of the criminal justice system and options available to the courts, as well as an underlying scepticism about the effectiveness of prison. They also found that as information about real sentencing grew, members of the public were less critical of the courts. They also became supportive of rehabilitation.

The report found that crime was an emotive issue and that people were struck by principles, not just facts. There was an overwhelming support for the idea of offenders

"paying something back" to the communities they had harmed and "making the punishment fit the crime".

These sentiments provide the basis for communities to become involved in the sentences passed, building on existing good practice. Some community groups now have a say on work to be done on community punishments, like clearing up a park on an estate or repainting a fence. The communities who suffer crime are involved in and benefit from the work of the offenders.

Most 10- to 17-year-olds pleading guilty to a first offence are given a referral order. This means they go to a youth offender panel, consisting of two volunteers from the community, often the victim, and a youth offending team worker. They consider the best course of action, which is written up in a contract and monitored regularly by the panel. The young person is forced to face the victim and to understand the impact her actions have had. She also has to undertake some constructive work to pay back for the damage she has done, which the community representatives – with input from the victim – decide.

Moving forward

Formal mechanisms should be established to enable local communities to set out how they think a much wider range of offenders from their communities should be dealt with. They should be able to discuss and decide what community punishments and reparations should be developed in their area and the visibility that they should be given. They should also be able to comment on resettlement and rehabilitation within the local community. A public that has an input into sentencing policy is more likely to see it as fairer and more appropriate. Indeed, the sentences will be more appropriate, because they will be serving those very communities that have suffered the crime.

Connecting offending, sentencing and communities in this way would be a first step to rebuilding confidence in the fairness and appropriateness of sentencing. Next, we must involve more local people from the highest-crime areas in the formal sentencing process. The Liverpool court with a community judge is one model that brings criminal justice closer to the people. But the type of lay sentencing panel used for young offenders could also be developed much more widely to decide on sentences for a range of lower-level adult crimes and antisocial behaviour. It is time to accept that, despite every best effort, the present magistracy will never become truly representative of the poorest and most deprived communities. We need to pilot new approaches.

At first sight, such a proposal seems to run against the idea of an impartial justice system. It could, for example, lead to variations in sentence for similar crimes in different parts of the country. But any variation is likely to be no greater than the variation in the sentences now passed by the courts. Every day courts take decisions based on an implicit assumption about what support will be available for offenders from families and communities, and assumptions about how communities will view a given sentence, without any real evidence about what will actually happen. Every day decisions are taken about rehousing ex-offenders, where to organise punishments, and when to offer restorative justice. It is widely – but wrongly – assumed that these decision are best taken by professionals alone without reference to the communities they serve. They are not. Instead, such decisions are best taken by those whom they affect the most: the very communities who have suffered the crime, and will continue to suffer unless the offender is effectively rehabilitated.

Responsive justice – involving communities at every stage

The next stage in reform should be to build closer links between sentencers and victims. In particular, sentencers should be required to give more explanation of why they have passed the sentence they have, and what they expect to happen as a result. Over time victims should have the right to know what has happened to the perpetrator.

We could build on the Criminal Justice Act 2004, which requires sentencers to consider protecting the public, punishing offenders, reducing crime, rehabilitating offenders, and reparation. Sentencers also have to weigh the seriousness of the offence, the defendant's record and her personal circumstances. The new sentencing guidelines try to apply this broad approach to different types of crime.

At present, however, although they have a "duty to give reasons for, and explain the effect of, sentencing", it is very much at the discretion of the judge or magistrate to say how they have struck the balance between the different considerations highlighted above. The victim and witnesses often have no idea why the judge or magistrate reached the conclusion that they did. Victims do not know what assumptions the sentencers have made. They have no right to know what actually happens in the months and years that follow.

The sentence should now include a formal statement of reasons. Victims will understand much more clearly why the courts have acted as they did. And by giving victims a right to know what happens next, it will become clear whether a drug treatment and testing order, fine or community punishment was complied with and successful. The new code of

conduct for victims gives some limited rights to victims of dangerous offenders. The new victims commissioner could be asked to oversee a radical extension of these rights.

The implications of this change are much more profound than simply improving the flow of information. Sentencers may assume, for example, that a prison sentence will include drug treatment or other rehabilitation measures. By making their assumptions explicit, and by giving victims the right to track the case, the National Offender Management System will be required to deliver these assumptions at every part of the sentence. The system will be held to account by victims in a way it is not at present.

These principles would apply across the system, of course, not just in the poorer areas. But its impact would be greatest in the areas with most crime and most victims. It would help develop a personal understanding and ownership of the criminal justice system, and a new level of accountability, that is now lacking.

The final stage where community involvement could have positive effects could be in rehabilitating and resettling offenders. Once the community sees itself having a role in preventing offending and reoffending, it should recognise the benefits of helping ex-offenders reintegrate.

For example, communities could set up projects addressing gaps in the local labour market by encouraging local businesses to take on ex-offenders, utilising community support. This way, everyone wins: offenders will gain through having a job; employers will gain from having another employee; and, since ex-prisoners with a job are two-thirds less likely to reoffend than those without, the whole community gains in safety. Similarly, we should encourage community groups to set up projects helping ex-offenders find suitable accommodation, access family support and address other needs.

Local people have the best understanding of the local context so are best placed to help. This could help ex-offenders into a more stable life, while at the same time reducing the risk they pose to the community. Again, by understanding the problems of crime and offending, communities can be empowered by developing responses that are relevant and appropriate to them.

Part II: Crime and communities

Chapter 4

Criminality and social justice: challenging the assumptions

Richard Garside, Director of the Crime & Society Foundation

Criminality and social justice: challenging the assumptions

Richard Garside

In a recent newspaper article the front-bench Conservative MP and former *Spectator* editor Boris Johnson reflected on class divisions in contemporary British society. "The real divide", he observed, "is between the entire class of people now reposing their fat behinds on the green and red benches in the Palace of Westminster, and the bottom 20% of society." This bottom 20%, he continued, "supplies us with the chavs, the losers, the burglars, the drug addicts and the 70,000 people who are lost in our prisons and learning nothing except how to become more effective criminals"[4]

"Residuum" was the term coined by earlier generations to describe this layer of seemingly indolent undesirables from whom most criminals were deemed to spring. These days "underclass", or the more politically respectable "socially excluded", are the preferred descriptors. Terminology aside, the association between socioeconomic position and criminality remains. "Crime", as the Social Exclusion Unit website puts it, is "disproportionately committed by people from socially excluded backgrounds." The Social Exclusion Unit goes on to list problems of "unemployment, education and training, substance misuse, housing, mental and physical health, attitudes and self-control, institutionalisation, debt and family breakdown" as among the causes of crime.[5]

What are we to make of this? Are criminality and social disadvantage related? If so, what is the nature of that relationship? And what should be the appropriate criminal justice response?

Offender profiling: a flawed logic?

Let us start with some of the known facts about those convicted offenders who end up in prison. A Social Exclusion Unit report published in 2002[6] examined some key characteristics of prisoners. It found all the markers of a profoundly vulnerable and needy layer in British society. Compared with the general population, the report found that prisoners were far more likely to have been taken into care as children; to have truanted or been excluded from school; to have experienced long periods of unemployment; to have been homeless; or to have been in receipt of benefits. They were more likely to have left school with no

4 Johnson, B "The Poor are Being Robbed in Labour's Class War" in *The Daily Telegraph* (8 December 2005).
5 http://www.socialexclusion.gov.uk/page.asp?id=3 (consulted on 4 January 2006).
6 Social Exclusion Unit *Reducing Reoffending by Ex-prisoners* (ODPM, 2002) (www.socialexclusionunit.gov.uk/page.asp?id=263).

qualifications and their literacy and numeracy skills were far lower than those of the general population. They were also more likely to be users of illegal drugs and to have suffered from a range of mental health problems.

Similar patterns emerge when a broader range of convicted offenders is examined. A Home Office white paper published in February 2001 – *Criminal Justice: The Way Ahead*[7] – included an estimate of the size of what it termed the "active offender population", those individuals likely to pick up a number of convictions over a relatively short period of time. The white paper estimated that there "are about a million active offenders in the general population at any one time". Of these, some 100,000 "persistent offenders" are "responsible for a disproportionate amount of crime". They also share a common profile:

Half are under 21 and nearly three-quarters started offending between 13 and 15. Nearly two-thirds are hard drug users. More than a third were in care as children. Half have no qualifications at all and nearly half have been excluded from school. Three-quarters have no work and little or no legal income.

The apparently strong correlation of personal, social and economic factors with criminality has proved remarkably influential in government circles. "You don't have to be an expert on crime to know its causes are woven into the very fabric of our society," the Prime Minister observed at the launch of the 2001 white paper. Among the causes he listed were family breakdown, unemployment, poor education, drugs and teenage pregnancies.[8] More than three years later the Home Office strategic plan for 2004-08 struck a similar note. "There are a number of well-known risk factors that correlate with offending," it claimed. "They include low income, low educational attainment and poor parenting, among others."[9]

The result has been an array of policies and interventions targeted at that layer of society whence so many criminals are deemed to spring. So we have initiatives like Sure Start, the New Deal for Communities, the welfare to work strategy and neighbourhood renewal, all justified as much for their impact on crime as for their potency in tackling social exclusion. They are, the Prime Minister explained in the above mentioned speech, "our crime-fighting strategy for tackling the 97% of crime that never gets to the courts. For

7 *Criminal Justice: The Way Ahead* (Home Office, 2001) (www.archive.official-documents.co.uk/document/cm50/5074/5074.htm).
8 Blair, T, speech at the Peel Institute (28 February 2001) (www.number-10.gov.uk/output/Page1577.asp).
9 *Confident Communities in a Secure Britain: The Home Office Strategic Plan 2004-08* (Home Office, 2004) (www.homeoffice.gov.uk/documents/strategicplan.pdf).

heading off crime before it happens. For identifying those people sliding into a life of crime, and giving them an alternative."

For the remaining 3% of crime that apparently does get to court, the government places a big emphasis on the role of the criminal justice system in reforming and rehabilitating offenders, addressing those factors that may have contributed to an individual's offending.

So the Home Secretary told a Prison Reform Trust meeting last September that prisons should be "institutions that ensure offenders become working and productive members of society upon release", rather than "universities of crime".[10] The former chief executive of the National Offender Management Service, Martin Narey, was even more up-front in a foreword he wrote for a recently published book on prison. Imprisonment, he wrote, "can be beneficial in the right circumstances. For a young man leading an utterly chaotic life, deeply addicted to drugs, unemployed and unemployable as well as being homeless, prison can provide a vital respite and a chance to start again."[11]

What should we make of this? On the face of it, the government's logic appears impeccable. If most crime is committed by the socially excluded, then it makes sense to place the tackling of social exclusion high on the priority list of the criminal justice system. If most criminals are going to wash up in the criminal justice system at some point, it would be a criminal waste of public money, as well as socially unjust, simply to seek to punish them.

Impeccable though this logic may appear, it is deeply flawed.

Varieties of crime and criminality

"Crime" covers a wide range of behaviours, from the serious and profoundly harmful (sexual assaults or mass fraud) to the petty and minor (filching office stationery or jaywalking). Some crimes, such as murder, are very rare; crimes such as theft, interpersonal violence or health and safety breaches are far more common. In the face of such multiplicity and complexity, to assume clear causal links between social disadvantage and crime in toto makes little sense.

10 Clarke, C "Where Next for Penal Policy?", speech to the Prison Reform Trust (September 2005).
11 Narey, M "Foreword" in Emsley, C (ed) *The Persistent Prison: Problems, Images & Alternatives* (Francis Boutle Publishers, 2005).

A drug-dependent pauper might burgle or thieve to fund her habit, and in this case it makes sense to speak of her disadvantage as being related to her offending. Disadvantage will less easily explain the respectable local bank manager embezzling her savers' accounts, never mind the massive frauds associated with Enron or Robert Maxwell.

Stockbrokers may not generally mug fellow passengers for their mobile phones on the commute back to Berkshire following a hard day's work in the office. Yet they may still routinely fleece their clients or indulge in insider dealing. Some of these white-collar crooks may feel badly off in comparison with their superannuated bosses. They may feel that in the dog-eat-dog world of the City, their £80,000 a year before bonuses is hardly a reflection of their manifold talents and abilities. But they are unlikely to feature as the subject of a Social Exclusion Unit report.

Many millions of apparently law-abiding people will admit to paying cash-in-hand to avoid tax, padding insurance claims or keeping money when given too much change. Some may have bent the rules to get out of a tight financial spot. More often these are merely the scams of the comfortably-off middle classes.

This means that crime and criminality are far more widespread and common than is popularly thought. A Home Office study published in 2000 estimated that more than 60 million offences were committed in the year 1999/2000, some five to six times as many offences as were reported by the official statistics.[12] A strategy unit report by the Prime Minister's former "blue skies thinker", Lord Birt, estimated that at least 130 million serious offences may have been committed in a single year. A more recent Home Office study estimated that nearly 4 million people aged 10 to 65 in England and Wales were "active" offenders, and nearly 1 million were "serious" offenders.[13] Both Home Office studies based their calculations on a fairly narrow range of offences, and neither covered Scotland or Northern Ireland, so the true figure for crime and criminality in the UK must certainly be higher.

This introduces important caveats into any attempt to develop policy based on a putative link between crime, criminality and disadvantage. If crime is common and everyday, it seems unlikely that criminal justice interventions will have a determinative influence on its levels and fluctuations. If a significant proportion of the population, from all social

12 Brand, S and Price, R *The Economic & Social Costs of Crime*, Home Office research study 217 (Home Office, 2000).
13 Budd, T, Sharp, C and Mayhew, P *Offending in England & Wales: First Results From the Crime & Justice Survey*, Home Office research study 275 (Home Office 2005) (www.homeoffice.gov.uk/rds/pdfs05/hors275.pdf).

positions, is actively engaged in some form of criminality, the assumption that criminal behaviour is largely the preserve of a couple of hundred thousand largely poor people seems unlikely to be valid.

It should not surprise us that it is mostly the poor and disadvantaged criminals who end up in the coils of the criminal justice system. For the function of criminal justice has always been to regulate largely the activities of the poor and marginalised. But it would be an elementary mistake to make bold assertions about the nature of crime and criminality, its causes and solutions, by fixating on those individuals who end up in our police cells, courtrooms and prisons.

At best, then, we can speak of the linkages between disadvantage and certain forms of crime and criminality. And we should not assume that such crime is necessarily the most widespread, nor the most harmful. Indeed, an investigation into the links between prosperity, prosperous individuals and crime would probably spark some interesting and thought-provoking conclusions regarding both incidence and harmfulness. The pensions and mortgage mis-selling scandals of recent years spring to mind.

Crime and disadvantage

To understand better the links between some types of crime, criminality and disadvantage, let us start by comparing UK rates for certain crime types with those of other European countries. According to the International Crime Victimisation Survey, the closest thing there is to a usable measure of certain crimes across countries and continents, in 1999 England, Wales and Scotland had some of the highest rates for some crimes. Taking an aggregate measure of all the crime types measured by the survey, England and Wales' 55 incidents per 100 inhabitants meant that it topped the list for rates of victimisation in a range of crimes, including burglary, car theft, and sexual and physical assault. Scotland was fifth, with 41 incidents. Denmark and France registered lower rates (35 and 34 respectively), as did Finland (29).

No single pattern emerges from a comparison of criminal justice interventions and victimisation rates. Portugal has a far higher proportion of police to civilians than does England, Wales and Scotland, and a much lower victimisation rate. Those who consider this a good argument in favour of more police might want to look at Denmark and Finland, however. Both countries have lower victimisation rates, fewer police and much lower rates of imprisonment. Scotland and Poland have comparable victimisation rates, but divergent policing and imprisonment rates. And this suggests that there is no clear

relationship between levels of crime and victimisation, and criminal justice policies.

Looking more closely at particular crime categories, the International Crime Victimisation Survey suggests that the UK jurisdictions had much higher rates of assaults and threats in 1999 than many other European countries. The incidence rate for England, Wales and Scotland was between 10 and 12 incidents per 100 inhabitants – significantly greater than rates for countries as diverse as Sweden, France, Belgium and Denmark. These latter countries typically measured four to seven incidents per 100 inhabitants.

A common factor among most of those countries with higher violence rates is high rates of poverty and income inequality. The internationally recognised Luxembourg Income Study calculated that 21% of the UK population in 1999 were living in households whose income was less than 60% of median earnings. In contrast, those countries with lower rates of violence tend to have a lower proportion of households living in poverty. Some 13% of German households lived on less than 60% of median earnings in 2000. In Sweden, the figure was 12%, in Belgium 16% and in Finland 12%.

This correlation is suggestive. But that is all. It is based on snapshot data over a couple of years, so tells us nothing of trends. Comparing crime rates across different countries and jurisdictions is also notoriously difficult. To get a better sense of possible correlations between rates of certain crimes and levels of disadvantage, we need to look at trend data.

Links to prison and poverty

The British Crime Survey has measured victimisation rates for certain crimes in England and Wales since 1981. It recorded a steady increase in the crimes it measures from around 11 million in 1981 to just under 20 million in 1995. Since then the trend has been a downward one. In 1997 the figure stood at nearly 17 million. The most recent survey, covering the 2004/05 period, estimated the number of crimes at just under 11 million – back to where it stood in 1981.

What might be behind these significant fluctuations in BCS crime levels? For those who support the "prison works" maxim, they make for compelling reading. Between 1993 and 2003 the prison population rose nearly 30,000, from some 44,500 to around 73,600. This coincided with a fall in British Crime Survey-measured crime, from 18.5 million offences in 1993 to 11.7 million by 2003/04. Put another way, BCS crime fell by around a third in England and Wales at the same time as the prison population increased by two-thirds.

I have set out elsewhere reasons for being sceptical about this line of argument.[14] The more interesting question is whether these fluctuating crime and victimisation rates are linked to changing rates of poverty and disadvantage.

One pattern that does emerge from the British Crime Survey is the greater vulnerability to crime and victimisation faced by certain groups. After young men the next highest risk group is the unemployed. Those living in private rented or social housing are also among those facing an elevated risk. Factors that increase the risk of burglary and theft include unemployment, living in private rented accommodation and living in a household with an average income of less than £5,000 pa. By comparison, the wealthy face a below-average risk of victimisation.

Joan Smith's point, made some years ago, that it is often dangerous and sometimes lethal simply to be a woman in British society, is also borne out by the British Crime Survey. A detailed analysis of domestic violence data reveals that women are far more likely to be victims than men. Women living in poor households are more likely to be victimised by domestic violence than any other group.

If the poor are more likely to be victims of certain types of crime than the rich, it would follow that a society in which more people are getting poor will also be one in which certain types of crime are on the increase. This is exactly what we find when we compare British Crime Survey crime rates with poverty rates.

According to the Luxembourg Income Survey, in 1979 around 17% of the UK population lived in households with an income less than 60% of median earnings. This rose to around 22% in 1995. The rate of increase for children was even steeper, with the comparable figures being 15% in 1979 and 30% by 1995. British Crime Survey crime, in other words, increased dramatically during the same period that rates of relative poverty escalated. Rates of poverty have largely stabilised since the mid-1990s. And since the mid-1990s levels of BCS crime have fallen.

Nowhere does the impact of poverty on crime and victimisation become clearer than in the case of murder. Between January 1981 and December 2000 approximately 13,140 people were murdered in Britain. A study published by the Crime & Society Foundation in 2005 undertook a detailed analysis of who was murdered, when, where and how they

14 Garside, R "Wrong Question; Wrong Answer" in *Prison Service Journal* issue 161 (2005) (www.crimeandsociety.org.uk/articles/Wrongq.html).

were murdered, and why they were murdered.[15] Through such an analysis the underlying causes of murder, rather than their superficial ones, become clearer.

Over the 20 years covered by the analysis, just under two murders were committed per day. Men were more likely to be murdered than women, and young men were the most likely victims of all. Significantly, the rate of murder increased as the 1980s rolled into the 1990s.

This increased rate of murder has not been distributed evenly across the population. Since 1981 the risk of being murdered increased for men, but decreased for women. But the strongest determinant of an individual's likelihood of being murdered was poverty. The risk of being murdered decreased for the rich, but increased for the poor. Indeed, the rise in murder in Britain was concentrated almost exclusively in men of working age living in the poorest parts of the country who grew up in the era of mass unemployment that was the 1980s.

Violent death is comparatively rare in the UK. A wider range of violence and social harms is far more common. And these depredations are themselves but part of a wider network of socio-structural forces that blight the lives of those people living in the poorest areas of all the developed countries. So it is that the average life expectancy of the poorest is five to 15 years shorter than that of the richest. "This huge loss of life," Richard Wilkinson writes in his recent book, *The Impact of Inequality*, "reflecting the very different social and economic circumstances in which people live, stands as a stark abuse of human rights ... [and calls] into question the humanity, morality and values of modern societies."[16]

What role criminal justice?

Our examination of the links between criminality and disadvantage has suggested that some poor and disadvantaged people do commit crime because they are poor and disadvantaged. Some of them end up in our prisons and courts as a result.

This does not mean that most crime is committed by the poor and disadvantaged. Nor does it mean that disadvantage is the cause of most crime. But some of the grossest victimisations are concentrated among the poorer members of society, and it is reasonable to conclude that the poor will often be perpetrators as well as victims.

15 Dorling, D "Prime Suspect: Murder in Britain" in Hillyard, P, Pantazis, C, Tombs, S, Gordon, D and Dorling, D *Criminal Obsessions: Why Harm Matters More than Crime* (Crime & Society Foundation, 2005) (www.crimeandsociety.org.uk/harm.html).
16 Wilkinson, R *The Impact of Inequality: How to Make Sick Societies Healthier* (Routledge, 2005).

Two broad policy trajectories flow from this. The first would seek to use criminal justice mechanisms to achieve social justice: target offenders, address their offending behaviour, incapacitate the most persistent, send the rest on their way. This "offender-focused" approach very much reflects government thinking, but it systematically ignores the broader social and economic context within which crime, criminality and victimisation unfold. Pursued rigorously it would probably result in far more chief executives than burglars populating our prison cells. That the opposite is the case tells us much about the systematic biases of our criminal processes, and the degree to which criminal justice is inimical to social justice.

The second would start by emphasising the fundamental difference between *criminal justice* and social justice; that the former is not a means of delivering the latter. This "victim-focused" approach would actively eschew criminal justice mechanisms in favour of a broad-based drive to tackle poverty and inequality at a systemic level and in a systematic way. For if the cause of vulnerability to certain crimes and a wider array of social harms is poverty and inequality, it is here that the policy focus should be.

Such an approach would not mean the dissolution of the criminal justice system, but it would imply its radical scaling back, and an infusion into it of genuinely humane principles. It would also imply the scaling up of a range of intermediate institutions, such as mediation services, to help citizens to resolve problems informally and quickly. But fundamentally it would mean acknowledging that social justice can only truly be achieved if society's social and economic arrangements are themselves organised justly.

Chapter 5

Communities and the criminal justice system

Rob Allen, Director of the International Centre for Prison Studies

Communities and the criminal justice system

Rob Allen

Communities, crime and offenders

Variations in crime

It is well known that incidents of crime and antisocial behaviour are not equally distributed across different parts of the country or types of neighbourhood. A recent study found that people living in the poorest 10% of electoral wards were almost six times more likely to be murdered than those living in the least poor 10%.[17] The countryside is safer than cities, and different kinds of neighbourhoods associated with higher risks of particular crimes.

Living in an area classified under the ACORN neighbourhood classification system as "hard-pressed" (predominantly low-income families, residents in council areas, people living in high-rise buildings) or "urban prosperity" (prosperous professionals, young urban professionals and students living in town and city areas) gives you a higher risk of criminal damage to your home than living elsewhere.[18] Burglary rates in the 88 most deprived areas are higher than average, and five times as many residents of council estates and low-income areas perceive a high level of disorder than those in affluent suburbs and rural areas.

Concentrations of imprisonment

Less widely discussed is the fact that the location not only of criminal events but also of the dwelling places of convicted offenders tends to be highly concentrated, usually in the most deprived areas. In the USA, research has found that the vast majority of incarcerated people come from and return to a relatively small set of inner-city neighbourhoods.[19]

The removal and return of so many people from and to a single neighbourhood has a major impact on the social fabric. Increasing numbers of prisoners returning to a small number of the most disadvantaged communities reduces stability, increases public safety risks and places extra strain on public services. The fact that prisoners are generally drawn from among the most socially excluded, and are concentrated in the neediest neighbourhoods, has a major impact on the permanence of housing occupancy, employment rates

17 Dorling, D "Prime Suspect: Murder in Britain" in Hillyard, P, Pantazis, C, Tombs, S, Gordon, D and Dorling, D *Criminal Obsessions: Why Harm Matters More than Crime* (Crime & Society Foundation, 2005) (www.crimeandsociety.org.uk/harm.html).
18 Ibid.
19 See, for example, the Open Society Institute's Justice Reinvestment programme.

and the strength of networks and cohesion, which are essential to safety and quality of life in those communities. Collecting a range of social data at a very local level has opened up a debate in the USA about the implications both for criminal justice policy making and for the best way of spending resources in the poorest areas.

Two major initiatives are under way there to explore the potential of this community impact approach. The Urban Institute has set up the Re-entry Mapping Network, a partnership to create community change through the mapping and analysis of neighbourhood-level data related to prisoner re-entry. RMN partners collect and analyse information about incarceration, re-entry and community well-being and develop policy options based on the findings.

In a similar vein, the Open Society Institute has developed a number of programmes under the banner of Justice Reinvestment. This aims to transfer some of the money tied up at state level in locking up prisoners miles from home, to locally administered rehabilitative and treatment measures that can help prisoner re-entry or even act as an alternative to imprisonment. The International Centre for Prison Studies, with funding from the Northern Rock Foundation, is exploring the relevance of these ideas in the UK.

With the scale of incarceration in the USA almost six times higher, the need for action on prisoner re-entry and the scope for justice reinvestment appear substantially greater than in the UK. Across the Atlantic, the individual, case-by-case decisions made by police, prosecutors, courts, prison and probation services collectively commit substantial public funds, ostensibly for the well-being of particular neighbourhoods. In some, mapping reveals "million-dollar blocks", in which more than a million dollars are spent to incarcerate and return residents from that small area in a single year. [20]

Yet despite the much lower absolute numbers of offenders under criminal justice control in the UK, work undertaken to explore the relevance of these approaches here is beginning to show both similar concentrations and the potential for more constructive and cost-effective measures, based on a much greater responsibility being exercised at the local level.

Prison and social exclusion

Evidence about the concentration of prisoners comes from both England and Scotland.

20 Gonnerman, J "Million-Dollar Blocks: The Neighborhood Costs of America's Prison Boom" in *The Village Voice* (16 November 2004).

In his chapter, William Higham of the Prison Reform Trust outlines the findings of research undertaken by the Scottish Prison Service in 2003, which showed that a huge proportion of Scotland's prisoners came from the poorest 12% of council wards, and that the rate of imprisonment for men aged 23 living in the country's 27 most deprived wards was an astonishing one in nine.

A similar pattern is emerging from a study of prisoners and probationers in an English city. Collecting the data is proving difficult – a not insignificant finding in itself, for a system that is seeking to provide a better level of end-to-end offender management. Sentenced prisoners about whom data is available represent less than one prisoner per thousand adults from the city – yet in one ward they represent more than four per thousand.

Drilling further down, to the level of census output area,[21] prisoners can represent more than 20 per thousand. In addition, some census output areas have more than 50 residents per thousand adults on probation, although the average for the city as a whole is less than 10. These high criminal justice neighbourhoods overlap substantially with indices of deprivation such as numbers on housing benefit or in receipt of free school meals or council tax benefits.

As in the USA, the criminal justice system is spending relatively large sums on residents from some of the poorest neighbourhoods – for example, committing almost £2 million pounds in imprisonment costs in one ward and over £1 million in four others. At census output area level, this represents as much as a quarter of a million – public money that in principle could be available for a variety of more socially productive uses of greater value to local people.

Looking at how resources are deployed in a given geographical location enables a cumulative assessment to be made of the social impact that is unanticipated by any of the individual decisions. And when considered as a pool of resources, more strategic options to affect positive changes in the neighborhood as a whole may become apparent.

Implications for policy

The social impact of prison

What, then, are the implications of an analysis of criminal justice at the community level?

21 Census output areas are the most local areas used in the 2001 census, each with around 125 households.

The first is to raise fundamental questions about the social impact of criminal punishment, in particular the benefits and costs of increasing the number of offenders sent to prison each year. The Social Exclusion Unit's authoritative inquiry in 2002 concluded that prison sentences were not succeeding in turning the majority of offenders away from crime, and that "there is a considerable risk that a prison sentence might actually make the factors associated with reoffending worse and therefore prove counterproductive as a contribution to crime reduction and public safety".[22]

The collateral damage of imprisonment has been well rehearsed – a third of prisoners lose their house while in prison, two-thirds lose their job, over a fifth face increased financial problems and over two-fifths lose contact with their family. There are also real dangers of mental and physical health deteriorating further, of life and thinking skills being eroded, and of prisoners being introduced to drugs. Imprisonment of a parent also diminishes children's life chances, increases risk of divorce, reduces scarce family resources and discourages civic participation. It is therefore disquieting that, since the Social Exclusion Unit's report was published, the prison population has risen by more than 5,000 to more than 76,000, and the ceiling of 80,000 proposed in Lord Carter's report has apparently been lifted by the Home Secretary.[23]

Most of those sent to prison will have experienced a lifetime of social problems, which have not been properly addressed. Prisoners are 13 times as likely to have been in care as a child, 13 times as likely to be unemployed and 10 times as likely to have been a regular truant. Eighty per cent have writing skills, 65% numeracy skills and 50% reading skills at or below the level of an 11-year-old child. Sixty to 70 per cent of prisoners were using drugs before imprisonment. Over 70% suffer from at least two mental disorders. And 20% of male and 37% of female sentenced prisoners have attempted suicide in the past.

Resourcing community-based projects that can help prisoners address those needs is likely to provide better long-term safety for local communities than recycling offenders through a series of short-term prison sentences. As the Home Secretary, Charles Clarke, has said: "Their poor education and health does not only damage them. It makes them more likely to reoffend and so a greater danger to society than they need to be."[24]

22 Social Exclusion Unit *Reducing Reoffending* by Ex-prisoners (ODPM, 2002).
23 Carter, P *Reducing Crime, Changing Lives* (Home Office, 2004).
24 Speech to Prison Reform Trust (September 2005).

The problem is that local authorities have little incentive to spend money on the kind of projects and programmes that can break into that cycle. For example, magistrates in Leeds incarcerate 1,200 adults and 150 young people each year, for an average of three months. The cost of the custodial places to the prison service and Youth Justice Board is more than £10 million, but to local agencies detention will remain a free good. Because it is paid for nationally, there is limited local interest in reducing the numbers, as any savings that accrue cannot be spent on other measures in the city.

The proposal to fund prisons and probation through a single budget in the National Offender Management Service will provide an opportunity for reductions in prison numbers to finance enhanced alternatives in a virtuous cycle. Equally, a single funding pot provides a ready source for funding more prison places, should sentencing guidelines here fail to produce the desired fall in numbers locked up.

But a purchaser-provider split operated in 10 government regions will do little to attract resources from mainstream public sources into rehabilitative or restorative activities at local level. Indeed, commissioning and contracting programmes for offenders could mean that universal services such as housing and education turn their back on offenders, unless they are given specific contracts to work with them. Local authority interest in, and responsibility for, offenders could be further diminished.

It is argued below that a more local structural organisation and management of offender services could produce better incentives. This would meet the recommendation of a recent inquiry into alternatives to prison, which argued for a "substantial transfer of funds from central to local authorities ... a move of this kind would fit well with our strong view that local communities should have a much greater involvement with the criminal justice system".[25] What this suggests is the need for an approach that requires offenders to pay back to their local communities for their wrongdoing, while offering opportunities to solve their problems through a much enhanced local infrastructure of community-based services.

A place-based approach

The second implication of the community impact approach is to develop policy and practice on the basis of places as well as cases. Tackling offending in the UK and North America has taken on a highly individualised philosophy, based on psychological

25 Lord Coulsfield *Crime, Courts & Confidence: Report of an Independent Inquiry into Alternatives to Prison* (Esmée Fairbairn Foundation, 2004).

assessment and the provision of programmes aimed at correcting the cognitive, behavioural or social skills of the individual offender.

The concentration of offenders in neighbourhoods suggests the need for an approach based as much on tackling the drivers of crime and reoffending in those areas as in correcting the allegedly faulty psychological profiles of individual residents. Developing an imaginative range of constructive opportunities for all young people in these areas to lead meaningful lives, combined with investment in social capital, arguably deserves a higher priority.

Requiring offenders to contribute something positive and visible to their local neighbourhood as part of their sentence, whether in prison or in the community, could also be explored more fully, with opportunities given to ordinary community members to set priorities for the kind of unpaid work undertaken by offenders. A project is under way to test different ways of giving communities a say, in four very different communities in the Thames Valley – Slough, Milton Keynes, High Wycombe and Bicester.[26] This may involve setting up new panels of local people to agree priority tasks for offenders to undertake, or it may be a question of adapting the agendas of existing bodies – community forums, tenants associations or consultative groups.

An important objective is to find a representative and sustainable way of tapping into the concerns of local people. It is possible that the project may go further and, like the youth offender panels that operate in youth justice, actually propose specific programmes for individual offenders. This is not, however, about taking the place of the court. It is about strengthening the delivery of penalties, boosting confidence in them and giving people a stake in a positive outcome.

Complementing such community involvement, there is a case for the organisation of offender services on a patch basis, with teams of probation and social workers actually based in the neighbourhoods they serve. In the USA as well as England and Wales, most probation departments are not organised around the geographical concentrations of their populations.

Mapping in New Haven, Connecticut, found 142 medium-risk probationers in one neighbourhood known as The Hill, amounting to one and a half probation caseloads.[27]

26 Rethinking Crime & Punishment: Implementing the Findings, initiative launched in 2005 by Esmée Fairbairn Foundation.
27 Justice Mapping Center (www. Justicemapping.org).

These 142 probationers fall into the caseloads of eight different officers, whereas they could theoretically be assigned to two. Moreover, if the probation officers worked in the precinct instead of the downtown office, they would have a substantially greater understanding of the neighbourhood in which their probationers resided. Preliminary work in England has uncovered a similar pattern.

There is a case too for a more devolved approach to judicial decision making, which seeks to dispense justice in a way that is relevant to the particular priorities of local communities and seeks to produce problem-solving justice. The community justice centres being piloted in North Liverpool and Salford draw heavily from exemplars in New York set up by the Centre for Court Innovation, particularly Redhook and the Midtown Community court. What these have in common is a jurisdiction covering a small geographical area, strong forums for consultation with local people and a high-profile judge who makes it her concern to know what is happening in the local area.

There is also an attempt to use sentencing to treat the problems underlying crime, and make use of approaches such as restorative justice and mediation, which can help produce long-term solutions to disputes and conflicts. Similar efforts to institutionalise local justice have been made in France, through maisons de justice et du droit,[28] and in the Netherlands (justitie in de buurt). More radical community justice initiatives have been established in South Africa, where peace committees provide an alternative route to the criminal justice process.[29]

Towards an inter-agency approach

The final implication is the need for much better collaboration between agencies at the local level. American studies have shown substantial overlap between neighbourhoods with high rates of incarcerated residents and those with high numbers of residents receiving temporary assistance for needy families. Large sums are being invested in the same place by different government agencies without co-ordination, which at best ignores opportunities to blend resources in more effective service combinations, and at worst may result in agencies working against one another.

One way of structuring collaboration is through locally based multi-agency teams, of the kind introduced into youth justice for under-18s in 2000. The 155 youth offending teams comprise representatives from social services, education, health, police and probation,

28 Crawford, A "Justice de Proximite" in *Social & Legal Studies* (2000).
29 British, J "Restorative Justice and the Regulatory State in South African Townships" in *Criminology* 42 (3) (2002).

providing a bridge between criminal justice, health and local government services. According to the Audit Commission they represent "a considerable improvement on the previous arrangements".[30]

There seems good reason to replicate this model for young adult and adult offenders. As a start, local authorities could be given a properly funded leadership role to co-ordinate the work of local partners in providing support to offenders returning to their communities; but this could develop into a responsibility for ensuring the delivery of a comprehensive service to preventing reoffending by adults through an adult offending team. Adult offending teams would deliver supervision of offenders in the community, focusing on enabling ex-offenders to address the underlying causes of their offending and on restorative justice.

The adult offending team would have a key role in directly providing or arranging for the provision of education, training benefits and housing, and strong links with primary care trusts, learning and skills councils and job centres. The team would be expected to establish close working relationships with the voluntary and community sector.

This model for local partnerships could be even more successful if integrated into the system of local area agreements being piloted in 66 areas of the country. These new kinds of financial arrangement between central government departments and local organisations enable local authorities, police, health providers and community groups to decide on the most pressing social problems in their particular area, and pool their resources to fund the preventive and remedial action they consider most effective in solving them.

Although one of the four aims of local area agreements is to create safer and stronger communities, strangely absent from their scope is the money spent on the punishment and rehabilitation of criminal offenders. At present all of the £3.5 billion spent each year on prison and probation services is dispensed nationally. Local people have little or no say in how the money is spent.

Working against localism

Prison and probation services are in the midst of a substantial reform designed to reduce reoffending by convicted offenders.[31] Yet the direction of the reform is not to align and

30 Audit Commission (2004); Youth Justice Board (2004).
31 See, for example, the Home Office report *Restructuring Probation to Reduce Reoffending* (2005).

integrate these services with the range of local activity so crucial to the successful reintegration and rehabilitation of offenders. Instead, the government is creating a new National Offender Management Service, which will be organised at the level of nine large regions and the whole of Wales.

The proposed restructuring of the probation service will reduce what little local input is now provided by the 42 local probation boards. Their successor trusts will comprise individuals best able to win business from the Home Office, with no necessary local connections. Services for offenders will be provided by a range of suppliers, with no artificial barriers to new players entering the market and "a level playing field for competition".

The reduction of localism and the introduction of competition are especially odd given the recognition by the Home Secretary of the need to form strong partnerships with the local services that are essential to successful rehabilitation. What this suggests is that, rather than creating a new and free-floating market in offender-based services organised regionally, the government should seek to embed probation work in the existing network of local public services. Locating such work in local authorities would both provide appropriate governance and accountability, and link statutory responsibilities for supervising offenders on community sentences with the provision of housing, social care and education that lies at the heart of effective resettlement.

Somewhat paradoxically, the Home Secretary has seen the need for prisons to "become far more engaged with their local communities, and better at building relationships with a wide variety of other organisations", attaching particular importance "to very strong local prison leadership and ... prisons becoming a vital part of the civic fabric of every locality".[32]

While population pressures make community prisons unlikely in the short term, a local approach is eminently achievable with probation. The reform of the service and the development of local area agreements represent an opportunity for a radical reorganisation at local level. They would follow a lead from Scotland, where community supervision of offenders is undertaken within the criminal justice social work departments of local authorities.

32 Speech to Prison Reform Trust (September 2005).

Conclusion

Metropolitan Police Chief Sir Ian Blair has identified an increasing sense that antisocial behaviour, as the opposite face of a civil society, is threatening our ability to lead free lives.[33] He blamed a decline in community cohesion, the disappearance of informal social control and the closure of psychiatric institutions: "This has left many people looking – in the absence of anyone else – to the police service for answers to the degradation of communal life – for answers to the neighbours from hell, the smashed bus stop, the lift shaft littered with needles and condoms, the open drugs market, the angry, the aggressive and the obviously disturbed."

Clearly, responding effectively to such problems is not solely or even mainly a matter for police or for criminal justice. Arrangements are needed in local areas that deal quickly, effectively and constructively with these problems. Prison is an important social institution, which in a democracy valuing freedom should be used sparingly – for dealing with dangerous offenders, grave crimes and persistent criminals who repeatedly fail to comply with alternative sanctions.

The remainder of crime and antisocial behaviour needs to be dealt with at a local level, in a way that properly addresses the needs of both victims and offenders. Putting appropriate levels of resources into creative ways of doing so must be a priority if we are to produce a system providing social as well as criminal justice.

33 Dimbleby lecture (16 November 2005).

Chapter 6

Social inclusion – the missing ingredient in criminal justice reform

Sir Charles Pollard, Former Chief Constable of Thames Valley Police and Member of the Youth Justice Board for England & Wales

Social inclusion – the missing ingredient in criminal justice reform
Sir Charles Pollard

Throughout my long career in policing and criminal justice in England, one thing that has never ceased to amaze me is how we tolerate such shocking failures.

By this I mean the appalling reoffending rates emanating from most things we try to do to rehabilitate those who have committed crime. In terms of their victims, I am referring to the fact that victims are still treated as little more than tools of and evidence-givers for the courts, with no attempt to involve them as participants in their own right.

Finally, it is amazing that despite all the platitudes about building social capital in local communities, so little has been done to engage citizens in the system. They remain largely excluded, and so local people still lack the resilience and confidence to tackle problems of antisocial disorder and minor crime themselves.

These are not just failures of the criminal justice system. They are also failures of something much wider: the failure to develop and deliver coherent policies for tackling crime and disorder based not on the adversarial, exclusionary principles of the past, but on the principles of the flagship government policy on tackling social exclusion. What stands out is that while government has developed imaginative, successful policies on social inclusion in many areas, this is patently absent in the case of criminal justice.

Crime and social exclusion

Alongside deprivation, poor education, chaotic upbringing and the rest, crime is one of the key drivers of social exclusion. Crime and social exclusion are inextricably linked – both offenders and frequently their victims tend to live in the most deprived areas, where exclusion is rife. In fact, it has been estimated that over half of all recorded property crimes and over a third of all property crime victims are likely to be found in just a fifth of the communities in England and Wales. Crime is also a consequence as well as a cause of social exclusion, with strong links between past offending, subsequent unemployment, and reoffending.[34]

Put another way, the relationship between crime and social exclusion is a downward spiral, and any initiative that aims to tackle social exclusion needs to have tackling crime

34 Social Exclusion Unit *Breaking the Cycle: Taking Stock of Progress & Priorities for the Future* (ODPM, 2004).

very close to, if not at, the top of its list of priorities. But recent approaches to urban deprivation have been largely hindered, rather than aided, by existing penal policy, with its emphasis on stigmatisation and state sanction. As the Institute for Public Policy Research has noted, very little thought is given to whether alternative responses such as restorative justice could be more effective at addressing offending behaviour, while sidestepping the damaging impact of a criminal conviction.[35]

Moreover, there is a fundamental contradiction between the promotion of social inclusion and the expansion of traditional criminal justice through the creation of ever greater numbers of offences and penalties. Amazingly, over a third of men in Britain have a conviction for a "standard list" offence by the age of 40;[36] and while employment is the most important factor in avoiding social exclusion, having a criminal conviction significantly reduces one's chances of getting work.[37]

What is the evidence?

Figures from the government's Social Exclusion Unit indicate that 58% of those leaving prison are reconvicted within two years. For younger prisoners under 21, imprisoned for property offences, the reconviction rate is over 80%, rising where they have served a short sentence of less than 12 months to a staggering 92%.[38]

Meanwhile, data from the latest British Crime Survey suggests that only 34% of people feel that the criminal justice system meets the needs of victims of crime. In other words, two-thirds feel it does not.[39] So victims of crime and their local communities – the very lifeblood of our whole response to crime, because the system totally depends on their support and co-operation to succeed – continue to feel disenfranchised and alienated. This is an appalling indictment of our approach to criminal justice.

Moreover, every time we try to reform the criminal justice system to make it simpler or better – and we do so by yet another initiative based on adversarial and exclusionary

35 Sparks, C and Spencer, S *Them & Us? The Public, Offenders & the Criminal Justice System* (Institute for Public Policy Research, 2002).
36 Ibid.
37 Department for Work & Pensions research suggests that any criminal record results in rejection for 17% of applications and, for many kinds of offences, probable rejection for around 50% of applicants. Quoted in Sparks & Spender, op cit.
38 Social Exclusion Unit *Reducing Reoffending by Ex-prisoners* (ODPM, 2002). But one should acknowledge that there have been some successes. For example, big progress has been made in preventing and tackling youth crime through the Youth Justice Board, local youth offending teams and their partner agencies – using inclusive processes such as restorative justice schemes, and youth offending panels where community volunteers (and ideally the victim) are involved.
39 Nicholas, S et al *Crime in England & Wales 2004/2005* (Home Office, 2005).

principles – it becomes even more bureaucratic, complicated and expensive. In fact, the criminal justice system has become a system with a life of its own, in which the process has taken over from the people. It seems to have become like the nine-headed hydra of Greek mythology – every time you chop one off, two more grow in its place!

A new way of working?

Now just suppose a new idea came along, a new way of doing things, quite radically different from those tried before, that greatly increased victim involvement and satisfaction while reducing reoffending and the fear of crime. And suppose that, when piloted, the new system worked very well. It did not create more complexity and bureaucracy; on the contrary it markedly reduced them because it reduced the number of cases going to court, and seemed to succeed precisely because it dealt with crime more simply and much more effectively in the community. Wouldn't that be wonderful?

And what if it also reduced social exclusion by the way it operated, taking all those involved in crime – whether as victims, offenders, or those from local communities – and engaging them in a constructive means to achieve these ends? Wouldn't that be a fantastic idea to adopt as soon as possible?

A pipe dream? No. That idea is already with us. Projects and schemes are up and running. It has been robustly tested with numerous evaluations – probably more than the rest of the criminal justice system put together – and the evidence is overwhelming in showing that it works. That idea is *restorative justice*.

Given the importance of promoting and developing social inclusion and improving the criminal justice system, one would have expected this innovation to be attracting the attention of the media, and grabbed by politicians, policy makers and criminal justice professionals, all competing with each other to exploit and implement this new development. But this is not case.

Of course, raising public awareness about restorative justice – colloquially known as RJ – is not easy. It is precisely because RJ is an inclusive process that it is so difficult to communicate simply. Most people are very familiar with exclusionary and adversarial processes – they see, hear and experience them every day with the media, parliament and the courts – but they struggle to understand the idea of tackling crime and conflict through face-to-face dialogue, personal accountability, respect and the direct engagement of the offender's conscience.

That RJ is not being taken up and championed by social reformers – despite its congruence with social inclusion – is also due, I believe, to another problem. Despite the excellent proven results of RJ, few people or institutions want to take up something that challenges them to do things so differently.

And RJ also challenges the vested interests of those professionals with process-driven cultures (in contrast to institutions that have clear outcome objectives), threatening their status and even their livelihoods. These vested interests are based on the bureaucracy of adversarial, exclusionary values. What is needed is a robust response from government and criminal justice leaders that neutralises these and replaces them with the sensible, fair principles of social inclusion. That has not happened.

What is restorative justice?

Much has been written by criminologists and practitioners trying to get a handle on what RJ is all about. But in fact RJ can best be described by reference to just two straightforward, underlying principles: the Nils Christie principle of "who owns the conflict" and the John Braithwaite "theory of reintegrative shaming". If one just keeps to these, it is easy to see how and why RJ works.

For the first, we need to go back to 1977 and the publication of eminent Norwegian criminologist Nils Christie's paper on "conflicts as property".[40] Christie argues that, as conflicts, crimes in most instances cause damage to other people and communities that is far more relevant than that against the state. If such conflicts are dealt with purely by professionals – the police, prosecutors, judges, social workers and the like – then in effect they are taken away from the very people best placed and most likely to be able to solve them, the people whose conflict it is. What happens instead is that the *professionals steal the conflict*.

The logical way to solve conflict, Christie says, is to bring the people whose conflict it is together and enable them to solve it themselves. In fact, he says, rather than viewing conflict as a bad thing, we should see it as a positive, healthy thing for a society because it provides potential for participation and activity by citizens. It is only through such means that one can create confident, active communities.

Of course, the state (through the professionals) should have a role, but that should merely

40 Christie, N "Conflicts as Property" in *British Journal of Criminology* vol 17, no 1 (January 1977).

be to provide the mechanism for people to take ownership of their own problems, and to provide a backstop (the courts) should this fail to protect the public, particularly in serious cases.

In 1977, quite apart from the theory itself being controversial in many quarters, no one had developed a sound mechanism for bringing people together in the way Christie proposed. And the dominant traditional thinking (which we now know to be totally wrong) was that victims would be vengeful and that bringing them directly into contact with offenders would be unjust.

More recently though, working with other nations, we have in the UK developed processes that do precisely this, bringing offenders and victims, with their respective families and friends, together face-to-face. And these methods work just as Nils Christie said they would.

The second underlying principle of RJ focuses on why such methods work, and takes us forward to 1989 and the work of another, this time Australian, criminologist, John Braithwaite.[41] Central to Braithwaite's theory of "reintegrative shaming" is the notion that most people thinking about crime and the causation of crime ask the wrong question. They always ask: "Why do people commit crime?" The real question to ask is: "Why do most people not commit crime?"

The reason, Braithwaite says, is the fear of being caught and being faced directly and personally with the harm they have caused, in the presence of people they love or respect; so the shame they would feel is so huge that they don't even commit crime in the first place, because they just could not put up with the shame they would feel.

The logic, then, is to apply this principle to those that do commit crime. Of course shame can be deployed to negative or positive effect. So-called stigmatising shame – caused, for example, by humiliating offenders in public as with the stocks of the last century – can be highly detrimental. This usually isolates and excludes offenders, making them even more angry and increasing their state of being in denial, so increasing the likelihood of their continued involvement in crime.

41 Braithwaite, J *Crime, Shame & Reintegration* (Cambridge University Press, 1989).

But reintegrative shaming – shaming within a context of respect, personal accountability and support – usually has the opposite effect, encouraging offenders to take responsibility for their actions and, through that, apologising and "paying back" to their victims, with the strong likelihood of also stopping or reducing reoffending.

Restorative conferences,[42] then, incorporate the principles of reintegrative shaming. They are run by neutral facilitators – trained to ensure the conflict is not "stolen" – using a "script" that takes participants through a structured series of discussions about what has happened, the harm done and to whom, and how to make amends. In a sense this is the magic of RJ: while it may seem a very bland way of doing things, in fact it generates a huge amount of emotional power and energy, leading to deep shame for the offender yet cathartic emotions for the victim, the offender and other participants. It is this alchemy that creates what Braithwaite has referred to as "superior motivation to actually do what is decided in criminal justice processes"[43] – that is, to make amends, to comply with the actions agreed and not to reoffend.

Does restorative conferencing work?

Let us consider for a moment the evidence. There have been at least 63 separate, independent evaluations of restorative justice in the five "common law" countries where most developments are taking place (New Zealand, Australia, Canada, USA and England)[44] – probably more than all the evaluations in the rest of our traditional criminal justice system in recent years.

In relation to victim satisfaction, the findings are overwhelmingly favourable. A minimum of 75% of victims – and, in the best-implemented schemes, 90-100% – report being satisfied with the process and outcome, often being able to move on in their lives and feeling much more confident about the future. With serious crime, post-traumatic stress disorder can often be reduced or eliminated.

In relation to reoffending the findings are also highly encouraging. No schemes have found an increase in reoffending, and reductions of between a third and half are not

42 Restorative conferencing, utilising both the Christie and Braithwaite principles, is the most powerful model of RJ although there are other models – for example, victim-offender mediation – that involve just the parties themselves, sometimes indirectly through shuttle diplomacy.
43 Braithwaite, J *Restorative Justice: Justice of the Future*, paper presented to international RJ conference, Winchester, England (March 2001).
44 Umbreit, M, University of Minnesota, lecture to Universal Forum on Conflict Resolution, Barcelona (June 2004). In fact since then the number of studies has increased to over 70.

unusual.[45] Of course the evaluations are of varying quality, but it is in the most rigorous studies that the results are the most powerful.

For example, in the Canberra-based (Australia) reintegrative shaming experiments, conducted as a randomised control trial, reoffending in violent crime among young offenders who were offered restorative conferencing dropped by 38% after one year, compared with the control group dealt with conventionally.[46]

Meanwhile the Indianapolis juvenile restorative justice experiment in the USA (another randomised control trial), evaluating restorative conferencing for first-time young offenders aged below 15, found that 41% of those dealt with conventionally had been rearrested within 12 months, compared with 31% of those involved in RJ conferences – a reduction of a quarter.

In the UK, Oxford University, funded by the Joseph Rowntree Foundation, undertook a rigorous evaluation of Thames Valley Police's restorative cautioning initiative, whereby final warnings are delivered with a restorative conference. Two-thirds of participants felt that the sessions had helped offenders understand the effects of their behaviour. Ultimately the study suggested that "restorative cautioning might be regarded as having halved the likelihood of re-sanctioning within one year".[47]

And the recent Home Office trials of RJ in Northumbria – again testing out restorative conferencing at final warning – have found a 60% reduction in reoffending for property crime within one year, compared with those going through a "normal" final warning.[48]

45 Examples include, from New Zealand, an evaluation of two pre-trial restorative justice diversion projects that compared 12-month reconviction rates for 200 adult offenders with matched samples of cases dealt with through the courts. Reconviction was reduced by around a third in one project, and by nearly half in the other. The seriousness of offences committed also declined. In Canada, the Winnipeg-based Restorative Resolutions project focused on medium-to high-risk offenders recommended for a custodial sentence. A 1998 evaluation tracked recidivism rates for 94 offenders over a one-year period and compared them to a matched control group of offenders whose cases were dealt with conventionally. It was found that 5.3% of Restorative Resolutions clients were subsequently convicted of a new offence, compared with 16.1% in the control group. Both quoted in Bowes, D "Restorative Justice: The Evidence" in *Justice of the Peace* vol 168, no 46 (13 November 2004).
46 Sherman, L, Strang, H and Woods, D *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments* (Australian National University, 2000) quoted in Bowes, op cit.
47 Hoyle, C, Young, R and Hill, R *Proceed with Caution: An Evaluation of the Thames Valley Police Initiative in Restorative Cautioning* (Joseph Rowntree Foundation, 2002).
48 These results have been presented at seminars in the UK but have not yet been published. With violent offenders there was no statistical difference for male offenders, while with female offenders reoffending was halved, in a similar result to that for property crime.

Finally, in the rigorous New Zealand trials using restorative conferencing for serious crime following referral by the courts, the outcome is best summed up in a recent judicial statement by Judge FWM McElrea:

It is noteworthy that the evaluation of the restorative justice pilot scheme recently completed through the courts shows not only a reduced reoffending rate for people taking part in restorative justice conferences compared to matched sample cases, but that such reduced reoffending occurs despite a reduced use of imprisonment ... Imprisonment in the pilot scheme was used at a rate 28% below that for matched samples, and with shorter prison sentences ... and despite this lesser use of imprisonment there was reduced reoffending.[49]

How does RJ tackle social exclusion?

These "hard" deliverables – proven victim engagement and satisfaction, and reduced reoffending – are of course in themselves important elements in reducing social exclusion.

Reduced reoffending is significant because of the obvious impact in terms of reducing the amount of crime entering the system, contributing to and reinforcing the vicious cycle of deprivation. And of course every person who stops reoffending represents someone now engaging in society – and included in society – as a responsible citizen.

But victim satisfaction too is very important, not just for its own sake but also in the wider societal gains it brings. Confidence in the criminal justice system is the oxygen, the very lifeblood, of the system itself – and it is therefore vital to the quality of life in our local communities. Without confidence people do not come forward to help tackle crime and conflict, or participate in their local communities – and if they are fearful of crime, they stay at home behind locked doors, excluding themselves from wider society.

That RJ increases public confidence and reduces fear of crime is now so well accepted that the government has given advice to local criminal justice boards recommending the implementation of restorative justice schemes.[50]

49 In the sentencing decision of Judge FWM McElrea, *R v Junior Sami* DC AK (14 October 2005), clause 33. The evaluation itself can be found at *New Zealand Court-referred Restorative Justice Pilot: Evaluation* (New Zealand Ministry of Justice, May 2005).
50 *Restorative Justice: Helping to Meet Local Needs* (Home Office, 2005). But no additional funding has been allocated to support this.

There is also what I term the hidden benefit. While it may not easily be evidenced, people who are involved or trained in restorative justice seem to enjoy higher job satisfaction and self-motivation than others. Multi-agency working also tends to be far more effective, because those involved share a common vision, common goals and a common language, which cuts through the bureaucratic adversarial nightmare of the traditional system. These features again manifest the inclusive nature of RJ, in contrast to the exclusive nature of traditional criminal justice processes.

These are all very important benefits of RJ. And they occur precisely because the processes of RJ include, rather than exclude, the people whose problem or conflict it is. It is self-evident that if you are involved in the solution to a conflict or problem, you are far more likely to buy into the agreed solution, to have confidence in the community processes for solving the problem, and to reduce any fear you otherwise might have about being affected by a similar conflict in the future. Quite simply, RJ is an inclusive process.

Of course, RJ is not a panacea: it is not right for all cases, for all victims and for all offenders. But based on the very powerful body of evidence, what we do know is that it works for many people and in many situations. The potential for utilising RJ in many, many more cases – and for expanding it into other areas of the criminal justice system, and indeed society as a whole – is overwhelming.

Conclusion

The government has pledged to tackle social exclusion, and much good work has been done in many policy areas. But with crime and fear of crime, how is it that – despite the conclusive results on RJ and its complete congruence with the idea of social inclusion – RJ is so low among government priorities, and indeed on the agendas of the opposition parties?

Of course, there has been broad government support in terms of research and in strategy documents, but these have been backed up with only very limited funding and resources. While RJ in the youth justice system has been successfully introduced through the referral order and use at final warnings, even there the lack of resources – for example, for investing in RJ victim liaison officers – has made implementation very patchy.

RJ in the adult justice system, where RJ could make such a large contribution to reducing reoffending and improving community confidence in relation to the prolific and priority offenders scheme, is almost nonexistent.

Elsewhere, in schools and in the community setting, RJ is developing and spreading very slowly. Here most developments have been made despite government, not because of it. Like criminal justice, these too are areas where RJ could make the vital difference in promoting social inclusion.

For example, in the community setting RJ could and should be a natural principle within neighbourhood policing, strengthening this excellent initiative to engage communities in tackling their own local problems.

And in education, the latest evidence shows that using the funds from behaviour improvement programmes to implement RJ approaches in schools could reduce exclusions from school by nearly half. Not only would this ensure that thousands of youngsters are kept in school, their attitudes and behaviour enhanced and their life chances improved; it would also save an estimated £60 million on school exclusion processes and billions of pounds on future spending on crime, social services, unemployment and community problems.[51] What better way could there be of bringing social inclusion into the mainstream?

Restorative justice is an idea whose time has come. It epitomises the benefits of social inclusion in our society. RJ should now be developed, mainstreamed and fully integrated into all future policies on criminal justice, community renewal, neighbourhood policing and schools.

51 Unpublished paper from the Youth Justice Board for England & Wales (November 2006).

Part III: Policing, detection and information

Chapter 7

Recording and sharing information – power, control and the end of privacy

Simon Davies, Visiting Fellow in the Department of Information Systems at the London School of Economics and Director of Privacy International

Recording and sharing information – power, control and the end of privacy

Simon Davies

In 1997 the human rights group Privacy International undertook a study to find out how much information was being held on each of us. The findings were quite remarkable, indicating that details of each economically active adult in the developed world were located in an average of around 500 major databases, creating enough processed data to compile a three-volume reference book on each person.

When Privacy International again conducted the survey in 2002 at the request of *The Guardian* newspaper, it found that the number of computer systems processing information on the average citizen had risen to more than 700.[52]

No escaping the electronic eye

Just about every aspect of our lives is subject to comprehensive scrutiny by computer systems. Nearly all forms of electronic communication are routinely scanned and profiled. All financial transactions are extensively tracked and monitored. Indeed, little we do in the electronic realm goes unnoticed or unrecorded. There has never been a time in history when so much information has been amassed on the population at large. And as this mass of data expands, the threat to personal privacy escalates to unprecedented levels.

The growth of the data empire can be explained in part by the increasing power and capacity of computers. But there is a more potent reason: we are all under surveillance A huge shift has occurred since the 1980s in the way governments view the ordinary citizen.

In the past surveillance was based on the targeting of specific individuals or groups. Now systematic surveillance proactively profiles millions of people at a time. In their often futile quest to second-guess the "bad guys", authorities have chosen to treat everyone as a potential suspect. Instead of working to build a profile on particular suspects, authorities now use template criminal profiles that are matched against the entire population. This is the way, for example, that airline passengers are screened.

So it is that the keyword for the 21st century is *control*. More laws and regulations have been enacted since 1980 than in the entire preceding century. A greater number of people

52 Davies, S "Private Virtue" in *The Guardian* (7 September 2001).

have been criminalised or officially constrained in the past decade than in all the decades combined since the Second World War. Meanwhile, surveillance has become a key component in the core design of the world's legal, communications and information systems.

Plagued by revenue problems, security scares and unprecedented pressures for instant policy fixes, risk-averse lawmakers have subtly renewed a social contract between authority and citizen. The goals of this new contract are straightforward: maximise the extraction of revenue, enforce appropriate behaviour and eliminate risk. In return, the contract claims to offer greater security, equality and economic efficiency.

In the process, governments have dumbed down the democratic process while creating the appearance of accountability. Bereft of grand ideas and scrambling to restore trust and social cohesion, political leaders throughout the world have chosen to abandon not just the concept of individualism, but also some key principles of individual rights.

The past 20 years have borne witness to this fundamental shift in the relationship between citizen and authority. It is a shift that ensures that the citizen yields rights in favour of security, and in which reactive and centrist public policy replaces traditional democratic process. The new contract goes by many names: "new deal", "rights and responsibilities" or "third way". And yet there appears little evidence that the promised security is real. Often, the threat is not real. It makes little difference. And despite relatively instantaneous response times to issues of public concern, public faith in the political process is crashing.

The right of privacy has been the most celebrated and mutilated casualty in this trend. Battered and compromised by changing fortunes, it now survives in public policy mainly on the strength of rhetoric and residual goodwill. It occasionally screams out for recognition, but corrodes daily from the competing demands of "greater" interests. In an average year in Europe and North America combined, more than 10,000 regulatory initiatives compromise this fragile right. Less than 300 are genuinely intended to protect privacy. Increasingly, human activity in all its forms is identified, scrutinised and regulated.

And yet never before in history has such an effort been made to emphasise the notions of democracy, freedom and individualism. "We are ready to shape a new era of freedom," assured President George W Bush in June 2004, at the same time that he was shepherding some of the most intrusive legislation in recent US history.[53] It was the same sort of

53 White House press release, 2 June 2004.

pretence, in precisely the same words, as had been recently uttered by the presidents of Liberia and Korea, and even by the Iraqi delegation to the UN back in 2001.[54]

To be blunt, "freedom" is being reinterpreted as freedom from terrorism, freedom from crime, and even freedom from economic hardship. The notion of freedom is seen as entirely different from the concept of "freedoms". Freedom and freedoms are thus set on a collision course.

Offering people such a deal requires a substantial investment in coercive and intrusive laws. At its most fundamental level, the zeal for such an effort flourishes in an environment of political pragmatism. That is to say, sacrificing the future on an altar of instant political reward.[55]

Legal reforms carry a double edge

Governments loudly promote those occasions when personal liberty is advanced, but this liberty invariably provides opportunities to leverage further constraint. The UK government, for example, recently relaxed a prohibition on "public" sex, yet in the same law reversed the burden of proof for defendants accused of sex crimes. The same government reformed the compensation rights for victims of crime, while simultaneously proposing to remove the right to trial by jury. Cannabis retains its classification as a class C drug, but conditional upon a vastly expanded reporting regime under the Children Act to ensure that authorities are aware of cannabis use.

This trend is most starkly evident in the world of personal information. Again in the UK, the government proposed a law (the Health & Social Care Act 2001) that claimed to improve the security of medical information, but at the same time removed many of the rights that patients traditionally have over their medical file. This information is now squarely under control of the government.

Indeed the UK, like Australia and the Netherlands, has become a template surveillance society. The Children Act, for example, provides for the profiling and analysis of all children, to detect which infants may be potential criminals. The Regulation of Investigatory Powers Act makes provision for the universal archiving of all communications records (phone, email and internet visits) for possible later use by authorities.

54 Statement of the delegation of the Republic of Iraq, United Nations, 31 August 2001 (http://www.un.org/WCAR/statements/iraqE.htm).
55 Sexual Offences Act 2003.

A raft of new laws on border security, travel and immigration controls assume that all travellers, UK nationals and others, are potential criminals and should be subjected to constant tracking and profiling. Financial regulations increasingly assume that innocence on the part of bank customers is dependent on a constantly narrowing zone of normal account behaviour, determined by constant electronic analysis.

The new contract is not a child of conspiracy. It is the result of several converging trends, most of which could not have been imagined by forecasters. Legal liability became democratised, and thus gave rise to a litigious culture. Societies became obsessed with risk avoidance, thus triggering defensive public policy. Politicians became terrified of making brave decisions, thus depriving their citizens of leadership.

Legal balance shifts from prohibition to permission

From the perspective of economic and population management, the goals of the new contract superficially make sense. From the perspective of social evolution, they spell disaster. In neoliberal cultures, the contract requires vast buttressing by legal enforcement. This is already taking place. The number of people who each year are restrained or disciplined by legal, administrative and judicial mechanisms is 1,000% greater than 20 years ago. Legislation regulating conduct in public has increased fifteen-fold in the same period. The requirement for "permission" to initiate group activities has soared.

It can now be successfully argued that individual freedom is no longer conditioned by what is expressly prohibited in law, but instead is circumscribed by what the law expressly permits.

The cumulative effect of these developments is a push to normalise human behaviour, with the intention of promoting "good" and socially responsible conduct. Deviants, when identified, are penalised in myriad ways never before imagined. With escalating regulation, deviation is increasingly probable, and with increasing surveillance deviation is easier to detect. A shrinking zone of normality has been constructed. Individuals may step outside this domain, but they will be more vulnerable, exposed and observed than ever before.

We are all potential deviants, that much is clear. The idea of the "good, law-abiding and honest" citizen has been eliminated. Government has now engineered an environment in which all citizens must be watched at all times. This phenomenon has come about partly because it is not acceptable to single out particular groups or classes, even if they are

known historically to be the cause of particular problems. It is also due to a flourishing philosophy that only those with something to hide would have something to fear from surveillance. The maxim "no one is above the law" has become "no one is above suspicion".

Every day, in every country, media headlines announce yet another privacy scandal. And every day the invaders of privacy respond with claims that intrusion is necessary and desirable. One thing is certain: we are all losing any pretence of privacy.

If the quest to eliminate personal privacy in the pursuit of the common good is to have any justification, it must provide two guarantees. First, such key aspects as accountability, oversight, due process, legal protections and transparency must be strengthened. Second, this common good must be quantified: we must have some way of knowing that the sacrifice has been worthwhile. Neither set of conditions has been fulfilled.

How the government fails to protect privacy

Former Cabinet Secretary Lord Butler knew this. Five fruitless months after completing his inquiry into Iraqi war intelligence, he launched into a remarkable attack on the present style of government, accusing it of control freakery and intellectual paucity. He bemoaned the decline of parliament, the obscene power of the whips and the puppeteer role adopted by the executive.[56]

Butler was in good company. A brief review of the investigations conducted by parliamentary oversight committees provides ample evidence that the government has engineered a wholesale and systematic abrogation of its responsibility to democratic process. Increasing anxiety expressed by the joint human rights committee has been largely ignored. The public administration select committee has expressed continuing disappointment about everything from the conduct of government inquiries to the way ministers answer questions.[57] The constitution committee has all but given up on hope to create any effect on government thinking.

The proposals for identity cards provide a sobering illustration of parliamentary malaise. Many Labour MPs voted originally for the Identity Cards Bill despite their grave misgivings. They warned the whips that the legislation was deeply flawed. Government promised the anxious MPs that the bill would receive a robust and thorough assessment if they voted

56 Cited in Davies, S "A Litany of Deception and Lies" in *The Guardian* (11 August 2005).
57 Fifth report of the public administration select committee (17 March 2005) (http://www.publications.parliament.uk/pa/cm200405/cmselect/cmpubadm/449/44902.htm).

for it at the second reading. Yet when the bill went to committee after the vote, not one of the 200 or so opposition amendments was accepted. Debate was guillotined as the government steamrollered the bill through the committee.

This sad episode is the latest event in a litany of deception and secrecy surrounding the proposals. David Blunkett, as Home Secretary, refused point blank to answer the home affairs committee's questions on the scheme's cost.[58] Any MP who dared unearth difficult issues was slapped into line with dismissive and aggressive responses. Little wonder that many MPs have lost faith in the government's credibility on this and other contentious bills.

Rather than strengthening protections in order to provide balance in the new social contract, governments have taken a regressive position. The Freedom of Information Act is a case in point. If the government had wanted to promote a quick and easy litmus test of its good intentions, this act would have been embraced with heart and soul. Instead the legislation has degenerated into a rather nasty joke.

Even as the ink was drying on the Hutton report, ministers and civil servants were expending energy figuring out how to subvert access to information. From their co-ordinated push for ministerial veto on disclosure, through to their insistence on a right to make unaccountable public interest decisions on non-disclosure of data, large sections of government have been unswerving in their ambition to remain closed.

The protection of our data is becoming equally unstable. Internationally, efforts to protect privacy have made some tiny inroads into preserving this fragile right. More than 50 countries have passed privacy laws aimed at limiting the collection and use of personal information.[59] Europe, Canada and Australia have a harmonised legal regime designed to provide a number of privacy rights for individuals.

Sadly, these laws provide almost limitless exemptions for government to invade privacy in the "public interest". The attitude of the UK government to data protection law has been nothing short of hostile. Rather than being perceived as a measure to enhance public trust

58 See the conclusions and recommendations in the home affairs committee fourth report (http://www.publications.parliament.uk/pa/cm200304/cmselect/cmhaff/130/13002.htm).
59 Privacy International & the Electronic Privacy Information Center *Privacy & Human Rights* (2004) (http://www.privacyinternational.org/index.shtml?cmd[342][]=c-1-Privacy+and+Human+Rights&als[theme]=Privacy%20and%20Human%20Rights&conds[1][category.....]=Privacy%20and%20Human%20Rights).

in government surveillance, ministers view the act as a nuisance. Its public interest exemptions have been exploited to the point where the Freedom of Information Act is now largely toothless.

This attitude is dangerous. Globalisation of systems such as the internet removes many legal protections to the flow of data. Convergence of computer systems is leading to the elimination of technological barriers between systems. Modern information systems are increasingly interoperable with other systems, and can mutually exchange and process different forms of data.

Meanwhile, the phenomenon of multimedia, which fuses many forms of transmission and expression of data and images, creates vast difficulties for the small number of legislators wishing to protect personal privacy.

If government wishes to continue its communitarian trend towards mass surveillance and control, it must first build a foundation of trust and accountability. Without this foundation, the new contract between citizen and authority will be little more than a dangerous sham that removes individual rights with no perceivable benefit to society.

Chapter 8

Technology in the criminal justice system – fresh options for social justice

Peter Micklewright, Business Director of LogicaCMG

Technology in the criminal justice system – fresh options for social justice

Peter Micklewright

The government is undertaking major programmes of change across the whole of criminal justice that will rejuvenate the very fabric of justice itself. At the same time, there is a growing debate about how society should tackle the causes of crime to reduce the crime rate. This chapter discusses what information and communication technology can do to help reduce the cycle of crime and reoffending by connecting people and communities, building capacity and improving deterrence.

Introduction

The internet is driving the convergence in business services, information technology and communications. In response, corporate organisations of all sizes are having to transform themselves, often through leaner organisational structures and more front-line services. In this way, information and communication technologies, or ICT, have become the catalyst, driver and powerhouse for competition, corporate transformation and global change.

In the public sector, the modernising government agenda has provided the vision and momentum for organisations to deploy their services online. As a result, the UK is now a first-tier nation in e-government services and in the uptake of broadband. Policy itself is now increasingly inspired and shaped by ICT. Recently, the government policy document *Transformational Government* focused on the need for e-government to deliver clear improvements in services, over and above simply providing services online.[60]

The criminal justice ICT programme – where are we today?

Over £2 billion is being invested to establish information flow between the seven independent agencies of the criminal justice sector, including the police, the Crown Prosecution Service, the courts and the prison service. Each agency is getting its own case management system:

- Crown Prosecution Service. The Compass system has 4 million cases shared across 400 locations.
- Magistrates' courts. The Libra system, in trial since May, will roll out in early 2006 to manage all court business including case results, fines and links to police.

60 *Transformational Government: Enabled by Technology* (Cabinet Office, 2005).

- Crown courts. The Xhibit hearing information system, now in 56 of the 101 Crown courts, will be complete by March 2006.
- Police. A major initiative is under way in all forces, putting in place a case and custody system that links into the criminal justice system.
- Prison and probation. The NOMIS case management system is being developed by the National Offender Management Service, as the service takes on the role of both agencies.

Almost half of the total investment in ICT involves two initiatives traversing criminal justice:

- Connectivity. The CJS Exchange system, now in a final stage of development, will enable common case information to be shared by the many organisations that make up the criminal justice system.
- Infrastructure. Work to install new networks, servers and PCs across all agencies is nearly complete. The final work in the Crown courts is due to finish in the first quarter of 2006.

In another major shift, the law-abiding citizen and the community have increasingly been acknowledged to be of central importance for improved civic services and a more inclusive society. Reflecting this trend, the police service – building on the 2001 white paper *Building Communities: Beating Crime* – places the citizen at the heart of strategy for policing. Citizen perceptions of policing now play a key part in the performance assessment of all police forces (National Policing Plan 2005-08).

Within criminal justice, investment has focused on the creation of a more joined-up and efficient system for the delivery of justice, and on the provision of better services for victims and witnesses – groups that have traditionally experienced a poor deal.

There is still an overall gap, however, between the government vision for criminal justice and the situation that exists today. Many continue to feel that criminal justice remains too disconnected from citizens and communities, and want more to be done to improve access, inclusion and public satisfaction.[61]

61 *Cutting Crime, Delivering Justice: A Strategic Plan for Criminal Justice 2004-08* (Office for Criminal Justice Reform on behalf of three government departments: the Home Office, the Department for Constitutional Affairs and the Law Officers' Departments, 2004).

What is new about ICT?

In the course of its 30- to 40-year history, ICT has had a profound influence in most industries and most aspects of public and private space. The ICT revolution is different from previous technological advances in terms of its rapidity, pervasiveness and alignment to human activities and thought processes.

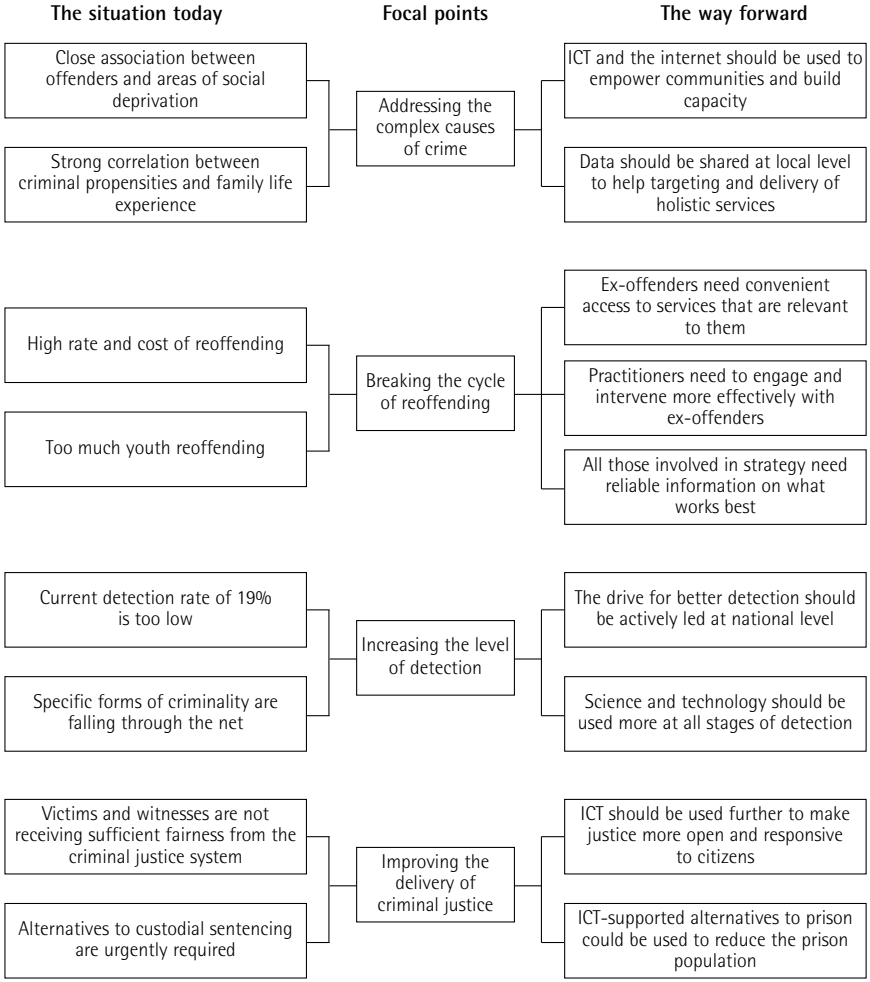
While previous technological revolutions were concerned with the manipulation of an inanimate world, ICT offers increasingly more intuitive solutions to human endeavour. It is a revolution that is not merely exploiting new tools to boost innovation and productivity, but driving profound changes in the way people live and interact in society.

In the public sector, broadband and the fusion of computing, communications and broadcasting are being actively promoted by the government to leverage economic opportunities, discourage the formation of a digital divide and improve the quality of service delivery in key areas of our society like criminal justice.

Evolving around a collection of information engineering disciplines, ICT is now universal and omnipresent. It is at the heart of the navigation system on a distantly roaming space probe and the guidance systems of CCTV cameras in many towns. Its ability to recognise patterns is being applied to facial and number plate recognition systems and to the 2.7 million DNA profiles within the National DNA Database. At a global level, Google and other search engines are transforming the management and dissemination of knowledge for professionals and the public alike.

However, ICT no longer focuses simply on implementing technical solutions only, but on managing programmes of change and defining the governance and operational structures and processes on which successful transformation depends.

The diagram showing the situation today and the way forward highlights areas where ICT can help most. The sections that follow expand on these themes and the overall role of social justice, criminal justice and communities in addressing the cycle of crime and reoffending.



Addressing the complex causes of crime

Most crimes are committed in economically marginalised areas, against the poor and within 1.8 miles of the criminal's home.[62] The communities that suffer most from criminality also suffer from high levels of social exclusion, namely a combination of unemployment, lack of skills, low incomes, poor housing, high-crime environments, bad health and family breakdown.

62 *Communities, Social Exclusion & Crime* (Smith Institute, 2004).

The prison population is disproportionately made up of people from such backgrounds. Seventy percent of prisoners leave school without any qualifications. Thirty-seven percent have the literacy and numeracy skills of an 11-year-old and most use drugs before imprisonment. The situation is even worse for younger prisoners, such as 18- to 20-year-olds.[63]

The close correlation between criminality and social exclusion has led to broad acceptance that the dimensions of social exclusion have to be tackled in their own right if crime is to be reduced. The government's social renewal programme builds on this principle.[64] As endorsed by case studies in the USA, there is also growing acceptance that the rebuilding of a neighbourhood is critically dependent on investments in the neighbourhood economy,[65] and that to successfully address the challenge of renewal, a well-defined agenda and active buy-in from the community are essential.

The role of ICT in tackling social exclusion

As part of the recently introduced digital strategy,[66] the government has created the Digital Challenge, with a £10 million award for an innovative vision and proposal on how digital technology can be best used to combat social exclusion and deprivation in an area, city or region. Candidate projects are encouraged to support a multi-channel approach (internet, digital television, mobiles and so on) in recognition of diverse needs and the goal of social inclusion.

Because social exclusion issues are heavily intertwined, there is no silver bullet. Sustainable approaches to intervention and neighbourhood renewal need to be holistic and sensitive to many factors in problem neighbourhoods, including crime, antisocial behaviour, drugs and unemployment.

There are many ICT trailblazer initiatives aimed at renewal.[67] These include:

- **Greater Manchester Against Crime.** This internet initiative brings together information from many organisations and uses geographical mapping to show hotspots in relation to the dimensions of social exclusion. This is widely believed to be of help in improving interventions and enabling the community to become more actively involved.

63 Ibid; *Reducing Reoffending by Ex-prisoners: Summary of the Social Exclusion Unit Report* (ODPM, 2002).
64 *Inclusion Through Innovation: Tackling Social Exclusion Through New Technologies* (ODPM, 2005).
65 *Communities, Social Exclusion & Crime* (Smith Institute, 2004).
66 Prime Minister's Strategy Unit *Connecting the UK: The Digital Strategy* (Cabinet Office, 2005).
67 *Data Sharing for Neighbourhood Renewal: Lessons from the North West*, research report 18 (ODPM, 2005).

- **Liverpool council.** This council is using interactive mapping to allow users to access information down to street level, report incidents and view performance. Data is anonymised automatically, to keep the site compliant with the Data Protection Act.
- **Manchester Tracking Neighbourhood Change.** This seeks to improve regeneration by publishing online the outcomes of initiatives aimed at the different dimensions of social exclusion (housing, crime, education and unemployment) and showing whether areas at sub-ward level are improving or in decline.

The Social Exclusion Unit recently conducted a review of numerous ICT initiatives across the country, addressing social exclusion issues (such as bullying, children potentially in danger, truancy and access to services), especially for one or more vulnerable groups (the homeless, unemployed, elderly, refugees and so on).[68]

The use of the internet and other channels (digital television, mobiles and so on) to support front-line services and build capacity in deprived neighbourhoods is still in a relatively early stage of development (see box on the role of ICT in tackling social exclusion). The same can be said of online services for key groups, such as neighbourhood wardens, facing a common challenge across the country.

More momentum is required if our society is to undergo a step change towards safer neighbourhoods and more inclusive communities. ICT and the internet have great potential to improve the quality of life in society.[69] Information and knowledge are empowering, and empowerment is necessary if communities and citizens are to tackle the issues and challenges that most affect them. To this end, therefore:

- ICT and the internet should be used to empower communities and build capacity.
- Data should be shared at local level to help target and deliver holistic services.

At national level, the internet should be used more to promote the sharing of information and expertise between neighbourhoods. This would greatly speed up the dissemination of best practice across neighbourhoods and help promote a culture of engagement and self-help. More can also be done to help rationalise funding for local projects, perhaps including a one-stop shop for funding applications.

68 *Inclusion Through Innovation: Tackling Social Exclusion Through New Technologies* (ODPM, 2005).
69 Prime Minister's Strategy Unit *Connecting the UK: The Digital Strategy* (Cabinet Office, 2005).

At neighbourhood level, building on the experience in Manchester and Liverpool, localities should be encouraged and funded to build communities online as part of a drive to enhance social cohesion. These could be used to: inform residents; provide access to local services related to social exclusion;[70] encourage discussion on improvements; aid prioritisation for those seeking funds; and promote local clubs, groups and events. The involvement of even a small number of active individuals in one way or another can be sufficient to deliver improvement. As part of such initiatives, the use of the internet for local incident reporting is also worthy of further consideration.

For individuals and groups who are disadvantaged, successful ICT initiatives should be championed for wider use so that the benefits of successful targeting, improved access and more integrated and personalised services can be used to build personal capacity and civic participation. To this end, the Social Exclusion Unit recently produced a 10-point action plan to guide local authority strategy in the period ahead.[71]

Recently the Social Exclusion Unit also completed a review of young adults with complex needs, and recommended the use of holistic services: that is, services that address the full range of problems that excluded individuals tend to face all at once. ICT can assist here by helping to define the possibilities and the partnership and governance arrangements required if such services are to function successfully across multiple agencies.

Breaking the cycle of reoffending

Reoffending by ex-prisoners accounts for 18% of recorded crimes and costs the criminal justice system over £11 billion annually. As recorded crime represents only a small proportion of total crime, the cost to society is much greater. The problem is especially acute among male 18- to 20-year-olds, where more than 70% will offend again within two years of release.[72]

The social impact of reoffending on society is in many respects greater than the financial cost, and does most damage to families, communities and neighbourhoods that are themselves challenged by disadvantage. Reducing reoffending therefore needs to be at the heart of the national agenda for reducing crime.

70 *Inclusion Through Innovation: Tackling Social Exclusion Through New Technologies* (ODPM, 2005).
71 Ibid.
72 *Reducing Reoffending by Ex-prisoners: Summary of the Social Exclusion Unit Report* (ODPM, 2002).

The government has set targets for reducing reoffending by 5% year-on-year to 2010.[73] This challenge will require policy makers and practitioners to work in partnership to achieve a shared view of what works best and to apply the lessons elsewhere.

Breaking the cycle of reoffending effectively means helping and empowering ex-offenders to break the cycle. This means building the individual capacity of ex-offenders, and giving practitioners and decision makers the information and tools to achieve this goal:

- Ex-offenders need convenient access to services that are relevant to them.
- Practitioners need to engage and intervene in a timely and appropriate way.
- All those involved in strategy need reliable information on what works best.

The Carter report (December 2003) into the prison and probation services advised that the agencies were dominated by the day-to-day management of the two services, and recommended that greater focus on the offender and a reduction in offending were required.

Moving forward, the new National Offender Management Service will need to put ex-offenders at the centre of any ICT services intended to support them during reintegration into society. It will also need to adopt a performance culture so that it continuously tailors such services towards better outcomes.

In order to educate and incentivise offenders to use services aimed at their rehabilitation, a national strategy will need to establish a greater role for ICT training in prisons, as existing provision varies greatly from one prison to another. This should be seen as an opportunity to deliver cost-effective training. For many, the very act of internet browsing is itself a step forward in educational empowerment.

The actual services required in such a solution need be informed and guided by the work carried out by the Social Exclusion Unit in its "going straight" contract proposal[74] as well as those being applied successfully to social exclusion.[75] As a minimum, they need to address the employment aspirations, learning and skills needs, and housing requirements of offenders on release and ex-offenders. Additional incentives could be supplied by

73 *Cutting Crime, Delivering Justice: A Strategic Plan for Criminal Justice 2004-08* (Office for Criminal Justice Reform on behalf of three government departments: the Home Office, the Department for Constitutional Affairs and the Law Officers' Departments, 2004).
74 *Reducing Reoffending by Ex-prisoners: Summary of the Social Exclusion Unit Report* (ODPM, 2002).
75 *Inclusion Through Innovation: Tackling Social Exclusion Through New Technologies* (ODPM, 2005)

providing access to email and internet facilities for personal use as part of the package.

For those involved in the care of ex-offenders, ICT is well suited to delivering collaborative case management-type solutions, which need to function across different government agencies and potentially other organisations, such as Citizens Advice Bureaux, in the voluntary sector. However, collaborative solutions should be designed with care, taking account of the diverse user community and the governance, roles and processes needed for effective case management.

Increasing the level of detection

Detection is key to deterring crime and to bringing more crimes to justice. However, the detection rate of reported crimes is less than 20%. The resulting low level of apprehension affects confidence in justice. Delay in conducting forensic visits following house burglaries increases the trauma for victims and reinforces a broader sense of failure from policing.

At present, the 43 police forces have relative autonomy in the way they conduct investigations. Each force uses a variety of local systems that are not joined up. The lack of national standards and tools is a source of weakness in detection.[76] The Bichard inquiry berated the dire consequences of these factors and called for a national and systematic approach to the way information is captured, retained, shared and destroyed.

The government has committed to improving the rate of crime detection by 6% to 25% by 2007-08.[77] To meet this challenge, improvements will need to be found at a number of levels. In moving forward:

- The drive for better detection should be actively led at national level.
- Science and technology should be used more at all stages of detection.

Local initiatives alone cannot make full use of the technological and informational advances that will provide a crucial plank in the drive for better detection.[78] As the capture and processing of information increasingly comes to dominate detection in the 21st century, a fundamental reappraisal of the investigation lifecycle is needed to inform and

76 The National Intelligence Model and the code of practice are too high-level to be considered national standards.
77 *Cutting Crime, Delivering Justice: A Strategic Plan for Criminal Justice 2004-08* (Office for Criminal Justice Reform on behalf of three government departments: the Home Office, the Department for Constitutional Affairs and the Law Officers' Departments, 2004).
78 The National Policing Improvement Agency now being set up will have the authority to spearhead national change.

guide a transformation in the direction of more joined-up information systems and processes, more sophisticated tools for information analysis, and probably a greater role for information engineers in detection work. This joining up will need to occur across geographical boundaries as well as across government agencies.

In past years ICT was best known for joining up systems. In recent years, however, a powerful new generation of tools have emerged that enable data to be enriched and exploited far more effectively than was possible in the past. The net outcome is better-quality information.

ICT is now transforming investigation work. During 2004, the Serious Fraud Office moved all new cases and detection work on to powerful computing environments; while shortly before the 7 July attack in London, the Metropolitan Police acquired a powerful new data warehouse, a move that played a key part in the rapid pace of the investigation.

Within the police and forensic services, the national DNA database has become a potent tool not only in detection work on serious crimes but in local volume crimes too. To illustrate, the average level of detection of burglary is just 14%, but when DNA is captured at the scene and checked against the 2.7 million database entries, this rises to 48%.[79]

The UK is now a global leader in the use of CCTV. This is used not only to detect criminals after the event, as seen following the 21 July attempted bombings, but in pre-emptive interventions with known offenders such as football hooligans. The Dutch police have made this into a more precise science by using automatic facial recognition software linked to databases holding the profiles of known offenders.

Like CCTV, automatic number plate recognition (ANPR) offers a powerful additional tool that could be used to great effect to alert the police to the movements of vehicles associated with known offenders This is already happening to a large extent in Scotland, where ANPR has been combined with photographic images (from CCTV) and instant look-ups in the Scottish Intelligence Database to pre-emptively monitor and record vehicle movements.

In London, pioneering work has been done with PDAs to explore new two-way flows between police on the front line and command-and-control systems and services. Such

79 Police Science & Technology Strategy Science Policy Unit *Police Science Technology Strategy 2004-09* (Home Office, 2004/05.

PDAs could in future be readily deployed as fingerprint readers to capture and verify a fingerprint of a potential suspect read at the front line.

The capture and transmission of information and biometrics has great potential to reduce the burden of paperwork, allow instant verification of data quality (a big problem with paper), and provide instant checking against databases such as those of the police national computer. The transmission of information and photographic images on suspects back to front-line staff has also great potential to improve the quality and speed of detection.

The combination of greater automation, improvements in the quality of information and a new generation of devices for front-line policing should go some way to giving police officers the tools they want and need, to increasing the time spent by police officers on the front line, and to helping to deliver an improved overall climate of deterrence in the community.

Of course, the drive for excellence in detection through the use of powerful new tools such as DNA and ANPR involves a major debate about the boundaries between legitimate enforcement activity and personal freedom, as with ID cards. This might be ameliorated by greater involvement of the public in crime detection and by appropriate public safeguards and standards on privacy and data protection.

Improving the delivery of criminal justice

During the 1990s, long delays in bringing offences to court damaged confidence in the criminal justice system. Crime increasingly appeared to be getting ahead of the capacity of the system to deliver justice, and this led victims, witnesses and the wider public to feel a sense of unfairness.

Recognising this, the government, in coming to power in 1997, put the law-abiding citizen at the heart of major reform. A series of national reform initiatives have since been directed at a radical overhaul in the delivery of justice and at improvements in the provisions within the justice system for victims and witnesses.

The government's strategy for justice in the period 2004-08 and the shape of justice at the end of this period are described in a recent strategic plan.[80] The goals include, for

80 *Cutting Crime, Delivering Justice: A Strategic Plan for Criminal Justice 2004-08* (Office for Criminal Justice Reform on behalf of three government departments: the Home Office, the Department for Constitutional Affairs and the Law Officers' Departments, 2004).

example: better services for citizens; more engagement with communities in setting priorities; specialist courts for drugs, antisocial behaviour and domestic violence; reduced delays in bringing cases to court and during court hearings; and better treatment for victims.

It is difficult to find fault with the vision and implementation programmes coming to fruition or those contained in the strategic plan for the period ahead. However, in moving forward, special focus is required in two areas where further improvements can be realised:

- ICT should be used to further make justice more open and responsive to citizens.
- ICT-supported alternatives to prison could be used to reduce the prison population.

The needs of citizens, particularly victims, must be at the heart of further improvement. Many victims will benefit from a more holistic victim support service that will keep them updated and informed from the time of the offence through the various stages of the subsequent case, irrespective of the agencies involved.

The candidate options should be pursued as part of a consultative programme on justice in which victim representatives are invited to play a key role.

Today, despite year-on-year reductions in crime, the use of custodial sentences in justice is rising alarmingly, creating one of the largest per capita prison populations in the western world.[81] The new specialist courts provide a fresh opportunity for smarter sentencing within the community.

The use of offender/ex-offender whole lifecycle management systems, touched upon earlier in this chapter, could be readily extended to support community sentencing and release-on-licence programmes. These all coalesce around the use of collaborative working across a number of agencies, ensuring that case information is maintained in a disciplined fashion, that interventions are well-informed and that outcomes are measured.

Concluding remarks

As part of a coherent overall framework for the future, criminal justice can build on what has been achieved to make its services more accessible, inclusive and citizen-friendly.

81 Jacobson, M *Downsizing Prisons: How to Reduce Crime & End Mass Incarceration* (New York University Press, 2005).

In moving forward, the drive to reduce crime and to improve the numbers of crimes being brought to justice will increasingly come to depend on ICT and other technologies. ICT will also be critical to the challenge of reducing social exclusion.

However, if ICT is to play a highly effective role in reducing the financial and social consequences of crime on society, it needs to be treated as an integral part of policy and strategy formulation, and not just of the implementation programmes that follow.

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Chapter 9

Police powers and the role of government – setting the boundaries

Gareth Crossman, Policy Director of Liberty

Police powers and the role of government – setting the boundaries

Gareth Crossman

On 1 January 2006 there was a small but significant shift in the nature of British policing. All criminal offences became arrestable. The new power, created by the Serious Organised Crime & Police Act 2005, means that police officers can place people under arrest for minor offences such as dropping litter. Up till now many minor offences, generally those not punishable by a custodial sentence, were "non-arrestable".

The change did not generate a great amount of media interest. Only *The Daily Telegraph* considered it front-page material. Compared with other recent changes in police powers, such as the planned extension of pre-charge detention contained in the Terrorism Bill now before parliament, it has not been considered particularly newsworthy.

In pure news terms this lack of interest is perhaps understandable. Extending powers of arrest to cover low-level offending is not headline-grabbing stuff. It is, however, symptomatic of a wider move towards discretion-based policing evident in recent years.

While the use of discretion has always been an obvious and necessary part of day-to-day police work, legislation in recent years has seen the government move away from setting clear parameters to policing powers. Unfortunately, the consequences of this trend might be to undermine the relationship – the social contract – that exists between public and police. In essence, we give up a degree of individual freedom in return for protection against, and investigation of, acts of criminality.

At the heart of this contract is an acceptance that powers to restrict our freedom will be proportionate and used only when necessary. Undermining this relationship, particularly in the present climate, may well prove to be in the interests of neither the public nor the police.

Are we focusing on the right things?

Debate about police powers and crime detection and prevention can often be framed in misleading terms. A good example of this is the Criminal Justice Act 2003. Writing in *The Observer* on 10 November 2002, the Prime Minister explained that the bill was necessary to "rebalance the system emphatically in favour of the victims of crime. Offenders get away too easily."

There are two points worth making here. First, it is misleading to imply that you are in favour of either the victim or the defendant. Ensuring that the criminal justice system treats victims and witnesses with consideration and respect does not necessitate the removal of protections against wrongful conviction.

Second, the focus of the bill was not on ensuring more criminals were caught and convicted. Many of the proposals – such as allowing greater admissibility of previous convictions and hearsay evidence, placing greater disclosure obligations on defendants and restricting jury trial – were aimed at ensuring that more people who pleaded not guilty were convicted. As a percentage of overall crime statistics this represents a tiny fraction of cases. Over three-quarters of crimes never lead to criminal charges. When charges are brought, the percentage of cases where the defendant pleads guilty or is convicted after pleading not guilty is generally in the mid-90s.

Yet the focus of the bill was that minuscule fraction of cases where the defendant pleads not guilty and is acquitted. The centrepiece of the legislative criminal justice programme was a bill which would have no discernable effect upon crime statistics. Increased detection rates are largely dependent on the number of police offers available to do the detection.

The changing role of policing

Police forces are under considerable pressure to meet targets. In particular, individual forces need to reduce crime and increase detection rates. Home Secretary David Blunkett set a gold standard of 40% as the detection rate all forces should aim for. However, this figure was based on the 1980 detection rate. Crucially, this predated the passing of the Police & Criminal Evidence Act 1984, the legislative cornerstone protecting against abuse and mistreatment of suspects in police custody.

The police have been governed by this act for over 20 years and it is sometimes easy to forget the treatment suffered by detainees under the previous common law rules and "judge's rules". Prior to the 1984 act, detention was intended to result in confession and, with no detention time limits in place, it was not unusual for suspects to be held for days until they became co-operative. Considering how different the policing world now is, it is not surprising that overall detection rates are lower these days, generally operating in the high 20 percentages.

Similar pressures exist in placing pressure on forces to reduce crime. Central allocation of resources is directly related to the meeting of crime reduction targets. Underperforming

chief constables could also face executive censure under the Police Reform Act 2002, which created powers for the Home Secretary to call for a chief police officer's suspension (earlier plans to allow the Home Secretary a direct power to sack having been abandoned). Similarly, proposals to reduce the number of police authorities from 43 to as few as 12 are likely to place pressures on individual authorities not considered to be "performing".

Be careful what you wish for ...

While the police are under pressure to meet targets, the Prime Minister and Home Secretary have insisted they should have all the tools they want to help them do so. In their joint introduction to the Labour Party document of April 2005, *Tackling Crime: Forwards Not Back*, they say: "We asked the police what powers they wanted and made sure they got them." Given this sort of blank cheque invitation, senior police officers might do well to consider the beginning of the classic American short story *The Monkey's Paw*, which warns: "Be careful what you wish for; you may receive it."

Powers given the police in recent years have become increasingly discretion-based. This can place an excessive burden on individual officers. The justification for making all offences arrestable under the Serious Organised Crime & Police Act 2005 was simplicity:

[The] basis of arrest remains diverse – it is not always straightforward or clear to police officers or members of the public when and if the power of arrest exists for offences at the lower end of seriousness.[82]

However, making all offences arrestable places a far more onerous, if somewhat impractical, duty upon individual officers. Before an arrest is made they will have to decide whether it is "necessary" to arrest. In human rights terms this means that every time police officers have to make a decision on arrest they will in effect be required to make a determination as to whether it would be proportionate to arrest under Article 5 (the right to liberty) and Article 8 (the right to privacy) of the Human Rights Act 1998. The reality is they will do no such thing.

It is to be expected that when the police are given powers they will exercise them to the limit of what is permissible. Sections 43 and 44 of the Terrorism Act 2000 give the police powers to stop and search persons and vehicles without the need for "reasonable

82 In the white paper *Policing: Modernising Police Powers to Meet Community Needs*, paragraph 2.2.

suspicion" normally required under the Police & Criminal Evidence Act 1984. While the Terrorism Act specifies that detention and search must be for terrorist-related purposes, the reality has proved different. The fact that the entire metropolitan area of London has been on a rolling authority allowing section 44 searches for several years is indicative of the general application of the legislation intended by the government. This broad-brush approach has been carried through to use at street level. Section 44 powers have been used against anti-war and anti-arms fair protestors, and were recently used to detain Walter Wolfgang, the 82-year-old who was thrown out of the 2005 Labour Party conference. In London, section 44 searches have been used regularly against young Asian males on a scale that would make it nonsense to suggest that these searches are solely related to terrorism.

Blurring the lines

A central plank of the government's criminal justice programme has been to combat antisocial behaviour. It is not the purpose of this chapter to consider the effectiveness and desirability of legislation targeting antisocial behaviour, other than to comment that it is possible to appreciate the need to take action against low-level criminality while remaining concerned at the manner in which it is done.

One of Liberty's principal concerns is that policy has consistently blurred the boundaries of criminality and broadened the scope for police action where no crime has been committed. The Antisocial Behaviour Act 2003 created powers of curfew so that 16-year-olds out after 9pm could be returned home by the police even if they were doing nothing wrong. It also created dispersal zones that would allow the police to move people on if gathered in a designated dispersal area where there had been a problem with antisocial behaviour. Again, no one has to be doing anything wrong, but failing to comply with a removal instruction is a criminal offence.

Similar dispersal powers are being created in the Violent Crime Reduction Bill, which allows the police to move people on if they believe that they might later be involved in drink-related disorder. This year promises more antisocial behaviour legislation, with the likely publication of a Respect Bill introducing new measures, including the possibility of on-the-spot antisocial behaviour orders.

At the heart of these legislative moves towards ever greater police discretion is a concern that the government is absolving itself of responsibility to lay down clear indicators as to what powers the police can legitimately use. This is not to suggest that special policing

powers should not exist. The police should have appropriate powers to deal with terrorist threats. If there were intelligence that a terrorist attack was being planned, no one could reasonably argue that the police should not be able to stop and search people in that locality without suspicion. If people are engaging in criminal antisocial behaviour, then naturally the police should be entitled, as indeed they have always have been entitled, to use reasonable powers to arrest, detain and charge.

Even pre-emptive powers to prevent offending, such as those that allow a person to be detained in order to prevent a breach of the peace, can be arguably justifiable. The problems arise when police discretion is increased to such an extent that there is no need for a nexus with criminality or wrongdoing.

A complicated message

The government is sending out a complicated message to the police. On the one hand there is a need to improve performance, reduce crime and increase detection. In order to do this, the police have been given all the powers and discretion they want. Meanwhile, they remain under an obligation not to misuse these powers. However, if there is pressure to get results then it can only be expected that the police will use them.

Sometimes the coercion is tangible. In May 2005, for example, it emerged that police officers in Manchester could lose their jobs if they failed to meet targets of at least four arrests a month. Even without such blatant pressure, it is hardly reasonable to expect young, inexperienced police officers given wide powers of stop, search, arrest and detention not to use the powers they have to their limits.

There has been recent debate about the way in which the police engage in political lobbying. In particular, during debates over the proposed extension of detention prior to charge to 90 days, a number of senior police officers went beyond the boundaries of legitimate police involvement in lobbying by approaching individual members of parliament, at ministers' behest, in order to persuade them to support the government's plans.

While police political neutrality should never be compromised, it is perhaps understandable if not acceptable that police chiefs who have been told to ask for what they want to make it theirs should act in this way. The government's reduced parliamentary majority may mean it no longer has in its gift to grant whatever powers the police desire. However, both police and government should think carefully about the creation of further policing powers.

The Association of Chief Police Officers, the Police Federation and other policing bodies have valuable contributions to make to legislative debate. However, even when offered all the powers they want, it would be more appropriate to approach new legislation in terms of what powers they actually need.

In July 2004, while giving evidence to the parliamentary home affairs select committee, the Metropolitan Police Authority said of section 44 of the Terrorism Act 2000:

Section 44 powers do not appear to have proved an effective weapon against terrorism and may be used for other purposes, despite the explicit limitation expressed in the act ... It has increased the level of distrust of our police. It has created deeper racial and ethnic tensions against the police. It has trampled on the basic human rights of too many Londoners. It has cut off valuable sources of community information and intelligence. It has exacerbated community divisions and weakened social cohesion.

The Metropolitan Police Authority should be commended for its comments, although ideally these concerns should have been expressed before, rather than after, the act was passed.

Yet the main onus is on government to ensure that legislation sets down a clear demarcation as to what behaviour is and is not permissible, what the police can and cannot do. Home Office and Crown Prosecution Service guidance will always be necessary, but cannot replace legislative certainty.

Over-broad drafting has been endemic in criminal justice legislation in recent years. The Sex Offences Act 2003, for example, technically criminalises any sexual contact whatsoever between the under-16s. However, it is in the exercise of police powers that the dangers are most profound.

The police hold a unique position in society. Generally they have rightly enjoyed trust and respect. In a time of increased concern over national security and public safety, there is a particular danger that disproportionately increasing police powers could seriously undermine that trust.

Chapter 10

What is targeted policing and what should we be targeting?

Matthew Baggott, Chief Constable of Leicestershire Constabulary

What is targeted policing and what should we be targeting?
Matthew Baggott

It would be relatively straightforward to write about targeted policing in the sense of why, and how, the police service has to target criminal networks, specific categories of crime and localities; or even why supporting and caring for victims and witnesses can produce a higher conviction rate and fewer collapsed trials. I could write about policing operations and how tactical choices are informed by intelligence, seasonal trends or national and local priorities. This would, however, be a somewhat technical exposition and in truth avoid some fundamental considerations. For at a time when the public and the police service face their greatest ever challenges, we need a deeper debate about the nature and outlook of the police service, and not just what we do. In other words, what makes up good policing and how this can be taken forward.

There is no doubt that good policing is both life-changing and a major contributor to social justice. When based on relationships and personal knowledge, it is an incredibly powerful and an essential element of a stable society. Good policing takes community information and concern and turns this into positive action and hope. It is business-like, accepting of challenge and always looking and assessing opportunities to make a difference.

Poor policing, on the other hand, is unthinking and mechanistic. It does things to people, rather than for people. Poor policing does not consider, except in the short term, where resources should be allocated. Poor, impersonal policing plays no part, other than the ad hoc, in reducing vulnerability or addressing deep-seated issues. History has shown the dangers when the impersonal imposition of order takes precedence over all else.

All policing, both good and poor, uses information to target effort and resources, but it is only with good policing that the uniform becomes the truest symbol of reassurance and integrity. Likewise, only good policing can support over 40 public service agreement targets and measures, ranging from health to educational improvement. Better neighbourhood confidence and security, and indeed optimism, have huge implications beyond the policing environment. We should be doing everything possible to ensure that all policing measures up to these standards.

There are now many examples of the good policing outlined above, backed up by the most compelling and academically sound evidence. At the heart of this is the neighbourhood

policing programme – the foundation upon which good policing is constructed and delivered. Although still in its early days, neighbourhood policing has built upon a rich legacy of reassurance, cohesion and priority policing area initiatives to demonstrate that it is genuinely possible to improve public confidence.

As public confidence underpins successful crime prevention and intervention, the implications of this should not be underestimated. In essence, putting the right people in the right places, in the right numbers will deliver massive benefits across the board. The ambition is for all people to be safe and feel safe.

By 2008 all constabularies have committed to providing every citizen with access to, and influence over, a dedicated neighbourhood team in their locality. The teams will have geographic ownership, target matters that most affect the public in a consistent and accountable way, and collaborate on lasting solutions. The 10 principles of neighbourhood policing highlight that these local efforts must be fully integrated with other policing activity, and use modern business disciplines to ensure resources are deployed against well-evidenced need.

As I write this chapter, I have just received a leaflet from my local neighbourhood team, setting out their actions and the corresponding rise in local confidence. As a local resident I have seen improvements – and, for the cynics, I do not live in my own constabulary area.

What sort of policing is needed?

If neighbourhood policing has such potential, why has it not been achieved before now? Perhaps this is because the depth of change required is only now appreciated. Neighbourhood policing is not simply a repackaging of philosophically based community policing, but demands new skills and disciplines. Implementing effective neighbourhood policing requires better analysis, integration and intelligence handling, and challenges assumptions about all policing functions. Successful implementation demands an organisational perspective, not simply a time-limited project.

The main reason, however, is that the nature of crime, risk and demand has grown in complexity, placing real strain upon resources and the capacity to change quickly. It would take an entire chapter by itself to outline contemporary policing demands and issues, but terrorism, organised crime, child protection and 24-hour crisis management all speak for themselves. This, of course, raises huge questions about what the police should be targeting in a world of finite means, and has led to calls for public debate. To some degree,

however, this could be a debate without resolution. The truth is that the public want to be safe and feel safe, and that requires a multitude of protective and relationship-building functions and actions.

In reality, the different levels of police activity have many interdependencies that simply cannot be separated. Neighbourhoods, for example, suffer from the effects of organised drug dealing, and the reassurance that a neighbourhood team brings can be undermined through a terrorist attack. The effects flow both ways, and neighbourhood policing can produce really effective intelligence on cross-border organised crime. There can be no false divisions between the neighbourhood service and the wider protective agenda; both contribute to the totality of good policing and confidence.

Neither will there be a watering down of the accountability of the police service to deliver across the board, irrespective of whatever government is in power. The electorate of today would not allow this to happen. The fact that overall confidence in policing has fallen, in contradiction to reductions in crime, is indicative of higher expectations and uncertainties.

The real debate, therefore, is how can we improve the overall capability of the police to achieve good policing, rather than targeting specific issues at the expense of others? The toolbox of methods and interventions available to the police is massive, but a solution to a problem often needs the use of many tools, not simply one in isolation. In effect, we should be exploring with government whether our existing outlook, skills, ways of working and the rules that affect this encourage or impede the potential of good policing. This will raise controversial issues, but they need to be confronted.

If the public desire to be safe and feel safe is to be realised, then we have to explore the hindrances from all perspectives. Force amalgamations and boundary changes may support the "be safe and feel safe" outcome but will not achieve it alone. I am convinced that amalgamation is necessary to provide greater flexibility, consistency and efficiency, but if we are not careful it will simply result in a reshuffling of the deck.

Furthermore, any cost benefits or efficiency savings will not be apparent until the longer term, and care must be taken that historical funding gaps are closed. Understanding capability in the here and now is not only an essential prerequisite to successful amalgamations, but absolutely necessary if the citizen is to come first.

Making good policing the target of all policing

The first step is to consider carefully whether the overall outlook of the police service is forward-looking and focused upon improving quality of life, or whether it remains predominantly reactive and task-oriented. Many of our recent improvements have come in the wake of very public crises and their subsequent action plans – the tragedy of Stephen Lawrence, Soham and the "secret policeman" exposé, to name but three.

In other words, improvement has often been retrospective, rather than forward-looking and anticipatory. Clearly, in a world of extreme busy-ness it will always be impossible to keep focused on every risk or vulnerability, but there would be merit in encouraging a greater emphasis upon, and a permeating culture of, continuous improvement. A simple step would be to raise the profile of competencies such as innovation and communication at every level of the service, and to demand supportive evidence for these skills when it comes to career progression or reward.

Leadership, whether at street, departmental, or command level, should demonstrate an unwillingness to accept the status quo, balanced by a rigorous approach to reform that always considers whether the citizen is being helped or supported by a proposed change. If we are going to target policing towards the vision of good policing outlined above, the systems and processes can never become outcomes in themselves. If this is not the case, then ways of working, however laudable in their ambitions, can actually reduce public confidence.

For example, reporting people for petty breaches of the law in order to meet performance expectations, or sending out impersonal victim letters just to keep to a timescale within a charter, do not contribute to meeting the overarching aim of providing a service that allows people to be safe and feel safe. Similarly, hypothecation of fine revenue can alienate the public if it is perceived as simply about revenue and not safety. The process, system or activity should always be focused upon the well-being of citizens and be to their benefit. If not, inefficient and expensive practices can be sustained and perpetuated at the expense of genuine protection.

A new understanding of the mission – policing as social enterprise

In this respect, I believe good policing demands a new understanding of the mission and outlook of policing. I have become more convinced that managing complexity requires policing to be seen, and to see itself, as a social enterprise rather than as servicing the needs of the criminal justice system. Investigation, arrest and prosecution are essential in

protecting people, but they are not solutions in themselves. They are some of the tools to be used in bringing about social justice and quality of life, and should be seen that way.

I find some of the definitions of social entrepreneurship very compelling. For example, according to J Gregory Dees, in *The Meaning of Social Entrepreneurship*, social entrepreneurs play the role of change agents in the social sector by:

- adopting a mission to create and sustain social value;
- recognising and relentlessly pursuing new opportunities to serve that mission;
- engaging in a process of continuous innovation, adaptation and learning;
- acting boldly without being limited to the resources currently in hand; and
- exhibiting heightened accountability to the constituencies served and for the outcomes created.

In many respects this is being demonstrated by neighbourhood policing. For example, social entrepreneurs attack the underlying causes of problems rather than treating symptoms and seek to create sustainable improvements. The main difference with policing is that social entrepreneurs invest profit back into the community, although it could be argued that sponsorship, multi-source funding and precepting have brought policing more in line with this practice.

In any event, neighbourhood policing takes public confidence, or emotional capital, and uses it wisely for the good of all. This is of immense importance, particularly with polarised and isolated communities. It also reinvests the information given by willing public allies to make further improvements in the locality.

It would be enormously beneficial if the entrepreneurial nature of neighbourhood policing could permeate throughout the entire organisation and its partners. Indeed, as people who should be independent from political or personal agendas, this would give the police enormous legitimacy with all communities, without compromising our constitutional position or accountability. I see little difference between this and the principles set down by the Independent Commission on Good Governance: notably, focusing on outcomes for citizens and users and engaging stakeholders and making accountability real.

There are massive opportunities to engender this culture through the neighbourhood policing programme, through devolution of initial learning and development, through leadership training and through consistent performance review. We should target a more

robust understanding of social mission, thinking about citizen needs and, frankly, employing common sense in all our activities.

This may not be such a large step as would have been the case even relatively recently. For example, the police service has taken the duty to promote equality far beyond the setting of policy, in a way unparalleled elsewhere. The banning of police membership of extreme groups, widespread support for faith groups in the aftermath of terrorist outrage, and even pushing the boundaries of positive action are clear signs of a social entrepreneurial culture.

Targeting governance

The second step is to consider whether the ways in which policing business is carried out actually support or impede such enterprise. At the heart of such consideration lies the issue of governance and whether existing arrangements are fit for the purpose. Three issues in particular are pertinent: that the complexity of the policing environment has increased; that the growth and nature of public risk has accelerated; and finally that solutions to quality of life problems transcend partnership boundaries.

It is clear that modern governance should be less focused on committee structures and statistics, and more dynamic in its assessment of risks and public confidence. Plans, resource allocations and programmes need to be constantly informed by real-time information. With the advent of strategic forces, it will be essential that strategic governance concentrates its efforts upon outcomes, risks and overall capability rather than rules-based micromanagement. For example, rather than duplicating existing consultation, emphasis should be placed upon ensuring that citizens are engaged consistently at neighbourhood level and their concerns being met.

Similarly, there must be clarity of accountability at local level. There are now a number of bodies essentially working in the same territory: consultative groups; crime and disorder and local strategic partnerships; scrutiny committees; and police basic command unit liaison meetings. These bodies are often attended by the same people, dealing with the same issues of local concern. As such, it should be possible to create local community safety arrangements that are non-bureaucratic, tidy up duplication and still hold local leaders mutually accountable for the resolution of local issues.

The public challenge would then be focused, not dissipated, and partners encouraged to collaborate fully. In doing so, great care should be taken not to allow vested interest or

artificial boundaries to restrict the matching of resource against threat. It would be hugely damaging to ringfence resources at local level if neighbourhoods were being threatened by an escalation of the drug trade from beyond their boundaries. The key is to listen and be answerable for both action and inaction.

I would also wish to see a much tighter focus on the absolute non-negotiables that partnerships should deliver if communities are to be safe and feel safe. The local area agreement framework must deliver on offender management, priority neighbourhoods, vulnerable families and specific local risks if it is to have impact across public service agreements. More collaboration on improving capabilities is required, rather than the design of plans and targets.

Targeting business disciplines

The third step is to ensure that a new generation of entrepreneurial leadership has the business skills to make informed judgments about appropriate organisational structure, prioritisation and collaboration. Neighbourhood policing quite rightly addresses local security issues and perceptions, but this is predicated upon getting the right people in the right places, in the right numbers. This means the use of better information and analysis to conduct objective assessments of vulnerability, and then ensuring policing structures are designed against reality, not philosophy! There will be little impact against crime or promotion of cohesion unless local policing matches demand and opportunity. The cost of getting this wrong affects all taxpayers and most certainly undermines social justice.

As I have written on a previous occasion, we must not be driven by the mistaken notion that fairness means evenhandedness when a "one size fits all" style of policing may actually disadvantage everyone. Setting and establishing an acceptable level of service is not the same as ensuring a local capability to tackle problems of differing intensity. The best-performing basic command units in recent pilots have been those who have explored in depth geographical and time-based demands upon policing, and have allocated resources objectively. They also constantly review the mix between 24-hour demand, investigation, specialist squads and neighbourhood policing to ensure it is the most effective possible.

Likewise, leaders should be able to replicate the commercial world in designing critical organisational processes to be as streamlined and relevant as possible, thus avoiding unproductive busy-ness. Criminal justice, crime recording and call management are three processes that should support citizens but can become self-perpetuating bureaucracies.

Targeting the targets

This leads on to the fourth step; reviewing the impact of national changes to police accountability and performance measurement. There is undoubtedly a real consensus politically, and within the police service, on putting the citizen at the heart of public services and bringing about civil renewal. Neighbourhood policing has been developed and led by the police service, and given tremendous political impetus and tangible funding. However, there are dangers that the shared desire to improve standards, particularly in relation to police performance assessments, has introduced anomalies and perverse incentives.

The statistically neat system of comparison based upon recorded crime and most similar force is in reality subject to significant variables. If not understood or used wisely, this has implications for public confidence. Recorded crime figures are affected by a wide range of factors: how accessible the police are to the public; operations to tackle disorder and the issue of new fines; legitimate interpretation of crime-recording rules; and even local public service agreements to raise the level of reported hate and domestic-related crimes. Most "similar" forces can be actually quite dissimilar from a criminological perspective or with regard to resource history.

This can have a number of consequences. First, local confidence can be undermined if a force is portrayed as performing poorly, when in actual fact it is doing all the things that the citizens demand. The difference between British Crime Survey and recorded crime-based assessments can be very stark; perhaps this is an endorsement of the above observations. Second, it can encourage resources to be shifted from functions that are important for public protection into activity to improve a specific target or indicator.

In effect, managing the risk of central intervention takes precedence over managing public protection through objective threat assessment. There is also the danger that numbers become more important than citizen-focused interventions, such as restorative justice.

At present there is little incentive to follow restorative approaches because they do not feature in performance outcomes and take time to facilitate. I have no concerns about information-based comparisons, or even targets, provided they form the basis for questions and are not taken at face value.

There has also been a very real rise in inspections, initiatives and guidance emanating from a wide variety of well-meaning sources, including the police service itself. These

inspections and initiatives are all laudable, but the sheer number can result in tick-box responses rather than thorough learning and development.

Furthermore, each inspection and initiative usually demands more investment in the area under the microscope, but when taken together the expectations cannot be realised. The worst-case scenario, of too high expectation and too little capacity, is that of public promises remaining unfulfilled. We do need greater prioritisation and co-ordination and less prescription in how to achieve standards, particularly if the enterprise culture is to flourish.

The establishment of the National Police Improvement Agency represents a huge step forward in this respect and is to be welcomed. The agency will put objective strategic assessment of threats and risks at the centre of its activity and will identify and address critical issues for the police service. If government, police service and other partners take true cognisance of its work, then there should be a growing link between threats, performance regime and initiatives. This would be genuinely joined-up public service, with fewer national imperatives and more local discernment of policing priorities.

Conclusion

In this chapter I have outlined the potential and attributes of good policing and how we should be targeting its overall development, rather than specific issues or problems. The world will not slow down for the convenience of the police service and we need to improve our capability to protect, listen to and support the citizen simultaneously.

Many of the lessons and answers are to be found in neighbourhood policing, although the scale of the task should not be underestimated, especially if we are to create a culture of innovation and enterprise. Recent reforms have resulted in significant improvement but there is a need to reassess whether some have inadvertently moved the citizen from centre stage.

Finally, the future is complex but I am optimistic we have the creativity, pragmatism and resolution to deliver good policing. For me, that is an ambition worth targeting.

Chapter 11

Harnessing communities to make neighbourhoods safer

Lord Hastings of Scarisbrick CBE, Chairman of Crime Concern

Harnessing communities to make neighbourhoods safer

Lord Hastings of Scarisbrick CBE

Over the past half-century we have seen a marked change in citizen involvement in the criminal justice system and community safety. Increasingly, citizens turn to the criminal justice system to deal with problems that, in the past, others might have mediated or resolved.

The postwar growth of public services heralded the beginning of a decline in community self-regulation and action. Although there are now signs that efforts are being made to reverse this trend, the prevention and early resolution of even low-level crime and disorder are still overwhelmingly perceived to be something "done by other people", that is, professionals. Accordingly, situations and issues that might be addressed more realistically, successfully and economically at community or neighbourhood level are seen as the responsibility of the state.

This chapter argues that the political consensus of increasing community-based approaches to crime reduction should be embraced enthusiastically and developed. It examines practical ways in which this could be achieved, and asks what can be learned from the wealth of excellent schemes that already exist. It argues too that evidence now supports a more visionary and pragmatic approach, which could better guarantee sustainable solutions for individuals and communities.

Problem-solving justice and confrontational justice

The increased professionalisation and complexity of society over the past half-century or so has unwittingly led to a dependency culture in which citizens habitually look to the state for solutions to many of their problems, for example in the area of welfare. In the crime and justice arena this has resulted in more police, probation and prisons, even though crime rates have fallen over the past 10 years. An adversarial system has evolved whereby justice has become confrontational rather than problem-solving.

The relatively recent creation of crime and disorder reduction partnerships, local criminal justice boards and neighbourhood policing illustrates an accepted need to stitch back together disparate elements of the state and to reconnect the state with citizens.

There are solid imperatives, let alone applied natural justice arguments, for supporting those unable to support themselves; but in the criminal justice field the disempowerment

of individuals and communities has built a reliance on a paradigm of (state) enforcement and court-based justice to solve many community problems. As community safety has become the province of professional groups and managerial systems, responsibility for neighbourhood dispute resolution and crime prevention has been taken away from the very individuals, families and communities often best equipped to affect sustainable change.

This detachment has been exacerbated by a decline in the informal social controls previously provided by the uniformed presence of groups such as park wardens and bus conductors. The increasingly stateist approach to community safety has been accompanied by increasing central control, characterised by nationally imposed targets and systems that check what little local autonomy remains.

Involving communities in delivery

Yet crime prevention and justice can be delivered without always resorting to the adversarial, expensive and often ineffective (in terms of recidivism) criminal justice system. Recently there have been signs that this status quo is being challenged and reversed, with, for example, the introduction of drugs treatment and testing orders and parenting orders and the debate about "respect".

Just as we increasingly view citizens as co-deliverers of public services, be it families and employers supporting learning or individuals taking responsibility for addressing their health needs, so a mature endorsement of wholesome family and community life will of itself release the energy needed to address the challenge of much crime and disorder.

Community-based approaches to crime prevention and community involvement in the criminal justice system should be championed for reasons of social justice as well as efficacy, cost-effectiveness and the real and perceived enhancement of local democracy and accountability.

The evidence for the economic case is compelling. For example, the Birmingham Safer Neighbourhood Programme, which was established in order to enhance quality of life and encourage community engagement, achieved impressive results. In the two years following its commencement in 2002,[83] youth crime fell by 29%, overall crime was

83 The project is based in five high-crime areas of Birmingham: Fox Hollies, Glebe Farm, Kingstanding, Nechells and West Northfield.

reduced by 14%, and it achieved an estimated saving in the costs of crime of £6.4 million against an investment of £600,000.[84]

The much discussed Perry Preschool Programme,[85] which identified short- and long-term effects of high-quality preschool education programmes for children living in poverty, found the economic return to society to be $17 per dollar invested. Of the public return, 88% came from crime savings.

At a national level, economic modelling by the Home Office for the Youth Justice Board[86] estimated the benefit of diverting an individual before they committed an offence as approximately £160,000 over the first five years. It also estimated that another 200 youth inclusion projects[87] would result in a net benefit of £41.4 million to the Exchequer. With the annual costs of crime estimated at £36 billion,[88] the case for increased funding for prevention and early intervention is persuasive.

With regard to efficacy, traditional recourse to the criminal justice system can be ineffective – failing to tackle the underlying causes of crime. Three-quarters of men in prison are affected by two or more mental health problems.[89] Just under a third of young offenders have basic literacy and numeracy skills, as do a quarter of those aged 25 and over in custody. Nearly three-quarters of young offenders have been excluded from school at some stage, and 63% are unemployed at the time of their arrest. Without effective support addressing these root causes of behaviour, recidivism rates will remain unacceptably high, with approximately three-quarters of young people reconvicted within one to two years of release from custody.

In contrast, the preventative Youth Justice Board-funded youth inclusion programme, which works with "at risk" young people aged between 13 and 18, has achieved reductions of 65% in the arrest rates for the young people considered to be most at risk of crime in

84 Based on figures from Brand, S and Price, R *The Economic & Social Costs of Crime*, Home Office research series paper 217 (2000).
85 Schweinhart, LJ, Montie, J, Xiang, Z, Barnett, WS, Belfield, CR and Nores, M *Lifetime Effects: The High/Scope Perry Preschool Study Through Age 40* (High/Scope Press, 2005).
86 *Early Intervention Programmes Assessment* (Home Office, February 2004). The paper was part of background analysis leading up to the 2004 spending review.
87 Projects that target young people, aged between 13 and 18, who have been identified by the authorities as being at risk of offending. Another 20 youth inclusion projects would target 10,000 young people.
88 *The Economic & Social Costs of Crime Against Individuals & Households 2003/04* (Home Office, June 2005).
89 As reported in May 2004, at a conference held by the Prison Reform Trust and the mental health charity Mind, entitled "Troubled Inside – Responding to the Mental Health Needs of Men in Prison".

each locality.[90] Unfortunately, at present there are less than a hundred of these scattered around the country. Even though more will be in place over the coming year, the scale of need is daunting.

The recent evaluation of the government's successful Positive Futures programme, which uses sport as an engagement and development tool for young people,[91] also concludes that non-enforcement-heavy approaches to some of the hardest-to-reach young people can be most effective: "Through building relationships on the basis of mutual trust and culturally appropriate understanding, there is a greater potential to influence young people who have not responded to more authoritarian approaches." The evaluation found that authoritarian approaches to changing the behaviour of troubled young people are often futile: "Staff with a very prescriptive way of dealing with behaviour struggle to establish young people's respect."

Encouragingly, there is already a wealth of community-based approaches to crime prevention that have proved themselves to be effective. These schemes must be replicated by the score, with sustainable funding, in order to make a major impact.

The role of social capital

While there is great scope for such community-based crime prevention, this potential will be fully realised only with improved social capital, which in turn, in a virtuous circle, it will help promote. Contemporary low-level crime and antisocial behaviour cannot simply be attributed to economic deprivation, when society has generally become more affluent. Instead, evidence is emerging that it is an absence of social capital that can undermine a locality's resistance to crime and disorder.

Conversely, evidence suggests that it is this "social glue" that can have the most powerful impact on crime prevention. Work by academics such as Robert Putnam has shown how neighbourhoods with higher levels of "collective efficacy" – where more neighbours know each other and are more likely to intervene in minor incivilities, where people take personal, family and societal responsibilities seriously, and where norms, values and understandings are shared – suffer significantly lower levels of crime.[92]

90 Burrows, MH *Evaluation of the Youth Inclusion Programme* (Youth Justice Board, July 2003).
91 Crabbe, T *Getting to Know You: Engagement & Relationship Building*, first interim National Positive Futures case study research report (Home Office, June 2005).
92 These positive effects are found even having controlled for socioeconomic factors and prior levels of crime, suggesting the effect is causal.

As a recent Cabinet Office discussion paper noted:[93]

Crime and antisocial behaviour are at least as strongly affected by the values and behaviour of individuals and communities as by the activities of the police and criminal justice system.

A recent report[94] by the Joseph Rowntree Foundation concurs, concluding that much antisocial behaviour is attributable to the breakdown of communities and the creation of an educationally underachieving group of young people who have "disengaged themselves from everything".

Fragmented communities are also less likely to assist enforcement agencies, particularly in the sharing of intelligence and supporting prosecutions. Witnesses and victims can live in fear of reprisals. With antisocial behaviour orders, communities can play a vital supportive role by providing evidence of antisocial behaviour. An example of such community involvement is the Brighton New Deal for Communities area, where the board includes a substantial number of community members, who engage well with the projects – lending credibility and building trust between the agencies and the community.

Mutuality and respect, not hierarchy and deference

Yet, in seeking to build social capital, we must resist the temptation of striving to recreate some nostalgic and romantic ideal of a stable and orderly community – a concept that is unrealistic in today's more mobile and diverse society, and that probably never existed anyway. Indeed, as Geoffrey Pearson noted in his book *Hooligan: A History of Respectable Fears*,[95] every generation since the 19th century has feared the decline of morality and communities. Pearson quotes a magistrate for Brighton giving his opinion on juvenile crime in 1898 – expressing sentiments that are echoed today:

The tendencies of modern life incline more and more to ignore, or disparage social distinctions, which formerly did much to encourage respect for others and habits of obedience and discipline.

93 Halpern, D and Bates, C *Personal Responsibility & Changing Behaviour: The State of Knowledge & its Implications for Public Policy* (Prime Minister's Strategy Unit, February 2004).
94 Millie, A, Jacobson, J, McDonald, E and Hough, M *Anti-social Behaviour Strategies: Finding a Balance* (Joseph Rowntree Foundation, 2005).
95 Pearson, G *Hooligan: A History of Respectable Fears* (Macmillan, 1983).

The communities we strive to build should be based on self-respect and respect for others – not on deference and hierarchy. Moreover, we must also be sensitive to the fact that not all close communities are a force for good. As recent tragic events have shown, communities can be insular and hostile to outsiders of different races or faiths. Work by Robert Putnam articulates the case for bridges between communities as well as bonds within them.

So the evidence is compelling; the default response to community safety issues should not just be to automatically fall back on authoritarian, centralist state interventions – simply through legislation and enforcement – however necessary this may be in some circumstances. While functioning and harmonious societies depend on the vast majority of the population subscribing, and adhering, to laws and norms of behaviour, not all behaviour is responsive or susceptible to legislative intervention.

The public peace is ... not kept by the police, it is kept primarily by an intricate, almost unconscious, network of voluntary controls and standards among the people themselves, and enforced by the people themselves.[96]

Society does need minimum norms of behaviour to be laid down by law and enforced, but the state should also create the conditions to stimulate and encourage the growth of social capital, while simultaneously providing targeted interventions to tackle the underlying causes of crime.

Formal and informal structures

Both formal and informal means exist to involve communities in crime prevention and community safety initiatives. Voluntary, community, faith and not-for-profit organisations have important parts to play in realising these; harnessing the credibility and relationships they enjoy at a local level in a way that the state (be it national or local government, or the police) can rarely achieve. The work of the third sector is especially valuable in deprived areas, where crime is highest but where perceptions of the state are often especially poor, and where people may be reluctant to take up state services.

Communities, if supported, often know best how to respond to their own particular circumstances. The success of a number of programmes proves that the behaviour of

96 Bowling, B and Foster, J "Policing and the Police" in Maguire, M, Morgan, R and Reiner, R (eds) *The Oxford Handbook of Criminology* (Oxford University Press, 2002), pp980-1033.

troubled young people can be turned around. A study of a Brooklyn neighbourhood in the 1990s noted that the "devastation wrought by drug markets and the 'war on drugs' in a number of communities had a profound effect on young people". "The multiple threats of violence, crime, AIDS, and addiction" compelled many young people to "[withdraw] from the danger and [opt] for the relative safety of family, home, church and other sheltering institutions".[97]

Closer to home there is an abundance of examples where young people, ostensibly against the odds, have taken responsibility and turned away from crime, and – in some cases – been a force for good in their communities. For example, a group of young people in Manchester set up a regeneration forum and worked with architects to development a multi-sports area in their local park (Crowcroft Park). The group then accessed a cash grant from Manchester City Council to provide lighting in the park. In 2000 they were commended with a Phillip Lawrence Award, and some seven to eight years on the arena is still well used and graffiti-free.

There are also numerous examples of young people being supported by third-sector organisations. For example, the Youth Action Group approach, which was pioneered by Crime Concern, engages and empowers young people to participate proactively in their communities. The groups, working out of schools and pupil referral units, and often with the police, have tackled issues ranging from truancy to mobile phone and shop theft to carrying knives and other weapons. With the support of Prudential Property Investment, they have also worked effectively with shopping centre managers and businesses to address crime and safety issues.

The results from this initiative have been impressive. For example, there was a 70% reduction in youth nuisance and antisocial behaviour in the Washington Galleries shopping centre in the first year of the project. Participation in schemes such as this have a positive impact on the young people as well as their communities – for example, 66% of young people taking part in Barnet Action 4 Youth felt the programme had helped them stay in school, while 85% felt the programme had improved their school attainment.

The youth apprentice programme that Crime Concern runs with the support of Norwich Union is another example of young people being instrumental in turning around communities. The programme, which is being trialled in Nottingham and Leicester, has

97 Curtis, R "The Improbable Transformation of Inner-city Neighborhoods: Crime, Violence, Drugs and Youth in the 1990s" in *The Journal of Criminal Law & Criminology* vol 88 (4) (1998).

recruited, developed and supported young people to work with other young people to create safer communities, and is creating a new generation of community safety activists.

With the final evaluation awaited, the interim findings report that "through the support of the apprentices" the aim of empowering young people to develop and implement projects in their own communities "is being achieved". Resident feedback is also very positive; for example:

We want to bring about a community spirit. With Michael's training and Hassan's training that can happen. They talk the language of the children. They talk their language and they can talk to them. Not down to them.[98]

Community-based crime prevention projects can also be effective in tackling the fear of crime. Intergenerational projects, which bring together young and elderly people, can help address the misconceptions many elderly people have about young people – misconceptions that are fuelled by the media and yet ignore the fact that elderly people are statistically less likely than young people to be the victims of crime.

In Wandsworth, for example, young people from the youth inclusion project cook at an old-age pensioners' lunch club, in addition to maintaining the allotments of local elderly people. This intimate approach is clearly more effective at allaying elderly people's fears than any distant government-run educational campaign.

Involving families

The importance of individuals, families and communities in creating and maintaining flourishing, harmonious and safe communities is paramount. Strong families, with their bonds of affection and duty, are often the relational heart of communities. As such, they have an unparalleled opportunity to encourage obligations and positive behaviour. Projects such as Gorton Against Drugs & Alcohol Abuse, where a group of parents provide drugs education for their children, peers and siblings in schools, are evidence of what communities can achieve with the right support.

Ineffective parenting[99] may precipitate or exacerbate nuisance behaviours in children. The government has recognised this and responded by recently announcing a series of

98 Quotation taken from a film on the programme made by Norwich Union, 2005.
99 Ineffective parenting can be due to prevalent cross-generational antisocial attitudes, mental health issues, or substance dependency.

initiatives designed to improve parenting. This support – if sensitively given – should be welcomed. Wherever possible the state should support parents to raise children themselves, rather than assume the responsibility itself.

Despite many tens of thousands of children being successfully protected by the state, when it comes to parenting, the state has a dubious and troubling record; children in care are three times more likely to be cautioned or convicted than their peers.[100] Moreover, parenting programmes can be extremely successful; the Youth Justice Board parenting programme[101] recorded a 50% reduction in the number of offences committed by children of parents on the programme.

In fractured families, fathers are especially likely to be absent from children's lives. Research from the USA shows that children of prisoners are six times more likely to end up in prison than their peers. Work by the National Family & Parenting Institute confirms what most have long suspected: that strong positive relationships between children and fathers are associated with a range of benefits later in life, including lower criminality.[102]

Getting the incentives right

Creating the conditions that build social capital is not easy without being prescriptive, and thereby stymying the very flexibility that local community initiatives bring. However, incentives, correctly used and orchestrated, can stimulate social capital and encourage community-based approaches to tackling crime from both individuals and organisations.

At an organisational level, the long-held debate about restorative justice not counting towards police sanction/detention targets highlights clearly a missed opportunity. Used appropriately, restorative justice – which seeks to address the concerns of both the victim and the community with the need to deliver justice and reintegrate the offender into society – promotes self-responsibility in offenders and helps victims feel that offenders have acknowledged the harm of their behaviour.

At an individual level, much more could be done (without recourse to anachronistic hierarchical and deferential models) to encourage people to take responsibility for their actions. Serious consideration should be given to incentivising pro-social behaviour.

100 *Outcome Indicators for Looked-after Children* (Department of Health, 2002).
101 Ghate, D and Ramella, M *Positive Parenting: The National Evaluation of the YJB's Parenting Programme* (Youth Justice Board, September 2002).
102 Lewis, C and Warin, J *What Good Are Dads*, commissioned by Fathers Direct, National Family & Parenting Institute, Newpin and Working with Men (2001).

Historically, UK governments have focused on disincentivising crime and antisocial behaviour. Yet policy initiatives in the USA suggest that carrots may be more effective than sticks in changing behaviour. The Cabinet Office strategy unit paper mentioned earlier cites the experience of the USA, where behaviour has been improved through incentivising initiatives, and notes: "Interestingly, the evidence is that this positive form of conditionality can often be rather more effective than the conventional negative forms." The report draws a parallel with tenancy agreements that differentiate levels of service responses according to the behaviour of the tenants, and which "represent a relatively clear example of conditionality aimed primarily at reducing [antisocial behaviour]".

The Community Merit Award programme, piloted by the Youth Justice Board, is evidence of the power of incentives. The programme aims to engage young people in community renewal work through the provision of rewards. Initiatives generated by the programme range from decorating projects and community gardening schemes to community clean-ups.

Independent evaluation[103] found that the scheme was highly effective in helping young people to feel they had a place in their communities and in encouraging local residents to view young people more positively. The evaluation concluded: "Almost without exception, young people have been able to describe, in a positive way, how they are now regarded in the areas where they live."

Interestingly, while material rewards may have been significant in encouraging young people to become involved initially, young people's motivation soon shifted to job satisfaction.[104]

Communities as sources of lasting change

So the government must resist imposing solutions on communities. Instead it should seek to create the climatic conditions that will support communities to bring about lasting change themselves. Means of crime reduction other than recourse to the police or the ever more stretched criminal justice system (with its overcrowded prisons) must be properly explored. The police cannot be expected to be the panacea for all of society's ills. Yet the demands on them are ever expanding. Sir Ian Blair, the Metropolitan Police

103 *Community Merit Awards: An Evaluation* (Youth Justice Board, 2005).
104 One project manager reported that: "Although the intention of Community Merit is to reward young people for their involvement, participants have often had to be reminded of this and in reality very little reward has been claimed, other than the satisfaction of a job well done."

Commissioner, eloquently articulated the complex and growing demands being made on the police in his recent 2005 BBC Dimbleby lecture.

Communities, armed with social capital, will often be the appropriate place to tackle crime, the underlying causes of crime and the fear of crime. The police should be released much more to concentrate on what they, and they alone, are best placed to do. The political debate about police numbers and the need for ever more punitive legislation is sterile and should be abandoned. In its place should be a debate about effective, economic and sustainable socially just alternatives.

Responses such as community courts, restorative justice and community sentencing, which acknowledge that communities have a responsibility to act in the interests of the collective and the individual (which will inevitably include perpetrators and victims), should be encouraged. These responses attempt to rebuild social capital and look on perpetrators as both part of and a solution to the problem. They allow people (often those in the most deprived areas of Britain, who are most likely to be victims of crime) to deliver their own services, rebuilding fractured economic and social capital.

However, this vision can be achieved only with a major reinvestment strategy to shift major resources towards prevention and early intervention, not simply a few window-dressing initiatives. Such a strategy would pay rich financial and social dividends in the medium to long term. Thought needs to be given to the shape of such a reinvestment strategy and it will have to address some of the inevitable professional and institutional resistance. It will mean looking increasingly to the third sector to deliver services and harness added community resources.

Recent research from the USA supports such an approach, concluding:

While incarceration is one factor affecting crime rates, its impact is more modest than many proponents suggest, and is increasingly subject to diminishing returns. Increasing incarceration while ignoring more effective approaches will impose a heavy burden upon courts, correction and communities, while providing a marginal impact on crime.[105]

Redirecting the debate and resources towards community-based and upstream crime prevention will require solid political courage and leadership to counter and challenge the

105 King, R, Mauer, M and Young, M *Incarceration & Crime: A Complex Relationship* (Sentencing Project, 2005).

punitive agenda peddled by some parts of the media. It would also require confidence in the public to react rationally and to listen to the evidence from the criminal justice world, including the police, to face change with maturity. Old habits die hard.

However, not only is this the right thing to do if we want to see long-lasting results, but with the correct presentation, the case for change is likely to be palatable to an electorate that (repeated surveys show) is less punitive than it is often imagined to be. The well-intentioned mantra of "tough on crime, tough on the causes of crime" has become tired. Perhaps a commitment to being "tough on crime, *smart* on the causes of crime" is what is required to deliver real and lasting change.

Part IV: The delivery of justice

Chapter 12

Due process and social justice – time to re-examine the relationship

Roger Smith, Director of Justice, and Sally Ireland,
Senior Legal Officer (Criminal Justice) at Justice

Due process and social justice – time to re-examine the relationship

Roger Smith and Sally Ireland

Only by rebuilding cohesive communities and reforming the system to bear down harder on antisocial behaviour can we achieve our vision of a strong and fair society. That is why reforms to restore civic responsibility are not a threat to social justice, but essential for its realisation in a modern society.
Tony Blair, speech on antisocial behaviour, 2003

The scale, organisation, nature of modern crime makes the traditional processes simply too cumbersome, too remote from reality to be effective ... To get on top of 21st-century crime, we need to accept that what works in practice is a measure of summary power with right of appeal, alongside the traditional court process.
Tony Blair, speech launching the Respect Action Plan, 2006

Justice is a concept that, in addition to giving its name to our organisation, resonates on several different levels. In the criminal justice system, "to do justice" embodies both notions of society's judgment upon particular conduct, and the idea of procedural fairness – due process – in a particular case. However, as long ago as 1971 John Rawls defined justice as "a proper distribution of the benefits and burdens of social co-operation":[106] what we now call "social justice".

This has traditionally been thought of as a matter of economic policy and social provision, and as having very little to do with ideas of fair procedures – or "due process" – in the criminal justice system. The human rights tradition has also polarised these two notions: social justice has been placed in the category of socioeconomic or welfare rights; notions of due process are firmly within the civil and political rights traditions.

One of the great achievements of the New Labour movement has been to recognise that the criminal justice system has a part to play in furthering the goals of social justice, and that these goals should help to determine its priorities. Social exclusion and economic deprivation make people vulnerable to crime and its consequences; in rights terms, a crime may not only be a direct interference with a fundamental right but may also inhibit the enjoyment of other rights – the human "flourishing" that is the goal of human rights protection.

106 Rawls, J A *Theory of Justice* (Harvard, 1971).

The government has recognised that the social justice agenda can be furthered by taking action against crimes that perpetuate social exclusion and blight the lives of the poor and vulnerable in society. This can be seen in two areas: one, the targeting of crimes – often "hidden" crimes – against vulnerable groups, such as domestic violence and racial harassment. This is an area with which the Director of Public Prosecutions, the Crown Prosecution Service, police and the government have, creditably, sought to grapple, although there remain allegations that cases with sexual and racial elements are not treated properly by police and prosecution.[107] The other is the increasing attention paid to urban crime and disorder in deprived areas through the antisocial behaviour agenda, which has mobilised a variety of agencies not traditionally at the forefront of fighting crime.

However, it is wrong to regard the other type of justice – due process – as expendable in the quest for efficiency and effectiveness in the system. Due process has been associated – as in the Prime Minister's second quote above – with traditionalism, an attachment to the forms and procedures of the criminal justice system, which hampers the fight against crime. It is also wrong for those of us in the legal profession and the human rights lobby whose traditional focus has been upon defence rights to ignore the potential of the criminal justice system to produce social justice outcomes.

In fact, the fair treatment of the individual defendant or suspect – due process – is both beneficial to, and indivisible from, the furtherance of social justice. Where due process is compromised, social exclusion and existing inequalities are perpetuated or even worsened. Nor does the loss of due process, in the long run, further the cause of efficiency: the breakdown in public confidence that results can lead to the system becoming compromised and increasingly ineffective.

Measures such as community policing in former no-go areas like the Broadwater Farm estate in Tottenham, and the piloting of community justice centres in Liverpool and Salford, demonstrate recognition of the importance of building public trust if the system is to be effective. But history has also shown us that due process – justice being done and being seen to be done – is vital if that trust is to be maintained.

The breakdown of respect for the institutions of the law brought about by a chain of miscarriage of justice cases in the early 1990s led to a major loss of legitimacy by the courts, the justice system and the police. The consequences linger on. Juries remain

107 For example, "Why We Believe the Police Have Lost Sight of Rape" in *The Times* (17 January 2006).

considerably more sceptical about police evidence than they had been previously.

But a commitment to due process does not mean resistance to reform – far from it – nor even that a traditional trial process is the only appropriate response to every type of criminal behaviour. We must therefore define what is required by due process, in order to sort the principle, which we hold sacrosanct, from the differing methods by which it can be implemented.

What is due process?

In the USA "due process" is a right expressly protected in the constitution, particularly in the fifth and 14th amendments, the latter of which reads:

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In the UK, we more frequently use other phrases to embody this notion – the older ones, of domestic origin, were "natural justice" or a "fair hearing"; we now judge the fairness of our procedures by the European Convention on Human Rights. Thus Article 6 of the convention begins:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...

The article imposes further requirements for criminal proceedings – such as the right to counsel, to an interpreter if necessary, and to examine the prosecution witnesses. These requirements are specific; but all they do is to lay down what is required, in a criminal trial, for the procedure to be fair. More is required of criminal cases not merely because they can result in the loss of liberty, livelihood and reputation, but because they have so great a capacity for unfairness, owing to the relative powerlessness of the individual as opposed to the prosecuting authorities of the state. These guarantees are, quite simply, common sense measures that aim to prevent a wrongful accusation from becoming a wrongful conviction.

It has been suggested, however, that the requirements of a fair trial can hinder rightful convictions. The Prime Minister, in his speech on 10 January, gave the example of "person X with £10,000 on them in cash in the middle of the city at 2am", saying that "to prove that ... [they]... got this money through specific acts of drug dealing is too hard. You may know it. But how do you prove it?"

The obvious answer to that question is: through evidence. If it is difficult to persuade local residents to come forward as witnesses, we now have, among other resources, one of the most comprehensive CCTV networks in the world to fall back on. In matters like these, knowledge that is not based on evidence is not knowledge at all, but assumption. And assumption, whether we like it or not, tends to reflect our prejudices, and those of the society that we inhabit.

The Prime Minister's example, while not in itself racially specific, is not so far away from what people used to say about black men who drove BMWs. To illustrate the point, we should ask ourselves – what characteristics would person X have to have to make us believe that their £10,000 came from drug dealing? We should then consider who the people are, other than drug dealers and money launderers, who tend to keep cash at home and not to have bank accounts – often elderly working-class people or people with transient lifestyles. It is a rather sobering process.

In advocating the Respect agenda, Tony Blair was keen to point out that in increasing our levels of respect for each other, we should not return to the old ideal of deference, to the social mores of the 1950s. His vision is of a meritocratic society: "We have left behind an era in which we refused to respect people because of who they *were*. The only reason to withhold respect is because of what people *do*." [108]

Genuine equality of opportunity – one of the key principles of social justice – cannot be achieved merely by focusing on crimes against marginalised groups. It also requires due process. It is surely axiomatic that whether you are arrested or convicted of a crime should depend on the evidence of what you have done, rather than assumptions made about your behaviour on the basis of your race, class, accent, gender, dress, age, etc. Due process is the method by which we sort the evidence from the assumptions and leave the latter to one side.

108 Speech launching Respect action plan (10 January 2006).

At all stages of the criminal justice system – policing, prosecution, trials and sentencing – we need to ensure that there is no room for decisions to be made on arbitrary criteria such as baseless assumption and prejudice. As well as furthering social justice, this approach will have the positive secondary effects of enhancing public confidence in the system and furthering efficiency, by ensuring that decision making is rational and that resources are effectively targeted.

Policing

With the passing of the Police & Criminal Evidence Act 1984 and its attendant codes of practice, England and Wales obtained some of the best legal safeguards in the world for due process during investigations. The requirement, at this stage, is to ensure, first, that the outcome of investigations (the choice to proceed to prosecute, caution, take no further action and so on) is made on the basis of evidence rather than assumption, and second, to ensure that evidence used at trial or evidence that is used to choose one of the aforementioned outcomes is full (not missing or withheld), accurately recorded and not misleading.

Thus, interviews are tape recorded (and, increasingly, visually recorded) not merely to protect suspects from brutality, but also to ensure that the record is accurate (neither mistaken nor doctored) and the evidence is not other than it seems – for example, a confession appearing to be freely given when it was in fact the result of a threat or a promise.

However, a large amount of police work is not focused upon the traditional chain of investigation, prosecution and trial, but deals with the application of summary measures, police cautions, community relations, restorative solutions and crime prevention. Only a small percentage of offenders are punished in court; the majority of those who come into contact with the system will only ever get as far as the police.

Even following the introduction of the Crown Prosecution Service charging scheme, the police still have huge discretion about how people are dealt with, and operate largely unsupervised. There is enormous scope for actions – which may be taken in good faith – taken on the basis of assumption, compounding societal inequalities. The development of a more representative force, which reflects the community it serves, and of closer ties between police and communities, reduces the potential for such action. But detailed legal safeguards are also needed, not to hamper effectiveness, but to target action to where it is genuinely warranted by the facts, rather than towards "the usual suspects".

The enactment of a variety of broad summary powers, without the safeguards mentioned above, has been a feature of recent legislation. For example, a clause in the Violent Crime Reduction Bill[109] now before parliament allows a police officer to require a person to leave the locality of a public place for up to 48 hours if her presence is likely to cause or contribute to alcohol-related crime or disorder there, and if the direction is necessary to remove or reduce the likelihood of such crime or disorder there in the period specified. The wording of the clause is so vague as, arguably, to embrace a person who was likely to be the victim of such crime or disorder rather than a participant: for example, the clause could, on its face, be used to require a black person to leave a locality where a neo-Nazi event was being held.

These powers have proved, however, generally resistant to challenge in our courts. For example, the Antisocial Behaviour Act 2003 allows the police to issue an authorisation in relation to any locality in which the senior officer concerned has reasonable grounds to believe that people have been intimidated, harassed, alarmed or distressed as a result of the presence or behaviour of groups of two or more persons in public places, and that antisocial behaviour is a significant and persistent problem there.[110]

The "authorisation" allows an officer, among other things, to disperse groups of two or more people and to require any of them who do not live in the locality to leave the locality and not to return for up to 24 hours – provided that there are reasonable grounds for believing that their presence or behaviour in any public place in the relevant locality has resulted, or is likely to result in any members of the public being intimidated, harassed, alarmed or distressed.

This power could embrace all kinds of innocent, reasonable conduct – which does of course sometimes distress people. Picketing and lawful public processions are specifically excluded by the section. However, other types of protest are not.[111] When the power was challenged, the Divisional Court held of the relevant section that:

The use of a dispersal direction, which I accept may interfere with fundamental rights, still falls to be justified by the test of proportionality and other public law criteria. In this way, section 30 is limited not only by its own express requirements; its use is controlled by, among other things, the European Convention on Human Rights. Far from "overriding

109 Clause 22, bill as brought from the Commons and ordered to be printed in the Lords on 15 November 2005.
110 Section 30.
111 As was affirmed in the recent case of *Singh v Chief Constable of the West Midlands* [2005] EWHC 2840 (Admin).

fundamental freedoms", its use is subject to them. In my judgment section 30 can be applied to protests.[112]

The Human Rights Act has been relied upon to provide the safeguards – the Police & Criminal Evidence Act 1984 codes of practice, for example, now make specific reference to the European Convention. While admirable, this approach provides little protection for due process in policing. First, it makes individual officers responsible for complex judgments about the compliance of their actions with the text of the convention and its interpretive jurisprudence. Unsurprisingly, the courts accord "a high degree of respect" for officers' assessments of risk.[113]

Second, powers capable of arbitrary exercise remain in place: review takes place after the event, and the consequences of a court judgment are not certain to trickle down to prevent future due process violations. Third, although the existence of the Independent Police Complaints Commission has to an extent improved matters, most judicial remedies will still rely upon an individual taking the case to court – which is likely to exclude those for whom social justice is most needed.

It is instructive to look, by contrast, to the jurisprudence of the US Supreme Court, where due process is of course specifically protected. In one case,[114] a Chicago city ordinance criminalising the refusal to obey a police direction was struck down as violating due process requirements. The ordinance prohibited "criminal street gang members" from loitering in public places. It provided that a police officer may order the dispersal of a person whom she reasonably believes to be a gang member loitering in a public place with one or more persons. Anyone who failed promptly to obey such an order committed an imprisonable offence.

The court held that the ordinance violated the 14th amendment since it was "unconstitutionally vague". One aspect of vagueness is that the "legislature establish minimal guidelines to govern law enforcement".[115] Where these are not in place, assumption and prejudice may prevail: a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections".[116] The safeguards were insufficient, because the power "necessarily entrusts lawmaking to the moment-to-

112 Ibid, para 24.
113 Tugendhat, J *Austin and Saxby v Commissioner of Police for the Metropolis* [2005] EWHC 480.
114 *Chicago v Morales*, 527 US 41 (1999).
115 *Smith v Goguen* 415 US 566 (1974) at 574.
116 Ibid, at 575.

moment judgment of the policeman on his beat".[117] In other words, the ordinance allowed a police officer to infringe civil liberties on the basis of assumption rather than evidence.

Since we do not have a constitution like that of the USA, which allows the courts to strike down primary legislation that is inconsistent with fundamental rights, due process rights should be specifically protected *in the text of the relevant legislation*. Powers must be drafted so that they are wide enough to be effective but not so broad that they can be exercised arbitrarily, capriciously or on the basis of assumption or prejudice. This requires a change in the style of legislative drafting.

It would also be easier if Home Office bills were shorter, and given more time for scrutiny in parliament. In recent years they have been characterised by excessive length, insufficient time for debate and subsequent amendment to rectify hasty provisions or, on at least one occasion, drafting errors. This aids no one – least of all the police officers, magistrates and judges who are trying to apply them.

Prosecution or diversion?

It is at the trial stage that the requirements of due process have generated the most attention from litigators, academics, and those drafting charters of rights. A more basic question, however, has increasingly exercised policy makers recently: when can a trial process be avoided altogether? Through measures such as fixed penalty notices, conditional cautions and civil orders such as antisocial behaviour orders, an increasing amount of criminal behaviour is dealt with without the involvement of a criminal court. There has even been a suggestion, in January of this year, that a large number of low-level crimes could be admitted by offenders and then sentenced by prosecutors – with no court appearance.

From a due process perspective, powers such as fixed penalty notices and conditional cautions can be exercised provided that there are appropriate safeguards in place. It must be ensured, for example, that those who receive them are targeted fairly – if fixed penalty notices are handed out against teenagers in Lewisham for littering, then pensioners in Tunbridge Wells should receive the same treatment. Patterns of deployment and guidance issued to officers must be considered on this basis.

117 *Kolender v Lawson*, 461 US, at 359.

Further, the notion of a fixed penalty across socioeconomic groups – which could soon be as much as £100 for some offences – does not sit well with a social justice agenda. Variation according to means may add to the administrative burden but if a workable method is found, it will produce a fairer result while maintaining a genuine level of deterrence, even for those on high incomes. Similarly, conditional cautioning should be offered according to rational criteria that do not subject vulnerable groups to a greater threat of prosecution than others. Legal advice should always be given to ensure that the future implications of receiving a caution, and the likelihood or otherwise of conviction and a more serious sentence in court are understood.

Much has been written about antisocial behaviour orders, by both Justice and others – and there is not room to repeat it here. It suffices to say that if they are to be retained, they must, to avoid compromising the social justice agenda, be employed as an effective method of protecting people from the blight of repetitive offending and not as an instrument to criminalise the depressed, the mentally ill, the homeless, the drug addict, and those whose circumstances have led them to begging or prostitution. Such antisocial behaviour orders are neither rational nor helpful to society (they will almost inevitably be breached); they stigmatise the socially excluded and enhance their vulnerability.

A tighter definition of antisocial behaviour and some tough regulation of overenthusiastic authorities are needed to prevent this. Requirements for liaison with agencies such as social, educational and medical services before an antisocial behaviour orders is applied for would help in spotting factors, such as autism or addiction, that make the order inappropriate; appropriate support could then be offered in its place.

Trials

The requirements of due process at trial stage are laid out in Article 6 of the European Convention and elsewhere, and we will not rehearse them here. One aspect of our trial procedure that has become controversial, however, is the jury. The debate surrounding serious fraud cases has suggested the belief, on the part of some policy makers, that trial by judge and jury is inefficient or ineffective, providing undue delay and uncertainty in criminal cases.

However, certainty of outcome in a criminal trial is of course the surest sign of an unfair procedure. While a jury trial is not the only method of providing due process in a criminal trial, the peculiarities of our common law system mean that it is fairer than any available alternative. This means that the jury is – more than any alternative available –

an instrument of social justice. It allows, to the greatest extent possible in our system, the trial of a person by evidence rather than by assumption, prejudice or error.

The judge and jury system separates the evidence from the law, and means that evidence that has been judged to be so tainted, or so prejudicial that it should not be heard, cannot affect – even subliminally – the verdict on the facts. Twelve different sets of prejudices are also likely to cancel each other out; 12 people are less likely to fall into the same error than one. The jury further allows the public to supervise the operation of the criminal law: it means that justice becomes society's justice, and on the rare occasions when the law is seriously out of step with society, the jury can remind it of that fact. To take one example, the reluctance of juries to give technically correct guilty verdicts in murder trials involving the mercy killing of a terminally ill person by her partner or relative is one reason behind the present review of the law on homicide.

Post-conviction stage

As at trial stage, the procedural requirements of a fair hearing should apply to the sentencing process. What is less obvious is how due process, in the sense of action upon evidence rather than assumption, applies here. Judicial discretion is increasingly curtailed in the sentencing arena, by guidelines from the Sentencing Guidelines Council, by statutory aggravating factors, and most seriously, by mandatory minimum sentences and "trigger" provisions.

Due process and social justice in sentencing are not best achieved by unstructured and unfettered discretion for sentencers. Like the overbroad police powers discussed above, this gives rise to the possibility of arbitrary decision making and the reinforcing of social prejudices. For example, traditionally, the choice of a non-custodial rather than a custodial sentence in a borderline case may have been motivated by factors such as employment (or, even more – being an employer of others), a settled lifestyle, positions of responsibility in the community and so on. The choice of custody for the person whose offence was of equivalent seriousness, but who was socially excluded – transient, unemployed, and so on – would be contrary to the notion of social justice.

Sentencing guidelines – most recently, the work of the Sentencing Guidelines Council – have provided in many cases for a proper level of structuring of judicial discretion that aims to ensure that sentencing is affected by legitimate aggravating and mitigating features rather than by socioeconomic factors. In some cases, however, the sentencer's discretion is further limited by legislation providing for mandatory minimum sentences, or

minimum sentences "triggered" by previous convictions. Such fettering of discretion is likely to prejudice socially excluded groups. In many cases, for example, recidivism may be associated with a cause linked with social exclusion such as drug use, mental health problems or unemployment.

Mandatory sentencing can also unfairly alter the balance of seriousness between offences that have an equally deleterious effect upon society but that tend to be committed by different socioeconomic groups. As a result, it can enhance social exclusion. It has been applied, for example, in recent years, to crimes such as firearms offences,[118] street crimes (robbery)[119] and drug trafficking,[120] for which a large number of offenders from ethnic minorities and/or from inner-city areas are arrested and prosecuted.

A positive, social justice approach to reform would involve re-examining the seriousness of offences, to ensure that maximum sentences and sentencing guidelines are structured on the basis of rational criteria and are not prejudicing vulnerable or socially excluded groups. If assessed on the scale of damage to victims and culpability of offenders, is it right, for example, that corporate frauds regularly attract lower sentences than those meted out for street robberies?

Conclusions

The categorisation of the criminal justice system as a zero-sum game, where social justice can only be achieved for victims and potential victims by destroying the due process rights of defendants and suspects, is a false one. The furtherance of the social justice agenda cannot be achieved only by considering the impact of crime upon socially excluded groups as victims of crime; we must also consider the impact upon them as suspects and defendants of the criminal justice system. Only in this way can we achieve true fairness.

118 Section 51A of the Firearms Act 1968, inserted by section 287 of the Criminal Justice Act 2003.
119 Section 109 of the Powers of Criminal Courts (Sentencing) Act 2000 (which covered other serious offences in addition to robbery).
120 Section 111 of above act.

Chapter 13

The importance of jury trials

Robert Rhodes QC, Outer Temple Chambers

The importance of jury trials

Robert Rhodes QC

There have been juries in England for over 800 years. Over the years, their function has changed from being a body of witnesses to having to decide the facts of the cases they try on the evidence put before them, being disqualified if they already have any involvement in the case. The struggle for independence of a jury's verdict was finally won at the end of the 17th century, when the chief justice of the day prevented punishment of the jury that acquitted the Quaker William Penn of participating in an unlawful assembly.

The essential justification of jury trial is the independent involvement of ordinary adult citizens in the criminal process brought against other people. The pooled experience of 12 men and women is commonly regarded as a better instrument for arriving at a just verdict than the experience of one person. It is widely felt that the jury is the best instrument for deciding on a witness's credibility or reliability in a case the outcome of which could result in a defendant's imprisonment.

It is easy for a single mind (or even the minds of two or three people) to be fallible about whether a person is telling the truth. This decision must be judged from the witness's demeanour and way of giving evidence. As Lord Devlin said in his Hamlyn lectures on the jury system:

The impression that a witness makes depends upon reception as well as transmission, and may be affected by the idiosyncrasies of the receiving mind; the impression made upon a mind of 12 people is more reliable. A judge may fail to make enough allowance for the behaviour of the stupid because by his training he regards so much as simple that to the ordinary man may be difficult. The jury hear the witness as one who is as ignorant as they are of lawyers' ways of thought.

The fact that lawyers are now eligible to sit on juries does not detract from the force of Lord Devlin's comments.

The jury's functions

A jury has four purposes. First and foremost, it does justice and decides whether the prosecution has proved its case against the defendant whom it is considering. But the jury's purpose does not stop there.

Second, it helps to ensure the independence and quality of the judges. The famous 18th-century jurist Sir William Blackstone regarded the jury as a safeguard against the violence and partiality of judges appointed by the Crown. We are a long way from those corrupt days, but who knows what the future may bring, and it is surely helpful to have a check on the possibility of biased judges being appointed by some future administration.

Third, it gives protection against laws that the ordinary man or woman may regard as oppressive. It was the refusal of 19th-century juries to convict sheep-stealing defendants of grand larceny[121] that led to the abolition of hanging for theft. Within the past 20 years there have been acquittals by juries in cases that offended their consciences where it was widely considered that judges would have convicted. Just to take one example, it would have been surprising had a judge sitting alone acquitted Clive Ponting for his justified and conscience-led actions after the Falklands War. At the other end of the spectrum, the recent conviction of, and long sentence of imprisonment imposed on, Mr Khordokovsky for alleged tax offences in the Soviet Union would not have been as controversial as it was had he been tried by a jury rather than by judge alone.

Finally, the jury system helps to ensure the maintenance of proper behaviour by investigating officers. The great majority of police and customs officers behave impeccably. There are, however, a small number who behave with arrogance or unfairness, or who are plain bullies (whether physical or verbal) to the defendants in their charge. Were a judge sitting alone or with assessors, whatever her abhorrence of such conduct, she would have to convict the defendant if the evidence proved guilt, unless it were possible to exclude the officer's evidence under fairly restricted statutory provisions.

Many criminal barristers have been involved in cases where the behaviour of blustering, bullying police officers towards perfectly decent, ordinary people has upset juries to the point where they have acquitted in the face of apparently overwhelming evidence. The principle that those investigating criminal offences should behave with absolute propriety to those in their charge is surely fundamental in a civilised society, and this principle should transcend the merits of an individual case.

There is, moreover, an important constitutional point as regards juries. A dictator, on seizing power, would certainly abolish or restrict trial by jury. That is because no dictator

121 They found that the defendant had stolen the sheep but that the value of the sheep was less than five shillings, and hence the offence was petty larceny which, unlike grand larceny, was not a capital offence.

could afford to leave a person's freedom in the hands of her countrymen. It is for this reason that Lord Devlin described trial by jury as "the lamp that shows that freedom lives".

Lengthy trial is no reason to abolish jury

The urge to abolish juries, in the first instance, in long and complex fraud cases is probably attributable to some controversial cases over the last few years. These range from the acquittal of Kevin Maxwell where (after he had given evidence for over a month) a jury decided that his guilt had not been proved, to the recent collapse of the Old Bailey trial relating to the Jubilee Line extension where the trial had been allowed to drag on interminably, mainly in the jury's absence.

It is the experience of most fraud specialists that the dedication of juries in long trials is remarkable and that, generally speaking, their verdicts are entirely understandable and deserving of respect. Mr Justice Mitting made a glowing commendation of the jury in the long trial arising out of the Wickes financial difficulties.

It is said against keeping juries in fraud trials that such cases are too complex for them, that they cannot follow or understand them. That has certainly not been my experience in a variety of fraud cases, some of which were of considerable complexity. A criminal case has been likened by a former Chief Justice of the USA to a three-legged stool: it needs competent prosecuting counsel, competent defence counsel and a competent judge. Take away any one of those legs, and the stool falls over. If a jury does not understand a case, it is the fault in the first place of prosecuting counsel for failing to explain it properly. Most judges who try serious frauds are competent to do so. Some, unhappily, are less than competent, and this can plainly cause real problems.

It is not necessary for a jury to understand the finest points of every aspect of a trial, so long as they have a broad, general grasp. At the end of the day, there are usually two questions for the jury in a fraud case:

- Has the prosecution proved that there was a fraud?
- If so, has the prosecution proved that the defendant whose case they are considering was a deliberate party to that fraud?

Juries are generally excellent at judging those issues. They bring to bear their common sense and experience as men and women of the world.

The government is proposing to legislate to permit trial by judge alone in what it says should be 15 to 20 cases a year of serious and complex fraud. For those convicted of fraud, the consequences are likely to be the imposition of a long term of imprisonment, confiscation of any "benefit" (which is very widely defined) derived from the offence, probably the loss of their home, and devastation to their family. It must be a question of real concern that any one person should be given such power over the life of another.

The danger of trial by judge alone

The overwhelming majority of the judges on the bench are scrupulously fair. But there is hardly a criminal practitioner in the country who has not been in cases where the judge has been grossly unfair, albeit not in such a blatant way as to enable any conviction to be quashed by the Court of Appeal on the grounds of this unfairness.

It might be suggested that unfairness by a trial judge can be overcome by the duty on the judge to give reasons for a conviction, and the resultant appeal process. But, unlike appeals from a magistrates' court to the Crown Court, an appeal from the Crown Court to the Court of Appeal is not a rehearing. It is an appeal on limited grounds. The Court of Appeal gives very great weight to a trial judge's views on the facts because she has heard the witnesses and has been in a position to assess them. Accordingly, an appeal court is reluctant to upset a judge's decision on the facts unless they are plainly untenable.

The only way I can see of minimising the risk of having an unfair judge try a case without a jury would be for there to be a list of specialist judges assigned to try serious fraud, and for the defendant to be able to choose a judge from that list.

Further problems

Then one can ask: what is the cut-off point to be as regards length or complexity where a case is not to be decided by a jury? How fair is it that deciding a question as fundamental as this is to be based upon the extent of the evidence (or perhaps the number of charges) that a prosecuting authority might decide to adduce, or the number of trials into which a case might be divided? Most fraud cases do not raise the question of society's standards of honesty, but some do. This is quintessentially a matter for a jury as setting society's standards in this field. How acceptable are just one person's views on what are society's standards of honesty?

There could be substantial political difficulties if trial is by judge alone, whichever way she decided the case. If she convicts a defendant in a case which has been the subject of

extensive publicity, it might be suggested that she could have been influenced by outside pressures. If she acquits in a case where the defendant has a similar ethnic and educational background to her own, it might be suggested that she is looking after her own. Those problems would not arise if trial were by judge and jury.

If the right to trial by jury in complex fraud cases is removed, one wonders where it will stop. Murder cases and drug cases can last as long as fraud cases and often involve questions of far greater difficulty and complexity (for instance, on scientific matters) than juries have to decide in fraud cases.

Apart from points of principle, there are pragmatic matters to be considered. One is the inevitable delay between the conclusion of the trial and judgment, and the ensuing additional strain on the defendant. The judge will have to provide a reasoned judgment, setting out the issues in the case, the evidence on each issue, her findings and her reasons for those findings. I have experience of advising on cases in common law jurisdictions where the trial has been by judge alone, and where the judge provides written reasons anything up to a year after the conclusion of the hearing. It also not infrequently happens that a judge's reasons are flawed by her misunderstanding of the evidence.

Appeals against conviction by judge alone are likely to take longer and involve significantly greater public expense because of the wider pre-hearing reading that the appeal judges will have to do in such cases, and the wider attacks on the judge's judgment that defence counsel will be making than they now make on the judge's summing up.

It is suggested that jury trial is sometimes a major contributory cause in preventing fraud cases from being brought to trial. That has not been my experience. Indeed, in 10 years of prosecuting for the Inland Revenue before taking silk, this only happened once.

It is also suggested that the protection that the jury represents against unjust or oppressive laws does not apply to fraud trials. But it is not unreasonable to see the possibility of acquittal in such cases where a jury regards an old, stale prosecution as unfair in the case of a person whom it might regard as having been led into crime by another who is not standing trial, but a judge would not be able to exercise her limited power to stay the proceedings as an abuse of process. Another example might be where the bringing of such a prosecution was considered to be plainly for political reasons against somebody who was a thorn in the side of the government of the day.

Tackling the burden on jurors

A major reason given for abolishing juries in long fraud trials is the burden on jurors in having to serve for such a long time. But this has been addressed in two ways. The first is by having so-called "Maxwell" hours (named after the trial arrangements made by the present Lord Chief Justice in the Maxwell case). What happens in those circumstances is that on a number of days each week (or sometimes every day) the jury sit from 9.30am to 1.30pm with a short mid-morning break, rather than from 10.30am to 4.00pm. The afternoons are set aside for the judge to deal with legal arguments, or for counsel to see experts or prepare for the following day. This has the considerable advantage for juries of allowing them to deal with their business or domestic affairs in the afternoons.

The second way is the protocol[122] issued in March 2005 by the then Lord Chief Justice. It follows on from the Criminal Procedure Rules 2005, designed to improve the efficiency of the criminal process. The purpose of the protocol is to control the length of complex criminal trials while not prejudicing either prosecution or defence.

A major factor that I have observed in the undue length of certain serious fraud trials is the prosecution's inability to focus on the key issues of the case, and their insistence on adducing every conceivable bit of evidence, apparently without considering the relevance or necessity of that evidence. The protocol should enable the trial judge to ensure that both sides focus on the real issues of the case. It is surely not unreasonable to suggest that, before engaging in something as drastic as removing a defendant's right to jury trial in a serious case, the government sees how effective the rules and protocol prove to be.

There are significant social reasons for maintaining the right to jury trial in British society. Inter-group tensions, particularly those related to ethnicity, appear to be on the rise. This is particularly true in many of Britain's major cities, as is shown by the recent riots in Birmingham. Those tensions are not just between majority and minority groups but also among different minority groups themselves.

There is significant alienation of ethnic minorities from authority figures such as the police. Maintaining the jury system gives reassurance to minorities that the criminal justice system is not just "white man's justice", with the judiciary automatically supporting the police. It is difficult to overstress the importance of ensuring that, however unjustified the view, an ethnic minority defendant does not have the perception that he is not being given a fair trial.

122 Protocol for the control and management of heavy fraud and other complex criminal cases.

Finally, jury trial is inconvenient and expensive. But the advantages to society as a whole of having what is generally accepted to be a satisfactory and fair criminal justice system that promotes social inclusion outweigh such considerations. Jury trial is the very cornerstone of our liberties and society.

Chapter 14

Sentencing and society

Professor Martin Wasik, Professor of Criminal Justice at
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Sentencing and society

Professor Martin Wasik

This chapter is designed to address some fundamental questions. What is the purpose of sentencing? For whose benefit are sentences passed? Is it possible to design a sentencing system that is clear and transparent, but that retains the flexibility to allow judges and magistrates to impose the appropriate sentences in individual cases? These questions are at the intersection of sentencing principles and sentencing practice.

The purposes of sentencing

There is an enormous amount of literature on this topic, with important contributions from philosophers, sociologists, theologians, lawyers and, no doubt, others. All start from the same basic premise, which is that the institution of state punishment stands in need of justification. This is because punishment involves the deliberate infliction by the state of harsh treatment (usually some form of restriction of liberty) on a citizen who has transgressed the criminal law. There is then a division of view as to the appropriate justification for punishment, with two very different schools of thought.[123]

One approach is the *utilitarian* (or consequentialist), which, in general terms, holds that state punishment can be justified only where it achieves a net social benefit, primarily through the reduction of crime committed by the offender, or more generally. A number of important sentencing aims come under the utilitarian umbrella, including deterrence (in both its individual and its general forms), rehabilitation and incapacitation.

All utilitarian views are susceptible to two critical approaches. The first is *empirical* – can the proponent of deterrence, or rehabilitation, demonstrate that their favoured approach "works"? Again, the literature on the relative effectiveness of different sentences is quite considerable but, to put matters simply, the research shows that all forms of sentence (custodial, as against community, as against financial penalties) are of roughly equal ineffectiveness in reducing crime. Adopting the standard measure of a two-year reconviction rate as the comparator, all sentencing options show failure rates of 60% or so within that timeframe. Of course that figure underestimates the true reoffending rate, since many repeat offenders are not caught and convicted for their further lawbreaking.

123 See further Wasik, M "A Fresh Look at Aims and Objectives" in Stockdale, E and Casale, S *Criminal Justice Under Stress* (Blackstone, 1992); Walker, N *Why Punish?* (Oxford, 1991).

From the standpoint of social justice it is clear that reduction in crime rates is much more likely to be achieved through crime prevention techniques, and through social policies designed to alleviate the underlying causes of crime, than through sentencing. Sentencing has only a limited role to play. This is an unpalatable truth for the public, for policy makers, and for sentencers themselves.

Judges and magistrates generally want to make a positive difference. The evidence demonstrates that this rarely happens, although it is important not to lose sight of the cases where a well-chosen sentence *can* make a crucial difference, and these cases are considered further below.

The second objection to utilitarian sentencing is *moral* – even if it could be shown that general deterrence, for example, works, its operation in practice may require the passing of a disproportionately severe sentence on an individual to achieve the desired social goal. Many regard it as a fundamental injustice to use one convicted individual as an instrument to try to achieve a social benefit.

The retributive function of sentencing

A very different approach is the *retributive* view, which regards punishment as a moral imperative to reflect the wrong done by the offender by visiting it with appropriate censure and sanction. While retribution is an ancient concept, its modern restatement is *desert*, or sometimes "just deserts". It is important to appreciate from the outset that utilitarian and desert justifications for punishment are substantially different. The desert approach makes no empirical claim. It requires only that the punishment imposed by the court be proportionate to the crime committed.

Desert has a number of clear advantages over the various utilitarian goals when considering sentencing policy. It does not involve us in the apparently fruitless quest to find sentences that work. Desert allows us to think in a structured and coherent way about the relative seriousness of different crimes (by dividing each into their harm and culpability dimensions) and weighing one against another. Advocates of a desert approach to sentencing take the view that the main purpose of sentencing is to ensure that sentences are imposed on offenders that are just, and proportionate to the offences committed.[124] This was, broadly,

124 Von Hirsch, A and Ashworth, *A Proportionate Sentencing* (Oxford, 2005).

the approach adopted by parliament in the Criminal Justice Act 1991 but, unfortunately, this key message has since become obscured by later statutory changes.[125]

Traditionally judges have said little about the purposes of sentencing. In the Criminal Justice Act 2003, parliament has, for the first time, set out the aims of sentencing. These, for adult offenders, are stated to be: "the punishment of offenders, the reduction of crime (including its reduction by deterrence), the reform and rehabilitation of offenders, the protection of the public and the making of reparation by offenders to persons affected by their offences" (section 142(1)).

The provision of such a list has been criticised by academic writers as unhelpful, since it provides neither theoretical coherence nor practical help to sentencers. In particular, no priority among the aims is suggested, so that no indication is given as to what should happen where the aims conflict. A helpful commentary on the subsection has been provided by the Sentencing Guidelines Council.[126] The council, on advice from the Sentencing Advisory Panel, has stressed that while these aims "may all be relevant to a greater or lesser degree in any individual case", in *every* case the sentencer "must start by considering the seriousness of the offence". The main thrust of the guideline is the need to retain proportionality between the offence and the sentence, whichever form that sentence takes (custodial, community, or financial).

In the youth court a different sentencing regime operates. Here, parliament has stated in the Crime & Disorder Act 1998 that the principal aim of the youth justice system (including sentencing) is the prevention of offending (section 37). When making that statement, however, parliament left in place all the key proportionality provisions of the Criminal Justice Act 1991, and it also chose to leave in place an important provision in the Children & Young Persons Act 1933, which asserts the importance of ensuring the welfare of any child or young person appearing before the court (section 44). The *Youth Court Bench Book* makes plain the difficulty in accommodating all these potentially conflicting objectives in one sentencing exercise, but concludes that the first responsibility is to sentence within proportionality restraints.[127]

125 Wasik, M "Going Round in Circles? Reflections on Fifty Years of Change in Sentencing" in *Criminal Law Review* (2004); Ashworth, A Sentencing & Criminal Justice (Oxford, 2005).
126 *Guideline: Overarching Principles: Seriousness* (Sentencing Guidelines Council, 2004).
127 Monaghan, G "The Courts and the New Youth Justice" in Goldson, B (ed) *The New Youth Justice* (Russell House, 2000).

The upshot of this discussion is that while utilitarian goals remain relevant for sentencing purposes, they offer uncertain results and can result in the imposition of disproportionate sentences. Utilitarian goals should therefore be limited by desert principles to ensure that proportionality and, so far as possible, consistency in sentencing outcomes are achieved.

For whose benefit are sentences passed?

Sentencing is the culmination of the criminal justice process, and is the most visible outcome of that process. Sentence is announced in open court and (unless restrictions apply) in the presence of members of the public and the press. The court is under an obligation not only to pass the sentence, but to give an explanation (in non-technical language) of the practical effect of that sentence.

If passing a custodial sentence the sentencer must indicate what the practical effect of that sentence will be, explaining the effect which the provisions on early release (if applicable) can be expected to have on the sentence passed. If passing a community sentence, the sentencer must (having first commissioned and then considered a pre-sentence report on the offender's background) explain why a community sentence has been imposed, what requirements are to be inserted into the order, and what the consequences of breach or commission of a further offence will be. Depending on the nature of the case, the sentencer may be required to give additional information, such as to explain why an ancillary order that the court was empowered to pass (such as a compensation order, or a parenting order) has not in fact been passed.

Sentences passed in particular cases are reported in the press, and are sometimes the subject of local or national concern. All this suggests that sentences are addressed to different audiences, and that sentence is passed for the "benefit" of all of these. Most closely concerned are obviously the defendant, the victim (or a deceased victim's next of kin), members of the public present in court, the media, and then the public more generally, to whom the media will report what has taken place.

The interests of the defendant

To take the defendant first, it has been argued above that the guiding principle of sentencing is the imposition of a sentence proportionate to the seriousness of the offence. Within that general constraint, the sentencer may select the order, or combination of orders, that seems to offer the best hope for preventing reoffending. For the relatively small group of dangerous violent or sexual offenders, this will probably involve lengthy detention (together with various disqualification and monitoring arrangements after

release). For the non-dangerous majority, sentencers are often faced with the choice between a custodial sentence (to reflect the nature of the offence, the offender's record, and other matters) and a community disposal.[128]

Statute requires that to qualify for a community sentence, the offence must be "serious enough" to justify that degree of intervention in the offender's life, but must not be so serious that only a custodial sentence would be adequate. The Sentencing Guidelines Council has provided further guidance, and has stated that community disposals should be subdivided into three bands, to reflect proportionate responses to offences of low, medium or high seriousness within that general category.[129]

Placing an offence in a particular band will influence the overall onerousness of the community order, in terms of the number of requirements and the length and onerousness of demands made by them on the offender. Provided that the overall sentence is proportionate, the court should select that requirement, or combination of requirements, that seems to offer the best opportunity for tackling the individual offender's offending behaviour.

The probation service will inform the court as to the accredited programmes available locally, and make a recommendation to the court as to the most suitable in the particular case. One example is the drug rehabilitation requirement (formerly drug treatment and testing order), which may be written into a community order where there is evidence before the court that the offender has a propensity to misuse drugs and there is reason to believe that the offender is fully motivated to tackle her drug problem.

In some cases a sentencing court will be open to that suggestion from the probation service, since this may well offer the best prospect for the future, in terms of tackling reoffending, long-term community safety and the offender's own well-being. A particular feature of the drug rehabilitation requirement is that the offender is returned to court on at least a monthly basis, for her progress to be monitored by the judge who passed the original sentence. This gives the offender an enhanced sense of commitment and continuity in the sentence. It also gives the sentencer an opportunity to follow up the sentence, and to see whether it has been successful or not. This is just one example of a wide range of accredited programmes available.

128 Hough, M, Jacobson, J and Millie, A *The Decision to Imprison* (Prison Reform Trust, 2003).
129 *Guideline: New Sentences: Criminal Justice Act 2003* (Sentencing Guidelines Council, 2004).

The interests of the victim

Sentencing is also for the benefit of the victim. The whole purpose of the criminal justice system is to relieve the victim of the burden of taking legal action against the offender. By doing so it is recognised that a crime is committed against society at large as well as against the individual victim.

The victim's interest in the whole process is obvious and clear. In the past it is true that victims' interests have tended to be overlooked by the system, but over the past 30 years there have been substantial improvements made to the ways in which victims are informed by the police and prosecution authorities of the progress of the case in which they have such a close interest. Victims now have legitimate expectations, set out in the Victims' Charter, of what they can expect the criminal justice system to deliver. They are also given (by the police) timely advice about the options for compensation, from the offender if convicted, or from the state.[130]

Nobody can doubt the value of improving the services to victims (and to witnesses). More controversial, however, is the role which individual victims might have when it comes to sentencing their offender. Since the early 1990s victims have been able to provide a written statement to the court, known as the victim personal statement. The statement then becomes part of the case file and will eventually come before the magistrates or judge when sentence is to be determined.

There are restrictions on what material can be included in this document.[131] Victims are able to describe the full effect the crime has had upon them. This information is important to the sentencer, because it assists in understanding the nature and degree of harm occasioned to a particular victim, a matter of central relevance to sentence.

On the other hand, the victim personal statement cannot be used to present the victim's own views on what the sentence should be. This applies whether the victim would seek a severe sentence or a lenient one. This distinction is surely right, because sentencing is a matter for the court, not for the victim. To allow victims' wishes to influence sentence in this way would result in sentences for similar offences varying in accordance with the personal predilections of victims, which would be to substitute personal retribution for state punishment.

130 Zedner, L "Victims" in Maguire, M, Morgan, R and Reiner, R *The Oxford Handbook of Criminology* (Oxford, 2002).
131 *Consolidated Criminal Practice Direction 2002.*

The government has recently concluded a consultation exercise on the question of whether the victim personal statement scheme should be extended to allowing the relatives of homicide victims to make an oral statement in court. The outcome of this consultation is not known at the time of writing, but the Council of Circuit Judges opposes it, on the basis that it will increase the emotional tension in court, place undue pressure on relatives to make a statement, and may raise false expectations that relatives will be able to lobby for a particular sentence.

The public interest

Sentencing is also for the benefit of the wider public. It is obviously important that public confidence in the criminal justice system is maintained and, if possible, enhanced.

There is a large body of research on public attitudes to sentencing.[132] The research shows a number of things. The first is that, if asked a simple yes/no question, members of the public generally say that courts are too lenient. The second, however, is that there is widespread public misunderstanding and ignorance of the sentencing system. Members of the public underestimate the extent to which the courts use sentences of imprisonment, and mistakenly assume that sentencing in this country is more lenient than elsewhere in Europe (in fact England and Wales together imprison more offenders per head of population than any other European country and have more life sentence prisoners than the rest of Europe put together). Many people dismiss non-custodial sentences as "soft options" but, when questioned, cannot name or provide any description of the range of community sentences now available to the courts.

The third, and most crucial research evidence, however, is that the public are actually nowhere near as punitive as the yes/no answers might suggest. In numerous research studies members of the public have been asked for their views on the appropriate sentencing of particular cases, but only after they have been given time to consider the full facts of the offence, and have been educated as to the range of sentencing options available. These studies are remarkably consistent in finding that lay people will, in the light of that information, propose a sentence consistent with, or often more lenient than, that imposed by the court in such a case.

It is clear that much of the confusion here arises from the biased and unrepresentative diet of information about crime that is fed to people via the mass media. As chairman of

132 For example, Ashworth, A and Hough, M "Sentencing and the Climate of Opinion" in *Criminal Law Review* (1996); Roberts, J and Hough, M *Understanding Public Attitudes to Criminal Justice* (Open University Press, 2005).

the Sentencing Advisory Panel, I have personal experience of how difficult it is to communicate any set of sentencing proposals through the media. Recently, a draft guideline on sentencing for robbery – which proposed no overall change to sentencing levels, and which indicated custodial sentence starting points for all three categories of robberies committed by an adult, and two out of three categories of robberies committed by juveniles – was presented in the media as being an exhortation by the Lord Chief Justice "not to send violent muggers to jail".

This travesty is not an isolated example. The draft guidelines of the Sentencing Guidelines Council on reduction of sentence for a plea of guilty were written up by the media as if the reduction for plea was a newly invented ploy to keep people out of prison, rather than something that has been part of English sentencing practice for a hundred years. There is no wonder that the public do not understand sentencing policy, when such distortions appear in the press almost on a daily basis.

Discretion and rules in sentencing

Judges and magistrates have traditionally argued that sentencing is an area where rigid rules are unhelpful and tend to produce injustice. They argue that in each sentencing decision a large number of factors will be in play, relating to the detailed facts of the offence and to the character, antecedents and circumstances of the offender. No two sentencing decisions are the same, and so sentencers must be accorded considerable discretion in allowing them to take these different matters into account.

While there is clearly some truth in this, the argument should not be taken too far. A corollary of discretion is disparity, and there has always been disparity in sentencing, from one sentencer to another, and from one area of the country to another. It is a basic principle of justice that like cases should be treated alike, and different cases differently, so the task is to identify key common features of offences and offenders that should allow us to generate guidelines for sentencing.

It is now widely accepted that it should be the function of parliament to set the general parameters for sentencing, including the general framework within which individual decisions are to be made by sentencers. The Criminal Justice Act 1991 was the watershed in this respect, but the Criminal Justice Act 2003 has adjusted the framework in a number of important ways, following the Halliday review.[133]

133 *Making Punishments Work: Report of a Review of the Sentencing Framework for England & Wales* (the Halliday report) (Home Office, 2001); Taylor, R, Wasik, M and Leng, R *Blackstone's Guide to the Criminal Justice Act 2003* (Oxford, 2004).

Difficulties occur when parliament intervenes more directly in sentencing outcomes. In recent years there has been ill-considered and highly political legislation in the sentencing field. An obvious example was the Crime (Sentences) Act 1997, which introduced a "two-strike" life sentence requirement for the second "serious offence" and a "three-strike" rule for domestic burglary cases. These unduly rigid provisions have caused considerable practical difficulty, and the former has now been repealed by the Criminal Justice Act 2003.

More generally, clarity in sentencing has been impeded by the passage of too many Criminal Justice Acts over too short a time period.[134] Each new set of statutory provisions has been overlaid on the previous law, so if an offender is being dealt with for offences committed some months or years ago, or is being sentenced for multiple offences committed either side of a commencement date, that individual will fall to be dealt with under one sentencing regime for one offence and a different one for another.

Textbooks have to set out in full these parallel legislative schemes to ensure that the likely practical problems can be resolved. As a result sentencing has become one of the most technically complex areas of law, and this complexity not infrequently generates errors, with provisions being overlooked or misunderstood.[135]

Sentencing guidelines

A different approach is that adopted through the provision of sentencing guidelines. Sentencing guidelines are an attractive model because they avoid both the excessive discretion of unfettered judicial decision making and the unnecessary rigidity of legislative rules. The authority that issues guidelines can also act as an effective buffer between the judiciary and the executive in the sentencing field. Guidelines can take account of up-to-date statistical information on sentencing patterns and research evidence on relative sentencing costs and effectiveness.

A number of countries have developed sentencing guidelines over the past 30 years or so. There are now many different models, of which the best known are the numerical sentencing "grids" common in the USA. Others, such as the one that operates in Sweden, are closer to the English tradition of narrative guidelines, and use words rather than numbers.

134 Wasik, M "Going Round in Circles? Reflections on Fifty Years of Change in Sentencing" in *Criminal Law Review* (2004).
135 Thomas, DA *Sentencing Referencer* 2005/2006 (Thomson, 2005).

The present English model is for sentencing guidelines to be issued by the Sentencing Guidelines Council (chaired by the Lord Chief Justice) on advice from the Sentencing Advisory Panel. The council mainly (but not exclusively) comprises judges drawn from the different tiers of the criminal courts. The panel is more widely drawn, with a minority of judges. The panel started work in 1999 and initially functioned alongside the Court of Appeal, which issued sentencing guidelines at that time. This role was transferred to the council by the Criminal Justice Act 2003. The process of devising guidelines is a careful and lengthy one, involving extensive consultation by the panel and an important further consultation of parliament by the council.

Guidelines typically prescribe sentencing brackets and starting points for the sentencing of an individual offence or group of offences (recent examples include sentencing for child pornography, domestic burglary, robbery, and so on). These follow the models pioneered by the Court of Appeal in early guideline judgments and the guidelines for magistrates' courts produced by the Magistrates' Association.[136] Additionally, guidelines can deal with matters of general relevance, such as the reduction in sentence appropriate to reflect a guilty plea,[137] or the principles underpinning the decision on mode of trial.

Finally, guidelines can deal with the appropriate use of new sentencing measures, in advance of their implementation through statute. Recent examples include guidelines on the new sentencing options in the Criminal Justice Act 2003 (including the new community order, suspended sentence, deferred sentence, and intermittent custody)[138] and the impending introduction of "custody plus" (whereby many short prison sentences will be replaced with a period in custody followed by a period of supervision within the community).

The judiciary is under a statutory duty to have regard to the Sentencing Guidelines Council's guidelines (Criminal Justice Act 2003, section 172), and counsel is under a duty to draw the attention of the court to any guideline case that might otherwise have been missed. The guidelines are automatically made available to the judiciary and to the bar, but they are also public documents that can be accessed by any interested individual. A case compendium of guideline judgments is available at all court centres, and can be found online at www.sentencing-guidelines.gov.uk.[139] Sentencing guidelines appear to offer the best way of providing a clear, transparent and open sentencing system, but also

136 *Magistrates' Courts' Guidelines* (Magistrates' Association, 2003).
137 *Guideline: Reduction in Sentence for a Guilty Plea* (Sentencing Guidelines Council, 2004).
138 *Guideline: New Sentences: Criminal Justice Act 2003* (Sentencing Guidelines Council, 2004).
139 *Guideline Judgments Case Compendium* (Sentencing Guidelines Council, 2005).

one that allows judges and magistrates the necessary flexibility to deal with exceptional factors in individual cases that can never be catered for in advance by guidelines.

Chapter 15

Punishment and social justice

William Higham, Head of Policy and Communications at the Prison Reform Trust

Punishment and social justice

William Higham

The call for social justice animates much of the government's purpose. The work of John Smith's Social Justice Commission recognised that barriers to prosperity or attainment were not solely a problem for individuals to surmount; they were problems for whole groups within society, and even by extension problems that hold back the dynamism and success of society as a whole. From this analysis, welfare schemes, extra resources and other government help could be targeted at those in most need – for example, the poorest pensioners, children in poverty, working parents on low incomes and the young unemployed – all with the aim of delivering social justice.

The criminal justice system, on the other hand, starts quite properly from individuals and their offending acts. Despite sharing the word "justice", these two concepts could not at first seem to be more different. One deals with groups within society, the other with individuals, literally case by case.

The scale of the problem

What is seldom fully appreciated, though, is the sheer number of individuals the criminal justice system now deals with. The fact that the prison population is at a record high is well known. It stands at just under 78,000 – a rise of 30,000 over the past 10 years. This is only a snapshot figure; the total number dealt with in any year is greater. We know that in 2003, 135,040 people entered prison. At any one time in the same year, almost 200,000 were under the supervision of the probation service.

The numbers of individuals in prison, community punishment or supervision under licence are huge and growing. Predicting growth has always proven difficult. In this year alone a set of growth predictions has been exceeded and recalled, only for the new predictions themselves to be exceeded. Even the present predictions foresee a prison population of 90,000 by the end of the decade.

Nor is there is any obvious natural tail-off to growth. The USA had an incarceration rate similar to ours in the 1970s; now it is five times greater than that in England and Wales, which is itself the highest in Western Europe. The system has a very poor record of reducing reoffending. Rates of reoffending in the two years after release from prison have climbed to 61%, up from just over 50% in 1992.

Finally, more and more people are returning to custody under breach of licence: just over 8,100 in the last financial year, with most breached for technical violations. Once people are in the system the exit routes seem far harder to find than the way back in.

So it is clear that the criminal justice system and the punishment disposals it commands are easily of a scale to affect society as a whole, as well as individual lives. But beyond that, by analysing the characteristics of those caught up in the criminal justice system and particularly prison, we can see that there are strong linkages between social deprivation, crime and punishment.

The social background

"Many [prisoners] have very poor skills, are unemployed on entering prison, and have a history of homelessness, drug addiction and mental health problems." So wrote Tony Blair, at the beginning of the Social Exclusion Unit's 2002 report *Reducing Reoffending by Ex-prisoners* – one of the most compelling modern documents on poverty, crime and punishment. It points out, for example, that a man or women in prison is 13 times more likely to be unemployed than a member of the general public, and that they are almost 15 times more likely to have been in public care.

What emerges from the analysis is an incredibly detailed picture of health, education and employment needs. Two-thirds of the prison population have numeracy at or below the level expected of an 11-year-old; two-thirds were unemployed before imprisonment. Half of sentenced prisoners were excluded from school; half ran away from home. Most men and almost three-quarters of women in prison have no qualifications. Half had no GP before custody and a third were homeless.

In these cases the criminal justice system is working with people who have been serially failed by the public services. They have fallen through every net. In the face of such acute need it is forced to act as a kind of capacious social service too, picking up many who are too "difficult" for other services to deal with. Beyond the education and employment needs of those in prison, it shows up two huge areas of particular need: drugs and mental health.

The Social Exclusion Unit report quotes a study finding that 70% of those entering prison had a drug misuse problem, and that 80% of those had had no contact with drug treatment services. Over half of prisoners report committing offences connected to their drug taking. That is the general picture. In some inner-city local prisons, receiving people

straight from the courts, the picture is even worse. Once the overwhelming majority of people received are suffering the effects of drug withdrawal, the very function of the place begins to look different. Is it a prison or a way of dealing with drug addiction? Is the establishment, in fact, fit for either purpose?

The link between punishment and mental health is equally strong. The Social Exclusion Unit reported that 72% of men sentenced to prison had two or more mental disorders. That compares with 5% in the general population. The very high level of mental illness is one of the first things that strikes on a prison visit. A new infrastructure is being built around attempting to manage the endemic risks of self-harm and suicide. It is quite usual to pass by several people who are clearly very seriously disturbed.

The Prison Reform Trust has just completed its *Troubled Inside* series on mental health in prisons with a study of men's mental health needs. It estimated that some 3,000-3,500 prisoners at any one time were so seriously ill that they needed immediate transfer to the National Health Service. Instead they are locked up, disproportionately likely to be punished and disciplined. But it is not just cases in prison that cause concern. Across the whole of the criminal justice system – from police stations, courts and probation to prison – awareness of mental health issues and the capability to refer people to treatment needs to become routine.

Many mentally ill people who have got caught up in the criminal justice system, and those bereaved by suicide, can tell stories that seem to come from another age. People with multiple suicide attempts – or even those arrested for events surrounding their attempts at suicide – often end up in prison, without a sufficient protection regime.

The scale of mental health problems in prison, and the extreme need of many mentally ill prisoners, ask hard questions of us. We all know from personal experience how unsettling, even disturbing, it is to interact with many of those who are suffering mental health problems. But there is a very clear duty to ensure that the criminal justice system does not institutionalise society's unease with mentally ill people, and end up locking them up in conditions that could not be better designed to make them more ill.

Who is in prison?

The Social Exclusion Unit report gives a fascinating insight into who is in England and Wales' prisons. More recently, the Scottish Prison Service commissioned its own report, *Social Exclusion & Imprisonment in Scotland*, to look at the Scottish data. It takes a very

different approach, relating the throughput of the criminal justice system to an area-based understanding of deprivation. The results are equally compelling.

The imprisonment rate in Scotland, at the time, was 130 people per 100,000. That compares to 144 in England and Wales, and is still extremely high by European standards. That is the headline figure. The rate for men aged 21-30 is calculated to be 924. But this is still a national rate. Scotland has 1,222 local government wards. One quarter of the prison population comes from just 53 of those wards. The total population of those 53 wards is 355,800 people, 7% of the national population.

The report plots wards' imprisonment rates against their level of deprivation, finding "that the imprisoned population comes disproportionately from the most deprived communities". It also shows that the relationship is a "linear correspondence, throughout the range from most prosperous to most deprived communities, between level of deprivation and imprisonment rate". The crime rate shows no comparable link.

This analysis allows them to calculate that the imprisonment rate for men from the most deprived communities is 953 per 100,000. For 23-year-old men from the 27 most deprived wards, the imprisonment rate rises to 3,427. On any night, one in 29 will be in prison. Each year one in nine men aged between 22 and 24 spend some time in prison. This amounts to a sustained and vastly funded intervention into some of the poorest communities. Without doubt, other arms of government will be busily attempting to increase employment, education and health in those very same areas, often investing huge sums. In that case, the quest for social justice and the aggregate effects of criminal justice have drawn a bead on the same communities and in many cases, the same groups of individuals.

Both reports give a snapshot of who gets caught up in the criminal justice system and eventually in the prison system. A phrase much used by those working in the system – understandably eschewing the heavy statistics of social exclusion reports – is "the bad, the mad and the sad", with the "sad" covering those persistent petty offenders who cycle through the system. However informally, it tries to capture the nature of those with whom staff work. It is commonly agreed too that the "bad" are both the smallest category and, somewhat surprisingly, that they can be the easiest to work with, responding to incentives, education and resettlement.

Victimising the vulnerable

The snapshot approach fails to reveal how much of the growth of punishment and

imprisonment during Britain's era of "toughness" has been at the expense of the most vulnerable, rather than by locating and locking up more career criminals. The number of people found guilty by the courts in England and Wales has very slightly declined since 1993, when the prison population was 30,000 fewer. Nor is there any evidence that the offences have grown more serious or the offenders more persistent.

We do know that the number of women, children and elderly people in prison has increased far above the average growth rate. The number of ethnic minority prisoners has outstripped the general growth too. As the Commission for Racial Equality so graphically put it, in 2003 there were more African-Caribbean entrants to prison than to UK universities.

Of course, offenders are not isolated individuals. Punishments that affect them also affect their family and their community. Amazingly, offenders' children are not yet recorded, even by the prison service. We know from research by the Department for Education & Skills that 7% of children experience their father's imprisonment during their schooling. It is estimated that at any one time 150,000 children have a parent in prison.

The problems of separation are particularly acute for children whose mothers are imprisoned, that is some 17,700 children a year. Many of the mothers are sole carers, and their children stand only a 5% chance of remaining in their own home. After the statistics examined above, we can make a pretty educated guess that many of these children will be living in deprived areas and therefore be targets of the government's mission to end child poverty.

So while the intellectual starting points of the drive for social justice and criminal justice are separately rooted, recent studies have underlined a very close correlation between the people, groups and areas in society that each deals with. The Scottish report puts its case strongly: "The policy problem that has to be confronted is not that there are high levels of illiteracy among prisoners or that the prisoner population is characterised by chronic unemployment but that imprisonment is a constituent component of social exclusion, as are poor housing or low life expectancy." That is certainly a bleak, almost fatalistic view.

What is certainly true is that individual failures of conscience cannot be the only causes of crime. Individual failings, the "sin" account of crime, are undoubtedly a necessary part of the explanation behind offending behaviour. But if that were a sufficient explanation, our criminal justice system would look very different. A prison landing might have tinkers,

tailors, soldiers and sailors in neighbouring cells; it would look like a microcosm of society. Instead it disproportionately picks up people from the most deprived communities. This leads to the tough question: if individual weakness is not the full explanation for offending behaviour, can punishing individuals and working on changing individual behaviour provide a full solution?

Considering public opinion

There are ways to align more closely the operation of criminal justice and social policy. But before examining them it is worth looking at the matter of public opinion. The hard/soft dichotomy runs the whole way through all public debate on crime; it cannot be ignored or finessed. Policy makers are rightly concerned to create a criminal justice system that reflects the public's sense of justice and just desserts. Indeed, the public's views are not merely a political dimension of a court's activities. It is integral to the operation of the courts that the disposals they make command general confidence. Justice is a public affair.

But it would equally be wrong to allow public opinion to be mischaracterised as unreasonable or uninterested in solutions to crime. The call for more "locking up", so amplified by the media, comes partly out of despair over alternatives. Widespread research into public opinion finds doubt over whether prison works to stop offending (the university of crime argument) and a willingness to look at working alternatives, particularly drug treatment regimes. While this is undoubtedly a hugely sensitive subject, the contours of public opinion are not purely those of punitiveness and revenge. Nor would it be right to try and examine how punishments can be best aligned with the ambitions of social justice by stealth – it requires public engagement.

In an interview with *Progress* magazine this summer, the Chancellor said he wanted to learn from the success of the Jubilee 2000 campaign in engaging civic society; what he has called a "progressive consensus". He cited "educational opportunity, tackling child poverty and both the causes and the problems of crime" as other areas suitable for the approach.

The Network for Social Change, funder of Drop the Debt, set up a campaign called SmartJustice a few years ago to work on building public support for alternatives to imprisonment on the same model. It has built a broad partnership over recent years by working with organisations like the Women's Institute, the Townswomen's Guild and the Soroptomists. It has been covered on ITV's *Loose Women*, in *The Mirror, Reader's Digest*

and many other places outside the national broadsheets, which have been the traditional target of reformers. Its work shows that it is possible to have a constructive conversation with the public about crime and punishment at the grassroots level.

Finding solutions

So what can be done to make sure that the punishments meted out by the courts do not clash with efforts to implement social justice? Here are some approaches to think about: diversion, integration of services, a true second chance for offenders, and alternative punishments to custody.

"Diversion" means identifying an individual at any stage of the criminal justice system whose offending behaviour is symptomatic of a problem, such as mental health needs or drug addiction, and passing that person over to services aimed at treating the cause. The government has promised a national system of court diversion for the mentally ill. But the reality remains a curate's egg, with little sign that the resources or the will are in place to build a consistent system.

In California five years ago Proposition 36 was passed to divert non-violent drug offenders into community drug treatment. It was prompted by the fiscal crisis that has followed the wave of mass imprisonment in so many US states, and was passed with enormous public support in a referendum. That it was passed in a state that has approved so much punitive "three-strike" legislation in the past is a measure of the complexity of public opinion. A similar system was introduced in New York City during the time when crime fell so markedly. Quite simply, resources were shifted from incarceration for drug offenders to community treatment.

The integration of the criminal justice system and the public services has been under way for several years. Prison healthcare and education are now provided by and with the public services responsible for health and education in the community. But we know that while in prison a third of people lose their home, two-thirds lose their job and over two-fifths lose contact with their family. This raises the risk of reoffending.

Of course, there will always be challenges in ensuring that punishments are not seen as an overtaking lane in accessing public services, but far too many opportunities to plug people into the health, employment, welfare, housing and education services are missed. Why is there a gap after release before benefits are accessed?

There are also opportunities for positive engagement. Perhaps additional pay for work in prison or the community, redeemable after a period of agreed behaviour, or payable directly into a dependent child's baby bond? Or what about a New Deal approach to offenders' employment?

In 2002 the government published *Breaking the Circle*, a review of the Rehabilitation of Offenders Act 1974. There were several recommendations, designed to ensure that employment for offenders was made as straightforward as is compatible with public safety. It called for changes around periods of disclosure, which have yet to be taken forward.

While a concern with public safety is understandable, it is entirely counterproductive to that aim to have rules that needlessly make it harder for ex-offenders to work. A job is estimated to reduce the chance of reoffending by over a third. Going back to those wards in Scotland where one in nine young men were in prison over any one year, it is hard to imagine an employment policy that makes sense without looking at the criminal justice system, or a policy to end reoffending that makes sense without looking at employment. The risk is making entire communities unemployable. The Social Exclusion Unit report recommended a "going straight contract" that would combine a caseworker approach and additional support for offenders, if they agreed to take responsibility too for their own resettlement.

Finally, it is impossible to look at the social cost of punishment without looking at the size of the prison population. Prison is the most serious sanction our society has. It is designed to remove someone's liberty. There is a broad consensus that that is right for serious and violent offenders, but there are two structural problems.

The first is asking how to restrict the punishment to the loss of liberty. A prison sentence is in practice very often much more than a sentence of loss of liberty. It is a sentence of poor healthcare, unemployability, crowded conditions, loss of family contact and risk of harm from self or others. The second problem is that these effects are passed on to families and even whole communities.

Continuing efforts are needed to make sure that prisons ameliorate the harm they do. But ultimately imprisonment remains a blunt tool, a tool of last resort. That means that we must look at alternative punishments in the community, which do not inflict that same enduring collateral damage on non-violent offenders, families and communities but do command public confidence that justice has been done. It also means looking for

structural solutions to build crime out of the most deprived in communities as part of the fight for social justice.

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Chapter 16

Where next for penal policy?

Rt Hon Charles Clarke MP, Home Secretary

Where next for penal policy?

Rt Hon Charles Clarke MP

My assessment of what the British people think about criminality and justice and therefore want to see from the system is as follows.

First and foremost, people want to feel secure in their homes and everyday lives – free from abuse, disrespect and antisocial behaviours, and respected by others as they would expect themselves to respect others. People expect government and all of its agencies to do their very best to prevent people offending in the first place.

Second, when a crime does occur, people want to feel that the offender will be caught and that justice will be done, will be carried out effectively, fairly, and hopefully swiftly, so that we live in a society based on the rule of law where other forms of revenge or retribution are outlawed and unnecessary.

In this regard, let me underline that this is a government that will continue to be tough on crime and criminals, especially really dangerous criminals and persistent offenders. As you know, people's concerns about the former were addressed in the Criminal Justice Act 2003, which introduced indeterminate prison sentences for the most dangerous offenders to ensure that society is protected against people who are judged to still be of risk to the public.

And third, people want to believe that when offenders leave the criminal justice system they will go back to "the straight and narrow" and become constructive contributors to the good of society as a whole. They know that unless this is achieved the cycle of reoffending will be perpetuated, thus undermining our efforts to reduce crime.

Each of these ambitions – security, justice and preventing reoffending – can be tackled only by all parts of our society working together. This is typified, for example, by the ways in which the Crime & Disorder Act is applied, the operation of youth offending teams and, in a different way, the principles of the Sure Start programme. The continuing fall in crime is a tribute to these approaches.

Focus on preventing reoffending

But what I want to focus on here is how best to prevent reoffending.

Over half of crime is committed by people who have already been through the criminal justice system, and of course this government generally already accepts the need to reduce that percentage dramatically. We need to move away from the idea that prisons can be universities of crime towards them being institutions that ensure offenders become working and productive members of society upon release.

Spending on prisons has increased by more than 25% in real terms since 1997, and spending on probation by 39% in real terms since 2001. We already spend £300 million a year on rehabilitative regimes in prisons. Thousands of prisoners are on education and skills programmes, so that now more than 10% of adults who gain basic skills qualifications are doing so from prison. Primary healthcare in prisons can now genuinely be compared to NHS standards. There is now drug detoxification in every local prison and drug treatment programmes in more than 100 prisons. Over 350 specialist mental health professionals have been appointed just to work with prisoners. We are putting both education and health services in prisons firmly in the mainstream, as learning and skills councils and primary care trusts take up responsibility for provision.

However, I believe that we have to do very much more. We are a government deeply committed to education and health. But the fact is that the least educated and least healthy people in the country remain those within the criminal justice system. And their poor education and health does not only damage them: it makes them more likely to reoffend, and so a greater danger to society than they need to be.

We have to make preventing reoffending the centre of the organisation of our correctional services. We have to make reducing the number of reoffenders the central focus of our policy and practice. We have to understand, and act on the fact, that cutting reoffending is essential if we are to cut crime.

That means that we have to move towards a form of contract between the criminal and the state whereby each individual in prison, on remand or on probation is required to commit to a non-criminal future, to no future reoffending. And in return the state and its agencies should commit to providing whatever support it can to stopping their reoffending.

Support for offenders

I emphasise the word "individual". Offenders are not a homogenous group – they have very different reasons for offending and will respond to different solutions. They have

individual needs and aspirations as well as varying length of sentence. For some the fact of prison, or even simply the threat of prison, will be enough to prevent any reoffending. For others prison is merely part of the reality of an institutional life in which the individual has little stake.

We have to create a package of support and interventions for each and every offender, and we have to do this in a totally methodical way. We need to make sure that for every person within our prison and probation services we have a realistic programme for their time in the system, with clear goals right from the start.

Community sentencing, with the flexibility and focus it offers, can be an important support for this approach – particularly as the authority of the court can reinforce the commitment offenders need to show towards such a package. The truth is that a well-planned and properly supervised community sentence is both tough on the offender and far more valuable in indicating a constructive future for the individual. Moreover, such sentences allow offenders to perform reparation in a more visible way, which the community is better able to shape and understand.

From the very first day that an offender enters prison or probation, there has to be a thorough and systematic assessment of the individual's needs, and of that person's own commitment to addressing them. On that basis a realistic programme has to be prepared that is specific for each individual case. At the core of this programme has to be the assessment of the measures that are most likely to be successful in reducing the likelihood of that individual offending again upon release.

The individualised support package I have set out will have a range of elements, but the focus should be particularly on health, education, employment prospects, social and family links and housing.

Each of these five areas that make up the support package for each individual can only develop through a full and vital external partnership. This is obviously difficult in the secure circumstances of prison, though much less so for probation. I nevertheless strongly believe that the way forward in tackling reoffending is to draw in resources from the wider community in order to reduce reoffending, and I believe there exists a strong desire widely to offer support in that way.

The development and implementation of the types of package I propose is difficult, as is

the kind of partnership working that I envisage. That is why I believe we must focus much more on developing the skills and talent of the individuals who work within the criminal justice system, and in particular within the prison and probation services. Any successful programme of change has to have at its heart those who work within it.

The prison estate

The approach that I am describing obviously has implications for the organisation of the prison estate, which has to deal with every offender. However, I believe that the organisation of the prison estate should recognise much more starkly the differences between individual offenders. It should directly reflect the way in which we want offenders to be managed, with the more individualised approach I have described earlier.

Of course I recognise that any process of change will inevitably be long-term in character, and that our immediate priority has to be to deal with the pressures the system is under. However, I do think that our long-term ambition has to be clear.

A county-by-county analysis demonstrates wide variations across the country in the relationship between the number of prison places available locally and the number that are needed. In some areas there are substantial surpluses, in others substantial shortages. For me, this brief survey points clearly to five conclusions about the way in which we organise the prison estate.

First, remand prisoners should wherever possible be held separately from sentenced prisoners, whether in separate prisons or in remand wings. They should be located close to courts, for example in good community prisons, which would help to speed up the whole court process. These prisons should deliver the services necessary to reduce unnecessary remands to custody – such as bail information schemes – which would help the criminal justice system work more effectively. The different needs of those on remand should be given special attention, since they are often very vulnerable, particularly if they are women.

Second, we should aim to provide good local community prisons that allow individuals to maintain family and community ties and have the ability to provide excellent support and interventions in the way I have described above. I see these prisons becoming far more engaged with their local communities, and better at building relationships with a wide variety of other organisations of the type I described earlier. I attribute particular importance to very strong local prison leadership and to the desirability of such prisons

becoming a vital part of the civic fabric of every locality.

Third, our priority must be to locate remand prisoners and those on sentences of less than four years (about 48% of all sentenced prisoners) in such local community or remand prisons, and to target those on lower sentences with the individualised support packages I have described earlier.

Fourth, for the most dangerous and very long-term prisoners, our priority must be to provide a very secure environment. This can be provided by a relatively small number of institutions with staff possessing particular skills.

Finally, particular attention needs to be given to prisoners with particular characteristics, such as women or young people, or particular problems, such as substance abuse or mental health.

Some of the approach I describe is already part of our practice, but I believe that more work is needed to establish this approach across the prison estate. Our central strategy must be to take all possible steps to encourage prisons to become colleges for constructive citizenship rather than recruiting centres for crime.

Organisational change

In one sense it is straightforward to set out these ambitions. The tough challenge is to make such changes happen. I believe that the introduction of the National Offender Management Service is central to this ambition. We have already set the key goals for the new service: to reduce reoffending by 5% by 2008, and 10% by 2010.

I am absolutely clear that the kind of individualised response I have described cannot exist without one person being responsible for each offender throughout their time in prison and on probation – the end-to-end offender manager. This role will embed partnership between the prison and probation services and the wider community, and that will be helped by new technology, which will better assess risk and manage offenders through one single database wherever they are in the system.

The introduction of the National Offender Management Service also seeks to maximise rehabilitative outcomes for every offender in a way that is far more consistent across the country. While some prison and probation areas have responded magnificently to these challenges and have improved, there are others that have not achieved as much as

necessary. This is the reason I am personally committed to the creation of a vibrant mixed economy with the National Offender Management Service. A strong structure of commissioning and contestability in prisons and probation will create a wider range of appropriate interventions, and raise the quality of offender management services across the country.

This is of course not easy to achieve, particularly when the historic cultures of the nationally managed prison services and the locally managed probation services are so very different. It is, however, essential, and I believe we can drive improvement through seeking the best possible providers for interventions and offender management in each area. In many areas, the public sector's skill and expertise will deliver the continuous improvement we need. In other areas, competition is needed to stimulate this improvement. For example, voluntary organisations with significant experience and history of success often already provide drug treatment interventions.

In short, I see no reason of principle or practicality why offender management should not be provided by the private or voluntary sector. And a very important part of the development of commissioning and contestability will be the ability to specify and contract for cross-cutting services, straddling the silos of prison and probation, and making a reality of the end-to-end management of offenders.

Clearly, the development of such a structure will inevitably require further organisational change within the National Offender Management Service. At present, probation boards have a free-standing – and exclusive – statutory duty to provide probation services in their geographical areas. In future, it will be those who commission who will have the responsibility for defining what services are necessary and ensuring that they are provided.

Probation boards will change into providers of whatever services are commissioned from them – this may be offender management or the delivery of interventions to reduce reoffending, or a combination of the two. As time goes on, there will be no guarantee that they continue to be commissioned to deliver services in their area if another provider can do it better – just as there is no guarantee that the public-sector prison service will continue to run a particular prison or group of prisons.

Of course I recognise that there will always be some prisons where we need to exercise great central control. However, I believe many could operate far more independently than at present. Through the commissioning process we should be able to be far more

demanding about how we expect local prisons to be led, to perform, and to develop. As these community prisons become embedded, we should be able to move to a situation where we can rely on the regional offender manager to identify what is needed locally, and use the contracting process to achieve that.

I do want to emphasise one point. The whole motivation behind this change is to drive up performance to further reduce reoffending. It is not about cost-cutting and standards slashing. At this time of change I know that there has been a good deal of anxiety and concern, but I want to emphasise my great respect for the professional staff, who are already doing a very difficult job extremely well. The proposals we are making are not about changing the staff, but about changing the organisation and management of the service to achieve ambitions that I know are very widely shared.

Sentencing policy

I want to conclude with sentencing policy.

It should be obvious that the legal processes we have in place affect our ability to rehabilitate individuals as effectively as we can. For example, if a significant portion of sentence is served pre-trial, we are unable to achieve much real rehabilitation during that period. As I have said, this suggests that we need to minimise the time spent on remand. But it also means that we should ensure that we remand people only where there is a danger to the public or a significant risk of the offender absconding. In the latter case, for most offenders the risk can be managed by making tagging a condition of bail.

We of course are looking to make many changes through our reform of the criminal justice system, but the injunctions to sentencers that I offer are:

- Be rigorous in using your powers to sentence in a way that protects society against dangerous and violent criminals, including making good use of indeterminate sentences for the most dangerous offenders.
- Be rigorous in upholding the authority of the court when it comes to enforcing penalties, including fines; to forcing offenders to give respect to the court and its procedures; and to ensuring that justice is rapidly despatched.
- Be flexible and positive in using community sentences, which can be far tougher than prison, to help prevent reoffending.
- Make full use of fines – effective penalties that hit offenders in the pocket, where it hurts.

- When giving a custodial sentence, take full account of the new guidelines issued by the Sentencing Guidelines Council, to whom I pay credit. They are there to deliver consistency and effectiveness in sentencing.
- Make full use of the custody minus, custody plus and intermittent custody arrangements when they are fully in place, since they will reinforce the flexibility that can best reduce reoffending.

Conclusion

I firmly believe that by working in partnership, the government and all its agencies, and the judiciary and all its agencies, can work together to ensure that those who are really dangerous to our society are properly dealt with, to minimise and hopefully remove the danger they offer to us all; while those who offer less risk but have got caught up in their own cycle of despair can be assisted to find ways through, to end their offending and to make a constructive contribution to our society.