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Conviction politics

a plan for penal policy



Stephen Shaw

Conviction politics: a plan for penal policy

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1. The purpose of penal sanctions

An entertaining fad in some present-day writing about penal policy is to begin by quoting a red-blooded opinion decrying the state of law and order. All the familiar items will be there: the degeneracy of youth, victims playing second fiddle to criminals, the lack of security in the home or on the streets, overcrowding in the prisons, the need for sterner sentencing. The writer then 'reveals' that the quotation dates not from the most recent Grub Street editorial or Tory Party conference but from an alleged Golden Age, at least before 1945 and preferably from Edwardian or Victorian times. The message is that crime is always with us and that the nature of the 'law and order' debate is timeless.

Although most of the commentators who employ this little conjuring trick do so from a radical perspective, the theme is actually a deeply conservative one. Crime and the response to crime are inextricably linked with our political and economic culture. A society generates both criminality and attitudes to criminality in due measure. Penal reform is as old as the penal system itself. Penal reform rarely equates with penal progress.

The objective of this pamphlet is not to deny that the penal system is connected with wider social, cultural and economic factors. Nor to dismiss the structural and political barriers facing changes in sentencing and the treatment of offenders. (It is instructive, in this regard, that penal policy was totally excised from Labour's 1987 Election Manifesto.) However, its purpose is to argue that rationality and principle can be introduced into the management of the penal process. And that the exercise of State power can and should be employed to construct a penal policy reflecting the values of liberty and natural justice as well as ensuring the efficient allocation of resources.

The first requirement is to decide

what penal policy is actually for. Conventionally, there are at least five justifications for penal sanctions. Three of these justifications—rehabilitation, deterrence and containment—are utilitarian in character. Two—retribution and denunciation—are 'symbolic' of an ethical and philosophical nature.

Rehabilitation

Over the last hundred years, criminologists have spent more time investigating the rehabilitative potential of particular penalties than upon any other topic. The aim of reforming malefactors actually lay behind the barbaric rules of silence and solitary confinement enforced in the nineteenth century prisons. It was the basis of the public school ethos of inter-war borstals. It has enthused those American positivists who have linked criminality with—amongst other things—food additives and chromosome imbalance. The underlying theory is sometimes known as the 'medical model' of crime. By analogy with a hospital patient, a criminal is 'sick' and can be 'cured' by the appropriate "therapeutic technique".

However, the findings of the mountains of research are uniformly negative. No penal 'treatment' can demonstrate greater effectiveness than any other, or indeed than no treatment at all (S R Brody, *The effectiveness of sentencing: a review of the literature*, Home Office Research Study 85, 1976; R Martinson, *What Works?—Questions and answers about prison reform* The Public Interest, Spring 1974). No doubt some offenders will respond positively on some occasions to some 'treatments'. But there is no case for grounding penal policy on the vague hope of occasional rehabilitative success.

All the more so when the recipient of the rehabilitative method may be forgiven for failing to distinguish reformatory measures from overtly punitive ones. Before being shot dead in an alleged escape attempt, George Jackson, the author of *Soledad Brother*, had already spent 11 years in prison for a \$70 robbery because he could not respond to 'treatment'.

The fundamental flaw in the notion of rehabilitation is its failure to locate offending within the broader social environment. Ironically, for that reason, the otherwise discredited medical model of crime may actually have a special relevance. For improvements in standards of health and life-expectancy have resulted far more from improvements in social conditions—drainage, housing, diet—than from medical technology or the products of the pharmaceutical industry. Similarly, rehabilitation of the social fabric—a programme of social crime prevention of the kind now embraced by Labour—offers far more than therapeutic programmes designed for the individual offender.

Deterrence and containment

The notion of deterrence provides little better basis for constructing a penal policy. Although it would be foolish to argue that people are never deterred by the prospect of punishment, there is scant evidence that more punitive

sentencing influences the crime rate. The presence of pickpockets at public executions is often cited. More recently, a highly publicised 20-year sentence imposed on a 16-year old Birmingham boy for 'mugging' resulted in no reduction in the prevalence of street robbery (R Baxter and C Nuttall, *Severe sentences: no deterrent to crime?* New Society, January 2 1975). Most crime is petty and impulsive and even premeditated offenders will discount the level of expected penalty by the unlikelihood of being caught. If capital punishment is not a unique deterrent in the case of murder (where the chances of apprehension exceed 90 per cent), it is hardly surprising that deterrent sentencing is ineffective with other crimes where the probability of being caught is very much lower.

Yet, if deterrence, like rehabilitation, is an imperfect guide to penal policy, surely the idea of containment—'keeping criminals off the streets'—must have a contribution to make? Indeed, this rather crude calculation has played some part in the trend towards mandatory prison sentences for recidivist offenders in the United States. Moreover, no-one could doubt the relief which all women felt when the serial killer Peter Sutcliffe was convicted and sentenced. The chances of falling victim to serious violent crime may be low but that is not an argument against the incapacitation of those who, if at liberty, would resort to violence or the threat of violence. Albeit another extreme example, the wave of internecine killings perpetrated by the Irish National Liberation Army in early 1987 was a direct result of the release of INLA members whose earlier convictions had been overturned.

Nevertheless, there are strong arguments of both natural justice and financial prudence which militate against containment as a general basis for penal policy. The argument of natural justice relates firstly to the issue of whether a person should be punished for the persistence of offending rather than for its inherent *seriousness*. And secondly, to

whether people should be punished for predicted *future* offending (particularly when prediction methods are notoriously unreliable). The argument of fiscal prudence strongly underpins these objections of principle. Home Office research indicates that a 40 per cent reduction in the prison population would increase convictions by just 1.6 per cent. By contrast, increasing the prison population by between four and seven times would be necessary to reduce convictions by about 17 to 20 per cent (S Brody & R Tarling, *Taking offenders out of circulation*, Home Office Research Study 64, 1980). The rough order of cost of the latter policy would be equivalent to a new Trident system every three years.

Punishment and the crimes of the powerful

In other words, the three classic utilitarian justifications for penal policy provide little guidance except insofar as the negative research findings argue for parsimony in the use of resources and the avoidance of unnecessarily damaging or intrusive sanctions. Non-utilitarian justifications—retribution and denunciation—are necessarily more problematic. The conservative criminologist Patricia Morgan has argued that the point of punishment is “to reassert the seriousness of certain moral rules of a community. Punishment makes a drastic and public distinction between those who have broken the rules and those who have not” (P Morgan, *Delinquent Fantasies*, Maurice Temple Smith, 1978). A not dissimilar case for punishment has recently been gaining support on the left. Thus, Ian Taylor, in a book which marked an important turning point in the thinking of socialists about crime, justifies his support for a more “repressive” rape law “not in the ability of the new law to identify and incapacitate individuals *per se* but rather in its importance in extending the availability of law as a symbolic defence for women,

as well as in providing a temporary respite to women caught in sexual relationships involving physical violence from men” (I Taylor, *Law and Order: Arguments for Socialism*, Macmillan, 1981, emphasis added). Similarly, A Sivanandan, Director of the Institute of Race Relations, has forcefully commented “I don’t want racists to be nice to me, I want them to be punished” (S Benton, *The left embraces law and order*, *New Statesman*, 21 November 1986).

Perhaps because social philosophers abhor a vacuum no less than their colleagues in the natural sciences, the movement ‘back to punishment’ can be seen as a response to the failure of positivist criminology, a response to the perception that “nothing works”. It is the case that punishment for punishment’s sake is scarcely a hopeful basis for penal policy. Moreover, socialists will obviously feel uncomfortable employing the terms “justice” or “just deserts” within the context of an unjust society. Nevertheless, the symbolic functions of punishment can provide some real guide to the shape which a socialist penal policy should take. Not only in regard to crimes against women, black people, pensioners and other disadvantaged groups, but also in regard to the crimes of the wealthy and powerful. As Clive Soley has pointed out: “When I looked at the last comparative statistics, they showed that four thousand million pounds was defrauded for income tax and there were just four people sentenced to immediate imprisonment as a result. For supplementary benefit fraud, it was two hundred million—and of those people who appeared before courts, 404 received immediate prison sentences. That is the level of distinction in social class” (C Soley, “Labour’s Prison Policy” in *Politics and Prisons: Prison Reform Trust Lectures 1985-86*, Prison Reform Trust, 1986).

A process not a system

Denunciation of particular types of

crime can form a proper part of a socialist penal policy. However, it is clearly only part of the framework. Indeed, denunciation of the crimes of the powerful is a dangerous strategy if it does not go hand-in-hand with the denunciation of those crimes which most concern ordinary people. No-one is frightened of walking after dark for fear of being confronted by an insider-trader, unless it is a fear of being run down by a Yuppie driving a Porsche.

In fact, the traditional socialist ideals of equality, liberty and fraternity provide strong policy leads in criminal justice terms (D Downes, *Law and Order: Theft of an Issue*, Fabian Tract 490, 1983). A more just society implies an equality of law and order. Liberty means the minimum use of liberty-depriving sanctions. Fraternity implies that the aim of policy should be to minimise the inevitable damage which results both from crime and from the exercise of penal sanctions. It additionally means greater public involvement and openness within the penal system and an emphasis upon restitution, reparation and the needs of victims. But it does not apologise for also standing up for natural justice and the rights of the accused and the convicted.

Criminal activity is neither rare (as Table 1 shows, one-third of men born in the early 1950s have at least one criminal conviction *in addition to* whatever motoring offences they may have picked up), nor fortunately is most of it very

serious (in itself an argument against a policy of incapacitation). Nor can penal policy exert more than the most marginal influence upon the incidence of crime. But any attempt to reduce the disproportionate numbers of working class offenders netted by the penal system must go hand-in-hand with an effort to reduce the disproportionate numbers of working class victims of crime.

The message that rationalisation of penal policy can be achieved without exciting a crime wave will only be plausible if it coincides with rigorous and amply funded action to reduce the crime and the fear of crime which blights so many people's lives. For while imprisonment may not reduce criminality, it may—like Neighbourhood Watch Schemes, which also do not in fact reduce crime—provide a feeling of security. No politician will need reminding that changes in penal policy are electorally naive if people feel less safe in their homes and on the streets as a result.

I have referred hitherto to the penal system, yet what we actually possess is not a 'system' but an irrational and chaotic penal 'process'. The result of differential policing, differential enforcement of the law, and a penal policy determined by a free market in thousands of individual sentencing decisions (which exhibit grotesque disparities from court to court), is neither system-

Table 1
Convictions of men born in 1953

Number of convictions	Proportion of all men with convictions by specified age		
	15 (ie by Dec 1968)	20 (ie by Dec 1973)	27 (ie by Dec 1980)
0	89.0	76.8	69.4
1	7.1	13.4	17.1
2	1.4	2.6	3.4
3	0.9	1.7	2.1
4	0.4	1.2	1.5
5	0.4	0.8	1.1
6-10	0.6	2.2	2.8
11-20	0.1	1.1	1.8
21+	—	0.2	0.8

Home Office Statistical Bulletin 7/85, Criminal Careers of those born in 1953, 1958 and 1963.

atic nor just. The enforcement of humane socialist values requires that the penal process be reorganised as a system based on principle, with clear objectives and with clear guidelines for

all the agencies involved. The implications of such a plan for the prisons, alternatives to custody, and the treatment of juvenile offenders form the subject of the following three chapters.

2. Prisons

For much of the period since their emergence after the Industrial Revolution as the lynch-pin of the penal process, the prisons have been shrouded in secrecy. In recent years it is fair to record a policy of greater openness. The result is that few people can now be unaware that our prisons are in a critical state.

However, the way in which that crisis has been presented by the government and in the press has concentrated almost exclusively upon physical decay and decrepitude. The 1986 report of the Wandsworth Board of Visitors affords particularly graphic examples: hundreds of prisoners sharing cells intended by the Victorians for single occupation; 23-hour lock-up; infestations of mice, rats and cockroaches; the room used for Muslim worship covered in pigeon droppings; prisoners choosing not to defecate in plastic buckets but throwing waste products out of the window to be collected each morning by a work-party. Wandsworth is, in fact, far from being the most overcrowded prison in the country, and the almost unspeakable squalor is replicated in many other urban gaols. Such conditions are disgusting and degrading for both prisoners and prison staff. As the House of Commons

Social Services Committee has recorded in 1986, "in some prisons, inmates are being kept in conditions which would not be tolerated for animals".

It comes as a surprise to many people, therefore, to learn that most British prisons are *not* overcrowded. There are very nearly as many new, glossy, prestige gaols as there are festering and fetid penal slums. The real nature of the prison crisis is the number and length of prison sentences, the misallocation of resources towards additional construction, the absence of prisoners' rights, and endemic conflict between prison management and prison staff.

Who is in prison?

In the summer of 1987 the prison population in England and Wales reached a new all-time record of over

Table 2
Prison Population, June 30 1986

Remand	
Male	9,600
Female	370
In police cells (male and female)	180
Total	10,150
Sentenced	
Adult male sentences up to 18 months	9,700
Adult male sentences over 18 months	16,600
Young offenders: Youth Custody	7,900
Young offenders: Detention Centre	1,100
Adult female	1,210
Total	36,510
Non-Criminal (includes Immigration Act prisoners)	220
Total	46,880

Based upon Home Office Statistical Bulletin 6/87, *The Prison Population in 1986*.

51,000. Most of these prisoners are young, white, male and working class. As Table 2 shows, one in five is on remand and awaiting trial, the majority of sentenced prisoners having been convicted of offences against property— theft, fraud or forgery, burglary. Over 20,000 receptions into prison each year (one-fifth of the total) are for fine default.

Women prisoners represent only about 3 per cent of the total. That they are such a small minority results in many women prisoners being detained hundreds of miles from friends and relations. Moreover, compared with men, women prisoners are more likely to be punished under the prison disciplinary system and to be either first offenders or held on remand.

The over-use of custodial remands (which is extreme enough in the case of men where just over half of remanded defendants subsequently receive a custodial sentence) is shown by the fact that only 34 per cent of women remanded in custody are later received again as sentenced prisoners. Remand prisoners represent the fastest growing section of the prison population. Imprisonment before trial is the one exception to the Magna Carta guarantee that no British subjects should lose their freedom until due process of law dictates otherwise (M Winfield, *Lacking Conviction: The Remand System in England and Wales*, Prison Reform Trust, 1984). A reduction in the numbers of remand prisoners can be achieved by imposing trial deadlines, opening new bail accommodation, establishing bail information schemes, enabling repeated bail applications and by strengthening the 1976 Bail Act. This should be a priority for a socialist policy, and one which would have particular significance for women prisoners.

It should also be a priority to avoid imprisonment for pregnant women or mothers of young children. A small number of women prisoners may keep their babies with them until the age of nine or eighteen months. A survey in 1985 showed that one woman and her baby were serving 28 days for shop-

lifting.

In contrast to women, black people are hugely over-represented in the prison population. A Home Office study has shown that about 8 per cent of male prisoners and 12 per cent of female prisoners are of West Indian or African origin, whereas even taking account of differences in the age structure, they only comprise between 1 and 2 per cent of the general population. Black people are more likely to be remanded in custody, to receive longer sentences despite having fewer previous convictions, and to be detained in higher security prisons. In April 1987 a black prisoner won a major test case over discrimination in the allocation of prison work which he had suffered four years earlier. It is true that over the past few years the Home Office has taken a number of welcome initiatives to combat racism but, as yet unpublished, research carried out by the Oxford Centre for Criminological Research demonstrates conclusively that discriminatory treatment of black prisoners remains routine. A further, albeit symbolic, step forward for the Home Office would be to make racially discriminatory behaviour an offence under the prison officers' disciplinary code.

No less scandalous is the fact that year-by-year the prisons continue to contain many people who are suffering from mental illness. It can be no part of a humane penal system to imprison people whose offences derive from a mental instability which is treatable, although there are suggestions that health service unions in psychiatric hospitals are partly to blame for blocking transfers. Equally, we should be keeping out of prison drunks, prostitutes, petty offenders from amongst the growing number of homeless, many remand prisoners and fine defaulters (although the real problem here is the level of fines imposed—many poor people may prefer to wipe out their fines through a short stay in prison). This would reduce the throughput of the prison system although it must be accepted that the diversion of these

groups will not substantially affect the total number of people within prison at any one time.

To achieve that end, it is necessary to reduce sentences on a much greater number of property offenders. This can either be done by mitigating sentences administratively—increasing remission, introducing an amnesty, amending the parole process to make release automatic—or by legislation to reduce the powers of the courts. This latter course is preferable both from the view of abstract justice and because, by minimising discretion, it is likely to be more effective in the longer term. However, it is also much the more politically unpalatable course raising as it would do the bogus but potent criticism of interference with the independence of the judiciary.

That independence is currently exerted in such a way that an offender is twice as likely to be sent to prison by magistrates in Oxford rather than Cambridge, in Manchester rather than in Liverpool, in Barnsley rather than in Rotherham, and ten times more likely to be remanded in custody by courts in Dorset than by courts in Bedfordshire or Hertfordshire (National Association of Probation Officers, *Magistrates' Courts and Custody*, 1985; Prison Reform Trust, *The Bail Lottery*, 1986). A rational restructuring of sentencing and an elimination of the disparities requires a Parliament brave enough to take on the magistrates and the judges.

The use of resources

One of the 'mysteries' of the prison system is that declining regimes and conditions do not result from a shortage of resources. On the contrary, compared to most other parts of the public sector, prisons have been consistently favoured since 1945. The ratio of prison officers to prisoners, for example, has fallen from 1:7 to just over 1:2. Rather, the money has been diverted into unnecessary 'security' tasks, and away from renovation of existing prisons into new construction. As Table 3 shows, since 1979 money has been poured into the prison system, but a gaol like Strangeways in Manchester is in much the same state it was eight years ago, indeed much the same state as it was in the late 1940s.

Another of the features of the prison system is the wide gulf in regimes and physical conditions between different establishments. The more disgusting prisons are allowed to operate without check because they are protected by Crown Immunity and are subject to no code of minimum standards. The introduction of such a code—to cover such issues as time out of cell, cell size, lighting, heating, sanitation—and backed by the force of law is an essential way of ensuring improvements in prison conditions. The code would provide unambiguous evidence as to the quality and quantity of the output of the prison system. It would also help in deciding

Table 3
Spending on prisons (£m)

Year	Net capital expenditure	Net current expenditure
1978-79	26.3	231.8
1979-80	26.0	286.0
1980-81	33.6	380.6
1981-82	31.9	425.3
1982-83	41.6	467.8
1983-84	43.2	517.0
1984-85	53.9	554.8
1985-86	83.0	572.0

Hansard, 15 May 1987 c.468.

upon resource allocation: prisons below minimum standards being favoured relative to the rest.

If an objective of a socialist penal policy is a reduction in the number of prisoners, then it should also aim to reduce the number of prisons. The case for cancelling the prison building programme will be made later. At this stage it is worth noting that there is an important side-benefit of switching resources from new construction into renovation. Because the provision of integral toilet facilities usually means converting the middle cell in a group of three, the effect is a substantial reduction in total prison capacity. In a humane system, no prison should be allowed to accept prisoners beyond the accommodation maximum for which it was designed.

Prisoners' rights

The paradox of the prison experience is that while most prisoners are sentenced for breaking the law and failing to respect the rights of others, prisons are lawless places (or at least places where the law rarely impinges) and prisoners enjoy few rights, merely 'privileges' which can be withheld at the whim of management.

The Prison Act was passed some 35 years ago and imposes few obligations upon the prison authorities. A new statute is required, specifying minimum standards and affording prisoners an entitlement to work, education and personal possessions. To reduce the isolation of prisons, prepare prisoners for their release and ensure equal standards as exist in society at large, prison-based services like the Prison Medical Service and the prison chaplaincy should be abolished. Access to *all* the rules and regulations governing prison life should be guaranteed and censorship and restrictions on correspondence removed. There should be unfettered access to telephones, improvements to visiting arrangements and a presumption that prisoners be detained as close as possible to their home area. There also seems

no good reason why prisoners should be stigmatised by association with peers of the realm. The Representation of the People Act should be amended and prisoners granted the vote.

The demand for an extension of prisoners' entitlements also encompasses the right not to be subject to secret and arbitrary rules. Categorisation of prisoners according to the risk they are thought to pose to security should be subject to independent appeal and review as should segregation (solitary confinement). No prisoner should lose remission as a result of prison disciplinary arrangements which do not allow for legal representation and an independent appellate system. Prisoners' grievances should be independently investigated through the establishment of a Prison Ombudsman. Local accountability should be enhanced by ensuring local authority representation on Boards of Visitors.

The most critical reform, however, should be the rolling back of the parole system. Parole is a secret, administrative exercise in re-sentencing against which there is no appeal (indeed, a prisoner is not even told the reasons for a refusal of parole). It is actually grounded upon a myth—parole is granted when prisoners are perceived to be at their 'peak of training', an optimum point when the effectiveness of the penal system is maximised. Yet, as we have seen, there is no empirical basis for such a peak, indeed no evidence of any 'training'.

The fact that it is unjust, unscientific, and the cause of much anxiety and resentment on the part of prisoners are sufficient reasons for consigning parole to the long list of penal failures. It may be added that parole probably does not even succeed in reducing the prison population, judges adjusting their sentences upwards to take account of possible early release. For most prisoners, parole should be replaced either by the system of 50 per cent automatic remission which exists in Northern Ireland and/or supervised release at the one-third stage of a sentence. Life sentence prisoners would still be subject to

review as at present but, in order to avoid a proliferation of discretionary life sentences for crimes other than homicide, it may be that a more restrictive policy regarding remission/supervised release is necessary for serious violent offences. However, in such circumstances, the policy should be based, not upon putative responses to prison treatment, but upon an explicit and individualised assessment of risk to the public.

The case for prison reform

Some prisoners represent such a threat to the community that their release may never be seriously contemplated. The vast majority of prisoners are at worst a minor public nuisance whose imprisonment does little or no good for society and may do them and their families considerable harm. The prison system should be whittled down because it is cruel and ineffective (recidivism rates range from about 60 per cent for adults to up to 80 per cent for young prisoners). It also diverts both attention and resources away from non-custodial punishments which would be better for the offender, and from crime prevention which would be better for

everyone.

Restrictions upon the rights of those remaining prisoners which are justified in terms of 'security' should be ruthlessly scrutinised. As far as possible, standards and entitlements should reflect, and be integrated within, those which exist in the community as a whole. Renovation of the old Victorian prisons should be accelerated. Provision for prisoners with special needs: those with reading difficulties, alcohol or drug problems, lack of work-skills, should be greatly improved.

These sorts of changes would only mitigate the pain of confinement. Nor should it be pretended that such a reformed prison system would be any more successful in terms of reconviction rates (although if prisoners' rights were respected and grievances properly investigated there would probably be fewer prison disturbances). Most prisoners inevitably leave prison less able to cope in the outside than when they entered. It should be no part of penal policy to brutalise and intimidate, indeed, the purpose of prison should encompass an apparent paradox: to give every opportunity to prisoners to prepare effectively for their eventual release.

3. Alternatives to custody

The very phrase 'alternatives to custody' appears to justify the central place which prison enjoys in any discussion of the penal system. Moreover, the sanction which ultimately backs up each alternative is the threat of custody itself. What is needed is a philosophical, linguistic and policy shift away from the focus on the prison.

On the other hand, the quickest way of reducing the prison population is to reduce the length of prison sentences, a measure with no direct bearing upon the range or effectiveness of alternatives. Furthermore, to avoid the proliferation of unduly coercive alternatives to custody each penalty should be judged on its own merits, since almost anything can scarcely fail to be judged superior to incarceration.

Any assessment of the role of alternatives also has to accept their disappointing performance actually to divert people from prison. Since the beginning of the 1970s both the number of non-custodial options available to the courts and the prison population have mushroomed. When the community service order was first introduced the use of probation orders fell. During the 1980s the probation order has enjoyed something of a renaissance while the use of the fine has declined rapidly. The idea that 'alternatives' are actually alternatives to one another and not to prison may exaggerate and simplify the nature of the sentencing process. What is not in doubt, however, is that courts are actually more likely to use prison

today than they were a decade ago when there were fewer alternatives (see Table 4).

The work of the probation service

In terms of its history, tradition and methods of work, the probation service has at first sight little in common with the prisons. Yet the present state of probation curiously parallels the prisons in two important respects. Both have been relatively favoured by the Conservative boom in law and order. And, as that boom has failed to contain the rise in crime, both services are being increasingly asked to specify their objectives and justify their cost-effectiveness. (Or rather, the prison service is expected to justify its costs, the probation service is expected to justify its costs *and* its effectiveness. It is interesting that promoting penal reform as a way of cutting wasteful public expenditure has hitherto been a notably unsuccessful tactic).

Although the failure to implement ethnic monitoring exercises or adopt equal opportunities employment

Table 4
Sentences for Indictable Offences (%)

	1975		1985	
	Male	Female	Male	Female
Immediate Custody	17.8	2.5	19.4	5.9
Suspended Custody	9.2	3.7	6.4	5.2
Non-Custodial	73.0	94.0	74.2	88.9

Criminal Statistics, England and Wales 1985, Cmnd. 10, 1986.

policies has been criticised, for the most part the penal reform lobby has not questioned the philosophy and pattern of probation practice but simply parroted the demand for additional spending. We also lack a fully developed picture of the shape probation work might take in a socialist society. The extolling of political advocacy, the notion of a voluntary contract between probation officer and 'client', the locating of offending in a clear socio-economic context are helpful insofar as they describe the 'style' of probation practice (H Walker and B Beaumont, *Probation Work: Critical Theory and Socialist Practice*, Basil Blackwell, 1981; *Working with Offenders*, Macmillan, 1985). They are less instructive in assessing the range of probation-run activities, the numbers and types of offenders for whom those activities are intended, and the balance to be struck between the needs and wishes of offenders and the needs and wishes of the courts.

These questions have become more significant as the probation service has grown. Over 150,000 people are supervised annually while the number of probation officers has tripled in the last 20 years and auxiliary and support staff increased by a factor of eight. The 35,000 or so people placed by the courts on probation orders represent only one-

third of all those being supervised by the probation service at any one time. Supervision itself represents only a proportion, albeit a sizeable one, of probation officers' time (see Table 5). Probation officers provide welfare services in prisons, work with victims, run day centres and hostels, write countless reports and are expected—in some ill-defined fashion—to contribute to crime prevention initiatives. Yet despite this seemingly continual multiplication of tasks, the classic aim of probation practice remains to "advise, assist and befriend" the offender, a phrase which first appeared in the 1907 Probation of Offenders Act.

As a statement of underlying philosophy this formulation looks increasingly antique particularly as traditional one-to-one casework has little demonstrable effect on offending (M S Folkard et al, *IMPACT. Intensive matched probation and after-care treatment, Vol. II—The results of the experiment*, Home Office Research Study 36, 1976).

Moreover, if the idea of an offender being 'sentenced to social work' appears fundamentally flawed, how is a voluntary contract consistent with the probation service's duty to the courts? Particularly if those courts are more interested in the controlling aspects of probation supervision—containment in

Table 5
People supervised by the Probation Service, 31 December 1984

Court Orders	%
Probation	36
Community Service	15
Children and Young Persons Act	8
Money payment supervision	5
Suspended sentence supervision	2
TOTAL	63
Aftercare	
Voluntary	16
Youth Custody	8
Detention Centre	2
Other	5
TOTAL	31
Domestic	7

Home Office, Probation Statistics 1984, London 1986. The sub-totals round to more than 100 since each person is counted once for each type of supervision to which they were subject.

the community. The development of techniques of electronic surveillance (the Offenders' Tag used in a few states in America and commended enthusiastically by the Offenders' Tag Association in Britain), the introduction of positive and negative requirements into probation orders, and the social work method known as 'tracking' (non-electronic surveillance plus curfew), all indicate the pressures on probation to take on a more and more controlling and coercive approach.

Because of the relative cheapness of probation supervision in all its many forms when compared to imprisonment, a simple economic argument can be, and often is, advanced for further growth in the probation service. To some it may seem too that the evil of imprisonment is so great and so pressing that to question the purpose of probation—which at least is on the side of the angels—is mere indulgence. However, it may be doubted that such an unsystematic approach can hold sway for much longer. Firstly, issues of philosophy, practice and structure are increasingly being debated within the probation service itself. Secondly, it cannot be assumed that the growth of probation on the coat-tails of law and order will be a permanent feature of penal policy. Thirdly, as already indicated, there are real pressures on probation to take on new and more coercive methods of surveillance and control. These will be best resisted not on an *ad hoc* basis, but from an expression of clear principle.

There are two guidelines which should underscore socialist probation practice. Firstly, it should be committed, in the words of the three representative probation organisations, "to the minimum necessary intervention and to constructive, humanitarian approaches" (Association of Chief Officers of Probation, Central Council of Probation Committees, National Association of Probation Officers, *Probation—the next five years*, 1987). This means in particular that the line between liberty and imprisonment should not be blurred by a rejection of anything which might ex-

tend the network of surveillance and monitoring (S Cohen, *The Punitive City: notes on the dispersal of social control*, *Contemporary Crises*, October 1979). For that reason, experiments in 'semi-freedom'—weekend or day imprisonment (despite their obvious intuitive attractions), electronic tags, curfews and so on—are not to be countenanced. Secondly, social work intervention must be reserved for those who may benefit from it and whose risk of custody is sufficiently high to justify compulsory supervision.

A humane penal system would additionally ensure that the probation service was in a position to offer real help to prisoners leaving gaol. Up to one-third of prisoners are released homeless, yet homelessness is one of the strongest predictors of further offending (C Banks, S Fairhead, *The Petty Short-Term Prisoner*, Barry Rose, 1976). Unfortunately, the Conservative government's Statement of National Objectives and Priorities for the Probation Service merely calls for the service to meet its statutory obligations to parolees and young offenders. Voluntary after-care has been more or less abolished. Hostel building is frozen. The notion that prisons are actually part of the crime problem is fundamental to the demand for a reduction in their use. Mitigating the harm which prison has done to those people for whom a custodial sentence was inevitable is equally fundamental—not least in terms of crime prevention.

A moratorium on alternatives

Not only does Britain have the highest prison population amongst EEC countries, British courts have more 'alternatives' at their disposal. The proliferation of new options seems simply to have confused an already complex sentencing structure.

Nowhere is this more true than in the case of the suspended and partially suspended sentences, the *net* result of

which may be to *increase* the size of the prison population. Not surprisingly, courts end up with suspended sentences of greater average length than those of immediate imprisonment for the same offence. Worse still, because of the vagaries of the parole system, it can actually be a disservice to a convicted person to receive a partially suspended sentence rather than one that is not suspended at all. Given this unhappy history, and following the principle that the line between liberty and custody should not be blurred, both of these sentencing options should be abolished.

Furthermore, despite the attractiveness of the concept, we should avoid the temptation of introducing direct reparation between offender and victim as a sentence of the court in its own right. Reparation and restitution rightly appeal as principles of a justice system although in practice they raise their own ethical and philosophical problems (it is for this reason that the National Association of Victim Support Schemes has been notably cautious in its attitude towards reparation experiments). If there is a place for such initiatives, and it would be disappointing if there were not, then that place is *before* the decision to prosecute, not at the sentencing stage.

Direct reparation might in any case put in peril the sentence of indirect reparation—community service—which has perhaps been the most signal success story in penal policy over the last decade. Since its introduction as an experiment in six probation areas in 1973, use of the community service order has expanded very rapidly. A total of 33,800 orders were made in 1985 (8 per cent of all sentences for indictable crime). However, there remains doubt about how many of these orders were made on people who would otherwise have gone to prison and it is occasionally argued, if never proved, that further expansion in community service by offenders is limited by the growth in Manpower Services Commission schemes for the unemployed which has also occurred over the last ten years.

Unemployment has also had an impact on the use of fines. Although still the most frequently employed penalty, fines have fallen from 51 per cent of sentences for indictable crime in the mid-1970s to around 40 per cent today. This is hardly surprising given that the majority of people coming before the courts are out of work.

Under the Magistrates' Courts Act 1980, magistrates (but not judges) are required "to take into consideration among other things the means of the person on whom the fine is imposed so far as they appear or are known to the court". In practice, it is a very hit or miss affair whether a fine matches in any way an offender's ability to pay. Not only does this lead to enforcement problems and the imprisonment of many thousands of people each year for fine default, the hardship which it causes and the inequity on which it is based are a moral affront.

In some countries in Europe this is overcome through a system of what are known as "day fines" which endeavour systematically to relate the level of the fine to the ability to pay. In essence, units representing the gravity of the offence and the culpability of the offender are multiplied by some (fixed) fraction of the offender's income. As well as its practical benefits in minimising the rate of default, this sort of system (a kind of means-test in reverse) would be welcome in Britain on egalitarian grounds. The rich would pay more, the poor would pay less. For equivalent offences, both rich and poor would be fined an equal proportion of their income.

In general, however, one should be sceptical of the case for further innovation in non-custodial sentencing (we should also perhaps stop using the phrase "alternatives to custody" and find something more positive to say). By definition, new 'alternatives' extend the discretionary powers of the courts. A socialist penal policy should be aiming—not to interfere with the independence of the courts—but to restrict the boundaries of judicial discretion.

4. Juvenile offenders

Contrary to public belief, and albeit for demographic reasons, juvenile crime is actually falling. The peak ages for recorded offending are 15 for boys and 14 for girls. The reduction in the size of this age-group suggests that the 'problem' of young people's involvement in criminal activity should continue to diminish over the remainder of the century. There are also some encouraging signs regarding the treatment of juvenile offenders who come to police attention. Areas such as Basingstoke and Northampton have virtually abolished the use of custody for juveniles by the use of cautioning and the provision of community-based sanctions which enjoy the support of local magistrates. On the other hand, the main trend in sentencing has been away from supervision and care orders—the principal planks of the 1969 Children and Young Persons Act. A five-fold increase in juvenile custody took place between 1965 and 1981.

It is something of a shock to realise that it is now nearly 20 years since Parliament legislated to abolish custody for those under 17 and to raise the age of criminal responsibility. The decision by the Conservative government of 1970-74 not to implement those sections of the 1969 Children and Young Persons Act marks the passing of an age of welfare-oriented penal optimism. The 1982 Criminal Justice Act, which greatly increased the powers of the courts with regard to juvenile offenders, was the culmination of a highly effective judicopolitical campaign against what was perceived as the insufficiently punitive approach embodied in the Children and Young Persons Act.

However, the picture over the country as a whole is very mixed. Juvenile justice is enforced not according to a national plan but through hundreds of differentiated local systems. Each police force area, petty sessional division, social services department and probation area has its own unique policy for juvenile crime. To take just one example, the cautioning (non-prosecution) rate for boys ranges from 81 per cent in

Northamptonshire to 42 per cent in Cleveland (for girls, from 91 per cent to 69 per cent in the same two counties). When this is combined with the different approaches of juvenile court benches, the wide range of facilities run by social services and probation, and the degree of involvement by voluntary agencies, the result is an inconsistent and unjust muddle.

Some interim reforms

The very multiplicity of juvenile justice systems argues the need for a fundamental review of the principles which should structure the approach to offending by young people. The message of the past decade is certainly that community-based provision is no less effective than custody. (Indeed, great things are sometimes claimed for the range of activities encompassed by the term Intermediate Treatment especially in dealing with serious or repeat offenders. However, such claims have not yet been rigorously tested.) But there are dangers of 'net-widening', the use of for-

mal sanctions in place of informal guidance, a criticism which has been directed particularly at police cautioning. Furthermore, while in some areas the use of custody against juveniles has been substantially reduced, overall the proportionate use of detention centres, youth custody centres and local authority secure units is 50 per cent greater than it was in the early 1970s although a recent tailing off is discernible, as Table 6 shows.

There is a temptation to regard the treatment of juvenile offenders as *ipso facto* different from that of adults. This bifurcation in policy is already evident in this country and in America where the conservative Mormon state of Utah has made great strides in avoiding custody for juveniles except in the most grave cases while remaining highly prison-oriented in its approach to adult offending. Yet the argument that punitive sentencing does not deter, is not reformatory, and does not lead to the individual's better integration with the community, applies no less to adults than it does to juveniles. Despite its obvious political appeal, there is no special virtue in blurring the case against custody by reference to the youthfulness of its charges.

Nevertheless, a useful programme of interim reforms has recently been issued by the Association for Juvenile Justice:

- existing statutory guidelines intended to restrict the courts' freedom to impose custodial sentences on young people should be strengthened;
- when places in some forms of custody are under-subscribed they should be closed; over-subscribed

institutions should be rationed;

- the use of custodial sentences for breach of Attendance Centre Orders and Community Service Orders should be abolished;
- remands in care should be counted against any final custodial sentence in the same way as are remands in custody. Tighter criteria should be introduced to govern the use of custodial remands as around 50 per cent of those so remanded subsequently receive a non-custodial sentence.

It will be seen that these interim reforms might be applied almost word for word in the case of adult offenders as well.

Fundamental reform

In England and Wales, juvenile justice is the responsibility of separately organised juvenile courts which are nevertheless criminal courts with a (sometimes rather oblique) welfare orientation. It has long been debated whether this system of juvenile courts serves either the welfare of the child or the interests of justice. A growing consensus is persuaded either by the system of children's hearings which exists in Scotland or by a fully-blown family court. According to the 1984 House of Commons Social Services Committee report on Children in Care: "Some of the advantages of the hearings system could be introduced into juvenile courts without wider changes. It would not be sensible to try and tack on practices from a very different legal tradition

Table 6
Males aged 14-16 sentenced to immediate custody

Year	Number	Proportion of total sentenced (%)
1973	4,500	8.5
1979	6,900	12.2
1982	7,200	12.1
1984-85 (July-June)	6,400	11.5

Criminal Statistics; Home Office Statistical Bulletin 14/86, The sentencing of young offenders under the Criminal Justice Act 1982.

without considering more fundamental changes. Children's hearings are not family courts. They do, however, give a glimpse of what a family court might look like in practice . . . A radical departure from the juvenile court must be envisaged" (House of Commons Social Services Committee, *Children in Care*, HC paper 360, 1984).

The government seems recently to have back-tracked from proposals for a family court. The worst possible situation would be if plans were laid for family courts which *excluded* young offenders. On the other hand, procedural safeguards would be necessary to ensure that family courts enabled proper legal representation and did not encourage a surfeit of social work intervention based on the supposed welfare needs of the offending child. Notwithstanding this danger, there is much to be said for the abolition of the juvenile court and its replacement by a new family jurisdiction (whose responsibilities would of course be much wider than juvenile offending).

For the rest it is a matter of returning

to first principles. Occasional minor illegalities are a normal part of growing up. Involvement with the criminal justice process does little or no good and—in many cases—considerable harm. The net-widening potential of cautioning is thus an additional reason for raising the age of criminal responsibility at least to 14 as proposed in the Children and Young Persons Act two decades ago. At 10, the current age of responsibility is the lowest in Europe, with the sole exception of Ireland.

The decline in the numbers of juveniles also provides a rare opportunity to phase out penal custody for those under 17—again as Parliament intended 20 years ago. Well over 80 per cent of juveniles currently entering custody have been convicted of non-violent offences, one-third have two or fewer previous convictions, three-quarters will offend again after leaving custody or residential care. The abolition of prison can sometimes appear as a naive or worse, an impossibilist demand. In the case of juveniles, it is actually within our grasp.

5. The Conservative legacy

Since 1979, the Conservatives' economic and penal policies have been in conflict. In contrast with the general endeavour to reduce the public sector, resources have poured into the 'law and order' services. Police pay has been improved, police powers extended and an extra 10,000 officers recruited. There has been a large programme of new court building, more judges and magistrates appointed and the powers of the courts increased. In penal policy, the centrepiece has been the biggest programme of prison construction for a century with the consequent recruitment of thousands of new prison officers.

At the same time, Tory penal policy can be seen to have been shaped by economic and other pressures. In 1984, Leon Brittan released 2,000 prisoners by extending the parole system to those serving short and medium terms. In 1987, Douglas Hurd released 3,500 by increasing remission from one-third to one-half for prisoners with sentences of 12 months or less. All three Conservative Home Secretaries have exhorted the courts to pass fewer and shorter prison sentences, while cautioning and Intermediate Treatment programmes for juvenile offenders have been lauded. Meanwhile, a major attack has been mounted on the working practices of prison staff and the possibility of private sector involvement in the penal system is increasingly under discussion.

In other words, not only has the Conservative 'law and order' formula been a failure if judged by its impact on the crime rate, it has also been far from consistent. Nevertheless, in spite of it being 'the Labour Party now which is organising meetings on law and order, not the Tories' (Gerald Kaufman at the 1986 Labour Party Conference), opinion polls show that crime control remains an area where the Conservatives enjoy a substantial lead over Labour in public support. The tensions which have played upon Conservative penal policy can be illustrated by considering three

subjects in detail: the prison building programme, the 'short, sharp shock', and parole.

The building boom

The Thatcher governments have committed themselves to over 20 new prisons, a number of which are now operating. It is a rolling programme (although it has rarely, if at all, been debated in Parliament) and two new gaols seem to be announced in the public expenditure plans each year. The programme of new prisons is estimated to cost in excess of £0.5 billion (over £50,000 per place) while much of the 'redevelopment' of existing gaols actually means additional accommodation. For example, the building programme at Leeds will virtually double the size of the existing establishment and will cost as much (£26 million) as an entirely new gaol. Every extra prisoner who will fill these places represents an expenditure of around £13,000 pa at current prices.

At first sight, the case for new prisons seems incontrovertible. Overcrowding in existing prisons results in some 17,000 prisoners sharing cells in conditions of degradation and squalor. Given projections of a continuing rise in the number of prisoners (an extra 9,000 by the mid-1990s), prison construction is necessary

merely to keep pace. It is for this reason that otherwise sensible liberal critics of penal policy like the Parliamentary All-Party Penal Affairs Group have never opposed the principle of new prison building.

However, there are strong counter-arguments. Firstly, the size of the prison population is not something which arises like an Act of God but is a matter of political choice. Both our own history and that of other countries demonstrates that the numbers of prisoners can be reduced dramatically given the political will to do so. Secondly, new prison construction does not appear to be very successful in reducing levels of overcrowding. Partly this is because new construction sends an unmistakable message to the courts condoning over-punitive sentencing. Partly, it is because overcrowding is in any case restricted to the urban remand prisons. The Conservatives have repeatedly had to postpone and redefine the 'end to overcrowding' which the building programme is supposed to achieve. Thirdly, the Home Office has a long record of producing various rationales to justify new building: to improve 'treatment', to meet increases in population, to improve conditions, to end overcrowding, to improve control. As each rationale is revealed as spurious, the mandarins come up with a new proposition in support of prison expansion. In other words, the prison building boom results from a malign coincidence of the Conservative requirement for a visible symbol of their commitment to 'law and order' and the Home Office's bureaucratic interest in extending the size of the prison estate.

The Conservatives' connivance in this Home Office ruse has not been without its political and economic cost. A devastating report by the National Audit Office has castigated the five-fold increase in capital spending on prisons since 1979. Strategic planning had been absent; staffing and maintenance costs had been ignored; accommodation of the wrong type had been built in the wrong places (National Audit Office, *Home Office and Property Services*

Agency: Programme for the Provision of Prison Places, HC Paper 135, 1985). At the same time, under Treasury pressure, the Home Office has been forced into cut-backs on revenue spending in order to protect the capital programme. Prison workshops have been closed, prisoners' privileges restricted, and a tactically inept, if not entirely misconceived, assault mounted on the staff overtime bill. The initial attempt in 1986 to reduce the wages bill resulted in riots and disturbances at over 40 prisons as prison officers enforced an overtime ban. The subsequent success of negotiations with the Prison Officers' Association may only have postponed further industrial unrest when staffing levels and practices in individual establishments are re-negotiated. During August 1987, the opening of one new prison (Feltham) was delayed, two POA branches in London were balloting on industrial action, and there was a vote of no confidence in the governor by staff at Dartmoor, all of which were related to alleged staff shortages.

Labour has failed to attack the prison building programme and to portray it for what it is: a highly expensive, fruitless and embarrassing symbol of Tory 'law and order'. A symbol perhaps best characterised by the renovation of one of the wings at Walton Gaol, Liverpool. The new, improved cell doors fell off their hinges and £50,000 had to be found to put them back on.

Short, sharp and shocking

Symbolism is also useful in explaining the short, sharp shock regime in detention centres. First announced in ringing tones by William Whitelaw before Mrs Thatcher was elected to power ('brisk tempo . . . hard and constructive . . . respect for authority . . . drill, parades and inspections . . . limited privileges'), the short, sharp shock was promoted as a return to disciplined Victorian values for young delinquents.

The shock treatment was initially introduced as an 'experiment' at four

detention centres and a full evaluation was ordered from the Home Office's Young Offenders Psychology Unit. When the Unit's report was published in 1984 it demonstrated the total failure of the regime. Not only were reconviction rates unaltered by the experimental 'treatment', but the young delinquents actually *enjoyed* the drill sessions. Far from finding the regime shocking, its macho para-military emphasis was actually consonant with the boys' own values. The government hastily curtailed the drill, but in one of those acts which retains for the Conservatives their reputation as the 'stupid' party, León Brittan pronounced the regime as a success and extended it to all other detention centres.

But ironically, the government had not counted upon the opposition of the courts to the short, sharp shock. Increasingly the courts have refused to impose detention centre orders and have shown instead a marked preference for the longer, but allegedly more 'positive', youth custody training. Despite prison overcrowding, many detention centres have been half empty. Indeed, the Magistrates' Association has now joined the call for abolition of detention centres and the introduction of one generic custodial sentence for young people. Opposition has also come from the Prison Officers' Association, whose members—to their credit—have found the regime depressing and demoralising to operate, and—in a paper doubting the psychological soundness of the technique—from the Monday Club! (S Shaw, *Reflections on the short, sharp shock*, Youth and Policy, No. 13, Summer 1985).

The demise of detention centres has been hastened by the short, sharp shock. Ever so quietly, the government has actually been *closing* its 'shock' institutions. Of the original four experimental centres, two are now prisons for adult men and another is a remand centre for adult women.

Parole

The Conservative approach to the parole system also rather neatly portrays the contradictions within its penal strategy. As with detention centres, Conservative innovation has probably also hastened the end for parole.

The parole system was introduced under the 1972 Criminal Justice Act. It was argued in an earlier chapter that as well as generating make-work tasks for thousands of prison staff, probation officers, lay members of review committees and the Parole Board itself, parole is unjust, ineffective, bureaucratic, secretive and based on what we now know to be a mythical 'peak of treatment'.

The Tories have made two principal changes to the parole process. Firstly, in a 1983 speech of breathtaking arrogance ('We are seen by millions of people as the only party truly willing to stand up to the men of violence; the terrorist, the thug, the child molester'), the then Home Secretary, Leon Brittan, announced that parole was virtually to be abolished for long-term prisoners convicted of offences involving violence, sex or drugs. Secondly, a simplified parole scheme was introduced for medium-term prisoners while the eligibility qualification was reduced from a sentence of 19.5 months to 10.5 months. Leaving aside the ethics of these changes, the practical results have been disastrous.

Retrospectively removing the prospect of parole for long-term prisoners and putting nothing in its place has greatly increased tension in prisons both in England and in Scotland. Liberalising parole at the lower end of the spectrum has turned much Crown Court sentencing into a lottery. There is now little effective difference between a sentence of nine months and one of eighteen months. The protests of the judiciary are presumably a major reason for the recent announcement of a thorough-going review of the parole system to be conducted by the former Minister, Mark Carlisle QC.

The spectre of privatisation

Since the prisons were pretty well our first nationalised industry (1878), it would be a cute historical touch if Margaret Thatcher's Conservatives were to return them to private hands. Privatisation—which was regarded as a joke little more than two years ago—is now firmly on the Tory agenda.

However, privatisation of the prison system seems unlikely to take the form of a multi-million pound television advertising extravaganza inviting the public to invest in the new, independent British Prisons Plc. Rather, particular services within the prisons (canteens, workshops, escort duties) may be put out to competitive tender, or prisons may be leased from private construction companies. This latter system of 'lease-back' could prove as popular with the Home Office as it has in some states in the USA, since it avoids the need for Treasury approval of new capital projects. In addition, we are likely to be offered an 'experiment' in the private management of one or two institutions, under contract to the Home Office. The existence of such a 'contract' caused the Conservative side of the House of Commons Home Affairs Committee to argue in a report issued in April 1987 that 'privatisation' was an inappropriate term. The Adam Smith Institute, which has made much of the running on this issue, has been less coy (Adam Smith Institute, *Omega Justice Policy*, 1984; P Young, *The Prison Cell: The Start of a Better Approach to Prison Management*, Adam Smith Institute, 1987).

In fact, we already have one privatised 'prison'—the Immigration Detention Centre at Harmondsworth on the edge of Heathrow Airport. The roll-on, roll-off ferry moored at Harwich as a prison hulk for other Immigration Act prisoners is also staffed by Securicor. Unfortunately, it was a Labour government which entered into the contract with Securicor for Harmondsworth (reportedly, to keep it out of the hands of the Prison Officers' Association). Given this was the case, and Labour's faltering

opposition to the privatisation programme as a whole, the arguments against prison privatisation need to be plainly stated:

- Law and order is properly the direct responsibility of the state in a civilised society. Privatisation would create a powerful lobby with a vested interest in a high prison population since private companies would have an economic interest in lengthening prison terms. In time, the political influence they would exert (a penal-industrial complex?) would subvert the making of penal policy.
- It would be totally unacceptable for private concerns to be involved in decision-making on such matters as prison discipline, home leave, and parole, which directly determine the length of a prison sentence.
- Applying the profit motive to prisons will mean that financial questions take precedence, even more than they do at present, over considerations of humane regimes, decent standards and staff safety and welfare. The result will be prisons run with the maximum of technology and the minimum of human contact (M Ryan and T Ward, *Prisons, Privatisation and the role of the State* in R Matthews (ed.) *The Privatisation Of Criminal Justice*, 1988, forthcoming).
- Privately-run prisons would not be publicly accountable. Evidence of this is the way in which Parliamentary Questions about Harmondsworth are frequently dodged by arguing that the terms of the contract between the Home Office and Securicor are matters of commercial confidence.
- The American experience of privately-run prisons has been greatly exaggerated by the commercial interests involved. As yet there is little evidence that privatised prisons in the United States are cheaper to run (except as 'loss leaders') or provide better conditions, and there are strong suggestions that staff training and regimes have been cut back.

Missed opportunities

Although Labour has come out against prison privatisation, in general such opposition as has been voiced to eight years of Conservative penal policy has been opportunistic rather than principled. Civil liberties considerations flew out of the window whenever drug dealers or City fraudsters were discussed. There were even calls for stiffer sentences from the Labour Front Bench. There has been little or no grass-roots debate of the kind which has focused upon policing. The absence of

any mention of sentencing or prisons from the 1987 Labour Election Manifesto (in marked contrast to the Alliance) is not a happy standard for the hard years which now lie ahead.

The Tories seem set to build yet more institutions, to encourage private 'innovation' in penal treatment, and to do nothing to restrict the punitive sentiments of the courts. Notwithstanding the conflicts and contradictions within that policy, the result will be thousands of lives unnecessarily damaged as the carceral net extends further into the community.

6. A socialist agenda: planning the penal system

Although public antipathy to penal reform is often exaggerated by the media, there are unlikely ever to be any votes in a rational penal policy. Nor is such a penal policy in itself likely to make the streets much safer, nor people less fearful, nor potential offenders more law-abiding. Penal policy is essentially a blunt instrument for attacking the crime problem.

This is not to say that social and economic policy cannot be directed towards crime control, nor that proposals for crime prevention and victim support are unattractive electoral assets. Indeed, the political fact of life may well be that penal reform is only possible in the context of reclaiming law and order—in its widest sense—as a principal objective of democratic socialism. A shift in emphasis towards prevention may well result in less insecurity on the part of the public, less crime and less punitive sentencing. But it is as well to be clear that an agenda for the *penal* system is essentially concerned with what to do about the criminals we catch rather than what to do about the rate of crime.

As was argued earlier, there are clear implications for the shape of criminal justice policy from the three ideals of equality, liberty and fraternity. In penal matters, equality means equal treatment for all classes of offender in the enforcement of penal sanctions. Liberty means that the use of liberty-depriving penalties should be avoided wherever possible. In addition to its implications for victim support and crime prevention, fraternity implies greater public involvement and greater openness within the penal system. In sum a socialist penal policy should make its stand on the basis of its respect for natural justice and civil rights. Recognising the interconnectedness of the criminal justice process, a further dis-

tinguishing characteristic should be the degree of planning at both the national and local level.

Natural justice and civil rights

There is no logical nexus between any one crime and any one sentence of the court. A justice which equates say a household burglary by an adult recidivist with an 18-month sentence is essentially a convention rather than an expression of universal principle. Since, too, imprisonment serves little or no practical purpose for the majority of offenders, while being expensive and damaging, a central aim of a socialist policy should be to minimise its use. A socialist agenda should also include the establishment of new statutory rights for those people for whom a prison sentence is inevitable. Humane conditions and regimes must be similarly laid down in law while the only objective of prison should be to provide the opportunity for prisoners to best prepare themselves for eventual release.

It is pertinent at this juncture to note that almost all the significant advances in prisoners' rights in recent years have resulted from actions before the European Court of Human Rights. Labour's sensitivity to proposals for incorporating the European Convention into a domestic Bill of Rights rather than ignores the fact that the right of individual petition to

Strasbourg already provides a final judicial constraint upon the actions of the executive. The problem with Strasbourg is the inordinate time which elapses between the filing of a complaint and its resolution by the Court. In one of the most significant prison cases (*Silver v. UK*, Judgment 25 March 1983, concerning the stopping of correspondence), the principal complainant, Mr Reuben Silver, had actually been dead for four years before the Court reached its decision. What we have is a Bill of Rights at long-stop. There seems little doubt that it would be in the interests of prisoners—and, in the view of the National Council for Civil Liberties, of civil rights generally—if the European Convention were to be incorporated within domestic law.

A tight control of the prison system represents only part of a coherent strategy. The vast majority of offenders are not sent to prison (although prison is the threat which enforces most other sanctions). It is essential, therefore, that the concepts of natural justice and civil rights also inspire the many non-custodial penalties. In particular, this means reversing the trend towards community-based surveillance and containment and ensuring that what happens to particular offenders depends upon the circumstances of their offence not upon the whim of the particular court by which they are sentenced.

Planning

A planned penal system should set targets to minimise the use of custody, reduce the number of sentencing options and impose tighter statutory guidelines on the courts. Preventing the excesses of the judiciary is fundamental, and aside from statutory restrictions (which would, in fact, mean building upon existing restrictions), there is much to be said for some form of Sentencing Council to establish a national framework for sentencing reform and provide consistent guidance for the

courts. Within such a Sentencing Council, the judiciary would properly enjoy considerable representation. But membership would reflect expertise from throughout the criminal justice process.

There can be little doubt about the virulence of the opposition from sentencers to any form of central control. However, it is worth emphasising that the idea that sentencing policy is or should be the exclusive preserve of the judiciary is a myth (D Downes, *op. cit.*). As Andrew Ashworth has said, "There is no constitutional rule or convention which prevents the legislature from restricting or removing judicial discretion in sentencing: the simple fact is that Parliament has taken little interest in the matter . . . The judiciary seems to believe that it has the right to determine sentencing policy, and for that there is neither constitutional nor pragmatic justification" (A Ashworth, *Reducing the prison population: the need for sentencing reform in A Prison System for the '80s and beyond*, NACRO, 1983).

While desirable on its own merits, a Sentencing Council is unlikely to prove sufficient for the task of planning the penal system without additional organisational innovation. In the early 1980s the House of Commons Home Affairs Committee, noting that the criminal justice system was "an instance of the whole being less than the sum of its parts", recommended the establishment of a National Criminal Policy Committee. Membership would be drawn from the Home Office, DHSS and Lord Chancellor's Department along with representatives of the higher judiciary, magistracy, police, probation and the local authorities. Although lacking any formal powers, the role of the proposed committee was to "make possible the *planning* of criminal policy at all stages of the process" (S Shaw, *Policy less than a sum of parts*, *Guardian*, 15 August 1983). Unfortunately, next to nothing has since been heard of this proposal and, given the lack of formal powers, there would obviously be a danger of the committee operating simply as a

talking shop.

The need to plan law enforcement and sentencing policy is what lies behind demands for the creation of a Ministry of Justice charged with running the criminal justice process as an integrated system. This would have the added bonus of abolishing the anachronistic Lord Chancellor's Department, although it would probably not succeed in reducing the Home Office to what it does best: liaising with the Channel Islands and covering up for MI5. Labour's experience in the 1960s is the best evidence that new 'super-ministries' do not always achieve the hoped-for results in the Whitehall jungle. But unlike the Department of Economic Affairs, establishing a Ministry of Justice would presumably be an irreversible step.

As with the question of incorporating the European Convention on Human rights into domestic law, it is regrettable that the idea of a Ministry of Justice has been adopted as a high-profile objective of the SDP, and hence tainted in many Labour eyes. For the key to a socialist penal policy is planning and the key to planning is a Department of State which actually enjoys overall responsibility. At

present, the balance between the various arms of criminal justice is determined by bureaucratic and political clout, not by any overall assessment of the contribution law and order services can make to improving public safety and welfare.

At a local level too, there is a case for the establishment of appropriate planning mechanisms. These already exist in embryonic form in the juvenile offending world where many Intermediate Treatment projects are required to have a multi-disciplinary steering committee representing magistrates, probation, social services and the police.

It would be a distinguishing feature of a planned penal system to endeavour to direct offenders to the least expensive and least damaging sanctions, thereby safeguarding the interests both of offenders and the public at large. Such a system would in general mean less use of the criminal justice process, fewer sentencing options and, above all, fewer prisons and fewer prisoners. It is one of life's paradoxes that in penal policy it is the proponents of reform, not the Conservative government, who propose the deployment of fewer resources.

Conviction politics: a plan for penal policy

Britain has the largest prison population of any EEC country despite a penal system which offers more alternatives to imprisonment. Moreover, many British gaols are in such appalling condition that there would be a public outcry were animals kept in them.

Against this background, Stephen Shaw critically examines the penal policy of Conservative governments since 1979 which has included a massive new prison building programme, the introduction of the short, sharp shock treatment for young offenders, changes in the parole system and now the possibility of some prison services being privatised.

He argues that these initiatives are based on a fundamentally wrong approach. The crisis in British prisons arises not from overcrowding but from the number and length of prison sentences, the misallocation of resources, the absence of prisoners' rights and the endemic conflict between prison management and prison staff. He calls for the reorganisation of the penal process to be based on principle, with clear objectives and with clear guidelines for all the agencies involved. And he examines the implications of such a plan for the prisons, alternatives to custody and the treatment of juvenile offenders.

He concludes by detailing an alternative penal policy based on a respect for natural justice and civil rights. This would include

- minimising the use of imprisonment;
- introducing statutory rights for prisoners which guarantee more humane conditions and prison regimes;
- establishing a Sentencing Council to set up a national framework for sentencing reform;
- integrating the criminal justice system by creating a Ministry of Justice.

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