

Confronting Crime

Crime control policy under
New Labour

EDITED BY

MICHAEL TONRY



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Preface

Michael Tonry

Punishment politics, policies and practices in England and Wales have undergone nearly continuous change since the late 1980s and even a temporary halt is nowhere in sight. The milestones seen through contemporary eyes are the Criminal Justice Act 1991 and the government's omnibus Criminal Justice Bill of 2002. The former attempted fundamental changes based on premises the latter repudiates.

The 1991 Act is premised on normative ideas about proportionality, just deserts and fairness to offenders, and a belief that government can do little to affect crime rates through changes in punishment. The 2002 Bill is premised on instrumental ideas about deterrence, incapacitation and fairness to victims, and a belief that changes in punishment can significantly affect crime rates.

The 1991 Act took shape in a time of widespread agreement in government that crime policies should be substantive, moderate and as humane as the practical realities of Her Majesty's Prison and Probation Services allowed. The 2002 Bill took shape at a time when makers of crime policy were at least as concerned by tabloid front pages and focus group summaries as they were about the content of the policies they promoted.

This book takes a hard-headed, practical-minded look at punishment policies and proposals of the past five years, and considers whether and how they might work. The texts mostly examined are John Halliday's 2001 Review of the Sentencing Framework, the 2002 government White Paper *Justice for All* and the 2002 Criminal Justice Bill. The focus is on the substance of the problems the proposals address.

The essays originate from two sources: a Cambridge Crime Policy Conference convened in November 2002 to examine the proposals set out in the White Paper, and the Cambridge Sentencing Policy Study Group which met regularly between October 2000 and April 2002 and which examined a wide range of sentencing and corrections policy issues, giving particular attention to the Halliday report's then-new proposals. Both are unusual among academic meetings in that they were composed primarily of experienced practitioners and policy-makers with only a leavening of academics. The rationale for this is that practitioners are so much closer to the ground that they see things academics miss. A mix of practitioners and academics brings to bear the best features of the overlapping intellectual worlds they separately inhabit.

Among the essays, therefore, some are written by practitioner-academic teams, some by practitioners, some by academics. All have been substantially expanded and updated since they were first written. Although the essays have named authors who put fingers to keyboards, all are informed by the diverse perspectives and experiences of the participants in the conferences for which they were first prepared.

It was an effort to establish in England and Wales a programme of ongoing policy seminars attended by senior practitioners and officials from diverse professional backgrounds, together with a small number of researchers and policy analysts, which would explore cutting-edge problems that transcend organisational and bureaucratic boundaries. Such programmes, typically called 'Executive Sessions', have been convened on criminal justice subjects since the late 1970s at the Kennedy School of Government at Harvard and elsewhere. Many, especially on policing subjects, have proven influential and contributed to the formulation of important policy changes. The immediate predecessor to the Cambridge Sentencing Policy Study Group was a series of Executive Sessions on Sentencing and Corrections convened at the University of Minnesota from 1997 to 2000. Several members of the Cambridge Group have contributed to this volume. We are grateful to those writers – Richard Crowley, Neil McKittrick, Sue Rex, Jenny Roberts and Michael E. Smith – and almost as grateful to the other attendees, without whose presence and insight these papers and this volume would be lesser things: Niall Campbell, Neil Clarke, Cressida Dick, David Faulkner, Richard Gebelein, John Halliday, Jim Gomersall, Peter Jones, Collette Kershaw, Alison Liebling, Amanda Matravers, Mary Anne McFarlane, Christopher Pitchers and Graham Towl.

Whereas the Study Group met five times, the Crime Policy

Conference met but once, for three days. The aim was more focused – to examine closely and assess critically the proposals set out in the 2002 White Paper. Here too the idea was taken seriously that practitioners and academics working together will see more than will either group working alone. As a result, almost all the papers prepared for that conference were co-authored. We are grateful to those authors, many of whom were surprised to receive matchmaking letters inviting them to write a paper with someone with whom the idea had neither been discussed nor even considered. Most of those approached accepted and we are all the beneficiaries: Larry Bill, Richard Crowley, Rod Hansen, Mike Hough, Gareth V. Hughes, Neil Hutton, Amanda Matravers, Darian Mitchell, Nicky Padfield and Ken Pease. Here again the other attendees made the papers better and we much appreciate their willingness to give three days of their lives to the enterprise: Andrew Ashworth, Simon Clements, Withiel Cole, Frances Flaxington, Loraine Gelsthorpe, David Green, Christine Lawrie, Darian Mitchell, Colin Roberts, John Spencer, John Stafford, Bryan Turner, Andrew von Hirsch and Alan Wilkie.

We hope this book and these essays will contribute usefully and insightfully to policy debates that have been going on for a decade, and will continue for at least as long. Readers will decide for themselves whether that hope is justified.

Michael Tonry
Cambridge
September 2003

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Chapter I

Evidence, elections and ideology in the making of criminal justice policy

Michael Tonry

The Labour government has undertaken a root-and-branch remaking of the criminal justice system of England and Wales. This includes reorganising the criminal justice agencies, setting performance targets and goals, looking for ways to increase cost-effectiveness and efficiency, and altering the statutory framework in numerous ways.

Processes have been underway since 1999 that look toward fundamental changes in the ways criminal courts are organised and operate and in the ways convicted offenders are dealt with. Five major government documents serve as milestones. The first, *The Way Forward* (Home Office 2001a), is a Labour government policy document published just before the 2001 national elections. The second is the final report of the Home Office Review of the Sentencing Framework, *Making Punishments Work* (Home Office 2001b), commonly known as the Halliday Report after its director, John Halliday. The third is the report of the Review of the Criminal Courts, commonly called the Auld Report after its director, Sir Robin Auld (Auld 2001). The fourth is a government White Paper, *Justice for All* (Home Office 2002a), which set out policy proposals partly based on the Auld and Halliday reports. The fifth is the Criminal Justice Bill introduced into Parliament in November 2002. Because the emphasis in this book is mostly on policy proposals relating to the punishment of offenders, I devote greatest attention to the Halliday Report, the White Paper and the Criminal Justice Bill.

Part of the backdrop is the government's expressed but schizophrenic commitment to 'evidence-based policymaking'. The schizophrenia can be seen in sometimes startling contrasts between the government's rationalistic claims to engage in evidence-based policy-making, and its

determination always and on all issues to be seen as tough on crime. Many millions of pounds have been devoted to piloting and evaluating new criminal justice programmes in the name of evidence-based policy. Preoccupation with media imagery, however, has led to support for policies for which there is no significant evidence base – including mandatory minimum sentences, Neighbourhood Watch, ubiquitous CCTV, preventive detention and weakening of procedural protections against wrongful convictions – to knee-jerk responses to shocking incidents like the New Year's Eve 2002 gun killings in Manchester and to rhetoric like this from the 2002 White Paper: 'The people are sick and tired of a sentencing system that does not make sense' (Home Office 2002a: 86).

Looking to see whether proposals are based on evidence is not the same thing as looking to see whether they are based on rigorously vetted findings from social science research or whether they accord with the policy preferences of academics. Academics have no special standing in these matters and systematic evidence can come from many places (Tonry and Green 2003). Not all systematic evidence comes from empirical research. Some comes from thoughtful analysis of official statistics. Much comes from professional experience and simple observation. The important question, however, is whether policy-making gives good-faith consideration to the credible systematic evidence that is available, or whether it disregards it entirely for reasons of ideology or political self-interest.

In section II below, I take the idea of 'evidence-based policy' seriously and ask what the evidence is and whether the major clusters of proposals in the White Paper and the Criminal Justice Bill take it into account. A number of proposals take the idea of evidence seriously. More do not. To lay a stage for that discussion, I canvass in section I reasons that have been offered for why criminal justice policies have become more repressive under the Labour government even than they were during the 'Prison Works' period of the last Conservative government of John Major.

I. Why?

The answer is that Parliament enacted tougher sentencing laws, Home Secretaries put those tougher laws into effect, magistrates and judges sent more people to prison and for longer times, the Parole Board became more risk averse and rates of recall and revocation increased, and the probation service shifted away from its traditional supervision

and social service ethos to a surveillant and risk-management ethos. In other words, every component of the English criminal justice system became tougher.

In a sense, then, there is a simple explanation for the current prison population – things got tougher all along the line – but that begs, or merely rephrases, the question. Why did things get tougher all along the line?

England's record and rising prison population is a remarkable phenomenon because it occurred during a period of generally declining crime rates and, except at the margins as yet, without the aid of mandatory minimum sentence laws, three-strikes laws, and truth in sentencing. Unlike in the United States, no plausible case can be made that a long-term increase in the imprisonment rate or enactment of tougher sentencing laws led to the decline in crime rates, and that continued increases or at least current levels are required to maintain momentum.

For a variety of reasons, the claim that US imprisonment increases caused crime rates to fall as much as they did is difficult to make (Harcourt 2001; Zimring *et al* 2001). The common-sense correlation is there though. It comports with most people's intuitions about deterrence and incapacitation, and so it is not surprising that many people believed prison works. In England, however, the deterrence-and-incapacitation logic is harder to argue when crime rates began to fall before imprisonment rates began to rise. It's also harder to countenance in England in 2002, when we know that crime rates have been falling in every Western country since the mid-1990s, irrespective of whether imprisonment rates have risen (England, the Netherlands, the US), fallen (Finland, Canada, Denmark) or held steady (Germany, Scotland, Sweden) (Tonry and Frase 2001; Tonry 2001). When crime rates in the US began to decline, by contrast, no one knew that crime rates would soon be falling almost everywhere, which made it possible to believe the declines were a uniquely US phenomenon that could be explained by reference to uniquely American developments.

Nor, conversely, can it plausibly be claimed that rising crime rates in England led to more convictions, which led to more prison sentences, which led to rising prison populations. Crime rates have been falling, which makes the English prison population trend even harder to explain. At least after a brief transition period, less crime should produce fewer convictions, fewer prison sentences and fewer prisoners. Other developments are more than offsetting the tendency of falling crime rates to lead to falling imprisonment rates.

Many explanations have been offered for why penal policies became

increasingly severe in England and America. I'll review the five major ones. The first, associated in England with Sir Anthony Bottoms and in America with David Garland, is postmodernist angst. The material and existential uncertainties of late modernity, Bottoms observed, have produced a public sensibility he famously labelled 'populist punitiveness' (1995). Garland, in his *Culture of Control* (2001), developed a similar argument though in more detail. Rising crime rates in the 1970s and 1980s combined with economic transformation, globalisation, personal insecurity, loss of confidence in the state and rapid social change to weaken support for welfare institutions, reduce sympathy for the disadvantaged and strengthen receptivity to easy answers. The major, and fatal, flaw of this argument is that essentially the same developments occurred in every Western country but harsh crime policies were adopted and prison populations leapt only in a few. Somehow, Scotland, Canada, Germany and all of Scandinavia escaped the penal policy influence of postmodernist angst.

A second explanation is racial. American penal policy trends are said by some to be the result of cynical and deliberate efforts (Edsall and Edsall 1991) or functional processes (Wacquant 2001) in which crime is a proxy for race and penal policy is a way to keep criminals (blacks) in their subordinate place. Whatever the power of those arguments in the United States, they can't explain English developments. The Civil Rights Movement has not had a galvanising influence in England, none of the major parties is strongly dependent on Afro-Caribbean support as the US Democrats are on black voters, and even today Afro-Caribbeans make up less than 3 per cent of the English population. Race relations in England may be highly charged but over the long term, at least in relation to Afro-Caribbeans, they have not been a central or dispositive issue in partisan politics. And, in any event, most Western countries are as much or more troubled by ethnic tension as England is, and in every country some visible minority group is heavily over-represented in the crime, victimisation and imprisonment statistics (Tonry 1997). The racial hues of the crime problem can't be the English answer.

A third, associated with David Garland (2001) and the American sociologist Jonathan Simon (e.g. Caplow and Simon 1999), relates to the weakness of the state. The arguments are somewhat different. Garland refers to the 'crisis of the state' and argues that the state can no longer meet many basic needs, including crime control, but must nonetheless be seen to be doing so. Policies aren't really meant to work but to express solidarity with public anxiety and good values. Simon's 'Governing through Crime' argument is that loss of confidence in the state's power to do good, coupled with the influence in the United States of single-

issue political groups, has required politicians to seek out symbolic issues which offend no one powerful on which to campaign. Issues like crime, welfare, immigration, and recently terrorism satisfy those criteria, and accordingly are the focus of political campaigns. Politicians cannot govern unless they are elected, and symbolic crime issues are what get people elected. Simon's argument is too idiosyncratically American to have broad explanatory force but Garland's, if right, should explain developments in all Western countries. It doesn't, and there is no reason why it should uniquely do so in England.

A fourth is that public opinion willed current policies and politicians and public officials responded. This has some validity but not much. Certainly it is true that political figures, from Lord Bingham famously observing that the courts must respond to what he saw as public demands for harsher punishments to Michael Howard invoking public opinion to explain his Bulger case decisions and Jack Straw promoting ASBOs (anti-social behaviour orders), claim to be moved by the public will. There are two major problems with this. First, for as long as people have been surveying public opinion about crime and punishment, the same findings have recurred: crime rates are believed to be higher than they really are and sentences and judges to be too lenient; typical crimes are imagined to be the exceptional cases featured in the media rather than the mundane cases that clog the courts; the public does not understand how the system works (Walker and Hough 1988). There is nothing special about public opinion findings in the 1990s to explain why penal severity ratcheted upward then rather than earlier. The second problem, as shown in the US by sociologist Katherine Beckett (1997), is that close analyses of media content and public opinion survey results show that media and political preoccupation with crime generally precede rather than follow up ticks in public concern. Public opinion by itself can't be the answer.

The fifth is political. Politicians for reasons of self-interest have cynically raised public concern about crime in order to offer proposals to assuage it and to win public favour by doing so. There is much evidence that conservative American politicians did this from the 1960s onwards, believing that most Democrats would oppose harsher policies and in a political shouting match would lose credibility with the electorate (Edsall and Edsall 1991). Public duels between emotional 30-second soundbites and lengthy assertions that things are more complicated than they appear are always won by the soundbiter. This is the standard account in England (Downes and Morgan 2002). From the late 1970s onwards, Tories were more inclined than Labour politicians to promote toughness, believing Labour would lose the soundbite duels. In the