

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

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The prisoners' dilemma in England and Wales

Over the last three decades, an ever-increasing prison population, along with a continuous law and order bidding war between the two main parties, have come to seem almost inevitable features of our political world. As governments struggle to establish their credentials for taking effective policy action, the support for strong law and order policies among a growing group of 'floating' voters has led to an extreme politicisation of criminal justice policy. In the context of this politicisation, 'law and order' has become a salient electoral issue within our adversarial political system, and it has become impossible for even the left-of-centre party, Labour, to sustain a focus on the social and economic causes of crime, or a welfarist approach to responses to crime. On Tony Blair's accession to the position of shadow Home Secretary, Labour accordingly began to abandon its traditional analysis in favour of a 'tough on crime, tough on the causes of crime' platform¹.

However, in his understandable quest to make Labour electable Blair created a phenomenon whose dynamics were out of his control. As law and order has swept into the flow of party political competition, both sides have had little option but to strive to be the tougher on crime. Thus Blair as leader of the Labour party and then Prime Minister, and successive Labour Home Secretaries, have put the emphasis firmly on the first part of the two-part equation. Notwithstanding some hopeful early signs of a more measured approach, the Brown administration soon moved to adopt a similar posture. And though policies oriented to social inclusion — particularly in education, housing, social welfare and the introduction of the minimum wage — have formed an important object of Labour

policy, and have had some impact², it has been assumed that the stigmatising and exclusionary rhetoric and policy of the 'tough on crime' side of the criminal justice equation are entirely consistent with its inclusionary 'tough on the causes of crime' side.

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

The sad fact, however, is that the size and demographic structure of the prison population suggest that the socially exclusionary effects of the 'tough on crime' part of the criminal policy equation have systematically undermined the inclusionary 'tough on the causes of crime' aspiration. The rate of imprisonment has continued to rise inexorably even in a world of declining crime, increasing by 60 per cent since the inception of the downturn in crime in the mid-1990s. This increase in imprisonment was unplanned. The fact that it formed no part of the Government's conscious strategy — notwithstanding the Home Office's own research unit's projections of the increase likely to result from prevailing policy³ — is vividly and distressingly reflected in the inadequacy of prison capacity, which has become particularly evident in the last two years.

1. Downes, D. and Morgan, R. (2007) 'No turning back: The politics of law and order into the millennium' in M. Maguire, R. Morgan and R. Reiner (eds) *The Oxford Handbook of Criminology* (4th edition), Oxford: Oxford University Press, p.201 and Newburn, T. (2007) "'Tough on Crime": Penal Policy in England and Wales', in M. Tonry (ed) *Crime and Justice*, vol 36, Chicago: University of Chicago Press, pp.425-470.
2. Machin, S. and Hansen, K. (2003) 'Spatial Crime Patterns and the Introduction of the UK Minimum Wage', *Oxford Bulletin of Economics and Statistics*, vol 64, p.677.
3. Councell, R. and Simes, J. (2002) *Projections of Long Term Trends in the Prison Population*, Home Office Statistical Bulletin 14/02, London: Home Office.

Where are politicians to turn for an escape from this counterproductive stalemate? Both parties are locked into a strategy of competition over the relative 'toughness' of their law and order policies; each is terrified of sustaining electoral defeat if it fails to reassure the 'floating voter' of its determination to promote security by tackling crime. On 16 November 2007, the day after the Lord Chief Justice, Lord Phillips of Worth Matravers, made a public statement describing the shortage of prison spaces as 'critical' and as a direct consequence of ministers' failure to build the impact of their sentencing policies into prison planning, the prison population in England and Wales stood at a record 81,547⁴. Less than two years on, it stood at a further high of 84,622⁵. Yet the huge social and economic costs of an ever increasing penal establishment seem to have disappeared from the landscape of political debate, and along with them any informed and reasoned discussion of the real contribution of criminal punishment to reducing crime or improving public security. Unmediated penal populism leads, it seems, to a world for which perhaps few, even among the relatively advantaged, would choose, rationally, to vote.

The structure of this political prisoners' dilemma is not peculiar to Britain, but is rather a feature of adversarial, majoritarian political systems under contemporary economic conditions⁶. The focus on the supposed views of the median voter sets up a highly unstable and unsatisfactory dynamic in criminal justice policy-making. There is, of course, much evidence about the complexity of public opinion about crime, demonstrating among other things a less punitive response to more contextualised questions about crime and punishment, and the extent to which public opinion may itself be led by political posturing⁷. Recent

examples of the latter in the UK are, unfortunately, plentiful. For instance, in November 2007 the Ministry of Justice issued a press statement publicising an ICM survey whose results illustrated the complexity and context-dependence of public attitudes to punishment, while reflecting relatively strong support for community sentences and a concern with prevention through rehabilitation and reparation as well as deterrence. Jack Straw, the Lord Chancellor and Secretary of State for Justice, contributed a statement supporting 'rigorous effective community sentences.' Yet the press release went out under the emotive heading 'Victims of crime want punishment'.

Even without this sort of political manipulation, the malleability of 'public opinion' makes it an unsound basis for policy development. To take just one example, recent empirical research in England and Wales found, within less than six months, the following apparently contradictory 'facts': first, that more than half those surveyed did not support an expansion of the prison estate and thought that government should find other means of punishment and deterrence; second, that 40 per cent of those surveyed thought that sentencing was 'much too lenient', with a further 39 per cent regarding sentences as 'too lenient'⁸. Yet notwithstanding such evidence of the ambivalence

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of 'public opinion', it seems that politicians' fear of the electoral costs of moderate criminal justice policy remains acute. In this context, the relative lack of insulation of criminal policy development from popular electoral discipline in adversarial, majoritarian systems, and the lack of faith in an independent professional bureaucracy⁹ are major problems.

Yet this is not a tale of inevitability for liberal market countries with majoritarian political systems¹⁰. Canada, for example, has seen a relatively stable imprisonment

4. Carter, Lord P. (2007) *Securing the future: Proposals for the efficient and sustainable use of custody in England and Wales*, London: Ministry of Justice p.2.
5. HM Prison Service (2009) *Population Bulletin — Weekly 30 October 2009*, <http://www.hmprisonservice.gov.uk/resourcecentre/publicationsdocuments/index.asp?cat=85> (Accessed 6 November 2009)
6. Lacey, N. (2008) *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies*, Cambridge: Cambridge University Press.
7. Downes, D. (2001) 'The macho penal economy', *Punishment and Society*, vol 3, p.61, see also Beckett, K. (1997) *Making Crime Pay: Law and Order in Contemporary American Politics*, New York: Oxford University Press, Roberts, J. and Hough, M. (eds) (2002) *Changing attitudes to punishment: Public opinion, crime and justice*, Cullompton: Willan Publishing and Beckett, K. and Sasson, T. (2004) *The Politics of Injustice: Crime and Punishment in America* (2nd edition), Thousand Oaks, CA: Sage.
8. Glover, J. (2007) 'More prisons are not the answer to punishing criminals, says poll', in *The Guardian*, 28 August, <http://www.guardian.co.uk/uk/2007/aug/28/ukcrime.polls> (Accessed 3 November 2009), see also Jansson, K., Budd, S., Lovbakke, J., Moley, S. and Thorpe, K. (2007) *Attitudes, perceptions and risks of crime: Supplementary Volume 1 to Crime in England and Wales 2006/7*, Home Office Statistical Bulletin 19/07, London: Home Office.
9. Lacey (2008) see n.6
10. *Ibid.*

rate over the last twenty years¹¹ and the Australian state of Victoria, while participating in the national trend towards higher imprisonment rates, has maintained its low level relative to other states within the federation¹². In Canada's case, important factors seem to have included the checks and balances attendant on Canada's distinctive federal structure; the influence of Francophone culture, particularly in the large province of Quebec; a relatively robust consensus orientation in politics; and a conscious sense of the desirability of differentiating Canadian politics and society from those of the United States¹³. Victoria's historically low imprisonment rates — little more than half of those of its neighbour New South Wales over the last decade — have been bolstered, notwithstanding some increase in the 1990s, by state-level policies such as liberal use of the suspended sentence and the development of plentiful non-custodial sentencing options. Our understanding of these differences is as yet relatively shallow, and a thorough analysis would need to look closely at the circumstances and institutional features of particular countries which either buck, or lead, the general trend towards penal harshness.

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

Debating the social and economic costs of imprisonment

How, then, might governments in liberal market economies like the UK help to generate a more expansive public debate about punishment? As the sub-title of the most recent report on imprisonment — 'Proposals for the efficient and sustainable use of custody in England and Wales'¹⁴ — reminds us, public analysis tends to be as much preoccupied with economic efficiency as with victims' rights (as well as markedly more preoccupied with each of these than with fairness to offenders). This is hardly surprising given the salience of perceptions of economic competence to political credibility. But given that public money spent on criminal justice has a knock-on effect for resources available in areas such as health and education, there are reasons beyond purely economic ones for being concerned about the 30 per cent increase in the proportion of GDP spent on 'public order and safety' between 1987 and 2005, or about a £2.7 billion prison expansion programme¹⁵.

There is a substantial literature on the economics of mass imprisonment, much of it from the US. In a review of this literature, Marcellus Andrews has shown that, although on the most widely accepted calculations

of the expected medium term benefits in crime reduction of incapacitative imprisonment the net costs outweigh the benefits, the policy is nonetheless economically sustainable in the medium term¹⁶. But sustainability is, of course, a different thing from optimal economic policy. Moreover, like criteria of macro-economic success, the way in which these economic calculations are made is highly contestable. In particular, the criminogenic effects of imprisonment, which decisively uncouples offenders from economic, family and social networks which could lead to reintegration, not to mention the damage to communities wrought by the mass imprisonment of

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11. Doob, A. and Webster C. (2006) 'Countering Punitiveness: Understanding Stability in Canada's Imprisonment Rate', *Law and Society Review*, vol 40, pp.325-368.
12. Freiberg, A. (1999) 'Explaining Increases in Imprisonment Rates', paper presented at the 3rd National Outlook Symposium on 'Crime in Australia: Mapping the Boundaries of Australia's Criminal Justice System', Australian Institute of Criminology, see also Cavadino, M. and Dignan, J. (2006) *Penal Systems: A Comparative Approach*, London: Sage.
13. Tonry, M. (2004) 'Why aren't German Penal Policies Harsher and Imprisonment Rates Higher', *German Law Journal*, vol 5, no. 10, pp.1187-1206.
14. Carter (2007) see n.4.
15. HM Treasury (2007) *Public Expenditure Statistical Analyses 2007*, Cm 7091, London: HM Treasury p.52.
16. Andrews, M. (2003) 'Punishment, markets and the American model: an essay in a new American dilemma', in S. McConville (ed) *The Use of Punishment*, Cullompton: Willan Publishing, p.116.

certain groups, notably young black men, are inadequately acknowledged in many of these calculations. When we add in these social costs of mass imprisonment, the cost-benefit calculation looks fragile¹⁷.

In a world in which it is the case both that high rates of imprisonment make, at best, a modest difference to crime levels, and that politically feasible increases in the size of the prison system make either a marginal difference or possibly even have counter-productive effects¹⁸, it seems sheer economic irresponsibility to invest an ever growing proportion of GDP in the prison budget. In this country, it is high time for these arguments to be confronted directly by politicians and informed commentators. Given that governments' competence in managing the economy is key to their electability, even those of us who see the issue in terms other than the purely economic must surely acknowledge the importance of pressing home the message that increased prison spending is a form of fiscal mismanagement.

A further, baleful feature of the current public debate about the relative costs and benefits of punishment in the UK, as in several other liberal market economies, is its failure to set the social costs of crime in the context of the costs of other socially produced, and avoidable, harms. This point has been made forcefully by Hillyard and others in their focus on the costs of harms such as environmental and corporate harms, and on the impact of social policies such as welfare cuts on harms — including harms associated with criminal victimisation — which find their impact disproportionately among the least socially advantaged¹⁹. Only once our public debate is mature enough to compare the relative costs of crime as conventionally defined and of these broader harms

will we be able to grasp the relative significance of punishment to social safety, and begin to assess rather than assume the relative contribution of punishment to the welfare of even victims of crime.

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

How are we to generate the sort of debate which is needed here? Clearly, it will not be an easy task.

Happily, however, there is one major difference between the situation of political parties locked into the strategy of competitive penal populism in majoritarian electoral systems and the prisoners of game theory's dilemma. This is that they are able to co-ordinate with one another. And this, surely, is where the beginnings of an escape from the cell of penal populism can be glimpsed. But this will only be possible if the two main political parties can reach a framework agreement about the removal of criminal justice policy — or at least of key aspects of policy, such as the size of the prison system — from party political debate. This might be done by setting up something akin to a Royal Commission, in an effort to generate an expanded debate which takes in not only the widest possible range of social groups but also a

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broad range of the non-penal policies and institutions on which criminal justice practices bear. In committing themselves to act on the outcome of such a Commission, the two parties would distance the issue of crime control from the upward pressure created by electoral competition. Institutional initiatives which provide a buffer between electorally driven political decision-making and criminal justice decision-making — carefully structured sentencing commissions would be an obvious, and topical, example — would also be worth considering²⁰.

17. Pratt, J. (2006) *Penal Populism*, London: Routledge, see also Western, B. (2006) *Punishment and Inequality in America*, New York: Russell Sage Foundation.

18. Freeman, R. B. (1996) 'Why do so many young American men commit crimes and what might we do about it?', *Journal of Economic Perspectives*, vol 10, p.25.

19. Hillyard, P., Pantazis, C., Tombs, S. and Gordon, D. (eds) (2004) *Beyond Criminology*, London: Pluto see also Hillyard, P. and Tombs, S. (2004) 'Towards a political economy of harm: States, corporations and the production of inequality', in P. Hillyard, C. Pantazis, S. Tombs and D. Gordon (eds) *Beyond Criminology*, London: Pluto, p.30.

20. Sentencing Commission Working Group (2008), *Report: Sentencing Guidelines in England and Wales: An evolutionary approach*, London: Ministry of Justice.

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

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

days — a period which is already significantly longer than that permitted in other comparable democracies²¹ — to 42 days.

The publication at the end of 2007 of Lord Carter's Review of Prisons underlines the ambivalence of the messages emerging from the policy process. On the one hand, Lord Carter recommended that a working party be set up to consider the advantages of a sentencing commission, drawn broadly from the judiciary, the legal profession and those with statistical expertise as well as victims' representatives, with the goal of producing the sort of structured sentencing practice which is thought to have helped to moderate imprisonment levels in Minnesota. He further

acknowledged the need for an informed public debate about sentencing, proposed the restriction of indefinite sentences for public protection, and hinted at the desirability of effecting some degree of insulation of sentencing policy from the political process²². On the other hand, these recommendations were nested within a report whose main substantive proposal was to build a number of prisons so as to expand prison capacity by 6,500 by 2012. This was in addition to the existing programme for an expansion of 8,500, resulting in an overall increase in net capacity to 96,000 by 2014. Against this background, the more hopeful

decision to establish a Sentencing Council seems unlikely to have much impact.

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

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21. Russell, J. (ed) (2007) *Charge or release: Terrorism pre-charge detention comparative law study*, London: Liberty

22. Carter (2007) see n.4.

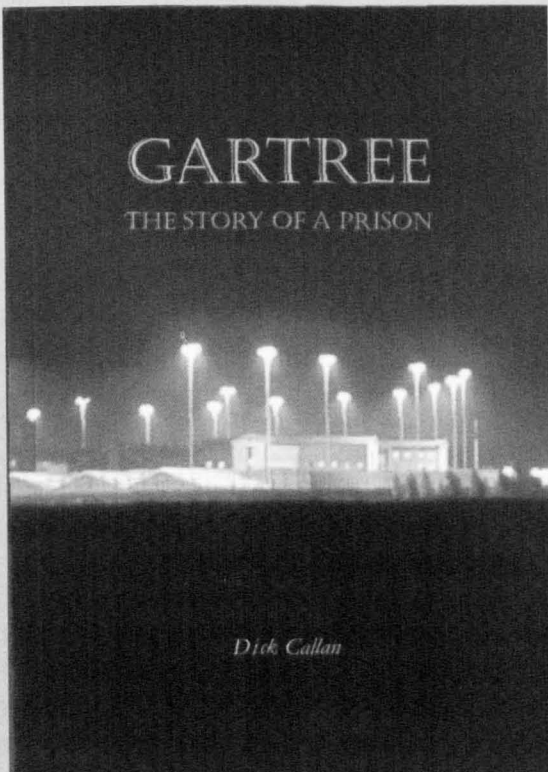
economic policy exist only in the rhetoric of 'joined-up policy making'.

This is not, of course, to underestimate the challenge which the existing dynamics of law and order in this country pose for politicians. These are challenges which reach deep into the political-economic structure of the country. The main keys to unlocking the dynamic towards ever greater inequality, social and political conflict and criminalisation lie in a bipartisan approach at the political level and in interventions at the level of the labour market, education and training with a view to economic integration. The economic aspects of this challenge will not be met merely by creating a new tier of low-skilled and low-paid jobs which do not generate the kind of income or welfare support which allows those who hold them to feel fully members of

the polity²³. And this, sadly, will be a tall order in Britain's political economy, whose competitive position has become increasingly dependent on low labour costs, low labour protections and job flexibility — implying a significant barrier to providing incentives to less skilled workers in the legitimate labour market capable of matching those in the illegitimate economy.

The political dimension of the prisoners' dilemma may, in short, be easier to escape than its economic counterpart. But since the prisoners' dilemma implies our being locked into a policy scenario for which, properly informed about its long-term implications and able to co-ordinate decision-making, it seems likely that a majority would not vote, an escape from its political dimension would itself be a worthwhile achievement²⁴.

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23. Young, J. (2003) 'To these wet and windy shores: Recent immigration policy in the UK', *Punishment and Society*, vol 5, p.449.

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