The problem with criminalisation

Christina Pantazis discusses the growing tendency for the state to criminalise since New Labour came to power and introduces the theme of 'criminalisation' for this issue of **cjm**.

Between New Labour's electoral victory in May 1997 and 2006, a new criminal offence was created almost every day; twice as many as introduced by the previous Conservative administration. This is a considerable feat in light of the strength of concern voiced by critics of the previous Conservative government, whose policies were invariably labelled as 'punitive populist', 'coercive' and even 'authoritarian'. Under New Labour more than 3,000 new offences have been created leading to the comment that the government's law-making is 'frenzied' and obsessed with 'controlling the minutiae of everyday life' (Clegg, 2006). Yet while many of these new offences have tapped into a populist mood, they have also been welcomed by organisations advocating for improved protections in relation to crimes committed against children, women, and ethnic minorities, for example. On the other hand, the need for many of the new offences has not been altogether clear, while many others have attracted considerable controversy—not least, those offences relating to terrorism which have seriously eroded traditional rights.

In parallel with these developments, there have been at least five other major changes that have strengthened the state's capacity to criminalise under New Labour. Among the most notable has been the hybridisation of criminal and civil justice systems (seen most clearly with the introduction of ASBOs). This has created a double whammy: civil prosecution of individuals on lower standards of proof and the full force of criminal sanctions in cases of breach, often with the threat of imprisonment. Second has been the growth in summary justice, allowing the police to by-pass the courts, to impose on the spot fines on offenders for low-level nuisance behaviour. Third has been the further expansion in formal police powers to stop and search, arrest and detain in relation to a number of offences including now common assault but also terrorist-related crimes. Fourth has been the creative use by enforcers of broadly defined legislation facilitating criminalisation for purposes not originally intended by legislators. Good examples of this trend include councils using anti-terrorist legislation to spy on parents suspected of lying about school catchment areas and the police using anti-terrorist powers against environmental or anti-war protestors. Finally, there has been a much greater willingness to intervene in children's lives through the abolition of *doli incapax* (which means that ten to 14 year olds are now held criminally responsible for their actions) and the introduction of instruments to assess the risk of children (from as young as four years) becoming offenders. This has led to fears about expanded and extended prospects for net-widening.

Criminology and criminalisation

So how have criminologists responded to some of these disturbing trends? The criminalisation of children and young people and the use of ASBOs have certainly attracted much attention, although criminology has been slower to respond to other developments such as the criminalisation of terrorist-related offences, and the repercussions this has had on the right to peaceful protest, for example. At the same time, there have been significant concerns about the lack of progress with enforcement in some areas, most notably in relation to health and safety harms where Tombs and Whyte (2008) have argued that we have an effective decriminalisation of workplace death and injury. Similar concerns have been raised about the appallingly high levels of attrition in criminal cases related to rape (Kelly et al., 2005) and domestic violence (Hester, 2005).

Traditionally the issue of criminalisation has not been a major preoccupation for criminology; the focus on discovering the causes of crime in people's individual pathology or social circumstances took precedence. Despite a much longer history, criminology's first substantial engagement with issues related to social control can be located to the 1950s. Thus began the writings of labelling and social reaction theorists, and whose influence can be seen in the de-criminalisation policies introduced during the 1960s and 1970s. Their endeavours ignited further interest in later scholars, who, influenced by Marx and others, went on to produce understandings of criminalisation rooted firmly within class power relations and ideological processes. Crime and criminalisation strategies were said to provide 'mystification' (Box, 1983): focusing attention on the harmful activities of the poor while simultaneously deflecting attention from the more harmful activities of the rich and powerful. Much of the subsequent interest in criminalisation developed under the auspices of critical scholars, among them feminists, critical criminologists, for example, who were given added impetus with the drift to authoritarianism under Thatcher (Scraton, 1987) and the prison lockdown in America (Parenti, 1999) with its devastating

consequences for black families and communities.

Within criminology the issue of criminalisation has continued to be problematised in broadly two ways. The first approach points to the over-criminalisation of specific locations and social groups–focusing its attention on the marginalised, vulnerable and impoverished including children and young people, urban dwellers, political dissidents, and certain minority groups (traditionally black youth, and now increasingly young Muslims). The second approach focuses on the under-criminalisation of the powerful such as state and corporate entities, and also on the relatively more powerful social groups such as men. In doing so the double standards and inherent biases in criminalisation processes, which to quote Jeffery Reiman (1979) mean 'the rich get rich and the poor get prison', have been exposed. This dichotomous response (of critiquing criminalisation for some groups but urging further criminalisation for others) has been, and continues to be, justified on the basis that crimes of the rich and powerful are more extensive and also more harmful. Moreover, naming a harm as 'crime' and demanding 'justice' and 'punishment' can provide powerful symbolic meanings.

Criminalisation and a social harm approach

There is concern, however, that a pro-criminalisation strategy with respect to the numerous harms, which have been poorly responded to by the criminal justice system, may be inadvertently feeding into increasingly punitive, divisive, and exclusionary law and order agendas. Moreover, we should also take caution from Hillyard et al.,'s (2004) observation that: "…'progressive' reforms which seek to alter the basic workings of a highly unequal criminal justice system can and are often turned on their head, and may ultimately serve to exacerbate structures of inequality and vulnerability; the intentions behind proposals clearly do not determine their actual uses." A pro-criminalisation position is

increasingly untenable in a political climate which is resulting in the growing use of criminalisation for a whole variety of social harms – some serious but also many quite trivial. With escalating imprisonment rates in a number of countries (including England and Wales, where prison numbers currently stand at the near record level of 83,500 and are projected to rise to a possible 95,800 by 2015 (Ministry of Justice, 2008), the dangers of calling for the criminalisation of further sections of society are all too apparent. This is all the more so given the failures of criminalisation and punishment - even on their own terms: it is well established that criminalisation is experienced as an overwhelmingly negative process leading to shame, stigma and labelling for the offender and thus potentially resulting in a further retrenchment of harmful behaviour – making society *less* safe, rather than more safe as the supporters of criminalisation purport.

But what of alternative solutions? How should society respond to behaviour which is considered harmful? Back in 1986, Louk Hulsman urged critical scholars to abandon the state-sponsored category of 'crime' because it locks us into using the framework of criminal justice, thereby supporting criminalisation as a tool. Hulsman's ideas have latterly provided inspiration to the social harm perspective developed by Hillyard et al., (2004, 2008). In their 2004 book, *Beyond Criminology: Taking Harm Seriously* the authors make a case for going beyond criminology and adopting an interdisciplinary and multi-disciplinary perspective – for only then can we be more imaginative about how, Hulsman's notion of, 'problematic situations' can be responded to. There are arguably more constructive ways of providing redress to those who have been harmed and for preventing harmful events or actions. In addition to providing genuine restorative measures which exist outside the criminal justice paradigm, crucially they involve abandoning neo-liberal agendas, which have underpinned recent developments, and shifting to welfare (see Garside, this issue). This

means extending and expanding social policies and social welfare (e.g. increasing social security benefits, improving mental health and drug services, extending domestic violence perpetrator programmes, and expanding educational opportunities, for example). It means closing the gap between the rich and poor to improve equality through adequate income provision and redistributive tax policies. It means strengthening collective responses in the workplace through trade union representation or employee democracy. It means raising cultural awareness to tackle hate crimes against women, minority ethnic groups, and people with different sexual orientations, for example. And ultimately, it means ensuring the protection of human rights for *all*.

Introduction to criminalisation

The following articles have been selected to illustrate some of these issues and tensions outlined above. We begin with three introductory articles which discuss criminalisation from different disciplinary perspectives. **John Muncie** provides a fuller discussion of how criminalisation has been understood by criminologists, while **Lizzie Seal** presents a historical perspective to examine how the process of criminalisation, which gathered pace in the 18th century, was inextricably bound up with class and property relations. **John J Rodger** follows by commenting on the increasing criminalisation of young people and their families in the context of the debates about the 'criminalisation of social policy.' The next five articles cover topics and concerns related to what might be described as the 'over-criminalisation' of people and places. **Lynn Hancock** continues with the historical theme by charting how criminalisation processes have related, and continue to relate, to 'places', primarily those blighted by poverty. **Jeffrey Reiman** considers the ideological benefits that arise from a criminal justice system which is predicated on the connections between poverty and crime. **Paul Hirshfield** analyses the increasing social controls and criminalisation

outcomes for school pupils in the US—an issue which is gaining increasing salience in the UK. The criminalisation of diversity, reflected most dramatically in terms of the treatment of asylum seekers and immigrants, is critiqued by **Jon Burnett. Simon Hallsworth** and **Svetlana Stephenson** draw disturbing comparisons between the criminalisation outcomes of two urban renewal projects; one under Tony Blair in Britain and the other under Communist Russia decades earlier. The next four articles focus on areas which are presently 'under criminalised' or have traditionally experienced 'lesser criminalisation'. **Simon Pemberton** examines the failure of regulatory agencies to enforce the minimum wage and takes a critical look at criminalisation as an enforcement strategy. **Rob White** identifies some of the challenges to effective responses to environmental harms and calls for a world environmental court. Finally, **Laureen Snider** takes a critical look at developments in criminalisation with respect to violence against women—an area of harm which the criminal justice system has been traditionally slow to recognise and, also, respond to. **Lois S Bibbings** also takes a 'criminosceptic' approach to

argue that recent UK legal changes, despite intentions, will still fail victims of rape. The final section of the theme includes two topics which have encouraged debates on alternatives to criminalisation strategies. **Rachel Lart** considers current government responses to illicit drug use and the issue of decriminalisation. Finally, **Geetanjali Gangoli** and **Melanie McCarry** examine recent debates on the appropriateness of criminal and civil law remedies with respect to forced marriages. ■

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