

May 2010-April 2011

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# Critical reflections: social and criminal justice in the first year of Coalition government

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Edited by Arianna Silvestri

CENTRE FOR CRIME  
AND JUSTICE STUDIES

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## About the editor

Arianna Silvestri is Research and Policy Associate at the Centre for Crime and Justice Studies.

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# INTRODUCTION

ARIANNA SILVESTRI

This collection of essays consider criminal and social justice developments since the Conservative-led Coalition government came to power. They provide an independent analysis of policy and legislative initiatives as they emerged in the year following the general election in May 2010.

The financial crisis provides the backdrop to, and the justification for, the attempt by the Coalition to radically readjust the public/private sector balance in the belief, apparently unabashed by the banking debacle, that the markets know best. In the UK as well as abroad (see e.g. the euro zone upheavals) governments have been trying to reassure the markets by effecting policies – economic and social – which are intended to create confidence among international capital.

This has led to moves to erode social security nets and public sector incomes and to growing inequality and (child) poverty – in effect an upward transfer of wealth. Previous aspirations to improve the provision of public services (e.g. in health, education, the enhancement of poorly paid jobs by tax credits and other programmes) in the UK are now gone for the foreseeable future (Taylor-Gooby and Stoker, 2011).

Criminal justice was initially approached by the new government in a rather sedate way: there were statements about achieving (small) reductions in the prison population and cutting through the jungle of New Labour's proliferating criminal offences. According to Nick Herbert MP, the Coalition intended to 'break out of the old politics' and the numbers game. Governments could not pretend to have 'quick and easy solutions' and that 'crime is also a social justice issue'. The Minister for Policing and Criminal Justice continued: 'We cannot rely on more laws to make us more law-abiding'; 'the test of an effective police force is not how much it costs or the number of police officers it employs... the test of an effective penal system is not the number of offenders in prison' (Herbert, 2010).

These good intentions were always to be understood in the context of the overall expense containment and reduction of public debt that the Coalition had committed to. However, Justice Secretary Kenneth Clarke (and to a lesser extent lower profile Minister for Prisons and Probation Crispin Blunt) were thoroughly vilified in some sections of the press for appearing to be 'soft on crime'. Looking ahead, Clarke's own gaffes, the wish to be seen to be coming down hard on the rioters and David Cameron's direct intervention into criminal justice meant that the initial opportunity and apparent willingness to reframe criminal justice in a less febrile way eventually floundered.

A significant tranche of the Coalition's initial policy thinking is considered: the 'rehabilitation revolution' compact of ideas, which were mostly contained in the *Breaking the Cycle* green paper. This is situated by our authors within the

frame of another key ideological tenet of the period, the 'Big Society'. The assumption that it is possible to rehabilitate rather than just punish people – and thus reduce reoffending – has been married to a localist, decentralising agenda via a marketising element: 'payment by results' furnishes the imagined (as so far unevidenced) solution to providing localised, effective ways to involve civic society (the third sector, with a good dose of private enterprise thrown in) and achieve value for money at the same time.

John Rodger in his essay views this as a 'monetisation of rehabilitation', in the context of what is effectively an 'enterprise society' rather than a 'big civil society'. Eoin McLennan-Murray and Eric Carlin explore two other tenets of the 'rehabilitation revolution' from *Breaking the Cycle*: work in prison and drugs treatment in and out of prison. The complexities and social implications of payment by results and social impact bonds, another form of 'social investment', are analysed by Dexter Whitfield. Dennis Gough considers the impact on the voluntary sector of 'contracting out rehabilitation' (Ministry of Justice, 2010).

One of the main questions around the Big Society is whether it represents a fig leaf for the cuts and a justification for a de-responsibilisation of the centre. Localism can be either conceived as empowering communities or getting services on the cheap by exploiting the goodwill of volunteers – a return to pre-welfare state paternalistic values and 'the destruction of the legitimacy of the collective subject' (Levitas, 2011).

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*...we need a thoughtful re-imagination of the role, as well as the size, of the state....we understand that the big society is not just going to spring to life on its own: we need strong and concerted government action to make it happen.*

*(David Cameron, speech at The Young Foundation, November 2009)*

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Does the scaling down of (welfare) state provision at a time of financial restraint go together with an increased reliance on social controls – what is often referred to as the 'criminalisation of social policy'? As the criminal justice system is squeezed other areas of social policy and more informal mechanisms are arguably called into play. The arguments – and alternative ways to consider the issues – are explored by Richard Garside in his essay.

Robert Reiner offers an overview of the overall trajectory of Coalition policy, setting criminal justice developments in the broader context of a fundamental crisis in political economy.

Reiner leaves room for manoeuvre: 'whether the Coalition hurtles further towards the nasty core of the Tory party, with ever tougher law and order vainly seeking to hold down the

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lid on crime and protest, depends on how much the stirrings of challenge succeed in bringing a greater measure of social justice and solidarity’.

We will be keeping a close eye on how social justice and criminal justice interplay, in the shifting sands backdrop of international capitalism, in the coming years of Coalition government.

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# May 2010 - April 2011: POLITICAL PROMISES AND POLICY NARRATIVES

REBECCA ROBERTS AND ARIANNA SILVESTRI

In the wake of the UK general election that took place on 5 May 2010, with no party emerging with an outright majority, negotiations took place and a Coalition government between the Conservative and Liberal Democrat parties was formed. The ensuing 'programme for government' (HM Government, 2010) released in late May 2010 established the Coalition's priorities, drawing on their respective manifestos and setting out the policy and political commitments of the government for the following five years. This essay outlines some of the key justice issues and delivery of promises in the first year (May 2010 to April 2011) of Coalition government.

## From the manifestos to the Coalition programme for government

In the days of campaigning for the general election, the manifestos laid down the aspirations of each of the political parties. While the Labour manifesto had talked of 'national renewal', 'tough choices' and a 'future fair for all', the Conservatives had focused on the need for 'change' to 'mend our broken society' through a 'Big Society'. The Liberal Democrats had emphasised their commitment to 'fairness' in a range of areas and pledged to instigate a 'change that works for you'.

Content analyses of the manifestos show that law and order featured in the top ten of issues for all three parties, especially for the Conservatives (where it remained in the top 3 in both 2010 and 2005): see Table 1. When it came to the Coalition agreeing to a programme for government (what is commonly referred to as the 'Coalition agreement': HM Government, 2010), law and order had a lower profile than in the Conservative manifesto, likely as the result of negotiations with junior partners the Liberal Democrats. How some of the key policy areas featured in the Queen's Speech in the first year of Coalition government, compared to previous years, is illustrated in Table 2.

Table 1: Top 10 manifesto issues (in ranking order), 2005 and 2010 and policy references in Coalition agreement 2010

Source: Bara 2010, Quinn et al., 2010 and MARPOR 2010

	Top 10 Manifesto Issues, 2005			Top 10 Manifesto Issues, 2010			Coalition agreement
	LABOUR	LIB DEM	CON	LABOUR	LIB DEM	CON	
Health and welfare	2	5	6	1	10	=5	2
Technology	9	10		2	2	8	=5
Education	=4		2	3	4		
Culture	6			4			
Demographic groups*	1	2	=4	5	5	4	=3
Economic Orthodoxy**				6	7	10	
Labour Groups***				7			
<b>Law and Order</b>	<b>=4</b>	<b>7</b>	<b>3</b>	<b>8</b>	<b>9</b>	<b>3</b>	<b>7</b>
Internationalism	=7	4	8	9	8	9	=8
Incentives****	10	6	7	10			10
Environmental protection		3			3	=5	=5
Decentralisation	=7	8	=4		6	=5	=8
Government efficiency					1	2	1
Government effectiveness	3	1	1			1	
Market regulation		9	9				=3
Agriculture			10				

\* Favourable mentions of, or need for, assistance to women, old people, young people, linguistic groups, etc; special interest groups of all kinds.

\*\* Support for traditional economic orthodoxy, e.g. reduction of budget deficits, retrenchment in crisis, thrift and savings; support for traditional economic institutions such as stock market and banking system; support for strong currency.

\*\*\*Favourable references to employees, unemployed people, trade unions; promoting support/good treatment of working people.

\*\*\*\*Need for wage and tax policies to induce enterprise; encouragement to start enterprises; need for financial and other incentives such as subsidies.

## Crime, justice and civil rights

In their manifestos, all three major parties had emphasised, to varying degrees, the importance of early intervention, policing, sentencing policy and prisons in their 'fight' against 'crime'. The Conservatives and Liberal Democrats had been keen to stress that they would protect civil liberties and turn around what they saw to be the more illiberal aspects of Labour policy on CCTV, DNA and ID Cards. Whilst both Conservatives and Liberal Democrats manifestos included plans for a 40-hour working week for prisoners, the Conservatives wanted to increase the capacity of the prison estate while the Lib Dems were against building new prisons and against short-term sentences. The influence of the latter was seen to mitigate the Tories' aspirations (at least initially), with the Coalition programme for government leaning towards a less punitive stance in criminal justice than the Conservative manifesto (see Table 3 for some highlights).

Table 2: Total mentions in Speeches to the Throne, 1997-2010  
Source: Jennings et al., 2011

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Health	4	6	2	6	4	4	3	3	5	3	4	4	0	1
Education	5	11	4	6	4	4	5	4	5	2	4	2	1	1
Law, crime and family issues	7	8	11	12	7	17	10	14	10	11	2	5	4	2
Defence	6	1	3	2	2	3	4	2	2	2	1	5	3	2
Civil rights, minority issues (incl. immigration) and Civil Liberties	3	4	12	0	1	0	5	10	5	2	2	3	2	3
Labour and employment	2	5	6	1	2	0	3	1	3	0	3	2	2	3
Social welfare	0	6	5	0	2	3	5	4	4	6	4	6	3	4
Macroeconomics	10	7	12	3	4	4	2	3	5	4	4	3	6	6
International affairs and foreign aid	28	22	16	10	12	15	14	13	21	15	14	5	6	10
Government operations	17	18	12	5	4	12	10	9	8	10	9	6	5	16

Table 3: What was promised? Extracts from party manifestos and the Coalition programme for government 2010

## Conservative Party Manifesto 2010

### Fight back against crime

'We will fight back against the crime and anti-social behaviour that blights our communities. We will take steps to reduce the causes of crime, like poverty and broken families. We will put the criminal justice system on the side of responsible citizens, take tougher measures against knife criminals and crack down on the binge-drinking that leads to violence. We will cut paperwork to get police out on the street and give people democratic control over local policing. We will introduce honesty in sentencing and pay voluntary and private providers to reduce re-offending.' (p.55)

### Restore our civil liberties

'We will scale back Labour's database state and protect the privacy of the public's information. We will introduce a balanced approach to the retention of people's DNA and reform the criminal records system so it protects children without destroying trust.' (p.79)

## Liberal Democrat Party Manifesto 2010

### Rebuilding security, opportunity, homes and hope

'Liberal Democrats believe in strong communities, where local people can come together to meet local needs, enjoy a pleasant local environment, and feel free from the threat of crime. We want every community to be safe and fair, and offer opportunities to people of every background. ...

Liberal Democrats will put thousands more police on the beat and make them work more effectively to cut crime. We value Britain's open, welcoming character, and will protect it by changing the immigration system to make it firm and fair so that people can once again put their faith in it.' (p.71)

### Restoring your freedoms

'Liberal Democrats believe it is an individual's right to live their lives as they see fit, without discrimination, with personal privacy, and with equal rights before the law.

Decades of Labour and Conservative rule have overthrown some of the basic principles of British justice and turned Britain into a surveillance state.' (p.93)

## Coalition programme for government 2010

(edited text; our emphases)

### Policing

'We will... **reduce bureaucracy**; introduce **better technology to make policing more effective**; amend health and safety laws that stand in the way of common sense policing; spread information about policing techniques and sentencing; have a full **review of terms and conditions of police officer employment**; introduce measures to **make police more accountable through a directly elected individual**; oblige the police to **publish detailed crime data**; require police forces to hold **regular 'beat meetings'**; make **hospitals share information** with the police; give people **greater legal protection to apprehend criminals**; ensure protection when they defend intruders; **ban the sale of alcohol below cost price**; review alcohol taxation; overhaul the Licensing Act; allow councils and the police to shut down any shop or bar persistently selling alcohol to children; **double fine for under age alcohol sales**; permit councils to **charge more for late night licences**; promise **better recording of crimes against disabled, homosexual and transgender people**; introduce a system of **temporary bans on new 'legal highs'**; **review the operation of the Extradition Act.**'

### Justice

'We will... introduce a **rehabilitation revolution** that will **pay independent providers**; conduct a **review of sentencing policy**; explore alternative forms of **treatment based accommodation for mentally ill and drugs offenders**; implement the **Prisoners' Earning Act 1996**; use proceeds from the **Victim Surcharge to deliver up to 15 new rape crisis centres**; carry out a **fundamental review of Legal Aid**; change the law so that historical convictions for **consensual**

**gay sex with over 16s will be treated as spent**; **extend anonymity in rape cases to defendants**; introduce **effective measures to tackle anti social behaviour and low level crime**, including **restorative justice**.

### Civil liberties

'We will... **reverse the erosion of civil liberties**; introduce a **Freedom Bill**; **scrap ID card scheme**, the National Identity register and ContactPoint database and **halt the next generation of biometric passports**; **outlaw fingerprinting of children at school without parental permission**; **extend the Freedom of Information Act**; adopt **protections for the DNA database**; protect **defence of trial by jury**; restore **rights to non-violent protest**; review **libel laws**; introduce **safeguards against the misuse of anti-terrorism legislation**; regulate CCTV; end storage of internet and email records without good reason; **prevent proliferation of new unnecessary criminal offences**; investigate the creation of a British Bill of Rights.'

### Immigration

'We will... introduce an **annual limit on non-EU economic migrants**; **end detention of children for immigration purposes**; create a **dedicated Border Police Force**; strengthen **arrangements to deal with serious crime and cross boundary policing challenges**; **support E borders** and reintroduce **exit checks**; apply **transitional controls as a matter of course for all new EU Member States**; introduce measures to **minimise abuse of the immigration system**; tackle **human trafficking as a priority**; explore new ways to **improve the current asylum system.**'

## Law and order: themes and public debate

The promises around justice in the Coalition programme for government were translated into a number of specific policy proposals in key consultation papers and Bills which generated public debate and media coverage. These discussions can be coalesced around some broad themes, as follows.

**The ‘rehabilitation revolution’, marketisation and ‘payment by results’:** The ‘rehabilitation revolution’ proposals presented in the *Breaking the Cycle* consultation paper (Ministry of Justice, 2010) included the Conservative manifesto plans to pay private and voluntary sector providers to deliver criminal justice services. They would be rewarded through ‘payment by results’ in terms of reducing ‘reoffending’ (the Social Impact Bond at HMP Peterborough, launched in September 2010, and other pilots were to test such ideas). Additionally, prisoners would be required to work full time (something both parties in power had advocated in their manifestos). ‘Rehabilitation’ would be further aided by introducing ‘diversion services for mentally ill offenders’ and by dealing with addiction with the introduction of ‘drug recovery wings’ in prison and the testing of ‘intensive’ treatments in the community. The use of restorative justice and tougher community penalties were also advocated in *Breaking the Cycle*.

**Spending cuts, localism and frontline policing:** Although the Coalition programme for government (and subsequently the Home Office Business Plan) emphasised allowing the police ‘greater freedom’ from top-down targets, ‘unnecessary’ bureaucracy and the Policing Pledge, public attention was largely given to the proposed introduction of elected, local Police and Crime Commissioners, meant to increase accountability but perceived by critics as potentially leading to skewed priorities and populist measures.

The fiscal climate was seen by many as the reason behind the apparently more lenient stance taken by the Coalition government towards punishment and behind their rehabilitative approach. The Comprehensive Spending Review in October 2010 revealed cuts of 23 per cent to both the Ministry of Justice and Home Office budgets, with central government funding to the police reducing by 20 per cent in real terms by 2014/2015. The likely impact of spending cuts and changes to employment terms would have on the ill defined ‘frontline’ of policing were widely discussed, as were plans to reduce the prison population by 3,000 by the end of the spending review period (HM Treasury, 2010).

**Civil liberties and human rights:** ID cards were abolished, but the following measures are examples of the Coalition’s difficulty, in spite of their stated intent, in making a clean break with New Labour policies in such politically and media sensitive areas:

- The promised death and subsequent reincarnation of control orders (turned into the suspiciously similar ‘terrorist, prevention and investigation measures’) and of anti-social behaviour orders (replaced by a raft of measures, including ‘crime prevention injunctions’ which if breached could lead to imprisonment<sup>1</sup>).

- The introduction of ‘gang injunctions’, civil orders that can restrict freedom of movement on a low threshold of evidence, e.g. hearsay.
- The commitment of the Coalition to end child detention for immigration purposes was fraught with delays.

Following the European Court of Human Rights ruling about the illegality of the UK ban, the rights of prisoners to vote was hotly debated, with David Cameron’s famous statement of the thought making him ‘physically ill’<sup>2</sup>.

**Access to justice and cuts to legal aid:** An area of policy that featured very little in the Coalition documents and party manifestos was that of the courts and legal advice. However, during this first year increasing attention was devoted to the closure of courts across the country and further scaling back of funding for legal advice.

**Soft on crime?** The first year of Coalition policy making was characterised by a sustained attack by some sections of the media on the Secretary for Justice Kenneth Clarke, who was personally vilified for proposals around sentencing and prison numbers reduction. Clarke had identified very early on into its tenancy that the prison population was too high and had criticised the tough rhetoric of punishment which had led to an ever expanding use of custody: imprisonment should be reserved for ‘dangerous and serious’ offenders, via the use of ‘intelligent sentencing’. Such policies were also perceived to be against the grain of Tory traditional stance on crime. This, catalysed by one instance of Clarke’s maladroit public handling of the early-plea discount plan relating to rape, eventually led to a notable U-turn, prompted by the prime minister, towards a much more punitive stance with the publishing of the *Legal Aid, Sentencing and Punishment of Offenders Bill* in June 2011. For a depiction of media coverage relating to some Coalition policy priorities, see Chart 1.

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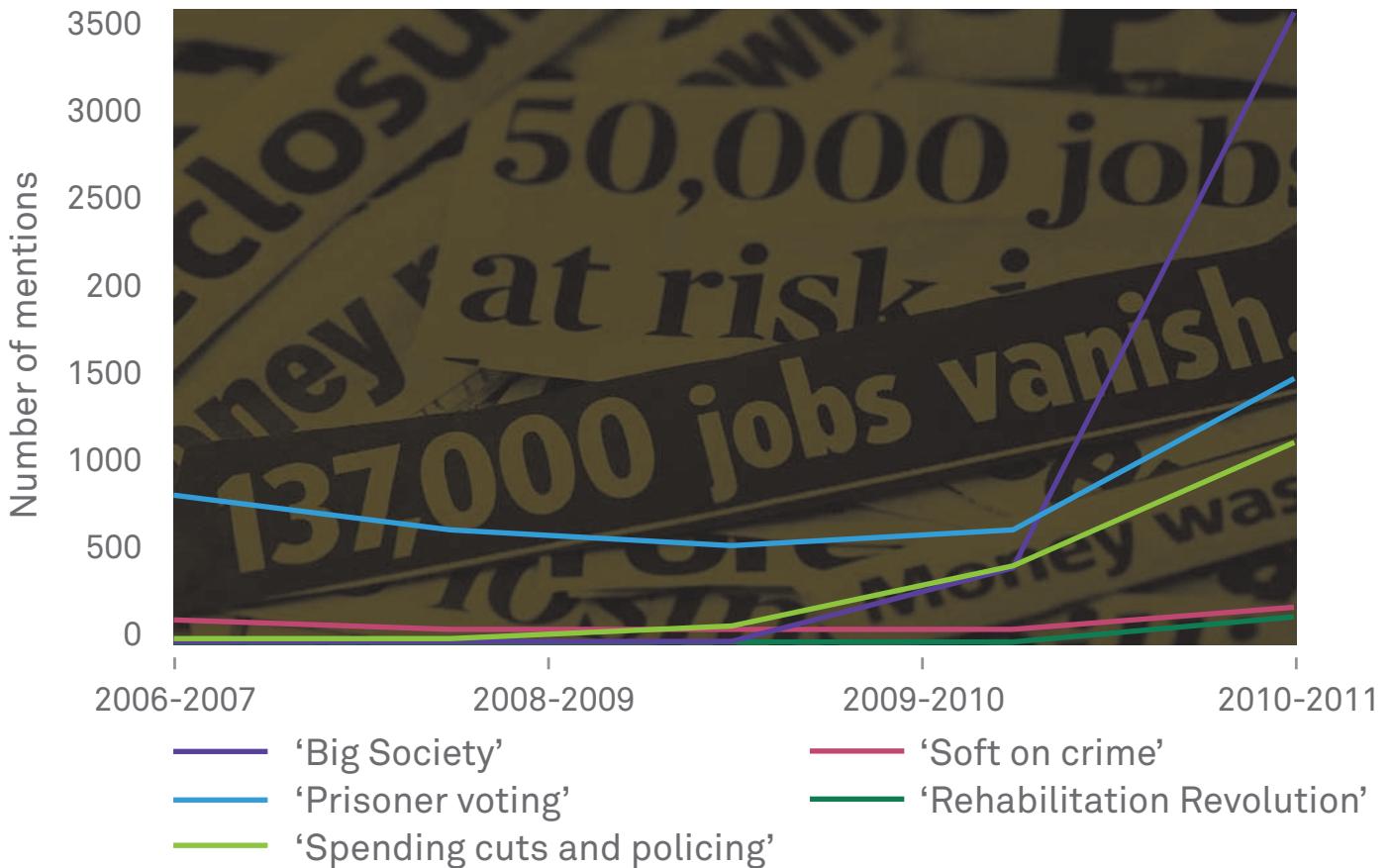
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**Chart 1: Justice and key policy areas: what made the news?**  
**UK newspapers, 2006/07-2010/11**

Source: *Nexis UK*



Total annual mentions. Searches conducted by CCJS using Nexis UK of UK national newspapers (excluding Financial Times); period 1 May to 30 April of each year.

<sup>1</sup> [www.homeoffice.gov.uk/media-centre/press-releases/asb-approach](http://www.homeoffice.gov.uk/media-centre/press-releases/asb-approach)

<sup>2</sup> See e.g. [www.express.co.uk/posts/view/209397/PM-Giving-prisoners-vote-makes-me-feel-sick](http://www.express.co.uk/posts/view/209397/PM-Giving-prisoners-vote-makes-me-feel-sick)

# CRIMINAL JUSTICE AND SOCIAL JUSTICE AT A TIME OF ECONOMIC CRISIS

RICHARD GARSIDE

## The Labour government's legacy

On the eve of the 2010 general election the criminal justice system in England and Wales had changed significantly from that which the Labour government had inherited in 1997 (Grimshaw et al., 2010; Mills et al., 2010a and 2010b; Silvestri, 2011).

Structural reforms and changes of varying degrees of success and significance had reshaped the system as a whole, as well as its constituent parts. Criminal justice had been enhanced in scale and reach. Spending across the system had also grown dramatically.

The apparent electoral benefit that accrued to Labour as a result of these major changes both motivated and justified them in their eyes. A reformist drive to reshape the nature and operations of government also played its part. But it was a relatively benign economic climate, with money apparently to spare, that helped to make it all possible.

## The Coalition's plans

The global recession has prompted a rethink about the economic and political challenges facing countries across the world. In the UK the 2010 Spending Review signalled the start of deep public spending cuts. In relation to criminal justice the real terms budgets for the Home Office and Ministry of Justice face cuts of around one quarter in the period to 2014-2015, reflecting a government-wide pattern of cutbacks (HM Treasury, 2010).

In the short term the spending cuts have created an unpredictable and unstable context for the ongoing delivery of criminal justice and other public services. In the longer term the cuts, if achieved, have the potential to reshape the nature of public services and the wider role of the state. This, indeed, is an important part of their overall rationale. As a Treasury insider told *The Financial Times* in the run-up to the October 2010 Spending Review:

*Anyone who thinks the spending review is just about saving money is missing the point. This is a once-in-a-generation opportunity to transform the way that government works.*

*(Parker, 2010)*

Only time will tell whether the Coalition does, indeed, succeed in hitting its spending targets and transforming the way government works. Within and outside government, opinion is divided over the speed and scale of the cuts. Others question whether the cuts are necessary at all (PCS, 2010). There are many developments – from riots, strikes, social unrest to a deteriorating economic situation and division within the Coalition – that might force ministers to rethink their plans.

Yet it is clear that the immediate financial and political context of criminal justice policy and practice differs markedly from that which operated under the last Labour government. This will have long term implications for the way criminal justice and other public services operate, regardless of how the government's plans work out in practice.

## From welfare state to criminal justice state?

Other authors cover the Coalition's key criminal justice policy preoccupations in the year under review, such as the 'rehabilitation revolution', marketisation and 'payment by results'. This essay considers a different question: that of criminal justice and its relationship to social justice concerns.

One approach contrasts the fortunes of the welfare state, as the embodiment of social justice principles, with that of criminal justice, as the embodiment of coercion and control. Social security, state pensions and free health care all play a role in protecting the poor, infirm and elderly and other vulnerable groups from chronic sickness and destitution. The state education system promotes fairer life outcomes by ensuring basic educational standards for all. The same beneficial effects are not generally ascribed to our police, courts and prisons, whatever else they might do.

In this context, it is often said that the UK, along with a number of other advanced capitalist countries, has over recent years embarked on a shift from a welfare state to a criminal justice state; from social justice to criminal justice. Social problems that previously would have fallen under the remit of welfare-based interventions increasingly are being managed through the criminal justice system, so the argument goes.

In scholarly circles, for instance, the French sociologist Loïc Wacquant has argued that there has been a roll back of the welfare state and a corresponding roll forward of the criminal justice state. Previously regulated and controlled by welfare, the poor in the United States and Europe have increasingly found themselves subject to regulation by the criminal justice system (Wacquant, 2009).

Similarly, David Downes and Kirsten Hansen have sought to demonstrate that criminal justice spending and social security spending sit in inverse relationship, the one to the other. Countries that spend generously on their welfare systems tend to have smaller prison populations. Those that spend comparatively less on welfare tend to have larger prison populations. This means that 'welfare cutbacks imply penal expansion' (Downes and Hansen, 2006: 1).

At a more popular level the argument that criminal justice responses to social problems has increasingly displaced the welfare state has been a regular argument among liberal columnists, campaigners and activists.

The financial data belie somewhat this argument. In the UK spending on social protection – which includes unemployment benefits, tax credits and pensions – grew from 23 per cent of general government expenditure in 1978 – 1979 to 29 per cent in 2010–2011. Spending on health and

education also grew and, with social protection, accounted for 60 per cent of general government expenditure in 2010–2011. By comparison, proportionate spending on law and order changed very little in the intervening years while that on the military – another manifestation of the state’s power to coerce – fell (Crawford and Johnson, 2011).

### Welfare and criminal justice as different modes of social maintenance

From a financial perspective, then, social justice – as represented by the welfare state – appears to be displacing criminal justice, rather than the other way round. But in important respects this financial view does not square with other things we know about the criminal justice system and the welfare state. Criminal justice does occupy a larger footprint in society than was the case a generation ago. The welfare state, by contrast, appears more conditional and uncertain than was previously the case.

Perhaps the problem lies in the sharp juxtaposition of welfare state and criminal justice structures. Could welfare and criminal justice be complementary, rather than contradictory, social institutions?

To explore this let us go on what might appear as a slightly odd detour into abstract reflection on the challenge of social reproduction: what is it that any given society has to do in order to maintain and perpetuate itself? Following the pioneering work of Anwar Shaikh and E. Ahmet Tonak (1994) we can start by distinguishing between *production* activities and *consumption* activities.

Production involves the making of all those material objects – e.g. food, clothing, housing, transport networks, machinery, consumer durables – that satisfy certain individual or collective needs. Consumption involves the use of these material objects either *personally* – food is eaten, clothing worn (and worn out), holidays taken, consumer durables utilised – or *socially*.

As far as *social* consumption is concerned, there is, first, distribution. Material objects that are produced are *distributed* in order to be used. Transport networks play a key role here, as do shops and other retail outlets. Banks and other financial services facilitate distribution through the supply of money and credit, the management of debt, and so on.

There is also *social maintenance*. This is the realm of general governmental, as well as some private, activities related to the maintenance of the existing social order. Examples of this include social security, pensions, health and education, along with national defence, foreign policy and criminal justice.

### Social justice and social maintenance

From this perspective, the welfare state and criminal justice are *different modes of regulating* the existing social order, not *opposing realms* of social justice and coercion. Order can be maintained in ways that are more inclusive or more exclusionary of course. Addressing a drug addict’s housing, welfare, health and employment needs offers an inclusive approach in the way that imprisoning him does

not. But both the welfare state and criminal justice perform complementary functions in maintaining, not transforming, the *status quo*.

The UK remains a society riven by profound social injustices (Dorling, 2011). Addressing this involves systematic work, over many years, to address a range of social ills. A more inclusive welfare state and a less intrusive criminal justice system might result in the mitigation of some of these. But it is implausible to think that genuine social justice will be possible simply by adjustments to the social footprint of the welfare state and criminal justice system.

Looking forward, the big story on welfare to have emerged from the Coalition in its first year – the new universal credit (Department for Work and Pensions, 2010) – will pose fresh challenges in the years to come. This, and the ongoing relationship between criminal justice and welfare-based approaches to social maintenance, are among the developments worth watching out for.

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# KEY ISSUES IN THE FIRST YEAR

ARIANNA SILVESTRI

## Austerity, spending cuts and the 'frontline'

### Police

By 2010 the police service had reached a record number of staff<sup>1</sup>. Police expenditure had increased by 48 per cent in real terms between 1998 and 2009 (Mills et al., 2010). It was a seemingly forever growing industry during New Labour's terms in office. Coming to power at a time of fiscal duress, the Coalition was clear from the outset that financial restraint had to be applied to all areas of public spending. However, the government also insisted that it wanted to protect police officers' and frontline jobs. Embarrassingly, it emerged in March 2011 that the Home Office actually had 'no formally agreed definition' of 'frontline' (Hughes, 2011). The Inspectorate of Constabulary (HMIC), tasked with rectifying this, hastily published a 'working definition' two weeks after the Home Office admission (HMIC, 2011).

In 2010 accrued pension rights had been 'protected': it was, claimed Home Secretary Theresa May, 'recognised that police officers should get bigger lump sums when they retired'. The remainder of the three-year pay deal was honoured, which meant that basic police pay by May 2011 was '2.55 per cent higher' than the same time the previous year (May, 2011).

The first part of an independent review of remuneration and conditions of service for police officers and staff was published in March 2011 (the second part, due to be published in January 2012, is to make recommendations for longer term reform). It found that police pay was 10-15 per cent higher than that of other emergency workers and the armed forces and up to 60 per cent higher than the average local earnings in regions such as Wales and the North East of England. The review also found that only 57 per cent of officers regularly work unsocial hours.

The review recommended that more than £1bn of savings should be made, including saving £60m a year in overtime payments. Police officers on mutual aid should be paid for the hours they work and travel, rather than a standard rate. A new payment system to those with specialist skills and the introduction of a national on-call allowance for all ranks were also suggested.

The changes suggested in the report would mean that 40

per cent of officers would be worse off by up to £4,000 a year. Most of the savings should be reinvested in 'frontline' policing (Winsor, 2011).

The Coalition's planned cuts to the police budget encountered strong reactions from police ranks and ACPO. Arguments were put forcefully forward that the cuts would compromise public safety and damage the service.

### Probation, courts and the CPS

The government's green paper *Breaking the Cycle* continued pushing for greater contestability (see Silvestri, 2011 for details of the New Labour years) into probation, with probation trusts envisaged to be competing to provide service with private and third sector providers.

However, the green paper lacked clarity about 'the role of probation in any new commissioning model', which 'fuelled concerns about the future direction of probation trusts. (...) Probation services have been uncertain about their future since the idea of wider competition was first mooted almost ten years ago. The Government must clarify its intentions for the future of probation' (House of Commons Justice Committee, 2011).

After the many changes the Probation Service had experienced under the previous Labour administrations, announcements of further changes and budget cuts were met with worries about more staff reductions and the consequent ability to deliver programmes to tackle reoffending (Napo, 2011).

Plans (announced in December 2010) to close 93 magistrates' courts and 42 county courts were criticised for curtailing access to justice and disproportionately impacting on disadvantaged people having to travel longer distances to court. Likewise budget cuts to the Crown Prosecution Service (CPS) (included under 'Law Officers Departments', see Table 5) were seen as likely to increase the burden on defence lawyers and to affect the quality of casework (Baksi, 2010).

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<sup>1</sup> As at 31 March 2010, 244,497 full-time equivalent staff (including police officers and civilians) in England and Wales (Sigurdsson and Dhani, 2010).

# Freedoms and security

## Civil liberties and anti-terrorism

The Coalition Programme included a number of commitments to restoring 'the rights of individuals in the face of encroaching state power, in keeping with Britain's tradition of freedom and fairness' (HM Government, 2010). Home Secretary Theresa May, in her evidence to the Home Affairs Committee on 15 July 2010, placed 'rebalancing national security and civil liberties' at 'the heart of what we want to do, as a government'.

Following this, the Coalition:

- closed the ContactPoint database, which held personal information on children under 18 in England (August 2010)
- abolished identity cards via the *Identity Documents Act 2010* (January 2011)
- introduced the *Protection of Freedoms Bill* (February 2011). The Bill includes provisions to bring in a new system for the retention of DNA and fingerprints; a code of practice for the use of CCTVs; safeguards 'against the misuse of counter-terrorism and security powers'; a reformed vetting and barring scheme; an extended freedom of information regime. It also repeals the introduction of serious fraud trials without a jury and 'unnecessary powers of entry'.

## DNA

The *Protection of Freedoms Bill* seeks to redress the failures of the very low threshold for entry into the DNA database: anyone arrested in England and Wales for any 'recordable offence' automatically has a DNA sample taken, regardless of whether charges are brought against them. The samples are permanently stored in the database. Ethnic minorities, children and individuals with mental health problems are overrepresented on it. The European Court of Human Rights (ECHR) ruled<sup>2</sup> that the blanket inclusion policy was disproportionate and unjustifiable under Article 8 (the right to private and family life).

Under the *Protection of Freedoms Bill* retention will vary according to different categories of people, e.g. adults and under-18s *arrested but not convicted* of a minor crime will no longer have their DNA retained; adults and under-18s *arrested but not convicted* of a serious crime will have their DNA profile retained for three years (with one two-year extension possible). Adults *convicted* of any crime and under-18s convicted of a serious crime will have their DNA profile retained on the national database indefinitely.

Although the new system has been welcomed as a definite improvement on the old regime, the addition of people

given fixed penalty notices (whose DNA can be kept for two years) is of concern. Also heavy handed is the proposal that under-18s convicted for the first time of a *minor crime* will have their DNA stored for five years (plus the length of any custodial sentence) and if they are convicted of a minor offence for a second time their profile will be retained indefinitely. Moreover, records deleted from the DNA database will *not* be removed from the Police National Computer. The Information Commissioner believes that there is no justification for this (Rowlands, 2011).

## Pre-charge detention and stop and search

The *Protection of Freedoms Bill* introduces a new regime for police stops and searches under the *Terrorism Act 2000* and reduces the maximum **pre-charge detention** period under that Act from 28 to 14 days. This latter measure would deliver one of the Liberal Democrats manifesto pledges. However, the 28 days period may be reinstated in 'exceptional' circumstances: the *Draft Detention of Terrorist Suspects (Temporary Extension) Bills* (published in February 2011) is one of the pieces of legislation intended to enable this.

Sections 44 to 47 of the *Terrorism Act 2000* (commonly referred to as 'section 44') enable a police constable to **stop and search** people and vehicles within an authorised area for articles which could be used in connection with terrorism, without 'reasonable suspicion' that such articles may be present. A senior police officer has to authorise the search, which must be confirmed by the Secretary of State if it is to last more than 48 hours. Section 44 was often used to stop and search protesters. In June 2010, the ECHR, in its final decision in the case *Gillan and Quinton*, found these powers to be in breach of Article 8. The court found the legislation was too broadly expressed – yet another blanket policy – and the safeguards in place were not sufficient.

Sections 44 to 47 will be repealed by the *Protections of Freedoms Bill* once enacted. The Bill will introduce new powers of stop and search: authorisation will have to be made by a senior police officer who reasonably suspects an act of terrorism and the search is 'necessary' to prevent such an act. The maximum period of an authorisation will be reduced from a maximum of 28 days to 14 days. 'Robust' statutory guidance on the use of the powers is to be developed 'to circumscribe further the discretion available to the police' (Home Office, 2011).

An interim section 47a is being used pending the enactment of the *Protections of Freedoms Bill*, which still gives the police wide discretion (Delsol, 2011).

## Control orders

When in opposition, both Coalition parties had been against control orders, which can use secret evidence to put people who have not been convicted of any offence under house arrest and impose a range of other restrictions on them.

<sup>2</sup> In *S & Marper v UK*, Application No. 30562/04, Grand Chamber judgment of 4 December 2008

The Home Office review of counter-terror laws recognised that ‘this system is neither a long term nor an adequate alternative to prosecution, which remains the priority’ (Home Office, 2011).

Control orders are to be repealed by the *Terrorism Prevention and Investigation Measures Bill*, which introduces a new regime of ‘terrorism prevention and investigation measures’ (TPIMs). These measures will be limited to a maximum of two years, but may be reimposed where there is new material showing that the person concerned is still considered a threat. They are meant to allow ‘greater freedom of communication and association’ and the High Court is to undertake a mandatory full review of each case, with a power to quash the intervention.

However, breaching TPIMs would be a criminal offence, carrying a maximum of five years’ imprisonment. The new powers will be permanent, doing away with the requirement for parliament to renew them annually (which was the case with control orders).

In ‘exceptional circumstances’ additional restrictive measures may also be imposed: the *Enhanced TPIM Bill*, published in September 2011, provides powers for the Home Secretary to impose ‘enhanced’ TPIM notices. Criticism has been that control orders have been but repackaged – if in watered down form – into TPIMs.

## Protest, dissent and police powers

### Dealing with protest

The first year of Coalition government saw a wave of demonstrations, from student fees to spending cuts to corporate tax avoidance protests. There were reports of kettling and CS spray (Taylor and Paige, 2011) being used by the police. Mass arrests were made (145 people at UK Uncut’s protest at Fortnum and Mason in March 2011).

Even before the outbreak of the riots in August 2011, Theresa May was willing to grant the police more powers (see her speech to the House of Commons, 26 June 2011), including banning ‘known hooligans’ from demonstrations. Pre-emptive measures to stop people protesting were used before the royal wedding in April 2011, with people being arrested before the event and released afterwards.

### Cutting bureaucracy and police accountability

In March 2011 the government reduced the requirements for the police on recording stop and search (under the *Police and Criminal Evidence Act 1984*). The police do not now have to record the name and address of whom they stop, the outcome of the stop nor any injury caused. The police can also decide to stop the recording of ‘stop and accounts’ altogether (Delsol, 2011). These changes would, claimed the Home Office, ‘save hundreds of thousands of hours both for frontline officers and back-room support staff’<sup>3</sup>. According to counterclaims, however, the savings in time would actually be minimal and would be at the expense of losing data that is crucial to making the police accountable and

mindful of the impact of their practices on minorities (Shiner and Delsol, 2011). Also from March 2011, police forces no longer have to *apply for authorisation* from the Home Office to drug test on arrest at specific police stations. Instead, Chief Constables will only need to *inform* the Home Office that they are using this power.<sup>4</sup>

Additionally, Coalition plans to move initial charging decisions from the CPS to the police may weaken the ability of prosecutors to act as checkers of ‘bad’ decisions (Burton, 2011).

## ‘Anti-social behaviour and ‘gangs’

The Home Office launched a consultation in February 2011 on new measures to tackle antisocial behaviour. This set out plans to repeal Anti-Social Behaviour Orders (ASBOs) and replace them with Criminal Behaviour Orders, which can be attached to criminal convictions and **Crime Prevention Injunctions (CPI)**, civil orders which if breached by an adult could lead, like ASBOs, to imprisonment (or a fine).

One of the criticisms of ASBOs as civil/criminal hybrids is that they fast track criminalisation and inhibit diversion from the criminal justice system. Although breaching a CPI would constitute contempt of court and could lead to imprisonment, it would not be a criminal offence. CPIs will be likely easier to obtain than ASBOs (Ireland, 2011).

**Gang injunctions** came into force in England and Wales in January 2011. Introduced by the last Labour government, they are civil orders that can be used by local authorities and police to restrict the freedoms of people they identify as members of ‘gangs’. As civil orders they require a lower standard of evidence: this means that identification of ‘gang members’ could be based on no more than hearsay evidence from police officers.

As for ASBOs and the new crime prevention injunctions, breaching an injunction could result in imprisonment or a fine.

It is also a long standing problem that, as the meaning and definition of ‘gangs’ is hardly clear or consistently applied, it is difficult to see how these injunctions could be applied fairly.

## Voting rights

In 2005 the ECHR had found<sup>5</sup> that the United Kingdom’s prohibition on all convicted serving prisoners from voting (another blanket policy) breached Article 3 (right to free elections). By 2010 the Joint Committee on Human Rights thought the UK failure to act ‘unacceptable’ and likely to lead to costly litigation (Ministry of Justice, 2010).

Before Christmas 2010 the government announced that it intended to allow prisoners sentenced to less than four years to vote. However, after a debate in parliament over the issue was secured by Jack Straw and David Davis MPs, Downing Street indicated that only individuals serving less than 12 months may be entitled to do so – in spite of the fact that the ECHR had already ruled elsewhere that an approach based on sentence length is illegal. At the

3 [www.homeoffice.gov.uk/police/powers/stop-and-search/](http://www.homeoffice.gov.uk/police/powers/stop-and-search/)

4 <http://nds.coi.gov.uk/content/detail.aspx?NewsAreaId=2&ReleaseId=418915&SubjectId=2>

5 In *Hirst v United Kingdom (No. 2)*, Application 74025/01, judgment of 6 October 2005; see also *Smith v Scott* [2007] CSH 9

Commons debate in February 2011 MPs voted in favour of maintaining the current blanket ban.

A case brought by two Scottish prisoners<sup>6</sup> was upheld by the ECHR in November 2010. The court said it had received 2,500 similar applications. In April 2011 the government lost its final appeal in this case and the ECHR ruled that the UK must draw up proposals to end the blanket ban on voting within six months. In September 2011 the government announced that it had requested an extension to this deadline to take account of the referral of *Scoppola v Italy* (a case similar to *Greens and MT*) to the ECHR, which was due to be heard in November 2011. The court consequently granted the UK government an extension of further six months from the date of the *Scoppola* judgment.

The difficulties, agonies and delaying tactics in dealing with prisoners' voting raise a number of issues, including:

- Is 'civic death', with the withdrawal of citizenship rights as punishment, justifiable? Isn't the loss of liberty by imprisonment the punishment?
- Should voting be seen as a duty rather than a right?
- When and if the government eventually legislates to introduce voting, will any rigid threshold (based on sentence length or otherwise) be again deemed to breach human rights?

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## Diversions? Immigrant children and mental health in prison

### Child detention

The Coalition Agreement had included a commitment to end the detention of children for immigration purposes. A review was set up in June 2010; in December the government announced that it would be 'ending the shameful practice that last year alone saw over 1000 children – 1000 innocent children – imprisoned' (Clegg, 2010). The government would be 'implementing a fundamentally new approach' to dealing with families in the immigration system and their removal from the country. This approach was to be in place (at least in part)



by March 2011. Detention would be used only as a last resort, in exceptional cases and 'for only the last 72 hours before departure' (Green, 2010), in units that 'won't be prisons (...) They'll be small and personal, for a few families' (Clegg, 2010).

In January 2011 the high court ruled that two mothers and their children had been unlawfully detained at Yarl's Wood immigration centre after dawn raids on their homes in 2010 (the family unit at Yarl's Wood immigration removal centre was eventually closed in December 2010). The UK Border Agency were found to have breached the families' rights to liberty, privacy and family life (their Article 5 and Article 8 rights under the European Convention on Human Rights). The judge said: 'no one can seriously dispute that detention is capable of causing significant and in some cases long-lasting harm to children' (EWHC, 2011).

Despite the announcement of the government's new approach, concerns remained that children were still being held in detention, albeit in short term holding centres, and in higher numbers than would be expected given the Coalition's commitments. For example, a freedom of information request by the Children's Society showed that 697 children had been detained at Heathrow and south-east ports from May

<sup>6</sup> *Greens and MT v United Kingdom*, Application nos. 60041/08 & 60054/08, judgment of 23 November 2010

to August 2011. Moreover, the strategies for dealing with detained children appear to critics to remain unduly coercive.

In March and April 2011 both the prisons inspectorate (HMCIPS, 2011a and 2011b) and the Independent Monitoring Board published investigations into the short term holding facilities for immigration detainees in Heathrow Airport. All the reports found that children continued to be detained. The IMB criticised the conditions families were being held in, often in rooms with poor ventilation, substandard washing facilities and no natural light (IMB, 2011).

In August 2011 a 'new' pre-departure accommodation centre, 'Cedars', was opened in Pease Pottage, West Sussex. Cedars houses children and families for up to a week before they are deported. It is a secure facility, with residents searched on arrival and regularly checked (Kittle, 2011). Cedars is part operated by children's charity Barnardo's. Responsible for security is G4S, the company in charge of the deportation operation that led to the death of immigration detainee Jimmy Mubenga in October 2010.

The role of Barnardo's in running these 'pre-departure accommodation' facilities has raised concerns 'that administering re-branded detention centres ultimately legitimises the detention of children, rather than challenges it' (Burnett, 2011).

The family wing of Tinsley House, an immigration removal centre near Gatwick Airport, has been refurbished as a high security detention facility to accommodate families deemed too 'disruptive' for non-custodial pre-departure accommodation in Pease Pottage (Parker, 2011). Critics have pointed out that both Pease Pottage and Tinsley House (also run by G4S) constitute 'repackaged' detention packages for children (see e.g. Crawley, 2011).

### Prisoners with mental health issues

*Breaking the Cycle*, included plans to divert people with mental health problems away from prison. Liaison and diversion services already exist at some police station and in courts that assess people with mental health problems, but this service is not consistently available across England and Wales. The intention in *Breaking the Cycle* is to achieve more coverage, in line with the 2009 Bradley Report's recommendations on improving mental health outcomes for people in the criminal justice system. Early assessment is meant to enable the police and the courts to make informed charging and sentencing decisions, as well as making treatment opportunities available.

These plans have been received by some as a meaningful effort to stop the prison revolving door of people with mental health issues and to achieve rehabilitation. However, according to research into prisoners with schizophrenia and other psychoses, such plans may be unrealistic. It is estimated that there are over 8,000 such inmates in English and Welsh prisons. The study found that only one out of ten psychotic prisoners receive treatment in prison. If transferred out of prisons, their treatment would have to be in conditions of security, which would likely overwhelm the number of places available in NHS secure units (Coid and Ullrich, 2011).

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## Accountability, transparency and the red tape challenge

### Localism

The Coalition committed to reducing centralised targets in order 'to free up the police to focus on local priorities' (Home Office, 2010c). Both the Policing Pledge and the public confidence target were ended in June 2010.

The introduction of Police and Crime Commissioners exemplify the Coalition's attempt to enhance accountability via 'localism' in the justice field. The *Police Reform and Social Responsibility Act*, which received Royal Assent in September 2011, replaces police authorities with directly elected individuals. Commissioners are supposed to improve democratic access to the police and reflect local priorities. Concerns however include that their introduction will lead to populistically dictated measures, to unevenness of provision and to the politicisation of policing.

### 'Transparency' and access to data

The Coalition made transparency a central tenet of its efficiency drive. Both the Home Office and the Ministry of Justice committed to facilitating access to data 'to help people to judge the progress of structural reforms, and help people to make informed choices'; '...it is no longer "our data" but should be viewed as "public data"' (Home Office, 2010a).

In November 2010 the Ministry of Justice launched a consultation about improving criminal justice statistics, following which it committed to introducing a quarterly bulletin and a new single measure of reoffending (Ministry of Justice, 2011).

In January 2011 a number of initiatives were announced:



- An independent review by the National Statistician was set up with the intention of helping increase public confidence and improve the coherence of crime statistics. Recommendations would be implemented from April 2012 (Home Office, 2011).
- The responsibility for the publication of crime statistics would move from the Home Office to an independent body.
- The scope of the *Freedom of Information Act* would be extended 'to open up government and other bodies to public scrutiny'. The Association of Chief Police Officers became subject to freedom of information requests from 1 November 2011, filling in a gap that had previously been widely criticised.
- Local 'crime maps' were made available online. The 'crimes' expressed on the maps are based on police recorded crimes and include traditionally understood 'street' crimes like burglaries and anti-social incidents, but not, for example, white collar or corporate crimes, so that the City appears as 'the most crime-free area of London' (Jenkins, 2011). The maps provide very little information to enable the reader to position the data in a meaningful context, or to make sense of the many variables that impact on what is being recorded.

In June 2010 the contents of the Treasury spending database, COINS, were published. In the same month the Communities and Local Government Secretary, Eric Pickles, called on councils to provide financial transparency by publishing spending information over £500 online by January 2011.

The release of central government spending data (over £25,000) by department was announced in November 2010.

Salaries of senior civil servants, government hospitality and departmental staff numbers and organisational maps have also been made available.

There have been concerns about the true accessibility, usability and usefulness of the spending data released so far; in places the format is obscure or over complex, in others it is missing or incomplete (see e.g. Rogers and Arthur, 2011).

### Bonfire of the Quangos – or not

In October 2010 the government announced its intention to scrap 192 and merge 118 non-departmental public bodies, or 'quangos', on the basis that they were inefficient, redundant and/or unaccountable. Some of the organisations were to be returned 'in-house' to government departments.

Not all from the original list of bodies to be abolished made it onto the *Public Bodies Bill* and others (like the Youth Justice Board and the Chief Coroner for England and Wales) dropped out of the list during the Bill's passage through parliament.

The Bill was criticised by the judiciary and in the House of Lords for giving power to ministers to abolish named quangos without the need for primary legislation. The relevant clause was eventually dropped.

The consultation paper *Policing in the 21<sup>st</sup> Century: Reconnecting police and the people* (published in July 2010) put forward plans to phase out the National Policing Improvement Agency (NPIA). A National Crime Agency (NCA) was also to be established, which remit would include serious and organised crime, economic crime, border policing and child protection. The functions carried out by the Serious Organised Crime Agency and the Child Exploitation and Online Protection Centre would be subsumed under this new agency.

### The 'Red Tape Challenge': or deregulation by another name?

In April 2011 the government launched a 'Red Tape Challenge', asking the public to participate in identifying the 'excessive regulation' that 'is burdening businesses, hurting our economy and damaging our society' (HM Government, 2011). Included for consideration were all areas of the law, not sparing major pieces of legislation protecting rights like the *Health and Safety at Work Act*, the *Sale of Goods Act*, the *Wildlife and Countryside Act* and the *Equality Act*.

### Police: light touch monitoring and professional leadership

*Policing in the 21<sup>st</sup> Century* advocates an enhanced role for Her Majesty's Inspectorate of Constabulary (HMIC). HMIC 'will become a stronger advocate in the public interest, independent from the Government and the police service.' HMIC's role will be to monitor police forces' and Police and Crime Commissioners' performance and value for money. 'It will do this through a light touch inspection regime .... A more robust Inspectorate will not mean a return to unnecessary and burdensome regulation' (Home Office, 2010b).

This consultation paper also envisaged that ACPO would be 'repositioned' as 'the national organisation responsible for providing the professional leadership for the police service, by taking the lead role on setting standards and sharing best practice across the range of police activities' (ibid). A government commissioned review of police leadership, published in April 2011, outlined the characteristics of a professional body for policing (Neyroud, 2011).

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# REHABILITATION REVOLUTION IN A BIG SOCIETY?

JOHN RODGER

The publication of the Green Paper *Breaking the Cycle* (Ministry of Justice, 2010) signalled, in the words of Kenneth Clarke, a 'radically different approach' to punishment and rehabilitation. What is this new radicalism in criminal justice policy? The pledge to make offenders 'work hard' both inside prison and in community settings and a renewed emphasis on restorative justice and victim reparations are not particularly new or radical, although the principles that prisoners should be committed to regular working hours and that their earnings should contribute to the compensation of victims have not been common practice in recent years. What is distinctive in the consultation paper is the proposal to use a 'payment-by-results' approach to the rehabilitation of offenders as a mechanism to inveigle commercial, voluntary and community sector organisations into becoming more involved in offender management. This aspect of the Green Paper has, of course, provided an ideal opportunity for the cynics to suggest that the prescriptions contained in it will allow the Conservatives in the Coalition government to hide their ideological interest in a smaller state, behind the principle of promoting something called 'the Big Society'.

While the private sector is now well entrenched in the criminal justice industry, *Breaking the Cycle* breaks new ground by involving voluntary and community organisations more explicitly in what amounts to the *monetisation* of the rehabilitation process: the aim is to 'make the concept of justice reinvestment real by allowing providers to invest money in the activity that will prevent offending rather than spending money dealing with the consequences' (Ministry of Justice, 2010: 38). One key initiative cited in the consultation paper is to underpin this idea through the use of 'social impact bonds'. They are described as involving monetary investment from local authorities, commercial investors, philanthropists or foundations to fund programmes of action to improve the prospects of a group of ex-offenders and reduce their re-offending. The funding is linked to improved social outcomes achieved by the group. The Ministry of Justice will repay the initial funding plus an agreed percentage return, or profit, based on the savings resulting from fewer people returning to prison or some other agreed measure of success (see Mulgan et al., 2011).

The Green Paper justifies the adoption of this 'radical' approach to rehabilitation by drawing attention to the quantitative features of a failing penal system: 50 per cent of offenders released from prison are reconvicted within 12 months; the reoffending of those released from short sentences is estimated to cost between £7-10 billion; and a relatively small core of about 16,000 active offenders, each with over 75 convictions, has served on average 14 prisons sentences of less than 12 months. The highlighting of these

statistics is simply recognition of something that has been evident to observers of the British penal system for at least four decades. The rehabilitative ideal, which historically constituted the moral legitimacy for the existence of prisons when incarceration itself became the principal form of punishment from the nineteenth century onwards, has collapsed. It has largely been abandoned by those working in the system because of what has been called the 'crisis of containment': as the prison population has risen relentlessly so the rhythms of prison life have become antithetical to the conditions necessary for thoughtful and well resourced programmes of education, training and preparation for re-integration into society. However, more significantly the rehabilitation principle has collapsed due to the ascendancy of *incapacitation* theory, which proclaims that *prison works* in an uncomplicated way by protecting society from incorrigible repeat offenders when they are incarcerated in large numbers and given long sentences. In this view, prison *cannot* rehabilitate and is primarily for the *exclusion* of the committed offender from 'respectable' society.

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*Breaking the Cycle breaks new ground in what amounts to the monetisation of the rehabilitation process*

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The Green Paper does not challenge this cherished theory of the political right. What it suggests is that a penal division of labour should be recognised between a prison system that punishes and a voluntary sector that seeks to rehabilitate. This relationship between the prison and the community had been undermined in recent years by the decline of *penal welfarism*, according to which the organisation of prisons should be consistent with the goals of the welfare state in seeking to improve the social outcomes of those deemed to have offended because of their social disadvantages (Cohen, 1985). Today the popular political view is that prisons should be organised on the principle of what amounts to 'less eligibility': the conditions within prisons should not be better than those experienced by the poorest law-abiding citizen in the community. *Breaking the Cycle* seems to hint at a movement back to a more *inclusivist* strategy by promoting a role for the community in the management of rehabilitative programmes. It is a strategy, perhaps, grounded less in principle and more in political and financial expediency.

## Reducing offending: building the Big Society or the colonisation of civil society?

The mantra issuing from the Conservative-led Coalition government is that the greater involvement of the voluntary and community sector in delivering public services has nothing to do with ideology. The voluntary sector, it is argued, already contains specialist knowledge and experience of service delivery in many fields of social support, including crime prevention and the rehabilitation of offenders and, by taking on a greater level of responsibility

independently from the state, it can contribute to the formation of a 'big society'. There are a number of confusions at the heart of this policy strategy that require clarification.

*What is actually occurring is the 'colonisation' of civil society and the third sector by the state. Whatever is understood by the project labelled 'the big society', the payment-by-results approach to the rehabilitation of offenders is antithetical to it.*

William Robson (1976) made an observation in the 1970s about the welfare state that is relevant to the current debate about 'the big society' and its relationship to the state. He drew attention to an important distinction between a *welfare state* and a *welfare society*. The former, Robson had observed, is 'what Parliament has decreed and the Government does' and the latter is 'what people do, feel and think about matters which bear on the general welfare' (Robson, 1976). He also commented that failure to understand the difference in policy terms can lead to 'a yawning gulf between public policy and social attitudes'. While talk in government is of re-awakening a slumbering civil society, it is clear, in the case of the rehabilitation of offenders, that voluntary and community engagement in this project will not be allowed to emerge organically from below but must be encouraged by the inducements of money, as if the complexity of persuading repeat offenders to take a different life pathway is simply a resource issue. By advocating a payment-by-results policy, *Breaking the Cycle* actually blurs the boundaries between state and civil society that Robson (1976) alluded to. Rather than creating the conditions for the 'big society' to thrive, and creating the possibility for genuinely autonomous community organisations to get engaged in prison after-care and rehabilitation, it is at best a strategy for the government to *work through* the voluntary sector.

Ironically, payment-by-results may actually lead to the displacement of voluntary action by large private security corporations, through promoting the formation of consortia of providers and sub-contracting in what looks like the industrialisation of rehabilitation (Ministry of Justice, 2010). What is actually occurring is the 'colonisation' of civil society and the third sector by the state. This can be understood as the penetration of money, power and administrative rationality into social action settings that are primarily motivated by empathy, altruism and caring. Whatever is understood by the project labelled 'the big society', the payment-by-results approach to the rehabilitation of offenders is antithetical to it. It is driven by the state in a top-down way and will succeed in re-affirming what one of its strongest advocates, Conservative MP Jesse Norman (2010), calls an 'enterprise society' at the expense of a 'big

civil society'. According to Norman, the big society is about releasing the energy and activism of citizens to create the conditions for communities to re-assert themselves as sources of control and social regulation. Interestingly, it is also about rejecting a view dominant in politics and public policy that we relate to each other as 'economic automata', motivated by a desire to maximise our market utility. How will the *monetisation* of rehabilitation play with cynical offenders?

Measuring successful rehabilitation may be a problem. While removing the employment and housing barriers to the reintegration of offenders into society is easily gauged, changing the cognitive and motivational issues behind deviant behaviour requires more patient and skilled management. The most common interventionist model currently employed by third sector organisations dealing with young people, gangs and prison aftercare is intensive relationship-based support, often involving a dedicated caseworker being attached to a client 24/7. This type of intervention can be particularly productive in dealing with the ancillary problems associated with the most criminalised people, such as drug addiction, mental health and anti-social behaviour. However, it is a very labour-intensive mode of intervention and may not be able to operate on the economies of scale required to make the process of supported rehabilitation a profitable enterprise for those investing in *social impact bonds*.

The initiatives discussed in the Green Paper may prove to be effective in reducing reoffending but they appear to be more about the colonisation of the third sector than building the 'big society' - which may be the real objective anyway.

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# 'REVOLUTION': MARKETISATION, THE PENAL SYSTEM AND THE VOLUNTARY SECTOR

DENNIS GOUGH

One of the key features of any discussion of contemporary punishment or crime control is the extent to which such practices should intrinsically be part of the state's function. The field of criminal justice has increasingly become populated with non-state players (Garland, 2001). The Coalition government's Green Paper, *Breaking the Cycle: effective punishment, rehabilitation and sentencing of offenders*, represents a further attempt to co-opt business and charities into delivering governmental agendas. The voluntary sector has a long history of working in cooperation with statutory probation services and within prisons (Gough, 2010). However, *Breaking the Cycle* proposals reconfigure the voluntary sector's function, opening up the possibility of charities competing with others to undertake what has traditionally been seen as the preserve of statutory agencies.

## A mixed economy of correctional providers

*Breaking the Cycle* echoes the localism and decentralising tendencies at the heart of government policies. A core part of the Coalition's approach to penal policy is the drive to create a marketplace for new providers of community and custodial punishments, aligned to the intention to decentralise and free up these new actors to innovate and increase effectiveness. The Green Paper talks of greater discretion for professionals and criticises previous managerialist and target-driven practice. Whilst New Labour's approach was top-down and prescriptive, focused on processes and *inputs*, the Coalition wants to distinguish itself as prioritising demonstrable *outcomes*.

The position and role of government is as yet unclear in these proposals: the Coalition has said very little regarding any systems of accountability other than a reliance on the self-regulation of the market, where inefficiencies and ineffectiveness are to be driven out by the awarding of contracts and 'payment by results'. This hollowed out state function in corrections may be conceptualised as merely a 'market creator' rather than a service deliverer - or a regulator: the state makes the rules for competition and allocates resources to the winners. However, a light regulatory touch does not take into account the politicised nature of punishing offenders and the state's interest in citizens both feeling and seeing that justice is done and punishment is delivered.

The Coalition government's plans to involve the private and third sectors in the provision of corrections are not new. The creation of a mixed penal economy has been a key part of

the reform of public services for a significant period of time. Harnessing the private and voluntary sectors in competitive ways and innovating service delivery have been government objectives at least since the Carter Review of 2003: many of New Labour's ambitions resonate with and are strikingly similar to the Coalition's 'revolution'. However, the Coalition proposals to reform the penal sector are mainly to do with the way in which the mixed economy of corrections will be *funded*: as such we are witnessing a 'funding revolution' rather than a 'rehabilitation revolution'. Orthodox penal policies still dominate, such as ever tougher community penalties as alternatives to prison, without any commitment to dramatically reduce the prison population or without considering effective early release schemes (which would increase the chances of successful rehabilitation). This is despite Justice Secretary Kenneth Clarke's claims that prison has largely failed to reduce reoffending.

*This hollowed out state function in corrections may be conceptualised as merely a 'market creator' rather than a service deliverer - or a regulator*

## New opportunities for the penal voluntary sector?

The marketisation of corrections is likely to have an enormous impact on the voluntary sector. Those charities which allow themselves to be reconfigured and embrace the melding of voluntarism and business ethics in new hybrid philanthro-capitalist structures are likely to be best placed to survive.

The response of the third sector to their increasing presence in the punishment and rehabilitation of offenders has varied. Important ethical debates can be heard within the sector as to whether charities should be involved at all in this highly punitive and politicised area of social policy (Silvestri, 2009). On the other hand, consecutive governments and a number of charities have attempted to view the mainstreaming of the voluntary sector and the introduction of competition as merely a natural evolutionary journey (Whitten, 2010). For example, the Serco and Catch 22 consortium, which successfully bid to run a prison, encourage us not to 'get hooked up on the fact that the doors are locked', as successful work to improve prisoners health, education and life opportunities can be undertaken, they argue, by reforming a chronically dysfunctional system from the inside (Cook, 2009). The third sector response to Coalition plans highlight the view that improvements can be made with innovation, risk taking and offender-centred interventions (Clinks, 2011).

Moving the third sector from the margins to the mainstream of the penal sector may offer greater opportunities to reintegrate offenders into communities. Charities are deemed to be more attentive and knowledgeable of local specificities and the sector has a long standing tradition of

employing members of the wider community (as volunteers or otherwise) rather than just criminal justice professionals (Aldridge and Bubb, 2008). There is some evidence to support the notion that charities can be responsive and effective in delivering interventions or adding value to the penal sector. For example, an independent evaluation of St Giles Trust 'Through the Gate' programme stated that it had a staggering cost benefit ratio of £1:10 and that those involved were 40 per cent less likely to reoffend than the national average (Pro Bono Economics, 2009). There was also a general if cautious welcoming of 'payment by results' across the sector (Clinks, 2011).

### Threats in the marketisation of corrections

Within the Coalition's proposals to mainstream the voluntary sector are significant threats to its independence and campaigning functions. Voluntary organisations can find themselves under pressure to change their organisational forms, their distinctive ethos and even goals in response to their involvement in public service delivery (Carmel and Harlock, 2008; Mills, 2009).

Claims of a 'hands off' approach from Whitehall give the impression that interventions for offenders will be based on evidence and not ideology. However, in the first year of the Coalition most attention has been placed on the politics of punishment, with major disputes within the government over sentencing reform and a perceived lack of toughness as Clarke attempted to take the heat out of sentencing. In addition, the angst over the European Court's demands that prisoners in England and Wales receive the vote highlights the political limits to reintegration and citizenship rights for offenders. The rehabilitation revolution is unlikely to be politically or ethically neutral as implied in the Green Paper. Those voluntary sector organisations entering the marketplace in modernised corrections should note that any sentences need to have the required 'penal bite' to secure political and public support and that being co-opted by government could impact dramatically upon their original mission and approach to service users.

The Coalition's proposals and particularly the 'payment by results' model mean that there is a risk that smaller, local charitable organisations will be unable to participate due to their lack of financial resources, scale and commissioning expertise. A key success criterion for the localism credentials of the proposals will be whether small scale charities have or can acquire the capital to test innovation and deliver interventions of the required scale in order to benefit from the payment by results pilots. Smaller charities may have significantly better relationships with local communities and have uniqueness to their service delivery, but will be unlikely to be able to wait to be paid for their work until data regarding reconviction is available.

Smaller charities will have to consider other ways of funding their work than the traditional grant provision or existing commissioning arrangements (Clinks, 2011). This may mean that such organisations can only move from the margins and take part in the 'rehabilitation revolution' through subcontracting with larger third sector organisations or with private security companies. On their own even large scale

national charities may find that the government's intention to transfer out some or in some cases all the risks, a gamble too far (Collins, 2011).

However, subcontracting models are likely to pose risks to the autonomy of voluntary sector organisations and their ability to deliver quality services. The idea that the voluntary sector could become a 'prisoner' rather than 'a partner' (Silvestri, 2009) to the large private sector security companies in corrections is a real one. Experience from the Department for Work and Pensions (DWP) Pathways to Work programme also shows remunerations problems, with voluntary sector deliverers being paid in some cases a quarter less per job than prime contractors. The DWP's own research found that 'service innovation on the part of prime providers was largely focused on reducing operational costs and achieving performance efficiencies' (Hudson et al., 2010).

### Conclusion

There is much to admire and preserve in the third sector's ability to deliver interventions to disenfranchised and vulnerable individuals in society from outside the criminal justice system. By presenting their services as client-led, non-compulsory, non-punitive and engaging, traditional interventions from voluntary organisations have a better chance of reaching marginalised groups than the coercive and punitive state. The third sector remains largely wedded to a welfarist and humanistic approach outside the criminal justice system. The key challenge and concern is whether these values can remain central when charities operate as full members of the state's network of punishment.

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# THE PAYMENT-BY-RESULTS ROAD TO MARKETISATION

DEXTER WHITFIELD

The Coalition government plans to accelerate the growth of a 'social investment market'. This strategy is part of a policy framework to mainstream commissioning and outsourcing in order to open up the provision of public services to new providers, reduce the 'bureaucratic burden' on small civil society organisations and increase social enterprises. The government believes in creating 'a new "asset class" of social investment to connect social ventures with mainstream capital' (Cabinet Office, 2011a).

A social investment market is supposed to enable social projects to obtain private investment, with a financial return via bonds or equity investments. The government has been dedicating resources to promote a new range of 'investment products', develop a secondary market for the sale and purchase of shares in social initiatives and increase share ownership in local businesses like pubs and post offices.

'Payment by results' has become the new performance management mantra. It is intended to incentivise contractors, with payment conditional on the completion of agreed outputs or outcomes. There are currently two such payment and reward models: the social impact bond mechanism and phased incentive payments. In the social impact bond model the final payment for outcomes may not be made until a few years after completion of the project. The phased incentive model is basically a standard outsourcing contract, with an incentivised payment mechanism.

## Social impact bonds

Social impact bonds are said to constitute a paradigm shift, meant to 'catalyse positive cycles of government spending, improving social outcomes and reducing costs' (Social Finance, 2009).

According to this model a 'social investment fund' raises the finance for a project and selects a contractor to deliver it. The contractor is paid in the normal way, but the investors funding the project are only paid if the project is successful. The government uses a proportion of the savings that result from any improved social outcomes to repay the investors.

The first UK social impact bond project is being carried out in Peterborough. The project provides intensive support both inside prison and after release to 3,000 male prisoners who have served a sentence of less than 12 months. Payment to investors is contingent on the contractor reducing reoffending by 7.5 per cent compared to the recidivism rate in a selected group of similar prisons. The greater the reduction in reoffending rates, the higher the return to investors, up to a maximum 13 per cent return. The return to investors is to be financed by the expected reductions in the cost of police work, court, community sentences and prison.

Four new social impact bond pilots have also been launched in Birmingham, Leicestershire, Westminster and Hammersmith and Fulham, which are meant to raise up to £40m '...to help families blighted by anti-social behaviour, crime, addiction and poor education' (Cabinet Office, 2011b).

Social impact bond projects require sufficiently high net benefits to allow investors to earn their required rate of return. Thus outcomes must be measurable, the user population must be well defined, and impact assessments must be credible (Center for American Progress, 2011). Unsuccessful performance must not result in early closure if it becomes evident to investors that performance targets will not be met and they will not be paid. If the project performs poorly or fails, the support and sympathy should be directed to the children, unemployed people and prisoners who have received a poor service, rather than to wealthy investors.

## Incentive payments contracts

The Work Programme, the Coalition's five-year welfare-to-work project, is an example of an incentive payments contract. Contractors receive a small start fee for each new participant, plus a 'job outcome payment' after a participant has been in a job for three or six months. Contractors can also claim 'sustainment payments' every four weeks when a participant stays in work for up to one year, 18 months or two years, depending on how long they have been unemployed.

The NHS payment by results system also works according to the incentive payment model. It is a national price tariff and does not take account of the quality of treatment: hospitals are paid only for the number of operations and procedures performed. The system is designed to make money follow patients and to spur competition between hospitals, forcing them to operate like businesses.

Payment by results in the NHS was designed to improve efficiency and value for money, facilitate choice and plurality of providers. It is not a results based system: if hospitals perform an operation at less than the national tariff they retain the difference, but if their costs are higher than the tariff the hospital will be forced to cut costs, do more operations to generate additional income, or terminate the service.

The emphasis of incentive payments contracts therefore shifts the focus away from the actual needs of service users.

## A high risk strategy

Payment by results is intended to incentivise contractors, with payment conditional on the completion of agreed outputs or outcomes. However, increasing the transfer of risk to contractors is not without additional risk. PbR projects have the same or similar risks (procurement, financial, operational, contract management and employment risks) as other outsourcing models, plus specific new ones related to their particular funding, payment mechanism and contract structure (see below).

**Savings and scaling up risks** – Savings may be dependent on economies of scale; for example, significant outcomes (in terms of reductions in prison places, court time and staff resources) may only be achievable with large scale

projects and interventions. However, it may not be possible to replicate the success/returns of small pilot projects on a wider/larger scale. Some projects may have particular scale/locality characteristics which mean that they cannot easily be copied and mainstreamed. Moreover, pressures to generate new funding streams as a result of the financial crisis could lead to a lack of rigorous evaluation of pilot projects and a rush to implementation. This could lead to long term problems that might discredit projects.

**Assessment risk** – Independent impact assessments will be required to minimise lengthy and costly disputes between contractors, clients, investors and government. However, setting up a fair and robust methodology able to ascertain the cause and effect of outcomes is a complex and potentially contentious process. It is difficult to extricate outcomes from the web of interacting factors which can influence them, e.g. to disentangle the impact of socioeconomic conditions, social policies such as health and education and individuals' specific conditions.

**Investment risk** – if returns to investors are low, this is likely to lead to pressure on the contractor. A widening range of investors into social impact bonds would also likely heighten the range of expectations and the pressure to increase returns, but such pressure could ultimately damage the model.

**Market gaming** – contractors may resort to 'gaming' techniques that exploit loopholes in payment systems, ineffective monitoring and inspection and contract variations. They may use 'cream-skimming' or 'cherry picking' to select high value or low cost service users (for example, capable/responsive prisoners who require predictable resources and support and are least likely to reoffend) and 'park' the harder to help clients.

**Complexity risk** – the contract structure is more complex than standard outsourcing arrangements as it involves investors, a social finance organisation or client, contractor, consultant assessors and the state (resembling the design, build, finance, and operational model of Private Finance Initiative projects). Complexity can lead to disputes and a loss of transparency.

**Unforeseen and other operational risks** – it is almost inevitable that new issues and problems will emerge with innovative social projects, which cannot be forecast at the procurement stage and which mean that contractors may not be able to achieve the performance levels required by the contract within budget and on time.

### Social benefits?

Payment by results models promise to bring about the social benefits of reduced reoffending and early intervention to support children and families: these are important outcomes, but as yet unproven. Service users appear to be absent from the debate: particularly lacking is their engagement in the design, operation and assessment of projects.

Such absence is important also in the context of the public investment required for these models. Because social investment and impact bond projects are initially financed by private investment, this gives the impression that they

are privately funded. However, they are the same as Private Finance Initiative projects and are entirely publicly financed – the government repays investors for the cost of the project, plus a return depending on the quality of the outcomes. There is also the potential for relatively high commissioning and transaction costs for procurement, contract management and monitoring and assessment consultants.

In some quarters, social investment and impact bonds are claimed to be a '...new alternative for channelling large-scale private capital for social benefit' (J P Morgan, 2010) – in effect creating new 'social markets'. A number of Wall Street investment banks and large foundations such as Ford and Rockefeller are developing these models.

The creation of a social market, however, will inevitably produce gaming, distortions and failures with major implications for fulfilling equalities duties. The contracting or market system is not designed to address those with the greatest need, but to obtain the maximum outcome at the lowest cost. Those most in need in training and work programmes often end up being 'churned' – either repeating or moving from one programme to another. In seeking to reduce the overall reoffending rate, prisoners with a combination of housing, education, skills and/or mental health needs are unlikely to be prioritised. There are also concerns about the quality of employment in new social enterprises when staff transfer regulations have been weakened.

Social markets are, in effect, a new form of financialisation, a means of transferring risk and responsibility to individuals and of reducing the scope of the welfare state. Privatisation has mutated into many new forms, designed to widen and deepen the role of the private sector in the design and delivery of public services. New charges and fees are introduced for services; personal budgets replace public sector provision of health and social care; private pensions and private finance of public buildings get prioritised.

In order to understand social markets we need to situate them in their wider context: one of continued financialisation, personalisation, marketisation and privatisation of public services and of the welfare state (Whitfield, 2011). Behind the rhetoric of commissioning, localism, big society and empowerment, public provision continues to get increasingly fragmented and commercialised.

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# PRISON WORK

EOIN MCLENNAN-MURRAY

Notionally, it sounds like an attractive idea to have prisoners working harder and for longer. It is a populist proposition that ministers can sell easily to both the right wing of their parties and of the media. However, is it possible to do it on any scale and will it contribute to lower reoffending? The government clearly signalled in their Green Paper, *Breaking the Cycle*, that this is their intention.

Before discussing the Green Paper approach it is worth saying a few words about existing arrangements, since this will give some idea of the scale of change that is needed to move from where prisons are now to where the government would like them to be.

Within the prison estate there are about 400 workshops, employing 9,000 prisoners and with an annual turnover of £36 million. Our better workshops operate a 33-hour week and there are some that do even more.

The government would like to boost the annual turnover to nearer £60 million over the next four years, using a mix of ideas intended to lead to more prisoners being employed. The political rhetoric has trumpeted a 40-hour working week, but ministers realise this is pie in the sky and will settle for a more achievable figure of around the 33/35 hour mark. The government have also made it very clear that there will be no injection of public money to bring about this transformation.

Currently those prisoners who do work in prison workshops are employed for about 22 hours a week. This is an average figure: in local prisons the working week may be less than this, while in the open estate it can be considerably longer. Ironically, it was only three years ago that governors were instructed to introduce a core day that reduced the working week from five to four and a half days. This was a cost reduction measure so that budgetary savings could be made. The core day instruction has since been rescinded but the savings associated with the reduction to 4.5 days are not available to governors to reinvest.

One imagines that the government will want to see both the efficiency and utilisation of the expensive capital equipment in prison workshops boosted. For example, some prisons have very modern industrial laundry equipment, which could be used for many more hours each week. A similar approach could be taken with the state of the art printing equipment that some prisons have. Governors will be encouraged to adapt their staff attendance systems so that more regime hours are available to extend the length of the working week.

The government's ambitions are not just restricted to increasing the working week. They would like to see prisoners up-skilled so that they are more employable on release. There can be no doubt that this, if achieved, would result in lower reconviction rates.

## Tackling reoffending? Short term prisoners

If one of the government's aims is to reduce reconviction rates by having more prisoners in work, it would seem logical to focus on that section of the prison population that has the highest likelihood of reoffending post release. This section of the population is the short sentenced prisoners, who in volume terms are responsible for much of the crime that gets apprehended.

Prison governors have argued for a long time that short sentences are ineffective in reducing future reoffending and alternative disposals in the community are a better option to achieve this. However, there will always be some people who are sent to prison for a short time and effort should be made on equipping them with the softer skills that underpin the skill set required for future employment. For short term prisoners this should be our priority, rather than herding them into low skilled work that does little to tackle the criminogenic deficits underpinning their antisocial attitudes and behaviour.

Short term prisoners tend to be accommodated in local prisons where overcrowding is endemic, where regime hours are at their lowest and where there are too few workshops to accommodate the available number of prisoners. Some of these issues could be overcome by prioritising resources and regime arrangements just for short term prisoners. However, prioritising short term prisoners may mean fewer resources for the remand population, who would then have less opportunity for involvement in the regime and spend longer in their cells. This could impact on the stability of the prison and at the very least would require careful and sensitive management.

Assuming some governors followed this path, what would be achieved? Short term prisoners would become gainfully





occupied in some work activity for 30 plus hours a week. The type of work on offer would, however, need to be suitable for a workforce that is subject to a rapid turnover, has low educational attainment, poor social skills and very limited previous work experience. Would prisons be able to offer work experience capable of transforming such prisoners into being able to successfully compete for a job on release?

### A tailor-suited approach

The government should move away from general statements about making prisons places of hard work and discipline. There is certainly scope within the prison estate to extend the length of the working week and provide skills that are transferable to employment post release. The government's strategy should be one of segmenting the prison population into different groups and providing for each what is required to facilitate employability.

It has to be recognised that different things need to be done with different groups of prisoners. General statements about making prisons places of hard work and discipline are misjudged because this is not practical or achievable in all prisons and for all prisoners.

What is practical and achievable, although extremely challenging, is to make *some* prisons places of hard work and discipline: these are the prisons that accommodate longer sentenced prisoners. Although they are not as responsible for volume crime and high reconviction rates when compared to short term prisoners, doing so would nevertheless make a valuable contribution to their future reintegration.

The foundations for such an approach are already in place (e.g. HMP Featherstone have a 35 hour prisoner working week; selected workshops in HMPs Manchester, Ranby and

Maidstone work in excess of 30 hours a week), but there has to be a recognition that transforming poorly educated and skilled prisoners into a self disciplined workforce takes time. Empirically, there is good evidence to show that reconviction outcomes for prisoners serving sentences greater than 12 months have improved significantly. The government's own statistics show that between 2000 and 2009 there was an overall reduction of 10.7 per cent in adult reoffending by former prisoners, with improvements of 25.6 per cent in reoffending outcomes for those serving four years and over, 23 per cent for those serving between two and under four years and 12.4 per cent for those serving between 12 months and under two years. Even short sentences have shown an improvement in offending rates of 6.5 per cent (Ministry of Justice, 2011).

Longer sentenced prisoners should be moved to prisons that have the well equipped workshops where training to up-skill them can commence. It is within this environment that the government should prioritise the length of the working week and seek to expand, with the help and, more importantly, the investment of the commercial sector.

### Conclusion

There is absolutely no opposition from prison governors to the idea of making prisons places of hard work and discipline. We would urge the government not to attempt implementing 'a one size fits all' solution but to recognise that different sections of the prison population have very different needs. Additionally, there are some prisons that could adapt their regimes so that a longer working week was achievable, but it must be recognised that other prisons, such as some locals, are not best placed to follow this route, since they neither have the necessary workshop infrastructure nor a suitable prisoner population. Such prisons would be better engaged in using their limited resource to prepare longer term prisoners for future employment within the prison system as well as tackling the softer employment skills deficits of those that are shortly to be released into the community.

Finally, with a prison population which as at January 2012 had exceeded 88,000 people in England and Wales and an existing workshop workforce of 9,000, there is certainly scope to engage more prisoners in work. The involvement of the commercial sector will be vital as this will be the only mechanism for funding the transformation required. The government envisage that creating new or extending existing workshops will be met by private investment, as will the costs involved in extending the working week for prisoners. The private sector will want to achieve a profit on any investment they make and it will be interesting to see what appetite they have to take on the heavy financial overheads involved.

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# COALITION DRUG POLICY: TINKERING AROUND RATHER THAN BREAKING THE CYCLE

ERIC CARLIN

Over several years there has been an increasing political tendency to blame many of our social problems on a (variously described) 'moral underclass', who somehow have chosen to opt out of 'mainstream' society. The English riots in August 2011 not only highlighted deep social divisions, they also threw into sharp relief the lack of a coherent vision for the necessary radical changes that we need to reduce inequality and exclusion. Instead, complex problems were described as 'plain and simple' by Prime Minister David Cameron, while the Justice Secretary Kenneth Clarke mused about the problems of a 'feral underclass'.

## A myopic drug policy

In many ways, drug policy exemplifies this lack of vision, essentially continuing to regard drug use as a moral failing and drug users as 'deviant'. Despite 'sounds off' by some Liberal Democrats, the fundamental review of the approach to drugs that many of us believe to be necessary seems as far away as ever. And there is no consistency about how to influence the long-term conditions whereby, for example, heroin use thrives as a 'poverty drug' on marginal estates. *Breaking the Cycle* (Ministry of Justice, 2010) and the 2010 Drug Strategy (Home Office, 2010) abound with commitments to 'effectiveness', yet proposals are set out that are based more on ideological positions than on evidence. For example, the Drug Strategy makes it clear that there will be no consideration of rethinking how our drug laws operate, despite the lack of research evidence from the UK, or anywhere else, that fear of arrest and sanctions is a major factor in an individual's decision of whether to use drugs.

For users, drugs can seem to offer solutions to other problems. Drug markets develop in a context of social disadvantage because involvement in the 'irregular economy' can provide a possibility of income for poor people. Drug dependency can take root where people lack social or family support, are cut off from community life, feel powerless and excluded. Many aspects of UK drug policy have served mainly to stigmatise individuals, groups and sometimes entire communities, restricting their ability to engage in social and economic activity. For example, programmes that identify and punish young people caught using or possessing drugs often result in their exclusion from education or employment, increasing the risk that their problems will worsen. Law enforcement activities that push dependent drug users underground make it harder for health and social programmes to reach them, also removing drug users from 'positive' social influences and increasing their exposure to health risks and criminal groups. An alternative framework to understand and respond to problem drug users is needed.

## Breaking the Cycle?

*Breaking the Cycle* acknowledges the multiple problems that prisoners tend to have. These include drug and alcohol issues, homelessness, mental illness, poor education and long term unemployment. The document also draws attention to the fact that the problems of women caught up in the criminal justice system can be exacerbated by experiences of domestic violence and sexual abuse. In the introduction Kenneth Clarke asserts that the government is introducing reforms that are 'both radical and realistic'. He argues that 'an intelligent sentencing framework, coupled with more effective rehabilitation', might 'enable us to break the cycle of crime and prison which creates new victims every day'. It is maintained that reoffending will be reduced by increasing the severity of community sentences, reducing the numbers of short stays in prison and making prisons 'places of hard work and industry, rather than enforced idleness'. In common with other Coalition policy areas, there is also a strong emphasis on local solutions, reduction of bureaucracy and the encouragement of market activity and competition to raise standards and improve efficiency.

*The government's harsh economic policies are likely to increase the marginalisation of certain groups of people, including ex-offenders and drug users*

So what will result from this? Given the complexity and interconnectedness of individual behaviours and social and cultural interactions, the outcomes of interventions in a policy area such as drugs are very difficult to predict. The interventions proposed in *Breaking the Cycle* and the UK Drugs Strategy are characteristically of the managerialist kind (Sayer, 1992), tinkering with the operational arrangements of, for example, how prisons function. This is done without seriously addressing root causes of 'criminal' behaviour and reassessing why we judge some behaviours such as drug use to be more serious than others, such as corruption at high levels in society. And in fact it may be the case that, contrary to the government's intentions, the nature of the prison regime and the increased emphasis on tough punishment and hard work for prisoners may actually undermine opportunities for individuals to recover from drug and alcohol problems.

In common with previous New Labour governments, the Coalition government has a tendency to issue platitudes with which no one could disagree. Who could argue with the assertion that 'we must tackle the drug dependency, mental illness and poor education which fuel criminal behaviour' or that they will reduce the 'misery caused by drug addiction and the accompanying low level crime. There should be fewer crimes, and therefore fewer victims'? However, the reality is that the government's harsh economic policies are likely to increase the marginalisation of certain

groups of people, including ex-offenders and drug users. An ideological emphasis on competition has not proved elsewhere to lessen social inequalities; the gap between rich and poor continues to grow and social mobility is almost non-existent.



*Breaking the Cycle* talks about increasing security measures in prisons to prevent drug and alcohol supply. As with so much else, this sounds very sensible. But haven't previous governments tried to do that? The prison population has doubled since 1993. Budget cuts and imminent redundancies are placing ever more pressure on staff. There is a lack of detail about how the Coalition will succeed where previous governments failed. The agenda of localism is another area which appeals, in its implication that power will be passed back to communities to find local solutions to local problems. However, this ignores the fact that globalisation and growing social inequality have played a large factor in leading to drug problems becoming embedded in poor communities. Macro-level responses are required as well as supporting work at local level and with individuals. Localism can also increase inequities between different areas and undermine the setting and maintenance of consistent standards in service provision.

### **Diversion, treatment and recovery**

Despite the need for a more radical, long term and strategic vision some policy moves are welcome. For example, the stated intention to divert more of the less serious offenders with mental illness and drug dependency into treatment rather than prison is a worthy aspiration, though not a novel one. It is clear that incarceration in prison often worsens the already problematic lives of drug users and drug dependent individuals, particularly the youngest and most vulnerable, facilitating affiliation with people habitually caught up in the criminal justice system, increasing stigma, worsening health conditions and reducing social skills (Costa, 2010).

Whether in prisons or in the community, activities to support recovery should not be limited to achieving abstinence. It is also vital that recovery is not reduced to an anti-methadone agenda. For many drug users methadone substitution

treatment makes an effective contribution to their recovery. Drug services in prison settings, equivalent to those in the community, need to be person-focussed, accessible, comprehensive and effective. The new pilot 'drugs recovery wings' should be cautiously welcomed if they are designed so as to facilitate this. However, it is possible that instead they will focus narrowly on trying to help people achieve abstinence. With the Department of Health taking over new responsibilities for drug services in prisons from the Ministry of Justice (a welcome move), it is also clear that there will be a need for a substantial training programme for health commissioners who are unfamiliar with the prisons context.

We know that relapse is more likely where prisoners are released but are unable to secure positions in normal community life and to establish everyday routines. However, prison services have never consistently built effective relationships with community providers of services to ensure effective discharge and support for prisoners after their release. This issue is mentioned in *Breaking the Cycle* but the detail about how this government might succeed where others have failed is scant.

The introduction of the concept of Payment by Results into drug services in and out of prison settings is also problematic, as different people's drug problems and recovery journeys vary markedly. Treatment services can support recovery, but treatment does not in itself produce recovery. People themselves achieve recovery. Payment by Results could also, worryingly, make it more likely that people with the most complex and long term problems will lose out, as treatment service providers 'cherry pick' clients for whom they are most likely to be able to argue they have achieved successful outcomes.

### **Conclusion**

The Coalition government's drug policies include some areas of improvement and some areas to be concerned about. However, there is a continued failure to undertake the open and comprehensive review of drug policy that is needed. Tough, decisive rhetoric is used to justify interventions that really only tinker round the edge of achieving any long term solutions to social problems, such as problematic drug use, which are embedded in structural social inequalities. Instead of 'breaking the cycle', policy making based on ideology rather than effectiveness continues.

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# RETURN OF THE NASTY PARTY

ROBERT REINER

## The cross-dressing politics of law and order: a contemporary history sketch

At the 2002 Tory Annual Conference, the current Home Secretary Theresa May sprang into the political limelight by warning them not to be seen as the 'nasty party'. In a recent interview she has claimed they have succeeded in this Herculean task (Hennessey, 2011). When David Cameron became Conservative leader at the end of 2005 he embarked on a series of much publicised stunts signalling the ambition of dextotifying the Tory brand. Embracing the mantle of compassionate conservatism, Cameron sought to become 'heir to Blair' by identifying with green and liberal issues, suggesting an image of cool modernity. This was of course modelled on Tony Blair's moments during the mid-1990s when, as the Labour leader in opposition, he had succeeded in converting the party from true to New Labour. None of Cameron's PR stunts matched Blair's attack on the fundamental tenets of his party, symbolised above all by the anti-socialist revision of Clause 4. Nonetheless they were greeted by the media as substantial reformulations of the Conservative Party's positions, welcomed or castigated according to taste.

In the law and order field this meant a staggering venture into political cross-dressing compared to the previous positions of the parties. During the 1970s and 1980s the Conservatives under Margaret Thatcher had captured (indeed largely created) the issue of law and order as their territory, whilst portraying the Labour Party as 'soft and flabby' on crime, gaining a substantial electoral dividend. They were aided in this by a variety of what have been called electoral 'hostages to fortune' in Labour's traditional policies in the area (Downes and Morgan, 2007: 217-9). These included commitments to civil liberties, democratic police accountability, and an analysis of crime and disorder as ultimately rooted in complex social causes. Although the Thatcher governments' policies in practice (with the exception of the undoubted militarisation of public order strategy) were something of a 'phoney war' on crime compared to the leader's blood-curdling rhetoric (Reiner, 2007: 129-131), they succeeded in monopolising the issue.

This prompted Labour's aping of the Tories when Tony Blair became Shadow Home Secretary and then party leader in the early 1990s, indicated dramatically by the famous slogan 'tough on crime, tough on the causes of crime'. Despite the fight-back from Conservative Home Secretary Michael Howard to recapture the toughest party in town mantle, for several years Labour succeeded in at least neutralising the issue by promoting its toughness in both rhetoric and practice.

When Cameron became Conservative leader, part of his attempt to end the 'nasty party' image was a series of gestures paradoxically echoing the Labour Party's 1980s

'hostages to fortune' in the law and order stakes. This *volte face* had already been presaged under the leadership of Michael Howard, erstwhile tough Home Secretary, when, on civil libertarian grounds, the Conservatives opposed Labour's attempt in November 2005 to give the police the power to hold terror suspects for 90 days. It continued with a new Tory commitment to the principle of democratic local police accountability (which they had castigated as politicisation of policing in the 1980s when, in another form, it had been Labour policy). It also embraced a social analysis of crime, most controversially in Cameron's so-called 'hug-a-hoodie' speech in July 2006, suggesting that without an understanding of crime's 'root causes' criminal justice policies were just sticking plaster. At the same time Cameron continued to affirm the need for tough police crime fighting, a bid to touch all bases that echoed Blair's famous soundbite. Has this 'compassionate conservatism' survived the transition from opposition to government?

## The Coalition's brief blissful morning

After many years of dismay at New Labour's escalating toughness on crime (but not its causes) - displayed for example in the rocketing prison population as sentencing powers and new offences proliferated, and the remorseless growth of police powers whilst safeguards were whittled away - many liberal and even radical criminologists welcomed the Coalition's early moves on criminal justice. In particular there was a warm reception for a landmark speech by Justice Secretary Kenneth Clarke on 30 June 2010 at the Centre for Crime and Justice Studies, trumpeting the promised 'rehabilitation revolution'. This harked back to the philosophy, articulated by the White Paper preceding the 1991 *Criminal Justice Act*, that prison was an expensive way of making bad people worse (paradoxically Clarke had initiated the retreat from the Act when he had been Home Secretary in 1992-1993). For the first time in nearly 20 years, there was government questioning of Michael Howard's mantra that prison works. This apparent conversion was very welcome, even if it was patently prompted in large part by economic considerations.

Initially the Coalition government appeared as if it might reverse the trend towards remorseless expansion of police powers. Home Secretary Theresa May announced in July 2010 that section 44 of the *Terrorism Act 2000*, empowering officers to stop and search anyone in a designated area without having to show reasonable suspicion, was suspended. However the ensuing *Terrorism Act 2000 (Remedial) Order* of March 2011 merely tightens the procedure and criteria for declaring a designated area, but retains the power to stop/search in the absence of reasonable suspicion. Furthermore, the recording requirements under Code 1 of the *Police and Criminal Evidence Act 1994* were reduced (partly because mobile technology supposedly supplanted them by automatic recording of location, time and date). The requirement to record 'stop and account' actions (not based on any legal power, but common practice legitimised paradoxically by the MacPherson Report recommendation that as it occurred anyway it must be recorded) was abolished as part of a bonfire of 'unnecessary' paperwork.

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## Policing or political economy?

The heart of the Coalition's policing policy is September 2011's *Police and Social Responsibility Act*, aimed to 'radically shift the decision-making on policing away from government to communities by giving them the power to elect police and crime commissioners (PCCs)'. This has a populist flavour that makes it hard to resist. 'Power to the people!', John Lennon rules, OK. What could be wrong with that? But it is misguided root and branch: conceptually, and in its tacit empirical assumptions.

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*we now live in a plutocracy:  
government of the rich, by  
the rich, for the rich*

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Whether 'populist policing' is 'democratic' is moot and open to contestation. The claim that PCCs achieve democratic governance of policing identifies democracy solely and wholly with voting; a contemporary trope that is (mis)used much more widely. Wikipedia conveniently tells us 'democracy is a form of government in which all people have an equal say in the decisions that affect their lives'; a pretty succinct summary. Free and fair elections are a necessary but not sufficient condition of democracy. Some of the most obvious problems, highly germane to policing (which deals with actual or potential conflicts), are:

- The danger of tyrannies of the majority (unbridled oppression of unpopular groups that become 'police property').
- Majority preferences must respect legal and civil rights.
- People have unequal resources to affect the political process (giving us the 'finest government money can buy' in the journalist Greg Palast's phrase).
- There is unequal access to relevant knowledge (apart from Ian Blair's 'NVQ' on policing, 'The Bill' – and even that is available nowadays only if you have Sky).

There is much evidence that we now live in a plutocracy: government of the rich, by the rich, for the rich. Democratic citizenship requires not merely political rights but civil and social/economic rights (borrowing from T.H. Marshall). Elections for PCCs in a context of vast and accelerating inequality of condition and resources cannot provide real power to the people. The new Coalition system offers us neoliberal policing in its starkest form. The criminal catching agenda is paramount; it can supposedly be achieved by a commonsense revolution in which security is attainable, even in the face of massive social and economic dislocation and injustice, provided the police are monitored by elected commissioners, who in turn will be kept on their toes through the election process.

A recent paper argues that some hope could be salvaged: 'an opportunity exists for the centre-left to develop and implement across large swathes of the country for a

progressive policy on crime, policing and disorder – and to make Police Commissioners a showcase a better politics of crime and policing' (Loader and Muir, 2011). If the appropriate people run and are elected perhaps they could show that an evidence led, public engaging, human rights respecting neighbourhood approach to security and protection for crime can be made to work not only effectively but in a just and fair way.

The law of unintended consequences applies to Conservative reforms as much as any other. By the time elections for PCCs begin in November 2012 the Coalition cuts will have begun to really bite. At a similar stage in 1981, after the Thatcher cuts, radical authorities swept to power in all metropolitan areas. And 2011 shows there is likely be civil disorder comparable to the 1980s. What if some PCCs were to prioritise neighbourhood crime, inhibiting personnel intense riot control and mutual aid? Would the government win something like the Miners' Strike again? Whether justifiable in democratic principle or not, perhaps elected PCCs can be turned into forces for social justice and the deep security and peace that can only flow from it. These are all possibilities, but they hinge on much wider questions of political economy and cultural conflict.

## The nasty party strikes back?

After a few brief salad days during which the Coalition appeared to burnish its liberal criminal justice credentials, there has been a rapid return to form as the government has reverted to tough law and order. This has been facilitated by some unforeseeable events and personality clashes, but is more fundamentally the predictable unfolding of the consequences of its quintessentially neoliberal economic strategy. As Karl Polanyi (1994), Andrew Gamble (1994) and many others have shown, unregulated free markets generate problems of intensified disorder and deviance that prompt resort to strong state controls.

It was sadly predictable that the Coalition's liberal ambitions would be frustrated in practice by increasing crime and disorder flowing from the financial cuts and downturn. What was less predictable was the speed and savagery with which David Cameron squashed Kenneth Clarke's reforms, buckling under to tabloid fury.

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*unregulated free markets  
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The growth of demonstrations and protests against the Coalition's cuts and the unjust burden placed on the relatively poor by the legal tax avoidance of the rich, spearheaded by heroic groups like UK Uncut, and the harsh policing tactics they have been met with, indicate clearly the order problems posed by neoliberal economic policy. So too do the riots of summer 2011. The riots of course were a criminological Rorschach test, sparking all manner of contradictory readings according to the commentator's pre-existing perspective, from the government's dismissal of them as 'criminality pure and simple' to a romantic left celebration of them as proto-rebellion. No doubt the participants' motives were varied and inchoate. The research undertaken by Tim Newburn at the LSE in conjunction with *The Guardian* (2011) has cast light on that.

The growth of more militant protest, the riots, and the recent indications of a renewed rise in the crime statistics following some 15 years of decline, all suggest that the can-do confidence manifested by many practitioners, politicians and even some criminologists in the crime control capacity of criminal justice without tackling the deeper causes of crime was misplaced. Since a new consensus on hard law and order consolidated in the early 1990s, and the sustained crime drop throughout the western world, a new realist orthodoxy has felt itself vindicated. Tough and smart policing, prevention and punishment can provide public safety and security ('crime is down, blame the police', as Cameron's favourite cop William Bratton boasted in 1998). This was possible, hucksters claimed, even as what used to be seen as the deeper prerequisites of peace - social justice and informal cultural controls - were undermined by neoliberal economics and the amoral individualism associated with it.

This belief that security can be maintained by suppression alone has been aptly named 'liddism' by Paul Rogers, the distinguished professor of peace studies. Applied to criminology, it converted the subject increasingly to liddology, the pursuit of what works in superior lid design. The intensification of the baleful economic and cultural consequences of four decades of neoliberal globalisation and financialisation since the crash of 2007 has blown the lid off. The public had always smelt a rat about this. The stubborn refusal revealed by surveys to accept that crime had indeed come down was not just irrationality brought on by excessive exposure to *The Sun* and solvable by reassurance policing. It had a rational kernel in the perception that deeper criminogenic pressures were being suppressed, not alleviated, by more effective criminal justice tactics.

We are clearly at a critical juncture, with the neoliberal presuppositions that have ruled for so long being widely questioned. Criminology and criminal justice policy

discussions need to recognise once more the wider embeddedness of deviance and disorder in political economy and culture.

It is remarkable that so soon after the economic and financial crunch in late 2007 seemed to discredit the neoliberal model, its savagely deflationary prescriptions for dealing with the sovereign debt crisis (resulting from governmental support for banking) have been embraced by the Conservative-led coalition. This government's zombie



neoliberalism is hard to explain and impossible to justify. The global growth of the Occupy movement and other protests against unfettered market capitalism are hopeful signs. Whether the Coalition hurtles further towards the nasty core of the Tory party, with ever tougher law and order vainly seeking to hold down the lid on crime and protest, depends on how much these stirrings of challenge succeed in bringing a greater measure of social justice and solidarity. There is much to fear but much to play for.

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