

An aerial photograph of a city, likely in the United States, showing a dense residential area with many houses and trees. In the center of the city, there is a large, multi-story institutional building complex, possibly a prison or a government facility, with several interconnected buildings and a large parking lot. The sky is blue with some light clouds.

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The Changing Quality of Justice:

the need for a clearer, more principled sense of direction

David Faulkner CB is a Senior Research Fellow at the University of Oxford Centre for Criminological Research and worked for over 30 years at the Home Office.

This article considers the context and nature of the present debate about criminal justice in England and Wales, reviews the agenda which successive governments have followed over the last 30 years, and discusses a number of issues where the approach which government, and the country as a whole, chooses to adopt will affect the quality of British justice and even the nature of our society as a whole.

Context

The formation of the coalition government in May 2010 gave reasons to believe that the new administration recognised the frustrations which had beset criminal justice in England and Wales during the previous twenty years, was ready to learn from the experience of the past, and would begin to set course in a new direction. Early ministerial speeches and the green paper *Breaking the Cycle*¹ gave a new emphasis to rehabilitation, work in prisons and some reduction in the prison population. Some of that programme remains and the government is still committed to promoting restorative justice, but much has effectively been abandoned. The debate, for example in the consultation papers published in March, 2012², is now more about devising new forms of punishment and promoting competition than it is about the underlying problems of crime, criminality and their effects.

Criminal justice has to be seen in a wider context in which social pressures, the economic downturn, and the policies of the coalition government have challenged long-held assumptions about what citizens can expect from government and their public services. Especially in England, people feel unsettled by uncertainty over the state of Britain's national finances, its social fabric (the so-called 'broken society'), its place in the world, and some would say its identity as a nation. The British Social Attitudes Survey shows that there is less sympathy for those who are disabled, disadvantaged or living in poverty. People find comfort in looking for enemies and scapegoats who can be

portrayed as threatening the hard working and law abiding majority and as different and less deserving. That reasoning applied especially to offenders but is often applied to those on benefits and foreigners as well. A new class structure may be appearing, with the poor, the disadvantaged and those who 'don't belong' at the bottom and subjected to the disdain of those who are more fortunate. The debate is often conducted in a language and in metaphors which portray complexity and uncertainty as if it were a simple conflict between 'good people' and 'bad people' in which 'good people' have to take sides³.

The anxieties, and sometimes behaviours, which prompt those attitudes are real and have to be taken seriously. But they need to be kept in perspective and to receive a sensitive but also considered and proportionate response. At such a time it is especially important that the process and institutions for dealing with crime and social conflict have the country's trust and are founded on firm principles of fairness and justice.

Nature of the Debate

There is general agreement that improvement is still needed, but agreement dissolves when the discussion turns to specific measures. It is hard to reconcile demands for more rigorous enforcement of the law, longer sentences, more people in prison and less regard for offenders' rights with providing more help for offenders' rehabilitation, more and earlier social intervention, a greater emphasis on reconciliation and restoration, and fewer people in prison. People will often try to present the choice as a practical matter — which does more to protect the public? Or it may be a political calculation about which will attract more support. In some aspects the choice may reflect more fundamental differences in moral values, ethical standards and beliefs about human nature and human behaviour. Those who hold strong opposing views are not often prepared to change them, find it hard to communicate with one another, and rarely meet for any

1. Ministry of Justice (2010) *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972, London: Ministry of Justice.
2. Ministry of Justice (2012) *Punishment and Reform: Effective Probation Services and Punishment and Reform: Effective Community Sentences*, London: Ministry of Justice.
3. Canton, R. (2010) 'Not another medical model: Using metaphor and analogy to explore crime and criminal justice', *British Journal of Community Justice*, 8 (1): 40 – 57.

dialogue. But they need to respect each other's point of view, and it should be a mark of a civilised society that they should work together towards objectives on which they can both agree.

There are some areas where agreement may more easily be found than others. Few people oppose the rehabilitation of offenders, and most people have sympathy for children (apart from those who kill other children). There is evidence that, except for the most serious crimes of violence, victims are often more concerned that the offence should not be repeated than they are about the severity of the offender's punishment. Opposing views may be more easily reconciled locally than at national level. Progress might best be achieved by starting with those areas of agreement and working at local level.

The Government's Agenda

Across government as a whole, the agenda for successive administrations has been one of improving efficiency and effectiveness, centralised direction and management, competition, outsourcing and now payment by results. Criminologists can connect it variously with 'late modernism'⁴, the 'new penology'⁵, 'new public management'⁶, or Rutherford's three 'strategies' — punitive, managerial and ethical⁷.

That agenda brought a necessary financial and managerial discipline, and important improvements were made, for example in the safety and humanity of prisons and through techniques such as neighbourhood policing and integrated offender management. But attempts to prevent and reduce crime and improve public confidence were overlaid by a separate and sometimes ideological agenda of modernisation and public service reform which raised their own issues and brought their own problems. The country lost sight of the more fundamental issues of what to do about crime, what is meant by justice, the nature and purpose of punishment, and what can be expected from the criminal justice system. It would be an interesting

research project to ask if the country is any more just, or fair, or safe, than it was 10, 20 or 30 years ago. The choice of the tests or metrics to be used would be as important as the answers, and rates of crime would be only one among others.

Policy and the Use of Evidence

In a lecture at the London School of Economics, Sir Gus O'Donnell, the former Secretary of the Cabinet and Head of the Home Civil Service, has set out 'Ten Commandments for good policy making'⁸. They are

- Be clear about outcomes you want to achieve
- Evaluate policy as effectively as possible
- Do not assume that government has to solve every problem
- Do not rush to legislate
- Work effectively across departmental boundaries
- Honour the evidence and use it to make decisions
- Be clear about who is accountable for what and line up the powers and accountabilities
- Encourage frank internal debate
- Do not forget that is a privilege to serve

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Keep a sense of proportion

Those commandments have been regularly broken, in criminal justice and elsewhere in government. Apart from their sometimes obsessive concern with statistics of reoffending, governments have been more concerned with impressions and the appearance of action than with substantive social outcomes. Policies have often been changed but rarely evaluated. Governments have tried to show that they have a solution to every problem and have responded by piling one new initiative on top of another. The flood of complex new criminal justice legislation and the proliferation of new criminal offences became a notorious feature of the Labour government after 1997, although the trend had begun before then.

4. Garland, D (1996) 'The Limits of the Sovereign State', *British Journal of Criminology*, 36: 445-70.

5. Feeley, M. and Simon, J. (1994) 'The New Penology: Notes on the Emerging Strategy of Corrections and its Implication'. *Criminology*, 30: 449-74.

6. Hood, C. (1991) 'A Public Management for All Seasons?', *Public Administration*, Vol 69, No 1, 3-19.

7. Rutherford, A. (1993) *Criminal Justice and the Pursuit of Decency*, Oxford: Oxford University Press.

8. <http://blogs.lse.ac.uk/politicsandpolicy/2012/05/01/retrospective-sir-gus-odonnell>

An extensive body of literature shows broad agreement that the processes of policy formation, legislation, management and implementation all need to be improved⁹.

The processes of policy formation, consultation and implementation should be more orderly and less febrile than they have been in the past. Despite years of talk and good intentions, better connections are still needed between the processes of policy making and the delivery of services on the ground. Change cannot be successfully achieved by imposing standard models or processes without engaging the people who will have to carry it out. It needs the active engagement of the workforce, and the consent and if possible the support of those who would be affected by it. That has not been conspicuous so far in any of the reforms of criminal justice.

There needs to be a stronger relationship of trust between ministers, public servants and the citizens they serve. Policy and legislation should be the outcome of open and responsive consultation which draws on experience and expertise from a range of relevant sources. Those who will be directly affected, especially those on whom the department will rely for delivery, should feel that they have been part of the process by which the policy has been formed, even if they do not agree with the outcome. The language should not be so obscure, or the issues made to appear so complicated, that only 'insiders' feel able to contribute. Consultation should not be left until the main decisions have been taken and the government is only interested in detail and the means of putting its intentions into effect.

Communities should feel that not only schools and hospitals but also the police, the courts, prisons and probation are 'their' institutions in which they can take some pride and towards which they have some responsibility.

The nature and relevance of the evidence which government needs to support a government policy varies according to the subject and the discipline involved. An important issue is the part which scientific evidence and understanding play in the work of the department, and especially the department's culture in looking for evidence, appreciating its significance and applying it to policy and practice. It should be an important part of the Chief Scientific Adviser's job to promote that culture and to encourage the relationships with universities, think

tanks and the private and voluntary sectors, in this country and abroad, that will enable it to flourish.

The evidence is significantly stronger, more widely accepted and more likely to be conclusive in medicine (for example) than it is in criminal justice. Government will sometimes be able to commission research which will settle an issue; sometimes the issues are too complex, or the study would be too expensive or take too long. Government may sometimes be able to rely on an expert committee to assemble evidence and give advice which it will normally accept; sometimes, and especially where the evidence is likely to be inconclusive or disbelieved, it will have to make a political judgement for which they take the relevant evidence into account but may not regard it as the determining factor. Ministers are entitled not to act on the evidence or the advice if they choose,

but they should then be ready to justify their decision to Parliament and ultimately to the electorate. Good practice would also expect them to give a reasoned explanation to those who have provided the advice. There is general agreement, not always observed in practice, that statistics and evidence from research should always be published and made publicly accessible, together with any expert advice that may be based on them.

The evidence is sometimes counter-intuitive and often inconclusive, especially if is based on small samples or pilot schemes. Ministers ask 'What causes crime?' or 'Will this work?' and the answer is often 'We don't know' or 'It depends'. It may be 'We can find out', but sometimes — though neither ministers nor criminologists would willingly admit it — the honest answer is 'There is no way of knowing for certain'. *The Evidence report* associated with the green paper *Breaking the Cycle* is a good example of what can be done.

Influencing Human Behaviour

Experience and research have shown that the country should be more realistic about the limited effect which governments and the institutions and processes of criminal justice can have on the general level of crime. It should acknowledge the evidence that the fall in crime since the mid-1990s owed more to crime prevention, improved security, and social and economic circumstances than to the increase in the number of people in prison. Sentencing as a deterrent has only a

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9. For examples, see Faulkner, D. and Burnett, R (2011) *Where Next for Criminal Justice?*, Bristol: The Policy Press, Chapter 10.

limited effect. There is good support for the calculation in the Halliday Report¹⁰ that it needs a 20 per cent rise in the prison population to bring a one per cent fall in crime.

The country should be more sensitive to the influences which affect criminal behaviour, and have a better understanding of the situations and motivations which lead people to commit crime, to stop committing it, or not to commit it in the first place. It should acknowledge that common assumptions about people's motivations and about incentives and deterrence are often mistaken. Crime and people who commit it, or are affected by it, should be seen in a wider context of their relationships and their social and economic situation, and criminal justice should be seen within a wider context of social policies and values. People, whoever they are, need material things — work, somewhere to live — and they also need supportive relationships and hope for the future.

More attention should be paid to the evidence on legitimacy and desistance — the reasons why people respect authority and obey the law¹¹, and why they stop offending or do not offend in the first place¹². It is consistent with the work which inspired therapeutic communities but it has a much wider application. It shows that a higher priority should be given to prevention, early intervention, responsibility and desistance, and that the country should be less obsessed with punishment and give more emphasis to change and restoration. The emphasis would then shift from managing the criminal justice system to promoting relationships, capabilities and motivation as the means of preventing and reducing crime.

Outsourcing and Payment by Results

The consultation paper on probation services promises that strong probation trusts will remain in the public sector, with certain functions such as advice to the courts and the Parole Board and the management of high-risk offenders reserved to it. Others would be put out to competition, with payment by results, but

usually with Probation Trusts as the commissioning authority.

Outsourcing is not objectionable in principle. It is well established in other sectors, although with what can now be seen as mixed results, and in criminal justice it could in theory enable small, usually voluntary, organisations to provide particular services for which they are especially well suited. But it is dangerous territory, especially if it accompanied by payment by results¹³. The main purpose, as the government sees it, is the transfer of financial risk from the tax payer to the investor, with the financial protection, the reduction in costs and the greater productivity that are assumed to follow. That assumption is however more a matter of political conviction and ideology than a conclusion based on evidence, and experience in other areas of public service has not been reassuring. Releasing the energy of small voluntary and community organisations is a secondary consideration and there is understandable scepticism about how far that will happen.

Some people seem to think that the only difference between the public and private sectors that matters is that the private sector is more efficient at running a business. But government is not just another business, and justice most certainly is not. There are very real differences in the sectors' culture and in the structure of their accountability, and those differences matter, especially when they affect justice, personal freedom and the fabric of British society. One is not better than the other — they are just different and they have different places in the scheme of things.

There are some functions which governments, or the state, should not attempt, and others which should only be performed by public sector organisations accountable to ministers and Parliament. Many of those taken in criminal justice involve judgements about a person's character and behaviour which may affect the person's liberty and position in society, the situation of their family, and the public's safety. Those judgements should be made within a statutory framework, in accordance with due process and professional standards

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10. Halliday, J. (2001) *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, London: Home Office.
11. Tyler, T. and Huo, Y. (2002) *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*, New York: Russell Sage Foundation.
12. McNeill, F. (2009) *Towards Effective Practice in Offender Supervision*, Edinburgh: Scottish Centre for Crime and Justice Research.
13. <http://opinion.publicfinance.co.uk/2012/04/payment-by-results-is-no-panacea/>

and by public servants who are accountable to ministers and ultimately to Parliament and free from considerations of their employers' profitability or commercial advantage.

The government's consultation paper on probation services acknowledges that argument in what it says about 'public interest decision points'¹⁴, and asks what are the key issues in outsourcing — or 'competing' — offender management for low risk offenders. Some specific services could well be 'competed' in accordance with those criteria but all offender management, for example, will involve 'public interest decision points' and it is hard to see how offender management could properly be 'competed', even for low-risk offenders.

There has so far been little public discussion of 'decision points' in relation to policing, and the government's arguments about the principles involved in outsourcing and the evidence for its success have so far been of a very general and often dogmatic kind. The issue needs closer analysis and more rigorous argument.

Localisation

There is much talk about the localisation of public services. The case for it is that decisions about priorities, the allocation and use of resources and the response to local issues should be taken as 'near the ground' as possible, and that those taking decisions should have some responsibility towards and some effective accountability to the communities they serve. Communities will then respect the decisions that are taken and feel some responsibility for helping to achieve successful outcomes from them. Greater budgetary control might enable local choices to be made about the best use and allocation of resources between different programmes — for example 'justice reinvestment'¹⁵ — without the perverse incentives which exist at present such as the temptation to use national resources such as prisons in preference to those which are funded locally. Local debates focused on practical questions of what will 'work for us' are likely to be better informed and less polarised than those conducted in national newspapers.

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There is not much about localisation in the consultation papers, but elected Police and Crime Commissioners will create a new dynamic in policing and probably in criminal justice more generally. It is not yet clear how genuinely representative they will be, how far their influence will extend to prisons and probation (or beyond), and whether they will be elected with enough votes to give them credibility. Critical questions will arise over their relationships with central and local government and the effect of their party political affiliations. Critics see the outcome as likely to be greater fragmentation, confusion, conflict and populism. Or, more optimistically, elected commissioners might in time help to move the focus of debate away from national government and national politics and towards local areas

and communities and local solutions, and perhaps towards a redistribution of priorities and resources on the lines of 'justice reinvestment', as penal reformers have argued for some time.

The dynamics of the new relationships and the spirit in which they are handled will be critical. Everything will depend on how power, responsibility and accountability are aligned. The critics' fears may not be realised, but the situation is likely to be precarious for some years.

Future of the Lay Magistracy

Localisation as it has been discussed in government has not usually been connected with the future of local justice or the role of the lay magistracy, and this may be the time to think more radically about the possibilities and opportunities. The Ministry of Justice has a review in progress, and the Magistrates' Association has published its own report on *The Magistracy in the 21st Century*¹⁶ and a collection of essays on the future of the magistracy to mark its 650th Anniversary¹⁷. The collection could have been a celebration of the magistracy's achievements over that time, but the Association decided instead to look forwards and invited contributions about the roles which it might play in future.

Some contributors argue for a closer relationship with the higher judiciary, stronger powers, simpler

14. The paper (page 17) lists initial assessments of the harm and risk of reoffending; advice to court and the Parole Board; determining required levels of offender management; participating in supervision and decisions about MAPPA cases; resolutions of recall and breaches; and early revocation of sentences for offenders for good progress.

15. Allen, R. (2009) 'Justice Reinvestment – a new paradigm?' in Collins, J and Saddiqui, R. (eds) *Transforming Justice: New Approaches to the Criminal Justice System*, London: Criminal Justice Alliance, pp 57-66.

16. The Magistrates' Association (2012) *The Magistracy in the 21st Century*, London: the Magistrates' Association.

17. Faulkner, D. (ed) (2012) *The Magistracy at the Crossroads*, Winchester: Waterside Press.

legislation and a transfer of business from the Crown Court. That is one approach, and there are good arguments for it, including the argument that decisions on sentencing may sometimes be better taken by a mixed panel than by a single individual. Others take a different approach based on ideas of community justice. They point out that although out-of-court penalties, neighbourhood resolution panels, and restorative justice are for the most part to be welcomed, there are important questions about accountability and legitimacy, about how standards and consistency are to be maintained, and about how much local variation of practice will be acceptable or tolerated. Suggestions are that magistrates could have a role in overseeing the use of out-of-court penalties; and that they might have functions in following the progress of offenders while serving their sentences, for example in discharging orders in recognition of good progress and supervising their recall to prison when that is necessary, perhaps on the lines of *juges d'application des peines* in France. They might also oversee the powers of such bodies as youth offending teams and multi-agency public protection arrangements (MAPPAs and MARACs); and become members of probation trusts or independent monitoring boards for prisons, despite the discouragement there has been so far.

Ideas of that kind need a lot more work before they can be turned into practical reality. Some would need legislation or a national initiative, but others could be developed locally. It might well be helpful if courts could work with a voluntary organisation, as the Oxford courts did the Thames Valley Partnership on the project 'Making Good'¹⁸ a few years ago.

Conclusions

The debate on criminal justice has become muddled and polarised by misunderstanding, false assumptions and preconceived ideas.

The country needs a clearer understanding of what is meant by justice and by punishment. Is justice the fact of bringing a person before a court, obtaining a conviction, and imposing a sentence that satisfies the victim or public opinion? Is it about achieving an outcome which is fair to all those affected by the offence, from which it is possible for them to move forward? Or is it the process by which those things happen? Or is justice to be found not so much in the outcome as in the fairness and legitimacy of the process and in the culture of the relevant services and institutions? How does criminal justice relate to social and procedural justice, and to fairness and proportionality?

What are the nature, role, and purpose of punishment? What makes it legitimate? Does it have to be deserved for something a person has done or can it be used as a precaution against something they might do in future? Does only imprisonment count as punishment? Must wrong doing always attract punishment? Is there a place for compassion, mercy and sometimes even forgiveness? It should be a matter for concern that those words are now rarely heard in public debate and are seldom if ever used by government.

The country does not need more reorganisation and legislation so much as a clearer and more principled sense of direction. Without it criminal justice will at best face a continuing period of frustration, and at worst increasing instability as further cuts and structural reforms take effect. The underlying principles of legitimacy, decency and humanity need to be restated and reinforced, together with integrity, honesty and transparency in governance and administration. This should be a time for vision and leadership, and for more vigorous and challenging public debate.

*The arguments in this article are discussed in more detail in *Where Next for Criminal Justice?* by David Faulkner and Ros Burnett, published by The Policy Press (October 2011).*

18. A report is at <http://www.thamesvalleypartnership.org/wp-content/uploads/making-good-an-assessment-tania-wickham-rob-allen.pdf>