Laws and Orders: Public Protection and Social Exclusion in England and Wales[*]

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The euphoria that greeted the new Labour government in the UK after 18 years of Conservative rule has been short-lived for those who believe that criminal justice is inextricably bound up with social justice. Far from making any radical break with the criminal justice policy that saw the average daily prison population rise from 42,000 in 1993 to 61,000 in 1997 (Home Office 1998a), the new government has introduced legislation and pursued policies which look set to ensure that the current projection of an average daily prison population of 92,600 by the year 2005 (Home Office 1998b) is not an overestimate. This paper aims to analyse aspects of the first year of New Labour crime and punishment policy, in particular the Crime and Disorder Act 1998 and the consultation document resulting from the Prisons-Probation Review. The analysis sets these developments in the context of trends inherited from the previous government and focuses on two concepts which have featured increasingly in criminal justice discourse - public protection and social exclusion. My argument will be that the pursuit of the illusory goal of public protection has undermined any possibility of reducing social exclusion. On the contrary, public protection requires the sacrifice of ever more outlaws, in the form of criminals and other rule-breakers, to be expelled from the community. I argue in support of Young's thesis that, far from playing a definite role in the community, as a Durkheimian analysis would suggest:

> Such an outlaw can never belong to the community, in that the community's very existence is founded upon her prior and continuing symbolic expulsion from it ...the surrogate[s] of a remembered and unresisted desire for the violence that lies beneath all communities (Young 1996:11).

In addition to the expulsion of increasing numbers and categories of offenders, I am suggesting that the latest sacrifice is the Probation Service itself, which has come to symbolise all that is unacceptable to (media created) public opinion about the rationalisation of punishment.

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Renaming the Probation Service

In August 1998 the Home Office launched what might, facetiously, be termed a new national game called 'Rename the Probation Service'. It invited suggestions for a name that 'is capable of inspiring public confidence in the work of that Service' and, while expressing 'no strong preference', provided a number of suggestions to stimulate ideas. These were:

> The Public Protection Service
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> The Community Justice Enforcement Agency
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> The Offender Risk Management Service
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> The Community Sentence Enforcement Service
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> The Justice Enforcement and Public Protection Service
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> The Public Safety and Offender Management Service
>
> The Community Protection and Justice Service
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> (Home Office 1998c: para.2.14)

Those familiar with Australian jurisdictions may wonder why the term 'Community Corrections' has been excluded. One can only speculate that the word 'corrections' has always been resisted in the UK on the grounds that it sounds 'too American', despite Walker's view (1991) that the term implies an appropriate humility about the state of our knowledge about the reasons for which people stop committing crimes. The call to rename the Probation Service, despite the acceptance by the Home Office that probation 'is a long established concept, well understood internationally' (para 2.13), has arisen from the determination of the new Labour government to abolish any terminology that might be 'misunderstood' or 'associated with tolerance of crime' (para 2.12). This is rhetorically compatible with their now famous manifesto pledge to be 'tough on crime and tough on the causes of crime' (Labour Party 1997). Nonetheless, the proposal that a Service with 7,200 probation officers and a total of fewer than 15,000 employees including clerical and administrative staff, (Home Office 1998d) can provide 'public protection' is difficult to take seriously.

The Prisons-Probation Review was set up in July 1997, shortly after the new government took office, and was intended to explore the possibility of integrating the Prison Service and the Probation Service. The consultation document reporting on the Review is entitled *Joining Forces to Protect the Public.*[1] The Review rejects a merger of the two Services, partly for reasons of principle (that there is insufficient overlap of responsibilities) but predominantly, one suspects, for reasons of cost (delicately phrased as 'disruption to staff and the difficulties of renegotiating major IT initiatives' [para.2.38]). In fact, very few of the Review's recommendations affect the Prison Service. The Probation Service, however, as well as being renamed, is to undergo a major restructuring. Of most significance is the proposal to create a unified national service with national leadership directly accountable to the Home Secretary.[2] This proposal is long overdue and welcome and, of itself, could go a long way towards remedying the perceived shortcomings and lack of credibility of the Service.

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1 Given the debate that has taken place about whether the Police are a *force* or a *service* (e.g. Avery 1981) and given that no-one has yet suggested that the UK has either a Prison *Force* or a Probation *Force,* it is perhaps telling that the term 'joining forces' has been chosen. Admittedly, 'joining services' has less resonance, but the linguistic device should not, I suspect, be overlooked.

2 The Probation Service, although funded 80% by central government, has always been organised locally in 54 areas, each with its own Chief Probation Officer, rather like the organisation of the Police Service. Only the Prison Service has been organised nationally with a Director General.

That the new leadership will be not be leading a recognisable Probation Service, however, rather undermines the gesture.

The desire of the current UK government to erase the concept of 'probation' from the collective conscience is the surface manifestation of a more fundamental desire to blur the boundaries between freedom and confinement and extend the disciplinary effects of imprisonment wider and deeper into the community. As the Review puts it, 'we are interested in looking at ways of replacing the present cut-offs with a more flexible set of sanctions based on a continuum of loss of liberty, reparation in the community and correction of offending behaviour' (para.1.8). Community-based sentences are no longer to be viewed as alternatives to custody (as they were in the 1980s as a response to prison overcrowding and the decarceration debate) or as sentences in their own right (as in the Criminal Justice Act 1991, which sought to reduce the prison population directly by limiting the powers of sentencers[3]) but as part of a continuum which allows smooth and easy movement between prison and the community. The state of tension - indeed of healthy conflict - that has hitherto been assumed to exist between advocates of imprisonment and advocates of community-based penalties has been rendered redundant. We are all in the same business now — the business of punishment - with no differences of principle. Retribution, deterrence, restoration and rehabilitation can be fitted neatly together within a socially constructed consensus about the purpose[s] of punishment. The only remaining differences are those of approach and even differences of approach are being eroded.

Joining Forces is clear that priority (and, of course, funding) in work with offenders, both in prison and in the community, will be given to the 'What Works?' research agenda, which is dominated by cognitive behavioural programs and their evaluation. A recent Home Office review of the literature on programs for offenders concludes that:

> The effectiveness of interventions with offenders varies significantly according to the type of approach adopted. Programs which seek to modify offenders' patterns of thinking and behaving are generally more successful than techniques such as group or individual counselling and non-directive therapy (Vennard, Sugg & Hedderman 1997).

It is not the intention of this article to decry the principles underpinning cognitive behavioural programs (though their emphasis on individual choice and responsibility sit comfortably with certain versions of communitarianism and contemporary political agenda) or their evaluation. Important as they are, however, the imperialism of this approach and its willingness to be reduced to an ugly political mantra (only the initiated will understand the derivation of the 'what works' mantra from Martinson's infamous phrase 'Nothing Works') can be seen as a threat to legitimate diversity and should, therefore, be of concern.

Analysing Punishment in the Community: Effectiveness or Social Meaning?

Contemporary political (and academic) debate tends to assume that penality is synonymous with prison and that the most important theoretical and policy questions revolve around the nature, number and treatment of the (predominantly male) criminals sent to prison by our courts. Much attention has also been paid to the symbolism of the prison and its disciplinary effect on the populace at large. Penal measures, which do not involve incarceration, tend to be regarded by most criminologists as monolithic, unproblematic and invariably preferable

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3 The Criminal Justice Act 1991 appears to have been the blueprint for Western Australia's Sentencing Act 1995 and other similar Acts in Australian jurisdictions, designed to make custody the sentence of last resort.

to prison, and by the public as monolithic, problematic and invariably not preferable to prison.[4]

Within the probation service there has always been much introspective analysis of the balance that can and should be maintained between caring for the offender and controlling him or her. A perennial essay question set for trainee probation officers asks 'Is the probation service still a social work agency?', the implication being that its 'value base' is no longer compatible with the ethics of social work and that it is moving inexorably towards the American model of a corrections agency.

But that debate has been largely conducted within an apolitical framework that takes criminal justice policy as 'given' and which sees the role of the service as that of adapting to, or at least surviving, the vagaries of that ever-changing policy. Such debate is epitomised by the picture on the cover of one practice guide (Raynor, Smith and Vanstone 1994), which shows a probation officer and an offender standing outside a prison gate. The image is powerful yet contradictory. The offender is *outside* the prison, the prison is *behind* the offender, but the image of the prison is integral to the message that is to be conveyed. Probation is always practised in the shadow of prison.

Instead, I want to argue that any analysis of the role of non-incarcerative sanctions must go beyond technical discussions of their effectiveness (for instance, in reducing re-offending) by comparison with imprisonment and must address their social meaning. What, to use Garland's phrase are the 'moral values and sensibilities' (1990:1) which such sanctions encapsulate (or fail to encapsulate)? What are their sources of authority and from whence do they gain their (lack of) social support? In short, it must explore the conundrum posed by the widespread usage of penal measures, which are discursively impotent.

Society's ambivalence towards punishment that does not involve prison can only be understood in the context of its deep-seated and increasing cynicism of the language of rationalisation. Non-incarcerative sanctions involve all the symbols of the modern state which arouse most suspicion - bureaucracy, professional power, unchallengeable claims to expertise, lack of public accountability - in an area of human experience which arouses extreme (if irrational) emotions of fear and anger. Far from being viewed as 'an index of the refinement and civility attained by criminal justice', such measures are deemed to have redefined the social meaning of punishment in such a way that it has 'been removed from direct public participation and involvement and....cast in a form which de-emphasises (its) moral content' (Garland 1990:1)

Part of the problem is that we are linguistically trapped. We talk of 'non-custodial sentences' or 'alternatives to prison' or even 'intermediate sanctions' but the absence of a collective noun which is not ineluctably hitched up to incarceration means that our analysis is conceptually impoverished. We simply cannot think about punishment without thinking about prison because we do not have the words with which to do it.

The punishing community

In an attempt to escape the spectre of prison, we now refer to 'punishment in the community', 'community penalties' or 'community corrections'[5] but we seem to assume that the use

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4 For a fuller version of the arguments in this and the following sub-section see Worrall, A. (1997) *Punishment in the Community: the future of criminal justice*, Addison Wesley Longman.

5 In Australia, however, the term 'corrections' has also come to be synonymous with prisons, to the extent that some states have renamed prisons as 'correctional centres'.

of the word 'community' is unproblematic. The term 'community' is one of the most promiscuous words in contemporary political usage. It is attached to concepts hitherto regarded as falling within the spheres of either the private or the public. It beguiles and seduces 'because it readily evokes images of neighbourliness, mutual aid, and a positive sense of "belonging"' (Smith 1995:93). At the same time, critics would argue, it blurs the boundaries of responsibility (which is part of its appeal) and consequently (to continue the metaphor) it cheapens and degrades the original concept, not least by its cost-cutting overtones.

While the term may appeal to a warm, nostalgic sense of 'belonging' among the self-proclaimed law-abiding, its promise of inclusivity can be interpreted in contradictory ways when applied to those who break the law and are criminalised. Far from demonstrating that it is resourceful, tolerant and healing, the community is then rejecting, excluding and intolerantly punitive. What, then, constitutes the 'community' in which offenders are to be punished?

The use of the term 'community' implies at least two things. First, it assumes an element of homogeneity based on common social characteristics, histories, traditions or beliefs. Second, it presumes that this homogeneity will manifest itself in a sense of mutual responsibility - a willingness to 'look after' or 'deal with' the needs of the members of the community. As Cohen says, 'the iconography is that of a small rural village in pre-industrial society in contrast to the abstract, bureaucratic, impersonal city of the contemporary technological state' (1985:118).

There is nothing new about these assumptions and presumptions but their proliferation in political discourse has been a feature of the last two decades of the century and, in particular, a feature of the ideology of the New Right. Initially, this may appear to be a contradiction in terms since one tends to associate the New Right with neo-liberal individualism, self-sufficiency and non-interference by the state. However, by appropriating the concept of community, the New Right has emphasised less its collective responsibility for its members and more the responsibility of members to the community (Fatic 1995). In particular, it has stressed the 'rights' of the community to require certain standards of behaviour from its members and, ultimately, to exclude members in the interests of the whole community. This notion of community has little to do with the values of socialism and is now as much a part of New Labour thinking as of conservatism - the former stressing the importance of 'new responsibilities to match new rights' (Ireland 1995:190).

The appeal of communitarianism lies in its ability to traverse the party political spectrum. By placing the community at the centre of our analysis and our value system, instead of either the individual or the state, we establish a social and political entity, which is local enough to be both sensitive to our needs and controlling of our behaviour. The extremes of rampant individualism and dangerous socialism are thus rejected in favour of a theory which blends social construction (the individual is shaped by the social environment) and the localised emergence (rather than state imposition) of collective values such as reciprocity, solidarity and 'club membership' (Frazer & Lacey 1993).

But, as Frazer and Lacey demonstrate, communitarian discourse does not in any way guarantee equality of access to the community's resources or 'club goods'. Communitarianism claims that moral and political values are generated and maintained by the community itself and are changed only through internal discussion, argument and conflict. The insularity of communities and the absence of 'debate across traditions and on the basis of values external to prevailing cultures' (Frazer & Lacey 1993:144) may result in the maintenance of sexist, racist or other discriminatory values and practices. There is nothing in the appeal to community that offers any fundamental criticism of oppressive traditional sexual

divisions of labour or social practices of racial intolerance and exclusion. Club membership is not equally available to all, despite the powerful rhetoric to the contrary.

When one talks, then, about crime control being a matter for the community, or a community responsibility, it is by no means clear which particular brand of communitarian values are being expressed (Fatic 1995). On the one hand, one may be arguing that crime and criminals are a product of the community, that the causes of crime can be found in the material and social inadequacies of the community, that criminals are produced when individuals are denied their rightful share of the community's wealth and welfare. On the other hand, one may view the community as the upholder of positive values and moral virtues, as an environment of trust that is betrayed by the actions of criminals. Either way, the relationship between the criminal and the 'law-abiding' community is problematic, since the decision has to be made whether the criminal can or should be excluded from or reintegrated within the community.

All of which is predicated on the questionable prior existence of an entity which is fundamentally cohesive, virtuous and, at least potentially, resourceful - the vision of an ideal community. Yet, as Frazer and Lacey argue succinctly, there is 'rhetorically powerful slippage between sociological and normative conceptions of community' (1993:154). The reality is that many of the communities most deeply affected by crime are fractured along hostile divisions of age, race and gender (Campbell 1993), exacerbated by endemic poverty and a chronic absence of resources other than those generated through the commitment of local interest groups (usually dependent on the skills and enthusiasm of particular individuals). For such people, an appeal to 'the community' is perceived only as abandonment by official state agencies and a licence for certain groups of people (predominantly young men) to intimidate and destroy the neighbourhood.

Such considerations are crucial to the government's claim that its policies are informed by the concept of restorative justice (Straw 1997). As Blagg has argued in this journal, there is little evidence that the 'strong rhetorical themes — healing, wholeness etc' (1998:12) are matched by the reality. Instead, the use of the term 'has been precisely about eliminating considerations of social issues from judicial calculus' (1998:12).

Against this background it is possible to identify at least four penal fallacies which have become embedded in criminal justice policy in England and Wales.

'Strengthening' community-based penalties means more public protection

The first is the belief that the public will be protected by making community-based penalties more punitive, and procedurally rigid. The use of the term 'strengthened' in this context means 'made acceptable to public opinion' and consists of two elements — more detailed and explicit demands on offenders and greater policing of the fulfilment of those demands, with imprisonment as an ever-present threat. Ever since the Conservative Government's call a decade ago for a recognition that 'not every sentencer or member of the public has full confidence in the present orders which leave offenders in the community' (Home Office 1988:2), community-based penalties have been socially constructed as 'weak and ineffective' in preventing recidivism. In the run up to the 1994 Criminal Justice and Public Order Act, the Home Secretary turned his fire on community sentences, declaring his intention to 'strengthen' them:

> These measures will mean an end to the approach which offers holidays for offenders. Out go holidays and in come tightly controlled community sentences (cited in Morton 1994:8).

In March 1995 the Government produced the consultation document *Strengthening Punishment in the Community.* Its main proposal was to replace existing non-custodial

sentences with a single 'community sentence', the exact content of which would be decided by sentencers to suit the perceived needs and requirements of each individual case. The clearly stated purpose of the proposal was to increase public confidence in non-custodial penalties; the less clearly stated aim (but one equally obvious to the initiated) was to bring the probation service once and for all under the control of the courts by making the purchaser-provider relationship quite explicit.

By August 1996 yet another truck had been coupled to the punishment train in the form of the White Paper *Protecting the Public*, later to become the Crime (Sentences) Act 1997, the main provisions of which concerned the introduction of mandatory prison sentences for repeat offenders. The White Paper contained very little that was new in relation to community punishment. The chapter on community sentences was notably thin and vague, apparently bowing to criticisms of the 1995 Paper and settling instead for supporting 'local demonstration projects'. Subsequent legislation has given the distinct impression that the Government has finally given up on community punishment. The tone of debate was set soon after the change of Government when the Home Office took the unusual step of publishing the Probation Circular of Serious Incident Reports for 1996, apparently demonstrating that 'offenders on probation are charged with one murder and a sexual assault on average every week' (The Independent, 2 July 1997), or, as the Daily Mail (2 July 1997) put it, they are 'at liberty to kill and rape'.

Later in the year, in a speech at the launch of the International Centre for Prison Studies, the Home Secretary, Jack Straw reiterated the

> need to prove to the courts and the public just how rigorous existing community sentences can be...And I make no apologies for being tough when abuses of the community sentence system or breaches of standards - not just by offenders but also by the Probation Service - come to my notice. A system which is failing at the edges will be one in which public confidence is severely lacking (1997:7-8).

Two points emerge from this statement. First, what is being sought is not genuine public protection (which is, arguably, the role of the police anyway) but public confidence, which may be based on insubstantial rhetoric and erroneous beliefs.[6] Second, 'strengthening' is not just about making more demands on offenders - and thereby making it more likely that they will fail to fulfil those demands and end up in prison. It is also about making more demands on the Probation Service — with, arguably, rather similar consequences.

De-professionalised probation officers are more effective

The second fallacy that has worked its way into penal policy thinking is a belief in the necessity to challenge the 'old' work habits of criminal justice professionals. It has been most marked in the staff recruitment policies of privately managed prisons, designed specifically to break the power of the traditional prison union. But it can also be seen in the gradual erosion of professional autonomy in the Probation Service through *National Standards* (Home

6 The creation of public confidence is a complex matter. A recent Home Office Research Study (Hough and Roberts 1998) attempted to argue that courts are tougher than the public thinks. As an example, it stated that 60% of people interviewed thought that fewer than 2 out of 3 rapists were sent to prison, when the proportion of *convicted* rapists sent to prison is 99%. It failed to mention the extraordinarily high attrition rate for allegations of rape, which may well make the public's perception more accurate. Sue Lees uses Home Office figures which show that only 8% of recorded rapes ended in conviction in 1994. This percentage compared to 24% in 1985. Despite the increase in reported and recorded rape, the actual numbers of convictions appear to be slightly fewer than a decade ago (Lees 1996:264).

Office 1992/1995) and the de-professionalisation of qualifying training. The introduction of *National Standards* in the early 1990s was justified on the grounds that professional autonomy had been used in the past as an excuse for some inconsistent and, therefore, potentially (or actually) discriminatory practice. The standards covered not just broad policy but detailed practice requirements in relation to all aspects of probation supervision. But they also needed to be seen in the context of the government's desire to make individual probation officers more accountable to management and management more accountable to the government. And it followed that the need for probation officers to undertake two years' training as social workers, when all the procedures they will ever need to follow were laid out in a glossy, ring-bound booklet, must be open to question.

In February 1995 the Home Secretary repealed the legal requirement for all new probation officers to hold a social work qualification, thus ending the control by higher education of probation training. The decision was justified on two grounds: first, that, since Social Services social workers are not required by law to have a social work qualification, why on earth should probation officers be required to do so? and, second, that existing training selection discriminated against mature students, particularly men who had relevant experience and skills (for example, in the armed forces).[7] The first argument was, logically, the stronger but politically weak, since most people agree that more social workers, rather than fewer probation officers, should be professionally trained. The second argument was disingenuous in the extreme, since the probation service has always recruited a proportion of older, second-career men. But it has insisted on retraining them.

The Conservative government was willing to leave all initial training to the Probation Service itself, bringing it in line with the Prison and Police Services. The new Labour government has been persuaded to recognise a Diploma in Probation Studies as part of a 'quickie' two year degree course based in selected universities but firmly under the control of probation service consortia, who will select and sponsor the small number of trainees who will qualify through this route. A large proportion of the training will be work- and competency-based, while the academic input will be strictly controlled and will focus on the 'What works?' research agenda. Quite how these arrangements will fit in with the renamed service remains to be seen - a Diploma in Public Protection Studies perhaps?

Some might say that in this, as in other aspects of the job, the probation service has precipitated its own downfall with its constant criticism, over the previous decade, of social work training. Particularly damning was research undertaken in the late 1980s by Davies and Wright (Hardiker & Willis 1989) which purported to show that probation students on social work courses considered themselves ill-equipped and inappropriately trained for their future employment. But reminding the service of this seems rather distasteful - like suggesting that a dear friend might have contributed to his own demise by reckless behaviour.

More orders mean less exclusion

The third fallacy is that the proliferation of court orders (both criminal and civil) designed to reintegrate offenders and (as we shall see) sub-criminal anti-social elements into the community will do precisely that. One of the problems with punishment in the community is that the kind of offender deemed suitable for community sentences is getting ever more tightly defined. I want to suggest that at least four groups of offenders are being increasingly excluded from 'reintegrated' community punishment, while at the same time being con-

7 In 1987 female probation officers formed 42% of the total; in 1997 the proportion was over 53% (Home Office 1998c).

structed as suitable targets for new mechanisms of control which have no such objectives. Those groups are:

- Women
- Black offenders
- Sex offenders
- Young offenders

I have argued elsewhere (Worrall 1998) that there should be serious concern about the reduction in the numbers of women being placed on probation and the increasing masculinisation of the Probation Service. An increased awareness of the need to divert women who commit minor offences from the formal criminal justice system and the new rhetoric of community punishment as 'tough and demanding' (and suitable for hardened male criminals) have combined to make sentencers increasingly reluctant to use community sentences for women in England and Wales. But while some women benefit from this, many do not, and while numbers on probation supervision are declining (from 29% of all such orders in 1983 to 18% in 1994), numbers in prison have doubled in the past five years (from 1,500 in the early 1990s to over 3,000 in 1998). Women, of course, are not excluded from community sentences but are subject to the same 'suitability test' as men. This results in a trap whereby women can only be admitted to this provision if they can be constructed as being as intractable as men. But since these refractory women tend to be tolerated less than their male counterparts, there is always the danger that women constructed as suitable for tough, demanding community sentences are simultaneously perceived as 'unfeminine' and therefore as 'needing' custodial control.

Although more difficult to quantify, the over-representation of African-Caribbean offenders in prison and their under-representation on community sentences is a well-rehearsed problem (Cook 1997). Hood (1992) confirms previous research findings that African-Caribbean men are less likely than white men to be given community punishments such as probation orders or community service orders. This appears to be partly due to an inability on the part of probation officers to make convincing recommendations for such options (Denney 1992). The optimism generated by Section 95 of the 1991 Criminal Justice Act (which attempted to outlaw discrimination in the administration of criminal justice) has long since disappeared.

The debate on working with sex offenders in the community has been virtually foreclosed. The field of intervention has been exploited to its maximum but, despite evaluation studies that indicate grounds for cautious optimism (Vennard, Sugg & Hedderman 1997), official government discourse now totally rejects the language of rehabilitation in favour of the language of surveillance and control through information (Hebenton & Thomas 1996). As a result of the Sex Offences Act 1997, every convicted sex offender has to register with the Police, who have discretion about the disclosure of information to third parties on public interest grounds. Consequently, numerous sex offenders released from prison have now been hounded out of one neighbourhood after another, some ending up as residents of police stations for their own protection and many others adopting nomadic — and therefore more dangerous — lifestyles. The new Crime and Disorder Act 1998 buttresses the Sex Offences Act by creating a new civil order — the Sex Offender Order — which allows courts to impose restrictions of movement on registered sex offenders. The probation service has no alternative discourse with which to challenge this shift because it has itself accepted the official construction of the sex offender. It has sacrificed its better judgement about why people offend and what makes them stop, based on decades of accumulated wisdom, and has found that it no longer matters (to the public, the media or the government) whether or not it delivers in terms of preventing recidivism. The sex offender has been constructed as

irredeemable. It is no longer his crimes that are unacceptable; he himself is unacceptable as a member of the community. He is forever non-reintegratable.

As far as young offenders are concerned, there has been a three-dimensional moral panic that has marginalised the Probation Service and demonised Youth Justice workers (Worrall 1997). The return to so-called Victorian values has both reflected and reinforced a perceived desire of public opinion to treat young criminals less and less differently from their adult counterparts. Two emergent moral panics of the early 1990s have been joined by a third, more recent, folk devil. 'Rat boy', the elusive persistent offender who laughs at the system because he is too young to be imprisoned, was soon accompanied by the more awful spectre of 'Child Killer' (following the murder of Jamie Bulger) and now both have been joined by 'Tank Girl', the new breed of violent, 'feminist' girl criminal. The 'growing out of crime' school (Rutherford 1986) taught us that many young people experiment with offending but most desist as they mature. A smaller group persists to become young adult criminals and an even smaller group commits one very serious offence. By conflating these three distinct groups, the myth is now being created that increasing numbers of juveniles are persistently committing increasing amounts of very serious crime - and increasing numbers of them are girls! And none of these young demons can any longer be constructed as being suitable for traditional supervision in the community.

Instead, the government has responded in three ways through the provisions of the Crime and Disorder Act 1998. First, it has abolished the concept of 'doli incapax' which provided a transitional zone between the age of criminal responsibility (10 years) and the age when a young person was deemed fully to understand the difference between 'serious wrong' and 'simple naughtiness' (14 years). Between the ages of ten and fourteen years there existed a rebuttable presumption that the child did not have that understanding. The abolition of this provision is in line with the removal in 1994 of the minimum age (previously 14 years) for a charge of rape and the introduction in 1998 of Secure Training Centres (child prisons) for 12-14 year old offenders.

Second, the Act makes major changes to the lower end of the Youth Justice system, changes which will almost certainly increase the numbers of young teenagers drawn into the purview of the system. Police cautions are to be replaced with a system of reprimands and warnings, the latter involving referral to the new inter-agency Youth Offending Teams (consisting of police, social workers, probation officers, education and health representatives) for possible further intervention in the form of a rehabilitation program. Courts are also being given additional powers to sentence young offenders to reparation orders and action plans, both of which are to be imposed at an early stage of a criminal career. At what is supposed to be a later stage, the new Detention and Training Order provides a new single custodial sentence for 10-17 year olds, thus removing the previous cut-off point for custody, which had been 15 years. The smooth path from freedom to confinement appears more like a motorway, set to turn naughty children into serious criminals faster than ever before.

Third, and perhaps most worryingly, the Act introduces a number of civil orders (backed with criminal sanctions) to control sub-criminal anti-social behaviour - or incivility. Anti-social orders can be issued against families who harass or intimidate their neighbours. Although the Act envisages that these orders will be used only to control serious criminal or sub-criminal behaviour and not minor neighbour disputes, it remains to be seen how this is used in practice. Parenting orders can be made against parents deemed to be in need of counselling or guidance in good parenting, requiring them to attend classes or sessions. Child Safety Orders (which have nothing to do with child protection, child abuse or child neglect) are designed to control children under the age of 10 years who appear to be unsu-

pervised or causing a nuisance. Local Child Curfews allow the Police to impose temporary curfews in particular areas and the Police are also given powers to remove any child in a public place that they suspect to be truanting from school. A child who breaches a curfew order is returned home but if there is no-one at home to receive them, they may be taken into police protection under child care legislation. Presumably, they may also be made the subject of a Child Safety Order and their parents the subjects of a Parenting Order.

It has to be remembered that there is widespread support for such measures in England and Wales. The Labour government's argument is that those who suffer most from crime and incivility are respectable working class families and older citizens, who cannot afford to move away from crime-prone neighbourhoods. The fallacy is believing that legislation can resolve problems created by years of disinvestment in the employment, housing, transport, educational and health needs of such communities. The extent to which such orders are used to discipline already vulnerable groups will require close monitoring. There is an obvious danger that Anti-social Orders will be used against families of differing ethnic and cultural backgrounds and that Parenting Orders will be used disproportionately against lone (female) parents, who are increasingly held responsible for the crimes of young men, by refusing to marry them, stay married to them or properly socialise their off-spring (Young 1996; Cook 1997; Worrall, forthcoming).

Anything is better than prison?

In a recent article, von Hirsch asks the question 'What is the acceptable penal content of non-custodial sentences?' (1998:195) and cautions against the fallacy that 'anything is better than prison'. By this, he means the misguided belief that offenders are willing to put up with any deprivation, humiliation or imposition, provided it stops short of imprisonment and that we need not, therefore, concern ourselves overly with ethical constraints. I have raised similar concerns elsewhere in relation to electronic monitoring (Worrall 1997: 30-32) and the confrontative nature of work with sex offenders (1997: 124).Von Hirsch asks whether, for example, we are entitled to require convicted drunken drivers to carry bumper stickers indicating their drinking habits. And everyone I have spoken to recently seems to remember the television footage of a young teenage girl standing outside a shop with a placard announcing 'I stole from this shop'. Von Hirsch points out that we might wish offenders to be ashamed of their behaviour and we might try to persuade them of the error of their ways, but cannot ethically require them to endorse attitudes with which they disagree, how self-evidently 'right' those attitudes may appear to be:

> Punishments should be of the kind that can be endured with self-possession by persons of reasonable fortitude. These individuals should be able to undergo the penalty (unpleasant as it inevitably is) with dignity, protesting their innocence if they feel they are innocent or acknowledging their guilt if they feel guilty - but acknowledging it as a *person*, not as a *slave*, would do. A person can endure the deprivation of various goods and liberties with dignity, but it is hard to be dignified while having to carry out rituals of self-abasement, whether the lockstep, the stocks, or newer rituals (von Hirsch 1998:194).

Punishment in the Community is no longer a matter only for offenders and those who work in the criminal justice system. Clearly, everyone - and certainly every parent - is now vulnerable to allegations of incivility, anti-social behaviour or poor parenting. Everyone may now find themselves facing the 'newer rituals' of New Labour's brave new world.

Seeing custody as the alternative

In his essay 'More justice, less law' John Pendleton (1995) argues that we must try to keep as many people as possible out of the criminal justice system because most of the

things that need to be done to put wrongs right in society cannot be done through sanctions. Playing at 'restorative justice' and 'mediation' in a grossly unequal society is, to mix the metaphors, applying no more than first aid to a gaping wound. Such approaches are a *reflection* of a just and confident society but they do not create it. Only when there is a political will to invest in human, social and cultural capital and a willingness for sentencers to see custody as the alternative - the sentence of last resort - will things change. And the Probation Service has to be prepared to engage with the social worlds which clients inhabit. As Drakeford and Vanstone (1996) say, it must 'rescue the social' and eschew 'rigid standards and procedures supported by macho correctionalism and "radical managerialism"' George Mair and Chris May's study of *Offenders on Probation* shows unequivocally that convicted offenders inhabit a world that is very different, in respect of every social indicator, from that of the general population:

> Irrespective of how these characteristics are related to offending, the poverty and deprivation exhibited by those on probation is an important factor which is likely to have implications for supervision and should not be forgotten or dismissed (Mair & May 1997: 30)

The role of community punishment as a means of reducing the prison population is a failure. There is no relationship between the use of community punishment and the size of the prison population *unless*, as with the 1991 Criminal Justice Act, there is a deliberate curbing of the court's sentencing powers through legislation. It should not be forgotten that, in the period between 1988 and 1993, the prison population in England and Wales fell from 50,000 to 42,000, largely as a consequence of the efforts of a senior official at the Home Office and a small network of like-minded researchers and civil servants (Downes 1997). But, left to their own devices, in the current worldwide obsession with internal law and order, courts find it hard to resist the 'pull' of imprisonment.

Downes' advice to the new government was:

> The main priorities for crime prevention and control concern measures which are not in themselves crime-specific. They are problems that need to be tackled by any new government as priorities in their own right: on jobs, on housing, on education and on inequality (1997:11)

Sadly, such sound advice has not only been ignored in favour of 'crime specific' measures, but increasing kinds and amounts of undesirable behaviour are being criminalised. More dangerously, the Labour government has continued the endeavour of the previous government artificially to minimise genuine differences of principle and approach, constructing such differences as subversive and *Other* - to be outlawed and excluded from legitimised discourse.

In a highly entertaining article, Haines and Sutton (forthcoming) apply Weber's model of the sociology of religion to the discipline of Criminology, arguing that there is, *inter alia*, constant conflict between the 'magicians' (whose prime concern is with 'what works') and 'priests' (the guardians of dogma). They conclude that this, and other, tensions are probably the destiny of the discipline and only become negative 'when we try to resolve these tensions'. The same observation can be made of the Labour government. 'Cut-offs', obstacles and holes in the road that runs between freedom and confinement are extremely important in keeping the debate about crime and punishment open. The public will be least protected by foreclosure of that debate as a result of a perceived consensus about the solutions.

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