



**THE TENTH PUBLIC LECTURE**

**In memory of**

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**‘Carcentricity: fatal attractions’**

**Given by**

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## **Introduction**

I generally do not favour one-liners and linguistic coinages. But this evening I want to make an exception. I want to talk about the fatal attractions of carcercentricity: what I shall term the appeal of custody as the solution for crime and disorder ills. I want to describe the state of play that prevails south of the border. I want to describe the trend in sentencing and then turn to proposals currently before Parliament which, despite apparent decarcerative good intentions, may exacerbate the trend. But I also want to sketch what I consider to be a more positive future, one that is possible if our politicians take up some of the options that they have already placed on the statute book and will shortly do so.

### **Sentencing Drift: the carceral centrifuge**

Most people, however slight their acquaintanceship with penal policy, are probably aware that prisons in England and Wales are overcrowded. The fact is regularly paraded before those members of the public that listen to television or radio news or read a newspaper, tabloid or broadsheet. The well-publicised reports of the Inspectorate of Prisons repeatedly draw attention to prisons overcrowding and its baneful consequences for regimes, the incidence of self harm, the delivery of interventions, effective prisoner resettlement, and so on (see, for example, HMI Prisons 2002, 3-4). The prison staff associations are not slow to draw attention to the negative operational consequences of prison system overcrowding and the highly professional penal policy pressure groups in England and Wales – the Prison Reform Trust, the Howard League, NACRO – parade the issue as a leitmotif in practically everything they do (see, for example, Levenson 2002; Howard League 2003). Nor do senior Home Office officials and Ministers, including those responsible for prisons policy, fail to acknowledge the operational problem (see, for example, reports of the pronouncements of Phil Wheatley, Director General of Prisons, in the *Guardian* and *Daily Telegraph*, 18 August 2003). All regularly concede the hard choices that they are required to make, readily admit that the situation is not desirable, and maintain that they are working actively to address it. All maintain that they are wedded to the proposition that imprisonment be used only as a last resort. Indeed, many of the players in this debate have come to see ‘crisis’ as a descriptor which will usefully lever in resources: the term is repeatedly used but with possibly diminishing effect. We have lived, it appears, with the prisons crisis for so long that it no longer sets the fiscal or any other pulse racing in quite the way that it did.

The facts, which no one contests, are startling. The prison population in England and Wales currently stands at 72,500, near its all-time high of just over 74,000, reached this summer. It has risen from approximately 41,000 in 1991, or 75 per cent, in a little over a decade. The trend continues upwards. The most recently published prison population projections, not taking into account the legislative proposals I will discuss below, suggest that the prison population will rise to between 91,400 and 109,600 by 2009 (Councell and Simes 2002). England and Wales already has, at 140 per 100,000 population, the highest incarceration rate in Western Europe (see Home Office 2003, Table 1.19; Hough, Jacobson and Millie 2003, Table 1.1). We have long since overtaken Portugal as the league table leader. All this is widely known, acknowledged and discussed. It no longer seems to cause great consternation.

Rather less well known is the fact that the problems besetting the Prison Service are mirrored within the Probation Service. If the prison system is overcrowded, then the Probation Service is overloaded, with larger probation caseloads increasingly silting up with low risk offenders. Sentencing policy in England and Wales has in recent years become increasingly punitive, interventionist and costly. Let me flesh out and substantiate these assertions and explore what is happening in greater detail.

### **Use of Imprisonment**

The dramatic growth in the prison population has recently been the subject of an exhaustive study by Mike Hough and his colleagues (Hough, Jacobson and Millie 2003). They show conclusively that it has not resulted from the courts sentencing more offenders – in fact the number of defendants dealt with by the criminal courts has changed very little during the last decade – nor does the explanation appear to lie in the mix of offences coming before the courts. Recorded crime has fallen overall since 1995, as has the clear up rate, though the incidence of some crime has risen as have some categories of offenders appearing before the courts. During the period 1991-2001 the proportions of all defendants found guilty of sexual offences, violent offences and burglary fell significantly; the proportion accounted for by offences of robbery, theft and handling, fraud and forgery and criminal damage remained much the same; and the proportion convicted of drugs offences increased significantly (*Ibid.*, Table 2.6; see also Corkery 2002). None of the changes, however, is sufficiently large to account for the sentencing trend.

There are two other offence-related possible explanations. First, that within each of the offence groups the mix of offences has become more serious. Secondly, that within each offence sub-group the offences have become more serious of their type. The Home Office has not found much evidence to support the first possibility and the statistics shed no light on the second (Hough, Jacobson and Millie 2003, 11), though it is an issue to which I want to return.

This means, setting aside the use of remands in custody - the rate of which has risen, but not greatly, and thus we can set this factor on one side - that there are two remaining possible explanations: an increase in the rate at which the courts resort to custody as a sentence and/or an increase in the length of the custodial sentences passed by the courts.

The Criminal Statistics show that there has been a significant increase in the custody rate.

**Table 1 Adult (21 and over) custody rate at the courts<sup>(1)</sup>**

Year	Magistrates' courts %	Crown Court %	All courts %
1991	5	46	17
1996	10	61	24
1997	11	61	25
1998	13	61	25
1999	14	63	26
2000	16	64	28
2001	16	64	28

Notes

(1) Persons aged 21 and over sentenced to immediate custody as a percentage of all persons of relevant age group sentenced for indictable offences.

Source: *Criminal Statistics England and Wales 2001* Table 7.13 (Home Office, 2002a)

The increase has been across the board, for males and females, for offenders in every age group, for the magistrates' courts and the Crown Court and for every offence group. However, the increase has been pronounced for particular offence groups.

**Table 2 Adult (21 and over) custody rate at the courts by offence group - 1991 and 2001**

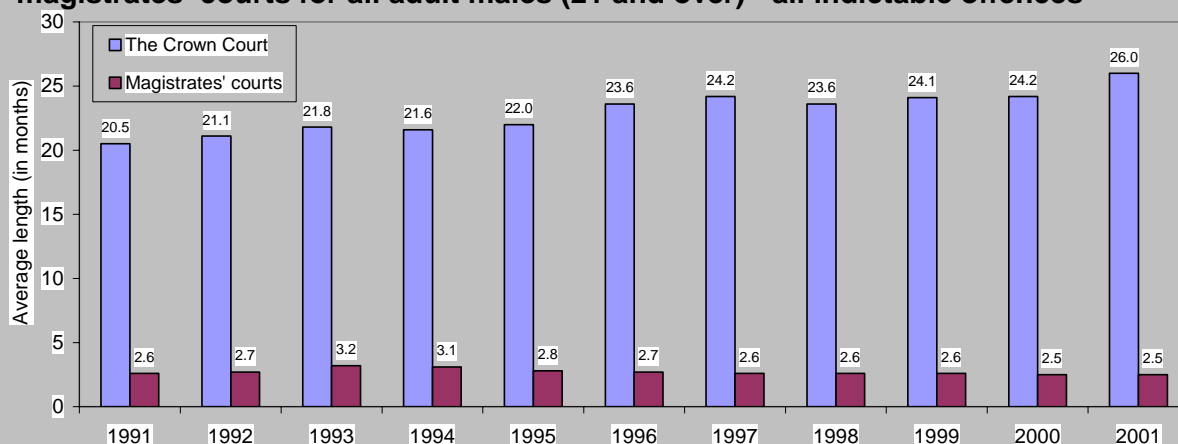
Offence group	Magistrates' courts				The Crown Court			
	1991		2001		1991		2001	
	Male %	Female %	Male %	Female %	Male %	Female %	Male %	Female %
Violence against the person <sup>(2)</sup>	5	2	19	10	47	20	61	34
Sexual offences	4	-	25	17 <sup>(3)</sup>	69	43 <sup>(3)</sup>	77	39 <sup>(3)</sup>
Burglary	15	9	40	27	56	27	79	60
Robbery	*	*	*	*	88	60	92	79
Theft and handling	6	2	23	14	36	19	59	40
Fraud and forgery	6	2	18	9	42	23	57	34
Criminal damage	5	4	8	5	36	13	43	28
Drugs offences	2	1	4	4	55	39	73	60
Other offences	4	2	10	6	41	21	53	33
Motoring offences	2	1	10	4	49	8 <sup>(3)</sup>	62	42 <sup>(3)</sup>
<b>Total indictable offences</b>	<b>6</b>	<b>2</b>	<b>17</b>	<b>11</b>	<b>48</b>	<b>23</b>	<b>66</b>	<b>45</b>

Source: *Criminal Statistics England and Wales*, Tables 7.15 and 7.16 (Home Office 2002a)

As Hough and his colleagues show, if all offenders sentenced in all courts are considered in aggregate for the years 1991 and 2001, then the proportion of burglars of dwellings sentenced to custody increased from 37 to 60 per cent. Other significant increases in the proportionate use of custody include: burglars of premises other than dwellings, up from 21 to 37 per cent; violent GBH offenders, up from 28 to 54 per cent; violent ABH offenders, up from 10 to 27 per cent; and drivers while disqualified, up from 18 to 47 per cent (*Ibid.*, 13). These are dramatic increases.

Analysts of the prison population will be familiar with the distinction between ‘stock’ and ‘flow’ or the average daily population and committals/receptions. Thus though the biggest increase in committals to prison in recent years has been of short-term prisoners serving less than twelve months, the proportion of the average daily prison population serving long-term sentences of four years of more has grown, neither statistic gives us an accurate guide to changes in the duration of sentences for like offences. We can approach the latter issue in two ways, first by looking at the average length of sentences passed by different courts and secondly by considering the distribution of short, medium and long-term custodial sentences passed on offenders in particular offence groups.

**Figure 2.2. Average length of sentence given by The Crown Court and by magistrates’ courts for all adult males (21 and over) - all indictable offences**



**Notes**

- (1) Up to 30 September 1992, includes partly suspended sentences given for principal offences; the full length (i.e. the suspended and the unsuspended part) of such sentences is included.
- (2) A charging standard for assault was introduced on 31 August 1994, which led to the increased use of the summary offence of common assault.
- (3) Excludes life sentences.

Source of figures: *Criminal Statistics England and Wales 2001 Tables 7.15 and 7.16* (Home Office, 2002).

The data displayed in Table 3 show that whereas there has been a three-fold increase in the proportionate use of custody by the magistrates’ courts between 1991 and 2001, the average duration of those sentences is now at about the same level, or slightly below, what it was at the beginning of the 1990s. Not so for the Crown Court, however. There the average length of custodial sentences, once again in the context of a considerable proportionate increase in the use of custody, has risen from 20.5 months in 1991 to 26 months in 2001.

Table 3 shows what has been happening within offence categories.

**Table 3 Proportional changes in use of long or short sentences in terms of offence group (adults 21 and over) – 30 June 1991 to 30 June 2001<sup>(1) (2)</sup>**

Sentence length	Violence against the person	Rape	Other sexual offences	Burglary	Robbery	Theft and forgery	Drugs offences	Other offences	Offences not recorded	Total
Up to and inc. 3mths	+1	-	-	-	<b>+1</b>	<b>+7</b>	-	<b>+14</b>	-2	<b>+2</b>
> 3mths to 6mths	+1	-	-	-1	-	<b>+9</b>	-1	<b>+5</b>	-	<b>+1</b>
> 6mths to 12mths	-	-	-	-5	-	<b>+1</b>	-2	-5	-	-3
> 12mths to 18mths	-	-	-1	-9	-	-7	-2	-2	+1	-4
> 18mths to 3yrs	-1	-3	-1	-1	-	-7	+2	-6	+1	-3
> 3yrs to 4yrs	+1	-4	-	<b>+10</b>	<b>+4</b>	-1	+7	-1	+2	<b>+3</b>
> 4yrs to 5yrs	+1	-8	-	<b>+5</b>	<b>+3</b>	-	+2	-2	-1	<b>+2</b>
> 5yrs to 10yrs	-1	<b>+1</b>	<b>+2</b>	<b>+1</b>	-8	-2	-8	-4	-2	-
> 10yrs but < life	-1	<b>+8</b>	<b>+2</b>	-1	-2	-	+2	-	-1	<b>+1</b>
Life	-1	<b>+6</b>	-	-	<b>+2</b>	-	-	-	+1	<b>+1</b>
<i>Longer or shorter sentences?</i>	<i>No overall change</i>	<i>Longer</i>	<i>Longer</i>	<i>Longer</i>	<i>Generally shorter</i>	<i>Shorter</i>	<i>No overall change</i>	<i>Shorter</i>	<i>No overall change</i>	<i>Generally longer</i>

Notes

(1) Where sentence length has become longer or shorter, positive changes are in bold.

(2) Total 1991=29,004; total 2001=44,487

- Where the proportional change was less than 1%.

Source: *Prison Statistics England and Wales 1991* Tables 4.1 and 5.1; 2001 Table 4.1 (Home Office, 1993; 2003a)

The data here show, as Hough and his colleagues have emphasised (*Ibid.*, 15), that the offence groups where short-term sentences have become more common are those where the courts were previously more likely to impose a non-custodial sentence – theft, handling and motoring: in these categories the custodial sentences passed have on average not been getting longer. However, in other offence categories – robbery, burglary, rape and other sexual offences – it is clear that the custodial sentences passed have been getting longer, with long-term sentences increasingly replacing medium-term lengths. Further, if one considers the trend in the relationship between custodial sentences passed and served, then it becomes apparent that the gap between short and long-term sentences has become progressively more.

**Table 4 Average number of months served in custody under sentence<sup>(1)</sup> – all adult males (21 and over) 1991 and 2001**

Adult males	1991		2001	
	Average length of sentence	Percentage of sentence served under sentence	Average length of sentence	Percentage of sentence served under sentence
Up to and including 3 mths	2	42	2.1	39
> 3 mths to 6 mths	5.3	43	4.8	39
> 6 mths but < 12 mths	10.2	41	8.7	37
12 mths			12	38
> 12 mths to 18 mths	16.6	42	16.4	41
> 18 mths to 3 yrs	28	42	28.3	43
> 3 yrs but < 4 yrs	45.7	49	42.3	43
4 yrs			48	54
> 4 yrs to 5 yrs	58.1	49	57.5	55
> 5 yrs to 10 yrs	84.6	53	85.4	53
> 10 yrs but < life	177.2	49	158.2	55
<b>All lengths of sentence less than life</b>	<b>18.4</b>	<b>46</b>	<b>16.3</b>	<b>46</b>

Notes

(1) Excludes time served on remand.

Source: *Prison Statistics England and Wales 1991* Table 4.15; 2001 Table 4.11 (Home Office, 1993; 2003).

Short term prisoners are being let out progressively earlier, in recent years as a result of the introduction, and then extension, of home detention curfew, whereas long term prisoners are generally being required to serve more of their sentences in custody by the executive authorities (see Home Office 2003, Chapters Four and Five; Morgan 2002, 1129). The most striking illustration of this trend is to be found in the statistics relating to life sentence prisoners. The number being received into custody annually has more than doubled in the last ten years and the annual daily population is now over 5000. This exemplifies a policy trend, which Tony Bottoms has called *bifurcation* (Bottoms 1977), of separating out serious and allegedly dangerous offenders from the mundane or run-of-the-mill.

### **More Punishment in the Community**

Let us turn now to offenders subject to community penalties supervised by the Probation Service. The courts in England and Wales now have a larger range of non-custodial penalties available to them than any other jurisdiction with which I am acquainted and, as we shall see, that range will be added to when legislation currently before Parliament receives the Royal Assent. The last decade has

witnessed the introduction of the Combination Order, the Curfew Order with Electronic Monitoring, the Drug Treatment and Testing Order (DTTO), the Exclusion Order and the Drug Abstinence Order. A separate set of new community orders has been introduced for juveniles. The language of community penalties has also been toughened. Probation Orders have become Community Rehabilitation Orders. Community Service Orders have become Community Punishment Orders. Combination Orders have become Community Punishment and Rehabilitation Orders. However, this process of toughening-up and ostensible intensification of intervention has not, as we have seen from the custodial statistics, served to displace custody. On the contrary. All the evidence supports the view that it has ratcheted up a more punitive approach across the board.

The big shift in sentencing practice over the last ten years has been the decline in the proportionate use of financial penalties (as dramatic as the increase in the use of custody), a slight decline in the use of discharges, conditional and absolute, and a significant increase in the use of a more diverse range of community penalties.

**Table 5 – Proportions of offenders aged 21 and over sentenced to discharges, fines and community penalties for indictable offences, all courts.**

<b>Sentence</b>	<b>1991</b>	<b>2001</b>
<b>Discharges</b>	<b>17.5</b>	<b>15.5</b>
<b>Fines</b>	<b>37.4</b>	<b>25.9</b>
<b>CROs</b>	<b>9.5</b>	<b>13.6</b>
<b>CPOs</b>	<b>7.2</b>	<b>8.6</b>
<b>CPROs</b>	<b>-</b>	<b>2.2</b>
<b>Curfew Orders</b>	<b>-</b>	<b>0.4</b>
<b>DTTOs</b>	<b>-</b>	<b>1.6</b>
<b>All Community Orders</b>	<b>16.7</b>	<b>26.3</b>

*Source: Criminal Statistics England and Wales Table 7.10 (Home Office 2003)*

If we consider the offences for which offenders currently supervised by the Probation Service have been found guilty, and some of these offenders' other characteristics, it appears that they are of a less serious nature than was the case a decade ago.

In 1990 26 per cent of probationers (CROs today) had violence against the person, a sexual offence, burglary or robbery as their principal current offence and slightly more, 28 percent, were convicted of a summary offence: by 2000 the equivalent figures were 16 and 36 per cent (Home Office 2002, Table 3.5). Community service (now CPO) offenders display a similar pattern. In 2000 18 per cent had been convicted for violence, sex, burglary or robbery compared to 28 per cent in 1990 and no fewer than two fifths (40 per cent) are now convicted of summary offences compared to one third (31 per cent) ten years ago (*Ibid.*). The proportion of combination order (now CPRO) offenders convicted of summary offences is at 43 per cent even higher, compared to 30 per cent ten years ago (*Ibid.*).

Further, these less serious probation-supervised offenders do not have a more serious offending history than was previously the case. As Table 6 demonstrates, the proportion of offenders subject to all types of community penalties who have

previously experienced imprisonment has fallen significantly (*Ibid.* Table 3.7) and those with no previous convictions has substantially increased.

**Table 6 – Criminal History of Offenders subject to Community Orders (%s)**

Type of Order	Previous Custody		No Previous Convictions	
	1990	2000	1990	2000
CRO	38	35	12	25
CPO	36	19	14	47
CPRO	45	34	10	27

Source: *Probation Statistics England and Wales 2001* Table 3.7 (Home Office 2002b)

Yet despite this pattern of less serious offending, the proportion of supervised offenders subject to at least one additional requirement, most commonly to participate in specified activities, has risen from 24 to 33 per cent (*Ibid.* Table 3.12). Not surprisingly the proportion whose CROs are terminated early for failure to comply with the terms of their order has risen (*Ibid.* Table 4.4), a trend which, given the current emphasis by the Government on the enforcement of orders, we can expect further to increase.

The picture that emerges, therefore, is that more and more offenders are getting mired deeper and deeper within the criminal justice system for doing less and less. The evidence is that since 1995 crime has fallen significantly, albeit the rate remains twice what it was as recently as 1980. Yet at 72,500 the prison population stands at a near record high and Probation Service has caseloads per frontline staff member approximately 30 per cent higher today than ten years ago, caseloads that are increasingly silted up with less serious offenders many of whom, ten years ago, would likely have been fined. Why has this happened?

### **Explaining the More Punitive Trend**

The two factors explaining the more punitive sentencing trend that most commentators have identified are:

- *The growth of a more intolerant public opinion climate* – reflected in public opinion poll evidence of increasing concerns about crime, mass media emphasis of the threat of crime, responded to by politicians from the principal political parties outbidding each other to present a tough ‘law and order’ stance in the hope of electoral advantage (see, for example, Dunbar and Langdon 1998; Downes and Morgan 2002; Roberts *et al* 2003)
- *Legislative and other legal changes* – of which there have been many. In addition to a succession of Acts incorporating tougher sentencing provisions (for example the doubling of the maximum sentence for causing death by dangerous driving in the Criminal Justice Act 1993 and the mandatory minimum prison sentences for drug traffickers and repeat burglars introduced by the Crime (Sentences) Act 1997, the scope for prosecution appeals has been extended and some guideline judgements from the Court of Appeal have

served to raised some sentencing tariffs (for a summary see Hough, Jacobson and Millie 2003, 24-9).

There does, of course, remain the possibility that the trend is not more punitive, but rather, as I suggested earlier, that the characteristics of the offenders being sentenced by the courts has changed in ways not straightforwardly revealed by the *Criminal Statistics*. Hough and his colleagues have explored this possibility through an analysis of the available contextual research and seeking sentencers' views. The proposition that offending is now more serious – both by type and in terms of persistence – they found to be the most popular explanation given by sentencers for the trend in their decisions (*Ibid.* 30-31). There is limited support for the contention in the research literature. The proportion of offenders sentenced to imprisonment with no or few previous convictions has marginally fallen whereas those with 11 or more has slightly increased (see Home Office 2003, Table 4.2). There is also abundant evidence that the number of dependent drug and heavy alcohol users in Britain has greatly increased, large proportions of arrestees test positive for heroin or cocaine and the links between drug dependency and persistent offending are strong (Godfrey *et al* 2002; DoH 2003; Bennett *et al* 2001; MHA Matrix and NACRO 2003; Richardson *et al* 2003). These connections may to some extent substantiate the contention which in my experience is made by many sentencers, namely that fewer offenders coming before them are today able to pay fines than was formerly the case and that they more typically have multiple personal problems, including drug abuse and debt, which need to be addressed.

Nevertheless, as we have seen, an increasing proportion of offenders supervised by the Probation Service are first or summary offenders. Further, the assessment tools most widely employed by the Probation Service show that a high proportion are at low risk of re-offending.

**Table 7 – Offender OGRS Scores – % Distribution by Sentence**

	0-29	30-76	77+
Adult/Life Imprisonment	9	48	42
Youth custody	16	54	30
CPRO	25	59	16
CRO	15	59	25
CPO	66	29	5
Fine	41	54	6
Conditional Discharge	50	49	0
Misc (usually minor)	31	42	26

**Source: National Probation Directorate, personal communication**

OGRS, the best validated predictor of future reconviction, is based only on current offence, age and previous convictions. OGRS data show that a quarter of offenders subject to CPROs, and two thirds of offenders subject to CPOs, have scores below 30, that is the threshold level below which it is considered that participation in an accredited offending behaviour programme is not just unnecessary but would likely be counter-productive – that is, would serve to increase rather than reduce the likelihood of re-offending. This is particularly important given that the NPS is about to roll out an accredited system to be termed ‘enhanced community communication’ a system which the data suggest two thirds of offenders currently on CPOs do not need.

This picture of low risk is replicated in the scores assigned to offenders by the joint assessment tool – OASys – which the Probation Service has developed and is rolling out with the Prison Service.

**Table 8 – OASys Assessments of Likelihood of Reconviction and Risk of Harm**

<b>RECONVICTION</b>	<b>CPO</b>	<b>CRO</b>	<b>CPRO</b>	<b>DTTO</b>
Low	57	23	31	4
Medium	39	55	54	42
High	4	22	16	54
Risk to Children - Low	97	90	96	97
Risk to Public - Low	83	78	68	86
Risk to Staff - Low	99	97	99	100
Risk to Known Adult - Low	91	84	68	86

Given that practically all offenders subject to court orders involving the supervision of the Probation Service have earlier been subject to pre-sentence reports produced by the Probation Service, and given that it is rare for pre-sentence reports to recommend discharges or financial penalties (Home Office 2002b, Table 6.4), these data suggest an additional explanation for the more interventionist sentencing trend. Namely, that the so-called correctional services – following the American fashion, Martin Narey, formerly Director General of the Prison Service, was this year appointed Commissioner for Correctional Services (youth justice, probation and prisons) – are over selling their services. That, in particular, the NPS is, through its pre-sentence reports, colluding with or, at the

very least, second-guessing, the more punitive tendencies of sentencers. The development of the so-called 'What Works' approach to penal policy, and the revitalisation of rehabilitative thinking that we can 'make people better' (Raynor and Vanstone 2002), appears to have given some support to the view that both prisons and probation can be made to work. Michael Howard's claim from the early 1990s has not been banished but lives on in a new more subtle guise. The widely held view of the 1980s that 'imprisonment makes bad people worse' has been replaced by the more than lurking suggestion that a period of imprisonment is an opportunity better to address so-called criminogenic factors – drug abuse, distorted thinking, an absence of basic skills, etc – previously neglected. Further, that community penalties offer an opportunity to reduce socio-economic marginality and diminish social exclusion. And, of course, all these interventions *can* be used more positively. But enthusiasm for so doing may have blunted the fact that the Probation Service does not, nor has it ever, existed primarily to promote the social welfare of offenders and prisons remain the worst conceivable environment within which to achieve any long-term personal benefit.

### **Legislation in the Pipeline**

There are no fewer than five bills currently before Parliament with a bearing on criminal justice. One of them, the Criminal Justice Bill, incorporates provisions with very significant potential implications for the workload of the Prison and Probation Services. The principal relevant provisions are:

- A cafeteria of sentencing aims. The Bill states that any court dealing with an adult offender 'must have regard to' punishment, the reduction of crime (including its reduction by deterrence), reform and rehabilitation, the protection of the public and reparation.
- Reversal of the presumption in favour of bail for arrestees who positively test for Class A drugs, whose offence is allegedly drug-related and who are unwilling to undergo assessment or who, having been assessed, are unwilling to participate in whatever intervention is offered.
- That any previous convictions, where they are recent and relevant, should be regarded as an aggravating factor, thereby increasing the severity of the sentence. This represents strengthening of the existing principle in s.151 of the Powers of Criminal Courts (Sentencing) Act 2000.
- An increase in the powers of magistrates to impose custodial sentences from 6 to 12 months, and 65 weeks in respect of two or more offences to be served consecutively. Another clause enables the Secretary of State to increase by order those limits to 18 and 24 months respectively for a single or two or more offences.
- The creation of a Sentencing Guidelines Council to be chaired by the Lord Chief Justice and comprising seven judicial members and five non-judicial members
- Replacement of all the community penalties with a single portmanteau *community order* to which can be attached no fewer than one dozen different requirements, or conditions, ranging from undertaking unpaid work,

participation in an activity or programme, refraining from a prohibited activity or subjection to a curfew or exclusion, to going to an attendance centre.

- Replacement of all custodial sentences of less than 12 months with something known as *custody plus*, namely that sets out a maximum period in custody of between 2 and 13 weeks accompanied by a licence period which must be of at least 26 weeks and the total length of which, in the case of consecutive sentences, must not exceed 15 months. During the licence period the offenders may be subject to requirements on the lines of a *community order*.
- Introduction of a new sentence of *intermittent custody* of between 28 and 51 weeks with respect to a single offence, 65 weeks in the case of consecutive sentences, whereby the courts will be enabled to specify the periods in each week to be spent in custody and on licence (for example, weekends in custody)
- Introduction of a new form of suspended sentence of imprisonment – known colloquially as *custody minus* - whereby a prison sentence of less than twelve months (now taking the form of a *custody plus* sentence) can be suspended for between six months and two years for as long as the offender does not commit a further offence and complies with requirements in the community along the lines required in a *community order*
- Introduction of life or indeterminate sentences for public protection for serious offenders where there is held to be a significant risk of further serious harm through the commission of further offences
- An increase in the maximum penalties for selected drugs and driving offences from five to fourteen years

The financial memorandum to the Criminal Justice Bill states that the sentencing provisions ‘will be implemented as part of a strategy which will aim to ensure that custody is reserved for sexual and violent offenders and serious persistent repeat offenders, and that the benefits of community supervision are made available for more offenders’ (*Explanatory Notes*, para 791). This implicit suggestion that the provisions will balance out and use of custody not rise, or rise only modestly, is lent support by the attached costings. These provide for only modest additional increases in prisons spending during the period 2006-2009 – between £36 and £47 million per annum – compared to the additional £176 to £194 per annum reserved for the Probation Service (*Ibid.* para 792). And of course there will be plenty of scope to achieve this result. The manner in which the new Sentencing Guidelines Council works, combined with the Government’s capacity to juggle implementation dates and their powers of executive release, may indeed result in the flattening out or even reversal in the dramatically upward trend in the use of custody in recent years. The latest custody figures regarding both juveniles and adults are hopeful (Youth Justice Board 2003, Figure 13), but it is not yet clear whether they will be sustained or whether they result from the efforts that the agencies involved have made to persuade sentencers that community alternatives, particularly the new *intensive supervision and surveillance packages* for juveniles, or *intensive change and control* programmes for young adults, are having an impact (*Ibid.*, 19-20).

The future is of course a matter of political choice. Among the huge *pot pourri* of provisions currently before Parliament are many that have the potential to move

us into positive territory or sink us further in the unconstructive predicament in which we currently find ourselves. It will depend on the political leadership that is given, backed by whatever resources are allocated. This leadership may be influenced by the recommendations about to be made to Ministers by a Cabinet Office-based Correctional Services Review led by one Pat Carter, a businessman consultant brought in by the Prime Minister to undertake the task.

In the time remaining to me let me sketch some of the possibilities.

How plausible is the outcome which the Treasury has agreed to fund? Critics of Government policy will be able to find abundant scope for predicting that the legislation I have described will exacerbate the more punitive trend of recent years and likely increase the prison population well beyond 100,000 by the end of the decade. They could point first to the fact that the core of the Government's crime strategy appears now to be closing what is termed 'the justice gap' (Home Office 2002c, para 0.4; Aim 3, Home Office 2003b). That is, reducing what criminologists used to call the attrition rate in crime recording and detection and success in bringing criminal justice proceedings. The Government has a target of increasing the number of offenders brought to justice (OBTJ) to 1.2 million by 2005-6 (a 17 per cent increase on the number in 2001-2). Secondly, the Government is focused on improving the *desistance* of detected criminals. This aim is represented by the target of reducing the rate of re-offending by 5 per cent by 2005-6. The contention will be that the Government is focused on existing offenders – that is, what is generally termed *tertiary* crime prevention – rather than reducing the likelihood that offences will be committed in the first places or focusing on groups at risk of offending within the population at large - *primary* and *secondary* crime prevention (Brantingham and Faust 1976). Success in this aim, it will be argued, will increase the number of offenders brought before the courts and concomitantly exacerbate the already growing burden on the Probation and Prison Services.

This contention has substance, but it is only part of the story and may not prove to be the driver of a more punitive trend. Despite the emphasis on 'narrowing the justice gap' – an objective, reducing criminal impunity, which the Government clearly takes to be essential for raising public confidence in the criminal justice system generally (see Home Office 2003c) - Home Office aims still include overall crime reduction targets for vehicle crime, domestic burglary and robbery (see Aim 1, Home Office 2003c). Further, the justice gap could be narrowed without employing punitive interventions. The latest, unpublished lower projections for the prison population, for example, *assume* that the 'narrowing the justice gap' target will be met or exceeded, but the latest data show that because the number of OBTJs includes those who accept offences *taken into consideration* or who are *cautioned*, the impact on the prison population has so far not been as large as was previously anticipated.

Further, there is substantial scope for extending the proportion of offenders dealt with non-punitively. The Criminal Justice Bill provides for *conditional cautions*, which holds out the diversionary promise of a significant shift away from prosecutions towards reparation, restorative justice and so on. At the time of writing the Bill does not envisage *conditional cautioning* involving agencies other than the CPS and the police on the arguable grounds that the Probation Services has *vires* only in relation to convicted offenders (it is not clear how the Service's tradition of providing pre-trial services in relation to approved premises, bail

information, etc, fits with this logic). However, given that restorative justice conferences are in many of the initiatives around the country convened by the police (see Young and Hoyle 2003), and the CPS is responsible for informing victims about what is happening in 'their' case, there is ample scope for getting many offenders to put right some of the wrongs represented by their admitted offences without court proceedings. Moreover, the Probation Service may yet be drawn into *conditional cautioning* schemes through late amendment of the Bill or subsequent provision. There is no reason why *cautioned* offenders could not be subject to a *condition* or *conditions* involving their participation in programmes, or accessing facilities, provided by either the Probation Service or one of its partners. There are, however, good reasons why the Probation Service might resist this suggestion. If the Service is already overburdened with low risk *convicted* offenders, it would make little sense for that burden to be further increased with responsibilities for *conditionally cautioned* minor offenders. However, at present this issue does not arise and no costs have been attached to the provision in the Bill. Even so, narrowing the justice gap need not, indeed should not, ratchet up the punitive trend.

Secondly, critics of the Bill may contend that insufficient has been done effectively to resuscitate use of the fine and other financial penalties. Indeed, they may plausibly argue the opposite. Clauses in the Criminal Justice and Courts Bills provide, in the event of default, for unpaid work or a curfew requirement or a disqualification from driving to be substituted for a fine. Critics may argue that it is doubtful that this will enhance the enforcement of financial penalties: on the contrary, it may encourage further prevarication by fined offenders in a poor position to pay or unwilling to pay. They may also emphasise that the Government has not been prepared to re-introduce the unit fine principle (by which a formula connection is forged between the seriousness of the offence and the disposable income, and thus capacity to pay, of the offender) incorporated in the Criminal Justice Act 1991 and so precipitately and unwisely abandoned in 1992. In which case, it will be argued, there is a very real danger that extended use of community penalties will continue.

I doubt this argument will prove sustainable. I anticipate that the Correctional Services Review will give a substantial boost to the argument that at a time when unemployment is at its lowest point for more than two decades it is not acceptable for the proportionate use of fines to be substantially lower today than 10-15 years ago. I anticipate that the provisions in the Courts Bill currently before Parliament (this places, *inter alia*, an obligation on defendants to complete means inquiry forms, enables courts to appoint Fines Officers with discretionary powers to take enforcement measures without offenders having to be brought back before the court, introduces discounts for prompt payment and excesses to be levied in the event of default and makes it easier for courts to order deductions from benefits), backed up by administrative initiatives (including the contracting out of fines collection), will serve to increase sentencers' confidence that fines imposed will be collected. The proportionate use of fines could return if not to former high levels then significantly increase.

Thirdly, critics may argue that the new portmanteau *community orders* are likely to be increasingly loaded up with the many requirements which the courts will henceforth be able to attach to them. It is true that the courts will be required to

consult an officer from the local YOT or Probation Area before inserting most conditions, but, as we have seen, the new expansive NPS has been willing to oversell its services and this tendency as yet shows no signs of abating. If *community orders* are loaded up with more and more requirements, in the same way that bail, for example, has in recent years increasingly had conditions attached to it, then it is almost inevitable, given the Government's general stress on enforcement, that a growing proportion of offenders will be returned to court for breach, some of them destined to have custodial penalties imposed as a substitute.

I have the impression, however, that the Correctional Services Review team has fully grasped these dangers and will stress the need to remove low risk offenders from the NPS workload. To the extent that this argument prevails how might it be done? I would stress two aspects: *process* and *disposal*.

There are signs that the Probation Service is re-thinking the form that pre-sentence court report advice takes. Chief Officers widely doubt that the increasing number of court reports the Service is being asked by sentencers to prepare are warranted and doubt that the shorter Specific Sentence Reports (SSRs), introduced partly to displace full-blown Pre-Sentence Reports (PSRs), are working to that end. Several Probation Areas have recently introduced short-format PSRs, produced on the same day as the court hearing, on the basis of a brief interview within the precincts of the court with the case being put down the magistrates' list. Why, quite apart from the fact that it offers potentially greatly reduced demands on probation officers, might this device be significant? If short-format PSRs are increasingly used in cases where a quick OGRS check reveals that the offender is low risk, and if the brief interview confirms that there are no significant risk factors for the Service to address, then we might see the Service recommending disposals falling short of community sentences for a significantly higher proportion of defendants than is currently the case.

I also detect increasing interest, which again the Correctional Services Review is likely to emphasise, in the growing efficiency and reduced cost of electronic surveillance techniques to monitor and track offenders. If the courts deem that offenders who though at low risk of re-offending nevertheless merit on tariff grounds a sentence more punitive than that represented by a financial penalty, then stand-alone electronic tagging orders could increasingly be imposed on offenders who, as we have seen, are currently often made the subject of community punishment or community punishment and rehabilitation orders. By this means very large numbers of low risk offenders could be removed from the Probation Service's caseload so as to provide the Service operational room for manoeuvre to do more intensive work with medium and higher risk offenders, many of whom are currently being sent to prison.

It is in relation to the latter category of offenders that the critics have more substantial grounds for fearing that the Criminal Justice Bill may exacerbate the growth in the prison population.

The *custody plus* provisions in the Criminal Justice Bill are on the lines of the recommendations of the Halliday Report reviewing the sentencing framework (Home Office 2001). Halliday devoted a great deal of attention to modelling the likely cost-benefit consequences of his proposals and, almost inevitably, described

a number of possibilities. Because *custody plus* involves more tightly circumscribing, and reducing, the degree to which any custodial sentence of less than 12 months involves time spent in initial custody, pessimists fear that sentencers might increasingly go for sentences of 12 months or more to avoid the constraints. Equally damagingly, sentencers contemplating intensive community interventions might, given the new opportunity represented by *custody plus*, be tempted to throw in a modest term in custody. In addition there arises the possibility that the savings in prisons places achieved by reducing the *initial* terms spent in custody might be outweighed by the breaches, and recall to prison, resulting from the likely intensive, and periodically judicially reviewed, supervision in the community. Halliday, who considered all these possibilities, estimated that his proposals might, depending on the different assumptions applied, result in either a reduction of 1500 in the prison population, or an increase of almost 10,000 (*Ibid*, Appendix 7, para 89). Either way, the consequences for the Probation Service were predicted to be much the same – an increase in their caseload of over 80,000 - it having been decided that the Service should supervise the resettlement, as currently it does not, of all prisoners, however short-term, on release on licence. Halliday's assumptions still apply.

Finally, the critics will point out, correctly, that various other provisions and recent announcements will certainly make some long sentences longer. In May 2003, for example, the Home Secretary announced principles, to be enacted under the Criminal Justice Bill, to inform the tariff for the amount of time life sentence prisoners will in future spend in custody. There are to be three levels. Certain murderers – for example, those who abduct and murder a child and terrorists – are to serve a whole life tariff. Others – murderers of police or prison officers, killing done for gain, etc – are to attract a starting point of 30 years. All others are to have a starting point of 15 years 'on which judges can build as necessary to ensure the appropriate sentence' (Home Office Press Release, 7 May 2003). These changes will greatly increase the average duration in custody of life sentences – which is currently just below 13 years – and they are in addition to other provisions, in the Criminal Justice Bill providing for life or indeterminate sentences of imprisonment for public protection where a serious offence has been committed and 'the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences'.

These provisions carry the danger of dragging upwards the tariffs of other offences. Much will depend on the decisions of the new Sentencing Guidelines Council and the degree to which it is backed by, and embraces, resources to model the consequences for the Prison and Probation Services. I think that the Correctional Services Review will recommend that this sort of cost-conscious approach be adopted.

### **Conclusion: Immediate Challenges**

To sum up, it is clear that the workload of the Probation Service will substantially increase as the various provisions in the Criminal Justice Bill commence over the next three or four years. Taking on responsibility for the supervision of short-term prisoners makes that certain. We can anticipate the number of offenders supervised by the Service rising from approximately 200,000 to somewhere between 250,000 and 300,000. The precise number will depend on the efforts,

which I anticipate will grow in their intensity, put into removing from probation caseloads those low risk offenders who might otherwise be conditionally cautioned, engaged in restorative justice processes, discharged, fined or electronically monitored by one means or another. What also seems clear, however, is that the staffing and other resources required by the Probation Service and its partners will depend as much on the *nature* as the *size* of its caseload. The offenders with whom the NPS will in future typically deal will likely be higher risk (both in terms of re-offending and likely future harm), be more intractable and exhibit multiple socio-economic problems and needs. They will have to be worked with more intensively if the Service is to enjoy the confidence of sentencers and the public at large in terms of public protection. It follows that scaling up the number of probation staff, assuming that the delivery of services is not contracted out to others, so as to match the anticipated caseload, will not suffice. No matter how future work with offenders is spread among the increasingly diverse probation workforce, caseloads cannot be allowed to grow yet further. If they do then the capacity of the Service to do the job – and thus its credibility – will undoubtedly be prejudiced.

As far as the prison population is concerned, the future is genuinely in doubt. The probability is that no matter what the impact of the particular provisions in the Criminal Justice Bill, it will grow towards 90,000 by 2009. If I am wrong about some of the prospects we have explored above, it may well exceed 100,000. Further, the process of *bifurcation* – shortening the time that less serious offenders spend in custody while keeping more serious (or dangerous) offenders in for even longer (see Bottoms 1977 and Morgan 2002) – will continue.

It seems possible, however, that, given strong political leadership, the provisions in the Criminal Justice Bill, backed up by the Correctional Services Review recommendations, may mean that we are on the cusp of a significant change of policy direction. *Parsimony* in the use of *custody* and *bifurcation across the range* may in future characterise the manner in which we deal with offenders. In this period of what some commentators have called *creative mixing* (Bottoms, Gelsthorpe and Rex 2001), when, as the Criminal Justice Bill emphasises, the full cafeteria of philosophical justifications and purposes can be drawn on by sentencers, we are likely to find different sentencing objectives being resorted to in support of different policies for allegedly different groups of offenders. There could be significantly greater resort to non-punitive responses avoiding prosecution for minor and lightly convicted offenders, while at the same time a small minority of serious and persistently serious offenders are incarcerated for the better part, or even the whole, of their natural lives. Meanwhile a middle range of repeat offenders may conditionally be subject to custody *plus* or *minus*, depending on their compliance with a judicially reviewed mixture of intervention and surveillance administered by probation and prison staff belonging perhaps to more integrated *correctional services* within which overall resources are more flexibly used. This is probably the politically saleable medium term future to which we are moving.

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