

rethinking sentencing

a contribution to the debate

a report from the Mission and Public Affairs Council

edited by Peter Sedgwick

Church House Publishing
Church House
Great Smith Street
London SW1P 3NZ

Tel: 020 7898 1451

Fax: 020 7898 1449

ISBN 0 7151 4026 4

GS 1536

Published 2004 by Church House Publishing.

Copyright © The Archbishops' Council 2004.

Index copyright © Meg Davies 2004

All rights reserved. No part of this publication may be reproduced or stored or transmitted by any means or in any form, electronic or mechanical, including photocopying, recording, or any information storage and retrieval system without written permission which should be sought from the Copyright Administrator, Church House Publishing, Church House, Great Smith Street, London SW1P 3NZ

Email: copyright@c-of-e.org.uk

Unless otherwise stated, the Scripture quotations contained herein are from the New Revised Standard Version Bible, copyright © 1989, by the Division of Christian Education of the National Council of the Churches of Christ in the USA, and are used by permission. All rights reserved.

This report has only the authority of the Council that approved it.

Printed in England by The Cromwell Press, Ltd,
Tonbridge, Wiltshire

contents

contributors	iv
preface by the Bishop of Southwark	v
introduction by Peter Sedgwick	vii
chapter 1 the reform of sentencing and the future of the criminal courts – David Faulkner	1
chapter 2 restorative justice in England – Tim Newell	18
chapter 3 responsible sentencing – Stephen Pryor	38
chapter 4 the churches and criminal justice – Stuart Dew	50
chapter 5 the future of sentencing: a perspective from the judiciary – Lord Justice Laws	64
chapter 6 restorative justice in a money culture: overcoming the obstacles to a restorative rationality – Peter Selby	68
notes	78
general index	86
index of biblical references	88

contributors

David Faulkner is a Senior Research Associate at the University of Oxford Centre for Criminological Research. He was a Fellow of St John's College from 1992 until 1999, and served in the Home Office from 1959 until 1992, becoming deputy secretary in charge of the Criminal and Research and Statistics Departments in 1982. His publications include *Crime, State and Citizen* (Waterside Press, 2001), and the chapter 'Principles, Structure and a Sense of Direction' in *The Future of Criminal Justice* (SPCK, 2002).

Tim Newell was a prison governor for 30 years who ended his career as Governor of HM Prison, Grendon Underwood, which is a therapeutic establishment dealing with high-risk prisoners. He is a Quaker and gave the Swarthmore Lecture in 2000, which was published as *Forgiving Justice* (Quaker Home Service, 2000). He is active as a restorative justice facilitator in the Thames Valley area.

Stephen Pryor is a Christian who retired as a prison governor in 2002, when he published 'The Responsible Prisoner – an exploration of the extent to which imprisonment removes responsibility unnecessarily' (available on the Home Office and Prison Service web sites). Since then he has led a group exploring the connection between the prison service's and the prisoner's lack of accountability to the courts for the sentence content and delivery.

Stuart Dew works for the Churches' Criminal Justice Forum, raising awareness of criminal justice as a cause for Christian concern, and encouraging church-going people to get involved in ways that make a difference. He was, for 15 years, a probation officer, and before that a newspaper and radio journalist.

Lord Justice Laws was formerly First Junior Treasury Counsel, Common Law, and became a judge of the High Court of Justice, Queen's Bench, in 1992. Since January 1999 he has been a Lord Justice of Appeal. He is an Honorary Fellow of Robinson College, Cambridge, and Exeter College, Oxford, and has been a Judicial Visitor of University College London since 1997. He has been President of the Bar European group since 1995.

Peter Selby has been Bishop of Worcester since 1997 and Bishop to HM Prisons (in England and Wales) since 2002. He was previously William Leech Professorial Fellow in Applied Christian Theology at Durham University. The penal system has been a concern of his since his days as a theological student, and his most recent research has been in the connection between faith and economics. Both these concerns are reflected in this essay.

preface

For many people the experience of becoming caught up in the criminal justice system and then obtaining a criminal record is a traumatic one. Some may only be given a caution, but others may proceed after a trial to custody. The experience of becoming a victim of crime can also scar people for years: it is only recently that their needs have been addressed as part of a response to crime. We have in England and Wales a criminal justice system that is highly professional and which constantly seeks to execute justice amidst the complexities of our contemporary society. The Government has spent a great deal of time and effort reforming this system since it came to power in 1997, including changing the working practices of the courts, the prison and probation services as well as creating the Youth Justice Board. It remains a fact that we send far more people to prison per head of population than any other country in Western Europe, and that prison numbers are still growing while the crime rate continues to fall.

The Church is fortunate in having a report written by those who are both Christians and national experts in their field. One of the authors was Deputy Secretary at the Home Office, and is now an eminent criminologist. Two of the authors were prison governors and both are very involved in promoting restorative justice and responsible sentencing. Both of these topics are explained lucidly in their contributions. There are also articles by the Criminal Justice Officer of the Churches' Criminal Justice Forum, a judge from the Court of Appeal and the Bishop to Prisons. Such contributions mean that the report is both comprehensive and challenging.

These essays are commissioned by the Mission and Public Affairs Council. The Council welcomes the publication of this collection as a contribution to encourage debate. Such a debate will echo the fact that a vigorous argument on why, and how, people should be punished has been at the centre of national life for the last decade. This report attempts to look behind the sound bites of politicians and the tabloids and to bring to bear on this subject an informed and Christian contribution. I hope that this report will be widely read both inside and outside the churches.

@ Tom Butler
Bishop of Southwark
Vice-chair, Public Affairs, Mission and Public Affairs Council

introduction

Peter Sedgwick

This is the first time since 1991 that General Synod has discussed a report on sentencing and the role of the courts. In 1991 the Board for Social Responsibility published *Crime, Justice and the Demands of the Gospel*,¹ and this report was debated in Synod. In 1999 a further report called *Prisons: a Study in Vulnerability*² was also debated, with the emphasis on those who were most vulnerable in prison, such as the young people, the mentally ill, women and sex offenders. In addition, the report looked at the vulnerability of prisoners' families, and how chaplaincy could respond to these needs. Synod was addressed on that occasion before the debate by Martin Narey, who was then Director General of Prisons.

Much has changed since 1999. In particular, the Government has carried out a wide-ranging review of sentencing policy, much of which was enshrined in the Criminal Justice and Sentencing Act, together with the Courts Act and the Anti-Social Behaviour Act. At the same time, restorative justice has become increasingly important as an alternative to traditional ways of sentencing, especially, but not only, in youth justice. There is also now a CTBI network coordinating the Churches' work in criminal justice, called the Churches' Criminal Justice Forum, which employs three staff, working on policy, education and resettlement of offenders.

For all these reasons it is appropriate that another report should be commissioned by the Church of England's Mission and Public Affairs Council. *Rethinking Sentencing* shows how the debate on the future of sentencing will affect all our lives, from the referral panel helping young offenders make reparation to their victims to the issues of social inclusion, civic renewal and zero tolerance for antisocial behaviour. There is one chapter on prisons, but its emphasis is on how life in prison contributes to a loss of responsibility among prisoners. The report shows how churches are involved with issues of criminal justice across the country, and how such topics as punishment, reparation and healing raise profound theological questions. How we pass sentence on another through the agency of the courts and the bodies that express restorative justice is inevitably a deeply searching issue for Christians.

The final conversation Jesus had before he died on the cross involved a criminal saying to him ‘In our case it is plain justice: we are paying the price for our misdeeds. But this man has done nothing wrong’ (Luke 23.41)³. This report asks ‘what is “plain justice”?’ and whether the only response to crime is to pay the price for misdeeds. In John’s Gospel Jesus places the authority of Pilate to pass sentence on him under the authority of God (John 19.11). By what authority do we punish one another, and what place does restoration have in all this? These are the issues raised by this report and which should concern all Christians.

Peter Sedgwick

Chair, Churches’ Criminal Justice Forum

chapter 1

the reform of sentencing and the future of the criminal courts

David Faulkner

Do not judge, and you will not be judged; do not condemn, and you will not be condemned. Forgive, and you will be forgiven; give, and it will be given to you. A good measure, pressed down, shaken together, running over, will be put into your lap; for the measure you give will be the measure you get back (Luke 6.37-8).

Those words are a warning against a purely retributive, utilitarian or instrumental view of sentencing, and an inspiration to those who are trying to promote a more reparative understanding of justice.

The first account in Western literature of a criminal trial is probably the description of the shield that the god Hephaestus made for the hero Achilles in Homer's *Iliad*. The shield shows a scene in which a trial is taking place over the penalty to be paid for a man's death. The defendant has offered to pay restitution; the victim's family refuses to accept it. The family's acceptance will bring an end to the matter – what might today be called 'closure'. Refusal will lead to a blood feud between the two families that might continue from generation to generation. The issue is referred to a judge or arbitrator, who calls in the elders of the community to form what might now be called a sentencing circle. The scene shows an early recognition that, in a settled society, the effects of a crime cannot be satisfactorily resolved by the parties on their own, others have a stake in the outcome, and a wider public interest is involved. Classical scholars have interpreted the text in different ways, but the issue the elders are being called on to decide is in effect a choice between retributive and reparative justice.¹

Later societies and cultures, in Roman, Anglo-Saxon, medieval and Tudor times, resolved the issue in different ways. Over time, retribution became more prominent, victims' interests became less significant, and the state – in England, the Crown – came increasingly to take charge of the process.

the liberal tradition

The Enlightenment brought other influences – to promote a scientific basis for knowledge, to challenge traditional morality, and to question, control and regulate the power of the state. It created the liberal tradition in Western criminal justice.² Radzinowicz described its features as including a belief in free will; criminal responsibility; punishment proportionate to the seriousness of the offence; retribution and deterrence as the major, if not exclusive, functions of punishment; strict definition of criminal offences; no retroactivity; judicial independence; openness and accountability; respect for the rule of law; and the presumption of innocence.³ Others might add the minimum use of imprisonment and respect for human dignity, equality and human rights.

From a broader social perspective, the liberal tradition can be seen as assuming a foundation of principles, especially the principle that people are of equal value and deserve equal respect as human beings, regardless of race, nationality, gender, religion or disability. At its best, it applies this principle regardless of differences in people's authority or status, and it demands a sense of 'common belonging' so that members of minority or disadvantaged groups (for example) can feel at home in their wider society,⁴ and the majority recognize them as members of that society and show them the same consideration and respect. The state should not intervene unnecessarily in the lives of its citizens; when it does so, the intervention should be proportionate to a legitimate need or purpose; citizens should have accessible procedures for appeal or redress if they believe they have been unjustly treated; and they should have some voice, or at least an opportunity for a voice, on decisions that affect them directly as individuals or which concern the well-being of their society or communities.⁵

The liberal tradition is now coming under criticism, from different directions. From one point of view, it reflects the notion of the 'nation state', whose time, the American writer Philip Bobbitt argues, came to a close with the ending of the Cold War, to be replaced by the 'market state', based on maximizing opportunities and satisfying expectations and demands.⁶ From another, it is seen as too tolerant and complacent, as allowing too pluralist an understanding of citizenship and national identity, and as failing to insist on the unified culture, values and discipline that are thought to be needed to meet the modern threats to morality and social cohesion. Those threats may come from permissiveness and 'political correctness', from international terrorism, or even, as some people have

claimed, from Islam.⁷ From a third and opposite point of view, it fails to provide adequate recognition or protection for ethnic and cultural minorities. From a fourth, it could be criticized as expecting too much from citizens and civil society, and as diminishing the role of the state to a point where its effectiveness could be undermined and its legitimacy called into question. From a less intellectual position, several writers and commentators, and even some ministers, have expressed dissatisfaction with systems of law or legal process that are designed to formalize and protect human rights.⁸

Neither the liberal tradition, nor the criminal justice process as it now operates, allow much space for compassion, mercy, reconciliation or forgiveness. Appeals to those values can be found in Shakespeare, for example in Portia's appeal to the quality of mercy in *The Merchant of Venice*, and in Isabella's appeal for pity in *Measure for Measure*,⁹ but there is not much authority for them in legislation or jurisprudence. The great jurists of the eighteenth century, for example Blackstone, Mansfield and Romilly, had a lot to say about freedom, but very little about compassion.

From a Christian perspective, Tim Gorrige has written of the need to shift the balance from individual satisfaction to biblical conceptions of redemption and reconciliation.¹⁰ David McIlroy has argued that the law has to be interpreted through the Holy Spirit,¹¹ and Christopher Marshall and Stuart Dew that, for the Christian, prisons and prisoners can never be left 'out of sight, out of mind' and criminal justice must always be matter of acute concern.¹² Jonathan Burnside has written of the biblical belief that true justice is inspired by God and of the biblical implications for the modern process of justice. They include the integrity of the system for appointing judges, and the danger of imposing too many restrictions on judges' discretion. They are especially relevant to the Government's proposals for an independent judicial appointments board, and, although bribery is not an issue for today's judges, there may be comparable questions about the attention that they should pay to the pressure of popular opinion or campaigns by newspapers.¹³ In more recent work, he has considered the Bible's support for proportionality in punishment, although not as an absolute principle; the fact that biblical law frequently assumes a background of negotiation between the parties, with obligations on both sides; and the need for communities as well as individuals, agencies and institutions to be involved. Crime control and criminal justice have to be reconnected with broader themes of social justice and social reconstruction; and punishment should reach beyond the individual offender and victim and the executive agencies to effect some repair

to the social fabric. Not everything can be put right through the criminal justice process, and outstanding injustice must be left ultimately with God.¹⁴

the politicization of criminal justice

Criminal justice has always been a political issue but it did not feature prominently in party politics until the late 1970s, when the experience of crime was becoming more widespread among the electorate and especially among the middle class.¹⁵ From then until the mid-1990s the Conservative Party believed it had a political advantage in depicting their opponents as 'soft on crime', partly because the Labour Party in opposition had traditionally been inclined to associate crime with poverty and economic disadvantage, rather than weakness in law enforcement or lack of severity in sentencing.¹⁶ From the mid-1990s onwards, the Labour Party responded vigorously with its slogan 'Tough on crime, tough on the causes of crime' and both main parties have since then competed to demonstrate which can be more 'tough' – in effect, which party can cause offenders to be punished more severely. Very little has separated the main parties in practice, and such opposition as there has been to governments of either of the main parties has come mainly from 'liberal' newspapers, and individuals in the House of Lords. Bishops have taken an active, non-political part in debates in the House of Lords, including especially Robert Hardy when he was Bishop of Lincoln and Bishop for prisons. The Board for Social Responsibility's report *Crime, Justice and the Demands of the Gospel*¹⁷ made an important, and politically impartial, contribution to the debate at the time of the Criminal Justice Act 1991.

The politicization of criminal justice has another significant aspect in the much closer attention that ministers and their political advisers now pay to the detailed formulation of policy, to law enforcement and the administration of justice, and to the presentation of their policies to the public. That development could be observed from the mid-1960s onwards, but it accelerated after the change of government in 1979 and did so dramatically after the change in 1997. One indication is the increase in the volume and complexity of criminal justice legislation (the Labour Government introduced 17 criminal justice Bills between 1997 and 2003), another is the frequency of administrative reorganization, and a third is the increasing range and detail of the politically imposed targets and performance indicators to which services are required to conform.¹⁸ Decisions that were once a matter of professional or administrative judgement are increasingly taken politically by ministers, or by officials

in what has become a political context. The White Paper *Justice for All*¹⁹ is an aggressively political document, quite different in style and presentation from those published on similar subjects during the 1980s.

responses to crime

Most governments, and most people, have in modern times come to see the country's response to crime as essentially a matter for the state, and in particular for the criminal justice system. That response then becomes a matter of detection, trial and punishment, to which the individual citizen should make a contribution by cooperating with the police, giving evidence in court, and sometimes by serving as a juror or lay magistrate, but in which he or she otherwise has no role or responsibility. Governments for their part have come to see their task not just as one of administering and regulating the process through legislation and financial control, as they did for the most part until the 1980s, but as one that also demands ministers' direct intervention or detailed oversight.

As crime increased and criminal justice became more politicized, ministers became increasingly frustrated by their apparent inability to reduce crime or to improve the public's confidence in the process. Declining rates of conviction, and the discovery that only about two per cent of crime is brought to a conviction in court,²⁰ were a particular source of irritation. Ministers' reaction has not, on the whole, been to look for new ways of reducing crime or of repairing the damage, but to try to make criminal justice itself 'more effective'.²¹ As well as seeking to improve efficiency by reducing delays and increasing detections and convictions, their policies have widened the scope of the criminal law, extended the reach of the criminal justice process, and tightened its grip.²² Successive governments have introduced legislation to create new criminal offences at a rate of between 100 and 150 offences a year. The results have included an increase in the severity of sentencing and a rise in the prison population of over 75 per cent over 12 years (from 42,000 in 1991 to 75,400 in March 2004). Many more people, including children, are either in prison or under some form of supervision and control, and that control may be of a more intrusive or intensive kind, by, for example, electronic monitoring. Almost the whole population is regularly observed by television cameras. Statistics show that crime is falling, but many people refuse to believe the figures. It is difficult to attribute the fall to any particular policy or initiative, or to judge the effect of other factors such as the state of the economy or exclusions from school.

The present Government, more than any other in recent times, has seemed determined that 'protecting the public', both from crime itself and from the loss, injury or fear caused by crime and social nuisance, is a responsibility it has to take upon itself. It has also been more ambitious in its claims that crime can be significantly reduced by changes in law enforcement, sentencing and penal practice. David Blunkett has said that 'social order is the first responsibility of government' and that he regards the expansion of criminal justice to deal with problems of social disorder as part of a policy of social renewal.²³ That view can be connected to a more general attitude on the part of government, which places great emphasis on the management and, so far as possible, the elimination or avoidance of risk – whether it is a risk to the public (for example from crime, accidents or disease), an operational failure (perhaps of a computer system), or a threat to the Government's own political standing and reputation.²⁴ Drawing on Philip Bobbitt's work already mentioned, Archbishop Rowan Williams has characterized that attitude as treating government as a matter of 'insurance' against the hazards of what is seen as an increasingly insecure global and political environment, and of the shift to a new political mode associated with the 'market state'.²⁵ Ministers, for their part, seem to see the change more as a transition to a more democratic, responsive and accountable style of government in which they can take some pride.

Four characteristics distinguish the present Government's approach to criminal justice from that of its predecessor. The first is its much more active approach to youth justice and its attempt, through the Youth Justice Board, to make more children the subject of criminal justice interventions and to do so at an earlier stage in their lives. The second is its emphasis on rehabilitation and reform (or perhaps, more accurately, the prevention of reoffending) through various compulsory forms of intervention and supervision. The third is its insistence on rigorous enforcement of court orders, conditions and requirements, with severe penalties for those who do not comply. The fourth is its determination to tackle antisocial behaviour by extending criminal sanctions to forms of behaviour that are not necessarily criminal or particularly serious in themselves, but which can be a serious nuisance if they are persistent or widespread, or which may show irresponsibility on the part of parents or others with a duty of care.²⁶ Those policies are based partly on the belief that they will reduce crime – as they may do to some extent but, because so many other factors will always be involved, it will be hard to say to what extent or at what cost – but they also seem to be founded on moral conviction. The Government's attitude led first to the Auld and Halliday reviews of the

courts and of the sentencing framework, then to the White Papers *Justice for All* and *Respect and Responsibility*,²⁷ and finally to the large volume of criminal justice legislation that Parliament enacted in 2003.

the function of sentencing

When the state punishes a convicted offender it can be seen as performing any or all of three separate functions. The first is declaratory and retributive – to uphold the law, to condemn, to punish. The test is ‘has justice been done?’ The second is utilitarian and instrumental – to protect the public and reduce crime. That can be achieved in various ways – physical control of the offender (typically by imprisonment, but also increasingly by electronic means), deterrence, or rehabilitation. The test is whether the method used ‘works’ or is ‘effective’.²⁸ The third is reparative – to repair the damage, to achieve some form of reconciliation, to compensate the victim. Here the test is harder to establish. It may be a feeling of satisfaction or relief on the part of those who have been affected by the offence, or a sense among some or all of them that it is now possible to ‘move on’. But it is more than simply an absence of reoffending, the personal satisfaction of an individual victim, or public applause.

Each of the three functions has come into prominence at different times. Retribution – or ‘just deserts’ – was prominent in the 1980s and in the Criminal Justice Act 1991; the instrumental view was prominent in the 1960s and again in the 1990s, especially after the change of government in 1997, and it is reflected in the Criminal Justice Act 2003. The reparative view has never been as pervasive as the other two and it has not been so clearly articulated, but it is now gaining ground. It has emerged partly as a response to the system’s long-standing neglect of victims, but also to correct what is sometimes seen as the system’s remoteness from ‘real life’ and ordinary experience. Anthony Duff, for example, has considered a more ‘communicative’ process of sentencing in which victims and communities would be more directly involved and which would look not for conventional punishment but for reparation and repair (although it would still include punishment of a different kind). He hopes in that way to achieve a resolution of what others have seen as a fundamental conflict between the different views of sentencing and punishment.²⁹ The best-known and most obvious expression of the reparative function of sentencing is, of course, restorative justice, which is the subject of the next chapter.

Each of the three functions of sentencing implies a different set of purposes, considerations and criteria – for example, the weight to be given to proportionality, previous record, social background or mitigating circumstances – and it is confusing to judge a sentence that is intended to serve one function by criteria that are more appropriate to another. It is possible, and it has historically been the practice, to see the court as concerned with the retributive function – to decide the amount of punishment that is needed to match the seriousness of the offence and the culpability of the offender; and the executive, principally the prison and probation services, as responsible for the instrumental function. That distinction is consistent with the traditional ‘liberal’ view that the punishment consists in the sentence of the court, not in the offender’s treatment after sentence has been passed. The sentencer’s responsibility is to apply the law in accordance with precedent and statute, not to consider longer-term outcomes, wider social consequences, cost, or the services’ capacity to give effect to the sentences imposed. The services have to do the best they can with the offenders who are placed in their charge, the resources that are available, and the targets and performance indicators that are set by government, but they are not concerned with those wider social factors that may also affect the outcome. No authority or agency has claimed any special ownership or responsibility for the reparative function, and sceptics might question whether it can be accommodated at all in an adversarial system of justice. As Stephen Pryor points out in Chapter 3, offenders themselves have no responsibilities except to comply with their sentences and the demands that are made on them.

That simple, or it might be said, simplistic, division – and denial – of responsibility makes quite good practical sense of what is inevitably a complex situation. It was more or less implicit in the Criminal Justice Act 1991. But it is no longer acceptable, if it ever was, to make such a firm distinction between the retributive and instrumental function of sentencing, or between the role of the courts and of what is now to be called the National Offender Management Service. It becomes impossible when the reparative function also has to be taken into account. Confusion inevitably arises when the three functions have to be divided between two constitutionally separate types of organization, and then reconciled and combined in a single sentencing decision.

sentencing reform

The Criminal Justice Act, the Courts Act and the Anti-Social Behaviour Act, all passed in 2003, are together intended to bring about a major reform of the criminal justice process and of the system that operates it. They are, in the words of the White Paper *Justice for All*,³⁰ guided by a 'single clear priority', which is 'to rebalance the criminal justice system in favour of the victim and the community so as to reduce crime and bring more offenders to justice'. They are to 'put the sense back into sentencing'.

Several of the provisions in the Criminal Justice Act attracted criticism when the Bill was before Parliament. They included those that allow previous convictions to be used as evidence of guilt; the retrial of certain serious offences after a previous verdict of 'not guilty'; restrictions on access to trial before a jury; and minimum or presumptive terms of imprisonment for offences of murder or which involve firearms. Parliament gave less attention to the provisions on sentencing, although they are likely to have a greater effect in the longer term.

The Act sets out five statutory purposes of sentencing: the punishment of offenders; the reduction of crime, including the effect of deterrence; the reform and rehabilitation of offenders; the protection of the public; and the making of reparation. Those purposes correspond more or less with the functions of sentencing that were discussed earlier in this chapter, but there is no recognition of the differences between them or of the implications of those differences. The Act provides that sentences are to be proportionate to the seriousness of the offence, but previous convictions are to be treated as an aggravating factor. There is to be a new, single form of community sentence, which can contain any of twelve possible conditions or requirements. There is to be a new range of sentences that will in different ways combine elements of custody and of supervision in the community, and a new set of life or extended sentences of imprisonment for offenders who are considered to be dangerous.

These are complicated provisions, and different and sometimes conflicting considerations will arise in individual cases. Sentencing is to be consistent, but it is not clear how consistency is to relate to the nature of the offence, the situation and culpability of the offender, or the intended purpose of the sentence among those that are now set out in statute. All those considerations are overridden for certain serious offences that are to attract a minimum or presumptive sentence. When considering a sentence, the court is presumably intended to decide, and to state, which of the statutory purposes the particular sentence is to serve.

But the means of achieving those purposes are in the hands of executive agencies – mainly in future the National Offender Management Service – and outside the control of the court. They also depend on the offender's acceptance by his or her community and by society as a whole. That division of responsibility, and the lack of coherence and accountability that could result from it, may become a source of frustration if the statutory purposes are to be taken seriously. Research has shown the confusion that has already been generated by the combination of complicated legislation, mixed messages and external pressures.³¹ Stephen Pryor develops the argument in Chapter 3 of this volume.

The mechanism intended to resolve those problems is the Sentencing Guidelines Council. Supported by the existing Sentencing Advisory Panel, it is to establish a new and comprehensive framework of guidelines for particular offences, and also to issue guidance that will resolve the possible sources of confusion. If it is successful, the creation of the Council may come to be seen as the Act's most significant achievement. But the Council has a huge and complex task, involving extensive consultation and political sensitivity in its relations with government, Parliament and the judiciary. The Council and the Panel will need access to, or their own capacity for, rigorous research and analysis so that they can estimate and then assess the effects of their guidance on the numbers and types of sentence imposed. They will need to consider the resulting demands on resources, and especially on the services' capacity to give effect to those sentences, and any differential and potentially unjust impact there might be, for example on children, women or ethnic minorities.

The passage of the Act was closely followed by the report *Managing Offenders, Reducing Crime*,³² and the Government's accompanying statement *Reducing Crime – Changing Lives*.³³ The report has two features that distinguish it from any other government-sponsored report in recent times. One is its clear statement of the need for a closer alignment between sentencing practice and the capacity of the system to give effect to the sentences imposed, with a reduction in the size of the prison population and of the number of offenders under supervision in the community from those that are at present projected, and with fines replacing community sentences for many less serious offences and low-risk offenders. The other is the separation of 'offender management', including the commissioning of accommodation and programmes, from the actual provision of those facilities. They would be commissioned in accordance with a principle of 'contestability', which would admit a wider range of providers, including providers from the private and voluntary and

community sectors. Commissioning would be devolved to the nine English regions and to Wales. The aim, and the assumption, is that the changes in sentencing and the new administrative structure will together enable sentences to be 'targeted' more accurately, and resources to be used more 'effectively', so that the outcome will be a reduction in reoffending and, therefore, in the overall level of crime. The Government's statement describes the report as a 'once in a generation opportunity'.

Reactions to the report were still being formed at the time when this chapter was being written. Those expressed so far ranged from an enthusiastic welcome to deep scepticism – a welcome for the fact that the problem of matching demand to capacity had at last been recognized and a radical solution proposed; scepticism because of a fear that the proposed solution might be unrealistically ambitious (politically and practically), or that it might be arbitrarily imposed without consultation.

This is an uncertain and precarious situation. Time and effort are needed to translate the intentions and the detailed provisions of the Act into fair, consistent and intelligible sentencing practice. The fact that the Act and the report are being implemented during a period of exceptionally severe pressure on resources will inevitably affect the timing and coherence of the process. The combination of legislative change, administrative upheaval and operational pressure will demand a high standard of political and professional leadership and the most skilled and careful management. The Act is unlikely to be the last word in sentencing reform, even for the next few years, and the report provides only an outline, with the details still to be decided. Both will require a continuous process of reconsideration, revision and adjustment as anomalies, injustices, inefficiencies and perhaps emergencies arise and have to be resolved.

children and young people

Britain is deeply ambivalent in its attitude towards children and young people. On the one hand, children are seen as a blessing, to be loved and cherished and to be nurtured as the foundation for the nation's future. Their rights have to be protected and respected; in many situations their welfare should take precedence over other considerations. On the other, children are unruly, noisy, inconsiderate, and an unwelcome nuisance as neighbours or in public places. They have to be kept in order. They have to be protected from danger and kept out of trouble, but once they are in trouble they should know the difference between right and wrong and they or their parents should be punished accordingly.

Government policy towards children has four main, and very distinct, strands: universal (in theory) education directed towards skills and qualifications; social and economic measures to reduce the extent to which children grow up in poverty; child protection for those at risk of neglect or abuse; and youth justice for those who break the law or – increasingly – whose behaviour is antisocial but not necessarily criminal. All four strands are receiving a great deal of attention, but each is being pursued independently. And yet the children who are the focus of those policies – those who do not make progress or who are excluded or truant from school, who live in poverty, who suffer neglect or abuse, or who become involved in offending – are very often the same or come from the same families and backgrounds.

Archbishop Rowan Williams has said that ‘for all our corporate sentimentality about childhood, and for all our well-meant protocols about the protection of children, thousands of our children in Britain are invisible and their sufferings unnoticed’.³⁴ He argues that the challenge is to become a country that takes children seriously by thinking ahead and not simply reacting to crises, with questions to be answered about the responsibilities of families, schools, the youth justice system and national government. Reforms of youth justice have brought better coordination and understanding between the services, especially through the formation of youth offending teams. Legislation has made a range of new and potentially valuable orders and programmes – reparation orders, action plan orders, referral orders, drug treatment and testing orders, parenting orders – available to the youth courts, with corresponding programmes of treatment and activity. Intensive surveillance and supervision programmes can be provided for persistent offenders as an alternative to custody. There is some evidence of success in reducing reoffending, which legislation has made the single aim and effectively the most important test. Most of the success has so far been associated with the less severe forms of sentence or disposal, but it is too soon to make any final judgement. The changes proposed in the Green Paper *Every Child Matters*³⁵ should improve the arrangements for protecting children at risk. A companion document *Youth Justice – the Next Steps*³⁶ proposes further reforms of youth justice, principally to simplify the structure of sentencing and strengthen the provision for juvenile offenders that is available in the community.

The Audit Commission’s report *Youth Justice 2004*³⁷ and the National Audit Office’s report *Youth Offending: The Delivery of Community and Custodial Sentences*³⁸ have reviewed the progress that has been made since the Audit Commission’s earlier report in 1996. They concluded that

the Government's reforms have generally been successful and that the situation has significantly improved over that period, but more needs to be done to improve communications and administration and to achieve a stronger recognition that 'mainstream agencies, such as schools and health services, should take full responsibility for preventing offending by young people'.³⁹

Even so, there remains an artificial, and for the child often accidental, division between civil and social measures on the one hand and criminal proceedings on the other. There is an increasing temptation, which the Government has encouraged, for the authorities to look to criminal proceedings and criminal sanctions as being 'more effective' despite their criminalizing and 'net-widening' consequences. The new arrangements are being operated on the ground with some optimism and enthusiasm,⁴⁰ but they have been severely criticized by some academics for their emphasis on criminalization and punishment. It is a sad commentary on British society that it should be so difficult to restore someone's childhood; that in 2004 almost 3,000 children should be in prison institutions compared with half that number ten years before; that conditions in those institutions should still fall so far below a satisfactory standard; and that, despite the criticisms of HM Chief Inspector of Prisons and all the children's and penal reform organizations, the situation should attract so little public anger or even concern.⁴¹ The old approved schools, abolished by the Children Act 1969, had many faults, but at least they were schools and not prisons.

For children and young people, the best way forward for sentencing and the courts may not be to go on extending the role and scope for criminal justice, but to focus on educational and social measures and institutions, to reduce the use of custody, and to develop alternative forms of provision and of residential accommodation where it is needed. In the longer term, although this is not politically realistic at present, the age of criminal responsibility ought to be raised progressively from 10 to 14 and eventually 16, as it is in most other European countries; and ministerial responsibility for both civil and criminal matters affecting children ought to be brought together in a single government department, separate from the Home Office.

social inclusion and active citizenship – the longer term

The White Paper *Justice for All*,⁴² and the subsequent legislation, are an expression of the Government's policies for the state to reduce crime and exercise social control by expanding the criminal law and reinforcing the criminal justice process. There is, however, another, less prominent but equally significant, strand in government policy. The Home Office Strategic Framework states that:

Our purpose is to build a safe, just and tolerant society,
so our role is to promote both:

Social inclusion and active citizenship

Effective enforcement of law, order and our borders.

The paper suggests that both aspects should be of equal importance.⁴³

During the summer of 2003, the Home Secretary, David Blunkett, published a paper on 'civil renewal', which, he believes, 'must form the centrepiece of the government's reform agenda for the coming years'.⁴⁴ His paper starts with a number of reflections on the nature of citizenship and democracy; on freedom, duty and obligation, including the nature and role of the state; and on community and social control. It continues with some comments on existing policies, including the reform of public services; and then sets out proposals for new reforms in the police and in criminal justice more generally, and for the creation of 'community courts' and a new Centre for Active Citizenship. In a separate paper, Hazel Blears has called for new forms of ownership and involvement by citizens or communities in public services, especially those in the areas of health and education.⁴⁵ Meanwhile, the Cabinet Office and the Office for National Statistics developed the idea of 'social capital', which they define as 'networks together with shared norms, values and understandings that facilitate co-operation within or among groups'; its main aspects are 'citizenship, neighbourliness, trust and shared values, community involvement, volunteering, social networks, and civil political participation'.⁴⁶

Several of the Government's existing policies can be seen as promoting social inclusion and active citizenship. They include, for example, Sure Start, the New Deal for Communities, the Connexions Service, and the work of the Social Exclusion Unit in the Cabinet Office and of the Communities Group, including the Active Communities Directorate and

the Social Renewal Unit in the Home Office, together with the Government's commitment to racial equality as expressed in the Race Relations (Amendment) Act 2000. They can also be seen in the Government's encouragement for citizens to become more actively involved in the criminal justice process as magistrates, through service on juries, or as members of referral panels for juveniles. A significant difference in what is now being proposed is that, after several years of central direction and control, the Government seems ready to contemplate and even to encourage a movement towards local responsibility, discretion and empowerment.

Ideas such as 'social inclusion' and 'active citizenship', and the related ideas of community and social responsibility, can be interpreted in different ways. They can be interpreted openly, in the spirit of the liberal tradition described earlier in this chapter; or restrictively, as a way of demanding social conformity and of insisting on compliance with norms and expectations as a condition of social acceptance. Failure to comply then brings punishment, and leads to social exclusion and a denial of access to legitimate social capital. The contrast has been more fully discussed elsewhere.⁴⁷ The balance that a government, a society, a community or a religion finds between the two sets of attitudes and approaches will change over time, but the balance is one of the features that defines its character. It is difficult at this stage to tell how far the Government is prepared to go in promoting local responsibility and discretion, how far local communities and the general public are willing or able to accept it, or if the outcome will be a society that becomes more 'safe, just and tolerant', more generous, confident and compassionate, or one that is more fearful, populist and punitive.

citizenship and the courts

The relationship between citizenship and the courts is a complex matter. It is certainly part of the duties and responsibilities of citizenship to appear as a witness, to cooperate with the court and tell the truth, and to serve as a juror if called upon to do so. Appointment as a magistrate is an obvious and important example of a citizen's service to the public. Successive governments have claimed to support 'local justice', at least at the level of the magistrates' courts, although the thrust of government policy has for 20 years been towards greater standardization and uniformity, with the closure of smaller courts in the interests of efficiency and a strong emphasis on consistency of practice. (It could be said that in this respect they have followed a tradition that goes back to Henry II.)

The whole point of the adversarial system of justice, as it operates in Great Britain and other common law countries, has been to detach the criminal trial from the complex set of relationships and responsibilities that make up the ideas of citizenship as they are discussed in this paper. The criminal trial is a contest to decide on the defendant's guilt – not on his or her innocence – according to the law, and then to impose a sentence that conforms to the expectations described earlier in this chapter. Ideas of citizenship have been relevant where they are concerned with respect for the defendant's dignity and humanity, with the fairness of the trial, with the proportionality of the sentence and with an offender's rights of appeal. The courts have not been concerned with the rights or responsibilities, still less the interests or feelings, of others who may be involved in the situation. Considerations of that kind may sometimes be brought into the process – the impact of the offence on the victim and the victim's feelings about it, or the offender's relationship with and responsibility for his or her family – but as matters of aggravation or mitigation that are marginal to the proceedings as a whole.

Magistrates and juries (though not judges) can be thought of as representing their local communities, although that is harder in urban than in rural areas, and they are not in any significant sense accountable to those communities. Ministers have said that they would like victims to be more closely involved in the criminal justice system, but so far – and most people would probably say rightly – on limited terms that do not extend to any sense of 'ownership' of, or access to, the court's decision-making process. The Government has announced its intention to reform the method by which judges are appointed in order to give it more legitimacy and to widen the social and cultural background from which appointments are made. But there has been no suggestion, and no serious demand, that citizens should be more actively involved, for example by instituting a system by which judges would be elected or made more directly accountable to the public.

There has been a similar attitude towards sentencing. On one view, which has probably been that of most judges and magistrates, sentencing is – like the rest of the criminal trial – a function that is undertaken on behalf of the state. It is a matter between the judge or magistrates and the individual offender, in which other citizens are not involved and have no standing. That view can reasonably be sustained for the process of establishing guilt in a contested trial (but with the significant addition of a jury in trials at the Crown Court), but the process of sentencing is clearly different from that of establishing guilt. Different considerations and different kinds of judgement are involved, and there is no obvious reason

(apart from convenience) why the same adjudicating authority or the same forum should be equally suitable for both. There has already been a move towards a separation of roles in the formation of referral panels in youth justice.

In his paper on civil renewal, David Blunkett⁴⁸ has proposed the development of 'community court', drawing on examples in the United States. A pilot project is being set up in Liverpool. Experience has shown that models in criminal justice are not easily transferred between one jurisdiction and another,⁴⁹ and his particular model of the Red Hook Community Justice Center in New York may be difficult to accommodate within the existing or proposed frameworks for court administration and sentencing in England and Wales.⁵⁰ But a programme that enabled the police, the prison and probation services, the Crown Prosecution Service and, importantly, defence lawyers to establish a stronger sense of local identity and responsibility, and to work more constructively with other agencies and with civil society in a spirit of social inclusion and active citizenship, provides an opportunity for serious and potentially fundamental reform. If the reforms proposed in the Carter Report are pursued in the same spirit, the outcome could transform both the process of criminal justice and the culture of the statutory services, the courts and the practising legal profession. Later chapters discuss some of the possibilities in more detail.

conclusions

The process of change and incremental reform will clearly continue, whether it is driven by a long-term vision of the nature of justice in a modern society, by political expediency and opportunism, or simply by events. Critical factors are likely to be the progress that can be made in establishing the reparative function of sentencing as part of the 'normal' criminal justice process, and the extent to which responsibility for preventing and responding to crime, including sentencing, can be recognized and shared more widely in society as a whole. The outcomes from that process will depend not only on the nature of the reforms themselves, but also, and perhaps even more importantly, on the spirit in which they are put into effect and on the nature of British society more generally. That spirit may be one of tolerance, compassion, humanity and trust. Or it may be one of rejection, vindictiveness, self-gratification and fear. Christians, and all people of good will, can affect how that choice is made.