

**The Justification and Limitation of the State's Power to
Incapacitate 'Dangerous' Offenders**

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DECLARATION

I declare that this thesis has been composed by me and that except where indicated the research reported herein is my own. This thesis complies with the regulations for the degree of Doctor of Philosophy at the University of Edinburgh.

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ABSTRACT

Following the *1991 Criminal Justice Act* a 'dangerous' offender is liable to a longer than normal sentence of imprisonment in order to prevent the commission of future serious violent and sexual crimes. The thesis argues that this new power is similar to, but significantly different from earlier legislative and medical attempts to control dangerous offenders. The new power establishes a system of social defence which proactively punishes offenders and generates a societal reliance on incapacitation through imprisonment. Such a policy arises out of a general failure of belief in modern criminological theories to provide a methodology for reducing all criminality including serious violent and sexual crimes.

The liberal state must justify the longer than normal detention of 'dangerous' offenders if it is to use this coercive power in a legitimate way. The thesis argues that the state is limited in its power to punish 'dangerous' offenders for what they might do. The state cannot discriminate against offenders by redistributing benefits which privilege some citizen's liberty over others without putting at risk the state's claim to treat all citizens equally. Neither can the state presume to predict and to judge in advance a rational citizen's future behaviour without seriously violating important moral principles. The situation is different for non-rational 'dangerous' offenders, for whom the use of incapacitation may be permissible, but civil detention must still be imposed in offenders' best interests not in the best interests of others.

That the state does violate fundamental liberal principles is made possible by social and cultural changes in which crime avoidance becomes a conscious part of everyday life. A heightened sense of the risk of crime reduces opposition to the incapacitative and disproportionate use of imprisonment and encourages a policy of social defence by governments frustrated at their inability to control crime. Nevertheless, the use of longer than normal imprisonment cannot be justified through the acquiescence of citizens to illiberal governance.

CHAPTER ONE

PUNISHMENT OF 'THE INNOCENT'

1.1 Introduction

For many Western countries, the decade of the 1990s saw the accelerated development of a political culture that placed the incapacitation of 'the dangerous' at the centre of penal and health care policy. In countries such as the UK, the USA, Australia and Canada, people who were found to be dangerous, either through criminal activity or through mental illness were subjected to policies designed to 'protect the public' from them¹. These policies were intended to encompass, perhaps especially, those people who were merely *predicted* to be dangerous since there are obvious utilitarian advantages in preventing harmful behaviour before it occurs.

The question at the heart of this thesis is whether it is justifiable for the modern liberal state to take such action, that is, to incapacitate adult offenders who are assumed to be dangerous. In England and Wales s.2(2)(b) of the *1991 Criminal Justice Act*² (the 1991 Act) permits sentencers to imprison offenders convicted of a violent or sexual offence for a longer period than is commensurate with the offence if it is considered that they will go on to commit a *serious* violent or sexual offence. Provisions such as this are *prima facie* illiberal since they authorise the imprisonment (or the imprisonment for a longer period) of offenders on the basis of something they *might do* rather than on the basis of something they *have done*. Yet the modern state is founded upon liberal principles, in particular the political and legal principles concerning the state's power to control and punish citizens. The thesis considers whether a provision such as s.2(2)(b) of the 1991 Act can ever be compatible with liberal political theory. In addition, taking the political climate in which the 1991 Act was introduced into account, this thesis addresses the question of why such an apparently illiberal provision failed to excite public protest.

¹ Pratt, J (1997) Chapter 2

² The provisions of the *1991 Criminal Justice Act* and other sentencing legislation have been consolidated in the *Powers of the Criminal Courts (Sentencing) Act 2000* (the PCC(S)A 2000). S. 2(2)(b) of the *1991 Criminal Justice Act* is now S. 80(2)(b) of the PCC(S)A 2000. References throughout refer to the original legislation in order to situate the provision more finely in its social and political context.

In brief, in this thesis I will:

- (i) describe the history, context and form of punishment of ‘innocent’ ‘dangerous’ offenders - those who have not committed a serious offence and are imprisoned on the basis that they require incapacitation to prevent predicted dangerous acts;
- (ii) consider the relationship between the concepts of ‘incapacitation’ and ‘punishment’. It will be argued that incapacitation imposed by the state for either past or future wrong-doing is always a form of punishment. Incapacitation delivered via the criminal justice system will be distinguished from non-punitive incapacitation *e.g.* quarantine and prophylactic interventions;
- (iii) argue that the state resorts to incapacitation partly because of a failure of criminological and other discourses to supply an alternative solution to the problem of the dangerous offender *i.e.* these discourses have failed to provide the methodology to predict or prevent dangerous offences;
- (iv) argue that punishment of the innocent fails to fit within a liberal political framework, and suggest ways in which incapacitation of the ‘dangerous’ person might be made to fit within liberal constraints, precisely by exploiting the distinction between punishment and [non-punitive] incapacitation (alluded to under (ii)), and taking into account the rationality (or otherwise) of offending behaviour;
- (v) argue that the use of expert discourses and the public’s attitude to risk have made it possible for the state to introduce an apparently illiberal measure, and argue that we can expect this form of punishment of the ‘innocent’ to remain government policy.

The title of this thesis contains quotation marks around the word ‘dangerous’ for a reason³. The marks are intended to distinguish the dangerous offender who has been convicted of a serious violent or sexual offence from the ‘dangerous’ offender who has not. The latter is deemed to be dangerous before he or she has committed or been convicted of a serious violent or sexual offence. This thesis will be concerned primarily with the longer than commensurate sentences imposed on offenders who are assumed to be dangerous but who have not yet committed a dangerous act. This is made clear, it is hoped, by the use of the quotation marks around the word ‘dangerous’ where relevant

³ A similar stylistic device is used in Floud and Young (1981) Preface, p ix

and by the use of provocative words such as 'innocent' to describe those who are subjected to punishment on this basis.

The thesis is centred around s.2(2)(b) of the *1991 Criminal Justice Act* because of the explicit element of incapacitation of the 'innocent' enabled in this provision. The provision allows for the incapacitation through extended imprisonment of those who have committed serious violent or sexual offences⁴, and it further permits the incapacitation of those who have not yet committed such serious offences. The historical background to the 1991 Act, outlined below, shows that legislators and policy makers have sought for many years to incapacitate offenders who commit specified criminal acts and as a result were found to be dangerous. Yet the 1991 Act is special in that it permits the incapacitation of those who are felt likely to be dangerous, *before* they have committed a dangerous act. The historical analysis outlined below is brief, and does not fully explore the connections between mental health and criminal justice policy and legislation. It is intended merely to give an impression of the number and variety of attempts in England and Wales to control the behaviour of those citizens felt to pose a particular danger to other citizens. The fact that so many mental health and criminal justice initiatives have been employed to this end throughout the 20th century shows the importance of the issue to policy makers. However, the fact that new policies continue beyond the 1991 Act into proposed criminal justice and mental health legislation of the 21st century must surely suggest that the state has not come to a permanent solution. Indeed, it will be argued in chapter two that it is precisely because punishment of the proven dangerous did not solve the problem of the dangerous offender, that the 1991 Act advocated the punishment of the 'innocent', a practice which looks likely to continue.

In the rest of this chapter I shall set out the background to this thesis, both the conceptual background in terms of assumptions and usage and the historical background to the 1991 Act. Critical political, sociological and philosophical evaluation of the policy is reserved for later in this thesis.

⁴ This power has existed for some time, see *e.g.* Moore (1986) Cr App R (S) 376, Zacharko [1988] CLR 546

1.2 Punishment and desert

I have acknowledged that the word 'innocent' is controversial in the context of a provision that applies to persons who have been convicted of an offence⁵. Such offenders are, of course, guilty of the violent or sexual offence of which they are convicted. However, the problem which underlies this discussion of s.2(2)(b) of the *1991 Criminal Justice Act* is that the pain of confinement inflicted in the name of incapacitation is imposed to prevent crime that has not been committed rather than to punish crimes that have been committed. The problem this raises is, 'To what extent is such incapacitation deserved?' There is considerable discussion of this question in the penological literature⁶ and a limited answer to it will form the basis of the discussion in chapter 3. As well as the question of desert, it is important to look at the foundations of the state's power to impose undeserved punishment on citizens as this is obviously an immensely powerful mechanism of control and has the potential for significant abuse.

Firstly we need to consider what it means for something to be deserved. Philosophers such as Feinberg argue that any benefit or suffering which is deserved necessarily arises due to some characteristic or action on the part of the person who benefits or suffers⁷. The difference between a reward and a gift is that the reward reflects some action of the recipient. The giving of a gift may have nothing to do with the recipient but may reflect the kindness, altruism or beneficence of the giver. The word 'reward' relies for its semantic force on the recognition that it is being given as a result of an act or characteristic of the receiver. Likewise, the difference between punishment and mistreatment is that the punishment reflects some action of the punished⁸. The mistreatment reflects the character of the abuser rather than any characteristic of the

⁵ Duff (1986b) argues that deliberately punishing an innocent person is a perversion of punishment, and this is why it must be accompanied by dishonesty and deceit on the part of the punishing authorities.

⁶ *E.g.* von Hirsch (1986)

⁷ Feinberg J (1970) Chapter 4, see also similar discussions in Primoratz (1989), Flew (1969), Hart (1973), Honderich (1976)

⁸ This may not always be true of some more metaphorical uses of punishment: *e.g.* 'a punishing schedule', 'the team took a lot of punishment defending a narrow lead'. Here punishment is equated with inflicted pain without thought to desert. We see that these are metaphorical when, if we ask what they are punishments for, there is no answer.

abused person. Punishment however, requires that the person punished is, or is perceived to be, responsible for, or deserving of, the punishment imposed.

Feinberg confirms this distinction when he states that: ‘...judgements of desert carry with them a commitment to the giving of reasons’⁹. Although Feinberg does not say this explicitly, the reasons for the judgement must not only be articulated, they must be sound in some sense. We cannot just adduce any (supposed) fact in justification of a judgement of desert, the reason or reasons given must be appropriate *i.e.* morally relevant to the action. *E.g.* it is not usual to say something like:

Ario deserves to win the lottery because he has green eyes.

The claim to desert here seems rather weak, even though it is articulated and a reason has been given. It strikes us as more appropriate to say:

Ario deserves to win promotion because he works hard and is good at his job.

What is crucial, in this elaboration of Feinberg’s argument, is that the desert attaches to some relevant quality or action of the individual. It would similarly strike us as inappropriate for someone to say:

Ario deserves to be beaten up because he has green eyes.

Being green-eyed is a quality which, for the sake of the example, we may agree Ario has. However it is hard to see how this quality is relevant to his deserving to be beaten up. Without any further information, the reason is not sufficiently compelling for the suffering to be seen to be truly ‘deserved’.

Any particular claim to desert may be flawed, but if it is articulated and relevant the invocation of desert is still appropriate and natural. Consider the following:

Ario deserves to be beaten up because he is a liar.

⁹ Feinberg (1970) p 58

This justification may be morally problematic (why should liars be beaten up?) or inaccurate (Ario is not a liar) but since the use of desert is potentially apposite, we have a sentence which makes moral as well as semantic sense to most English speakers.

It seems that 'winning the lottery' or 'being beaten up' are examples of gains and pains which may be undeserved or deserved. The situation with respect to the deservedness of state inflicted punishment is more complex. The word 'punishment' conveys with it a sense that it must be deserved. Implicit in the notion of punishment is the concept of social censure¹⁰ and censure cannot lack articulation or justification. Punishment is more than just the imposition of pain or the deprivation of goods such as money. If it was not, then high taxes and dental treatment would be punishment, and they are not, except metaphorically¹¹. Punishment carries with it disapproval and condemnation, and it is impossible to see how disapproval or condemnation can be thought of as undeserved by those voicing the disapproval or condemnation (assuming they act in good faith). The pain imposed may be morally questionable or the circumstances may be factually wrong, but for the pain to be *punishment*, there must be a justification for its imposition. That is to say, it must be seen to be *deserved*.

Yet the term 'undeserved punishment' is not a moral oxymoron. Rather, what it indicates is a difference between two perspectives. Pain may be inflicted as punishment by one party which judges it 'deserved'; a second party either knows of no adequate justification having been given or being available, or judges any justification of the infliction of pain to be inadequate. There may be no disagreement as to the facts of the case. The interpretation of the facts however, will involve judgements influenced by political considerations and it is these that bring about the difference in perspectives.

Nevertheless, the philosophical foundation of punishment is that it be deserved. But a judgement of desert is context dependent. It was hinted above that the sentence:

Ario deserves to be beaten up because he has green eyes.

¹⁰ Duff (1986), von Hirsch (1993)

¹¹ *I.e.* dental treatment may be seen as 'punishment' for poor oral hygiene, and high taxes may be seen as 'punishment' for poor fiscal management.

does not make moral sense (rather than semantic sense) *without further information*. To be more exact, it does not make sense to *us*. However, in a society which has different values and beliefs, the position may be different. For example, consider the additional context provided by:

Witches cause harm.

Only witches have green eyes.

Ario has green eyes.

Therefore, Ario is a witch and causes harm.

Hence,

Ario deserves to be beaten up because he has green eyes.

Having supplied the detail, it is apparent that, if all of the steps in the argument are believed by those participating, Ario's beating may well be held to be deserved by those participating. This is so even though we, today, find the justification spurious and, in all likelihood, consider the judgement itself morally untenable because we think it most unlikely that being green-eyed could be an appropriately relevant feature in any similar circumstance. It is essential to examine the context in which justifications of any punishment are offered, including both moral and factual beliefs, before it can be established whether participants in that context regard the punishment as being deserved. Thus, in the context of a late modern society with high levels of recorded crime, rising levels of violent crime and an increased awareness of sexual crime, the punishment of the 'innocent' may be explicable. Chapter 5 considers the social and political context of such measures in detail.

The argument above establishes that there is a context-dependent moral requirement for the articulation of reasons for imposing punishment. This requirement is expressed through the legal limitations of the right of the modern state to punish. In the modern liberal state, the punishment of unconvicted people offends longstanding political values and fundamental legal principles because the punishment has not been shown to have

been deserved. For example, textbooks in English criminal law commonly start by asserting that:

The accused is guilty only if he has acted. He is not liable for being just as he is (e.g. poor, religious, black). People are not punished for mere thoughts... the accused is guilty only if he had at least some control over his behaviour. There must be a willed act, a voluntary act¹².

As the quotation above implies, not only is it necessary for the act to have been committed, it must be determined that it has been committed by that person, *i.e.* the reason for the imposition of any punishment *on that person* must be articulated. As noted above, 'punishment' cannot be imposed at random, without any justification, since this removes the element of deservedness which is essential to the sentence being punishment¹³.

The principle that punishment should follow only upon conviction is tacitly accepted in current textbooks but it can be identified in the Declaration of Rights dating from February 1689 and which arose from the events known as the Glorious Revolution¹⁴. The Declaration states:

And thereupon the said lords spiritual and temporal and Commons... do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties declare:...

¹² Jefferson (1999) p 4-5

¹³ However, as the analysis of miscarriages of justice has shown the justification for the imposition of punishment may be factually mistaken, see Walker and Starmer (1999) (eds.)

¹⁴ The principle dates back to the Magna Carta clause 39 'No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed - nor will we go upon or send upon him - save by the lawful judgment of his peers or by the law of the land'. But as the events of the Glorious Revolution established the sovereign powers of parliament, the 1689 declaration is arguably the first record of the limitation of the *state's* power to punish.

... 12. That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.¹⁵

In general, the law holds that without the determination that there has been a proscribed act (conjoined with a particular mental state), there can be no conviction. Without a conviction, there is no justification for the imposition of punishment. So, we have two important legal principles arising from the moral foundations of the concept of desert:

1. There should be no punishment without a prior conviction;
2. A conviction requires determination that the accused committed a criminal act.

These principles (or more strictly, principle 1 which follows from principle 2) limit the state's ability to exert coercive control, *i.e.* punishment, over citizens. However, there are some exceptions to both these general principles. There are exceptions to the requirement that criminal liability requires an act: an omission may be considered a type of act so *e.g.* the failure to feed a dependant person, who dies as a result, may constitute murder¹⁶. Similarly, there is an exception to the principle that punishment cannot be imposed before conviction: a person who has not been convicted of any offence may be held on remand in custody awaiting trial. In this way, a court can lawfully decline to release an accused person on bail under the *Bail Act* of 1976 if there are grounds to believe that there is a risk that the accused will fail to return to court when required, will interfere with witnesses or will commit further offences while on bail. The police also have powers under the *Police and Criminal Evidence Act 1984* and the *Criminal Justice and Public Order Act 1994* to hold a suspect in custody while awaiting a court appearance or while collecting evidence against the suspect.

¹⁵ Quoted in House of Commons (2001)

¹⁶ R v Gibbons and Proctor 13 Cr App R 134

The use of remand alerts us to an idealisation in our conception of 'punishment'. It was established above, that the moral foundations of punishment require justification for its imposition. This clearly cannot be given before conviction and a remand prisoner will not have been convicted of the instant offence¹⁷. Remand in this sense is not 'punishment'. But remand is a form of coercive control of the citizens by the state, albeit without the formal condemnation and expression of disapproval which follows from conviction and sentencing. The conditions under which a remand prisoner is held are almost identical to those of a sentenced prisoner. Thus, it can be argued that the remand prisoner is indeed being 'punished' prior to conviction although the deservedness of such action has not yet been confirmed. That this is indeed how we see remand some of the time is shown by the fact that any period of time spent in custody on remand is counted against any sentence of imprisonment that is subsequently imposed¹⁸. That there is idealisation in our conception of punishment, or perhaps just an unwillingness to face up to its consequences, is shown by the fact that no restitution is made to the prisoner detained on remand and later found not guilty: his case is not treated as a case of wrongful imprisonment for which compensation would be offered. Perhaps this shows that, while there are moral and legal principles concerning the requirements that must be met for a person to be found guilty of a crime and imprisoned, these requirements are not absolute. It also highlights the importance of censure to the understanding of what constitutes punishment.

We should note, however, that there are other instances in which the state exercises coercive control over the citizen and in which questions of desert and punishment do not arise. Taxation has already been mentioned above, enforced quarantine in the event of an epidemic of disease is another example. Such exercises of power are given utilitarian justifications. This is also the received view concerning remand, *i.e.* that the interests of justice are served by detaining the accused rather than permitting him or her the opportunity either to re-offend or to abscond before trial (see discussion in section 1.7 below). Questions about the role of utilitarian decision making will be considered in detail in chapters 2 and 5 of this thesis.

¹⁷ The 'instant' offence is the offence for which he or she is accused. Obviously a remand prisoner may have previous convictions.

¹⁸ Wasik (2001) s 4.4.5

1.3 Principles of sentencing and the 1991 Act

The rules concerning the correct, *i.e.* legally permissible, imposition of punishment have developed as the criminal law has evolved and as new forms of punishment have become available. Principles of sentencing exist to govern the appropriate imposition and length of a custodial sentence following conviction. The common law and statutory law have traditionally only set sentence maxima for the period of imprisonment for which an offender may be sentenced for particular crimes¹⁹, apart from murder²⁰. The 1991 Act, for the first time in English statute law, introduced general guidance concerning the imposition of custodial sentences and the length of any custodial sentence, where that period is not mandatory. The principle set out in the 1991 Act states that custody should only be imposed if the offence committed is so serious that only such a sentence can be justified²¹ or if custody is necessary to protect the public from the offender²². Thus, in effect, the Act states that custody can only be imposed if the state wishes to impart to the offender and the public the message that this offence is particularly serious, or, where the offender is a risk to the public, though it is often not clear where these thresholds lie²³.

Having established the requirement for custody, the 1991 Act also restricts sentencers as to the length of prison sentences they may impose. The Act limits the length of sentence to a term 'commensurate with the seriousness of the offence or the combination of the offence and one or more offences associated with it'²⁴, although seriousness is a vaguely defined concept²⁵. The reference in the Act to the commensurate length of the sentence

¹⁹ This has recently changed with the introduction of mandatory sentencing legislation known as 'two-strikes' legislation in the *1997 Crime (Sentences) Act*

²⁰ Which results in a mandatory life sentence of imprisonment.

²¹ S. 1(2)(a) *1991 Criminal Justice Act* now S. 79(2)(a) of the *Powers of the Criminal Courts (Sentencing) Act 2000* (PCC(S)A 2000)

²² S. 1(2)(b) *1991 Criminal Justice Act*, now S. 79(2)(b) of the PCC(S)A 2000

²³ Ashworth and von Hirsch (1997)

²⁴ S. 2(2)(a) *1991 Criminal Justice Act*, now S. 80(2)(a) of the PCC(S)A 2000. This principle also dates back to the Magna Carta clause 20 'For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood'.

²⁵ Cochrane *et al* (1993)

was intended to prevent the application by sentencers of longer terms of imprisonment in order to set an example to others²⁶. This 'length of prison sentence' criterion in the 1991 Act illustrates a third general principle:

1. There should be proportionality between the seriousness of the offence and the punishment imposed for that offence.

Although such a general principle appears *prima facie* to be incontrovertible, in practice it elicits a variety of problems given that seriousness is not well defined and it is difficult to measure the difference in the punitive weight of penal measures²⁷.

As the restrictions on the imposition of custody cited above imply, the 1991 Act and the policy documents that preceded it, were explicit in advising sentencers that they should use imprisonment sparingly and only impose it as a punishment of last resort. This guidance was not new to the 1991 Act, having been expressed 10 years earlier in the case of *Bibi* where it was stated:

sentencing courts must be careful to examine each case to ensure, if an immediate custodial sentence is necessary, that the sentence is as short as possible, consistent only with the duty to protect the interests of the public and to punish and deter the criminal²⁸

The principle of parsimony referred to in *Bibi*, requiring sentencers to impose the shortest period of imprisonment possible, has been stressed by the higher courts periodically throughout the past 100 years. Recently, following legislative changes which have undermined the universal applicability of this principle, the Court of Appeal

²⁶ See the comments of Taylor CJ in *Cunningham* [1993] 1WLR 183

²⁷ von Hirsch (1993)

²⁸ *Bibi* [1980] 1 WLR 1193

restated the principle of parsimony in the case of *Ollerenshaw*²⁹. Parsimony is seen as desirable on financial and humanitarian grounds. The expense of custody is acknowledged to be major financial burden for taxpayers and the interruption and damage to offender's lives is well documented³⁰. In practice, however, it is often difficult to know what constitutes the features of a crime that make it so serious that only imprisonment can be justified as a punishment for it. The *Bibi* judgement, referred to in the case of *Howells*³¹, cited the Chief Justice, Lord Bingham as saying that the 'nature and extent of the defendant's criminal intention and the nature and extent of any injury or damage caused' are indicators of offence seriousness³². The discussion in *Howells* echoes earlier comment in the case of *Bradbourn*³³ concerning the difficulty sentencers have in articulating reasons why an offence is serious enough to require a custodial sentence to be imposed³⁴.

The 1991 Act's general criteria for the determination of sentence length³⁵ have not been altered in the consolidated *Powers of the Criminal Courts (Sentencing) Act 2000* (the PCC(S)A 2000) and the principle remains that a prison term should be the minimum commensurate with the seriousness of the offence and other offences associated with it, and with the offender's previous convictions and response to previous sentences³⁶. The reference to offences 'associated with' the offence commonly refers to the situation where an offender is convicted of several offences in one trial. However, relevant 'associated offences' include those which the defendant has requested be 'taken into consideration'³⁷. The theoretical advantage to the defendant of having other offences 'taken into consideration' is that any addition to the punishment for the extra offences is less than it would have been if these charges had been tried separately. Yet, as Wasik

²⁹ *Ollerenshaw* [1999] 1 Cr App R (S) 65 The principle of parsimony conflicts somewhat with the provisions of the *Crime (Sentences) Act 1997* s. 2, which states that, unless there are exceptional circumstances, the court shall impose a life sentence on an offender convicted of a second serious offence.

³⁰ Both of these effects are acknowledged in Home Office (2002), discussed below.

³¹ *Howells* [1999] 1 WLR 307

³² cited in Wasik (2001) p118

³³ *Bradbourn* (1985) 7 Cr App R (S) 180

³⁴ Ashworth and von Hirsch (1997), Wesson (1994), Thomas (1992), Nash (1992)

³⁵ As amended in the *Criminal Justice Act 1993*

³⁶ See Wasik (2001) ss. 2.2.5 and 4.4.2

³⁷ See Wasik (2001) s. 3.8

notes, having an offence taken into consideration does not amount to a conviction³⁸. The offence for which the offender has been convicted can be found to be more serious, and the prison threshold reached, as a result of consideration of these unproven associated 'offences'³⁹. Just as worrying is the fact that an offender convicted of an offence committed while on bail and awaiting trial for another charge, may have the earlier unproven charge considered an 'associated offence' for the purposes of gauging the seriousness of the present conviction⁴⁰.

The inclusion of the 'associated offences' criteria in a consideration of the seriousness of the current offence undermines the proportionality requirements originally laid down in the 1991 Act. This inevitably means that some offenders are being sentenced to prison rather than a community sentence, or a longer prison sentence, on the basis of acts which they have not done. This conflicts with the principles 1 and 2 above, as well as the guidelines concerning proportionality between offence seriousness and sentence, and the desirability of penal parsimony. Hence the guiding principles for determining sentence length in the 1991 Act are contaminated through the detail and implementation of the legislation.

1.4 Exceptions to principles

We have seen that three general principles concerning (i) the requirements for imposing custody, (ii) the determination of guilt and (iii) the appropriate length of a prison sentence all encounter exceptions. The seriousness criteria for custody may be based on assumptions concerning unproven 'associated offences' rather than convictions. Recent statutory changes have resulted in legislation which creates additional exceptions to the principle of proportionality between seriousness of offence and severity of sentence.

³⁸ Wasik (2001) p 107

³⁹ The evidential requirements of this process are weak and the danger is that offenders are being sentenced to custody on the basis of associated 'offences' which they did not commit. There are temptations for the police to clear-up unsolved crimes by pressuring suspects into signing lists of offences to be 'taken into consideration' and it is known that some defendants admit to crimes they did not commit. See Belloni and Hodgson (2000) Chapter 3

Non-mandatory sentence minima have been set for certain specified offences, where the offender satisfies conditions relating to previous offences and in which there are no 'particular circumstances'⁴¹. For example, unless there are exceptional circumstances, the court must impose a minimum prison sentence of 7 years for third Class A drug trafficking offence⁴². The argument that this results in a sentence which is manifestly excessive for the instant offence has been rejected in the case of *Harvey*⁴³. Similarly, a minimum sentence of three years imprisonment for a third domestic burglary⁴⁴ must be applied unless there are exceptional circumstances. An automatic life sentence for a second serious offence⁴⁵ must be imposed unless there are exceptional circumstances, even where a sentencer feels that such a sentence is unjust⁴⁶.

Both forms of life sentence also dissolve the connection between specific offence seriousness and sentence severity. The discretionary life sentence is available for all offences where it is provided as the maximum penalty. As it is an indeterminate sentence, it has been argued by Wasik that this sentence logically cannot be commensurate with the seriousness of the offence⁴⁷ and should only be passed under the provisions of s.80(2)(b) of the PCC(S)A 2000 *i.e.* as an explicitly incommensurate sentence. If the sentencer wishes to sentence proportionately there is nothing to prevent him or her imposing a very long determinate sentence of imprisonment for a very serious offence⁴⁸. The discretionary life sentence is held to be appropriate only where the offence is very serious and requires a long sentence, the offender suffers from a mental disorder and is a danger to the public⁴⁹. The discretionary life sentence is thought to be particularly appropriate if the offender's mental illness is untreatable and is unlikely to improve over a known period⁵⁰. These criteria are unrelated to the seriousness of the offence which has

⁴⁰ See *Baverstock* [1993] 1 WLR 202, and s. 151(2) of the PCCA(S) 2000

⁴¹ See Wasik (2001) s. 4.2.1

⁴² S.110 PCC(S)A 2000 see Wasik (2001) s. 4.3.3

⁴³ *Harvey* [2000] 1 Cr App R (S) 368

⁴⁴ S. 111PCC(S)A 2000 see Wasik (2001) s. 4.3.4

⁴⁵ S. 109 PCC(S)A 2000 see Wasik (2001) s. 4.3.6

⁴⁶ *Kelly* [1999] 2 Cr App R (S) 176

⁴⁷ Wasik (2001) p131

⁴⁸ *Wilson* (1964) 1 Cr App R (S) 329

⁴⁹ *A-G's Reference* (no 22 of 1996), [1977] 1 Cr App R (S) 191

⁵⁰ In other cases an order under the Mental Health Act 1983 S. 37 may be more appropriate, see Wasik (2001) 4.3.7

been committed. The discretionary life sentence has long been justified as providing protection from those offenders who are felt to be dangerous due to a continuing and untreatable mental disturbance. The combination of offence seriousness⁵¹ and the offender's dangerousness is used to justify the imposition of an indeterminate sentence⁵². It is not appropriate as a sentence for a serious offence where the offender is not suffering from a mental illness or if it is felt that the offender's mental condition is likely to improve during the term of a commensurate sentence. In the latter case, if the offender's condition is thought likely to improve during the period of a commensurate sentence, then a commensurate sentence should be imposed⁵³. The inappropriate use of the indeterminate life sentence may reflect some sentencers' desire to impose a sentence which sounds particularly severe, arising from its parity with the mandatory life sentence.

Finally, the sentence of life imprisonment is mandatory for murder committed by an adult. The absence of sentencing discretion for this crime means that it is impossible for sentencers to reflect the wide variety of situations under which murder can be committed. The offence of murder can encompass actions as diverse as a terrorist killing or the facilitation of the death of a terminally ill spouse, but this cannot be reflected in the sentence imposed upon those convicted of this crime. The mandatory life sentence therefore cannot be commensurate with the seriousness of the individual offence⁵⁴. The sentence has been criticised on this basis in a Report of the House of Lords Select Committee⁵⁵ which recommended that it should be abolished. The Sentencing Advisory Panel has recently offered guidance to the Court of Appeal on the subject of 'minimum sentences' for those convicted of murder which it argues should replace the mandatory sentence.⁵⁶ The arrangements for release of life sentence prisoners have also been criticised for depending on the final approval of the Home Secretary, although this process has been found to be in breach of human rights of the prisoner and is likely to change. The involvement of the Home secretary was felt by many to result in a sentence

⁵¹ See Chapman [2000] 1 Cr App R (S) 377

⁵² Virgo (1988) 10 Cr App R (S) 427

⁵³ Hercules 1980 2 Cr App R (S) 156

⁵⁴ In practice the time served in prison following a conviction for murder can vary quite widely. See Wasik (2001) S. 4.3.5

⁵⁵ House of Lords (1989)

⁵⁶ Sentencing Advisory Panel (2002)

which is commensurate not with the seriousness of the crime but with the degree of public interest in the case⁵⁷.

1.5 Principles, Exceptions and Protecting the Public

It has been my intention in the brief survey of sentencing to draw attention to the fact that sentencers have considerable legal authority to depart from the principles that govern the imposition and length of sentences of imprisonment. Where the departure from principle is permitted, the justification frequently given is that the public requires protection from the offender and only a sentence of imprisonment will provide this protection⁵⁸. This justification was made clear in *Protecting the Public*, the White Paper preceding the original *Crime (Sentences) Act* of 1997 in which the statutory minimum sentence of three years imprisonment was introduced for a third offence of domestic burglary:

The Government believes these proposals will strongly reinforce the successful efforts the police are making to target some of the most callous and persistent professional criminals in this country. Statutory minimum sentences for burglary will act as a powerful deterrent. Those who persist regardless will be taken out of circulation for a long time, thus *protecting the public from their evil activities*. The public is entitled to expect no less⁵⁹ (*italics added*).

The policy of imposing an automatic life sentences for those offenders convicted of two serious offences originates from the same white paper:

⁵⁷ See Home Office (1990) para 2.1 and also Secretary of State for the Home Department, *ex parte Hindley* [1999] 2 WLR 1253

⁵⁸ An exception being the mandatory sentence for murder, which reflects the seriousness of the offence and does not consider the dangerousness of the offender. This issue has recently been considered in the case of the conjoined twins *Re: A* [2001] 2 WLR 480 where the doctors' liability for the murder of the weaker twin during the separation procedure was reviewed. The doctors were clearly not considered dangerous but would have been liable to the mandatory life sentence if convicted of murder.

⁵⁹ Home Office (1996) *Protecting the Public* paragraph 12.9

Too often in the past, those who have shown a propensity to commit serious violent or sex offences have served their sentences and been released only to offend again. In such cases, the danger of releasing the offender has been plain for all to see - but nothing could be done, because once the offender has completed the sentence imposed, he or she has to be released. Too often, victims have paid the price when the offender has repeated the same offences. The government is determined that the public should receive proper protection from persistent violent or sex offenders. That means requiring courts to impose an automatic indeterminate sentence, and releasing the offender only if it is safe to do so⁶⁰.

These provisions show that the state has developed a number of measures which depart from the principle of proportionality between offence seriousness and punishment, and these can be employed where it is felt that this is necessary to protect the public from dangerous offenders. Although they are all deviations from the principle of commensurability, the mandatory life sentence, discretionary life sentence, automatic life sentence and minimum sentences are all imposed following *conviction* for a *serious* offence. If we assume the commission of a serious offence is tantamount to a finding of dangerousness, then the sentences are consistent with the policy of imposing disproportionately long sentences of imprisonment on dangerous offenders. Such sentences may breach the principle of proportionality and the principle of parsimony, but they do require the offender so sentenced to have been convicted of the act for which the disproportionate sentence is imposed.

In s.2(2)(b) of the 1991 Act, the principle of commensurability between offence and sentence has been eroded further to the point where it is effectively the case that a person can be punished on the basis that an act which they might commit in future will be more serious than anything they have done to date. S.2(2)(b) empowers sentencers to assume

⁶⁰ Home Office (1996) Protecting the Public paragraph 10.11. The public protection justification for the automatic life sentence has been reiterated in the case of *Offen and others* [2001] 1WLR 253. On the other hand, an incompetent and non-aggressive attempt at robbery, although a second serious offence, did not result in the automatic life

that the offender will continue to offend, and gives them the discretion to assume that the offending will escalate in degree of seriousness. A sentence imposed under s.2(2)(b) contravenes principle 3. (above) which states that the punishment should in some way reflect the seriousness of the crime *committed*.

S.2(2)(b) also circumvents the principles 1. and 2. even though there is a conviction, as the punishment relates to another unconnected offence. The offender has been found guilty of an offence but has not committed the act for which the extra punishment is being imposed. The fact that the offender has committed a qualifying offence, somewhat disguises the fact that the ancient principles are being discarded. The merging of two offences, one which has been committed and another which is presumed will be committed, hides that fact that the offender is being punished before there is a conviction (for the future offence) and prior to a determination of guilt.

The discussion in section 1.4 and this section shows that there exist counter-principles, statutory interventions and practices, some of which predate and others which succeed the 1991 Act, that undermine general sentencing principles and the foundational sentencing philosophy of the 1991 Act. So the inclusion of s.2(2)(b) in the Act as a departure from the general proportionality principle is not exceptional or even particularly unusual within the English criminal law. However, the following section will detail the particular way in which s.2(2)(b) is novel, unique and qualitatively different from the other deviations from the principles and practices outlines as exceptions to the general requirements which must be satisfied before it is legitimate for punishment to be imposed upon an 'innocent' offender.

1.6 The 1991 Criminal Justice Act

The *1991 Criminal Justice Act* (as amended by the *1993 Criminal Justice Act* s. 66(2)) introduces longer than normal penalty provisions as follows:

sentence as it was held that the offender did not pose a danger to the public, see *Buckland* [2000] 1 WLR 1262.

2. - (1) This section applies where a court passes a custodial sentence other than one fixed by law.

(2) The custodial sentence shall be-

(a) for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it;

(b) where the offence is a violent or sexual offence, for such longer term (not exceeding the maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender.

Note that under the 1991 Act, all custodial sentences are justified either on the basis of the seriousness of the offence or on grounds of public protection if the offence is a sexual or violent offence. A *protective* custodial sentence can only be imposed if:

where the offence is a violent or sexual offence, ... only such a sentence would be adequate to protect the public from serious harm from [the offender].⁶¹

A custodial sentence passed under either s.1(2)(b) or s.2(2)(b) will be justified on the grounds that it is necessary to protect the public but only a sentence passed under s.1(2)(b) is commensurate with the seriousness of the offence. Both are imposed on the basis of a 'predictive' rather than 'desert' based rationale⁶² the difference being that under s.1(2)(b) the prediction affects the style of punishment (the 'custody threshold') while under s.2(2)(b), the prediction affects the length of the custodial sentence. Even though the move from a non-custodial to custodial sentence is, for the offender, a major consequence of being found likely to commit serious harm in the future, the sentence of imprisonment under s.1(2)(b) is nonetheless imposed as commensurate with the

⁶¹ S. 1(2)(a) 1991 Criminal Justice Act

seriousness of the offence of which the offender has been found guilty, and it is not a longer than normal or disproportionate sentence. A sentence passed under s.1(2)(b) therefore does not suffer from the same political and philosophical difficulties as a sentence imposed under s.2(2)(b).

Section 2(2)(b) has been criticised on (at least) four grounds: (i) the inadequacy of the definitions of violent and sexual offence; (ii) the limitation of the longer than normal sentence to the maximum provided for the offence for which the offender is convicted; (iii) the vagueness of the criteria used for imposition of a longer than normal sentence; and (iv) the inflexibility of the sentence, *i.e.* the offender cannot be released earlier if he or she is held no longer to be dangerous nor detained further if he or she is held still to be dangerous⁶³. Criticisms (i) and (iii) relate to the problems of determining the qualifying criteria for the sentence. For the purposes of an examination of the political legitimacy of imposing a longer than normal sentence it is the second and last of these criticisms that are important. With respect to the second criticism, Thomas notes that ‘the powers given by the section are limited to the maximum sentence provided for the offence of which the offender is convicted. This is particularly unsatisfactory in cases of violence, where maximum sentences are relatively short...’⁶⁴. However, this point surely applies just as appropriately as a criticism of the length of the commensurate sentence. Thomas cites, for example, the maximum sentences for unlawful wounding, maliciously inflicting grievous bodily harm and assault occasioning actual bodily harm as being ‘relatively short’ at five years. Yet as the longer than normal sentence is being imposed for an offence that has not been committed, it does not seem unreasonable to limit the penalty to the maximum possible for the offence of which the offender *has* been convicted. If this were not the case, and *e.g.* the offenders could be sentenced to the maximum permitted for a *predicted* offence then sentencers would be required to be much more specific about the nature of the predicted offence. This would impose an extreme evidential burden and allow considerable scope for appeal. As it is the Court of Appeal has stated that the maximum sentence for any offence is reserved for the worst possible example of

⁶² Wasik (1998) 4.2.6

⁶³ Thomas (1996)

⁶⁴ Thomas (1996) p 5

the offence⁶⁵ so there is certainly scope for a longer than normal sentence to be imposed and still offer some additional period of protection⁶⁶. As Wasik notes: ‘...the average length of prison terms actually imposed for offences is well below half the maximum term which may lawfully be imposed’⁶⁷.

Not even the prediction that the offender is likely to commit a *serious* violent or sexual offence in the future justifies going beyond the maximum possible sentence for the (non-serious) offence for which he or she has been convicted. An escalation in offence seriousness can occur in two ways. The escalation may result from a more serious incident of the same type - a more violent assault perhaps - or the escalation may result in a more serious offence, *e.g.* an attempt to endanger life by poisoning rather than an attempt to injure by poisoning. When a prediction is being made about a potential increase in the seriousness of the person’s offending, as will be the case under s.2(2)(b), it is surely less unreasonable to assume that the future more serious offence will be of the same *type* as the offence that has been committed, even if it is more serious, than to assume that the offending will escalate into a different type of crime with a longer maximum term of imprisonment⁶⁸. If there were not this limitation, it would be possible for the least serious violent or sexual offence imaginable to incur a life sentence, this being the most serious sentence possible for a violent or sexual offence.

That said, there is a problem of how the sentencer regards a prediction of future more serious offending. This is so particularly where statutory criminal law itself supplies fine gradations in the seriousness of acts such that an increase in seriousness determines a

⁶⁵ Byrne (1975) 62 Cr App R 159

⁶⁶ Tonry (1994 and 1998) and Morris (1976) present versions of the argument that the sentence for the instant offence should be placed within a range which is determined on a retributive basis but within which adjustments can be made for mitigating, rehabilitative and incapacitative purposes. A version of this sentencing philosophy informs the Halliday report discussed below at s. 1.8.

⁶⁷ Wasik (1998) p 124

⁶⁸ A person convicted of the crime of attempted rape who is assumed to be likely to commit more serious offences might well be considered likely to commit rape in future. However, this does not alter the sentencer’s options as (with a few exceptions) s 4(1) of the *Criminal Attempts Act 1981* permits the maximum punishment imposed for an attempt to be the maximum that can be imposed for the offence itself. See Wasik (2001) p 125

different offence. An example is found in the offences relating to poisoning noted above. When an increase in seriousness results in the act being defined as another crime, it is indeed the case that the sentencer's discretion is constrained. To illustrate: in the case of the crime of Administering Poison with Intent to Injure, the statutory maximum under the s. 24 of the *Offences Against the Person Act 1861* is 5 years while the crime of Administering Poison with Intent to Endanger Life carries a maximum penalty of 10 years under s. 23 of the *Offences Against the Person Act 1861*. A sentencer who thought the 'dangerous' poisoner was likely to move from intending to injure to intending to endanger life would be unable to incapacitate the offender for longer than 5 years. In general however, the law provides scope for a substantial increase in the period of imprisonment within the bounds of the maximum penalty of the offence for which the offender has been convicted. As s.2(2)(b) of the 1991 Act has been conceived, the increasing seriousness of predicted offences is not based on a scale of increasing seriousness of offence type. Rather the increase in seriousness is based on some more intuitive notion of a change in the quality of the offence, of which the offence before the court is an instance.

As to the fourth criticism Thomas lists, that of the inflexibility of the sentence with respect to the release of the convicted person sentenced under s.2(2)(b), the offender sentenced to a longer than normal term of imprisonment is treated as if the sentence was imposed as commensurate with the offence. As such, the offender is released at the latest time designated by law, or earlier if (having served half of the sentence) the judgement of the parole board is that the offender poses no danger to others. There is no difference between the release process of the person serving a commensurate sentence and the offender serving a longer than normal sentence. In both cases release occurs eventually regardless of the likelihood of repetition of the offence or the commission of other offences. The sentencing philosophy of the *1991 Criminal Justice Act* was to punish offenders on commensurate, retributive grounds⁶⁹, *i.e.* on the basis of the seriousness of the crime committed. Normally, altering a sentence on the basis of perceived changes in the offender's propensity to reoffend would be irrelevant and it would be inappropriate to alter the sentence that was imposed. However, when the sentencer is permitted to deviate from a commensurate sentencing policy, as is the case with s.2(2)(b), Thomas argues that

it is unfair to restrain the offender longer than is necessary where there is no continuing evidence of dangerousness, or more plausibly, when there is positive evidence that the offender is no longer dangerous. In effect, Thomas' criticisms amount to a complaint that s.2(2)b is inflexible in both directions, both with regard to the still dangerous and the no longer dangerous.

In defence of the policy of treating 'dangerous' offenders in the same way as offenders sentenced to a commensurate period of imprisonment, it could be argued that a person convicted under s.2(2)(b) is unlikely to have been so sentenced as a result of an isolated offence, whereas a person with a commensurate sentence might well have been. The Court of Appeal has given guidance to the effect that where there is no reason to suspect future offending, an isolated case should not give rise to a sentence under s.2(2)(b)⁷⁰. As a result of the persistence of offending an offender might well be considered to demonstrate a greater probability of future harm than the person convicted of an out of character or first offence⁷¹. But this assumption only holds if there is an escalation in the seriousness of offences. Otherwise a series of offences would not be an indication that the offender will commit a more serious offence in the future, just that it is likely he or she will commit more offences of the same type and no inference could be drawn with respect to future offending being more serious.

Thomas' observes that the offender sentenced under s.2(2)(b) will be released at the expiry of the term of his or her sentence. No extension of the term of custody can be made on the basis that the offender poses a continuing risk of causing harm to the public. As noted above, for the purposes of release from prison, the offender serving a s.2(2)(b) sentence is treated exactly the same as his or her commensurately sentenced counterpart. The problem with the 'inflexibility' criticism of the 1991 Act as mounted by Thomas, is that it relies on an assumption that dangerous offenders are those (and only those) identified by having been subject to a longer than normal sentence under s.2(2)(b). As

⁶⁹ Ashworth (*et al*) (1992)

⁷⁰ Crow (1995) 16 Cr App R (S) 409. Clearly if there is no reason to suspect any further offending the longer sentence cannot be justified, there must be evidence that further serious offending would occur before the longer than normal sentence is justified.

⁷¹ Bestwick (1995) Cr App R (S) 268

this is very unlikely to be the case, no special measures, such as indeterminate or extendable sentences, should be set aside just for such offenders. Remedying Thomas's criticism increases the likelihood of injustice in cases of predicted dangerousness. The reasoning is unsound unless all and only those offenders who are dangerous are identified as such (by receiving a longer than normal sentence). If this is not the case, and some form of extendable sentence was re-introduced, then some 'dangerous' prisoners would be released at the end of their term and others would not. Given that some of these offenders have not yet committed a serious offence, it would be a further injustice to detain those who have been identified as 'dangerous' beyond the (already longer than normal) period for which they have been imprisoned. The criticism that Thomas notes is also no more pertinent to the sentence imposed under s.2(2)(b) than it is to commensurate sentences. If the government was concerned about release of imprisoned offenders who present a continuing risk, and introduced measures to extend the period of imprisonment, such measures would need to apply to all offenders since sentencers may fail to identify some dangerous offenders. Such a policy, if unlimited in its scope, would require total revision of the system of sentencing⁷².

The obvious problem with a policy of turning longer than normal sentences into indeterminate sentences is that it totally invalidates the idea of sentence maxima or proportionality between the offence and the punishment, which is retained, albeit in a minimal form, with the maximum sentence limitations of s.2(2)(b). If all offenders were liable to a variation in sentence length depending on each individual's ability to rebut accusations of dangerousness pending his or her release, then no offender could ever be certain of eventual release. Thomas' criticisms rather neglect to consider the overall political ethos of the 1991 Act with its strong support for a commensurate 'just deserts' sentencing ideology, and to recognise that the longer than normal sentencing provision was an important and acknowledged *exception* to this general principle.

Within the body of English criminal law, s.2(2)(b) stands out as an obvious exception. As noted above, there are provisions, statutes and practices that permit the state to imprison citizens prior to conviction, and in a manner which is not aimed at achieving

⁷² See S 1.10 below

proportionality between the offence or seriousness of the particular offence and the sentence which is handed down by the court. Yet despite the growing number of exceptions, s.2(2)(b) is special since it does not require the commission of a serious violent or sexual offence to 'trigger' the consequences of the commission of such an act. A presumption is made about the future behaviour of the offender, based in some cases, on the evidence supplied by the conviction of a single offence. The singularity of s.2(2)(b) is apparent, yet it fits within a history of legislation which has aimed to control the behaviour of certain groups of citizens. As the following survey of the legislation shows, the characteristics of such groups have changed over time. Despite being aimed at different groups, the legislation detailed below has attempted, over the past 100 years, to identify problematic populations and individuals, with the aim of incapacitating them, making it difficult or impossible for them to commit crimes against the public. From 1908 to 1991, laws have been invoked to protect the public from the behaviours of those who were perceived to be troublesome, frightening and disruptive. In short, s.2(2)(b) of the 1991 Act, although novel, is merely the latest in a series of measures which attempt to control those who are deemed to be dangerous.

1.7 Incapacitation and public protection: a short history

As noted in the introduction, the 1990s were not the first time in English legal history that incapacitation was used as a form of harm (including crime) control, nor was that decade the first time that the criminal law was knowingly used to incarcerate people who have not yet been convicted of a crime. The long tradition of the detention of the legally innocent on remand in order to ensure the attendance of the defendant at trial continues and the proportion of prisoners who are unconvicted⁷³ continues to be high. 7,950 untried people were held in custody in 1999, down from 8,160 in 1998 and 8,450 in 1997. As the average prison population in 1999 was 64,770, the proportion of people held in prison who had not been convicted of an offence was over 12%. The average time spent in custody in 1999 by male untried prisoners was at the lowest level seen during the last decade, but was still 46 days. Female untried prisoners spent an average of 35 days in

custody. In 1999 approximately 22 per cent of males and 21 per cent of females remanded in custody were acquitted, or the proceedings were terminated resulting in release without conviction⁷⁴.

It was noted above that remand of untried prisoners was undertaken to ensure the defendant's presence at trial and to prevent the defendant interfering with witness before the trial. Justified in this way, remand is not an incapacitative procedure imposed to prevent the defendant committing further crime⁷⁵. Given the delays in the modern criminal justice process noted above, (some) remand can be justified on the basis that during the period between arrest and conviction, serious crimes may be committed and that release of the defendant puts the public at risk⁷⁶. Nevertheless, punishment of the technically-innocent defendant on remand results in similar a breach of the principles of justice as the punishment of the 'technically-innocent' *offender* under s. 2(2)(b) of the 1991 Act.

The reference to the 'technically-innocent *offender*' above points to one vitally important difference between the remand prisoner and the 'dangerous' offender sentenced to a longer than normal sentence. The remand prisoner may have no convictions. By contrast, in order for the court to have the power to sentence a person deemed to be dangerous to a longer than normal sentence, the person must have been convicted of a violent or sexual offence. Although such offences need not be terribly serious, there is still some significance to be attached to the fact that the person has 'qualified' for a longer than normal sentence where the remand prisoner may not have committed any offence. Perhaps therefore it is provocative to suggest that s.2(2)(b) provision of the 1991 Act applies to 'innocent' people? The presence or absence of previous convictions similar to the current offence, or the overall pattern of offending behaviour, may be a relevant

⁷³ Of course, the people held in prison pending trial may well have had previous convictions but they have not been convicted of the 'instant' offence for which they are defendants before the court.

⁷⁴ Home Office (2000) *Prison Statistics: England and Wales* The Stationery Office, London

⁷⁵ Remand is incapacitative in the logically trivial sense that failure to attend for trial without good reason and obstructing the course of justice are further offences

⁷⁶ Ashworth A (1998) Chapter 7.

factor for the liberal state to take into consideration when considering the justifications of incapacitation. It has been argued, for instance, that a consequence of having a criminal conviction is that the convicted person forfeits their moral standing, in particular the convicted person forfeits the right to be assumed 'innocent'⁷⁷. Such an argument would thus permit the distinctive treatment of the 'dangerous' convicted person compared with the treatment of the innocent remand prisoner⁷⁸.

Imprisonment under s.2(2)(b) of the 1991 Act and imprisonment on remand are alike in that they invoke procedures that incapacitate the 'innocent'. Typically however, the law incapacitates convicted offenders through the use of commensurate terms of imprisonment (although other methods are available⁷⁹). The usefulness of a prison sentence as a way of forcing offenders temporarily to cease offending has been accepted for at least a century. The *1908 Prevention of Crime Act* (the 1908 Act) arose out of the Gladstone Committee's observation in 1895 that for certain offenders, typically those who persisted in offending, punishment did not result in deterrence or reform. The outcome of recommendations made by this committee was contained in Part II of the 1908 Act. As explained by the Home Secretary of the day it was intended for 'professional criminals who were often highly skilled in their trade and who preferred a life of crime'⁸⁰. Part II of the 1908 Act required a jury to consider the question of whether an offender who met certain criteria and who had been sentenced to a period of penal servitude was a 'habitual offender' (a person could also admit to this additional charge). If it was found that the convict was a habitual criminal, the court had discretion to impose a sentence of preventive detention. The period of preventive detention would follow the sentence of penal servitude (*i.e.* it was consecutive and not concurrent) and would add a period of between 5 and 10 years to the sentence of penal servitude as determined by the court. A 'habitual criminal' was defined in the Act as a person who since the age of 16 had been convicted of a crime and was leading persistently a dishonest or criminal life.

⁷⁷ Goldman (1982), Morris (1991).

⁷⁸ Chapter 2 considers this question in greater detail.

⁷⁹ *E.g.* disqualification from operating a business.

⁸⁰ Quoted in Taylor (1960) p 21

The 1908 Act was concerned to use imprisonment to control the behaviour of persistent offenders even when this offending was not particularly serious. The 1908 Act required that the offender was given notice that, in addition to the specific charges for which he or she was appearing before the court, there was an intention to charge him or her as an Habitual Criminal. The grounds for this charge included:

- that the offender was an associate of thieves and persons of bad character;
- that for a specified period the offender had been almost continuously in prison for various offences;
- that the licence for a previous offence had not expired;
- that the offender had previously been convicted and sentenced to imprisonment and penal servitude;
- that the offender had abandoned honest employment to resume a dishonest or criminal life;
- that the offender committed the offences for which he now stands committed for trial whilst on licence from a sentence of preventive detention.

Although the habitual criminal provisions of the Act were designed to prevent crime, and frequent or 'habitual' offenders were obviously its concern, a government memorandum of 1911 reminded prosecutors and the police that the provisions of preventive detention were designed to apply to persistent *dangerous* criminals and not just nuisance offenders such as petty thieves or pilferers. As well, the police were advised not to request indictment on a charge of being a habitual criminal unless the accused was over 30 years of age, had previously undergone a period of penal servitude and the current charge was a serious offence. This later alteration clearly indicates that other disposals were considered more appropriate for younger offenders. Even for older offenders straightforward punishment must have been tried before a sentence of preventive detention could be imposed. These developments in the use of the 1908 Act's preventive detention provision make clear the government's view that it should be used only as a sentence of last resort. However, as a sentence of last resort it was (not surprisingly) little used. Between the years 1912 and 1935, 1020 people were sentenced to preventive

detention, an average of 44 convictions a year. This was despite the fact that in just one year, 1929, 8329 offenders were held in English prisons having a penal biography which included at least 6 terms of imprisonment⁸¹.

Although the infrequent use of the sentence of being a habitual criminal need not have been seen as a problem, the fact that so few offenders were sentenced to preventive detention was noted and used as an argument for revising the sentence for persistent offenders⁸². Although the government's aim and explicit instructions concerning the use of preventive detention emphasised the desire that the sentence should be used only for those offenders whose crimes were both persistent *and* serious, it was apparent that police, prosecutors and courts were keen to see some form of special sentence devised to apply to those whose crimes were persistent if not particularly serious. As the 1932 Departmental Committee on Persistent Offenders concluded, a extension of between 5 and 10 years was obviously excessive for most merely persistent offenders and did not provide a remedy for the offending of those younger than 30. Critics of the 1908 Act argued that those offenders who were persistent in petty crimes, and those who were younger, could possibly be prevented from further crimes by a shorter extended period of detention combined with some form of training or treatment and that this option should be available to the courts. It was this feeling that the provisions were missing their target that led to a revision of the preventive detention provisions of the 1908 Act.

The 1932 Departmental Committee recommended a separate sentence of corrective training for younger offenders and this recommendation was incorporated into the *1948 Criminal Justice Act* (the 1948 Act). However, preventive detention of between 5 and 14 years was retained for those offenders over 30 who had at least 3 previous convictions, had been sentenced to either borstal or corrective training and who had previously been sentenced to imprisonment for a period of two or more years. These provisions suggest that the offenders for whom preventive detention was intended had to be relatively mature in years, to have committed at least one relatively serious offence in the past and

⁸¹ Timasheff (1939) p 467

⁸² 'Fewer than a thousand persons had been sentenced to preventive detention between 1909 and 1930' Report of the Advisory Committee on The Treatment of Offenders (1963) para 9

to have been convicted of several offences. She or he had also to have been subjected to some kind of reformatory punishment prior to the experience of preventive detention. Such narrow specification of the criteria for the use of preventive detention shows how this new provision was also designed as a sentence of last resort. Incapacitation was to be used only in cases where an offender was living what seemed to the court and the legislature to be a persistently criminal and *seriously* criminal life. The 1948 Act explicitly referred to this sentence as being aimed at the protection of the public.

Like the preventive detention elements of the 1908 Act, the main criticism suffered by the preventive detention provisions of the 1948 Act was that it penalised the 'nuisances' rather than the dangerous criminals for whom it was intended. After some years of its implementation, the Report of the Advisory Committee on the Treatment of Offenders commented:

...the majority of preventive detainees are of the passive-inadequate type, feckless and ineffective in every sphere, who regard the commission of crime as a means of escaping immediate difficulties rather than a part of a deliberately anti-social way of life. Very few of them are of the seriously violent or aggressive type of personality.⁸³

Interestingly, the report went on to say 'the Act of 1948 does not require the Court to satisfy itself that the offender is a danger to society, but that the public need to be protected from him'⁸⁴. This is perhaps a rather fine distinction but reflected the Committee's view that even 'petty' offences such as the theft of a bicycle cause distress and inconvenience to the victims, and that 'minor' offences may result in relatively serious loss among poorer communities. However, this argument has universal relevance and does not have any special significance for preventive detention. Poor communities are inevitably less likely to have the resources such as insurance to protect them from loss or the means to take action to prevent future victimisation. Although this distinction is obviously an attempt to show some sensitivity to the subjective effects of

⁸³ Report of the Advisory Committee on The Treatment of Offenders (1963) para 21

⁸⁴ Report of the Advisory Committee on The Treatment of Offenders (1963) para 17

victimisation, it could also be suggested from the evidence of the sentences that preventive detention nevertheless tended to result in enhanced protection of the public from those offenders who might otherwise be deemed 'nuisances'.

Preventive detention was also criticised for appearing to promote disparity in sentencing of a most extraordinary kind. The Advisory Council in the Treatment of Offenders cites an Appeal case *R v Caine* (1962) where it was apparently stated that 'a comparatively minor offence against property did not warrant a sentence of more than two years imprisonment, even where a defendant had 14 previous convictions of dishonesty, while, on the other hand, a sentence of seven years preventive detention was entirely appropriate in the same circumstances'⁸⁵. Indeed, over a third of sentences of preventive detention were reduced to commensurate periods of imprisonment on appeal⁸⁶. As well, concerns about the likelihood of institutionalisation were expressed by the Lord Chief Justice of the day⁸⁷.

The growing perception that there was a problem with the sentence of preventive detention was discussed in the legal and criminological literature and inevitably came to the attention of politicians, the judiciary and the media. The Guardian newspaper reported a case in 1961 where a prisoner successfully appealed against a sentence of 12 years preventive detention. The judge who substituted a term of 3 years imprisonment made clear his view that the offender was ineffectual rather than violent and therefore was not suitable for preventive detention⁸⁸. Despite the desire to limit preventive detention to those who committed serious offences, those sentenced in this way under the 1948 Act were overwhelmingly offenders who had committed property offences. In 1956 it was observed that 35% of these property offences involved goods valued at £10 or less⁸⁹. Although these crimes were not perceived as being particularly serious even at that time, the apparent harshness of such a sentence, resulting as it did in a minimum of 5 years further detention, must be considered in the context of the criteria which the offenders had to meet. Those who supported the provisions could argue that the degree of seriousness of the instant offence was only one factor in the court's determination of

⁸⁵ Report of the Advisory Council on The Treatment of Offenders (1962) para 59

⁸⁶ West (1963) p109

⁸⁷ 1962 Cr App R (S), 46, 234

⁸⁸ Reported in West (1963) p 107

whether a particular offender was liable to a sentence of preventive detention. It was certainly the case that most of those sentenced to preventive detention had many previous convictions. In 1956, only 25% of those sentenced to preventive detention had the minimum of three previous convictions and over half had six or more previous convictions⁹⁰. Nevertheless, as noted above, a large proportion of appeals against the sentence were allowed on the grounds that the instant offence was not serious enough to justify the imposition of preventive detention despite the previous convictions of the offender.

The academic evidence that the sentence of preventive detention did not work to protect the public from *serious* offenders was supported by the Taylor study published in 1960. Taylor examined the characteristics of 100 men starting a sentence (though not necessarily their first) of preventive detention in 1956. He noted that the offences for which they were sentenced were relatively trivial but that the average number of previous offences was 16.5⁹¹. Despite the wide variation in social and family circumstances, Taylor felt able to conclude that the men had in common a cycle of conviction and imprisonment which meant that there were few long gaps between periods of imprisonment. He noted that, as a result of this, some the men developed few close personal ties or entered into living arrangements such as marriage which could provide stability. The study concluded that in general the offences committed were of nuisance value and that the men were not dangerous⁹².

By 1967, Jackson was able to claim that a consensus had emerged with respect to the lack of utility of preventive detention. It was observed that serious offences, in particular violent offences could anyway attract long sentences, and thus the sentence of preventive detention would inevitably be passed on those who would not ordinarily receive long sentences of imprisonment. Jackson also noted the higher judiciary's expectation that the sentence would be rarely used. A practice direction stated that 'Preventive detention has thus come to be a last resort, in general limited to those nearing forty years and over, and

⁸⁹ Report of the Advisory Committee on The Treatment of Offenders (1963) para 17

⁹⁰ Report of the Advisory Committee on The Treatment of Offenders (1963) para 18

⁹¹ Taylor (1960) p 24 also West (1963) for similar research and conclusions.

⁹² Taylor op cit p36

not to offenders who have for even twelve months appeared to live honestly'⁹³. However, although the drafters of the 1948 legislation and the higher judiciary felt that the provision should be applied to only those offenders who posed a threat of committing a serious offence, judges were continuing to pass sentences of preventive detention on merely persistent offenders. Jackson states:

The record of these special sentences shows that in application the result may not be at all the same as that envisaged by the framers of the legislation or by Parliament in passing the Act. It could be argued that judges have persisted in carrying on with their traditional ideas of sentences and have allowed legislative change to have far less effect than the executive and the legislature intended.⁹⁴

Any disproportionate detention policy is open to criticism at a number of levels: (i) disparity of sentence, (ii) inclusion of those for whom the policy is not intended *i.e.* nuisances, and, (iii) neglect of those for whom the provisions are intended. Indeed, as a political measure, longer than normal punishment of this form is optimistically naïve. If such provisions are used to any extent then the punishment may appear to be excessive and give rise to the impression that it allows sentencers to punish at random some offenders who have committed less serious offences. If it is used rarely or not at all, such provisions may be deemed to be failing to protect the public and sentencers could be criticised for not making use of the full range of sentencing possibilities open to them.

The 1908 and 1948 Acts recognised that preventive detention was imposed in order to try and prevent crimes occurring in the future and was therefore distinct from punishment for crimes committed. The legislators and implementers of the preventive detention provisions in both Acts were aware of the possibility that these provisions could be interpreted as being undeserved punishment or at least disproportionate punishment. One way they attempted to head off such criticism was by designing a more relaxed regime to distinguish those offenders who were sentenced to preventive detention from those who were being retributively and proportionately sentenced to imprisonment. Following the

⁹³[1962] 1 WLR 403, see Jackson (1967) p157 and Lord Chief Justice's Statement of 26 February 1962 (Appendix B in Home Office 1963)

⁹⁴ Jackson (1967) p 158

passing of the 1908 Act, a separate institution for preventive detainees was set up, at Camp Hill on the Isle of Wight⁹⁵, where the conditions were intended to be less 'punitive'⁹⁶. The 1948 Act divided the period of preventive detention into three stages, in three different institutions with different régimes. Despite the implicit assumption in the Act that the preventive detainee is almost beyond reform, the progress to the third stage and hence preparation for release was dependent on the detainee's 'progress'⁹⁷. Admission to this third stage was important to the detainee as it offered the hope that he or she would be released at the end of two thirds of the sentence rather than five sixths as was the case for those prisoners who did not progress beyond the second stage.

1.8 The decline of preventive sentencing

From 1961 to 1968 the court's use of preventive detention (or the extended sentence which replaced it in 1967) started declining. The nadir was reached in 1961 when only 240 people (0.7% of those sentenced in the higher courts) were sentenced to preventive detention, and this figure does not reflect the numbers of people who successfully appealed against the sentence. By 1968 only 27 people had been sentenced to an extended sentence (a mere 0.06% of those sentenced in the higher courts)⁹⁸.

Lionel Fox drew attention to the fact that the 1948 Act had taken an explicitly parsimonious approach to the use of imprisonment. The 1948 Act attempted to strengthen the provisions of probation and fine as alternatives to prison for adults and especially so for offenders under the age of 21. Fox commented: 'Except in its provisions for the treatment of persistent offenders, it (the 1948 Act) is above all an Act for keeping people out of prison'⁹⁹. Like the 1948 Act, *the 1991 Criminal Justice Act* was an Act

⁹⁵ Which must have only made the situation worse for those offenders who were removed a great distance from their families and communities.

⁹⁶ Nozick (1974) p 143 notes that if preventive detention can be justified (and he thinks it cannot) then those subjected to it must be compensated, a very different notion from holding them in slightly improved conditions of detention as was the case at Camp Hill and very far from the usual practice whereby preventive detention is indistinguishable from commensurate imprisonment.

⁹⁷ See discussion in Fox op cit. p318ff.

⁹⁸ Carr-Hill (1970) fn 31

⁹⁹ Fox (1952) p 66

designed to encourage the punishment of most criminals with community penalties and to reserve imprisonment for the most serious offences or those offenders from whom the public needed protection¹⁰⁰. It has been argued that the drafters of the 1991 Act included longer than normal sentencing provisions in order to counter political accusations that the government was reducing its general commitment to the imprisonment of offenders¹⁰¹. Whatever the reasons for their introduction, as with the 1948 Act, the disproportionate sentencing provisions in the 1991 Act were expected to apply to a small minority of dangerous offenders from whom it was felt the public needed protection. Initially a small drop in the levels of imprisonment followed the 1991 Act, however, the numbers of prisoners started to rise within two years, particularly after the Act's primary concern to establish proportionality between the instant crime and the sentence passed was weakened in the 1993 Act¹⁰².

The preventive detention elements of the 1908 and 1948 Acts both lapsed into disuse for a number of reasons: in the case of the 1908 Act preventive detention was known to be problematic as early as 1911. Norval Morris argued that the policy of the 1908 Act was undermined by a lack of Judicial consistency in determining the type of offender for whom the provisions were aimed. The 1948 Act, when reviewed in 1963 by the Advisory Council on the Treatment of Offenders¹⁰³, likewise found that Act to have given rise to an unacceptably inconsistent application of preventive sentences - some persistent offenders would serve relatively short terms of imprisonment reflecting the relative low seriousness of their crime, while others convicted of the same offence would have preventive sentences applied and would thereby serve long sentences of imprisonment¹⁰⁴. The Advisory Council recommended the abolition of the preventive sentence¹⁰⁵.

There is an important difference between preventive detention in the 1908 and 1948 Acts which sought to prevent the offender from committing more offences (of any type) and

¹⁰⁰ Home Office (1988) para 1.1

¹⁰¹ Windlesham (1996) Downes and Morgan (1994)

¹⁰² Stone (1994a), Home Office (1995a)

¹⁰³ Home Office (1963) *Preventive Detention* report of the Advisory Council on the Treatment of Offenders

¹⁰⁴ Home Office (1963) para 61

¹⁰⁵ Home Office (1963) paras 57 and 58

the longer than normal sentence in the 1991 Act which seeks to prevent the offender from committing serious offences. Prior to the 1991 Act it was generally assumed that incapacitation was imposed to prevent offences of the same type (and degree of seriousness) as the offender had already committed. An assessment of the offender's qualifying status was based on his or her past behaviour and criminal convictions. It was not the case that the offender could be subjected to such provisions as a result of a prediction which assumed he or she would be dangerous in the future without having been dangerous in the past.

Unlike the earlier Acts the *1991 Criminal Justice Act* has clear criteria for identifying a dangerous or 'dangerous' offender. The Floud report, an important and influential precursor to the 1991 Act, noted:

Violence is almost universally regarded as the hallmark of dangerousness. 'Dangerous' offenders are presumed to be violent and violent offenders are presumed to be dangerous... Violence undermines confidence in the usual precautions against harm and it inspires fear by emphasising the vulnerability and helplessness of victims and the ruthlessness or at least the recklessness of offenders.¹⁰⁶

The Floud Report¹⁰⁷, perhaps reflecting the outlook of their commissioners, the Howard League for Penal Reform, found that they were not convinced of the need for the introduction of any new form of protective sentence unless the overall length of sentences was reduced, in which case a protective sentence might be required for a minority of offenders¹⁰⁸.

The 1908, 1948 and 1967 measures all sought to provide an alternative to indeterminate sentences for certain individuals held to pose a threat to others. In effect they were trying to forge a strike a balance between retributive and non-retributive (utilitarian)

¹⁰⁶ Floud and Young (1981) pp 7-8. Elsewhere (pp118-119) the Floud report includes loss or damage to property, environmental damage and threats to state security as having the potential for harm, but these are not incorporated into the 1991 Act and its implicit definition of dangerousness.

¹⁰⁷ Floud and Young (1981)

¹⁰⁸ See Ashworth (2000) pp 180-183

justifications for the imprisonment and punishment of offenders in exceptional cases. The frequency of the changes in legislation and the speed with which they were abandoned shows how difficult it is to find and maintain this balance. As Nigel Walker noted:

Preventive detention, 1908 style, was followed by preventive detention, 1948 style, which was itself followed by the 'extended sentence' in 1967. The pseudo-mandatory longer-than commensurate sentence which replaced all these in 1991 is merely the latest compromise...¹⁰⁹

The compromise to which Walker refers relates to the choice between a retributive versus non-retributive justification for the sentence and a determinate versus indeterminate term of imprisonment. The desire to find an alternative to the indeterminate sentence was founded on a need to distinguish between offenders who are deemed to pose a danger or problem for the public and those who are deemed to pose a problem or threat to the public as a result of mental illness. The dangerousness provisions of all the Acts from 1908 to 1991 relate to the sentencing and punishment of offenders without a recognised mental disorder. However the discussion of dangerousness and what to do with those felt to pose a danger cannot ignore the influence of the parallel and related discussion of dangerous mentally disordered offenders. If offending behaviour is seen to be brought about as a consequence of their illness, the latter group of offenders at least have the advantage of the assumption that the offending behaviour will cease should their illness recede or be cured¹¹⁰. As it is not known when this may occur, an indeterminate prison sentence may be justified, as in effect such offenders are being incapacitated until they get better and it is felt that they cease to pose a threat to others. This presumption is not available to offenders who are not held to have a mental disorder.

¹⁰⁹ Walker (1996) p 181

¹¹⁰ Although other disadvantages apply, Peay (2002)

1.9 Dangerousness and mental disorder

The re-focusing of the 'dangerousness' debate on to violent and sexual offenders emerged in public policy in the UK in the 1970's. This was, in part, due to the abolition of the death penalty in 1965, which had offered a permanent 'solution' to the problem of dangerous offenders, and also due to the related increase in the number of offences for which sentencers could impose a discretionary life sentence¹¹¹. The growth in indeterminate sentences awakened interest in the possibility of extending indeterminate sentencing to less serious offences in order to maximise the protective potential of sentences of imprisonment. Bottoms¹¹² dates the renaissance of interest in dangerousness to 1975 when both the Butler Committee¹¹³ and the Scottish Council on Crime¹¹⁴ published new sentencing guidelines for dealing with dangerous offenders. Both reports recommended various forms of indeterminate sentences separate from the standard life sentence in order to eliminate potential 'defects in society's defences'¹¹⁵. These defects were differently defined. In the Scottish Council's case, the aim was to prevent the commission of harm by violence prone persons likely to inflict 'serious and irremediable personal injury'¹¹⁶. The Butler Committee defined dangerousness as 'a propensity to cause serious physical injury or lasting psychological harm'¹¹⁷. For the Butler Committee, the sentencing weakness centred on the release from prison at the end of sentence of persons with some history of mental illness who were not suitable for treatment in hospital *i.e.* they were not severely enough mentally disordered to be compulsorily admitted to hospital under other powers.

In attempting to plug the gap in society's defences, both the Butler Committee and the Scottish Council on Crime were extremely conservative in their perceptions of what constitutes a dangerous person. They did not, for instance, consider offences involving

¹¹¹ The use of the discretionary life sentence rose markedly from 1960, Kinzig (1997).

¹¹² Bottoms (1977)

¹¹³ Home Office and DHSS (1975)

¹¹⁴ Scottish Council on Crime (1975)

¹¹⁵ Home Office and DHSS (1975) para 4.35

¹¹⁶ Scottish Council of Crime (1975) para 122

¹¹⁷ Home Office and DHSS (1975) para 4.10

breaches of health and safety regulations in the workplace to be dangerous¹¹⁸, nor did they include offences relating to driving whilst intoxicated. The Scottish Council considered but rejected categories of crimes other than those of violence, stating,:

It is clear, however, that the category of crime which has the most serious actual and potential consequences not only for the victim but also for the peace and order of the country is that of crimes of violence against the person, including homicide. It is this type of crime rather than the highly organised armed robberies, drug trafficking or complex financial swindles which in Scotland is the most serious in its consequences for individual members of the public.¹¹⁹

By advocating indeterminate, incapacitative sentences (called the 'reviewable sentence' and the 'public protection order' respectively) and reserving them for violence-prone and mentally disordered offenders, the Butler Committee and the Scottish Council explicitly assumed that these groups of people are dangerous in ways that other offenders are not. These groups were judged to be less amenable than other prisoners for standard reductive consequences of punishment *i.e.* individual deterrence and/or rehabilitation, an assumption that increases the likelihood of the use of such protective sentencing.

Peters notes that this constitutes a differentiation between certain groups of offenders. 'Normal' offenders would be punished according to the classical penal principles of proportionality, justified by appeal to retribution and deterrence. Others, such as juveniles, habitual offenders and mentally disordered offenders would be subject to either therapeutic disposals or incapacitative disposals¹²⁰. In the case of the Butler Committee it might be argued that the report's commissioners¹²¹ believed that mentally 'normal' dangerous and 'dangerous' offenders are dealt with adequately by the sentence of the courts since the report restricts its concern to those offenders with some history of mental illness. Strangely, given the overall conclusions of the report, the terms of reference for the Butler Committee contain no specific reference to the *danger* posed by

¹¹⁸ Unlike the later Floud report, which did consider broader notions of 'dangerousness' Floud and Young 1981 p 10

¹¹⁹ Scottish Council on Crime (1975) para 8

¹²⁰ Peters (1988) p28

¹²¹ The Secretary of State for the Home Office and the Secretary of State for Social Services

mentally disordered offenders and do not direct the Committee to consider especially those persons for whom a mental disorder may have a causal relation to their offending behaviour.

The terms of reference of the Butler Committee are worth reviewing:

(a) To consider to what extent and on what criteria the law should recognise mental disorder or abnormality in a person accused of a criminal offence as a factor affecting his liability to be tried or convicted and his disposal;

(b) To consider what, if any, changes are necessary in the powers, procedure and facilities relating to the appropriate treatment, in prison, hospital or the community, for offenders suffering from mental disorder or abnormality, and to their discharge and aftercare; and make recommendations.¹²²

The Butler committee did consider the issue of disability in relation to the trial, and exemption from criminal responsibility in the form of the special verdict; however, the major part of its report is concerned to protect the public from the offender rather than to protect the offender from the system. In the contemporary context of high profile killings by mentally disordered people *e.g.* the murders committed by Graham Young following his release from Broadmoor Psychiatric hospital¹²³, the Committee's focus on dangerousness is understandable. Regrettably though, the attention given to dangerous mentally ill offenders, and in particular to their incapacitation, led the Committee to neglect other aspects of their terms of reference in particular relating to the aftercare of such offenders. Rather than proceed to investigate what incapacitative effects could be arranged outside of prison or hospital, the Committee preferred to consider only the advantage of continued indeterminate supervision in either hospital or prison. In a rather chilling passage they note:

¹²²Home Office and DHSS (1975) p 1

¹²³For an account of Young's case, see Prins (1995) pp 231-2

Some of these prisoners have spent time in Broadmoor but have been returned to prison as *not treatable*.¹²⁴ All have either been refused parole or have exercised their option not to be considered, and their potential dangerousness generally excludes them from the normal 'socialising' prison pre-release schemes, such as home leave and the pre-release employment scheme. Therefore, paradoxically, these, of all people, are discharged direct from prison to the community without acclimatisation beforehand or supervision and control afterwards.¹²⁵

There is a suggestion here that the Butler Committee believed such re-integration schemes to have had some value. It is unfortunate, then, that the Committee did not have a more innovative solution to the problem of the release of mentally ill offenders at the end of their sentence than the reviewable sentence. Given the extremely small numbers of relevant serious offences that had been committed at the time the report was compiled, and the fact that many more mentally ill persons were voluntarily and forcibly housed in hospitals at the time anyway (as compared with the subsequent policy of housing most mentally ill patients in the community), the Committee did not seem too concerned about the false positives¹²⁶ their proposal for an indeterminate sentence would certainly generate. As they recognised;

The tendency (which many members of the public will applaud) will generally be to err on the side of caution, with the result that some people will continue to be detained who, if released, would not commit further violent offences.¹²⁷

¹²⁴In itself the morality of returning mentally ill people to prison because they are not treatable is extremely dubious. It would be unacceptable for severely physically ill people to be rejected by the medical profession just because their disease was untreatable. The medical profession provides hospices for those dying of organic diseases, medical and social services provide care for the mentally handicapped in a variety of supported environments in the community, yet the severely mentally ill are accommodated in prisons. The Scottish Council initially considered recommending that the detention of persons under the Public Protection Order in a special institution that was 'neither prison nor hospital' but decided that the option of detaining persons in prison must be left available under the order. Scottish Council On Crime (1975) para 136.

¹²⁵Home Office and DHSS (1975) Para 4.34, italics added

¹²⁶A false positive occurs when a person is diagnosed as being dangerous who would not go on to commit dangerous acts. A false negative, less discussed in the literature, occurs when a person diagnosed as not being dangerous goes on to commit a dangerous act.

¹²⁷Home Office and DHSS (1975) para 4.13

The Butler Committee took an expressly rehabilitative stance on the management of the mentally ill offender. The report says of the indeterminate sentence it recommended:

The new sentence would not be punitive in intent but designed to enable the offender to be detained only until his progress under treatment... allows him to be released under supervision without serious risk to the public.¹²⁸

The Committee considered, rightly or wrongly, that it was recommending what was best for the offender as well as the public. Yet it is hard to reconcile the emphasis in the report on the non-punitive nature of the 'reviewable sentence' with a recommendation for totally indeterminate sentences to be served in prison. They said:

We do not think it necessary or desirable for the court to lay down or recommend a minimum period for which the offender must be detained in custody, so as to ensure the period of detention is appropriate to the gravity of the act. As we have said above, the new sentence will not be punitive in intent.¹²⁹

The Butler Committee seemed to be unaware of, or to consider irrelevant, the contemporary crisis that was occurring in academic criminology. This crisis was most visible in the early 1970's, and culminated in the slogan-claim 'nothing works' made by Martinson¹³⁰ only the year before the Committee reported. The presence on the Butler Committee of the Cambridge criminologist Nigel Walker suggests that the committee should have been aware of the doubts being raised concerning the efficacy and ethics of treatment programmes for the rehabilitation of offenders¹³¹. Of course, critics of the indeterminate sentence were not considering the mentally abnormal offender specifically, but were making the point that behind a supposedly benign rehabilitative ethic, lay

¹²⁸*Ibid.* para 4.39

¹²⁹*Ibid.* para 4.43

¹³⁰Martinson (1974)

¹³¹In fact, Professor Walker was a member of the Scottish Council on Crime and the Floud working party as well. The differences of opinion and emphasis and the apparent discrepancies in the choice of applied knowledge are interesting given this link between all three reports.

serious problems of abuse, human rights and justice, with particular reference to indeterminate sentences of just the kind the Butler report was advocating¹³².

The Scottish Council were aware of the contemporary debates and criticism surrounding the rehabilitative ethic but placed the protection of the public as a higher priority:

Such a new form of disposal [the public protection order] would have potentially serious consequences for the individuals who fall to be dealt with in this way. Penal detention has some sort of moral justification in that the offender is held to have 'deserved' it by his crimes (and past crimes). Psychiatric detention of the seriously mentally disordered has underlying it the compassionate intention that medical treatment will relieve the patient's morbid condition, or at least provide him with the care and nursing that the condition requires. It cannot be claimed however, that there is any great prospect of successful treatment (in the medical sense) of the 'dangerousness' during the detention of those who, though they may be abnormal, are not seriously mentally disordered; the prime purpose of the detention would be the protection of the public...¹³³

The Butler report was explicitly concerned with the mentally abnormal *convicted* offender, so it is assumed from the start that this group of people have been tested in court and found to be responsible with respect to the offences for which they are before the court. However, if this is so and the offender is deemed to be competent and in control of his or her own actions, then why should the release of the mentally abnormal criminal (as he or she is now defined) pose any greater problems than the release of other offenders at the end of their proscribed prison sentence? There are various logical possibilities, relying on an appeal to the offender's rationality: that people with some mental illness may take longer than other offenders to be deterred *i.e.* to make the connection between the offence and the resulting unpleasant punishment; or take longer to be socially rehabilitated *i.e.* to be convinced that it is in their rational best interests to conform to the prevailing social standards of behaviour; *i.e.* by an appeal to the offender's rationality. By contrast, imprisonment may not be aimed at improving the rational processing of the offender but by dampening this kind of thought process. It may

¹³² *e.g.* Allen (1981), Johnstone (1998), Anderson (1995), Cohen (1985)

be the case that the punishment affects (reduces) the capacity of a suggestible mentally disordered offender to choose to commit crime by exposing him or her to 'corrective' rehabilitative, psychiatric programmes. In effect, the offender may be 'cured' by exposing him or her to a form of indoctrination. The latter example shows us that the desire to eliminate criminal behaviour sometimes sits uneasily within a caring ethos. With its overtones of coercion and paternalistic enforcement, this form of rehabilitation suggests that the offender can be 'corrected' by removing his or her capacity for independent responsible action¹³⁴. Only if we take the weaker form of 'rehabilitation' as being an appeal through rational argument to the offender, a form of persuasion rather than an attempt to change him or her, can we avoid the potential for an abuse of power, yet this assumes the offender is at least minimally rational and hence removes the justification for treating him or her differently from other offenders.¹³⁵.

It is apparent that the Butler Committee believed that, whatever the reason, the mental illness of some offenders was such that it would increase their dangerousness upon release, and that appeals to rationality would be ineffective. This is made clear by the rejection of any individually deterrent theory of punishment in favour of rehabilitation techniques, with very little examination of the data concerning the efficacy of such rehabilitation. The Scottish Council however, concerned only with the prevention of crime, expresses doubt at the success of treatment regimes:

The treatment of offenders may be defined as positive action - as opposed to hurtful or preventive action - directed to rehabilitation and future avoidance of crime by detected and convicted offenders. It is a basic difficulty about the treatment of offenders that it seems almost impossible to distinguish its effect on the prevention of crime from other effects. Indeed it is probably fair to say that the treatment of offenders has only a small part to play in our present measures for the prevention of crime.¹³⁶

¹³³Scottish Council on Crime (1975) para 125.

¹³⁴ As was attempted in the abuses of the Cultural Revolution in Maoist China

¹³⁵ See chapter 4 passim, below

¹³⁶Scottish Council on Crime (1975) para 52



In the absence of rational persuasion or successful treatment, preventative detention was considered necessary as a default position for those offenders whose offending could be thwarted in no other way. Despite the fact that a conviction requires the legal presumption of criminal responsibility and this implies the offender is rational and possesses free will, both the Butler Committee and the Scottish Council adopted a deterministic model for the disposal of mentally abnormal offenders.

The confusion felt by the Butler Committee and the Scottish Council was not new. Duster contends that within the process of (modern, Western) law enforcement there is often a 'switch' or a variation in the attitudes of the law to the presumed responsibility of offenders during some forms of punishment when a change in status occurs. He observes that different agents of the criminal justice system have inconsistent assumptions:

On the one hand, the criminal is said to be mentally balanced, and therefore capable of, and responsible for, his actions. On the other hand, his criminal behaviour is popularly and professionally conceived as a reflection of a disorder of personality... the police, the prosecuting attorney, the judge and the jury all have a tendency to view the criminal as mentally normal, sane, and responsible. However, after conviction, and beginning with incarceration, the imputation shifts and the criminal is suddenly regarded as psychologically disturbed.¹³⁷

Duster considers offenders who have no history or symptoms of mental illness but his point is equally well made in the case of mentally disturbed convicted offenders for whom the Butler Committee was recommending indeterminate sentences. If it is established that these offenders satisfy the normal tests for criminal responsibility¹³⁸ then there ought to be no assumption that the mental disorder is causally relevant to their offending and hence there should be no requirement for an incapacitative sentence. At most, there can be a case made for longer sentences for mentally ill offenders on the grounds identified above, that the rational process may be slower for the mentally ill, or diminished in the process of rehabilitation. But, if the offending behaviour is not of a rational kind, then it is hard to see how these offenders can satisfy the due process

¹³⁷Duster (1970) p227

¹³⁸On the test for mental responsibility *e.g.* M'Naghten's case (1843) 10 CL&F 200 at 210, for discussion see Prins (1995) Chapter 2, Peay (2002).

requirement for criminal responsibility, it seems they should neither be found guilty nor disposed of in the same way as those deemed to be rational¹³⁹.

Although they adopted a 'medical' model of violence, the Scottish Council discussed the identification of the 'root causes' of crime and the relevance of studying 'remedial social measures in deprived areas of cities'¹⁴⁰. They commented upon the situational and spontaneous elements that are present in much violent behaviour as well as the contributing influence of alcohol intoxication¹⁴¹. In seeking to prevent such acts of violence, they proposed various measures including 'stop and search' powers to deter and obstruct the carrying of weapons, improved communications amongst the various services who come into contact with violent people, and of course, they recommend the introduction of the Public Protection Order.¹⁴²

The Butler Committee was not asked to consider the case of unrepentant, non-mentally ill, violent offenders who reach the end of their sentence professing their intention to commit violent crime upon release. The Scottish Council on Crime did not limit the subjects of its Public Protection Order in such a way but in its assessment of dangerousness called for evidence (not necessarily convictions) of past and recent acts of violence and an assessment of risk of future violence. The implementation of a system of Public Protection Orders would depend on the choice of definitions of violence. As noted above, these might include employers who breach health and safety standards and careless drivers, as well as professional boxers, negligent doctors and industrial polluters. In practise of course, none of the above would be considered, and the report's recommendation that there be professional opinions obtained from two psychiatrists, a clinical psychologist and an experienced social worker¹⁴³ would ensure the predominantly clinical, medical and overtly pathological definition of violence would prevail. The recommendations that a Public Protection Order be developed were not incorporated in the *Mental Health Act 1983*.

¹³⁹ This argument will be considered further in chapter 3.

¹⁴⁰ Scottish Council On Crime, Para 72

¹⁴¹ Scottish Council On Crime, Para 73 (1)

¹⁴² One member of the Council, Professor Illsley disassociated himself from both the 'stop and search' and the PPO recommendations.

The longer than normal sentence provision of the *1991 Criminal Justice Act* is not explicitly aimed at mentally disordered offenders. Yet it is clear from the case of *Fawcett*¹⁴⁴ and the research findings of Solomka¹⁴⁵ that some of those who have been subject to the disproportionate sentence under s.2(2)(b) have been suffering from some form of abnormality of mind and this has not been held to be an obstacle to the imposition of a longer than normal sentence¹⁴⁶. Although there is evidence that a proportion of prisoners have a mental disorder, the percentages vary from 7% to 63%¹⁴⁷. Nevertheless, even at the lower end of diagnosis, the figures for mental disorder are substantially higher than those found in the general population¹⁴⁸. As most prisoners are not subject to psychiatric assessment on admission to prison it is difficult to know the levels of morbidity prior to incarceration, *i.e.* at the sentencing stage. In general the law holds that there should be separate provisions for the mentally disordered offender, and that this has been stated unambiguously in government documents: ‘...it is government policy that, wherever possible, mentally disordered persons should receive care and treatment from the health and social services’.¹⁴⁹

It is clear that not all mentally disordered offenders are diverted out of the criminal justice system nor is it immediately clear that they should be diverted. As Bartlett and Sandland note ‘Even if a person can be shown to be mentally disordered, to show that there is a relationship between his or her current disorder and offending is quite another question.’¹⁵⁰ Yet it has been argued that there is a growing tendency for the concepts of violent criminality and mental abnormality to become conflated in both legislation and policy¹⁵¹. This is despite evidence, albeit mostly from America, which has shown only a weak correlation¹⁵² or no correlation¹⁵³ between mental disorder and violent crime. Yet it is possible to argue the opposite, *i.e.* that the law and criminal justice system has tended

¹⁴³ Scottish Council On Crime, Para 131

¹⁴⁴ *Fawcett* (1995) 16 Cr App R (S) 55

¹⁴⁵ Solomka (1996)

¹⁴⁶ Peay (2002), von Hirsch and Ashworth (1996),

¹⁴⁷ Peay (2002)

¹⁴⁸ Singleton N *et al.* (1997)

¹⁴⁹ Home Office (1990) para 2

¹⁵⁰ Bartlett and Sandland (2000) p154

¹⁵¹ *E.g.* Peay (2002), Pilgrim and Rogers (1999), Rose (1986)

¹⁵² Monahan (1981)

¹⁵³ Steadman *et al* (1998), Rapoport and Lassen (1967)

to ignore the differences between mentally disordered and other offenders in its approach to sentencing and punishment. This would account for the high numbers of mentally disordered remands and convicts in prison and for the much lower numbers of offenders who are diverted from prosecution, found unfit to plead or referred to hospital¹⁵⁴. Sentencers make the presumption that there is no issue of mental abnormality unless this is raised by the defence. Nor is the question of 'dangerousness' considered as a separate issue after the determination of guilt. The English law has no equivalent of the Canadian Dangerous Offenders provisions which have been used since 1977 and which require a second hearing to determine 'dangerousness' after conviction¹⁵⁵.

Current mental health legislation supplements criminal justice legislation in attempting to incapacitate dangerous and 'dangerous' people. S (37) of the *Mental Health Act 1983* provides for the compulsory detention in hospital of people who meet threshold criteria¹⁵⁶, and gives courts powers to impose a restriction order on those who it is felt pose a risk of harm to others¹⁵⁷. However, medical ethics¹⁵⁸ and health care policy require medical intervention to be based on the principle that the person who is being treated should benefit, particularly when that treatment is being administered coercively under compulsory powers of commitment to hospital. Thus, some mentally disordered persons whose condition is not judged to be treatable, cannot ethically be detained unless it is in order to provide some benefit to them or at least to prevent a worsening of their condition¹⁵⁹. In attempting to recognise the ethics of treatment, the 1983 Act created a lacuna whereby mentally disordered offenders who are not considered likely to benefit from treatment are excluded from admission to hospital¹⁶⁰. If these untreatable mentally

¹⁵⁴ Remand of an accused person to hospital is possible under ss. 35 and of the 1983 *Mental Health Act*. The power to impose a hospital order rather than imprisonment is found in s 37 of the 1983 Act. In 1997 only 104 hospital orders were made by Magistrate's courts in summary proceedings (Home Office Research and Statistics Directorate, (1998) table 18).

¹⁵⁵ See Correctional Service of Canada website (www.csc-scc.gc.ca/text/pubed/feuilles/dngoff_e.shtml)

¹⁵⁶ See Glover-Thomas (2002) pp 41-48

¹⁵⁷ *Mental Health Act 1983* S 41, see Glover-Thomas p 193-4.

¹⁵⁸ See Beauchamp (1983)

¹⁵⁹ *R v Hallstrom, ex parte W (no2)*, *R v Gardner, ex parte L* [1986] 2 All ER 306.

¹⁶⁰ This is known as the 'treatability' criterion. The definition of 'treatability' has been widened in *R v Canons Park Mental Health Tribunal* [1995] QB 60 (see Glover-Thomas p 50).

disordered persons are convicted of serious offences then there is no alternative to confinement in prison under criminal justice rather than mental health legislation. As a result of a criminal justice disposal being made, there is also no power to delay discharge on the grounds of the offender's continuing dangerousness as would have been the case had the offender been subject to a hospital order. The offender is required to serve his or her sentence of imprisonment as normal, and does not have the opportunity to apply to a Mental Health Review Tribunal for discharge¹⁶¹. Both of these consequences have been seen as posing problems for offenders and the community. For offenders the sentence is one of imprisonment, and as it fixed in length, there is no opportunity for argument that the offender no longer poses a danger and can be released earlier than is normal¹⁶². For the public, the threat posed by the offender is not reviewed as systematically as it would be under the relevant mental health provisions and there is no legal power to prevent release of even avowedly dangerous offenders at the completion of the sentence.

As even this brief discussion shows, the discourses, policy and legislation concerning the incapacitation of mentally disordered dangerous and 'dangerous' offenders and ordinary dangerous and 'dangerous' offenders are complex and inextricably linked. They are linked by a shared desire to protect the public from those who have committed violent acts and who may do so again. They are also linked by the recognition that there are many offenders in prison who are mentally disordered, and it is acknowledged that in some cases the mental disorder contributes to the person's offending behaviour and propensity to commit further offences. Yet the structures of the state do not enable an easy transfer between the two sectors¹⁶³. A mentally disordered offender can only be transferred to hospital under special circumstances, *i.e.* if the illness is considered to be

¹⁶¹ See Glover-Thomas p 48-51

¹⁶² Although a determinate criminal justice disposal (prison sentence) gives the offender the advantage of knowing the latest possible date of release. S 46 of the *Crime (Sentences) Act 1997* give courts the powers to impose a 'hospital direction' whereby a mentally disordered offender can be transferred to hospital temporarily for treatment, or, assessment of the potential for treatment. However, under this provision the offender would be returned to prison if at the end of the treatment or assessment the sentence of the court had not expired. Thus it is increasingly unlikely that any mental health disposal will result in a shorter period of detention (in hospital or prison) since the offender would be anyway required to complete the sentence of imprisonment at the cessation of the treatment programme (see Glover-Thomas p 194-5).

¹⁶³ See Johnson and Taylor (2000) where it is noted that the numbers transferred from prison to hospital are increasing but are still very low (fewer than 800 prisoners in 1999)

treatable. The morality of such a position is doubtful as, in other contexts, patients with incurable illnesses are not prevented from receiving palliative medical care and attention in hospital.

Between them, the health and criminal justice sectors of English society have the power to contain almost anyone who has committed a serious violent or sexual act. The abandoned *Dangerous People with Severe Personality Disorder Bill* (1999-2000) had indicated that the government was intending to extend this sort of power to those who have not committed any offence provided they are diagnosed as mentally disordered and it is thought that they may pose a threat in the future (see 1.10 below). The government's proposals for the future are as yet unclear but there are hints as to the direction of proposals in both draft criminal justice and mental health legislation currently being debated.

1.10 The immediate future.

The latest proposals for future developments in criminal justice in England and Wales with respect to dangerous and 'dangerous' offenders are outlined in the white paper *Justice for All*¹⁶⁴ emerging from what has come to known as the *Halliday Report*¹⁶⁵. These documents specify the 'paramount' purpose of sentencing to be the protection of the public. For those deemed 'dangerous' the proposals include the recommendations that an indeterminate sentence of imprisonment be introduced and that life licence should be considered for these offenders if and when they are released from prison. Nowhere in the white paper is mention made of mental illness and of its role in the commission of dangerousness or criminal behaviour¹⁶⁶. Following the publication of the white paper, it is expected that a *Criminal Justice Bill* will be presented to parliament in 2003 proposing new sentencing guidelines based on crime reduction, risk minimisation and

¹⁶⁴ Home Office (2002)

¹⁶⁵ Home Office (2001)

¹⁶⁶ However the medical profession has recognised the implications of the policy which will require the further involvement of psychiatrists in the 'hybridisation' of punishment and health care. See Editorial, *British Medical Journal* (1999) 318: 549-551 (27 February)

incapacitation¹⁶⁷ of the 'dangerous' and persistent criminals and moving away from the 1991 Act's emphasis on desert as the primary determinant of the severity of sentence. A 'special' indeterminate sentence for sexual and violent offenders (*n.b.* not *serious* sexual and violent offenders) is proposed whereby after the expiry of a minimum period, release would be dependent on an assessment made by the parole board that the offender no longer poses a risk to the community¹⁶⁸. Although details are not yet available, the language suggests that this sentence, if implemented, would be similar to the existing discretionary life sentence. This proposal goes beyond the recommendation made in the Halliday Report which had advocated determinate, proportionate sentences for 'dangerous' offenders with release from the half way point of the sentence being at the discretion of the parole board¹⁶⁹. Unlike the later proposal, the Halliday report's 'special' sentence would not be completely indeterminate as the offender would know that they would be released at the latest at the expiry of the full declared term of the sentence of imprisonment.

The special sentences proposed in the Halliday report and the white paper relate to offenders processed through the criminal justice system. The proposals for 'dangerous' people with mental disorder in England and Wales have been under consideration for some time, with legislation proposed, abandoned and revised. The Home Office and the Department of Health jointly published a consultation paper *Managing Dangerous People with Severe Personality Disorder*¹⁷⁰ in July 1999 and this led to the *Dangerous Persons with Severe Personality Disorder Bill* (DPSPD Bill), as noted above, now abandoned. However, a new white paper, *Reforming the Mental Health Act*¹⁷¹ and a draft

¹⁶⁷ Section 5.8 of *Justice for All*, Home Office (2002), lists 7 purposes of sentencing, 3 of which are relevant to incapacitation: 'protect the public', 'reduce crime' and 'incapacitate'.

¹⁶⁸ Section 5.41 Home Office (2002). Similar proposals are made in the MacLean Committee Report in Scotland. See www.scotland.gov.uk/maclean.

¹⁶⁹ Non dangerous offenders would automatically be released at this half way point. An extended period of supervision in the community, even life licence, was also proposed for 'dangerous' offenders after release from prison.

¹⁷⁰ Home Office and Department of Health (1999) *Managing Dangerous Persons with Severe Personality Disorder - Proposals for Policy Development*. See also, House of Commons Select Committee on Home Affairs (2000) *Managing Persons with Severe Personality Disorder* 1st report HC 42, London, The Stationery Office

¹⁷¹ Department of Health (2000) *Reforming the Mental Health Act*, Cm 5016-I, London, The Stationery Office

Mental Health Bill has incorporated many of the elements of the old DPSPD Bill especially those elements of the DPSPD Bill which prioritised the protection of the public.

...for some people their plan of care and treatment will be primarily designed to manage and reduce high risk behaviours which pose a significant risk to others.¹⁷²

The new *Mental Health Bill* proposes that people diagnosed with a personality disorder who are felt to pose a threat to others, even prior to the commission of a violent act, and certainly regardless of any criminal conviction, may be detained for as long as it is felt that they pose a threat to the public. If their mental disorder is not considered to be treatable, and the person has committed a criminal offence, then this detention may occur in prison.

The treatability issues of the *1983 Mental Health Act* are avoided in the new draft Bill in an interesting way, by extending the concept of the 'care in the community' to include prisons. Traditionally care of the mentally disordered was mostly provided by families and religious communities, notwithstanding the development of the asylum in the mid 19th Century¹⁷³. Following the *1913 Mental Deficiency Act*, an Act inspired by eugenicist concerns about the fertility and promiscuity of people who were mentally handicapped or insane, there was a bifurcation in the policy of care of the mentally disordered. The 1913 Act aimed to control the 'feeble minded' and advocated hospitalisation as a means of doing this, but it also suggested that some affected people could be placed under the control of guardians or local authorities in the community. The prevailing view, for most of the century was that mentally disordered people could be treated more effectively and efficiently in large institutions, often hospitals located in remote rural environments. In the late 20th century, this policy was severely criticised as stigmatising the mentally disordered and ostracising them from society. Although there had always been some form of provision for community care, the 1980s provided a decisive move away from

¹⁷² Department of Health (2000) para 1.4

institutional living arrangements for the mentally handicapped at first, and subsequently for those who are mentally ill¹⁷⁴.

To show the scale of the de-institutionalisation process that took place in the second half of the 20th century, Glover-Thomas notes that in 1954 there were 152,000 inpatient psychiatric beds. By 1994, the number was 43,000¹⁷⁵. The motives for this move towards treatment outside of hospitals included the desire to reduce the stigma of mental illness, a recognition that many patients did not require such intensive treatment and indeed may suffer from it¹⁷⁶, and improvements in the pharmacological treatment of mental illness. Although costings were crude or vague, politicians certainly hoped for substantial financial savings arising from the change in policy¹⁷⁷. The *1959* and *1983 Mental Health Acts* provided statutory support for care of the mentally disordered in the community, the latter placing a duty on local authorities to provide care for sufferers after release from hospital. Although the policy was criticised as being under-resourced and there were high profile failures, it was considered quite normal for mentally handicapped adults to live in the community, with varying levels of state provided support and for the mentally ill to be receiving treatment and care in a variety of setting ranging from secure hospitals to private homes.

The Consultation Document of the Mental Health Bill¹⁷⁸ puts forward the purpose of the proposed legislation, including:

To provide a legal structure for requiring mentally disordered people to submit to compulsory treatment, without necessarily requiring them to be detained in hospital...¹⁷⁹

¹⁷³ Glover-Thomas (2002) chapter 3, Jones (1972)

¹⁷⁴ Jones (1993)

¹⁷⁵ Glover-Thomas (2002) p71

¹⁷⁶ Goffman (1961)

¹⁷⁷ Ministry of Health (1963) *Health and Welfare*

¹⁷⁸ Department of Health (2002) *Mental Health Bill: Consultation Document Cm 5538-III*

¹⁷⁹ Department of Health (2002) s 2.2

This extends to the community the compulsory treatment of all people affected by a mental disorder. It is suggested that the use of a single definition of 'mental disorder' in new legislation will remove the requirement that the offenders can only be detained if their condition is treatable¹⁸⁰. Instead of treatment having to work for the benefit of the patient, compulsory treatment may be imposed if treatment is necessary for the protection of others.¹⁸¹ But more significantly, the proposals extend the sites at which treatment can be delivered to 'the community', extending this concept to include prisons. The document introduces the phrase 'prisoner patients' and states:

At the moment prisoners' access to mental health care is limited by the Mental Health Act 1983, for they cannot be treated on a compulsory basis while in prison - the Act only allows this for patients detained in hospital.¹⁸²

We are consulting about whether prisoner patients should have access to orders in the community. We believe this will help to prevent prisoners' mental health deteriorating to a state where admission to hospital is necessary.¹⁸³

Clearly the conjunction of 'prisoner patients' and orders delivered 'in the community' suggest the extension of the definition of the community to the prison environment¹⁸⁴. Although this sounds alarming, it also offers some hope that those offenders in prison who are suffering from forms of mental illness will have more access to treatment. However, it also seems likely that mentally disordered prisoners are at risk of getting inferior quality mental health care in an environment which is not designed for the delivery of medical interventions. The consultation document makes clear the policy of extending treatment into the criminal justice sector:

The new Bill provides a framework for mentally disordered people to receive compulsory treatment without necessarily being detained in hospital. For people in the community, the Mental Health Tribunal may issue a treatment order based

¹⁸⁰ Department of Health (2002) s 2.11

¹⁸¹ Department of Health (2001) s 3.21

¹⁸² Department of Health (2001) s 3.33

¹⁸³ Department of Health (2001) p 24

¹⁸⁴ Although, confusingly, as we will note below, a sentence of imprisonment need not be served completely in prison.

in the community on the basis of a care plan submitted by the patient's clinical supervisor. There should be similar flexibility for patients to receive compulsory treatment in prison... This would be in the patient's best interest and consistent with best practice.¹⁸⁵

The consultation document recognises the difficulties inherent in 'treating' mentally disordered offenders, including those who are currently thought of as 'untreatable', in prison. The document proposes safeguards to ensure that if a mentally disordered offender would be better in hospital than in prison, then the transfer would be arranged. In addition the offender treated in prison would have the safeguards offered by the Mental Health Tribunals and be treated by Health Service staff. It is also recognised that not all prisons are able to offer appropriate levels of care. Despite the experience of 'care in the community' which found that, delivered well, it was more costly than institutional care, there is no mention of the extra costs involved in turning prisons into extension of mental health facilities 'in the community' nor of the difficulties of applying the quality standards that apply to hospitals and other therapeutic environments to the prison estate. Nevertheless the new proposals, if implemented, will enable mentally disordered offenders to be held in prison, as an extension of community care. The extension of mental health provisions to all mentally disordered prisoners will permit the indeterminate detention of those felt to pose a danger, beyond the term of their sentence of imprisonment, under the restriction provisions of Mental Health legislation, in order to protect others from the danger that they are felt to pose. It does not appear to be the case that upon the expiry of the sentence of imprisonment that prisoners will be entitled to be transferred automatically to a form of civil detention as their treatment will be being delivered in the community, even if this is within the walls of a prison.

An attempt to blur the boundaries between institutions and the community, and particularly between institutions which detain people against their will and the community has been exploited before. The concept of punishment in the community is well established and although much research and media comment is focused on imprisonment, it should be remembered that the majority of punishment occurs outwith

¹⁸⁵ Department of Health (2002) s 3.35

prison, *i.e.* 'in the community'¹⁸⁶. The Carlisle Committee¹⁸⁷, in the process of a review of the function and procedures of the Parole system in England and Wales, introduced the concept of a prison sentence being served partly in prison and partly 'in the community'. However, the phrase has not entered popular consciousness, and there has been criticism by politicians and the media of the situation whereby a sentence of imprisonment can mean the period served is half of the full term specified as the sentence of the court¹⁸⁸. The Halliday report, however, retains the Carlisle Committee's perspective and terminology¹⁸⁹ arguing that, if certain conditions relating to supervision and recall apply, then it is reasonable to think of a prison sentence as being partially served 'in the community':

The sentence is genuinely, therefore, and in its entirety, one of imprisonment - served partly in prison and partly in the community - the requirements for the community element being determined by the offender's behaviour.¹⁹⁰

The new proposals will make it possible for courts to detain offenders and mentally disordered offenders in prison as well as secure hospitals. In both spheres of policy these new proposals place the protection of the public at the centre of measures to manage the dangerous and the 'dangerous'. Thus, if implemented, the proposals currently under consideration will enable the indeterminate detention of those who are deemed 'dangerous' under both mental health provisions and criminal justice provisions. They do this by widening the definitions of 'treatment' and 'the community' to include incapacitation in prison.

1.11 Conclusion

This chapter has argued that it is necessary for state imposed 'punishment' to be deserved for it to be punishment. Nevertheless, there are many forms of deprivation

¹⁸⁶ Downes (1989), Home Office (1995b), Home Office (1998)

¹⁸⁷ Carlisle (1988) Cm 532

¹⁸⁸ Henham (1996c)

¹⁸⁹ Home Office (2001) chapter 4 *passim*

imposed by the state which are either not deserved or which are imposed prior to the determination that they are deserved. However, in most cases, punishment is imposed as a retributive response to an act that has occurred, *i.e.* it is punishment for something that has been done. Even where incapacitative measures have been adopted with the intention of preventing future crimes, the legislation has been aimed at preventing crimes of the type and degree of seriousness that has been committed by the individual criminal in each case. S.2(2)(b) of the *1991 Criminal Justice Act* is unique in that it permits the imposition of more severe punishment (a longer period of imprisonment) in order to incapacitate offenders who have not yet committed crimes of the type which the sentence is trying to prevent. Under the 1991 Act, a dangerous offender is defined as someone who commits a serious violent or sexual offence. Offenders who are perceived to be 'dangerous' and who have been convicted of a violent or sexual offence may be subject to this sentence, despite not having committed a serious offence.

As this brief history of English and Scottish legislative efforts to control persistent and/or dangerous offenders shows, there have been several approaches taken to try and incapacitate those offenders who are felt to pose a problem for the public. These attempts are examples of the theory of social defence, which promotes the use of the criminal justice system not (only) to punish retributively those found guilty of criminal acts but also to protect the public from the harmful acts of others. Such a policy uses the metaphor of self-defence¹⁹¹ and applies it to the criminal justice context. It seeks to provide arguments that are consistent with showing respect for all citizens as potential offenders while protecting the public from the harm of criminal activity. Obviously, a propensity to endanger others is not confined to the mentally ill or the violent criminal but creating defining characteristics of such people as 'dangerous' is, in part, aimed at providing legitimacy to the process of control.¹⁹² Teubner and Garland maintain that the criminal justice system and welfare sectors such as the health service together provide a potent method for determining dangerousness and managing those so defined¹⁹³. The characteristics of those whom it is thought necessary or beneficial to identify as 'the

¹⁹⁰ Home Office (2001) s 4.8

¹⁹¹ Discussed further in chapter two

¹⁹² For a detailed discussion of social control, including the hegemony of authorities and institutions, see Cohen (1985) *passim*.

¹⁹³ Teubner (1986), Garland (1985)

dangerous' vary, as we have seen, but the requirement to identify and symbolically separate the group of people to be controlled from the general community, endures.

The incapacitation of 'innocent' citizens through the criminal law provides a sharp dilemma for the liberal state. The liberal state takes many forms but fundamental to all is the concept of liberty as the primary political value and the principle that no state can exercise unrestrained or arbitrary coercive power over its citizens. The state must justify any curtailment of citizens' liberty on the basis that the state's action will either increase the overall liberty of the individual involved or increase the liberty of other individuals. However, as we shall see in Chapter 3, the state's power is not justified wholly through utilitarian calculations. Liberalism requires that utilitarian judgements be constrained by certain non-defeasible parameters, to protect those citizens whose interests and desires are different from those of the majority. Nevertheless, the modern state takes as its legitimate responsibility the protection of citizens from the harmful, liberty reducing activities of other citizens. Indeed, the state justifies its formal monopoly over crime control and punishment as being constitutive of its responsibility to maximise the freedom of citizens. So the state is charged with the duty of protecting citizens from harm yet it is restricted in the power it can exercise over those it predicts will cause harm: this is the dilemma of incapacitation.

The dilemma of incapacitation highlights the conflict between the state's duty to protect citizens from serious criminal acts and the limitations intrinsic to the liberal state on the power to imprison citizens for acts that have not yet been committed. It will be argued that only a particular conception of liberalism allows the punishment of citizens for crimes for which they have not been convicted. However, this conception, if instituted more generally beyond the bounds of the criminal law could undermine the claim that individuals consent to governance by the state. As a result, the liberal state adopts a policy of incapacitation of the innocent only at the risk of losing the consent of those it governs. In a period of increasing levels of crime and significantly increasing numbers of *violent crimes*¹⁹⁴, the attractiveness of utilitarian arguments that justify the protection of

¹⁹⁴ Although there are problems in ascertaining the exact amount of crime (Bottomley and Pease (1986)), it is generally believed that crime rate rose steeply throughout the second half of 20th century (Maguire 2002). In the context of the *1991 Criminal Justice*

citizens is obvious. Therefore, if it can be shown that popular democratic will does not require or desire the constraints on state power provided through a liberal political structure, perhaps a policy which is effectively punishing 'innocent' people is morally justified. Popular support can be demonstrated for the increased use of coercive power if it results in policies that appear to maximise security for the majority¹⁹⁵. However, as will be shown in chapter 5, the state is reluctant to renounce the limiting liberal principles under which it governs since a non-liberal alternative other than anarchy would require the state to take full responsibility for crime prevention. This it is unwilling to do as the state would certainly fail in its promises to prevent serious harm from occurring. Such a policy would also raise concerns among those who fear state sponsored abuse. As Matravers says:

whilst it seems plausible to think that the point of threatening sanctions must have something to do with preventing offending, ... that is not the same as arguing that preventing offending through the threat and imposing of sanctions is morally permissible¹⁹⁶

The longer than normal sentencing provisions of the 1991 Act, and the future proposals in mental health and criminal justice show that the distinction between punishment and incapacitation is important. The state may not wish to have the power to *punish* all citizens prior to the commission of a dangerous act, but as the 1991 Act shows, the state does wish to have the power to *incapacitate* citizens prior to the commission of a dangerous act. The practical difficulty which the state encounters is, how does it incapacitate without the infliction of punishment? To manage this difficulty, the state is forced to adopt a technical solution to justify its apparently illiberal intervention in citizens' lives. In the case of England and Wales the current method is to neutralise the 'dangerous' offender in prison and the 'dangerous' non-offender in a medical setting. This seems likely to change as the distinction between prison as the site of punishment

Act, the British Crime Survey (BCS) published in 2001 suggested both recorded and unrecorded crime from 1981 to 1991 rose at close to 3% per year. Records since the 1995 BCS, suggest that the rate of recorded crime, including violent crime, has started to fall (Maguire 2002).

¹⁹⁵ Dunbar and Langdon (1998) Nash (1999)

and hospital as the site of medical care is blurred. 10 years after the introduction of proactive incapacitation in the *1991 Criminal Justice Act*, the white paper *Justice for All*¹⁹⁷ and the draft *Mental Health Bill*¹⁹⁸ suggest the government is considering an extension of incapacitation. The use of broad definitions of ‘treatment’, ‘imprisonment’ and ‘the community’ gives the appearance that the government is determined to incapacitate the ‘dangerous’ in any way it can. Chapter two considers the epistemological foundations of the arguments for such a policy of ‘social defence’.

¹⁹⁶ Matravers (2000) p 7

¹⁹⁷ Home Office (2002)

¹⁹⁸ This Bill was not included in the Queen’s Speech of November 13, 2002 outlining the government’s immediate legislative priorities. However, the Secretary of State for Health, Alan Milburn, has indicated that the Bill will be reintroduced following consideration of the responses to the consultation document. *Guardian* newspaper, 15 November 2002, p 2.

CHAPTER TWO

THE FAILURE TO CONTROL THE DANGEROUS

This chapter will discuss the development of a modern paradigm of criminological knowledge and note its integration into criminal justice policy and law. The theories and methodologies arising from this paradigm have provided authority and an ontological foundation for government policy with respect to dangerous offenders. However, none of the theoretical perspectives adopted provided the state with effective methods to reduce harm, prevent serious crime, or predict dangerous behaviour. One outcome of this is that the criminal justice system rejects expert knowledge and takes decisions in isolation. The main argument of this chapter is that when there is disillusionment with paradigmatic knowledge the state resorts to a position of social defence (a pragmatic 'default' position). S.2(2)(b) of the 1991 Act is an example of this 'default' position where the state has withdrawn from a reliance on theory to a position of social defence.

2.1 The development of criminological 'knowledge'

Crime and punishment have been elements in the stories of human kind for millenia. There are stories concerning transgression, remorse, forgiveness, revenge, mercy and power in the texts of the major religions, the mythologies of Greek and Roman antiquity and the oral traditions of indigenous peoples throughout the world. It is not surprising that this should be so, as human beings gathered together are likely to conflict, and stories about the origins of conflict and mechanisms of resolution must play an important part in the construction of social groups. Indeed, Durkheim claimed the purpose of punishment was to bind societies together, by reinforcing the collective conscience and acting as an outlet for a shared expression of emotion, reminding societies of the reactions that they hold in common¹⁹⁹.

Yet despite the long history of human discussion of crime, criminology is held to be a *modern* discipline, even a late modern discipline, with many histories placing its emergence at a mere 200 years or so in the past. The characteristically modern nature of criminology and the criminal justice system are indeed important. Modernity is held to

¹⁹⁹ Durkheim (1902)

represent a move away from the inconsistent, arbitrary and violent justice that is the stereotype of the feudal systems of justice and medieval conceptions of evil²⁰⁰. Modernity also represents a move away from religious to secular explanations of human behaviour, and consequently a move towards granting people the authority to punish, rather than a belief that all punishment is authorised by a God whose motives cannot be challenged²⁰¹. The modern systematisation and secularisation that has occurred in the study of crime and the institutions of criminal justice, are now embedded in contemporary culture. They are taken for granted, so much so that it is almost impossible for modern western citizens to contemplate any alternative²⁰².

The two main theoretical positions of criminological discourse which have derived from the development of a modern stance arise from accounts of human society in political philosophy and the development of a scientific explanatory schema for human behaviour. The former has led to the creation of institutions of justice which attempt to define and apply the concept of justice, particularly with respect to punishment, and to emphasise recognition of, and respect for, individual freedom. The scientific aspects of modernity have provided a basis for attempting explanations for harmful and criminal behaviour and offer the hope that such behaviour or its effects can be minimised. Unfortunately these two strands of modern thought sometimes pull against one another and can lead to a contradictory and inconsistent response to criminality²⁰³. For example, the scientific analysis of crime may suggest methodologies for responding to crime which are ruled out by the modern sensibilities of particular societies, sensibilities which determine what constitutes a 'just' response to offending²⁰⁴.

One of the key motifs of modernity is a desire to make things better, and a belief that through human application of knowledge, improvements in social organisation, in technology *etc.* are possible. Modernity is therefore an optimistic, even utopian, perspective, seeking to design political structures and to make scientific discoveries in order to improve the lives of all human beings. The reference to all human beings also

²⁰⁰ Briggs 1996, Foucault 1977

²⁰¹ Morrison 1997 p 72, McGuigan (1999), chapter 2

²⁰² The failure of claims that there is anything approaching a 'postmodern' criminology are evidence of this. See Garland (1995)

²⁰³ Chapters 3 and 4 below will consider this in more detail.

²⁰⁴ Elias (1978a)

points to a prevailing characteristic of modern thought, its tendency to search for universal solutions to problems. However, recognising that not all institutions, structural arrangements and practices will benefit all humans at all times, modernity frequently takes a utilitarian approach to the distribution of benefits which is also a potential source of contradiction.

The modern criminal justice system emerged as a reaction to perceived injustices of the past. As was noted in the previous chapter, the earliest known English legal documents, such as the 1689 Declaration of Rights, sought to make the law public and universally applicable (at least in theory), and place the power of the law in the hands of parliament rather than the monarch. Even in its earliest articulation the criminal justice system is evidently modern. Then, as now, it is a *system*, concerned to ensure the public definition of offences, the universal applicability of the law, the efficient administration of the institutions of law and to provide safeguards against error and malpractice. Of course such high aims are quickly muddled by complicated wrangling over the meanings of the terms²⁰⁵, and may be corrupted in application. But the modern characteristics which define the criminal justice system are immensely important to the legitimacy of an institution that possesses the power to create and interpret the law and to administer punishment.

The paradigm of modernity has been influential on both criminal justice and the study of crime. *Criminology*, as the name suggests, has been influenced more by the scientific than the political elements of modern thought. The discipline, particularly as it is practised outside of academic institutions²⁰⁶, is overwhelmingly concerned with discovering the causes of crime, *i.e.* using scientific methodology based on observation and experimentation to test and revise hypotheses. This sort of view takes as its presupposition that there is a causal process at work which the theoretical perspectives, following the scientific method, will be able to uncover. This is the claim that science reflects the world, a position which has been criticised in Richard Rorty's 'mirror of nature' argument²⁰⁷, where he points to one of the dangers of such a view. Rorty argues that by constituting various items as objects of study, researchers validate their existence

²⁰⁵ *e.g.* who is entitled to have access to justice.

²⁰⁶ *i.e.* in policy-driven organisations such as the Home Office in England and Wales

²⁰⁷ Rorty (1979)

as natural objects of study. So, for example, 'crime' becomes an object of study as natural as 'the eye', even though it is a far more socially constructed term. This criticism is particularly pertinent to a discussion of the 'dangerous' offender, because, as the previous chapter showed, the term is used in a concrete way in the official language of government policy despite being a notoriously vague and socially variable concept.

However, the point is that *criminology* is seen by many of its practitioners as a scientific discipline, and this is demonstrated by the evidence that 'criminologists' have been collecting data and testing theories at least since the statistical work of Guerry in the early 19th century and the physiological typologies of Lombroso²⁰⁸ in the late 19th century and Hooton in the 20th century²⁰⁹. These researchers were collecting data, in the case of Hooton and Lombroso particularly relating to the physical characteristics of offenders, in the hope of discovering the difference between criminals and 'normal' men. Hooton held that:

Criminals as a group represent an aggregate of sociologically and biologically inferior individuals... Low foreheads, high perched nasal roots, nasal bridges and tips varying to extremes of breadth and narrowness... compressed faces and narrow jaws fit well into the general picture of constitutional inferiority... very small ears... hint at degeneracy.²¹⁰

Although Hooton's conclusion and the physiological hypothesis upon which it is based are no longer fashionable in quite this crude form, this style of investigation continues to be funded by government and supported by scholars. The longitudinal study of children in Scotland presently being undertaken at Edinburgh University is gathering information on as many aspects of the lives of these individuals as possible, and the project intends to follow the subjects from school to adulthood with the expectation that this data will help to explain, or even predict, subsequent criminal or deviant activity²¹¹. This type of research: scientific, evidence based and aetiological, is commonly described as being *positivist*, and there is an entire theoretical position within criminology devoted to

²⁰⁸ Jones (2001) p 105

²⁰⁹ Morrison (1997) Chapter 6

²¹⁰ Hooton, cited in Morrison (1997) p 129

²¹¹ Smith (2002)

research in this manner²¹². Positivist theory, as indicated by the quotation above, seeks to discover features associated with criminality, in order to find out what is different about criminals, or about the social conditions in which they live.

Criminological positivism is often crudely divided into three kinds, biological, psychological, sociological. Biological positivist theories hypothesise that there is something about the individual criminal's body that causes that person to commit crime. Examples have included the hypothesis that Klinefelter's syndrome (the male sufferer has an extra Y chromosome) causes violent behaviour, that there is a gene for aggression which may lead to crime *etc.* Psychological positivist accounts hypothesise that there is something about the individual's psychological makeup which causes that person to commit crime. The belief that children who are abused may be damaged and thereby become abusers in adulthood is an example of this type of theory as is the idea that early maternal deprivation may lead some children to commit theft²¹³. Sociological positivism is more complex, relying on a difference and pathology not within an individual but in the environment in which an individual or group lives. Sociological positivist theory, looks at the problems inherent in a society, social group, economic environment *etc.* which separately or more commonly through a combined effect, can influence or cause the individuals living in the affected social or physical environment to commit crime²¹⁴. The theory that poverty causes crime, or cultural conflict²¹⁵ causes crime *for an individual* is an example of a theory of this type.

The many other varieties and examples of positivist theories can be found in introductory criminology textbooks, and it is interesting that in many of these texts, the positivist perspective dominates the discussion at the expense of available alternatives²¹⁶. Positivist theory exemplifies the optimism of modern thought, an optimism justified by the advancement which science has brought to humans over the past few centuries. Few would argue against the claim that, in the richer countries where the benefits have been most obvious, modern science has brought immense benefits to mankind. These takes many forms ranging from improved health care and longevity, to liberation from the

²¹² Farmer (1967)

²¹³ Bowlby (1949)

²¹⁴ For an overview of this cluster of theories see Rock (2002)

²¹⁵ Sutherland and Cressey (1978)

constant need to be concerned about the pursuit of food, shelter *etc.* and the resultant opportunity to use leisure time in the production and enjoyment of art²¹⁷.

Criminological positivism, echoing its modern foundations, holds out the promise of a better future. It holds that, if scientific method is employed rigorously, and if the findings of research are integrated into policy, then levels of crime can be reduced. If, for example, it is possible to identify physical characteristics of criminals, by measuring their ears, or testing their chromosomal makeup, or examining their family circumstances then these afflicted individuals may be identified, 'cured' or removed to a place where they pose no threat to others even *before* they have committed a crime. Positivist theories are therefore frequently sympathetic to a policy of incapacitation²¹⁸, even incapacitation before the commission of an offence, if the evidence is supportive of the claim that harm is very likely to occur unless a person is prevented from acting. However, incapacitation is a last resort, used only when it is felt that there is nothing that can be done to change an offender's behaviour, and only until science has found the relevant treatment for the offender. For most of the 20th century, positivist theory and research progressed by assuming that, with the careful collection of data, followed by the appropriate application of theory to practice, offenders could be rehabilitated.

This rehabilitative optimism was obvious in the report of the Gladstone Committee which proposed that offenders who could be rehabilitated would be diverted from prison into a variety of treatment programmes²¹⁹. These programmes would be customised to deal with the problems of particular groups such as drunkards, mentally disordered offenders, women and debtors²²⁰. The promise of rehabilitation outside of prison coalesced with concerns about the prison environment itself. Reformers such as Beatrice and Sydney Webb were scathing about the damage the prison inflicted:

²¹⁶ *E.g.* Williams (1997), Lilly *et.al.* (1995), Tierney (1996)

²¹⁷ Of course the alternative position holds that the ideology of modernity has resulted in some of the most obscene acts of human history such as the holocaust or shoah of the Second World War (see Bauman (1989)).

²¹⁸ Modern incapacitation is not concerned to prevent the commission of all crimes, it has been concerned to prevent crime being committed against certain groups, typically middle class property-owners and employers. Therefore, incapacitation has taken many forms and has included eugenic programmes, transportation of offenders to overseas penal colonies, capital punishment and confinement in asylums and prisons.

²¹⁹ Radzinowicz and Hood (1986) p 618-657

We suspect that it passes the wit of men to contrive a prison which shall not be gravely injurious to the minds of the vast majority of prisoners, if not also to their bodies. So far as can be seen at present the most practical and hopeful of 'prison reforms' is to keep people out of prison altogether.²²¹

Throughout the first half of the 20th century there seemed to be some degree of acceptance that prisons were causing harm, and failing to reduce crime²²². However, offenders still needed to be punished or 'managed' in some way. The new positive sciences of psychology and psychiatry offered an opportunity for dealing with some offenders by rehabilitating them. Women offenders were identified as being suitable for psychiatric intervention, since low recorded rates of offending by women appeared to support the argument that female offending was unusual and pathological²²³. Similarly, young offenders were singled out for research and special 'treatment' measures as it was expected that they could be cured before the 'disease' of criminality became irremediable. Cyril Burt claimed to have identified as many as 170 of the factors that were relevant to offending²²⁴ in young offenders and his work was influential in the introduction of separate borstals for young offenders into the prison estate following the 1908 Act. The application of scientific argument, language and techniques conferred prestige upon the institutions and practices of penalty and it was some time before this was challenged²²⁵.

The application of modern theory and practice in the period between the 1890s and the second world war resulted in a convergence of arguments that advocated a reduction in the use of the prison. The direction of scientific effort to the management of offenders led to a belief that rehabilitation and reform could work to prevent all but the most intractable offenders from re-offending. At the same time penal reformers were raising concerns about the rights of prisoners and the damage caused by imprisonment²²⁶. A

²²⁰ Harding *et. al.* (1985) p205-235

²²¹ Webb (1922) p 248

²²² Bailey (1987)

²²³ Dobash *et. al.*(1986)

²²⁴ Burt (1931)

²²⁵ Garland (1985) p 82

²²⁶ Rawlings (1999) Chapter 8

reduction in the use of imprisonment, it was held, would be good for both individual offenders and for society. But these developments in the management of offenders were not occurring in isolation and did not presage a reduction in state control over offenders or indeed over citizens in general.

Ironically, reform of the penal system, and a desire to reduce imprisonment, were part of a process of greater state intervention in, and control over, the lives of citizens. Garland has argued that these changes were closely tied to the development of the welfare state²²⁷. Poorer citizens were offered help *e.g.* in the form of old age pensions, free health care and education. But these benefits would only be available to those who satisfied certain criteria *i.e.* were prepared to use these benefits appropriately and to refrain from anti-social activity in recognition of the state's 'charity'. For example, the old age pension was only provided for those who had been in regular employment and who had put money away while in employment²²⁸. The welfare state would provide for the 'deserving poor' and the 'undeserving' would be subject to greater supervision, intervention and control through withdrawal of benefits or through the mechanism of the penal system.

These welfare reforms offered the same choice for citizens as the reforms in the criminal justice system, the state would intervene in an apparently caring way, to assist the poor and the criminal, up to a point and subject to conditions. Garland argues that many of these efforts were directed towards identifying those who could and would be 'normalised' into conforming with the needs of a capitalist economy and segregating or incapacitating the others²²⁹. The criminal justice legislation provides evidence of this strategy. Apart from the habitual offenders provisions mentioned in chapter one, the *1908 Prevention of Crime Act* introduced measures that reflected the Gladstone Committee's view that offenders should be given the opportunity to be reformed outside of the prison environment. Only those offenders who could not be reformed would go to prison. Other statutes of the time were also aiming to divert people from the prisons by putting in place arrangements for probation²³⁰, making prison less inevitable for fine defaulters²³¹, and by

²²⁷ Garland (1985), Thane (1996)

²²⁸ Hay (1977) The pension was not available to imprisoned offenders for 10 years after their release.

²²⁹ Garland (1995) chapter 8

²³⁰ *The Probation of Offenders Act 1907*

²³¹ *The Administration of Criminal Justice Act 1913*

establishing more hospitals for offenders who were mentally disordered²³². As noted in the previous chapter, the *1948 Criminal Justice Act* made a distinction between corrective training, for offenders who were held to be reformable, and preventive detention for those who were not. The former sentence, although expected to relate to younger offenders, had no age limit and was explicitly rehabilitative. A sentence of corrective training was not intended to run concurrently with a sentence of imprisonment²³³ but could be served immediately after a sentence of imprisonment expired²³⁴.

The reformatory movement was born out of a concern for the individual prisoner but it was also a reflection of the broader changes in the relationship between the state and citizen. To the extent to which the state was offering the benefits of the welfare state, citizens were expected to control their impulses to crime and disorder. Where possible, knowledge of the reasons individual offenders committed crimes would be taken into account in the state's response which would, at least initially, be corrective rather than punitive in intent. 'Correction' was contrasted with 'punishment' because, positivists argued, offending behaviour was the result of some difference in the criminal which *caused* the criminal act, therefore *punishment* for the act seemed improper. The appropriate response was to care for the offender in such a way that he or she could resist the stimulus which caused him or her to offend, or to incapacitate him or her so that he could not offend again. This was the prevailing ideology of the *1908 Prevention of Crime Act* and the *1948 Criminal Justice Act*, with the habitual offender and preventive detention provisions reserved only for those considered resistant to correction, or for whom science had not yet provided the solution to their offending behaviour.

The positivist paradigm which entered the English criminal justice system with the Gladstone Committee report in 1895 was part of what Garland terms an 'assault' on the traditional 'classical' jurisprudential basis for criminal justice²³⁵. He describes this assault as operating in the following way:

²³² *The Mental Deficiency Act 1913* Zedner (1991)

²³³ *R v Heritage* [1951] 1 All ER 1013, *n.b.* corrective training was nevertheless served in prison.

²³⁴ *R v Albery* [1951] 1 KB 680, [1951] All ER 491

Against the doctrines of free will and responsibility, which formed the basis of the whole legal edifice, there was counterposed the conclusions of science.²³⁶

According to the classical school, criminal behaviour is the outcome of a calculation made rationally for which there can be no mitigating circumstances to alter the offender's liability for his actions. However, somewhat against this explicit presumption of free-will rational choice is the equally strong classical belief that, since each individual is part of a consensus to maintain the social contract (ultimately for his own benefit), breaking the social contract is either irrational or pathological²³⁷. This dilemma was the outcome of the theory having been espoused by a property owning class which did not imagine that the rational basis for action from the point of view of the indigent would be radically different from its own. Proponents of the social contract theory ignored the fact that protection was afforded the property owning classes by the social contract yet little was to be gained from such a system amongst the poor. Positivist criminology avoids the rationality dilemma of classicism by eliminating any free-will metaphysics in favour of an assumption of determinism and commitment to the search for observable, measurable and verifiable causes of criminal behaviour. Positivist criminological methodology focuses on the particular offender and seeks to identify variations from the 'norm'. These differences are aggregated, correlated and, often circularly, held to be both a symptom of, and an explanation for, the offending behaviour. Positivists hold that since an offender's behaviour is determined, given enough research and information, dangerous and criminal behaviour can be predicted.

Criminological positivism typically assumes that crime is an objectively defined phenomenon and that the contribution of the social to its definition and aetiology is minimal. As early as the 1890's the positivist champion Garofalo had recognised the potential difficulties posed by subjective definitions of crime and was arguing for a 'natural' definition of crime. Unfortunately this only stimulated further circularity in positive criminology: the criminal is identified by certain observable 'natural' features, behaviour exhibited by people with these features is therefore criminal. The failure of criminological positivism was the failure to recognise that in the search for those features

²³⁵ Garland (1985) p 84

²³⁶ Garland (1985) p85

²³⁷ See Chapter Three

which would identify all and only offenders, a methodology which focuses on the physical characteristics of people in isolation from their social environment is likely to fail. The theory both fails to recognise the clearly subjective definition of much criminal behaviour (how else can changes in laws defining criminal action be accounted for?) and ignores the importance of social interactions and their role in the motivation of people to either commit or not commit crimes. As the Scottish Council on Crime notes:

...the findings of research have not been of great value to those operating services for the prevention of crime. The negative findings of criminological research, for example the demonstration that certain simpler beliefs about the causes of crime do not stand the test of fact, may have been of greater value.²³⁸

von Hirsch also observes the decline in optimism with respect to prevention strategies:

Past research about rehabilitation, deterrence, and collective incapacitation showed a depressing cycle of optimistic projections, followed by those projections' deflation under more careful scrutiny...²³⁹

Whilst positivism has had some success at looking for the causal factors influencing individual criminals, it has not been able to simply and accurately (and predictively) generalise to the whole population. The principle, practical failing of criminological positivism is that its experimental design aims to solve the question of the aetiology of crime for individuals, when the demand of legislators, sentencers, victims and politicians is to provide the aetiology of crime for whole classes of people. The doctrines of free will and responsibility and their incorporation into the criminal law enabled the distribution of blame and the infliction of pain upon offenders. As was noted in Chapter One²⁴⁰, punishment had to be deserved to be *punishment*, and something could only be deserved if the person had a morally relevant connection to the act, *i.e.* was responsible in some sense for the commission of the act. Yet a positivist approach which argued that deviant or criminal behaviour was the result of some form of pathology eliminated responsibility for the act. A man who is violent as a result of having Klinefelter's

²³⁸ Scottish Council on Crime (1975) para 55

²³⁹ von Hirsch (1985) p 173

²⁴⁰ Section 1.2

syndrome could not be blamed for his actions and morally could not be punished. He could however, be rehabilitated and, if it was not known how to do this, he could be incapacitated.

The abandonment of the classical jurisprudential concepts in criminological discourse arose out of a conflict within modernity. The classical concepts emerged from the political and metaphysical response to modernity, but were incompatible with the scientific pursuit of social change. For one thing, the 'classical' view of punishment focused on the harmful act that had been committed rather than any future behaviour of the offender. In seeking to demonstrate equality and fairness in the application of punishment, the classical approach was incompatible with the individualised approach of the scientific paradigm. These contrasting approaches were both attempting to reflect the values of equality and fairness that were so much part of a modern perspective on punishment. But the classical approach argued that it was fair to treat all offenders the same, with perhaps some exceptions at the extremes of age, mental capacity *etc.* By contrast, the positivist approach argued that it was fairer to treat all offenders as individuals, customising their treatment and punishment in order to maximise the benefits to both the offenders and the society²⁴¹. To advocates of the positivist standpoint, classical theory was seen as being ridiculously legalistic, inflexible and a hindrance to the development and employment of techniques to reduce offending and re-offending. As evidence, Garland cites Saleilles on classical penal theory:

though it attempts to make criminals pay for their debts, it does not succeed in preventing them from contracting new and equally irresponsible ones.²⁴²

Given the confidence of the positivist approach in its ability to reform offenders, and the resultant prevention of crime which the paradigm promised, it was not surprising that the classical view of freewill, responsibility, proportionality and uniformity of punishment was deprecated. It remained in the rhetoric of the criminal justice system and in the determination of guilt, a point made by Duster²⁴³, even with respect to mentally disordered offenders. However, from 1895 to the last quarter of the 20th century, the

²⁴¹ Chapter 3 consider this point in detail.

²⁴² Saleilles, cited in Garland (1985) p 85

²⁴³ Duster (1977), see Chapter one, S. 1.9

positivist approach prevailed and the 1908 Act and the 1948 Act show that, even though the doctrine which assumed individual responsibility was maintained in the criminal law, these Acts extended the positivist ideology to *all* offenders when it came to measures after conviction²⁴⁴.

The positivist theory, exemplified by the rehabilitative ethic which infused penal policy and legislation from 1895 to 1991 was driven by concerns about the needs of the individual offender. But as least as important to legislators and proponents of the use of community punishments was the advantage that this approach would provide for society²⁴⁵. Since the 19th century there had been some involvement of charitable and religious institutions in taking responsibility for the control of some individuals, particularly the young²⁴⁶, outside of prison. The *1907 Probation of Offenders Act* gave the policy of allowing offenders to be punished and treated outside of prison official endorsement, although probation services were not initially funded by the state²⁴⁷. The period between 1907 and the *1991 Criminal Justice Act* saw an increase in the number and variety of community sentences. In 2002 sentencers have the power to apply six different forms of community sentence to adult offenders, some of which can limit the offender's liberty quite considerably²⁴⁸. Although these can be seen as being punitive, and are part of the policy, noted in the previous chapter, of the extension of imprisonment into 'the community', for most of the post war period, community punishments were conceived within a treatment model²⁴⁹ which was positivist in its assumptions.

²⁴⁴ The frequent application of the dangerous offenders legislation, noted in chapter 1, to those offenders who were merely persistent or a nuisance, reminds us that the retributive elements of the classical paradigm were never completely obliterated by the prevailing positivist ethos, probably because there was a difference of opinion between policy makers and the sentencers on this point.

²⁴⁵ It was hoped that this advantage would be both social and financial in nature.

²⁴⁶ Raynor (2002) p1172, *n.b.* this is similar to the involvement of charitable and religious organisations in caring for some mentally disordered people, noted in chapter one.

²⁴⁷ Garland (1985) pp210-214

²⁴⁸ *E.g.* A community rehabilitation order can specify that the offender must obtain treatment for addiction, and can impose a curfew or exclusion order on the offender. See Raynor (2002)

²⁴⁹ McWilliams (1986)

Although crime rates in the immediate post-war period were higher than pre-war²⁵⁰, it was thought that this reflected the disruptive effects of the war rather than an increase in the propensity of people to commit crime. Throughout the 25 years following the end of the war there was still optimism that the changes in criminal justice, together with the extension of welfare provisions to include housing and health care, would eventually lead to a decline in social problems including crime²⁵¹. Insofar as community punishments claimed to reduce the need for imprisonment, and offered hope that they would be effective in stopping or reducing the severity of offending by individuals, they would be judged to be a success. Although even the most optimistic advocates of the positivist framework recognised that it would not eliminate crime, the success of the programme could only be claimed if there was *some* decline in the rates and/or severity of crime. Unfortunately, as we shall see in the next section, crime rates rose throughout this period, and the essential evidence was not forthcoming.

The early 1970s saw calls for a return to more punitive and retributive penal rhetoric. In 1966, shortly after the abolition of the death penalty, the murder convictions of Myra Hindley and Ian Brady shocked the country. Brady and Hindley were found guilty of the brutal killings of 3 young children, although they killed 5. The media interest in the case was high and re-ignited the debate about capital punishment. Public opinion vilified Hindley and Brady and it would have been impossible to countenance that the supposedly caring and less punitive ethos of rehabilitation²⁵² could apply to them and to other serious offenders, even if it was carried out within the prison walls. The ideology of positivism, with its belief in the reformative opportunities of the criminal justice system, failed to impose itself on the public consciousness. The evidence also failed to persuade policy makers and sentencers of its efficacy. Treatment was seen as a failure and as a soft option for offenders.

²⁵⁰ Smithies (1982)

²⁵¹ Rawlings (1999) p130-133

²⁵² Despite a subsequent diagnosis of mental illness and confinement in a secure hospital for Brady.

2.2 The decline of optimism

The positivist perspective facilitated the development of increasingly complicated and differentiated responses to different groups of offenders committing different types of crimes. Yet the theory failed to demonstrate that it was preventing crime or even preventing recidivism. The difficulty for positivist criminologists was that the reforms introduced were comprehensive yet they comprehensively failed to make any difference, at least in terms of reducing the numbers of crimes recorded by the police. The police records show that the crime rate increased eightfold between 1950 and 2000²⁵³. The rate of imprisonment and the length of sentences likewise rose at a disturbing rate during the post war period²⁵⁴, and this accelerated even more markedly during the last decade of the century²⁵⁵. Some 'blame' could be directed at sentencers who persisted in using imprisonment even when they were instructed that it was an inappropriate site for the delivery of rehabilitative programmes, but even among those offenders who received community sentences, recidivism continued to be high²⁵⁶.

Some of the reasons for the post war increase in imprisonment are generally viewed with approval even by penal reformers, *e.g.* the imposition of life sentences on offenders who would have once been subjected to the death penalty²⁵⁷, an increased awareness of, reporting of, and official response to some crimes such as rape, domestic violence and child abuse, and a tendency towards harsher penalties for alcohol-related fatal motoring accidents. However, the continuing accelerated growth in the numbers of people held in prison cannot be explained in full by these factors. The number of persons sentenced to death in this century was not high enough to make a significant difference to the level of imprisonment even if all capital sentences had been carried out and, mercifully, most were not. The impact on imprisonment of an increase in the seriousness with which some violent crimes are viewed can also only be part of the answer since these are the minority of crimes for which imprisonment is imposed (although they will result in longer average sentences and thus have a greater impact on average daily occupancy than higher

²⁵³ Maguire (2002), Fig. 11.1, p 344. Note that Maguire details the difficulty in obtaining an accurate picture of crime trends based on recorded crime statistics.

²⁵⁴ Morgan (2002) p 1116

²⁵⁵ Ashworth (2002) p 1077

²⁵⁶ Brody (1976), Martinson (1974)

²⁵⁷ Hale (1961)

receptions of shorter periods)²⁵⁸. By contrast with these minimally augmentative factors, there were many reductionist strategies put in place in the 1980s and early 1990s. Maximum penalties for some crimes were lowered (e.g. for theft and some forms of burglary²⁵⁹), some offences were legitimised (e.g. suicide²⁶⁰, some forms of abortion²⁶¹, most forms of homosexuality²⁶²).

The increase in crime rates and the increase in imprisonment rates were significant in bringing about a paradigm shift in criminology and in the criminal justice system. In the early 1970s, a number of studies claimed that community penalties prevented re-offending among a small group of offenders who committed crimes infrequently, but that otherwise rehabilitative programmes were ineffective²⁶³. Indeed, for young people, there were fears emerging that community programmes were resulting in *increased* levels of incarceration²⁶⁴. The optimism that had characterised policy with respect to offending started to be open to question. A challenge to positivism emerged from two arguments, the first being that the treatment model did not work²⁶⁵ (with the corollary that sentencing on this basis was therefore manifestly impossible and unjust²⁶⁶), the second being that it played down the importance of the question of the offender's culpability and blameworthiness²⁶⁷.

Barbara Hudson describes the 1970s and early 1980s as a period of 'frantic innovation' manifested by the introduction of alternatives to custody and an overt policy of diversion from prosecution especially for young persons²⁶⁸. Likewise, Andrew Ashworth speaks of a 'policy of proliferation'²⁶⁹ and notes that it 'was not a conspicuous success'²⁷⁰. Much of this activity was designed to reduce the use of custody. To anyone unfamiliar with the

²⁵⁸ See Morgan (2002) p 1130

²⁵⁹ 1991 *Criminal Justice Act* s 26

²⁶⁰ The *Suicide Act* 1961

²⁶¹ The *Abortion Act* 1967

²⁶² The *Sexual Offences Act* 1967

²⁶³ Shaw (1974)

²⁶⁴ Thorpe *et. al* (1980), Cohen (1985)

²⁶⁵ Martinson (1974), note that Martinson retracted his 1974 conclusions in Martinson (1979)

²⁶⁶ Hood (1974), von Hirsch (1976)

²⁶⁷ Bottoms and McWilliams (1979)

²⁶⁸ Hudson (1993) Chapter One *passim*

²⁶⁹ Ashworth (1995) p251

reality, these factors, and the growth of alternative penalties mentioned by Hudson and Ashworth, would suggest that there must have been a *decrease* in the use of imprisonment. Yet, throughout this period there was an increase in the proportion of the population in prison at any one time as well as an absolute increase in the prison population²⁷¹. Swamping the reductionist efforts was the ubiquitous increase in the rate of recorded crime²⁷², easily the most significant single explanatory factor in any account of the rise in post-war levels of imprisonment.

Much of the blame for increased rates of imprisonment fell upon sentencers despite the Court of Appeal's adherence to, and promotion of, a declared intention of reserving imprisonment for the most serious cases. The Appeal Court employed many arguments and strategies to discourage sentencers from using their power to imprison. These included (i) stressing the totality principle which states that when there are multiple offences before the court, the sentence should reflect the overall severity of the offences, not the aggregate of the seriousness of each offence²⁷³, (ii) the principle that any prison sentence imposed should be the minimum necessary to achieve the purpose for which it was imposed²⁷⁴, and (iii) the principle that prison should be reserved for the gravest instances of the offence likely to occur²⁷⁵. These principles are all designed to limit the use of imprisonment. Yet as the precise meaning of phrases such as 'minimum necessary to achieve the purpose' is left vague, the Appeal Court cannot ensure its guidance will be effective. Henham notes that s. 20 of the *1973 Powers of the Criminal Courts Act*, which provides that the court should not pass a prison sentence on a person unless it is *of the opinion that no other method of dealing with him is appropriate*, leaves the court with unfettered discretion. Henham recognises where the blame is directed, if not due:

Ostensibly, since these constraints were designed to require the justification for imprisonment to be made explicit it can be argued that they failed to create any significant impact on the prison population which continued its inexorable rise throughout the 1980s. Their collective failure to do so was taken as further

²⁷⁰ *ibid.*

²⁷¹ Morgan (2002)

²⁷² Maguire (2002)

²⁷³ *E.g.* R v Dillon (1983) see Ashworth (1995) pp209-214 for discussion

²⁷⁴ R v Hitchcock (1982)

²⁷⁵ R v Smith (1975)

evidence of the need to curtail sentencing discretion without any cogent evidence being produced of a causal link between an incorrect sentencing approach and rising imprisonment rates.²⁷⁶

Henham here seems to suggest, that sentencers' behaviour was unfairly blamed for the rise in imprisonment. Since the statutes and the guidance of the Court of Appeal were making clear the official position that imprisonment was to be used more sparingly, those sentencers who continued to use imprisonment at the rate in which they always had could not have been sentencing 'correctly'. Sentencers' use of imprisonment in a way which might have once constituted 'correct' sentencing, had been disapproved and a policy recommending the diminished use of custody was endorsed explicitly by both parliament and the Court of Appeal. But, as evidence suggests that short terms of imprisonment (surely the most substitutable by community penalties) continued to be handed down²⁷⁷, it is difficult to avoid putting some of the blame for the increase in imprisonment on sentencers. At the very least sentencers were failing to respond adequately to the demand to be parsimonious in the use of imprisonment. At worst, it could be argued that sentencers did not change their sentencing behaviour at all and that their failure to do so, in conjunction with the rising crime rate, accounts for the inexorable rise in imprisonment.

Unfortunately, it seems that, attempts to convince sentencers of the merits of reducing the use of imprisonment and increasing their use of alternative sanctions had produced little effect. Hence the *1991 Criminal Justice Act* introduced for the first time a definitive statement of the the primary purpose of sentencing and the justification for the imposition of punishment. The Act set down strict criteria which had to be fulfilled before the sentencer could impose a term of imprisonment. The wording used for the criteria was taken from the *Criminal Justice Act 1982* which gave threshold parameters for the imposition of custodial sentences on offenders under the age of 21. These criteria were imported directly into the adult context in the 1991 Act despite the criticisms made of the provisions in the case of juvenile offenders. Burney argues that with respect to the application of the threshold criteria to young persons, the criteria used *i.e.* the seriousness of the offence, danger to the public and failure to respond to previous disposals, were not

²⁷⁶ Henham (1996) p6

defined, leaving sentencers the discretion to impose custody as often as they chose²⁷⁸. This was despite the fact that it was considered very important to avoid imprisoning juveniles. It was feared that juvenile offenders could learn new criminal skills in detention centres that were described as being little more than 'universities of crime'. There was also concern that incarceration could lead to these young people, mostly men, labelling themselves as criminals and starting criminal 'careers'. Despite the widespread acceptance of the benefits of a policy of diversion from custody for young offenders, custody was imposed as frequently after the 1982 Act's provisions came into force as before²⁷⁹. It seems to have escaped the attention of the drafters of the 1991 Act that since the provision had not worked to divert the most vulnerable group away from sentences of imprisonment, it was always unlikely the unaltered criteria would reduce sentences of imprisonment imposed upon adult offenders.

One possible explanation for sentencers' reluctance to reduce their use of imprisonment has been suggested by James Q. Wilson, advisor on criminal justice to US President Ronald Reagan and an advocate of the increased use of imprisonment in certain circumstances. Wilson argued that it is reasonable to view imprisonment as only another gradual step along the penal continuum, especially if punishment in the community is considered as a type of deprivation of liberty²⁸⁰. On Wilson's model, the use of punishment in the community could lead to increased use of imprisonment because the similarity in the *effect* of punishment inflicted (loss of liberty) is emphasised rather than the difference in *kind* or the *quantum* of punishment imposed. In 1979 Stan Cohen echoed Wilson's view and described the 'blurring of the boundaries' between community penalties and imprisonment; Cohen claimed that amongst its many defects this policy caused a desensitisation to the unique severity of the penalty that is imprisonment²⁸¹. As there is evidence that government policy from the 1970s did indeed downgrade the difference between punishment in 'the community' and punishment and treatment delivered behind the walls of the prison²⁸², Wilson's and Cohen's observations are prescient. However, the effect of the policy change on sentencers is difficult to prove,

²⁷⁷ Morgan (2002) p 1129

²⁷⁸ See Burney (1985)

²⁷⁹ See Morris and Gelsthorpe (1994)

²⁸⁰ Wilson (1975)

²⁸¹ Cohen (1979)

²⁸² Greenberg (1975), Scull (1977)

especially given the frequent reminders of senior judiciary to their sentencing colleagues of the need to limit their imposition of imprisonment.

We have seen that the numbers of recorded crimes and the numbers of persons sentenced to periods of imprisonment increased consistently throughout the second half of the twentieth century²⁸³. The promise of positivism was discredited, or at least positivist claims had to be dramatically scaled down²⁸⁴. That is to say, some forms of positivist theory had failed. As noted at the commencement of this chapter, 'traditional' positivism is divided into three forms, two of which concentrate their methodology on the identification, segregation, treatment and/or incapacitation of morbid individuals.

Sociological positivist theorists have argued for a large variety of social and physical factors which may influence an individual's propensity to commit crime. Included among the research are studies that consider: whether certain physical environments precipitate certain types of crime²⁸⁵, whether poverty leading to family breakdown produces delinquency in children²⁸⁶, whether the strain of unfulfilled (and structurally impossible) expectations leads to deviant adaptations²⁸⁷, and whether the lack of legal opportunities for excitement and self expression lead to destructive violence²⁸⁸. This group of theories pathologises social conditions rather than individuals and was the subject of at least as much interest as other positivist approaches to a small number of criminologists²⁸⁹. However, examining the social causes of crime was not as useful to policy makers as it was of interest to the theorists. Sociological positivist theories had two practical problems and one political difficulty. Practically, the solutions they proposed, such as reducing family breakdown and poverty, and increasing social inclusion, were difficult if not impossible to achieve, and would take decades rather than years to achieve - a period of time that went beyond the terms of office even a highly successful political party was likely to serve²⁹⁰. As well, it was hard to believe that the causes of the increase in crime were to be found in social problems when the state had, on the face of it, done so much to

²⁸³ With the exception of a small a fall in recorded crime in the 1990s.

²⁸⁴ For an analysis of the decline of rehabilitation ideology see (Hudson 1993)

²⁸⁵ Wikström (1991)

²⁸⁶ Wilson (1980)

²⁸⁷ Merton (1957)

²⁸⁸ Matza (1964)

²⁸⁹ *E.g.* Taylor, Walton and Young (1973), Lemert (1951)

improve the situation of the poor since the end of the second world war. Redistributive taxation had brought about a welfare system which guaranteed the provision of old age pensions and social security benefits for the unemployed and ill. Investment in social infrastructure such as housing, education and healthcare had been provided yet crime rates still rose. Politically, it was held to be wrong to label the poor and the underclass as the group which was committing more crime and disorder, when clearly not all of the poor were criminal. This was particularly the case when the data on crime rates were so vulnerable to challenge. As noted above, criminologists argued that the poor had come to be observed, controlled and disciplined by the (discriminatory) provisions of the welfare state and that this alone might account for their increasing criminalisation²⁹¹. But at the same time, other criminologists were pointing to changes in the types of crime committed, brought about by new opportunities²⁹² and cultural changes particularly among the young and urban poor²⁹³.

The practical difficulties of addressing broad social, economic and institutional structures in order to reduce crime were immense. A radical perspective proposing revolutionary changes to bring about social justice was never likely to receive a warm reception from politicians concerned with instant, predictable results. Nevertheless, the sociological positivist perspective was influential on policy. Precisely because it was not concerned to identify the pathologies of individuals, sociological positivism offered an alternative way of addressing the problem of crime. Although general political and economic features were difficult to change, where there were identifiable 'pathologies' in local environments it was possible to investigate the potential to change these areas and to reduce crime. It was relatively simple to identify locations where there were high levels of recorded crime and to compare these with areas which recorded low levels of criminal activity²⁹⁴. Such research found that aspects of a location such as visibility, ease of access, and the absence of preventive factors influenced the likelihood that a crime

²⁹⁰ Hudson (1993)

²⁹¹ Cohen (1979), Garland (1985), Hudson (1993)

²⁹² *E.g.* the opportunities for crime brought about by new technology such as the internet, and a desire for excitement which generates some crimes such as football related violence.

²⁹³ Davis (1990), Hayward (2003)(forthcoming)

²⁹⁴ Bottoms and Wiles (2002)

would occur in that area²⁹⁵. This approach is positivist, its methodology is clearly scientific and seeks causal or correlative connections, but this approach is not aimed at finding the deviant or pathologised *individual*.

Unfortunately for the status of criminology, this crime prevention theory can be re-described in a way which situates it within the competing *classical*, free-will theoretical position. This view holds that humans are rational and act in ways which are likely to best provide them with desirable outcomes and to desist from actions which are likely to fail. Accordingly, changing the physical environment to increase the likelihood of detection, conviction *etc.* will make the rational potential offender choose not to commit a crime in a particular place and time. The fact that the success of a particularly 'common sense' approach, *i.e.* situational crime prevention, could be claimed by both competing doctrines, did not enhance the credibility of either classicism or positivism or of criminological theory generally.

Policy makers could not be blamed for despairing, since the opposing theories could not be distinguished by their successes or failures. Low level 'knowledge' about what works in a particular place and time was useful, but high level theory about why certain measures work and on whom was not. So, information concerning the efficacy of situational crime prevention measures was accepted by policy makers and adopted into policy programmes. But it is not surprising that this knowledge was influential in a non-explanatory way which did not credit any one kind of criminological theory.

2.3 The emergence of a 'new penology'

The abandonment of a theoretically grounded approach to crime reduction marks the origin of the penal model which has come to be known as the 'new penology' and which is characterised, in part, by the sentencing provisions of the *1991 Criminal Justice Act*. This penal paradigm is identified by features such as instrumental, technical and scientific approaches to crime control, actuarial reasoning and a reliance on professional (rather than clinical) judgement. Its most broadly defined characteristic can be summarised as the efficient management of risk. As a result, it is deeply concerned with

²⁹⁵ Clarke (1995)

the reduction and minimisation of harms and its firmly instrumental outlook favours the use of strategies of harm reduction such as crime prevention and incapacitation. When incorporated into practical crime control, the new penology emphasises prediction²⁹⁶, the application of new technology²⁹⁷, prevention²⁹⁸ and a cost/benefit analysis of penal measures²⁹⁹. The Probation Service was the first part of the criminal justice system to feel its influence moving from a reformatory, individualised service to one based on the surveillance and control of groups of offenders³⁰⁰.

The new penology ideology arose from social changes which are more easily identified in the social circumstances of the United States than in the United Kingdom and other parts of Europe. In the USA since the 1960s labour market changes had led to a reduction in the demand for unskilled labour. Criminal activity increased as a result of unemployment and also made it difficult for offenders to be rehabilitated and re-integrated into the community through work. As communities became more deprived the capacity of local people to participate in offender rehabilitation was reduced so *e.g.* outsiders such as probation officers were required to assist offenders in reintegration without the support of the offender's family. With the failure of the economic sector to provide unskilled jobs, the social structure began to fail making it more likely people would begin to offend and making it more difficult for offenders to cease their offending behaviour³⁰¹. Rates of imprisonment rose dramatically as large numbers of offenders appeared to be uncontrollable and incapacitative policies were developed to manage this underclass of 'dangerous' criminals.

In the UK, Raine and Willson³⁰² point to the oil crisis in the Middle East and the consequent economic pressures which brought about changes in the management of public funds in the 1970s. The political determination to adjust to straitened times was forced on Britain by stipulations on monetary policy applied by the International Monetary Fund (IMF) from which Britain had needed to borrow funds to meet public

²⁹⁶ *E.g.* Simon (1971)

²⁹⁷ Home Office (1990b)

²⁹⁸ Home Office (1990c)

²⁹⁹ See Raine and Willson (1993) *passim*

³⁰⁰ See also Raine and Willson (1993) 2.2.1

³⁰¹ Garland (1985)

³⁰² Raine and Willson (1993) 1.3.1

spending requirements. The demands of the IMF for tighter control over public spending coincided with the rise of the new right in economics with its ideology of private investment rather than public ownership, lower taxation to provide incentives for entrepreneurial enterprise and a reduction in the welfare state. As part of this political shift to the right, the UK government brought in policies that were hostile to welfare and were prepared to exclude individuals and groups from economic and social life if they were unproductive or difficult to manage. In the same way as the market economy could operate with maximum efficiency if some people were excluded from the economic environment³⁰³, penal policies sought maximum efficiency through the exclusion of people from normal social life³⁰⁴.

Evidence that a change of thinking with respect to social policy had occurred can be found in the new styles of management adopted by many government organs, including those of the criminal justice system. New management styles included the introduction of devolved budgets, performance indicators, cost/benefit analyses applied to resource management, support for privately managed prisons, risk assessment in the management of offenders on parole, and policing strategies designed to target police resources at those offences which were of most concern to the public³⁰⁵. However, the features of new penology only partially describe the changes in penology and crime control in the UK throughout the 1980s and early 1990s. A form of rhetoric that predates positivist criminological theories survived to operate alongside the new perspective, and is most visible in a tendency towards explicitly *expressive* language and policies. The message that was to be communicated through these policies was one of abhorrence of criminal activity and the threat of total state control of individuals through heightened levels of punitiveness. New penology was not concerned to be less punitive than its alternatives, although one of its aims was to reduce the inefficient reliance on imprisonment³⁰⁶; however it was not particularly concerned with demonstrating its punitive credentials.

Before considering the introduction of punitive rhetoric onto new penology, it is important to consider the political climate which preceded the new penology. 'Old

³⁰³ *E.g.* if levels of unemployment are high, then the cost of labour is cheap.

³⁰⁴ *E.g.* if a person offends repeatedly then they should be incapacitated.

³⁰⁵ Stenson and Sullivan (2001) Introduction and *passim*

penology' is the name I shall use to describe the criminal justice paradigm that dominated the post war period until the 1970s. Old penology was essentially positivist social policy, seeking to understand the causes of criminality in order to put in place measures to prevent or correct it. It aimed to find mechanisms to bring the offender back into law abiding society, and left the development of the techniques to experts such as psychiatrists, clinicians and social workers rather than politicians or the common sense opinions of lay persons. Rather in the way medicine and science are felt to be specialist subjects in which ordinary people can only rarely give an opinion, crime control was considered best left to the experts.

In contrast to the policies of new penology, old penology did not seek to reduce crime in the fastest, most cost-efficient way. Instead, it sought to encourage offenders back into full and virtuous membership of their communities. As a consequence, for old penology the social exclusion of offenders through incapacitation was seen as failure rather than success. For the new penology, the use of incapacitation is evidence neither of success nor of failure. It is to be used when it is the most efficient means of preventing offending or re-offending. Of course, although advocates of new penological policy claim that the decision about the efficient use of imprisonment is a scientifically determined matter, it is always influenced by political facts. The rise of populist punitiveness³⁰⁷ meant that the policies adopted as part of new penology in the 1980s and 1990s were never going to be exclusively based on a scientific foundation nor would the policy with respect to offenders be divorced from public opinion nor completely devolved to professionals.

2.4 New penology and the 1991 Criminal Justice Act

The 1991 Act can be seen as statutory articulation of the new penology. The Act set forth a policy which sought to sentence offenders on the basis of the crime that they had committed, not in order to correct the pathology from which they suffered. The Act was also concerned with the efficiency of the criminal justice system, and sought to limit the wasteful use of resources. It therefore set in statutory form restrictions on the use of imprisonment and on the length of sentences of imprisonment. Sentence length was

³⁰⁶ Imprisonment, being expensive, is not seen as efficient if other penal measures prevent re-offending just as effectively.

³⁰⁷ Bottoms (1995)

required to be the minimum that was commensurate with the seriousness of the offence, with the exception of those offenders who were found to be 'dangerous' who would be subject to longer than normal sentences of imprisonment.

As was clear from the 1990 white paper³⁰⁸ which preceded the Act, the proportionality aspects of the *1991 Criminal Justice Act* were linked to the theory which had become known by the phrase 'just deserts'. Just deserts theory posits a relationship between the criminal act and the punishment that the act attracts. This relationship can take two forms: the seriousness of certain criminal acts must be ranked in accordance with the severity of punishment so that *e.g.* more serious criminal acts attract harsher penalties; the second and more problematic form sets the punishment in a proportionate relationship to the absolute seriousness of the crime. The punishment must be proportionate to the seriousness of the offence taking into account any aggravating or mitigating factors. The objectives of such sentencing could include: denunciation and retribution for the crime; public protection; reparation to the victim; and reform of the offender (preferably in the community)³⁰⁹. That a variety of sentencing objectives was recognised as legitimate is suggestive of the theoretical neutrality of the new penology. No particular sentencing rationale is promoted by the 1991 Act, although the *length* of a prison sentence is determined by the retributive criterion of the seriousness of the offence.

The just deserts sentencing framework emphasises the fairness of punishing the offender only for the offence for which he or she is before the court³¹⁰. In practice this means that the court cannot take prior convictions into account in the determination since that is irrelevant to the estimation of the seriousness of the current offence. The white paper acknowledged this quoting the Court of Appeal's ruling that an offender should not be 'sentenced for the offences which he has committed in the past and for which he has already been punished. The proper way to look at the matter is to decide a sentence which is appropriate for the offence... before the court.'³¹¹ Nonetheless, prior good character as shown through the absence or small number of similar offences may enable

³⁰⁸ Home Office (1990d)

³⁰⁹ Home Office 1990 s. 2.9

³¹⁰ von Hirsch (1986) Although this principle was introduced in the 1991 Act, it was severely weakened in the *1993 Criminal Justice Act*.

the court to reduce the sentence. However, within the just deserts framework, the offender cannot be punished more harshly as a result of his prior convictions for to do so would be to punish him or her more than once for those offences. Taking prior convictions into account would also inevitably result in more punitive sentences with no clear justification, and this is therefore contrary to the desideratum put forward in new penology that punishment should be the minimum necessary or else state resources are wasted.

We saw in chapter one that the 1991 Act, in keeping with new penology thinking, promoted parsimony in the sentencing of offenders to prison. The Act also reduced the maximum sentence for some crimes³¹²: Theft (when tried on indictment) was reduced from a maximum of 10 years to a maximum of seven years, and the offences of conspiracy to steal and attempted theft were also reduced. The maximum sentence for burglary was also reduced in those cases where the burglary was not of a person's home. This is compatible with the seriousness criteria underlying much of the sentencing revision in the 1991 Act, making a distinction between crimes that disturb the security and safety of persons and crimes which are aimed at property. In the case of burglary of a dwelling house, the maximum possible sentence was not reduced from 14 years. The maximum sentences that were reduced were those which had not in practice been approached for some time and therefore these changes made little difference except in a presentational and symbolic sense. However, within a just deserts framework such symbolism cannot be disregarded, as the sentence maxima are a guide to the relative seriousness with which certain crimes are viewed, and are therefore an important guide for sentencers even if it happens that these maxima are never approached.

The just deserts rationale provided a method by which the Executive could better control the sentencing habits of the judiciary through a clear outline of the aims of sentencing, and through guidelines, rules and standardised levels of punishment³¹³. Just deserts theory militated against many of the expensive elements of old penology regimes,

³¹¹ *R v Queen* (1981) 3 Cr App R (S) 245

³¹² It must be noted that the maximum penalty for some crimes was increased in the *Criminal Justice Act 1993*, notably the crime of causing death by dangerous driving, the penalty for which was increased from a maximum of five years imprisonment to a maximum of ten years imprisonment.

³¹³ In the USA this led to the use of sentencing tables. See Von Hirsch (1986) Chapter 2

particularly the long or indeterminate sentence that was claimed to be rehabilitative and in the offender's best interest. As there was little or no confidence in crime reductive efficacy of the rehabilitative approach, the new penology preferred punishment in the community as it was cheaper. If it also had the effect of reducing offending through re-integrating the offender and making amends to victims then this was clearly desirable. Thus the 1991 Act did not exclude the possibility that there were substantial benefits to be gained through reparation, community service, probation, and forms of community punishment which minimised the deleterious effects on families, and employers. The rational calculating elements of new penology were reflected in the 1991 Act's introduction of unit fines³¹⁴. Unit fines enabled calculations of financial punishment to be more fair *e.g.* to strive towards an equal impact with respect to the levels of monetary fines imposed on offenders of varying financial means³¹⁵.

Just deserts theory provided a perfect way to introduce two elements of the new penology into the English criminal justice system. Reacting to the failure of criminological theory to provide an explanation of the causes of crime, just deserts theory nevertheless provided a method by which the severity of criminal sentences could be determined. By promoting sentences determined by desert, and by taking a bifurcated³¹⁶ approach to the imposition of punishment, the policy reserved the most expensive resource of imprisonment for those offenders who had committed the most serious crimes and from whom the public needed protection³¹⁷. To the extent to which the success of the policy can be measured by a fall in the length of sentences of imprisonment, it was initially successful³¹⁸. To the extent that just deserts and new penology failed to reduce the prison population in the longer term we need to look at the influence of public opinion on politicians, and accordingly, the influence on penal practice.

³¹⁴ Ashworth *et. al.* (1992)

³¹⁵ The use of unit fines was abandoned almost immediately following adverse publicity.

³¹⁶ Bottoms (1977)

³¹⁷ Taking punishment in the community as the norm and setting strict (although vague) threshold criteria for the imposition of imprisonment.

³¹⁸ Home Office (2001b) Figs 1.3 and 1.5

2.5 Populist Punitiveness

From 1950 to the mid 1970s, the arguments surrounding the effectiveness and justifications for punishment in the post war period were largely conducted in a detached, measured and co-operative tone between the political opponents³¹⁹. However, an increase in political conflict over law and order policy followed the 1979 British general election. From its success in this election, the Conservative Party was seen to have a definite electoral advantage over the Labour Party in the area of crime and punishment³²⁰. The Conservative Party emphasised individual responsibility for crime and undertook to spend more on police, prisons and the criminal justice system.

The origins of crime lie deep in society... the government alone cannot tackle such deep rooted problems easily or quickly. But government must give a lead: by backing not attacking the police; by providing a tough legal framework for sentencing; by building the prisons in which to take those who pose a threat to society - and by keeping out of prison those who do not; and by encouraging local communities to prevent crime and to help the police to detect it³²¹.

The Conservative Party's argument seemed to resonate with public concerns and clearly distinguished them from the Labour Party's more diffuse approach to crime and disorder³²². The issue of crime was associated in the public mind with the failures of Labour governments in the seventies to manage other forms of 'disorder' such as the strikes of miners and public service workers³²³. However, in the middle of the 1980s the Labour Party sought to reposition itself and to compete against the Conservatives on the issue of law and order. In particular the Labour Party dropped its opposition to the introduction of new police powers thus abandoning its previous stance of demanding increased scrutiny of the police. The Conservatives responded to Labour's more pro-police stance by becoming more punitive, rightly perceiving that this would be popular

³¹⁹ Downes and Morgan (2002). This is despite the emotive nature of the debate over the abolition of capital punishment.

³²⁰ Conservative Party (1979)

³²¹ Conservative Party (1987) p55

³²² Butler and Kavanagh (1980)

³²³ Downes and Morgan (2002)

with voters, and a spiral of engagement formed, each party struggling to appear tougher on crime and criminals than the other.

Garland argues that the public response to law and order is not merely a copy of the spiral of punitiveness brought into existence by party-political posturing³²⁴. He argues that the rising crime rate since the Second World War meant that by the time of the 1980s high crime rates have become seen as the norm. As a result of the increase in personal experience of crime and an increase in media attention to crime, individuals and business become more crime-conscious and start investing in crime reduction strategies to protect their homes, business and property. Garland terms this 'adaptive behaviour', and notes how the acceptance of the normality of crime has touched all levels of society including the increasingly wealthy post-war middle class who had previously been largely untouched by the problem. Therefore as these groups became more aware of crime through personal experience and second-hand reports, they took steps to reduce their exposure to crime.

Adaptive behaviour is particularly obvious in the business sector which invested heavily in security and control mechanisms such as fencing, closed circuit television cameras, patrolling security officers *etc.*³²⁵. The extent of the change was such that, by the 1970s, private policing of private property had become a bigger industry than the public police³²⁶. As well as making adaptive changes to the workplace, businesses responded to criminal activity in ways that were designed to minimise the costs to them of such activity. Businesses were not concerned to catch and prosecute offenders, nor were they interested in punishing or rehabilitating them. Business concern with crime centred on prevention, harm minimisation and cost control. This economic model for dealing with crime originated in the private sector response to increased crime rates but was fairly swiftly imported into the public sector and was a direct precursor to the policy initiatives arising from the new penology.

Individual citizens and households also began to change their daily routines to make crime less likely. Simple measures like locking doors and windows and keeping

³²⁴ Garland (1997)

³²⁵ See Pease (2002) Table 26.1

³²⁶ Newburn (2001)

valuables out of sight became commonplace³²⁷, and much was made of the contrast between the period before the war when communities were more integrated and such measures were felt to be unnecessary or even impolite, suggesting that one could not trust one's neighbours. Once introduced, security measures would spread throughout a neighbourhood as individual property owners did not want their home to appear to be the most vulnerable in the area. In the most extreme examples, entire gated communities developed with enhanced security systems. These communities used surveillance and boundary restraints to control the movement into and out of private residential space in the expectation that criminals would be diverted from difficult targets onto less well protected areas³²⁸. Such patterns of behaviour showed clear social adaptation to an environment where the high rates of crime were considered normal³²⁹. Crime avoidance became a conscious activity and a commonplace part of everyday routines.

Such behaviour fitted the paradigm of new penology well. The government was able to build on already existing social changes when it sought to introduce *e.g.* CCTV in town centres and placed fences and gates around schools to secure them from the external world. New penology advice concerning crime prevention and the minimising of risk led to a revolutionary change in the way crime is perceived by ordinary citizens. Instead of crime being an issue only when a member of a household or a close associate is a victim of crime, crime becomes an everyday concern. Adaptive changes such as installation of burglar alarms, avoidance of certain areas at night *etc.* make citizens more aware of the possibility of crime. This heightened level of awareness becomes a psychological fact which is exacerbated by the reports of crime in the media. Fear of crime is generalised, which means that householders are unable to distinguish between their likeliness of suffering property crime and their likelihood of becoming a victim of violent and sexual crime³³⁰. Crime is perceived in an undifferentiated way and this heightened perception means that reports in newspapers concerning crime, and in particular all serious violent crimes, are perceived as crimes that 'could have happened to me'.

³²⁷ Pease (2002)

³²⁸ Hayward (2003)

³²⁹ This adaptive behaviour also occurred in other spheres of life. The increased use of seatbelts and child restraints reflected the increased awareness of the normality of road traffic accidents.

³³⁰ Zedner (2002) p425-428

From the new penology perspective, instead of being perceived as the activity of disturbed or disadvantaged individuals as it had been under old penology, crime was perceived as a kind of routine activity, as a hazard which was to be avoided. If crime could not be prevented then at least the costs resulting from it could be minimised. Public property such as bus shelters were made of material that is easy to clean and repair after attacks of vandalism, improved street lighting and closed-circuit television cameras sought to prevent and displace crime from particular areas. Criminologists have developed new penology thinking as comparable with other risk analysis systems such as air traffic control, motorway design and the management of entertainment and retail spaces such as Disney World³³¹. Crime is considered as a risk which has to be prevented, but like aircraft accidents, it is recognised that problems will occur at some stage and so plans are made to minimise the harm caused by crime when it does occur. A risk management model is adopted for crime which aims at reducing the number of incidents through prevention and harm minimisation.

Prevention of criminal 'accidents' naturally requires identification of those factors which correlated with crime. The new penology outlook stimulates the examination of groups of offenders and, significantly, victims, to profile the characteristics of those individuals who made up these groups. Care was taken not to blame victims for their victimisation but nevertheless, research had provided some evidence for the proposition that victim action could precipitate or provoke criminal acts³³². This information was taken as having the virtue of 'common sense'. If the householder made it obvious that a property was unattended, then this behaviour could precipitate a burglary. More controversially the methodology was extended to encompass the behaviour of victims of violent and sexual offences. For example, the behaviour of women who were assaulted or raped by men they knew was used as a (partial) explanation of the acts of violence against them³³³.

However, unlike the positivist methodology used by old penology, new penological research into the correlates of crime was not done at the level of individuals but used actuarial techniques to study large groups of people. The approach was correlative rather than causal and explanatory. Data concerning the characteristics of groups could be

³³¹ Shearing and Stenning (1987) Simon and Feeley (1995)

³³² von Hentig (1948), Wolfgang (1958)

³³³ Lees (1997)

collected relatively quickly and cheaply in contrast with the time consuming and expensive process of making an assessment of an individual³³⁴. Following the aggregation of the data, the characteristics of high rate offenders were compared with those of occasional offenders in the hope of being able to devise actuarial categories of risk and apply them to the prevention and incapacitation of the high rate offenders³³⁵.

As noted above, Garland argues that public involvement in crime is mediated by a daily activity of crime prevention which promotes awareness and fear of crime³³⁶. It is therefore understandable that householders become more condemnatory towards the criminal who, in the abstract, has required him or her to take these adaptive steps to prevent him or herself becoming a victim. The politician's rhetoric of toughness finds a sympathetic audience in such an environment. Particularly amongst the middle classes who had been traditionally more tolerant towards offenders, their experience of crime prevention, even in the absence of direct victimisation, makes them more punitive and more likely to see themselves as potential or future victims. Punitive attitudes spread throughout the social classes just as they had always been prevalent in the heavily victimised poor.

So the extension of support for punitive populism is not merely the result of political rhetoric but a response by much of the population to their potential for victimisation. This concern was recognised by politicians and, to give but one example, enabled politicians to enjoy unquestioned support for expenditure on new prisons. Increases in levels of punitiveness amongst the public have been assumed by politicians despite some evidence to the contrary. Judgements based on the experience of victims and the public outrage at high profile killings such as the murder of James Bulger or shootings at schools give politicians the impression of increased levels of popular punitiveness. This impression is supported by media pronouncements which assume that the general public believe that criminal sentences are excessively lenient. In fact, when surveyed about the sentence they would hand down when presented with an example of a 'normal' crime, public attitudes to sentencing turn out to be well within current sentencing practice.³³⁷

³³⁴ Feeley and Simon (1994)

³³⁵ Simon (1988)

³³⁶ Garland (1997)

³³⁷ See Hough and Roberts (1998)

Criminologists may argue over whether punitive populism exists but the fact is that politicians have little to lose by acting as if it does. No votes have been lost by taking a more punitive stance even if the enhanced punitiveness is not really extant in ordinary people when considering the vast majority of ordinary offences.

2.6 The rise of a *punitive* ‘new penology’

The perceived rise in punitive populism in the early 1990s was partially brought about by increased crime prevention measures and a greater awareness of crime. It encouraged politicians to use punitive rhetoric in their statements on crime and punishment. This meant that new penology strategies had to become more ‘political’. While new penology ideology was developing public policy that was evidence based, actuarial and striving for efficient use of resources, the newly politicised debate surrounding crime was expressive, moralistic and focused on the prison as a symbolic central icon of punishment. The punitive discourse was driven by the novel element of universal public interest and involvement in criminal justice and was heightened by proselytising and interactive media coverage of crime³³⁸.

From the early 1990s, public participation in the debate around criminal justice was not concerned with the rehabilitation of offenders. Following the Bulger case, discussed below, there was not even public interest in calls for the rehabilitation of young offenders. This reflects the position of new penology thinking which is not straightforwardly positivist in the way that old penology had been.

New penology thinking and public opinion shared a pragmatic approach to crime control that was not concerned to discover the causes of crime in order to correct them. New penology resolved the ‘mad vs. bad’ debate by advocating sentencing on the basis of offence seriousness. For *serious* offenders, it appeared irrelevant to discover whether they were ‘mad’ or ‘bad’, the only thing of concern was that the public need protection from them. However, when the ingredient of populist punitiveness is added to the debate,

³³⁸ E.g. the *Crimewatch* television programme on the BBC, which requests public assistance in the detection of criminals, and the *Daily Mail* newspaper ‘name and shame’ campaign which exhorted people to identify and challenge alleged paedophiles in their community.

all offences are redefined as serious. In this environment, the prison (or secure hospital) is perceived to be primary site for punishment. The prison is the presumptive form of punishment because only by imprisoning can the state provide protection from *all* offenders. Instead of serious offenders being considered dangerous, all offenders are considered to be potentially or actually dangerous. Thus, new penology sentencing ideology which based sentence severity on the seriousness of the offence had to be reconsidered. A punitive new penology was required.

Punitive new penology policies, in contrast to the instrumental policies of the new penology, are *expressive*. They seek to reflect and respond to the anxiety felt by the public about crime. Rather than being economically rational, populist punitive policies are moral-absolutist in outlook. With punitive populism, value for money is less of a consideration. Rational, evidence-based policy is cast aside in favour of sentiment, symbolism and 'common-sense' wisdom. Instead of looking at the data and analysis provided by researchers, punitive populism is anti-expert and anti-professional, preferring the judgement of popular opinion usually expressed through the tabloid press.

Advocates of punitive new penology sought the increased use of imprisonment for all crimes³³⁹. Since protecting the public is a central concern, imprisonment of offenders has become an increasingly desirable outcome of the whole criminal justice process. Punitive new penology is satisfied with the sentencing policy of just deserts so long as the level at which the seriousness of an offence and the commensurate punishment for that offence is high. In effect this has meant that punitive new penology accepts just deserts' emphasis on the ordinal ranking of offences as long as the newly punitive political climate is reflected in the cardinal ranking of offences.

In the USA the expressive feature of populist policies led to the increased stigmatisation of criminals through the use of chain gangs and striped clothing and the resumption of the use of the death penalty in many states. High profile crimes committed by some offenders following release made it impossible for politicians to take risks over the release of prisoners or the commutation of the death penalty. In Britain and the US, crime policy became more responsive to the expression of vengeance, anger and fear by the

³³⁹ *E.g.* Michael Howard, Home Secretary from 1995-7

public. The rhetoric of policy pronouncements became increasingly punitive and did not reflect the views of their own researchers *e.g.* in the Home Office Research Unit³⁴⁰. Instead, penal policy followed the lead given by market researchers, echoing the public's common sense view that if you punish offenders severely enough they will stop offending, and if all else fails, you can lock them away so they cannot re-offend. Policy pronouncements were simplified and made emotionally appealing, for maximum impact they were often given in the highly dramatic arena of party conferences before a very sympathetic audience³⁴¹.

Punitive populism was most clearly visible in Britain in 1993 following the tragic abduction and killing of James Bulger, a toddler, by two boys aged 10. This killing and the shock and outrage which accompanied it led directly to the re-introduction of secure units for children which were in effect prisons for children³⁴². Other examples of the results of punitive populism could be seen in the revival in rhetoric if not in practice of the 'boot camp', and the 'short, sharp, shock' theory which argued that giving young offenders a taste of custody would deter them from behaviour which could lead to longer periods in custody. For adults, a change in prison régimes occurred, with a reduction in what were known as 'privileges' (these included family contact and home leave) and a regime of austerity was instated. Security was emphasised over all other considerations leading to some extreme measures such as the handcuffing of women prisoners whilst they were giving birth. Proposals for mandatory minimum sentences were imported from the USA as was the idea of community notification of the release of certain offenders, particularly sex offenders. The rhetoric of the day resounded with punitive slogans 'condemn a little more, understand a little less', 'tough on crime, tough on the causes of crime'³⁴³.

Of course, punitive new penology shares some characteristics with new penology, the theory on which it is based. Both approaches justify the imposition of punishment primarily on retributive grounds but the goal of punishment is to prevent re-offending. Neither theory is concerned with individualised sentencing based on what is best for the

³⁴⁰ Hudson (2002)

³⁴¹ Gamble (1994)

³⁴² Newburn (2002) p 555-7

³⁴³ Downes and Morgan (2002)

offender. Hence neither are they interested in rehabilitation unless that 'rehabilitation' can be incapacitative (e.g. the chemical castration of sex offenders). Where the two penal paradigms differ is that new penology is essentially rational, seeking to get the best use of public money in the operation of the penal system. This being so, it is concerned to use the prison as little as possible (although this may still mean quite a high use of the prison), mainly for the incapacitation of dangerous and/or repeat offenders. New penology thinking is sceptical about the crime reductive potential of reformatory programmes. It therefore concentrates resources on situational crime prevention, surveillance in the community and the incapacitation of certain offenders based on projections of risk. New penology justifies punishment on a retributive basis, with the minimum possible use of the prison, but it permits an element of enhanced punitiveness to incapacitate dangerous and 'dangerous' offenders.

Punitive new penology by contrast, is irrational, it is not interested in making the best use of public resources and it is not willing to take any chances with future offending. Punitive new penology takes the view that crime rates will fall if all offenders are rounded up and locked away for a long, long time. The offender is felt to have abdicated his rights as a citizen and should therefore be removed from society. Any calculation of the likelihood of re-offending is unnecessary since he is going to be incapacitated anyway. For advocates of punitive new penology, increased use of the prison is a (highly desirable) outcome of increased punitiveness imposed retributively. An offender's conviction shows that he or she is capable of causing harm, and arouses an emotional, irrational reaction against the offender. In this political environment, when the offender is reviled and it is not known how to prevent him or her from re-offending, the only apparent option available is a long sentence of imprisonment.

The differences between the three penal perspectives can be summarised as follows:

	OLD PENOLOGY	NEW PENOLOGY	PUNITIVE NEW PENOLOGY
Model of sentencing	Individualised sentencing	Just deserts with bifurcation	Just deserts at enhanced levels
Description of the offender	Sick or deprived	Normal	Bad (don't care)
Mode of thinking	Positivist rational	Risk analysis rational	Non rational
Primary purpose of punishment	Rehabilitation	Incapacitation	Incapacitation and denunciation
Length of prison sentence	Indeterminate	As short as possible	As long as possible
Incapacitation is appropriate for...	The incorrigible	Dangerous offenders and recidivists	All offenders

Fig 2.1

The movement in political thinking that favoured punitive new penology led directly to the decision to allocate funds for the provision of new prisons, and more prison accommodation³⁴⁴. This expenditure and activity was almost contemporaneous with introduction of the prison-reducing measures introduced by the *1991 Criminal Justice Act*. As part of a political 'package' of law and order reforms, imprisonment became central to criminal justice policy and, if one were to believe the rhetoric, was almost the only weapon available in the battle to defeat crime.

2.7 New Penology, Punitive New penology, and the 1991 Criminal Justice Act

We have seen that the new penology policies which the *1991 Criminal Justice Act* embodied very quickly began to be undermined by a return to more punitive styles of penal rhetoric and policy. In *Cunningham*³⁴⁵ it was stated that sentences could be passed for the purpose of deterrence. Ashworth notes that this decision effectively 'torpedoed the proportionality principle' with the consequence that fewer community sentences were passed and sentences of imprisonment became longer³⁴⁶. However, although significant changes were made in the *1993 Criminal Justice Act*, the 1991 Act was not repealed and general sentencing policy of just deserts remains in place in 2002. Just deserts ideology was retained in the language of proportionality featured in the Act but not in its implementation. Politically, the shortcomings and expense of imprisonment were spoken of less frequently and the language of condemnation and blame was revived. Instead of a discourse which advocated imprisonment as a measure of last resort, the changes in penal rhetoric culminated in the statement by Michael Howard that 'prison works'³⁴⁷.

We have seen that the two competing government policies of the post-*1991 Criminal Justice Act* period reflect the underlying ideologies of new penology and punitive new penology. The policy that underpinned the Act, which advocated reducing the prison numbers by limiting the purpose of imprisonment to the incapacitation of the dangerous, was a reflection of the new penology paradigm. Translated into penal policy, this model

³⁴⁴ Morgan (2002)

³⁴⁵ *Cunningham* (1993) 15 Cr App R (S) 444

³⁴⁶ Ashworth (2002) p 1098

³⁴⁷ Home Secretary Michael Howard, cited in Newburn (1995b)

sought to make best use of penal resources which meant the use of structured and demanding community sentences where possible. It was the case however, that the new penology supported the use of imprisonment for the purpose of reflecting the seriousness of some offences. Additionally, s. 2 (2) (b) of the Act expressly allowed the imposition of longer than normal periods of imprisonment for those offenders whom it was felt were at risk of committing a serious violent or sexual offence in the future.

It is important to emphasise, as has been hinted above, that the new penology perspective is not necessarily anti-prison. The new penology approach to the use of the prison centres on the most appropriate use of the prison as an expensive penal resource. The main purpose of the prison is to incapacitate offenders since all other penal outcomes can be achieved outside its walls. If the prison is used for other purposes, such as rehabilitation and deterrence, then it is a wasteful use of public money. Rehabilitation is at least as effective when delivered outside of prison, and any deterrent effect brought about by a sentence of imprisonment is at best extremely short-lived³⁴⁸.

The incapacitation effects desired by advocates of the new penology can be broadly divided into two types. These are commonly referred to in the incapacitation literature as 'selective' and 'general' incapacitation. These designations, unfortunately, are slightly misleading. 'Selective incapacitation' suggests, correctly, that the individuals chosen for this type of punitive disposal are chosen for some particular attribute of their personality or of their offending behaviour. It implies however, that those persons who are subjected to a policy of 'general incapacitation' are not chosen. In fact this is not the case, what is often termed 'general incapacitation' in the criminological literature refers to the incapacitation of larger numbers of people than those incapacitated selectively, and is based on entirely different qualifying criteria. The incapacitation that occurs with general incapacitation is still selective, so it is neither general nor non-selective.

The new penology does justify incapacitation differently for two distinct groups of offenders. Qualitative incapacitation seeks to incapacitate those offenders who pose a risk of committing very serious offences and hence of causing high levels of harm. This is the type of incapacitation advocated in the disproportionate detention provision of the

³⁴⁸ von Hirsch *et. al.* (1999)

1991 *Criminal Justice Act* and it is usually characterised (as it is in the Act) as incapacitation of violent or sexual offenders. It is, as the name suggests, incapacitation based on some quality of the act or the offender. Quantitative incapacitation by contrast, seeks to incapacitate those offenders who commit the most crime, and its goal is not the prevention of serious violent and sexual offences but a reduction in the overall crime rate. This has been justified by the assertion that a substantial number of crimes are committed by a small number of offenders. Therefore, the incapacitation of a few offenders will have a disproportionately large effect on the reduction in the crime rate. This policy can satisfy the new penology criteria of penal efficiency provided there is substantial reduction in losses caused by the incapacitated offenders being unable to continue offending. This reduction in criminal loss may offset the cost of imprisoning the offenders, leading to a net economic gain³⁴⁹. New penology could, in principle, favour on utilitarian grounds the application of either quantitative or qualitative incapacitation although it naturally prefers qualitative incapacitation as this results in the fewest offenders being committed to the most expensive penal resource. Both groups of offenders singled out for the incapacitation would need to be selected for particular qualities, either the risk of serious crimes being committed in the future or the risk of the commission of high rates of crime in the future³⁵⁰. The net effect would be either a reduction in the levels of serious harm committed or a reduction in the cost of criminal activities to victims. However, it is important to note that new penology, based as it is on rational cost-benefit analysis, does not advocate the application of the universal use of incapacitation.

Conversely, the rhetoric of punitive new penology strongly supports a model of truly general incapacitation. This rhetoric advances the view that all criminal behaviour is serious, and that all criminals are liable to imprisonment whether or not they would commit further offences. Once there, imprisonment serves to protect the public from their criminal activities, whether these be serious or high rate. It is not surprising to note that under the punitive new penology the phrase 'persistent petty offence/offender' has disappeared. In this paradigm, no offence is considered petty, and all offences are liable to attract the most severe punishment *i.e.* imprisonment. Not only does imprisonment

³⁴⁹ See Zimring and Hawkins (1995) Chapter 3

³⁵⁰ Imprisoning those who only commit a few offences is not justified since the cost of their crime is not outweighed by the cost of their imprisonment.

represent the most severe sanction the state administers as punishment, the increased severity results in enhanced levels of incapacitation as a useful by-product.

We have seen that punitive new penology is content to keep the sentencing model of 'just deserts' (providing of course that the levels of sentence severity are high enough). We have also seen that the punitive new penology is not necessarily motivated to seek incapacitation for its own sake, incapacitation is a welcome consequence of a punitive sentencing regime which focuses on the prison. Punitive new penology arrives at quantitative incapacitation not through a quasi-economic justification as might be achieved under the new penology, it believes that anything less than imprisonment does not reflect the seriousness of most criminal behaviour.

So how well do the disproportionate sentencing provisions of the *1991 Criminal Justice Act* fit the punitive new penology paradigm? We have seen that the disproportionate detention provision enables sentencers to punish medium to high seriousness offences with longer than normal terms of imprisonment. The policy which gives rise to this provision can be described in incapacitative terms, as it was in the policy documents leading to the Act, but crucially it can also be described as variety of increased punitiveness. The disproportionate detention provision of the *1991 Criminal Justice Act* is useful therefore in that it allows for the sentence to be extended to the ceiling of the maximum sentence even when the offence before the court is not the most serious example of its kind. Thus the court is given extra discretion to apply more severe punishment on retributive grounds, because this punishment has an incapacitative by-product. The Act gives the scope to supply an incapacitative justification for what may be simply enhanced punitiveness. The underlying penal ideology may have changed from new penology to punitive new penology around the time of the introduction of the Act, and the disproportionate sentence provision of s.2(2)(b) is flexible enough to survive the change.

The disproportionate sentencing provision of the *1991 Criminal Justice Act* is notable since it manages to satisfy the demands of these two different penal policies. The role of the disproportionate detention provision of the *1991 Criminal Justice Act* is shown in the following diagram:



Fig. 2.2

Both new penology and punitive new penology result from adaptive changes which bring about an increasing awareness of crime and potential victimisation. However, the responses to the changed penal environment take entirely different forms and the successes of the policies based on the paradigms are measured through different outcomes. In particular, success for the new penology is measured through a reduction (or no increase) in crime rates and with a corresponding decrease in rates of imprisonment. Success for the punitive new penology is reflected in an increase in the

use of imprisonment. A change in crime rates for this paradigm would not be critical to establishing its success. Even if there is no fall (or if there is an increase), this may just reflect an increase in the commission of crime since the incapacitative effect of imprisonment is taken for granted. In fact, an increased crime rate could favour punitive new penology theory as it proves the need for more and more incapacitative capacity³⁵¹.

The revival of disproportionate detention in s.2(2)(b) of the *1991 Criminal Justice Act* was compatible with changes in the political environment towards a rhetoric of 'law and order' as well as to the managerial, actuarial approach to punishment. Disproportionate punishment provided the evidence that punitive government rhetoric was genuine, while satisfying those who wished to limit imprisonment to the incapacitation of the serious violent or sexual offender. However it is justified, disproportionate detention, and the move towards incapacitation as the symbolic goal of punishment are symptoms of a political ideology known as social defence that seeks, above all, to ensure that the public is protected from the dangerous offender.

2.8 Social Defence: The Theory

Social defence theory is a broader sociological account of the changes that have been identified above in the context of the imprisonment of offenders. It is not a term that has been used as widely as new penology in criminological discourse. Yet it is just as useful in describing the change that was noted in chapter one, that is, the change from the state's incapacitation of those people who have committed a dangerous act, to the incapacitation of those who are predicted to commit a dangerous act. We noted that new penology policy advocates the qualitative incapacitation by imprisonment of serious or dangerous offenders while punitive new penology policy advocates the quantitative incapacitation by imprisonment of high rate offenders. Both policy positions are less concerned about discerning the reasons for offending than in incapacitating offenders following the commission of an offence. Social defence theory adds one extra dimension to this debate, and one that is particularly relevant to the incapacitation of the 'dangerous' offender, *i.e.* the convicted offender who is predicted to be dangerous but has not yet been convicted of a serious violent or sexual offence. Just as the individual

³⁵¹ This may in fact be what has occurred in the USA.

target of an aggressive act is morally entitled to defend him or herself before the act occurs, so social defence theory claims that the state is entitled to defend itself from some offenders before they have committed some offences. Therefore social defence theory provides the justification for pre-emptive incapacitation of the 'dangerous'.

Social defence uses the metaphor of self-defence, the doctrine which states that it is legitimate to harm another if this is necessary to prevent that person harming oneself, and applies it to the debate about the state's use of pre-emptive incapacitation as exemplified by s.2(2)(b) of the *1991 Criminal Justice Act*. The theory thus encounters the same philosophical difficulties as any account of self-defence, e.g. when is it right to harm an unlawful aggressor who has an equal right as his or her victim not to be harmed? In the version which is of interest here, the question can be phrased as follows:

When is it right to imprison for a longer period than is deserved, persons who have not yet committed a dangerous act?

The immediate problem with of all such discussions is the difficulty in separating the moral questions from the epistemological question. We might all agree that it is morally right to imprison a would-be future murderer before that person kills anyone, but there is the practical impossibility of knowing that the person *will* kill before he or she has done so. If however, we defer the epistemological question and assume that the 'dangerous' offender is indeed dangerous, then we are left with the question of the moral justification for pre-emptively incapacitating a dangerous offender.

Locke's second treatise provides one answer:

...by the fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred³⁵².

Locke's solution fits within the framework of social defence because it effectively redistributes the burden of danger from the innocent to the 'guilty'. This redistribution

³⁵² Locke (1952)

cannot be unqualified however, if it is to be a moral redistribution. There are conditions which must apply, including the requirement of proportionality. For the distribution of harm among those who are to blame for that harm must be proportionate to the harm that would be caused to innocents if the distribution were different. That is to say, it would be improper to burden an offender with the pain of punishment, if the harm prevented is insignificant, in order to prevent the innocent victim from harm which, had it been inflicted, would have caused only minimal pain.

The second condition that must apply is that the redistribution of harm will not impact more upon some innocent persons in the process of protecting other innocent persons. This can be interpreted in a number of ways: that the harm caused to innocent families, employers *etc.* of offenders being prevented from causing harm by the imposition of punishment should not be more than the harm prevented to innocent victims. More controversially, it could be argued that all innocent citizens suffer if the burden of punishment exceeds the harms prevented to victims, because of the reduction in 'justice' and security presented in such a redistributive process.

Social defence is goal driven, pro-active, interventionist and utilitarian. As the second condition above shows, its utilitarian calculus is based on more than the anticipated effects of crime reduction. As Ancel conceives it, social defence in practice is largely based on education and the substitution of rehabilitation for retributive punishment with the use of incapacitation reserved for cases of rehabilitative failure³⁵³. He makes this clear when he says:

Social defence presupposes that the means of dealing with crime should be generally conceived as a system which aims not at punishing a fault and sanctioning by a penalty the conscious infringement of a legal rule, but at protecting society against criminal acts... The intention of social defence is to carry such social protection into effect, quite naturally, by means of a body of measures that are generally outside the

³⁵³ Ancel (1965) and Ancel (1987)

ambit of the criminal law as such and are designed to 'neutralize' the offender, either by his removal or segregation, or by applying remedial or educational methods.³⁵⁴

Notwithstanding his claim that social defence measures must operate outside the criminal law, Ancel recognises the importance of the criminal law in achieving social defence. To this end he calls for the criminal law and the penal system to adopt what he calls 'social individualism' and become 'humanised' by which he means the development of an individualised regime which attempts to (literally) re-socialise the offender. In so doing says Ancel social defence theory demonstrates 'the desire to promote or to safeguard the concept of the human person, to whom none but humane treatment may be applied'³⁵⁵.

Ancel notes that social defence is *not* synonymous with a positivist framework for the disposal of offenders under the criminal law. Social defence undoubtedly exhibits strong positivist influences through an interest in classifying offenders in order to prevent dangerous behaviour. But social defence extends into areas of social life outside of the legal and criminal justice arenas. It advocates using social policy to create a society that maintains order by supporting individuals and institutions without recourse to formal government institutions.

Although Ancel makes the point repeatedly that social defence is not concerned merely to repress crime, social defence theory could be described as having the potential to put at risk the rights of the individual. The complaint has been made that the teleological perspective of social defence theory offers the potential for the degradation of human rights through *e.g.* an excessive response to minor infringements of the law and the infringement of rights in the name of rehabilitation and/or incapacitation. Naturally, this form of social defence is unacceptable to those who support the idea of punishment for purely retributive purposes and who believe that penal measures must only be imposed in proportion to the harm done³⁵⁶. Peters notes:

³⁵⁴ Ancel (1965) p 24-5

³⁵⁵ Ancel (1965) p 28

³⁵⁶ *E.g.* Andrew von Hirsch, see Von Hirsch (1986)

In the classical school the main concern was with the definition of right and wrong. Punishment served the purpose of moral clarification. The modern school was intent on acting upon individual criminals and punishment was conceived as treatment. In the school of social control the concern is with systems of action; punishment has become an instrument of policy.³⁵⁷

The methods of social defence theory are incompatible with those liberal thinkers for whom the essential individual basis for the actions of the state renders the idea of scientific classification and treatment of offenders unworkable. If, as Jeremy Bentham maintains, punishment should be the minimum necessary to achieve general deterrence, then the notion of social defence which individualises punishment according to the danger posed by the offender is unpalatable. But punishment under a social defence model may result in the offender being punished more leniently, since a particular individual may not require a particularly harsh punishment in order to deter them from reoffending.

Even when there may be no empirical difference between the quantum of punishment delivered to an individual offender it is important to ascertain the purpose behind the quantum of punishment to be administered. It is possible that a particular sentence could be handed down in order to stimulate general deterrence and the same quantum of punishment given to an individual offender in order to protect society. Much depends on the way the protection of society is envisaged: whether society is thought to require protection from a few dangerous people or from the selfish actions of many people³⁵⁸. If general deterrence is desired, the punishment should be the maximum needed to deter the majority or 'the reasonable man'. It will therefore be at the higher end of the punishment spectrum for it is aimed at the least easily deterred individual in the majority population.

Beccaria believed the law served not to preserve moral codes but to serve the needs of the particular society, a view that is supported by advocates of social defence theory. As

³⁵⁷Peters (1988) p32

³⁵⁸ See Alexander (1980) Quinn (1985) Farrell (1985) Montague (1995) for different accounts of social defence.

noted above the use of punishment through social defence criteria can also be justified on utilitarian grounds. Like Bentham and Beccaria, social defence theorists argue that punishment is only moral if it serves to prevent future crime, simply retributive punishment is immoral as it serves no utilitarian purpose. These theoretical positions concerning punishment all share with the social defence position a strong teleological justification for punishment. Punishment is not an abstract good in and of itself, but a means to an end: preserving social harmony. However, social harmony does not necessarily mean social control and Ancel and others recognised that curbs on the state's power to monitor and suppress those it sees as troublesome are always necessary.

Unlike liberal policies discussed in the next chapter, social defence takes an explicitly moral approach to the offender being punished. The state's role is to prevent the offender from committing actions which result in harm and to communicate to others the unacceptable nature of the offender's deeds. What social defence does not seek to achieve is the symbolic rejection of the offender as a person worthy of respect, rights and consideration. Social defence theory, as characterised by Ancel, bears a striking resemblance to the rehabilitative ethic at its best. It has three main features, each being sufficient to show the moral foundation of ideas of social defence:

- a) a concern for the protection of society expressed through a reaction to crime that brings about benefits for society;
- b) the desire to bring about the amelioration of the offending behaviour through the re-education of the offender, the goal of punishment being more than the infliction of a purely exemplary or retributive penalty;
- c) the desire to safeguard the dignity of the human person through a re-integrative response to criminal actions if possible with exclusion used only as a last resort.

In common with classical legal theorists, the dominant strand of the social defence movement accepted the doctrine of free will and personal responsibility for one's actions. This is reflected in the social defence movement's attitude towards the individual's culpability for his criminal act. Ancel says:

The new social defence movement, in readapting and giving fresh thought to the idea of responsibility from the point of view of the individual human being, evidently has to look for the feeling of moral obligation in that individual, and therefore tries to stimulate the idea of his duty towards his fellows, as well as encouraging him to become aware of a social morality to which he is necessarily subject.³⁵⁹

An important consequence of the re-introduction of the notion of moral responsibility into penal policy is that the individual-state relationship is thereby seen as part of a network of responsibilities arising out of a social contract. Included in this network is the responsibility of the society to the individual through respect for human autonomy and freedom. In the social defence context, this means that the system has limits to its power. These limits are based on classical foundations of law. As Ancel puts it:

Respect for human dignity, or the need to safeguard individual freedom - which is the first condition of the individual's exercise of his rights and the development of his personality - thus leads to the maintenance of a system founded on the rule of law, to the establishment of judicial rules of procedure, and to an instinctive distrust for the institution of an administrative system of preventive measures which might be arbitrarily laid down *ante delictum*.³⁶⁰

Not all social defence theorists take this view. Herschel Prins³⁶¹ developed a theory of social defence that included a wholesale denial of the problem of whether there is such a thing as personal responsibility and free will. Prins believed that the two extremes forced on criminologists by the diametric opposition of classicism and positivism served only to leave society undefended from dangerous citizens. Arguing against the classical tradition, Prins noted that the belief that the offender enjoys free-will failed to provide adequate protection for society. The classicists' desire to punish according to retributive and proportionate grounds, Prins argues, leads to a policy of mass (often short-term)

³⁵⁹ Ancel (1965) p 104

³⁶⁰ Ancel (1965) p 105

³⁶¹ Prins H (1899) *Science pénale et droit positif* and (1910) *La défense social et les transformations du droit pénal*

imprisonment alongside a tendency to develop an ever widening defence of diminished responsibility for those who are obviously mentally impaired. Prins argued that, in the classical legal framework neither the punishment of the majority of 'normal' offenders for minor offences that attract short sentences of imprisonment nor the pardoning of those who are not 'normal' offers the framework of protection necessary to provide social defence.

Prins also recognised however, that positivism does not provide the solution to the problem of reducing harmful offending behaviour. As evidence of the inadequacy of its determinist stance, Prins noted that many strategies had been tried to predict and then to reform the offender, with a conspicuous lack of success. At the time of the publication of Prins' book *La Défense sociale et les transformations du droit pénal* in 1910³⁶² the most pressing problem in criminology was how to reduce or eliminate repeat (mostly petty) offending. As noted above, the positivists have some way to go in convincing others of the success of their predictive, corrective and preventive techniques in reducing repeat offending³⁶³.

One reaction to this popular criticism of the failure to reduce reoffending was to limit the goal to one of reducing the likelihood of *serious* repeat offending. Yet still positivists cannot claim to have developed the techniques and provided the results that enable their case to dominate. Indeed, serious offending may be more difficult to predict and control than petty offending as it is less common, less amenable to environmental changes such as locks and alarms and more closely associated with mental illness. If it is the case that with enough knowledge the behaviour of individuals can be predicted with substantial accuracy, then the positivists have thus far failed to provide methods for obtaining this knowledge and applying it to individuals. For Prins and others, this failure to demonstrate the utility of determinism undermined the positivist argument.

³⁶² Prins (1910) Cited in Ancel (1965) p 50 no further bibliographic details given

³⁶³ An echo of which is found in Martinson's frequently cited phrase 'Nothing works', see Martinson (1974)

Prins laid the foundation for his theory of social defence by pointing out the futility of the ubiquitous argument between the positive and classical schools concerning the existence of freedom of the will. The extremes taken by these two schools and any compromise composed out of elements of each brought about the result that society was never protected against the actions of the dangerous offender. Ancel makes this point:

For Prins, the justification for the theory of social defence lay in the inadequacy of the classical idea of moral responsibility. In doctrine, the theory of moral responsibility led to an impossible choice between determinism and free will; in practice, it led to a multiplication of short prison sentences and an ever increasing acceptance of the notion of diminished responsibility, leaving society practically defenceless against the most dangerous criminals. Thus criminal law based on moral responsibility failed to provide effective protection for society. Nor did the traditional prison system, which was inspired by the same ideas, provide any better protection, for the system of solitary confinement and the supposedly curative action of the traditional type of prison had proved to be completely ineffective; this is sufficiently indicated by the considerable increase in the incidence of recidivism, especially at the close of the nineteenth century.³⁶⁴

For some of the writers on social defence such as Prins, the abandonment of all theories of the origin of action from criminological discourse was liberating. It did not matter why the offender presented a danger to society, whether it be through his or her freely made choice or due to some physical or socially-induced chain of causality. What mattered was how society could neutralise the danger that the offender presented. Unfortunately, Prins' denial of the relevance of the positivist/determinist divide offered little in the way of solutions.

To devise a utilitarian social defence strategy requires some sort of practical framework. Both the classical free-will approach and the positivist determined view of the offender's mental state offer some way forward in the plan to reduce harmful behaviour. Prins'

³⁶⁴ Ancel (1965) p51

position offers no standpoint from which to construct a methodology for predicting or preventing harm. Without looking at the aetiology of harmful behaviour, Prins relies solely on the state reacting to harmful behaviour in order to incapacitate those who exhibit it. In this sense, a Prins' style social defence theory (unlike Ancel's) presaged some contemporary penal systems particularly the policy of mass containment that has been employed by the USA³⁶⁵. The USA takes a Prins' style pragmatic view on the causes of criminal behaviour, preferring not to engage in the debate on whether crime is chosen or determined. Instead it focuses on identifying and classifying criminals and incapacitating them (by imprisoning them for long periods) immediately a sufficient number of criminal offences have been committed. This policy has led to a very high increase in the proportionate levels of imprisonment, without, it must be pointed out, any noticeable overall decrease in crime levels or perceived improvements in levels of community safety³⁶⁶.

The concept of modern social defence as described by Ancel takes elements from both positivism and classicism and combines them. Clearly there is much that is taken from the positivist framework in the form of attempts to educate and reform the offender, and treating the offender with humanity is seen as being an essential component of successful rehabilitation. This rehabilitative framework can be re-described in a classical way as offering instruction in rational decision making, re-incorporating the offender into society and its social-contractual relationships thus helping him to make non-criminal choices. In both paradigms those who cannot be 'cured' of their criminal propensities, or 'rationally persuaded' of the disadvantages of crime are a residual problem. For these people, social defence recognises that incapacitation is necessary as a last resort, protecting the society against dangerous impulses of the mentally ill or the habitual or serious offender through segregation of them from others. It is this form of social defence theory that is reflected in longer than normal punishment provisions.

³⁶⁵ See Garland (2001), Mauer (2001)

³⁶⁶ The argument about whether mass imprisonment decreases crime can never be won or lost. If crime rates do not fall (or even rise) supporters of the policy can always claim that crime would have been even higher if it were not for the incapacitative effects of imprisonment.

Social defence theorists took the foundation of classical penal theory, with its goal of punishment imposed proportionate to the offender's culpability, to be unattainable. As Ancel put it:

...the root of the trouble lay in the fact that theories of moral responsibility tried to assign to criminal law an absolute and unrealisable objective: to *punish* the criminal, in the fullest sense of the word, in exact proportion to the moral fault he had committed. But the purpose of criminal justice, an essentially human process, can never be anything other than relative. Its only purpose must be to ensure in the best possible way the protection of the personal security, life, property, and reputation of citizens. This can be truly achieved, however, only if the idea of moral responsibility is replaced by the notion of the dangerousness of the offender... According to this first view of social defence, *the means of dealing with the criminal should even, if need be, involve depriving him of liberty for a longer period, where such action appears essential for the better protection of society*³⁶⁷ (emphasis added).

Although not all the elements of social defence were explicitly adopted as a justification for longer than normal sentencing in the *1991 Criminal Justice Act*, the reasoning that was adopted for the introduction of longer than normal sentencing drew on many of the ideas and aspirations of the social defence movement³⁶⁸. It was this governmental concern with social defence that promoted the introduction of provisions such as s.2(2)(b) of the 1991 Act and it is this form of governance which must be examined closely in the light of liberal political theories and the potential conflict between coercion and protection.

2.9 Social Defence and Incapacitation

There are two contrasting perspectives in social defence which consider the moral responsibility of the offender. The first is Prins' stance which argues that since there is no evidence in favour of the assumption of freewill, but nor is there conclusive evidence

³⁶⁷ Ancel (1965) p 51

³⁶⁸ See Floud (1977)

that criminal behaviour is physically or socially determined, the discussion is void. Therefore, he claimed, any debate about responsibility and culpability is irrelevant to the objective of protecting the public from dangerous people. The criminal justice system, according to this view, should focus not on punishment but on social defence. This has the result of producing a criminal justice system based on incapacitation of known offenders since there is no other way of preventing criminal acts³⁶⁹.

The contrary argument, put forward by Ancel, claims that even if it is not the case that moral responsibility exists, it feels to human beings as if it does and therefore it is worthwhile trying to inculcate the values of society into the offender through education and reform. As well, respect for human agency leads to a system of safeguards which prevent any penal policy based on social defence from becoming corrupted by despotic or totalitarian régimes. This has the effect of ensuring that classical legal safeguards such as *nulla poena sine lege* (no punishment unless a law is broken), no retrospective legislation and no treatment without the consent of the offender continue to operate, despite their potentially unprofitable consequences for social defence.

An Ancel style social defence theory accepts that human agency exists but acknowledges that there may not be a direct link between the agency of a particular offender and the harm that he causes. In this respect intentions become both more and less important as a result of their interaction with the concept of dangerousness. Intentions become more important where an offender has attempted a crime but has failed to carry it out. Intentions are less important where a person has not intended to commit serious harm but has done so in the course of committing an offence *e.g.* an armed robbery where the robber has not intended to shoot bystanders but has done so in the course of the robbery (perhaps while trying to damage the security system). The social defence view places the failed attempt at the same degree of dangerousness as the commission of the act and the non-intended, but performed act at the same level of dangerousness as the intended act. The offender can be dangerous as a result of his intentions (even if they are not carried out) or as a result of his incompetence (when unintended acts occur). Examples such as

³⁶⁹ Crimes can of course be committed in prison, against staff and prisoners and even members of the public given that it is impossible (and undesirable) to prevent prisoners

these show that social defence theory can only operate outside of regular sentencing policy. Unlike sentencing policy, social defence is based on a relationship between the culpability of the offender, the events that have taken place and the harm caused by the events.

With respect to penal policy, Ancel comments that his conception of social defence means that 'in relation to enacted law, social defence would take its place on the edge of traditional penal law with its system of punishments'³⁷⁰. As we have seen in the previous chapter, this is a fair description of most legislation where longer than normal punishment is approved. The social defence provisions are imposed within the criminal law but operate outside the standard justifications for the imposition of punishment. In social defence strategy, the criminal law functions as a tool for identifying the dangerous who are then separated from other lawbreakers, subjected to incapacitative sentences that are different from the traditional retributive or deterrent justifications for imposing punishments.

Social defence provides theoretical support for longer than normal punishment by providing an argument for measures that stand outside the 'normal' retributive justification of punishment. Social defence works backwards from the desired ends of the criminal law to its methodology. In so doing it resolves (by ignoring on the one hand and integrating on the other) the problem of the choice between free-will or determinism that has so beset criminology and criminal justice. By absorbing element of both classicism and positivism, social defence theory provides two possible lines of argument why ascertaining the presence or absence of a mental state (the *mens rea*) of the offender should not be the priority for the criminal justices system when responding to harmful behaviour. The mental state of the offender, in a social defence model, should not complicate the system which is seeking to exercise its authority over him. It is the offender's dangerousness that matters, not issues such as his or her intentions or culpability. Whether such dangerousness stems from the exercise of free will or from socially or physically determined behaviour is unimportant.

from having any access to the outside world.

³⁷⁰ Ancel (1965) p 15

The social defence paradigm also makes a strong argument for the retention of preventive measures in the criminal justice sphere and as a proper part of formal penal apparatus rather than *e.g.* a medical/quarantine model for dangerous offenders. Ancel emphasises the importance of the safeguards that the legal process can and should supply and the restrictions on the grosser excesses of positivism such as prior preventative action imposed on those deemed likely to offend but who have not yet offended at all. The classification of offenders, although a useful tool in the social defence armoury, is only to be applied once the offender has been shown to exhibit dangerous tendencies for the purpose of his rehabilitation or incapacitation. This combination of positivist investigation into the causes of dangerous and criminal behaviour (and the means of preventing its recurrence), together with classical human rights safeguards are the primary feature of social defence as Ancel envisaged it.

Social defence differs from a neo-classical conception of justice in that it rejects the idea that the primary purpose of the criminal justice system is to offset the harm caused by a particular act with a carefully calibrated quantum of punishment. In the social defence framework, the punishment is determined only by the measures that are required to neutralise the danger that the offender poses to the society through his harmful behaviour. The longer than normal punishment provisions of the *1991 Criminal Justice Act* fit a social defence model as they require an offender to be convicted of an offence before preventive detention is imposed. This satisfies (if only minimally) classical rules about the necessity of crime preceding punishment, which is then followed by the use of positivist predictive methodology in order to protect society from the identified threat. Social defence theory has three main advantages for the policy maker attempting to bring in longer than normal punishment as part of a bifurcated penal system which aims to punish most offenders in the community. A social defence policy-maker would support the use of rehabilitation and community punishment, with their aims of re-integration and re-socialisation. But the theorist of social defence would also advocate *in extremis* the use of incapacitation to protect society from those that are truly felt to be so dangerous or so incorrigible that no other measure is sufficient to protect members of a society.

Social defence works backwards from goals to means, it includes elements of positivism and classicism which will satisfy those supporters of each paradigm, yet it allows for a methodology of operation which can circumvent or ignore the classical and positivist debate as to the aetiology of harmful, criminal behaviour. It is the combination of satisfying a large intellectual constituency and at the same time providing demonstrable practical outcomes that makes this type of theory politically attractive. What is not clear is whether the theory undermines the structural foundations of the liberal political philosophy on which the modern state and the modern criminal justice system is built.

2.10 Conclusion

The period since the 1970s has seen a decline in the belief of policy makers and politicians in positivist criminological 'knowledge' to supply the solution to the problem of dangerous and 'dangerous' offenders. This belief may have been overstated and utopian but it had provided a working paradigm for the construction of criminological theory and penal practices since the beginning of the 20th century. Disillusionment with this paradigm led to the perspective known as 'new penology' which scaled down its claims for the success of crime prevention, took a hyper-rational view of crime control and adopted a prudential approach to the allocation of resources. The new penology was, however, a largely administrative approach which did not elicit media or judicial support. The lack of support and incidents such as the killing of James Bulger, brought about an increase in public punitiveness and revised the new penology to bring about a greater reliance on the use of the prison to incapacitate many more offenders regardless of cost.

Despite the policy changes brought into effect by the new penology and punitive new penology, approaches to crime control and punishment never completely abandoned the rehabilitative approach which had dominated positivist criminology. This is why the model of social defence more accurately describes English penal practice in the late 20th century. Social defence describes a position that can rely on rehabilitation, reintegration, deterrence and incapacitation, both in the penal system and in the medical sector. It can incorporate both classical and positivist conceptions of the offender as its efforts are focused on crime prevention however this can be achieved.

New penology concentrated on the efficiency of the penal and criminal justice system, with minimal use of incapacitation. Punitive new penology focused on the retributive and denunciatory purpose of punishment with the maximum use of incapacitation. The social defence metaphor takes a 'hybrid' approach to crime control with prevention being the overriding goal. Social defence also captures the mentality of fear and perception of the need to be proactive and defend oneself from criminal loss that is explicable in a period in which high levels of crime are normal. We can see the influence of social defence thinking in the *1991 Criminal Justice Act* in particular with respect to the bifurcated approach to sentencing of offenders. Like new penology, social defence based policy reserves imprisonment for those who either commit serious offences or cannot be deterred or rehabilitated. Prison is thus a last resort for many offenders, when community penalties have failed to prevent re-offending. However, like punitive new penology, social defence is content to use the prison more readily for those offenders who may not pose a threat of serious criminality. The retributive and denunciatory elements of punitive new penology are present in a policy which will imprison offenders, however insignificant, who do not desist from crime. As with both new penology and punitive new penology for social defence incapacitation is therefore the default position.

The policy of imposing longer than normal imprisonment on those who are held to be likely to commit serious offences in future fits more comfortably within the social defence framework than within the other positions. Advocates of the new penology, seeking to use resources in the most efficient way, would be reluctant to imprison an offender for a longer than normal period unless a professional risk analysis shows that he or she is very likely to pose a danger to others. On the other hand, punitive new penologists would be very willing to use expensive penal resources in this way, as the non-rational response to crime brings with it a desire to incapacitate all offenders for a long or longer than proportionate period of time. Social defence theory operates somewhere between the two, with longer than normal sentences of imprisonment reserved for those people who somehow qualify by suggesting the possibility of a threat. The qualifying action, the commission of a violent or sexual offence, however minor, is sufficient for the risk of serious future offending to be taken into account in the distribution of penal measures. Thus a penal policy based on social defence would not automatically imprison all offenders, nor would it try and minimise the use of long terms of imprisonment. It would use community penalties where possible, and proportionate

terms of imprisonment for some serious crimes and recidivists. Where the danger of the potential violent or sexual offender is identified, then social defence theory will justify the imposition of longer than normal sentences to prevent future serious harm. Social defence theory thus best describes the sentencing policy contained within the *1991 Criminal Justice Act*. However, as we shall see in the next chapter, social defence does not fit quite so comfortably within a liberal political structure.

CHAPTER THREE

LIBERAL GOVERNANCE AND 'THE DANGEROUS'

3.1 Liberalism(s)

The power to punish citizens for what they might do rather than what they have done is *prima facie* anti-liberal since such measures place the freedom of all citizens at risk from the coercive power of the state. People subject to such measures are being proactively punished. This is effectively what occurs when a person is sentenced under s.2(2)(b) of the 1991 *Criminal Justice Act* where an offender is imprisoned for a longer than normal period than is justified by the offence for which he or she has been convicted. Although the convicted offender has committed an offence, the punishment with which the offender is sentenced, is based on a prediction that he or she will commit a serious violent or sexual offence in the future. For some offenders sentenced under this provision, no dangerous act has ever been committed, and may never be. Thus the extra term of imprisonment cannot be justified on the grounds that the offender has demonstrated a definite (serious) threat to others. The person given an longer than normal sentence not only loses his or her liberty for a longer period of time, but also the freedom to be presumed innocent of any additional *criminal* act until the determination of guilt³⁷¹. He or she may appear to pose a serious threat but it cannot be known that any threat will be realised. Even if it could be known that a dangerous act would take place there is no possible procedure that can establish the degree of culpability nor is it possible to take mitigating factors into account in setting of the sentence.

Clearly the state should not take lightly the power to imprison people for a longer than normal period: incarcerating people is expensive and incarcerating people on the basis that they are 'dangerous'³⁷² brings with it reminders of political régimes that put at risk

³⁷¹ This is significant as even if the act predicted would be certain to occur, the lack of a trial eliminates the possibility of the defence obtaining some non-guilty result such as 'not guilty by reason of insanity' which produces a different sentencing outcome.

³⁷² The policy of the incarceration of people on the basis that they have a certain constitution (and not that they have committed a certain act) will be discussed in chapter 3.

the rights of citizens and others³⁷³. The Green and White papers which preceded the *1991 Criminal Justice Act* stressed that the introduction of a sentence of longer than normal imprisonment was to be used sparingly³⁷⁴. Liberal democratic states such as the UK aim to promote a society in which difference can be tolerated. Therefore the imprisonment of persons for longer than they deserve must be justified on grounds which are impervious to the criticism that people are being subject to such measures merely as a result of their race, religion, age or cultural and social choices. Of course, in a multicultural, multiracial, multifaith society, it may never be possible to have a consensus on the provision of policies, laws and principles which enable each individual or group the freedom to live life as freely as possible. However, the prediction of the behaviour of mentally normal people relies on assumptions about their cultural and social choices. Therefore a penal measure which relies on prediction of behaviour is always going to be more vulnerable to the criticism that it is unfairly discriminatory than a penal measure that is based on actual behaviour.

The tension between the need to produce a system which treats all people the same and the need to take account of differences of opinion and choice is a permanent problem for the liberal state. As John Gray notes:

From one side, toleration is the pursuit of an ideal form of life. From the other, it is the search for terms of peace among different ways of life. In the former view, liberal institutions are seen as applications of universal principles. In the latter, they are a means to peaceful coexistence. In the first, liberalism is a prescription for a universal régime, in the second, it is a project of coexistence that can be pursued in many régimes.³⁷⁵

This chapter examines whether it is possible to construct a fit between the competing principles of liberalism noted by Gray, and the practice, exemplified by s.2(2)(b) of the *1991 Criminal Justice Act*, of incapacitating offenders through imprisonment for crimes more serious than they have committed to date which they might commit in future. The

³⁷³ *E.g.* Stalinist Russia, China during the cultural revolution, states such as the USA, Britain and Australia that imprison without trial foreign nationals who are suspected of involvement in terrorism.

³⁷⁴ Home Office (1988) and (1990d)

question under consideration is not whether the perfect³⁷⁶ liberal state can approve of the general policy of incapacitation, but the specific use of incapacitation for an offender who is convicted of a violent or sexual crime, and who is predicted to commit a *serious* violent or sexual crime in the future.

It is difficult to characterise liberalism exhaustively or to state what is an exclusively 'liberal' political policy since liberal themes permeate and overlap with many of the principles of competing political ideologies. Heywood suggests that so pervasive and persuasive is liberalism in the modern West that it is more appropriate to think of it as a meta-ideology under which various ideologies can be accommodated³⁷⁸ Francis Fukuyama controversially claims that liberalism has come to dominate world politics to such an extent that we have reached 'the end of history', by which he means that liberalism is the zenith of political development³⁷⁹. Even though the existence of popular non-liberal forms of political activism such as environmentalism³⁸⁰, and the stability of states and movements whose political philosophy is founded on a religious ideology³⁸¹ suggest Fukuyama's argument is not yet proven, elements of liberalism can indeed be found in political ideology ranging across the spectrum from libertarian conservatism³⁸² to anarchism³⁸³ and liberalism has an obvious influence for some socialist writers³⁸⁴. So, it is not surprising that the plasticity of the concept means that it is difficult to rule in or out particular practices as acceptable within a liberal political framework³⁸⁵. Nonetheless, for reasons that shall be discussed below, imposing longer than normal punishment for offenders who have not committed a serious offence is hardly *prima facie* a liberal

³⁷⁵ Gray (2000)

³⁷⁶ *I.e.* the hypothetical state which exists without any internal inconsistencies, or deviations from liberal principles.

³⁷⁸ Heywood (1998) p 27

³⁷⁹ Fukuyama (1993) For a discussion of contrary views see Gray (1995) and Holden (1993)

³⁸⁰ Versions of which do not privilege the human individual.

³⁸¹ *E.g.* Islamic states such as Iran, Christian fundamentalists in the USA, Buddhist nationalists in Sri Lanka *etc.*

³⁸² As exemplified by Adam Smith and Frederick Hayek, for a brief overview see Heywood (1998) chapter 3.

³⁸³ *E.g.* Michael Bakunin

³⁸⁴ *E.g.* Herbert Marcuse and TH Green, see Marcuse (1964), Green (1988)

³⁸⁵ Possibly the best example being the liberal state's desire to outlaw sado-masochistic sexual practices. See chapter three below.

policy. However, by taking into account the different constructions of liberalism and the use to which these are put, it will be possible to determine how it came to be the case that a country with a liberal democratic political system such as the UK³⁸⁶ introduced what appears to be an inherently illiberal measure. The discussion that follows is necessarily somewhat artificial, as no state ever maintains a consistent and ideologically pure form of governance. However, the crucial distinctions can be made with reference to particular policy contexts and are therefore of more than just theoretical importance.

3.2 Liberalism and the social contract

Liberals accept that groups of people living together need some sort of collective order. This acknowledgement of the need for governance and the existence of an enforcing power is what distinguishes liberals from anarchists who believe that individual freedom is unduly restricted in a political structure with *any* form of authority. Liberalism does allow ideological space to atomists or possessive individualists who believe that each person is, and ought to be, self seeking and maximally self reliant³⁸⁷ if their selfishness is constrained by a tolerance for the wishes of others. Such self seeking behaviour may condone the use of 'illiberal' forms of governance if the atomist thinks it is unlikely to apply to him or herself³⁸⁸.

The need for an organising structure to facilitate the common pursuit of (different forms of) the good life was recognised as long ago as 1651 by Thomas Hobbes. Although far from being a liberal, since he believed that an absolutist government was necessary to protect society from disorder, Hobbes is nevertheless important from a liberal point of view. His masterpiece, *Leviathan*, shares several themes with liberalism. Principally, Hobbes advocated a separation between religion and politics, making obedience to the rulers independent of religious affiliation. Although the purpose of Hobbes' argument sought to ensure that state authority was not threatened by the schisms of Christianity in

³⁸⁶ Of course the provision only operates in one of the UK's jurisdictions, England and Wales.

³⁸⁷ Interestingly, the British Prime Minister in power at the time of the introduction of the 1991 *Criminal Justice Act* was Margaret Thatcher whose dictum 'There is no such thing as society, only individuals and their families' and her policies reveal her to be something of a possessive individualist. Quoted in (Heywood 1998) p 73

³⁸⁸ I will return to this argument in chapter 4.

the context of the English Civil war³⁸⁹, it had the effect of promoting an early and limited form of freedom of religious expression and toleration, and movement towards a more rational and secular understanding of law and governance.

Hobbes was influenced by contemporary scientific discoveries and he sought to apply the methodology of science to the understanding of human society. He hypothesized that without law, each individual will seek to satisfy his or her desires in an unconstrained way since the fundamental psychological instinct of human beings is selfish³⁹⁰. As all people will be pursuing their own ends simultaneously, life will be full of mistrust and danger. There would be no scope for the benefits and pleasures of science or art, as all would be engaged in defending themselves and attacking others. In his most famous paragraph he describes this pre-political 'state of nature':

In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation; nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare and danger of violent death; And the life of man, solitary, poore, nasty, brutish and short.³⁹¹

Of course, as Hobbes admitted, this rather depressing picture of human existence was a fiction, it did not exist in his time and may not ever have existed. Indeed it is not even a plausible picture, for although Hobbes cited the mundane empirical evidence of locking one's doors and providing for one's personal security whilst travelling³⁹² as evidence that it is a normal state of affairs for individuals to anticipate and protect themselves from attack by others, he knowingly sets out an extremist position that considers no alliances

³⁸⁹ For a detailed account of the origins of Hobbes' thought see Hampsher-Monk (1992) chapter 1.

³⁹⁰ This is not a morally reprehensible state, just a necessary condition of life and self preservation.

³⁹¹ Hobbes (1991) p62 of original edition of 1651

³⁹² *Ibid.* p 63

of family, tribe or territory³⁹³. This is so while the rest of his theory points out that it is clearly rational to form such alliances. However, Hobbes' point is well made even if he has exaggerated or set up a straw man argument. Human beings will recognise the benefit to be gained from forming groups with others to share responsibilities. By developing trusting relationships which can afford more effective and efficient arrangements, the pursuit of the good life will be achieved more easily than is the case for isolated individuals. Hobbes' understanding of the natural world of social animals, and his interest in the physiology of the human body reinforced this conception of human society. He saw the merits of organisation in systems and the advantages of specialisation and co-operation as essential to the individual organism's well being.

The point of the state of nature argument is that the unconstrained pursuit of happiness by all inevitably leads to less happiness for all. In order to avoid chaos and to put in place the conditions for security, it is required, says Hobbes, for there to be some form of sovereign power to maintain order, by force if necessary. Hobbes and liberals here agree: the setting up of some kind of authority with power of enforcement will increase the chances of individuals achieving the good life, and humans are rational enough to recognise this fact and to act on it. In making this argument, Hobbes draws attention to two important elements of liberal thought developed later by others: the theory of utilitarianism and the recognition of human rationality³⁹⁴.

Hobbes notes that the setting up of any system of government inevitably involves the derivation of rules, and sanctions and mechanisms to enforce those rules. This obviously imposes a restriction on the liberty of the individual as he or she is required to obey the rules or to suffer the sanctions imposed if he or she does not. However, the purpose of rules is that they may indirectly lead to greater liberty for the individual as the rules so imposed protect him or her from the liberty restricting actions of all others, the rules being applied equally to all. To illustrate the agreement by which individuals agree to

³⁹³ There are obvious connections here to a literature which points to the failures of humans, most obviously the fall of Adam and Eve in the Old Testament. Hobbes may also have been influenced by the anthropological explorations of his time which were making Europeans aware of the possibility of other (to them, alien and barbaric) forms of human life (see Hampsher-Monk (1992) pp 26-29).

³⁹⁴ To be considered in chapter 4

give up a certain amount of liberty in the process of setting up a government, Hobbes used another fiction, the social contract. He gives an example of this sort of agreement:

I authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.³⁹⁵

The governed society can be set up in two ways, *de novo*, by agreement of the sort cited above or through the subjugation of a society in war. In the latter case, the vanquished individual must still agree to the sovereignty of the victorious power, claims Hobbes, and in return he receives his life ‘and the liberty of his body’³⁹⁶. Hobbes is at pains here to show that it is only through *consent* that a person can be justly governed. Hence, slaves, who do not enter into any agreement with their owners, are entitled to escape or even to kill them, but servants, who enter into an agreement with their masters, are not³⁹⁷. This has some relevance for punishment. Firstly, it shows how the establishment of governed societies requires the consent of the governed, even if in the case of those who have been conquered in war, this consent is impelled by the *desideratum* of life. Secondly, Hobbes argues that even if it is the case that those who are conquered give their consent because they really have little choice, that consent still gives rise to an obligation to obey. Hobbes is concerned to ensure that obedience to the ruler occurs through consent rather than through coercion, even if the consent gained through the threat of death is a very weak form of consent. Consent is necessary to Hobbes’ theory since societies that are governed by consent commit no moral wrong in demanding the obedience of the subject. Whether consent is gained through agreement, through birth, or through coercion, the giving of consent means the sovereign power is able to demand obedience and to punish the disobedient³⁹⁸.

Hobbes’ preference for absolutist governance leaves no room for dissent once a society is founded. Consent, once given, is all embracing. In return for security and order (and life

³⁹⁵ Hobbes (1991) p87 of original edition of 1651

³⁹⁶ *Ibid.* p 103

³⁹⁷ *Ibid.* p 104

³⁹⁸ For Hobbes, the obligation to be obedient arises out of the contract, the ruler’s power to punish does not arise from the contract but is a right of natural law.

for the vanquished) the ruler rules absolutely³⁹⁹ and may punish (or not) anyone in any way he pleases. This is not a liberal society. Liberalism arose out of a desire to oppose the use of arbitrary decision making, particularly in the areas of taxation and punishment⁴⁰⁰. Liberals agree with Hobbes' state of nature argument in so far as it holds that humans are better able to achieve the good life within certain constraints that structure society. They also agree that a legitimate authority can only be constructed through the consent of those it governs. But they do not agree that the consent supplies the ruling authority with unlimited power that can be exercised arbitrarily. For liberals, the social contract involves more than passing over the authority to exercise power. The liberal social contract involves subjects (or citizens) and ruler forming a mutually binding agreement, which sets out specific principles and obligations on both sides. These duties and obligations flow both ways and as they legitimise the authority in power, they structure and constrain the authority's use of its power.

So, can we know whether the writers of a liberal social contract would consent to longer than normal punishment for incapacitative purposes? Hobbes argues that, as it would be irrational to consent to harm to oneself, it would be irrational to consent to a contract which might lead to one's harm. But this is itself an irrational argument. As Hobbes advocated an absolutist government with all the vagaries that implies, there would be no guarantee that the subject would be protected from harm by others, and therefore little point in him or her consenting to obey in the first place⁴⁰¹. In a contract enforced by an absolute ruler, the benefits of the contract for the subject are uncertain. The ruler may impose order and in so doing relieve the subject of some of the burdens of self protection he or she was under in the state of nature. As a result the subject would be no worse off than he or she was in the state of nature. It is also the case that the perfectly rational person, believing him or herself to be among other perfectly rational people, will see that the contract will result in a net benefit in terms of individual freedom, and will enter into the contract in good faith, intending to keep to it. As such there is no irrationality in

³⁹⁹ Indeed, as suggested by the quotation above, the contract binds the subjects with each other and the sovereign is not bound by any contractual obligations to his subject. See Hobbes (1991) p99 of original edition of 1651

⁴⁰⁰ See discussion of the writings of Locke below.

⁴⁰¹ It is also irrelevant whether the subject consents to punishment since, for Hobbes, rulers have a right to punish under natural law and presumably potential subjects know this when they agree to the contract.

consenting to punishment for others who are not so rational, honourable or disciplined. Indeed it would be irrational not to permit the punishment of others since contract breakers threaten the security of the contract. In the worst case, if the ruler does not ensure compliance with the contract through punishment and there is no enforcement of the agreement made between subjects, then the subject is actually worse off as he or she is bound by an obligation to the ruler and still needs to be on his or her guard against fellow subjects.

For the social contract to operate successfully, punishment for wrongdoing must be explicitly guaranteed and the governing authority must acknowledge an obligation to carry out such punishment for the advantage of all. Such a contract would set out the rights and obligations binding all parties including the sovereign power. If a liberal social contract, not based on a Hobbesian, natural law doctrine, was drafted which excluded punishment, what protection would be afforded to citizens by the contract? Assuming the contract to contain binding obligations on the ruler as well as citizens, a social contract could be put in place that afforded protection from invasions by foreign powers, a guarantee of health care and education, a guarantee of housing, income, employment *etc.* The contract does not obviously need to include punishment for serious crimes. But without a system which punishes those individuals who breach the contract by acquiring or damaging the property or person of others, the liberty-generating value of the goods afforded in the contract would be limited. If, *e.g.* it was left up to individual households to protect their person and property, then the benefits of education, income and good health would be put to use in the protection of property and person. The reduction in income is a restriction on liberty, and the practices of crime prevention that would need to be employed permanently would be invasive and restrictive of liberty. If *e.g.* no one enforces breaches of minor regulatory rules such as parking restrictions, inconvenience and disruption result, inevitably restricting the freedom of all motorists. Citizens would be better off than in a state of nature, but they would not be as well off as they could be if the contract included a duty on the ruler to punish certain harms. So it appears that, unlike an absolutist social contract which is an agreement between subjects that is arbitrarily enforced by the ruler, a liberal social contract places obligations on citizens *and* ruler, including a duty for the ruler to arbitrate and enforce the relationships between citizens. This arbitration and enforcement will inevitably require coercion and hence will necessitate the use of punishment.

It is also possible to imagine a contract containing a reference to punishment that would satisfy a minimalist liberal. It could include some sort of clause that stated that, in return for a promise to obey certain well specified laws pertaining to non interference with others, lawbreakers would be punished. Providing the laws are acceptably minimal, such a clause is inoffensive and justifies the incursion on citizen's freedom inflicted by the state. It is an essential and necessary condition for the construction of a minimal state that the areas within which the state may interfere in the lives of citizens are clearly demarcated. In practice this means a body of law that makes as clear as possible the grounds for state intervention, particularly with respect to punishment, which is, arguably, the greatest inhibitor of liberty available in most liberal states.

The contractual basis of liberalism is fundamental, for without it the state has no legitimacy to provide any benefits for citizens or to impose punishment on citizens. The contract, in effect, enables citizens the freedom to give up certain freedoms. A contract which permits the state to regulate the behaviour of all, must also permit the state to impose punishment in order to enforce the contract. The liberal state can only impose punishment due to the contractual nature which is the foundation of the relationship between the state and citizens. As Hobbes showed, consent is crucial, and therefore the contract model of governance, however fictional, is at the heart of the justification of the liberal state.

Hobbes argued that whilst the duty of the subject to obey arises out of the contract, the right of the sovereign to punish arises not out of the contractual agreement but is a *natural*⁴⁰² right. Liberals however, believe that the contractual relationship between rulers and subjects or citizens binds both parties in particular ways. In particular, the rule of law binds the sovereign as much as it does the subject, and if the state fails to fulfil its obligations to the subject the subject can dissent. John Locke expressed it thus:

Freedom of men under government is to have a standing rule to live by, common to everyone of that society and made by the legislative power erected in it, a liberty to follow my own will in all things where the rule prescribes not, and not

to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.⁴⁰³

In a similar way, Hayek argued that the rule of law:

...means that government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to see with fair certainty how the authority will use its coercive power in given circumstances and to plan one's individual affairs on the basis of this knowledge.⁴⁰⁴

Dworkin agrees, stating:

Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.⁴⁰⁵

These and other liberal thinkers who stress the role of the rule of law do so because they see it as operating an essential constraint on the state's exercise of coercive power. Writers such as Locke, Hayek and Dworkin argue that, without the rule of law it would be impossible to maximise individual liberty. The rule of law constrains the state and it also constrains the actions of one citizens against another. The law, on this view, provides a barrier which impedes the passion of public morality and the populism of politics from interfering with individual liberty, a separation which is essential in a pluralistic society.

Liberals accept the state of nature argument justifies the necessity of a political authority with some coercive power. But unlike advocates of authoritarianism such as Hobbes, liberals see the social contract as authorizing rulers to act on their behalf, to put in place the minimal framework of restraint needed to prevent the society from becoming

⁴⁰² A natural right is one granted by nature or God, not through treaty or contract. It therefore cannot be annulled by treaty or contract.

⁴⁰³ Locke (1952) p15

⁴⁰⁴ Hayek (1944) p72

disordered and dangerous *for all*. What liberals do not countenance, because it gives the sovereign power too much control, is a situation whereby the sovereign puts in place measures that prevents all danger to all individuals. Individuals therefore still have some responsibility for their own safety and welfare. As a result, it is not to be expected that the state will protect individual citizens by putting in place invasive preventive measures. For the reasons that shall be articulated below, the sovereign's role in controlling 'dangerous persons' must be limited, reactive and proportionate if the state is to be truly liberal.

John Locke put Hobbes' conservative ideas into a truly liberal political framework, developing a theory of 'protective democracy' where the involvement of the people sets out the basic terms of the social contract but where limitations on the extent of intervention into areas of social and economic life prevent what de Tocqueville⁴⁰⁶ called the 'tyranny of the majority', the possibility that the goals of the minority are overwhelmed by the demands of the majority. Others, such as Madison⁴⁰⁷ argued along similar grounds for there to be constraints on the rule of the majority. It says something about their class and status that they argued this way, not only to protect the powerless from the powerful, but in order to protect those with property in particular, from the demands of the property less⁴⁰⁸. Locke sought to found a society based on shared rules - a form of life which is shared by autonomous individuals, with autonomy being protected by the state and with all citizens bound by the 'rule of law'. This form of liberalism requires the state to provide the rules to promote and defend a society in which every individual has access to the goods which are to be shared by all.

So just as liberal ideology is uncomfortable with the arbitrariness of absolute authority, it also has some difficulty with democracy which can, if unconstrained, become a comparable tyranny. We cannot therefore just ask whether the majority would approve of longer than normal punishment as an affirmative answer does not of itself guarantee that

⁴⁰⁵ Dworkin (1977) p93

⁴⁰⁶ de Tocqueville (1968)

⁴⁰⁷ The fourth US president (1809-1817), Madison played an important part in the drafting of the US Constitution.

⁴⁰⁸ Perhaps along the lines of the experience of (white) farmers in newly independent African countries where the poor (black) majority are strong in numbers and in physical

the measure is liberal. If the only argument for an illiberal measure rests in the support of the majority, particularly if that support is based on fear and ignorance, then that measure is despotic and illiberal.

3.3 Liberalism and negative and positive liberty

The fundamental premise of liberalism is that there is no one way in which humans can pursue a good life. The way society is organised must reflect this fact and allow humans to pursue the good life in any way that they please. In this way liberalism promotes toleration because a multiplicity of ways in which one can live a good life means that differences of opinion on this matter must be accommodated⁴⁰⁹. Liberals of all varieties believe in the importance of the individual, and the freedom of the individual to pursue the good life, so long as this does not interfere with other individuals pursuing their version of the good life. So, clearly individuals do not have unlimited freedom or 'license' and active intolerance such as discrimination is not permitted. Importantly for our purpose, should an individual's pursuit of the good life impinge on others' then force may be used against the individual. Consider John Stuart Mill's comment:

...the only purpose for which power can rightfully be exercised over any member of a civilised community, against his will, is to prevent harm to others⁴¹⁰.

Mill's liberal view, in this phrase, suggests that he is advocating a conception of liberalism that is restricted to providing minimal and negative liberty⁴¹¹. It is minimal in that it seeks to limit the reasons for the use of force or coercion to the one, the prevention of harm to others. It thus allows the commission of harm to self, accidentally or deliberately. It is negative because it does nothing to promote the individual's pursuit of

presence and can both legally and illegally take the 'private' land into the control and ownership of the majority.

⁴⁰⁹ This connection between toleration and liberalism has resulted in an alternative (often derogative) use of the word 'liberal' to mean 'broadminded' - even 'defender of amorality'. In the case of punishment, 'liberal' is often used to mean lacking in the desire to punish offenders harshly (or at all). These uses of liberalism, while closely related to the political sense of the word, should not be confused with it.

⁴¹⁰ Mill [1859] (1972) p 73

⁴¹¹ The distinction between 'positive' and 'negative' liberty is due to Isaiah Berlin, see Berlin (1969)

the good life. It does not uphold a right to anything other than freedom from harm by others and does not encourage the individual to take advantage of opportunities, even if these would self evidently help the individual toward his or her goals.

In fact, although the short phrase from *On Liberty* above, lifted out of context, expresses a form of negative liberty, Mill believed that the liberal state has a duty to provide the conditions under which individuals could more easily, and equally, pursue their individual conceptions of the good life. This conception of a 'positive liberty' is a more interventionist and ontological view of liberalism, which accepts that the state has a role to play in the well being of citizens and that its role should be to provide the conditions for the pursuit of the good life through e.g. minimal conditions of security, welfare and education. This conception of liberty is more in keeping with Gray's first depiction of the purpose of liberal institutions. Gray describes one liberal approach to governance as the application of 'universal principles' to facilitate the good life for citizens, rather than providing the means to bring about 'peaceful co-existence'⁴¹². The determination of which principles are 'universal' is of course a political question driven to some extent by the demands of the electorate, and the individual beliefs of elected representatives. As we saw in Chapter One when the social changes brought about by the welfare state were discussed, these 'universal' principles are subject to change and political negotiation and are never universally accepted⁴¹³.

An interventionist state is prepared to limit the freedoms of its citizens beyond the absolute minimum in order to help them achieve their goals. Would such a state permit incapacitation of the dangerous as a purpose of punishment? Quite likely, yes, it would. The state so described is not unlike most western liberal democracies. To a greater or lesser extent the modern liberal state such as the USA or Britain does see part of its role as being the provision of the means of the pursuit of each individual's version of the good life, which clearly involves the prevention of (certain types of) harm to that individual. This means that where a danger is identified, such as a person who commits proscribed acts which restrict the liberty of others, the state can intervene and punish that person. Where such acts are harmful and serious the state is justified in punishing in such

⁴¹² Gray (2000) and note 375 above

⁴¹³ Chapter five will argue that the state's responsibility to provide social defence is one of these 'universal' principles.

a way that the offender is incapacitated at the same time. So proportionate sentences that incapacitate as a side effect are not *prima facie* illiberal.

Would such a state permit longer than normal sentences in order to protect citizens from 'dangerous' offenders? This is much more difficult to assert. The liberal state (whether interventionist or not) cannot afford to guarantee its citizens protection from all predicted harm. Such a policy is clearly impractical and impossible. The decision of when the state may intervene requires consideration of the balance between the extent of intervention required and the freedom thus generated. Consideration of this balance means that criteria must be devised in order to compare different types of freedom under conditions of uncertainty. The mere fact that harm prevention and incapacitation can fit within a liberal framework does not automatically mean that a policy of longer than normal sentences for those predicted to be dangerous is acceptable.

From the perspective of minimal (non-interventionist) state and its responsibility to provide only negative liberty, the sort of provision exemplified by s.2(2)(b) of the *1991 Criminal Justice Act* is even more troublesome. As the quotation from Mill suggests, liberal doctrine does approve of the restriction of an individual's liberty in order to prevent harm to others, and this is clearly the goal of s.2(2)(b). However, Mill's statement does not make clear whether the harm to be prevented must be immediate, nor how certain it must be that harm will occur before an individual's freedom can be restricted⁴¹⁴. The idea of the minimal state surely implies that government intervention should be sufficient to enable pursuit of the good life and no more. The extent of government intervention involved is therefore crucial. Although a *prima facie* case can be made for the introduction of a measure such as s.2(2)(b), the details of the policy and of its implementation are important to the determination of whether it is acceptable under this form of liberalism.

The distinction between negative and positive liberty is important and relevant with respect to the types of responsibilities that the state assumes. Both negative and positive liberty adopted as founding modes of governance can enable the individual's pursuit of the good life. However, the difference between these forms of governance results in a

difference in the way citizens maximise personal freedoms. The difference relates to the extent to which the liberal state ought to take account of the diversity of human talents, abilities and *disabilities* of its citizens. This natural difference between individuals means that some are naturally better able to recognise and pursue their own version of the good life. However, among the diversity of humans, some individuals will be born who, however hard they strive will never achieve their version of the good life. The problem for states which aim to provide negative liberty is that the natural difference between the abilities of citizens appears to lead to natural unfairness in the distribution of liberty-enhancing benefits.

Negative liberty is provided by the state's retraction from interference in citizens' lives. It theoretically allows the most amount of freedom for citizens as everything that does not interfere with the liberty of others is permissible. The state's role in ensuring negative liberty is limited to ensuring freedom from interference by others, through deterrence and by punishing breaches of rules. The state however does nothing else. It does not promote certain strategies as being likely to result in the good life as it is up to each individual to determine for him or herself how this will be accomplished and to take the necessary steps to succeed. The state which guarantees negative liberty also does not intervene in order to prevent reckless, self harming or risky behaviour of citizens where such behaviour does not affect others.

So, the absence of laws requiring *e.g.* the wearing of seat belts in cars, the absence of welfare provisions to provide for the unemployed, the absence of free health care, are all examples of the types of provisions that might be found in a state which guarantees its citizens only minimal liberty. Often the lack of provision of state benefits is related to other seemingly more private freedoms, *e.g.* the freedom not to wear a seat belt can only be seen to leave others unaffected if the person who suffers injury as a result of not wearing the belt is also the person who bears the costs of the medical bills required to treat him or her following an accident. If other citizens paid taxes in order to fund a national health system⁴¹⁵, or if other private individuals share the burden of risk in a

⁴¹⁴ An unintended consequence of Mill's statement is that consensual harm would be ruled out as it involves harm to another, but this is a quibble and easily remedied.

⁴¹⁵ This would not be a state offering merely negative liberty.

health insurance policy⁴¹⁶, then the individual's risky action of not wearing a seat belt does have the capacity to affect others' liberty and would therefore be prohibited. As well, some individuals would have responsibility for ensuring the least risky strategy is taken for those individuals who are not competent to choose for themselves their preferred degree of risk. So, a parent could not risk his or her child's life by failing to use a suitable restraint in cars, even if it is the parent's own expression of his or her own liberty to drive unbelted.

The existence of a modern state which offers only negative liberty is practically impossible unless a very broad notion of harm is taken. To illustrate: a state that offered only negative benefits would not, *e.g.* be able to state which side of the road citizens should drive upon and chaos would result. Unless one wants to define chaos as harm, the state which provides only negative liberty is powerless to resolve this problem. Giving up the liberty to choose what side of the road one drives upon seems a very small sacrifice if the state is prepared to ensure everyone drives on the same side (most of the time) and thereby each driver gets to his or her destination more easily and quickly. The ideology of negative liberty also does not offer citizens any scope for assistance if they cannot pursue their version of the good life unaided. As noted above, citizens who are or who become disabled, and are thus unable to provide for their own basic needs, will suffer. Such people will have fewer choices, and less liberty than their counterparts in a state which offers positive liberty. For some citizens, the state which provides freedom from interference may, in effect, be providing those citizens with the freedom to 'choose' to starve. The explanation that this is a desirable consequence of their liberty is a fiction.

Since there is some risk of harm in all human activities, positive liberal ideology does not imply that the state takes control over all aspects of life which potentially involve one person harming another. If the state did this, then its incursion into the everyday personal and professional lives of citizens would be all encompassing and it would hardly be liberal. From the perspective of an interventionist state, seeking to maximise positive liberty, liberal doctrine suggests that it is the state's responsibility to provide those

⁴¹⁶ This situation could arise if there is an obligation to avoid taking certain harms in the insurance contract. A breach of such a clause would be policed privately, thus not affecting the citizens' relationship with the state just with the other private individuals and the corporate structures involved in the insurance contract.

goods, such as education, welfare benefits, healthcare *etc.* that enable each individual to flourish. But these are all *positive* goods, providing citizens with some benefit, rather than protecting them from some disadvantage. Of course, such benefits can be described negatively, healthcare provides protection from illness, welfare prevents starvation *etc.* However, whatever way the positive provisions are described, they aim to provide a beneficial outcome by enhancing the circumstances under which individual citizens go about their pursuit of the good life. A state which aims to provide only negative liberty does not become involved in such issues, it is concerned only to prevent liberty restricting behaviour between individuals, as far as is possible, and to punish instances of liberty reducing behaviour when these occur.

In a state which offers positive liberty, provisions extend beyond the restriction of harm from others. Such a state provides a minimum standard of benefits which, it is felt, give individuals the freedom to determine and achieve his or her own mode of enjoying the good life. Typically such benefits include freedom from: hunger, homelessness, untreated severe illness, and the provision of basic education. These are assumed to be universal goods in Gray's sense without which any citizen is unable to make meaningful choices about how to attain the good life. However, not surprisingly given that resources will be limited, the provision of even such basic goods entails a certain responsibility on the part of those citizens who benefit from them. A health service funded out of general taxation can justifiably demand that its users are not profligate with resources and will take reasonable steps to avoid unnecessary and unavoidable expenditure. Using the example above, the wearing of seat belts can be demanded as the expense of treating those persons who are more severely injured in an accident than they might otherwise have been falls on those who pay for such care or who also call upon its resources⁴¹⁷.

The problem with the state's provision of positive liberty for its citizens is that every citizen who claims these benefits is, in effect, reducing the liberty of all other taxpaying citizens. This creates a dependent and sometimes hostile relationship between those

⁴¹⁷ A counter argument would exist if those people who wanted to resist the command to wear a seat belt could demonstrate that in any accident they were more likely to die and thus cause minimal cost to the health service, in which case the economic argument would fail. This argument would be even more compelling if those who opposed the requirement to wear a seat belt argued that in any fatal accident their organs could be used in transplantation to treat others, thereby saving money and lives.

whose taxes provide net benefits and those who claim them. To manage this tension there are rules as to the eligibility and behaviour of those who claim the benefits. For example, claimants of unemployment benefits must show that they have been actively looking for work. Such rules automatically reduce the claimants' liberty. The state must take the decision as to the degree of freedom which is sacrificed by citizens who wish to claim these benefits. It must answer questions such as: How much (liberty reducing) inconvenience can the state reasonably demand of its unemployed citizens before it will supply them with money to provide (liberty providing) food and housing?

In practice, all modern states offer citizens forms of positive liberty although the benefits offered can vary considerably. Most states offer assistance to those who are born unable to care for themselves and for those who find themselves unable to provide basic requirements of living. Some, but not all, liberal states offer free health care for all citizens. The provision of order among millions of people requires that the state's role extends beyond the mere prevention or punishment of others who interfere with individual freedoms. As well, the international responsibilities of the state, including defence, trade and immigration require that the state make and enforce a set of rules concerning relations with other states. These rules *e.g.* the requirement to have travel documents, will necessarily reduce the freedom of citizens. However, if this were not the case, the state could not ensure that the citizens who are eligible for its positive benefits are the same as those who are contributing (or would contribute if they were able to do so).

3.4 First and second order benefits.

The United Kingdom is a state which overtly aims to provide positive liberty for its citizens⁴¹⁸. This is evident from the existence of a national health service, the availability of free education for children, and a welfare system that provides an income for the unemployed and those unable to work. The purpose of government in providing these benefits is that they supply the means for the individual citizen to pursue his or her version of the good life. In so far as this is achieved, these benefits are morally justified, but they require an incursion into the liberty of each individual beneficiary. As the state

must decide how such benefits are to be organised, funded and distributed, and resources to fund the benefits are limited, the recipients must satisfy qualifying criteria. As a welfare recipient, choices are taken away from individuals and certain behaviour may be enforced by the state. Nevertheless, the provision of basic services does enable those who would otherwise be at a disadvantage to gain the tools to make choices and to explore the best way to live their version of the good life.

So, the positive liberal state provides at least basic amenities which enable all citizens to exercise a level of choice in their lives. I shall call this type of state-supplied provision a first order benefit. A first order benefit acts directly to provide a benefit for the person on whom the state is acting. For example, a first order benefit is the provision of free primary school education for children. This aims to provide the children with the tools to make choices in later life and it does so by acting upon an individual child directly. That this is purely a first order benefit is shown by the fact that an education is provided even for those children for whom there is little expectation that they will have the opportunity to use their education to benefit others in adult life⁴¹⁹.

By contrast, the state may act upon an individual in such a way that the state's intervention gives rise to a benefit for another individual. I shall call this advantage a second order benefit. For example, the state may require that modifications are made to a vehicle so that in the event of that vehicle hitting a pedestrian, the pedestrian's chances of survival are maximised. In such a case the state's intervention requiring the owner of the vehicle to make modifications to the vehicle offers no advantage to the owner (assuming he or she is not at risk of being hit by the vehicle) but only to an unknown third party in the event that the vehicle is involved in an accident. Laws restricting the publication or distribution of material that is deemed to be offensive, pornographic or an incitement to violence also provides only second order benefits. The restriction on the authors, publishers and retailers to display or sell such material is applied not in order to provide benefits for them, as such laws are detrimental to commercial profits, but to

⁴¹⁸ The terms 'citizens' encompasses residents of a state who are entitled to the same benefits as nationals.

⁴¹⁹ For example, the UK as a positive liberal state, ensures the education of people with severe learning disabilities, where such education can only be to the benefit of the individual recipients.

provide benefits to members of the public who do not wish to encounter such material unexpectedly or who it is felt may be damaged by viewing these items.

A great many state supplied provisions give rise to both first and second order benefits, indeed this may seem the ideal use of public resources. For example, the expensive state funded training of an individual who becomes a medical doctor gives that individual a career, status *etc.* and also provides an advantage to all of the patients whom that doctor is able to treat. Welfare benefits may appear at first sight to be first order benefits but the fluctuations of the labour market require that a healthy workforce is available at short notice⁴²⁰. Thus the provision of unemployment benefit can be explained as offering first and second order benefits by ensuring a ready supply of labour as well as providing a legitimate source of income for people who would otherwise need to turn to illegitimate methods in order to survive.

There is little moral or political difficulty with state intervention that gives rise to both first and second order benefits. There is however a genuine difficulty when the state's intervention produces only second order benefits, *i.e.* the state intervenes in a way that does not provide a benefit for the person being affected but the benefit is felt by one or more others on whom the state is not applying interventions. For example, in the example given above, the requirement that certain publications are only sold or displayed in particular areas where they will not be seen by casual customers reduces the liberty of the producers and sellers of such material. The producers and retailers bear the cost of these restrictions and may feel justified in arguing that their liberty is being reduced in order to advantage other persons.

It was noted that a first order benefit *e.g.* a medical education that is provided to an individual may provide second order benefits for others in the form of healthcare expertise *etc.* However, the primary beneficiary is still the recipient of the education as he or she then has the choice of whether or not and how to use that education. The skills and employment the education provides gives the individual more choice about how to live his or her life, and there is no compulsion by the liberal state to make the individual put to use his or her medical education in any direct way. If the doctor wants to qualify as

⁴²⁰ Rusche and Kirchheimer (1939)

an architect at the conclusion of state funded medical training there is nothing to prevent him or her from doing so. Therefore, there is no general test for whether state provided benefits will be first and second order benefits, although solely first order benefits will generally be apparent in the choices they offer the recipients of such benefits.

As the example above shows, second order provisions may not produce benefits that specifically advantage particular individuals, they can be based on assumptions about the advantage that accrues for the general public. This is significant, since, while it can be argued that the general public is merely a collection of individuals so that benefits for the public inevitably lead to benefits for many individuals, without identifiable benefits for individuals, any claim that a policy benefits the public may be impossible to verify, or the quality of the benefits may be difficult to measure. As will be shown below, liberal policy requires that all intervention, but in particular solely second order intervention, produces verifiable results, else it is vulnerable to the criticism that it is unnecessary government interference.

Solely second order benefits are those which provide some advantage not for the subject of state interventions but for others. In such cases, the liberty of an individual is reduced in order to increase the liberty of others. Clearly for this to be a politically and morally acceptable position, the advantage that accrues to the recipient must be substantial and verifiable. The benefits of some solely second order provisions can, of course, be shown statistically. If we consider *e.g.* the success of a policy of enforced culling of apparently healthy animals on a farm that is contiguous to a farm that has suffered an outbreak of foot and mouth disease⁴²¹. The advantage that accrues from killing apparently healthy animals is clearly solely second order since there is no immediate benefit to that farm (or indeed animal), but the second order benefits can be measured in the reduced rate at which the disease spreads in the neighbouring farms and general animal population.

Even in the absence of a uniquely identifiable farm which gains the second order advantage of its animals not catching the disease, such a policy of contiguous culling can fit a liberal model because the benefits are substantial and verifiable. But consideration of second order gains does mean that calculations about the maximisation of individual

liberty become generalised, incorporating within them the question of utility. Utility inevitably takes into account a balance between the liberty producing consequences of policies for *groups* rather than for individuals. This does not mean such provisions are necessarily illiberal but they raise questions about the priority of individuals in liberal governance.

3.5 First and second order benefits and penal policy

With respect to the benefits of criminal justice measures, all forms of general deterrence⁴²² such as the publicity given to penalties and the use of situational crime control technology⁴²³ (call these 'preventive' measures) which are designed to act on a potential offender, have both first and second order benefits. To the extent that preventive measures thwart initial offending the person who does not commit a crime avoids the possibility of liberty-reducing prosecution and punishment and thus gains a first order benefit. The prospective victim is relieved of the liberty-reducing consequences of the crime and thus receives a second order benefit. So preventive crime control measures produce first and second order benefits. Yet, the primary appeal of preventive policies and strategies which are designed to produce general desistance from crime must surely be to first order benefits. That is to say, these policies rely for their force on the argument that it is to the advantage of the individual citizen to be law abiding. The publication of penalties, and the visible presence of detection mechanisms reinforce the idea that it is not worth committing crime because this brings about the first order benefit of not being caught and punished.

It is equally possible to demonstrate that there are first and second order benefits arising from individual deterrence, incapacitation and rehabilitation (call these 'reductive' measures). These measures are aimed at individuals who have already committed crimes and are intended to stop the offender committing further crimes. Assuming the desired crime reductive effect takes place, and no further crime is committed, the criminal

⁴²¹ Such a policy was employed during the outbreak of foot and mouth disease in the United Kingdom in 2001.

⁴²² General deterrence is aimed not at preventing a particular offender from re-offending, but aims to prevent the general public from contemplating a crime.

⁴²³ Closed Circuit TV, street lighting, speed cameras, car alarms, visible policing *etc.*

receives the first order benefit of no further punishment⁴²⁴. However, the advantage that is gained from these measures is primarily second order *i.e.* the intended recipient of the benefit is the prospective victim(s) of the crime(s) that are prevented. This is apparent if we consider that the first order 'benefit' the offender receives (assuming the measures work) is an absence of future punishment but this benefit is achieved only through the implementation of present punishment.

The situation becomes more complicated when the likelihood of future punishment is considered as it must be if the first order benefit of not being punished is to be taken into account. A utilitarian calculation concerning the effect of any action may make a potential offender take the risk of bringing about the state's response to his or her offending behaviour. If the likelihood of detection is low, then the remoteness of the possibility of the first order effects brought about by punishment, suggests that committing crime is more likely than abstention from crime to produce liberty enhancing benefits.

The first order benefits of the criminal justice system differ according to whether the benefits are preventive or reductive and depend on the likelihood that they will be imposed. For the individual who is contemplating a criminal act, effective *preventive* measures do provide the first order benefit of no punishment, but this must be set against the advantages that accrue from the crime and the likelihood of detection and conviction. For the offender who has been detected and convicted, effective *reductive* measures impose a loss of liberty in the course of generating a first order benefit of preventing future imposition of punishment. Successful reductive measures produce for the desisting would-be criminal the first order benefit of not being punished in the future but they do this only by the imposition of (liberty reducing) punishment (and this must still be set against the advantages which result from the commission of crime). This can be seen as providing a net advantage for the offender on whom the reductive measures are applied as any uncommitted future offending may have been more serious and even offences of the same degree of seriousness may have resulted in more severe penalties. However, the first order advantage to the offender who desists from future offending as a result of

⁴²⁴ Ignoring of course for the moment, the likely fact that much acquisitive crime at least, must provide more liberty for an offender since the monetary gain provided by much crime effectively buys choice, opportunity and status.

the imposition of reductive penal measures is less obvious than is the case for the potential offender subject to preventive measures. This highlights the value of considering reductive forms of punishment as being primarily intended to produce second order benefits.

In the case of preventive punitive measures, the benefit produced is first order and second order, *i.e.* the measures act upon individuals and those individuals benefit from the avoidance of punishment. The potential burglar who desists because of his or her knowledge of the likelihood of detection and punishment receives the first order benefit of not being detected and punished. The preventive measures also provide benefits for others as other individuals are not victimised. The potential victim of a burglar also benefits from the success of the preventive measures which have, in this case, worked to stop the burglary. Despite the fact that there are first and second order benefits of preventive measures, the measures are designed to influence the choices made by the potential offender and thereby they are predominantly affecting his or her liberty.

In the case of reductive measures the balance falls the other way: those on whom the measures are applied are not the main recipients of the benefit, it is the general population, each of whom may be a potential victim, that is the (second order) beneficiary. It seems inappropriate for a *minimal* liberal state to have as its primary purpose the provision of predominantly second order benefits for its citizens. Even an *interventionist* liberal state would limit those second order benefits from which some citizens might gain liberty. Yet both the minimal and interventionist liberal states consider that protection from harm is an essential duty of the state. If this is so, will it be possible for the liberal state to avoid responsibility for the provision of solely second order benefits? Can any truly liberal state remain liberal while still offering even limited protection for its citizens?

The question for a liberal state is whether its role in punishment should be confined to the provision of first order benefits for citizens (which may provide second order benefits as well) or whether it should extend its mandate to include the provision of solely second

order benefits⁴²⁵. There are no genuinely solely first order benefits in the context of punishment as almost all penal measures offer the potential to prevent future offending and therefore provide second order advantages for those who would otherwise become victims of crime. Even the unconditional discharge has potential second order consequences as it may result in the convicted offender desisting from future offending by the experience of detection, conviction *etc.* that has given rise to the sentence. Only where no available measure would deter the offender will the impact of punishment fail to result in second order benefits. Such cases will be rare, *e.g.* the person who consistently parks in prohibited places and incurs penalty fines but does not cease the practice of parking illegally. In such cases of course, the first order benefit of avoiding future punishment also does not result from the imposition of the penalty.

Criminal justice measures, including punishment, can be seen to offer both first and second order benefits, assuming that they work to stop initial offending or recidivism. As we saw above, both preventive and reductive measures, provide the offender with the advantage of no further punishment, and provide the potential victim with the benefit of not being victimised. The calculation of benefits though, shows that for preventive measures, there is a definite first order benefit, the potential offender avoids future punishment by eschewing the opportunity to commit crime. For reductive measures, the first order benefit is less apparent, as the first order benefit of no future punishment is achieved only by the reduction in liberty brought about by the imposition of punishment.

The imposition of punishment as found in s.2(2)(b) of the *1991 Criminal Justice Act* on 'innocent' offenders raises an interesting question about the benefits of punitive state intervention on citizens. It has already been argued above that reductive penal measures, although they may offer first order benefits, primarily provide second order benefits by either deterring, rehabilitating or incapacitating offenders. In the case of longer than normal punishment, the benefit of the punishment is solely second order. The fact that the offender is already subjected to penal measures suggest that any first order benefit would be delivered in the course of the proportionate element of the sentence. Therefore the disproportionate extra punishment imposed on the 'dangerous' offender cannot be

⁴²⁵ The answer to this question will vary depending on the context, so, for example, the answer with respect to the culling of animals during an outbreak of disease may be different from the answer given in the context of punishment.

imposed to provide any advantage for him or her. It must therefore be a solely second order advantage provided to benefit the potential future victims of the 'dangerous' offender.

A provision that acts upon people who are assumed or predicted to be dangerous, and imprisons that person for a longer period as a result, gives rise to a solely second order benefit. The individual who is immediately affected by the state's action by being incapacitated is not the beneficiary of the provision. The beneficiary is another, possibly unknown person or persons. In this sense at least, there is an important question to be addressed concerning whether advocates of positive liberalism, still mindful of the need to restrict the powers of the state, have in mind solely second order provisions.

Solely second order benefits are consistent with a liberal political structure if two conditions are fulfilled. These conditions are necessary to ensure that the state's intervention does not contravene the liberal requirement that all citizens are treated equally.

1. A solely second order benefit must be universally available to citizens, and all citizens must be liable to any state intervention that gives rise to a solely second order benefit.
2. The advantage that accrues from a solely second order benefit must be substantial, specific and measurable to justify the disadvantage that brings it about.

Does s.2(2)(b) of the *1991 Criminal Justice Act* fulfil these two conditions? The first condition can be addressed by a consideration of political and legal criteria, the second is an empirical question. In the sense that the English criminal law applies equally to all citizens, then the provision of s.2(2)(b) can be seen to be universally applicable and therefore condition 1. is met. However, if we consider the singular importance of s.2(2)(b) in English legislation then this question is not so straightforward. As was noted in chapter one, s.2(2)(b) is unique in introducing to the criminal law the ability of sentencers to punish an offender more than he or she deserves. It allows a sentencer to sentence an offender who has committed a violent or sexual crime to a longer than normal term of imprisonment if it is felt that the offender is likely to commit a *serious*

violent or sexual crime in future. The offender who is subject to such a measure is treated differently from other offenders in two senses. Firstly, by committing a qualifying offence he or she is singled out for an undeserved punishment, secondly, the decision to apply the extra punishment to this particular offender is discretionary. Although many sentencing situations offer the sentencing magistrate or judge considerable discretion, and there are guidelines for the appropriate exercise of discretion, most discretionary powers are concerned the imposition of *proportionate* punishment. Discretion in such cases is employed to decide which of several options is sufficient to reflect the seriousness of the crime. S.2(2)(b) offers the sentencer the discretion to impose undeserved and disproportionate punishment. This is a unique power is not universally applicable to all citizens or even all offenders. It therefore fails the first condition and cannot be justified under liberal political ideology.

With respect to the second condition, the advantage must be substantial and measurable. To the extent that being detained in a prison makes it difficult for an offender to commit violent and sexual crimes against members of the public, incapacitation in prison does, trivially, prevent further offences for the period of incarceration. It is impossible to measure the numbers of crimes prevented and the seriousness of the crimes prevented⁴²⁶. Given that the offenders subjected to longer than normal imprisonment under s.2(2)(b) have already committed a violent or sexual offence, it can be argued that they show a propensity for such crimes and merit incapacitative measures. However, it should not be forgotten that such offenders may not have committed a serious violent or sexual offence in the past, and the sentence is based on an assumption about future behaviour. To the extent that many discretionary sentencing decisions are based on the offender's future behaviour this is not unusual. However, as we have seen, 'normal' reductive sentences have at least the potential for some first order benefits. The imposition of a longer than normal sentence under s.2(2)(b) cannot supply first order benefits to the offender and so the assumption of future serious offending must be based on firm evidence if the presumption is to be justified.

The lack of a method for testing the effectiveness of longer than normal imprisonment to prevent serious violent and sexual crime means that there is no compelling empirical

argument in favour of such a sentence. An obvious second order benefit cannot be shown to exist and this second order benefit therefore does not outweigh the disadvantage that accrues to the offender subject to the provision. Since the benefit of such state intervention falls only on others, and cannot be justified by the demonstrable prevention of serious crimes, s.2(2)(b) fails to satisfy condition 2 above. As it has also been shown to fail condition 1, on the basis of the equality requirement of liberal governance, the use of a measure such as s.2(2)(b) cannot be justified.

The practice of making it physically impossible for a person to commit harm, takes different, though related, forms for the mentally ill and for those found guilty of crime. The justifications for the incapacitation of both categories of dangerous person are also different, as a result of consideration of the criteria of rationality and the conceptual role which rationality plays in both legal and medical discourse. As a result different policy and legislation has been implemented to deal with both groups, in an attempt to reflect differences in rationality and hence culpability⁴²⁷. However, concurrent practice of incarceration of the mentally ill 'offender' in prison and the criminally insane 'patient' in special hospital seems to blur rather than sharpen any distinction between categories of 'culpable', 'blameworthy' offenders and 'mentally disturbed' patients. Throughout the development and implementation of the policies of incapacitation, the state, the media and the public have cared little about the conditions under which incapacitated people are held, concern has been directed only at the security of the public.

Chapter four will analyse the liberal justification for incapacitation in the legal and medical contexts through examination of the concepts of 'rationality', 'responsibility' and 'quarantine'. It will be argued that differing conceptions of 'rationality' can justify differential treatment of the mentally ill from the criminal offender. It is argued that the rational subject of law cannot be subjected to an disproportionate incapacitative disposal, since to do so denies the subject's citizenship and fails to acknowledge their essential humanity. But the non-rational citizen still has certain rights which preclude the imposition of longer than normal punishment on him or her unless it can be shown that such incapacitation is primarily in his or her best interests.

⁴²⁶ Monahan (1981), Philpotts and Lancucki (1979), Pratt (1997). This will be discussed further in chapter 5.

⁴²⁷ See chapters 3 and 4 below.

CHAPTER FOUR

RATIONALITY, SCIENCE AND DANGEROUSNESS

This chapter advances the argument that scientific concepts continue to be significant in a society which utilises an implicit policy of social defence. This is so, despite the fact that social defence arose out of a general disillusionment with the promises of scientific criminology. Whilst criminological science failed to convince policy makers of the value of positivist methodology in general, medical science provides the authority for particular forms of intervention. So, a general lack of belief in the utility of the guidance provided by science coexists with a reliance on scientific techniques to identify, select and manage some offenders.

Norbert Elias' account of the civilising process helps to explain the mechanisms by which society identifies those individuals who are different from the majority and are perceived as 'dangerous' as a result⁴²⁸. Elias argues that each society's conception of normal and acceptable behaviour is founded upon sensibilities, the emotional response to certain behaviour. The presence of sensibility responses to certain behaviours defines the behaviour as acceptable or unacceptable. Similarly, certain forms of punishment are considered acceptable (do not offend general sensibilities) within the context of a particular society at a particular time. In the 20th century, a period where there is an increasing awareness of the risk of crime, people become more sensitive to the 'offence' that is crime. There is an increase in expressions of outrage and disgust at the commission of crime, even less serious property crime, but especially of violent and sexual crimes.

So society's conception of 'the other', the 'dangerous' person, is based on non-rational sensibilities. Yet, in the liberal state, it is not enough to justify intervention such as incapacitation in prison by appealing to the fact that some offenders bring forth a non-rational emotional response. There must be an argument before the state can coercively restrain these 'dangerous' people. In the case of the longer than normal punishment

⁴²⁸ Elias (1939) (1978 a and b)

provisions of the 1991 Act, sentencers need not obtain advice from experts such as psychiatrists or social workers as to the 'dangerousness' of the person before the court. This in effect means the sentencer alone and without advice has the discretion to apply (or not) vague standards from outwith the criminal law in determining whether to impose a longer than normal period of imprisonment under the authority of the criminal law. The foundation which underpins this power is that the sentencer is guided by scientific principles and evidence when he or she comes to make the decision about sentencing the 'dangerous' offender.

Although the status of science is exploited in order to justify treating some groups of individuals differently, such measures must also have political justification or else they appear arbitrary or discriminatory. Thus the incapacitation through imprisonment of the 'dangerous' offender must be seen to be appropriate and necessary. Medical science provides both a model and the authority for doing this, in the form of the concept of 'quarantine'. However, the use of such a model carries with it conditions that rule it out in the response to the rational offender's criminal acts. Quarantine is an appropriate response to the non-rational offender, but if the concept is to be used in the criminal justice context then it must be employed impartially, and where possible in the best interests of the 'patient', if it is to be ethically acceptable.

4.1 The Construction of Dangerousness

Concerns about dangerous offenders are often associated with categories of mental illness such as schizophrenia and psychopathy⁴²⁹. However, unlike the term 'dangerous', there are frequent and constant attempts to set objective criteria for medical terms⁴³⁰. Definitions of dangerousness might be thought to follow some common sense patterns such that a person is likely to be considered dangerous only if the relevant activities are persistent rather than isolated; they cause harm rather than mere nuisance; and the individual is of a predatory character responsible for his actions rather than being

⁴²⁹ Campbell (1995), Johnstone (1996), Prins (1986). This tendency is exacerbated by media characterisations of mental illness such as the representation of the cannibal Hannibal Lecter in the film 'Silence of the Lambs'.

⁴³⁰ Pilgrim and Rogers (1999), Bartlett and Sandland (2000)

accident prone. However, there are some potential contradictions within this account as the cultural and media concept of 'the dangerous' person also includes the person who commits sporadic and unpredictable violence. Just as the predatory, rational actor is dangerous so too is the uncontrolled, irrational and irresponsible mentally disordered actor regardless of the benign underlying character of the person. The mentally disordered person is considered to be especially dangerous if the mental disorder is not amenable to treatment or control. So the 'dangerous' offender may be someone who is making calculated plans to cause harm to others or the person who is committing violence without intending to do so.

We saw in chapter two that a policy of social defence institutes measures to control the dangerous regardless of the reasons for the commission of dangerous acts. In particular, social defence policy aims to put in place measures to prevent harm, and this will include rehabilitative and medical interventions. However whether the measures put in place under social defence are based on incapacitation in prison or rehabilitation and incapacitation in a medical setting, justifiable criteria must be developed and implemented to ensure that the power to coercively detain or treat a dangerous or 'dangerous' person is not misused. The language of 'dangerousness' is dangerously vague, a point made by Radzinowicz and Hood when they argued 'it should never be introduced in penal legislation'⁴³¹. The problem with the absence of a clinical account of 'dangerousness' is that policy based on nebulous social and cultural concepts influenced by media reporting of current events, has the potential to be unnecessarily coercive and even corrupt.

Categories of dangerousness are socially constructed and therefore will be politically and morally potent⁴³². Mary Douglas observes the way that the concept of 'danger' can be used by governments to maintain public order and to justify policies of social defence through patterns of explanation and practices of blaming⁴³³. Douglas observes that there is a gap between subjective concepts of danger and objective calculations of risk and that this discrepancy is explainable sociologically. She claims that by turning the language of 'danger' into the language of 'risk' the modern industrial society and criminal justice

⁴³¹ Radzinowicz and Hood (1978) p722

⁴³² See Scott (1970)

⁴³³ Douglas (1992)

system benefits from a (spurious) scientific objectivity. This superficial objectivity hides the political sensibilities which underlie the imposition of the term 'dangerous'.

Douglas argues that the new sense of the word 'risk' has political and cultural force because it only refers to negative outcomes. The word 'risk' has been pre-empted to mean *bad* risk⁴³⁴. The promise of benefits in contemporary political discourse is couched in other terms such as 'choice' 'opportunity' and 'rights'. Those elements of social life that bring about distress and unhappiness are termed 'risks'. Ulrich Beck argues that this means that governance is concerned with the redistribution of (bad) risks rather than the redistribution of goods⁴³⁵. For these purposes 'danger' would have once been the right word, but plain danger does not have the aura of science or afford the pretension of a precise calculation. Risk also depersonalises the potential harm that may occur from most activities and this can be useful for governments. So, for example, the 'danger of driving a car because fatal car accidents do occur' becomes the 'risk of having a fatal accident whilst driving a car'. The former reminds one of the unavoidable nature of harm occurring, the latter that everything one does carries with it the possibility of harm. The former is more direct and certain, the latter raises the mere possibility of harm. Posing the 'danger' in terms of 'a risk' gives the impression that risks are something that one can control whether through government intervention or through individual measures. The discourse of risk also brings with it the knowledge that some harmful acts will occur as no measure can be taken that reduces risk to zero.

As Douglas goes on to say, our theories about risk perception are not as scientifically objective as might be thought. Risk analysts must consider the production and control of information, the production of scientific consensus and the development of public expectations if they are to provide practical guidance about interpreting the social world and developing social policy. In practice this does not happen, and the generation of knowledge operates through an unquestioned reliance on the objectivity and authority of science. She says:

Appealing to degrees of risk is appealing to an external arbiter, an independent, objective judge of the rights and wrongs of the case. Normally an appeal to

⁴³⁴ See also, O'Malley (2000)

experts to settle questions of accountability works when their methods and results are backed by authority. In the present circumstances the appeal to science is made because of the absence of respect for any adjudicator. But when science is used to arbitrate in these conditions, it eventually loses its independent status and finally disqualifies itself.⁴³⁶

As the quotation shows, Douglas argues that there is a possibility that the use of scientific authority in a political context has the capacity to reveal the inherent subjectivity of science. However, the strength of our belief in science is such that there is a reluctance to view science as being less than perfectly impartial and objective. Almost any explanation can be given for the failure of science except where that explanation might threaten science itself. So trusting are we in science that we do not even apply science to itself, it is uncritical in its self-preservation. David Bloor demonstrates this characteristic of science by utilising Durkheim's distinction between the sacred and the profane⁴³⁷. Bloor extends the analogy of faith in a religious phenomenon to our attitude towards science. He asks principally why there is a resistance to the scientific investigation of science, why science is presumed to be immune from comparison with belief, custom, tradition. Science, argues Bloor, occupies the sacred ground in our knowledge discourse, and it is prohibited that we should even compare the sacred with the profane world of social interactions such as politics.

4.2 Dangerousness and science

The discourse surrounding dangerousness reveals an interaction between the scientific and legal domains which is further exposed through the rhetoric used by the penal and psychiatric establishments when discussing dangerous offenders and patients. There can be no discrete separation of the scientific and the legal since dangerous behaviour is conceived through its harmful effects on other persons, effects which may require forensic disclosure or explanation, while harmful relations between persons are ultimately regulated through the legal system. Also, considering the nature of the science used in debates surrounding dangerousness, especially the use of psychiatric knowledge

⁴³⁵ Beck (1992)

⁴³⁶ Douglas *op. cit.* p24

⁴³⁷ Bloor (1991)

and methodology, it is often impossible to differentiate strands of argument that originate from moral and social analyses of behaviour and those made on the basis of scientific theory. What is possible however, is to recognise the use of particular types of discourse that are relied upon in the justification of decisions made concerning dangerous individuals.

The argument and methodology of many criminological theories and penal programmes rely heavily on science for their persuasive power but in order to deprive individuals of their freedoms, the recommendations of scientists must be approved through the legal system. Insofar as the legal system is a representation of the dominant moral attitudes prevailing in a particular society at a particular time it is necessarily both reliant on and critical of the arguments put forward on a scientific basis. When a decision is reached that results from the conjunction of science and the legal system it has a special impregnability. Science supplies expert knowledge and status for the decisions made, and the legal system provides moral sanctioning and administrative authority in the carrying out of these decisions.

Many commentators claim to observe an embarrassment within the field of social science caused by the failure of social scientists to develop an agreed paradigm for the methods of discovery and explanation in their various fields. For example Rabinow and Sullivan in the introduction to the second edition of *Interpretive Social Science* comment:

While not denying the persistence and theoretical fruitfulness of certain explanatory schemes in the social sciences, social investigators have never reached the extraordinary degree of basic agreement that characterises modern natural science.⁴³⁸

Rabinow and Sullivan make the observation that the 'baseline realities' in the human sciences are *practices i.e.* socially constructed actions that provide meaning. They emphasise that human actions are the product of interrelationships, interaction, discourse, conflict and communication. As a result, interpretation is the principle mode of understanding and a recognition of the priority of interpretation requires the full

⁴³⁸ Rabinow and Sullivan (1987) p 3

acceptance of the distinction between the observer and the observed. The methodological limitations imposed ensure there is argument and debate concerning the validity of results.

Charles Taylor takes a similar view, claiming there can be no verification (or falsification) procedure, rather that competing interpretations take the place of standard scientific justifications for phenomena. Taylor states:

We can only continue to offer interpretations... some differences will be nonarbitrable by further evidence, but each side can only make an appeal to deeper insight than the other.⁴³⁹

It is not a criticism of science to observe that much scientific language and practice is socially constructed. Bloor holds that the respect with which science is held inhibits the sociological analysis of scientific methods and applications. Yet Bloor stresses that without a scientific approach to the nature of knowledge, theories are vulnerable to prevailing ideologies and will lack autonomy and development as a result⁴⁴⁰. What is required is a sociological analysis of science and a scientific analysis of social theories. The latter is prevalent in the form of positivism, the former is, as Bloor observes, much more difficult to achieve. In addition, there are competing motivating goals and similar organisational pressures in scientific as well as social and legal enterprises. Pure scientists are looking for verifiable and falsifiable causal processes and to determine the truth or otherwise of beliefs about the dangerous. Practitioners and policy makers in the legal realm are looking for at best utilitarian, and at worst pragmatic, ways to manage the risks that arise from the dangerous. All professionals are seeking to maintain the status of their expertise and knowledge and use whatever ideologies they can to achieve authority and influence.

The divisions that exist between science and the juridical in legal systems are often crudely expressed as being between positivist and classical theories. The United Kingdom's legal systems operate on a neo-classical fusion between the classical, so-

⁴³⁹ Taylor C. in Rabinow and Sullivan (eds.) *Op. Cit.* Chapter 1 'Interpretation and the Sciences of Man' p75

⁴⁴⁰ Bloor (1991) *passim*

called 'justice' model of the offender which assumes rationality and free will, and positivist criteria which presuppose individual deviation from an abstract rational norm. As we saw in chapter two, individualistic positivist criteria are seen as undermining the universality and objectivity of the classical theoretical position. For example, determining the objective material facts of the case is insufficient to determine guilt at a criminal trial. For most offences, the criminal law requires an assessment of the responsibility and culpability of the individual defendant before it can convict the person of that crime⁴⁴¹. In some cases, particularly those relating to violence and sexual offending, the test of the responsibility of the offender for his or her behaviour is devolved to expert scientists, especially psychiatrists. The effect of this application of scientific evidence is that the classical assumptions in the criminal procedure are qualified by the use of positivist criteria. Psychiatry is used as the arbiter of who is mad, as a result it also becomes the arbiter of who is bad and gains enormous legal power and social status in so doing.

As has been noted in chapter two, for the past 20 years there has been a diminution of the expected benefits of rehabilitation programmes for the reform of offenders. Since it is a branch of medicine, which is held to be concerned with the well-being of patients and a desire to rehabilitate those affected by illness or injury, psychiatry should be motivated to involve itself with the treatment based, caring management of offenders. It might be expected that psychiatrically-influenced penal practise would also have declined due to the loss of faith in the rehabilitative effects of punishment. However, it has been argued by Johnstone that the term 'rehabilitation' means something quite different in the penal environment than in the medical environment⁴⁴². The rehabilitative programmes of prison regimes have always been directed towards preventing the repeat of criminal behaviour, even if these regimes were understood broadly and encompassed general vocational and recreational education. Whatever value might be derived by the prisoner, the focus of the regime is not primarily aimed at making his life more comfortable by helping with mental or physical illness, although this may be a desirable (and crime reducing) side effect. Johnstone argues that the benefits of all penal rehabilitation programmes, unlike medical rehabilitation programmes, are not aimed at the offender but at the offender's future victims and society. Johnstone's argument provides evidence that a policy of

⁴⁴¹ Lacey (2002)

social defence is in operation in which state intervention in citizen's lives in the name of rehabilitation, is in fact aimed at reducing reoffending regardless of whether this treatment was in the offender's best interest⁴⁴³.

Johnstone's argument helps to explain how the sacred status of science is useful in justifying a state policy of social defence, despite the absence of belief in positivist criminological theory. Calling upon the scientific discourse of risk also helps to justify longer than normal punishment of the type enabled in the *1991 Criminal Justice Act*. Government policy can rely on the argument that whilst society may not know how to prevent or cure 'dangerous' offender, the use of actuarial models, psychiatric diagnoses and risk analyses can at least help to identify 'dangerous' offenders. In the absence of any ideology strong enough to challenge the dominant scientific discourse, these types of calculations will hardly ever be challenged. This is made clear by the fact that almost every policy document and article on the subject of dangerousness refers to the high rates of 'false positives'⁴⁴⁴ which result from predictive judgments of dangerousness. Yet such evidence has been ignored in favour of a willingness to incapacitate those whom any scientific evidence suggests may pose a threat. The overriding concern for the protection of the public means that false positives are not important, on the other hand the awareness of risk means that false negatives⁴⁴⁵ are totally unacceptable. The combination of the lack of concern for the equality of offenders as citizens and the determination not to take any chances with public safety means that a policy of using longer than normal punishment to incapacitate the 'dangerous' is unchallenged.

The concept of dangerousness that is employed by agents of the criminal justice system is underpinned by narrowly utilitarian (crime reductive) justifications for the prevention of harm. A judgement of dangerousness is an assessment of the likelihood that serious harm will be caused to others. The Floud report argued that those who deliberately place others at risk of harm are more dangerous than the merely reckless or accident prone.

⁴⁴² Johnstone (1990)

⁴⁴³ Johnstone's argument offers support for the view that penal interventions are primarily aimed at producing second order benefits, as argued in chapter three.

⁴⁴⁴ Individuals identified as dangerous who would not go on to commit future dangerous acts.

⁴⁴⁵ People who are *not* identified as dangerous who would go on to commit future dangerous acts.

However, victims and the public are concerned with the consequences of dangerous behaviour regardless of the intent of the person whose behaviour has caused harm. Despite this, the dangerousness provisions in the *1991 Criminal Justice Act* contain criteria for the attribution of dangerousness which do not incorporate strict liability or accidental harm, as they are based on a predicted pattern of future behaviour. The expectation that specific prohibitions for the reckless and those prone to endanger others inadvertently can be enforced on the majority of these offenders, also contributes to their not being classified as dangerous.

4.3 Dangerousness, Civilization and Control.

The process of becoming identified as deviant, criminal and dangerous may have very little to do with the actual likelihood of the commission of harm. Obviously, a propensity to endanger others is not confined to the mentally ill or the career criminal but defining some people as dangerous is, in part, aimed at providing legitimacy to the process of control⁴⁴⁶. Teubner and others maintain that the criminal law and the welfare state together provide a potent method for determining dangerousness and managing those so defined⁴⁴⁷. The reasons why it is found necessary or beneficial to identify 'the dangerous' vary, but will require the group of people to be controlled to be symbolically separated from the general community.

The theory of the 'civilizing process' put forward by Norbert Elias⁴⁴⁸ can be used to explain how governments may exploit the public's reactions to crimes in order to bring in controversial or coercive legislation. By appealing to the affronted sensibilities of the majority and acting in response to particularly horrific crimes, a government can make the introduction of such measures seem urgent, necessary and natural⁴⁴⁹. Sensibilities also help to show 'us' who are the 'dangerous' and therefore who 'we' need to be protected from. Even within a supposedly tolerant liberal society, those who fail to

⁴⁴⁶For a detailed discussion of social control, including the hegemony of authorities and institutions, see Cohen (1985) *passim*.

⁴⁴⁷Teubner (1986) see also Garland (1985)

⁴⁴⁸Elias (1939)

⁴⁴⁹How sensibilities are communicated is an interesting question. For an analysis of the arguments concerning the role of television in public perceptions of crime and criminals see Sparks (1992).

exhibit the same sensibilities as the vocal majority can be identified as deviant and possibly dangerous. For some individuals their inability or unwillingness to share the majority's sensibilities will be considered a pathology and they may receive help rather than punishment. The force of Elias' argument is shown by the words which are used in describing breaches of the criminal law. Law breakers are 'offenders', their 'offending' actions arouse an emotional response and bring forth a demand for a punitive response.

Elias recognised that the successful co-existence of millions of people who are strangers and have no direct vested interest in each other's welfare, results from having a shared system of sensibilities which controls and inhibits certain behaviours. That this self control is brought about through emotional reactions rather than *e.g.* despotic rule, suggests that the internal controls are operated unconsciously and feel very natural. Despite the mutual dependence of all, there is an impression of freedom and the limits to freedom seem minimal and unintrusive. However, close scrutiny of any of the new 'informalisations' and freedoms reveals a structured if disguised system of controls.

Elias' interdependence thesis relies on shared systems of disapproval as a means of preventing breaches of the prevailing sensibilities. In a similar way, Bottoms⁴⁵⁰ argues that the primary focus of crime prevention in criminal justice systems is not in the punishing but in social control through the communication of norms of acceptable behaviour backed up by punishment only when necessary. This fits in with a policy of social defence. The agencies of government, in particular the criminal justice system, have a law-enforcement effect primarily through the articulation of social rules which work because so few people even contemplate breaking serious rules. It varies from individual to individual but most people would not contemplate committing the most serious crimes unless placed in extraordinary situations. There are many crimes which offend and cause outrage, and many crimes, of greater and lesser degree of seriousness, that most people would not contemplate committing. Elias' argument shows that much inhibition is the result of our attitude to criminality and each individual's perception of him or herself rather than any lack of opportunity. The inhibitions that sensibilities bring about are instrumental in ensuring that levels of crime remain endurable. Our reactions to

⁴⁵⁰Bottoms (1983) p186

crime as individuals and as society through the media ensure that the norms are communicated to new members of the society.

As part of his analysis, Elias draws heavily upon Freudian psychoanalysis for his description of the changes in the interactions between individuals. In essence, Freud details the necessity of repressing, via the anxiety ridden super-ego, that part of human psychology which is self-centred and 'free', and which otherwise might prevent the individual from accepting and sharing the norms of society. The desires of the individual to act purely selfishly, *e.g.* the driver who would arrive faster by driving through a red light, must be repressed in order that society functions smoothly. Although the taking of advantage by one individual does not threaten the smooth workings of the society, a general breakdown in the norms would produce a Hobbesian state of nature, which, in a highly integrated, modern society is counterproductive to both general and individual well being. It is in the individual's best, long term interests that others control their selfish desires and comply with the norms of the society in which he is living, and as a result he has a duty to do so himself. This is, of course, a version of social contract theory discussed in chapter three, with the difference that, for Elias, rehabilitation of the offender results in him complying unconsciously in society's norms. Elias shared the overall utilitarian framework of the contract theorists but the influence of Freudian psychology suggested to him that it is the subtle instilling of the prevailing sensibilities into the offender, until he feels they are his own, that leads to conformity rather than any form of rational calculation about self interest.

Elias noted that, a reaction, often in the form of punishment, is triggered when an individual or group challenges the sensibilities that enable the interdependent society to operate smoothly. This aspect of Elias' thesis is very similar to Durkheim's account of the integration of social life although without the excesses of Durkheim's functionalist stance⁴⁵¹. Durkheim believed that crime, and the punishment of it, re-enforced the unity of society by permitting the expression of condemnation and by inhibiting members of the community from offending or deviating; a unifying/deterrent effect. This deterrence is achieved on Durkheim's account through the stigmatising of the individual and the re-enforcement of the community's rules for the all members of the society. Elias, like

⁴⁵¹ Durkheim (1902)

Durkheim, puts forward an argument that emphasises social adaptation and the symbolic importance of condemnation for the development of sensibilities and inhibitions.⁴⁵² These inhibitions are necessary given an integrated, interdependent society, as contravention of the societal norms must be punished to ensure the continued smooth operation of the society. The punishment communicates to all in the society the reaction and the punishment which is provoked when a prohibited action takes place.⁴⁵³

As a negative example of Elias' thesis, the failure of the criminal justice system to operate effectively against white collar crime, and other crimes of the powerful when it is apparent that these do cause great harm, is evidence of the absence of the sensibilities that condemn this type of crime and which would otherwise define those who participate in it as dangerous, which is of course, a first and essential factor in deciding who is to be policed, prosecuted and punished. The presence of legislation to enable investigation and prosecution in cases of white collar crime is less significant than the absence of a strong general sensibility against it, even amongst those who are its victims. Discrimination of 'the other' is a crucial step in the process of determining who is dangerous since it is difficult to condemn and punish 'ourselves'.

We saw that in the 1991 Act there was the explicit adoption of a penal policy which promoted the practice of 'bifurcation'⁴⁵⁴ in the use of imprisonment. This policy sought to discriminate between offenders who must be incarcerated in the interests of public safety or the seriousness of their crime, and other offenders who may be punished in the community. Implementation of this policy depends on a clear and consistent identification of those offenders who do pose a threat to the community, those offenders who are dangerous and the seriousness of any offence. As we saw in chapter three, changes in attitudes to offending mean that *all* offending is considered serious, this provides an easy way for sentencers to avoid having to make decisions on the dangers posed by offenders. So the need for an assessment of 'dangerousness' is, for the most part unnecessary, as the criteria of the seriousness of the offence can be used in the

⁴⁵²Durkheim claims that the *conscience collective* becomes less important as social life becomes more pluralistic. The structures that underpin the integration of society are less emotional and more pragmatic, rather than reflecting common codes of sensibilities, ethical norms are more metaphysical, such as tolerance and freedom.

⁴⁵³ See also Duff (1992)

⁴⁵⁴ Bottoms (1983)

decision to impose imprisonment. The perception of all crime as serious leads to the perception of all criminals as being 'dangerous' and therefore of an increase in the use of incapacitative forms of punishment, particularly of the prison. The use of scientific assessment is really only required when a longer than normal period of imprisonment is being contemplated under s.2(2)(b) of the 1991 Act. In this case the sentencer has to arrive at a determination of the offender's likelihood of committing serious harm in future, a decision which must be justified in a rational and scientific way.

The criminal law must, to a large extent, reflect social norms in order to retain the support of the public. But changes in popular sensibilities need to be recognised and absorbed into the institutional sensibilities before they can be acted upon. For example, it was only when the issue of domestic violence became publicised and politicised, and an issue for the middle classes, that the police and sentencers reacted accordingly, re-defining domestic violence as a public rather than private crime and therefore within the scope of the criminal justice agencies⁴⁵⁵. The sensibilities of the system as well as those of the public were re-tuned into condemning and punishing acts of violence between marital partners. This raises the question of how far the criminal justice system can be influenced by the refinement, change and spread of sensibilities. The knowledge that the exploitation of sensibilities may disguise the hegemonic and manipulative behaviour of government, and the unequal operation of power may provide opportunities to counteract these processes.

The theory of 'the civilizing process' not only provides a compelling and distinctive account of the actions and reactions to behaviour in society. It also points the way for these to be harnessed in the pursuit of change. Elias' theory offers guidance for penal reformers, prison treatment programmes and for political resistance to certain forms of punishment. When 'dangerous' offenders are seen as human beings rather than 'the other' then restraint will be exercised in the application of indeterminate or longer than normal sentences. If reduction of the harm caused by crime is the aim, then *inter alia* it is required that people share the sensibilities that inhibit the commission of crimes. This gives scope for a re-evaluation of treatment and rehabilitation programmes in the penal system. However, it also forces decision makers to accept that the inequalities in society

⁴⁵⁵ Heidensohn (2002)

determine people's sensibilities and affect their behaviour. In a pluralistic society the criminal law should reflect only those offences against social sensibilities which are inclusive of most members of society. Until this occurs the sensibilities of elites will prevail, preventing any prospect of justice in punishment.

The insights of Norbert Elias' theory of civilization have shown that the desire to discriminate the 'dangerous' offender is a reaction to the perceived threat within the chains of interdependence which enable a highly specialised modern society to function. In this way, the concept of dangerousness is useful to the social policy apparatus which is concerned to maintain social defence in any way it can. For a system that is concerned with results rather than the considerations of due process and justice, the problem of the over generalisation of scientific criminological results will not be a major concern.

4.4 Dangerousness, criminal justice and mental health

Changes in psychiatry's attitudes to its patients have been mirrored in the attitude of the criminal justice system to the dangerous. As Johnstone points out punitive and medical conceptions of crime and treatment have been 'harmonised'. Johnstone notes the benefits that this has had for the study of penality.

Criminology, by framing its theories and propositions in medical-scientific terms could utilise the scientific status, social prestige and caring image of medicine in order to promote its medical theories and penal programme. Penal reform programmes were likely to meet with greater success if they were expressed in the idiom of medical science.⁴⁵⁶

Johnstone goes on to note that 'treatment' does not carry the same meaning when employed in discourses of penal policy as it does when it is employed in the context of somatic medicine. Both disciplinary mechanisms (psychiatry and the criminal justice) have relied upon repression and incarceration for both the 'treatment' and study of their subjects, most obviously in the sites of the asylum and prison⁴⁵⁷. Both have increasingly widened their subject base *i.e.* psychiatry now focuses on more than insanity and has an

⁴⁵⁶ Johnstone (1990)

wide sphere of interest; dysfunctional families, children, sufferers of mild depression. Similarly, criminal justice systems have been accused of widening their net beyond their natural subject base of law breakers (as is evidenced by the role of police in community crime prevention activities which may in themselves lead to labelling and thus augment crime rather than reduce it). Both psychiatry and crime control agencies have relied on the therapeutic value of segregation, justified as being for the benefit of the offender or patient by removing him or her from the environment that caused the deviance or illness. However, as we saw in chapter two, when segregation could not be justified on these grounds, it was renamed as incapacitation and was justified on the grounds that it protects the public.

Mental illness has come to be established in the authoritative domain of psychiatrists although this was not always so, and the management of incurable psychopathy is still the responsibility of the criminal justice system⁴⁵⁸. The development of the criminal justice system's concern with dangerous offenders has followed a similar pattern to that of psychiatry's concern with its patients. It is important to be cautious in taking the insurance metaphor too far, but it can be noted that one technique insurers use to reduce their exposure to risk is underwriting. Underwriting excludes people deemed to be of high risk from obtaining insurance. Psychiatrists are underwriting their patient base when they exclude persons from their patient population and their services and study. The most obvious group that is not currently underwritten by psychiatrists are some types of sex offenders. Although to the lay person it would appear that certain bizarre forms of non-consensual sexual behaviour are indicative of mental disorder, the lack of success with treatment of sex offenders seems to have led to a reluctance in the psychiatric profession to acknowledge their behaviour as an illness and to supply therapeutic intervention.

Psychiatric and criminal justice techniques of control are subject to the same critiques, these being - theoretical, institutional, juridical and technological. The processes of becoming criminalised and psychiatrically diagnosed are similar, as are the consequences of obtaining such a label. Both institutions have been criticised for the power that is held over their subjects and for their perceived creation of a need for control over an increasingly large number of people. By medicalising and publicising deviance both

⁴⁵⁷ Foucault (1977)

institutions establish a need for their services and are thus their own advocates in the justification of their activities. And of course both claim to unambiguously work in the best interests of the public as well as of offender/patients.

The concept of 'treatment' for psychiatry and the criminal justice system has shown a historical shift in the notion of who treatment is aimed at benefiting. Of course it has usually been assumed that it is the patient or the offender who would be cured of his illness or offending behaviour with the happy consequence that the just as the offender's life improves so would the condition of others who would no longer be at risk from the offender/patient's deviant behaviour. However, as was noted in chapter three, it is increasingly obvious that it is the public who are seen as the chief beneficiaries of treatment, and that the aim of treatment is to prevent a recurrence of deviant behaviour regardless of whether this also contributes to an improvement in the circumstances of the offender or patient. Ultimately, if deviance cannot be reduced to acceptable levels through treatment, incapacitation is used to guarantee the protection of the public.

The classification of an individual as 'dangerous' is a socially influenced judgement. This has so far failed to be taken into account by the criminal justice system which has sought to relinquish the 'diagnosis' into the hands of pseudo 'experts' including judges. Unfortunately, even medically qualified and experienced experts are not very good at predicting uncommon events such as violent behaviour⁴⁵⁹, so it is natural that their lay colleagues prefer to err on the side of caution. The likely result is that this results in the imposition of many unnecessary incapacitative sentences. Notions of the treatable and the untreatable also have changed throughout the century with the rise and fall in the popularity of the rehabilitative ethic in both psychiatry and criminology. We saw in chapter one that psychiatry is still in a process of defining its patient population to include only those who are amenable to treatment and cure, with the residue being left to the management of the criminal justice system. There is an apparent reluctance to see much offending behaviour as related to patient's mental health problems. This is partly because the definition of those who are appropriate subjects for psychiatric rather than criminal justice intervention is controlled, determined and safeguarded by the pseudo-expertise of the courts.

⁴⁵⁸ Peay (2002)

There is an abundance of studies concerned with the empirical prediction of dangerousness⁴⁶⁰. Predictive studies are vulnerable to criticism on methodological grounds because of problems of limited time scales and small sample size and due to the perennial problem of ascertaining levels of offending due to the 'dark figure' of crime, *i.e.* the number of offences that are not reported and/or recorded. There is considerable expense and professional risk in compiling results from long term follow-up research. The consensus seems to be that the most methodologically sound of the cited research on the prediction of dangerousness takes the form of following the behaviour of patients diagnosed as being dangerous after they have been released from hospital or prison. The well-known Baxtrom⁴⁶¹ case details the circumstances of a group of allegedly dangerous mentally ill patients who were released following court decisions which determined that they had been detained unconstitutionally. The researchers followed the progress of a sample of the patients after release and found the levels of dangerous and criminal behaviour to be very low and concluded that the incapacitation of most of these patients had been unnecessary. The Baxtrom case is interesting because it allows for analysis of the false positive and false negative rates of the same group of offenders (although, as the Butler committee noted, caution must be exercised as a result of the advanced age of many of these patients when released, which may have had an effect on their offending behaviour).

The Baxtrom case raises many questions for the disposal of the dangerous person in either the prison or hospital systems. As Bottoms notes, the concerns of the Butler Committee were with the mentally abnormal offender who is identified as being dangerous during the progress of his sentence. The Baxtrom case centres around a patient who was diagnosed as dangerous and then transferred to a secure hospital at the end of his prison sentence. Obviously, such a disposal would still be open to the authorities if the offender was seen to come under the powers of the appropriate Mental Health Act. However, the reviewable sentence which the Butler Committee proposed relies on sentencers identifying all dangerous persons at the time of sentencing, which does not address their original problem of how to incapacitate those *not* identified as such whose

⁴⁵⁹ Gunn (1996)

⁴⁶⁰ Prins (1986) pp 87ff and Floud and Young (1981) Appendix C.

⁴⁶¹ Prins (1995), Bottoms (1977), Home Office and DHSS (1975).

term of imprisonment is approaching an end. It is quite probable that the prison medical and other authorities, in close contact with the offender for a period of several years, will reach a different assessment of many offenders' dangerousness than the judge passing sentence some years earlier, even if he or she is given access to a great many expert opinions⁴⁶².

Both the psychiatric and juridical systems seek to regulate social behaviours. Both systems operate on theoretical and technical levels. It is by distinguishing these different levels that we understand the phenomena that psychiatry and the criminal justice system seek to regulate. We cannot seek a definition of madness or criminality by looking for these categories in isolation from the powerful institutions that control the management of such behaviour. In any case categories such as 'madness' and 'crime' are only partial elements of the behaviour that comes under the sphere of influence of these institutions, both now claim to have a social vocation that ensure that their influence reaches more broadly than their particular patient/ offender base would suggest. As well, psychiatric and juridical structures must be understood in a context of competing and intersecting social practices and agencies. To understand these social regulators we need to understand the heterogeneity of their ideologies, origins, practices and methodologies.

We saw in chapter one that the solution to the problem of predicting, controlling and treating those persons who constitute a danger to others has often been sought within a scientific paradigm. For the first two thirds of the 20th century, both criminologists and psychiatrists have assumed that the answer lay within a dominant positivist methodology. Assumptions were and still are made concerning the success of the aggregation of information and the generalisation of data from individuals to groups. Failures to accurately predict 'dangerous' behaviour are attributed to the deficiency of the data rather than any theoretical shortcomings. Despite the decline by policy makers in the belief in positivist ideology to come up with workable solutions, criminologists still cling to these old methods and approaches. The possibility that the data would necessarily always be insufficient for this methodological weakness to be overcome is rarely contemplated. If it were, the lives, careers and choices of honest individuals who are

⁴⁶²To quote Norris (1982) 'The courts... allow much greater reliance to be placed on psychiatric predictions of dangerousness than does the organised profession of psychiatry', Duff and Garland (1995) p244

aiming to improve the world would come under critical review. The potential for a finding a conceptual space which allows for uncertainty, chance or randomness is largely ignored as being metaphysical nonsense⁴⁶³.

Medicine is an example of one of the most 'sacred' sciences in modern society, principally as a result of the great success manifest in the improvement in people's longevity and well-being. Although medical knowledge can be obtained by a lay person, and there are substitutes for it in the form of herbal, homeopathic and folk treatments for disease and ailments, it remains the case that traditional medical practitioners are privileged to hold a high status that is very seldom challenged. When medical care is subject to criticism that critique is usually in the form of accusing the individual medical practitioner of failure to meet the highest standards of the discipline rather than a critique of the discipline and its authority. Criminology cannot be said to enjoy the same high status as a knowledge. However, it does obtain much of its authority through a parasitic affiliation with the discourses of science, medicine and psychiatry. The two discourses of criminology and psychiatry are intimately related through a common foundation in modernity, a shared methodological framework and a similarity of goals. The theoretical basis upon which the two knowledges operate are similar and they can be seen to be cross fertilising in their empirical and theoretical developments throughout the twentieth century.

The concept of 'dangerousness' is flexible enough to capture people who commit prohibited violent and sexual acts whether they are considered to be rational or non-rational. The representation of the *criminal* as being responsible for his actions is clearly influenced by the concept of rationality. Responsibility presupposes rationality but in the criminal justice system rationality is considered in a particular and technical way⁴⁶⁴. An assessment of the rationality of an act consists in examining the reason a particular criminal activity might provide some benefit to the offender that is greater than the risk of punishment. This cost/benefit analysis, strongly economic in its style, is simple enough when it come to accounting for crimes of material gain such as robbery, burglary and trading in stolen goods or illegal drugs and to the cathartic release provided by some

⁴⁶³ Hence it has been argued that there can be no such thing as a 'postmodern criminology'.

⁴⁶⁴ Norrie (1993)

forms of violence. However, the model of costs and benefits is less useful when it comes to 'anomic' activities such as vandalism, or when the benefits of crime are not material but psychological, *e.g.* the emotional arousal and feeling of dominance gained through some violent or sexual crimes.

Duster⁴⁶⁵ argues that the imputation of rationality is itself a social construction. He gives hypothetical examples of a poor woman who steals, where the motive is apparent - she needs money to feed her children. In this case there is obviously a rational 'explanation' for the theft therefore the intent is assumed, she is found guilty and sentenced accordingly. Duster contrasts this case with a rich woman in possession of many material goods who also steals. Because there is no need for the woman to steal in order to satisfy her needs, her actions are deemed to indicate an aberrant state of mind *i.e.* illness rather than criminal intent, and the woman is referred for psychiatric treatment. The absence of a rational explanation in the latter case (and a determined rejection of the simple explanation that rich people may be also be covetous), leads to the conclusion that the action is the result of illness rather than choice and the offender is relieved of responsibility for her actions.

A similar functional process can be seen in the defining of certain forms of dangerous behaviour as either criminal or pathological. Behaviour such as violent rape is, as far as is known, relatively uncommon⁴⁶⁶. It is certainly abnormal, disconnected from the physical and emotional engagement that arises in (even casual) consensual sexual behaviour and often there seems to be no rational explanation relating to its commission. Yet psychiatrists are reluctant to diagnose sex offenders as being mentally ill unless the behaviour becomes extremely deviant and socially repugnant *e.g.* necrophilic or gerontophilic behaviour. However, given the comments of Douglas, Bloor and others concerning the social construction of science and the importance of maintaining the mystique of science, this should not be surprising. As a profession psychiatrists have little to gain by the adoption of this group of offenders into their patient base. The treatment methods available are of uncertain benefit and the risk of professional criticism in the event of inaccurate prediction (both false positives but especially false negatives)

⁴⁶⁵ Duster (1970)

⁴⁶⁶ I exclude consideration of the use of mass rape as a technique of warfare from this discussion.

is high. The reluctance to take responsibility for serious violent and troubled offenders has elicited little sympathy from some commentators. Greenland remarks;

until more efficient and humane methods are developed and sanctioned by society, clinical psychiatrists should stop being apologetic and defensive and accept these difficult, and often thankless tasks as part of their professional and legal mandate.⁴⁶⁷

When a person posing a threat is not capable of rational argument or when it is assumed that a rational argument from the person's point of view will still result in criminal action, then the likelihood of harm from dangerous behaviour is felt to be especially acute. Thus the two most characteristic types of dangerous offender are those not capable of rational argument (mentally disordered) and those who believe the benefits of crime outweigh the risks (recidivist or career criminal). In both these stereotypes of dangerous offender, there is an underlying perception that the usual social constraints that deter most people from committing crime are absent or ineffective. There is also the feeling that the results of individual deterrence (*i.e.* punishment) are likely to be less effectual for these offenders. As a result of these scarcely articulated beliefs concerning the difference between 'normal' and 'dangerous' persons, the state justifies treating 'dangerous' offenders differently from 'normal' offenders.

We saw in chapter two that current Western penal systems are recognisably a cocktail of classical deterrence and retribution theories together with a positivist theory of scientific prediction and correction all attempting to deliver a (utilitarian) reduction in, or total prevention of, dangerous behaviour. Confusion arises where there is conflict between the primacy of legal safeguards and due process considerations of classical theory, as against the pragmatic, predictive and behaviourist foundations of positivism. Bottoms⁴⁶⁸ draws attention to the competing assumptions of classical and positivist penal theories with respect to their definitions of dangerous offenders. As well as an inherent contradiction in what is considered legitimate for the penal system to act upon, past or future conduct, these differing schools of thought promote divergent accounts of who or what constitutes a dangerous offender or dangerous act.

⁴⁶⁷ Greenland, quoted in Prins (1986) p88

The introduction of mitigation into the classical theory required positivist methodology to be used in the legal exercise of determining liability, culpability and in the disposal of those deemed guilty. In particular, positivist methodology in the form of expert evidence becomes important in assessing the mental states of those before their court, in order to ascertain their legal status as defendants, their responsibility for their actions and crucially, their dangerousness. As Peters notes:

the criteria for decision making in the administration of criminal justice assumed an increasingly non-legal, 'scientific', character. Thus traditional legal concepts made way for the scientific, or pseudo-scientific, categories of psychiatry and criminology.⁴⁶⁹

4.5 Rationality and Dangerousness

We saw in chapter one that the English criminal justice system has long struggled with the goal of averting certain types of harm. Various strategies have been adopted in the interest of reducing harm by preventing crime, most obviously through the existence of deterrent penalties and the use of rehabilitation and incapacitation as part of the process of punishment. The mere presence of penalties assumes that citizens are rational: *i.e.* that citizens who do not commit crime do so, at least in part, because they might suffer unpleasant consequences if they are caught, convicted and punished. Nevertheless, there exist people who frustrate the law's assumption of rationality. There are those persons who do not refrain from crime despite the severity of potential punishment, or who, having committed crime, are not hindered from committing further crime as a result of the unpleasant and/or therapeutic things done to them in the name of retribution and rehabilitation.

Those offenders who are subject to rehabilitation and incapacitation are often assumed not to be rational *e.g.* mentally disordered offenders, offenders who act while automatons, children. The desires of such offenders are either: not amenable to rational

⁴⁶⁸ Bottoms (1977)

deterrence (non rational); or, the desire for the perceived rewards of crime is so intense that the threshold for being deterred by punishment is high enough for the person to be prepared to take a risk that others would not (objectively irrational). In extreme cases of non rationality where the desires cannot be controlled, the criminal law may respond by acquitting the offender of responsibility for the crime, as occurs with the defense of insanity. For those who are deemed rational but nevertheless do not make the 'right' decision the criminal justice system's response (*i.e.* the punishment) is designed either to *change* the individual - to make them in some sense more (objectively) rational, more normally deterrable (which may happen merely through the passing of time or result from the pain of punishment), or to incapacitate the offender so that they are unable to offend.

Of course, the law does not deem all offenders to be non-rational or irrational. It recognizes that there are many rational reasons for offending although it does not normally approve of them. But it is certainly not the case that all offenders without an objectively good reason for offending are deemed irrational. Indeed if this were the case this could provide problems for finding of guilt since some forms of *mens rea* and *actus reus* clearly require rationality. It may be possible to decide to do something on the basis of a non-rational process such as flipping a coin, but once the intention is formed, a rational process is required to carry it out (or to decide that it is not worth carrying out). The rational process of committing a crime is an indication of the person's desire and motivation and this in turn reveals the intention, *i.e.* the *mens rea* of the person at the time of the offence. In a similar way, an argument can be made that recklessness and negligence are rational strategies, since to ignore an undesirable possible outcome of one's behaviour is just the prioritizing of present pleasure over potential future pain, and this is rational if the future pain is considered to be sufficiently improbable. On the other hand, a person may desire to commit an offence and intend to commit it in a certain place and time but decide on rational grounds that the act should be deferred or abandoned, in which case there is no *actus reus* and no crime. So the law does not *require* that the decision to do something illegal is rational for there to be a finding of guilt, but the rational process adopted in carrying out an illegal act is an indication of the required mental state for the finding of guilt.

⁴⁶⁹ Peters (1988) p28 see also Garland (1994b)

The criminal law has a conception of rationality which is of the following kind:

(R) If any agent x , wants d , and x believes that the illegal act a is the best way to attain d under the circumstances, then x does a rationally.

For an offender to be accepted as non-rational the following must hold:

(N) If any agent x , wants d , and x commits the illegal act a in order to attain d under *any* circumstances, then x does a non-rationally.

For the most part, the law assumes that offenders are rational in the sense that (R) describes. The majority of the non-offending citizens who also desire d , may act equally rationally but do not find the illegal act a to be the best way of attaining d (e.g. they purchase the goods rather than steal them) or prefer to go without d rather than commit the illegal act a and risk the possibility of being punished. As part of the rational calculation the possibility of punishment as well as the likelihood of other unpleasant consequences (loss of status *etc.*) are relevant to a determination of whether the illegal act is the best way of achieving d .

The decision as to the best way of achieving d is always subjective to the person making the calculation and will be based on imperfect information and of estimates of expected utility. Hence it follows that (R) is also a description of *irrationality*, where the 'best' way to attain d under the circumstances is subjectively rational for the offender but does not appear rational to others. The vagueness of the concept of rationality entails that it is not necessary for an offender to be totally non rational to be considered mentally disordered. At the point where the objective rationality of the offender's actions seems so far removed from the rationality of 'normal' persons, the law will take the view that the offender is mentally disordered.

Notwithstanding those cases of objective irrationality that are considered to indicate mental disorder, the law considers most offenders to be rational. But there are some offenders whose behaviour makes the attribution of rationality difficult from the standpoint of the expectations of the criminal justice system. As we have seen, the

system need not concern itself overly with rationality except insofar as it helps determine guilt, but the rationality of offenders is relevant to the question of punishment. Those who are most frustrating because they do not conform with the assumptions of penal psychology are repeat petty offenders and those offenders who are deemed dangerous. Repeat offenders seem to be undeterred by the law's penalties (both possible and actual) as a result in some jurisdictions they are punished disproportionately to ensure they are incapacitated (*e.g.* 'three strikes' - type sentencing strategies)⁴⁷⁰.

The way the criminal justice system responds to 'dangerous' offenders is informed by the system's assumptions of their rationality or irrationality. These decisions influence the extent to which the state can justify infringing the rights and freedoms of those deemed dangerous. So-called 'dangerous' offenders are frustrating to a modern criminal justice system because the assumption is that the offender's very dangerousness makes him or her resistant to 'normal' calculating processes. These processes should result in him or her being deterred from future offending by the threat of sanctions or the memory of past sanctions (or treatment). As with other offenders it may well be that the dangerous behaviour is sufficiently pleasurable or rewarding to outweigh the potential risks and costs. The court cannot conclude the offender is non-rational and not susceptible to rational calculations of the type assumed in penal theory and the criminal law without acquitting that person of responsibility. In fact, since those offenders who are subject to longer than normal punishment are found guilty there is a presumption of subjective rationality even if the behaviour appears irrational to objective onlookers such as the court.

The case of the repeat petty offender who is acting rationally, and the dangerous offender who is acting (objectively) irrationally, contrast with the case of the disease carrying person. Imagine the worst case of a disease that can be transmitted very quickly from person to person without physical contact and with serious consequences for the newly infected person. In such cases, whether the carrier of the disease acts rationally or not in trying to prevent transmission, there is little that he or she can do. Nothing short of

⁴⁷⁰ An appeal to rationality makes it clear why such strategies are likely to fail to deter offenders. Although the costs of repeated convictions under such a sentencing system are high, the low risk of any particular offence triggering a conviction makes rational each instance of offending.

isolation (quarantine) can prevent the transmission of the disease. Assuming the unfortunate carrier of the disease is not wanting to pass on the disease, the rationality of the carrier is irrelevant. *All* his or her actions (rational or not) pose a threat until and unless he or she is placed in quarantine. Nothing he or she chooses to do (apart from entering quarantine) reduces the harm that he or she poses. We cannot for example point out that it would be in his or her best interests to refrain from spreading the disease since the disease carrier has no control over its spread. Unless he or she resists going into quarantine, he or she is not culpable for any subsequent transmission of the disease as it is beyond the diseased person's power to do anything to stop it.

Drawing on an argument from the previous chapter, it is important to see where the distribution of benefits lies in the demand that a person or offender be placed in quarantine. In the medical case it is difficult to see what first order benefit can be obtained by the imposition of quarantine on a diseased person. The unfortunate carrier of a disease is already infected, and there is little or no advantage in treatment for the person to be placed in quarantine, the benefit of the state's enforcement of quarantine is entirely second order. The most that can be hoped is that the disease carrier receives the first order benefit of relief at not infecting others. The rationality of the disease carrier is irrelevant to the imposition of quarantine as his or her behaviour and its motivation cannot effect the transmission of disease, except to the extent that the individual submits to the quarantine.

The situation is different for the 'dangerous' person who is subject to measures of 'quarantine'. For the situation to be equivalent, the 'dangerous' behaviour of the individual must be unavoidable. Such behaviour must be beyond the control of the 'dangerous' offender and beyond the scope of deterrent or rehabilitative measures. In contrast to the medical case, in order to qualify for quarantine, the incapacitated person must be non rational, as any rational person would be able to control their dangerous tendencies (and would be liable to proportionate punishment if and when a dangerous act is committed). As in the medical case, detention can be justified only when nothing short of containment can prevent the commission of a dangerous act. But in this case the individual placed in 'quarantine' receives the first order benefit of not being punished as the 'dangerous' act is prevented by the restrictions of quarantine. Although this is a somewhat artificial example, taking as it does an extreme view of the evidential

certainties with respect to dangerous behaviour, it does show the theoretical possibility that some form of 'quarantine' may bring about first order benefits for a 'dangerous' person. Thus, for the non rational dangerous person, who is unable to control his or her own future serious violent or sexual offending, 'quarantine' in the form of civil detention can be legitimate and justified providing as it does first and second order benefits. Note however that, in practice, the evidential requirements rule out the use of civil detention.

The Floud report takes a slightly different perspective on the issue of quarantine which they consider is a useful counterpart of preventive sentencing. If quarantine can be justified, they argue, then preventive sentencing can also be justified. The Committee argued that the state cannot interfere with a citizen's right to be presumed harmless unless that person has committed a dangerous act of the kind that the state is seeking to prevent.⁴⁷¹ The evidential difficulties are therefore not so acute as with longer than normal sentencing under the *1991 Criminal Justice Act* as they require past behaviour of the same type and degree of seriousness to provide evidence for future behaviour. However the report privileges procedural mechanisms over accuracy in individual cases since they note that:

The correctness of a predictive judgement cannot depend on our being justifiably certain that an offender will actually reoffend... it depends primarily on the soundness and reliability of an assessment of his disposition to inflict harm. Whether, if he is let at large, he will actually do harm is very much a matter of chance⁴⁷².

The report does not consider the case of a person who has been found guilty of a qualifying though not serious violent or sexual offence whom it is thought will go on to commit a serious violent and sexual offence. However, they do consider the use of civil preventive detention of the innocent (unconvicted) 'dangerous' person. The committee was keen to find an argument that approves the use of quarantine and protective sentencing but rules out preventive civil containment. In order to do this they rely on the concept of 'intention' and arrive at the somewhat strange view that the state can incapacitate citizens who are liable to cause unintentional harm (this enables quarantine)

⁴⁷¹ Floud and Young (1981) p44

but cannot incapacitate citizens who intend harm but have not committed a dangerous act (this rules out civil preventive detention)⁴⁷³.

4.6 Rights, Rationality and Dangerousness

Discussions of the role of rationality or reason in the law go back at least to Aristotle whose account in the *Physics* describes biological creatures, and hence humans, as being *changeable*. According to Aristotle, human beings are able to order their behaviour according to rational understanding, indeed this rational behaviour is seen as human kind's most defining characteristic. This concept of alteration, the idea that through reason humans are able to make choices to determine a course of action, to modify, moderate and decide their own actions, is constitutive of the concept of a person which is the foundation of the politics and law of liberal societies.

Rationality is not equivalent to free will although they are related concepts. A person needs free will in order to be rational but not vice versa. One can have free will but exercise it non-rationally, as in the example given above of forming an intention through the toss of a coin. The liberal political society is premised on the idea of rationality rather than free will since it appeals to ideas of social contract and the interdependence of individuals living in communities. It is this rational appeal to self interest via the interest of the group that underpins the idea of the modern liberal society and which generates the need for the protections of individual rights from the demands of majorities and the powerful.

Aristotle's conception of human beings as rational and teleological is also the foundation of the concept of rights as promulgated by the United Nation's Universal Declaration of Human Rights issued in 1948, the European Convention for the Protection of Human Rights and Fundamental Freedoms signed by member states in 1950 and the UK's *Human Rights Act* of 1998. These documents put forward a theory of rights arising from the concepts of freedom of choice and freedom of action which is grounded in rational decision making. Because human beings are creatures able to make free and rational

⁴⁷² Floud and Young (1981) p 57

⁴⁷³ The 'quarantine' argument in Floud and Young (1981) has been criticised in Bottoms and Brownsword (1982)

choices, they have certain fundamental rights, primarily the (limited) right to act upon the choices they make however irrational those choices seem to others. On this view, to take away the opportunity to exercise rational choice is to take away the most fundamental of human rights, indeed to take away the right to act on choices takes away the feature that defines what it is to be human.

The model which protects the rights of the individual arises from the concept of a person as maximally exercising rational choice but which recognizes the need for some of the choices of the individual to be curtailed in order to permit social cohesion. The conception of rights put forward in the documents listed above is predominantly negative, preferring to afford protection against interference in the exercise of rational, freely chosen behaviour rather than to specify the positive benefits a person can demand from his or her community. This is a consequence of the tacit limitation of certain freedoms by individuals in the construction of the liberal state and society. The state has a role in protecting the (negative) rights of individuals, since individuals have already given up substantial freedoms in order to maintain the smooth operation of social life. This protection is necessary to act as a curb on the unrestrained desires of the majority to act in their own best interest, and to enable people to choose what is in their own best interests without having such choices imposed on them by the state. Thus the state is constructed through a (rational) derogation of individual freedoms but in exchange must act to preserve essential individual rights against the excessive demands of the majority.

The European Convention on Human Rights sets out a diet of minimum rights and states such as the UK which accept these rights have an obligation to protect the rights of individual citizens under the convention. However, the state also has a right to protect the interests of community values against the preferences of individuals. Communitarian values may hinder the protection of individual rights in a variety of ways. Ashworth reminds us:

In political terms communitarian theories may be found on a spectrum from the Left to the Right. What they share is an insistence on placing community values above individual preferences. For left-of-center communitarians the argument is that liberal theories have tended to focus excessively on the rights of the individual, failing to recognize that rights are ineffective without the practical

power to exercise them, and ignoring the need for co-operation in many matters if individuals are to realize their goals. Right-of-center communitarians, on the other hand, tend to argue that concepts such as human rights are inimical to public safety and handicap the legal system in its endeavor to protect innocent citizens from malefactors⁴⁷⁴.

Ashworth's depiction of the position of right-of-center communitarians clearly chimes with the aims of an incapacitative penal policy such as that used in s.2(2)(b) of the *1991 Criminal Justice Act* and is a version of the crime control model of criminal justice. The left communitarian difficulty with individual rights is a paternalistic variant of social contract theory. It holds that citizens are prone to lose some rights (e.g. the right to safety) unless the state intervenes to prevent the exercise of some other rights (e.g. the right to act on choices which harm others). The communitarian argument surely is correct to assert that, in the context of the UK's version of liberalism, the state *does* have an obligation to endeavor to protect innocent citizens from malefactors. The state has an obligation to do so since individuals give up their freedom to arm and defend themselves against certain types of harm, and since citizens fund the criminal justice system through taxes.

It seems the state has conflicting obligations, both to protect the liberty of individuals and to protect the community against those same individual's harmful acts. How does the law resolve the issue of competing obligations? Can there be distinctions between different types of obligations or is one of these obligations not an obligation at all. To consider this question, it is useful to consider John Searle's discussion of *prima facie* obligations⁴⁷⁵.

Consider the following forms of relations:

- (a) *X* has an obligation to do *A*
- (b) *X* has a duty to do *A*
- (c) It would be a good thing if *X* did *A*
- (d) *X* ought, other things being equal, to do *A*

⁴⁷⁴ Ashworth (1996)

⁴⁷⁵ Searle (1978) (examples slightly modified).

(e) X ought to do A

(f) All things considered, X ought to do A

As Searle remarks, in classic conflict situations, (a) entails (d), but not (e) or (f). In fact, as he goes on to say, the assertion of (a) is consistent with the denial of (f) and the assertion of (g):

(g) All things considered, X ought not to do A

To give an example, if I am X and A is giving a lecture. Then it follows from (a) that I have an obligation to give my lecture. This entails (d) that I ought, other things being equal, to give the lecture. However, it does not entail (e) that I should give the lecture *simpliciter*, nor does it entail (f) that all things considered I ought to give the lecture. I may encounter a road accident on my way to the university and be able to offer life saving assistance to the injured which would entail (g) that, all things considered, I should not give my lecture. That is to say, my encountering the accident does not mean that I do not still have an obligation to give my lecture, I do. But I also have an obligation to help the injured accident victims, and, all things considered this is a stronger obligation than the obligation I have to give my lecture⁴⁷⁶.

If we use Searle's distinction between obligations *simpliciter* and obligations all things considered, where does this leave us in resolving the state's dual obligations to protect the liberty of citizens but to also protect the safety of citizens? In the present case there is a sense that there is a genuine obligation in both cases. So it is not convenient to say, as Ross⁴⁷⁷ does, that if you have inconsistent obligations, then at least one of them is not really an obligation, but is only a *prima facie* obligation. In the dangerousness case, the state has conflicting obligations to both the person deemed dangerous and to the public. This can be formalised as follows:

1. $Op \ \& \ Oq \ \& \ -\diamond(p\&q)$

⁴⁷⁶ Note that I cannot morally eschew my obligation to give all my lectures by seeking out people who urgently require assistance - Nor do I have an *absolute* obligation to help all people in need as e.g. a medical doctor does under the Hippocratic Oath.

⁴⁷⁷ Ross (1930)

There is an obligation to do p and an obligation to do q but it is not possible to both p and q.

But if one of the obligations is an obligation all things considered (O*) it follows that:

$$2. (O^*p \ \& \ Oq \ \& \ - \ \diamond (p \ \& \ q)) \supset (O^*p \ \& \ -O^*q)$$

An obligation all things considered over-rules any obligation with which it is in conflict.

But importantly, it is *not* valid to say that:

$$3. -O^*q \supset -Oq$$

Just because there is not an obligation to do q (all things considered) this doesn't mean that there is not an obligation to do q (at all).

Searle's formulation is useful because it allows that there can be inconsistent obligations without denying that both obligations exist. Nevertheless, we still have an empirical problem: in the dangerousness case, since the obligations are prima facie incompatible, one (and at most one) of the obligations must be an O*, *i.e.* an obligation all things considered rather than an obligation *simpliciter*. It is a constitutional and political judgement that determines which obligation is the O*, and this question brings us back to rationality and rights, quarantine and incarceration.

So, under the *1991 Criminal Justice Act* once a person has been found guilty it is not necessary to take account of his or her rationality before considering punishment. The rationality is assumed for all offenders not explicitly dealt with under provisions set aside for the mentally disordered. Those offenders who have been convicted of a violent or sexual offence and are assumed rational may be subject to a judgement of dangerousness if it is thought that there is some risk that they will commit a *serious* violent or sexual offence in future. The offender is receiving an extra dose of punishment (*i.e.* a longer term of imprisonment) on the basis of something that he or she *might* do but has not yet done. Whether or not the offender is morally liable to this sentence is a question that relates to his or her rationality.

There is obviously a questions of rights here, which brings us back to the question of the state's conflicting obligations. In this specific case, the conflict is between the right to liberty of individuals who have committed a violent or sexual offence, and the right of each member of the public not to be the victim of a *serious* violent or sexual offence. Given that both of the state's obligations are genuine and cannot be abrogated, one of them must be an 'obligation all things considered' rather than an obligation *simpliciter*. Let us take the obligation of the state to protect the rights of citizens from serious violent or sexual offences. The first point to be noted is that the state can never guarantee to protect its citizens from harm, in particular it cannot guarantee to protect its citizens from harm caused by other citizens. If the state were to do this, the protective elements that would be involved would probably be more than most of us are prepared to tolerate. Such measures might include CCTV in the home, curfews for all, a ban on alcohol consumption. This would clearly be an incursion into a broader set of liberties that do indeed offer the potential for harm, and occasionally the risk of serious harm. But to guarantee every citizen's freedom not to be a victim of crime entails taking away freedom in just about all other areas of life and replacing them with a 'big brother' state.

The government does have an obligation to protect the public from victimisation, but only up to a point, it is *not* an obligation *all things considered*. Practical as well as principled argument makes that clear. It would obviously be unimaginably expensive to attempt to prevent all serious violent and sexual crime and impossible to achieve in practice. Treating this obligation as a prioritising obligation *all things considered* would inhibit human freedoms in many ways. It would curtail the freedom to engage in all acts that the state sees as being (objectively) irrational and harmful. The paradigm example of such behaviour is consensual sado-masochism. Indeed the protection of individuals against harms defined as being against their best interests could also be taken to mean protection against all threats to the political structures and the *status quo* thus inhibiting political challenge and social change.

The state has an obligation *simpliciter* to protect citizens from victimisation, but that obligation does not persist in the face of other considerations such as the right to privacy and freedom to act in consensual if objectively harmful ways. In short, citizens have a right to protection from victimisation but do not have a right to be protected from all and

every harm. We would not want it that way and it would be an infringement of our liberty for the state to force this 'freedom' upon its citizens.

But perhaps the government's obligation to protect the liberty of the 'dangerous' offender is also an obligation *simpliciter*. Are there conditions under which the government does not have an obligation to ensure this right? Under the political structure within which rights are constituted, the right to liberty is a consequence of human beings exercising rational choice. This includes a right to choose to commit (or not) a serious violent or sexual offence. Since these offenders have been deemed rational (or at least not been diagnosed as non-rational or grossly irrational), to take away the individual's right to act (or not) on a rational choice is to take away what Aristotle and others consider the foundation of humanity. Imprisoning a person because they might commit a serious violent or sexual offence (even though they have not yet done so) is to seriously undermine their status as a rational human being.

The state cannot argue that being dangerous is similar to having an infectious disease which requires quarantine. In the quarantine case, which is reserved for only the most serious and contagious of diseases, the diagnosis is relatively easy (although it is always possible to have false positives). The probability of the transmission of the disease is easier to determine, and there is no way to prevent the infection from being transmitted other than quarantine. These practical features contrast markedly with the offender who is held to be dangerous and is subjected to a longer than normal term of imprisonment as a result. The person has not (yet) committed a dangerous act so it is very hard to make the 'diagnosis'; estimates of the likelihood of a particular individual committing a serious offence are generally accepted to be very unreliable (or make a prediction that there is a very low probability of such future offending). There are also other less intrusive ways to protect the community from potentially dangerous offenders (enhanced support on release from prison, tagging *etc.*).

For those deemed 'dangerous' to be imprisoned for longer than they deserve is a breach of the obligations of the state to protect the liberty of its citizens *all things considered*. The state's obligation to protect citizens from harm is an important obligation but it is an obligation *simpliciter* and can be revoked by other obligations that hold when all things are considered. Rational offenders inflicted with extra punishment are deprived of the

opportunity to exercise rationality and hence are being denied their right to act as human beings. If an offender goes on to commit dangerous acts, the state has an obligation to protect the public from him or her, but until the act is committed, the offender has the same right to liberty as other rational members of the community.

4.7 Science, mental health and rationality

Zimring and Hawkins note the late 20th century disillusionment with the rehabilitative ethic, and the longstanding doubt concerning the efficacy of rehabilitation in prisons. They point to the growth of a consensus of opinion, particularly in the USA but also in Britain that justifies the use of prisons to incapacitate large numbers of offenders⁴⁷⁸. However, they have rightly pointed out that ‘incapacitation’ means different things to different groups. There are widely different conceptions of how many and for what reasons offenders should be incapacitated. Zimring and Hawkins suggest that the argument in favour of imprisoning only a few seriously dangerous offenders to ensure public protection, known as selective incapacitation, is subject to considerable problems. These problems chiefly concern the difficulty in discrimination of the dangerous, and the differential disposal of offenders who commit similar offences: the latter being a complaint that was also levelled at the discredited rehabilitative ethic.

Zimring and Hawkins argue that, as a result of problems in predicting and discriminating the dangerous, the momentum of incapacitation has turned away from selective incapacitation and towards incapacitating generally. This is justified on the grounds of both control of less serious and property crime and the protection of the public from serious violent crime. Although the use of incapacitation does not rule out the attempt to employ a rehabilitative regime in the course of imprisonment or other containing punishment, incapacitation becomes the dominant justification for a certain type of punishment. What is striking is the similarity of the aims that have persisted during the shift from a rehabilitative justification for imprisonment to an incapacitative justification of imprisonment. In both systems the aim is straightforward crime control and although the supporters of these different regimes may argue that there are benefits for the

⁴⁷⁸ Zimring and Hawkins (1995)

offender in their preferred penal regime such benefits are welcome additional but not necessary consequences of the regimes.

At the level of individuals, incapacitation is a less ambitious project than rehabilitation and hence more easily achieved. Obviously, it is possible to guarantee the incapacitation of an offender so long as that person is held securely in custody, but it is impossible to guarantee his or her rehabilitation. Someone locked in a prison is prevented from committing crimes in the public domain although he or she is not, of course, prevented from committing crimes against fellow prisoners or prison staff. Advocates of a policy of general incapacitation argue that it provides for a maximum level of safety for society - avoidance of what Thomas calls 'manifest disaster criteria' which would demonstrate the failure of the penal system to perform its task, that task being the 'removal of recalcitrant members of society'⁴⁷⁹.

Psychiatric intervention also operates by removing the mentally ill members of society, sometimes through physical means such as compulsory hospitalisation but also through drug therapies and intensive supervision. Incapacitation has a long history in both psychiatry and penalty. Traditionally it has been justified in both domains as being the therapeutic removal of an individual from an environment likely to make him or her deviant through illness or illegality. In this form incapacitation (at least in its rhetoric) was directed to benefiting the offender-patient and was pursued as a treatment. But as we saw in chapters one and two, a change occurred in the late 20th century with respect to the incapacitation of both criminals and the mentally ill. The justification was no longer that the incapacitation was imposed and structured in the best interest of the patient. Rather, incapacitation was justified as providing protection for the public from the deviant and criminal behaviour of the offender or patient. As was noted in chapter three, incapacitation is still seen as a treatment and a therapeutic intervention but the regimen is aimed at caring for the general public. It provides a solely second order benefit. The medical model is one of quarantine and prophylactic intervention rather than remedial or palliative care.

⁴⁷⁹ Thomas (1972) Cited in Zimring and Hawkins (1995) p 25-26

We saw in chapter three that there are constraints on the power of the Liberal state to revoke the freedom of citizens. In the case of longer than normal imprisonment, it is clear enough that the justification for this action is the protection of the public from the harmful activities of the offenders who are incapacitated. The state that uses such measures is acting in a paternalistic and utilitarian way - both familiar though not necessarily *liberal* features of the modern state. The aim of this measure is to protect the majority of the citizens, from the activities of those who are felt to pose some serious risk to them. The willingness of the state to take upon itself this duty is interesting given changes in the role of the state in 'late' or 'advanced' modern societies⁴⁸⁰. The state no longer guarantees to provide security and protection for its citizens. Yet in introducing longer than normal sentences for those felt to pose a risk, the state is returning to a paternalistic and utilitarian role that is neither liberal nor consistent with other characteristics of governance in late modern societies.

The policy of incapacitation, *i.e.* the practice of making it physically impossible for a person to commit harm, takes different, though related, forms for the mentally ill and for those found guilty of crime. The justifications for the incapacitation of both categories of dangerous person are also different, as a result of consideration of the criteria of rationality and the conceptual role which rationality plays in both legal and medical discourse. As a result different policy and legislation has been implemented to deal with both groups, in an attempt to reflect differences in rationality and hence culpability. However, as we saw in chapter one, the distinction between incarcerating the mentally ill 'offender' in prison⁴⁸¹ and the criminally insane 'patient' in a special hospital seems to be blurring. This blurs the distinction between categories of 'rational and 'non-rational' offenders. As we saw in chapter two, support for the development and implementation of policies of social defence arise out of a pragmatic concern to prevent crime, and incapacitation in whatever form is an important element of this. In this climate of opinion, politicians, the media and the public care little about the justification under which incapacitated people are held, concern is directed only at maintaining the security of the public. Social defence policy uses incapacitation as a default mechanism for those whom the state wishes to proactively incapacitate. As Rose notes:

⁴⁸⁰ See Rose (1999) and chapter 5 below.

...despite their apparent complexity and heterogeneity, contemporary control strategies do show a certain strategic coherence. They can be broadly divided into two families: those that seek to regulate conduct by enmeshing individuals within circuits of inclusion and those that seek to act upon pathologies through managing a different set of circuits, circuits of exclusion.⁴⁸²

We saw in chapter one that there have been many attempts to place the dangerous in 'circuits of exclusion' in the past 100 years. In the following section an attempt will be made to set out the organising assumptions of the social framework for criminal justice and mental health practices and to interpret the political, cultural, and psychiatric conditions which transformed these assumptions into the ruling ones of their particular time. The analysis focuses upon the changing practices and arguments concerning the incapacitation of dangerous offenders, since various patterns of incapacitation including imprisonment, execution and involuntary hospitalisation have provided the most sensitive measure of which offenders fit the prevailing definition of dangerousness.

4.8 Morale hazard and social defence

Despite the lack of overt interest in rehabilitation, the penal and psychiatric establishments cannot give up on 'treatment' ideology because to do so would be to undermine and devalue the dominant scientific discourse. In fact, by adopting a social defence system which applies a purely incapacitative methodology to the management of the dangerous, science is at risk of diminishing its role in crime reduction and control. However, as we saw in chapter two this is avoided by the scientific enterprise shifting away from diagnosing the best form of treatment for individual offenders and towards diagnosing the best form of protection (quarantine) for the public though the use of actuarial and probabilistic methods.

Incapacitation through imprisonment is justified as providing protection of the public from those offenders sentenced to long terms of imprisonment, and also as a crime-reducing measure for those undergoing short periods of imprisonment. But where incapacitation is used without a commensurate programme of rehabilitation or deterrence

⁴⁸¹ Although prison may be situated in 'the community', see chapter one.

we are in danger of promoting a situation that insurance analysts term 'morale hazard'⁴⁸³. Morale hazard occurs when the incentives of a policy holder shift in a particular way following the purchase of insurance such that the policy holder is at more risk of suffering loss following the taking out of insurance than he or she was prior to purchasing the insurance policy. Morale hazard is not to be confused with moral hazard which is the tendency of a person to commit fraud having secured insurance cover. Morale hazard involves no deliberate intention to claim the insurance but describes an increased relaxation of the safeguards that prevent losses and subsequent claims.

In the case of dangerous offenders, the state is at risk of morale hazard if it relies exclusively on incapacitation for crime control. The rhetoric calls for the incapacitation of the 'core offenders' who commit most crime and offers the simple claim that if these people are prevented from re-offending crime rates will fall. The motivation of the state to use other methods to reduce crime is diminished because the theory claims that it can both reduce crime and protect the public through incapacitation (and incidentally that nothing else works). Political and fiscal responsibilities such as the improvement of inadequate housing and poor educational opportunities can be ignored and their criminogenic influences discounted. Those who desire to obtain additional 'insurance' and have the means to do so will also rely upon privately managed situational crime control measures to supplement the publicly sponsored (although in part privately operated) incapacitation of known offenders.

If morale hazard occurs in the penal system as a result of an over reliance on incapacitation to reduce crime, advocates of incapacitation are forced to ignore uncontroversial data of offending behaviour⁴⁸⁴ which suggest that incapacitation following conviction will never be sufficient to reduce crime to acceptable levels, particularly in environments where there is no situational crime control. The rhetoric of incapacitation satisfies many of the political and organisational demands of the criminal justice system, especially the calls for public protection by advocates of the victims of crime. Incapacitation may even, as Durkheim's theory of punishment suggests, lead to an

⁴⁸² Rose (2000) p 187

⁴⁸³ See Heimer (1985)

⁴⁸⁴ *E.g.* Data which suggest that many offenders are not caught and will never be subject to an incapacitative disposal.

increase in social cohesion through the act of punishment. As crime control however, the evidence provided by comparative rates of imprisonment shows that incapacitation at levels much higher than are currently used in the UK will not have substantial effects on the rates of criminal activity and the harms caused by dangerous offenders. The dilemma of incapacitation may be that as a result of morale hazard, it leads to more crime rather than less.

4.9 Conclusion

This argument of this chapter has been that, despite a failure of criminological science to provide a 'solution' to the problem of the offending in general and the 'dangerous' offender in particular, scientific discourse is a fundamental element of the decision process with respect to violent and sexual offenders and the imposition of longer than normal punishment. Scientific language and methodology provide an important source of authority for decision making which would otherwise appear to be based on non-rational and emotional responses. A society which takes social defence as its implicit approach to crime control may appear to be vulnerable to the demands of its citizens for a response to particular incidents and fears. The use of high status medical and actuarial calculations avoids the problem of the state appearing to impose punishment on non rational grounds. As Rose notes, these scientific techniques need only to be gestured at for their force to be felt:

The languages of description and techniques of calculation that are pervading the work of control professions may be probabilistic, but they are seldom actuarial, and are often only weakly numericised. For the control professionals, it is probably better to understand what is happening in terms of the emergence and routinisation of a particular style of thought: risk thinking. This is concerned with bringing possible future undesired events into calculations in the present, making their avoidance the central object of decision-making processes, and administering individuals, institutions, expertise and resources in the service of that ambition⁴⁸⁵.

⁴⁸⁵ Rose (2000) p 197-8

Science provides authority for the use of predictive judgements even when these are being formulated not by scientists but by sentencers. The apparent confusion that exists over the distribution of the care and punishment that of mentally disordered offenders and patients causes little concern in an environment of social defence which will tolerate rehabilitation and/or incapacitation, delivered in the community, hospitals or prisons, as long as such measures work effectively to protect the public.

Although it is recognised that no human is perfectly rational, the ability to connect desires and action is an important constituent of humanity. Thus, for the most part it is assumed that people act in particular ways because they have made a rational decision to do so. The criminal justice system reflects this outlook as it is a requirement of criminal liability that an offender is responsible for the prohibited act that he or she has committed. If a rational criminal is convicted of a crime and receives a proportionate punishment, there is no threat to the status of the offender as a rational actor. The state has an obligation to protect its citizens from dangers, but it cannot act on the basis of a prediction as to what a rational offender will do as this removes from the offender the opportunity to choose to confound the prediction. This argument demonstrates that it is potentially a threat to the human status of a rational individual if that person receives a longer than normal sentence of imprisonment on the basis that he or she may commit a more serious act in the future.

This position is different for a non rational offender. In this situation, medicine provides a model for the incapacitation of the 'dangerous' offender through the concept of coercive quarantine. The medical use of quarantine is only used in extreme situations, not when there is merely a high probability of the transmission of disease to others but when the harm to others is unavoidable. Quarantine is invoked when the transmission of disease would occur regardless of the actions or choices of the individuals who has been placed under quarantine. Such a situation is uncommon in the criminal justice framework. If a person was unable to prevent him or herself from committing a prohibited violent or sexual act, then it is difficult to see how this person could be seen as responsible for his or her actions. If the harm posed by an offender is truly unavoidable then that person is not amenable to the deterrent or rehabilitative measures applied by the criminal justice system. No argument would persuade this offender that ceasing offending is in his or her best interests as whether or not the person agreed, the harm

which he or she is going to cause will occur. In such cases it is difficult to describe this offender as rational. If the offender is unable to exercise choices, or to act on the choice he or she makes, then that person should not be considered rational and should not be liable to a criminal justice disposal. In this case, then, a form of civil quarantine, such as a hospital order under mental health legislation may be appropriate and will be justified. For the non-rational 'offender', this disposal does not interfere with their essential humanity, because they are being responded to in a way which recognizes some difference or pathology.

The non rational potentially violent person shares some of the characteristics with the disease carrying person. Both are unable to take measures to prevent the harm that they may pose to others. In both cases, only quarantine is sufficient to prevent the commission of future harm to others. Yet the theoretical justification for incapacitating the 'dangerous' person is more compelling as the 'quarantine' measure of incapacitation provides a first order benefit to the individual whose harmful behaviour is thwarted. The first order benefit is the absence of future liberty reducing punishment which may have occurred if the act had been committed. For the disease carrying patient, quarantine poses only the flimsiest of first order benefits, and quarantine primarily results in second order benefits.

However, despite the fact that the political justification favours the use of 'quarantine' for the 'dangerous' person, the evidential difficulties rule this out. It is impossible to know which offender poses a threat such that only incapacitation will suffice to prevent future serious violent acts. There is no equivalent of the 'disease' for which no other measure short of quarantine is suitable. In the case of 'dangerous' rational persons, the criminal justice system includes within its remit a range of inchoate offences, including criminal attempts where it is not necessary for a harmful act to have been committed⁴⁸⁶. As well, serious violent or sexual offences will attract long determinate sentences of imprisonment which will effectively incapacitate the perpetrators of such offences. So, not only is there a huge evidential problem in the identification of the 'dangerous' person but there are alternative ways in which the 'dangerous' offender can be incapacitated.

⁴⁸⁶ Padfield (2002) chapter seven

There is therefore no justification for the use of 'quarantine' or 'civil detention' type measures for rational offenders who have not yet committed a dangerous act.

The use of incapacitation, whether it is general or selective and wherever it occurs is aimed at crime reduction. Keeping a large number of citizens in prison or hospital is expensive and diverts resources from other state funded amenities. A policy of using secure accommodation to incapacitate 'dangerous' offenders can only be contemplated if it has some positive benefits for the society in which it is employed. However, such a policy runs the risk of creating a society that suffers from 'morale hazard'. Government and citizens place their faith in the use of the prison to solve the problem of crime and relax their guard feeling that no other measures are as successful or necessary. If rates of imprisonment fail to reduce crime then more and more prisons are required to be built. This may result in less effort and money is used to combat crime in other ways, *e.g.* by looking at the social and economic conditions which the proponents of the (largely untried) sociological positivist theories claimed gives rise to high crime rate communities. Therefore, prioritizing the use of incapacitation to the detriment of other crime reductive measures runs the risk that levels of crime will rise as a result.

CHAPTER FIVE

JUSTIFICATIONS AND LIMITATIONS OF INCAPACITATIVE SENTENCES

The longer than normal sentence of imprisonment as permitted by s.(2)(2)(b) of the *1991 Criminal Justice Act* is an extraordinarily powerful instrument. The Act gives sentencers the power to incapacitate an offender by the use of disproportionate punishment imposed for crimes which he or she has not yet committed. This thesis gives an account of the way in which one legal jurisdiction in a modern liberal state developed legislation which permits the punishment of an individual citizen more severely than is deserved, on the basis of a prediction about future behaviour, even though there may be no evidence that the citizen has acted in the predicted way before. The thesis argues that the apparent justifications for the use of such a measure are inadequate and puts forward arguments to show that the measure is illiberal and incompatible with the moral and political foundations of the state.

No liberal state ought to contemplate a measure such as s.2(2)(b), as it severely impinges on the liberty of citizens, citizens who have not committed the act for which the punishment is imposed. Punishing someone for something they have not yet done will inevitably mean that some offenders are punished for crimes which they would not have committed had they remained at large. Yet this law, which is still in force in England and Wales, received very little media interest at the time it was introduced and continues to fail to attract attention outside of the academic literature. Part of the explanation for this is that, although it is *prima facie* illiberal, such sentencing is also *prima facie* utilitarian. Incapacitation via imprisonment, like the incapacitation of quarantine, is invoked for public policy reasons, the understandable desire to prevent the public from being subjected to the activities of those who may cause them harm. But it is not enough to assert that such a measure is utilitarian, a policy of undeserved incapacitative punishment must be supported by a considered moral and political justification if it is to be acceptable in a modern liberal society.

The thesis considered the historical, political and sociological foundations of the imposition of incapacitative undeserved punishment and some elements of similar

controversies in mental health. The 1991 Act can only be understood in the context of changes in the British society throughout the 20th century, but particularly in the post war period. This time span has seen remarkable changes, not the least of which has been a phenomenal rise in the level of recorded crime. The rise in crime was accompanied by:

- the introduction of a variety of new punishment styles;
- an increase in the level of imprisonment;
- the rise and decline of the rehabilitative justification for imprisonment;
- a related loss of faith in medicine's ability to treat certain types of mental illness;
- changes in the economic and structural constitution of government organisations including privatisation in the prison sector and the development of agencies removed from their central government funding departments;
- a change in the relationship between the judiciary, the executive and the legislature;
- the development of academic research in criminology and its gradual, intermittent influence on criminal justice and penal policy.

All of these changes in economic, cultural, intellectual and political attitudes meant that the discourse surrounding the crime and punishment changed considerably over the century. Particularly in the last two decades of the 20th century, new modes of thought and analysis were invoked to try and control crime and manage offenders. In the febrile environment of punitive political rhetoric and media interest in crime at this time, it was perhaps not surprising that an illiberal measure which was novel and qualitatively different, yet which could offer a guarantee that it would protect the public to some extent, could be introduced without controversy and criticism.

We saw in chapter one that the state must articulate and justify the imposition of punishment if punishment is to be imposed legitimately. Longstanding jurisprudential principles state that punishment must be deserved and result from the commission of a proscribed act. These principles derive from sources as ancient as the magna carta and

are an important safeguard against the improper use of power by the state. Without the existence of constraining principles the state would have unlimited power to exercise coercive control over citizens. Despite the presence of the ancient principles of criminal law, there are common and unremarkable exceptions to these principles and to the principles of sentencing. The use of longer than normal imprisonment on 'innocent' offenders provides an exception to the general criteria for the imposition of punishment. S.2(2)(b) provides a specific variation from the principle of proportionality that is the foundation of the 1991 Act, and the principle of parsimony in the use of imprisonment, which has long been a recurrent goal of English penal law. The 1991 Act brings into English law the opportunity for sentencers to pass penal measures on the assumption that the offender will, in future, commit crimes more serious than the one that is currently before the court and more serious than he or she has committed, to date. This unique power highlights the significance of the new penal paradigm brought in by the *1991 Criminal Justice Act* which includes pre-emptive incapacitation as a general aim of punishment.

The 20th century saw many attempts to control those whom it was felt were particularly threatening to individuals or to the stability of British society. Starting with the *1908 Prevention of Crime Act*, English legislation has attempted to use the prison as a site of incapacitation of the 'dangerous'. The 1908 Act enabled a sentencer to add a period of between 5 and 10 years to the sentence of penal servitude if an offender was found to be a 'habitual offender'. The incapacitation of habitual offenders attracted criticism that it was falling on inappropriate offenders who did not require such stringent measures. Thus preventive detention provisions in the *1948 Criminal Justice Act* were aimed at serious offenders rather than habitual offenders who appeared to be impervious to reform. Although these measures were designed to prevent offending by incapacitating the offender, the sentences were imposed as a consequence of the offender's dangerousness as judged by the current offence and criminal record. None of these incapacitative provisions was ever heavily used and they were criticised for promoting extreme disparities in sentences.

Incapacitation is not only used in the standard criminal justice context. It has been considered as particularly advantageous in the prevention of the harm that may be posed by 'dangerous' mentally disordered people under mental health legislation. But there is a

tension between the criminal justice and medical provisions for the mentally disordered, convicted and unconvicted offenders. Recent policy papers suggest that the government may be considering the reintroduction of indeterminate sentences which could be served either in prisons or in medical establishments. As the prison has traditionally not been considered an appropriate location for the delivery of mental health treatment, this policy development will require that the concept of care delivered in 'the community' be extended to include the prison. The concept of a prison sentence partially served 'in the community' also suggests that there is a deliberate blurring of the distinction between the prison, other penal measures and health care. The blurring of the distinction between the prison and the community and between imprisonment and other penalties distracts attention from the fundamentally different nature of imprisonment and the qualitatively different experience of being punished in this way. As a result, the sentence of imprisonment is not seen as being particularly special; it is just the endpoint of a spectrum of penal measures all of which remove liberty. But this ignores the social, psychological and cultural significance of the sentence of imprisonment.

In chapter two it was observed that the preventive detention elements of the *Criminal Justice Act* 1991 reflect a frustration with crime reduction policies and a retreat to the most secure crime reduction technique - incapacitation. Governments have tacitly admitted that they cannot completely control crime. Yet they are faced with a legitimacy crisis as crime is one of the few visible domains of public welfare over which they still claim total and exclusive responsibility⁴⁸⁷. In the absence of war, government obligations to the people such as defence, diplomacy and development seem distant to most people. Economic sovereignty has been reduced, as has the state's influence over agricultural, environmental and trade policy through participation in the European Union and through the machinations of the world economy. Even health care has become less of a state monopoly with the growth of private hospitals and insurance provision. Just as social contract theorists see the maintenance of order and stability as the overriding goal of the state, the criminal justice system remains a central area of concern for government and an area in which they must demonstrate their authority and influence.

⁴⁸⁷ Although forms of private policing exist, the state has exclusive responsibility for punishment. If it did not, then vigilantism would be more prevalent and possibly bring about a spiral of retaliation.

A decline in the belief in positivist criminological 'knowledge' to reduce crime rates generally and to provide a method for preventing the occurrence of serious crimes led to the perspective known as 'new penology'. New penology takes a hyper-rational view of crime prevention and adopts a prudential approach to the allocation of resources. However, when it was introduced into public policy, the new penology lacked media and judicial support. This fact, together with the co-incidence of that highest profile crime of the past 30 years occurred, brought about a revised form of the new penology with an added element of punitiveness and a reduction in concerns about the efficient use of resources. The model of social defence best describes English criminal justice in the late 20th century and there is evidence of social defence thinking in the *1991 Criminal Justice Act*.

Social defence is a pragmatic position that uses rehabilitation, reintegration, deterrence and incapacitation in the penal and medical sector in order to prevent crime. Social defence policy reserves imprisonment for those who either commit serious offences or cannot be deterred or rehabilitated and thus supports the bifurcated approach to punishment that is provided by the sentencing provisions of the 1991 Act. As well, the longer than normal sentencing provision of s.2(2)(b) of the 1991 Act satisfies advocates of punitive new penology. However, any policy of social defence welcomes pre-emptive incapacitation to ensure that if all other measures fail, the state can prevent those whom it fears will harm others from doing so. For all the frameworks discussed, incapacitation is the default position, when all else seems unlikely to prevent the commission of serious offences.

The 1991 Act takes incapacitation to a different level than the Acts which preceded it by introducing powers that enable sentencers to use the prison for the incapacitation of those offenders who are considered 'dangerous' even though they have not yet committed dangerous act. By taking action against potential rather than actual threats, the state is, in a sense, only doing that which it is requiring its citizens to do. O'Malley⁴⁸⁸ and Garland⁴⁸⁹ have noted that as the state limits the promises it makes to its citizens, particularly with respect to crime control, citizens are required to take on themselves the responsibility for their own protection. Incapacitating people known to be at risk is the

⁴⁸⁸ O'Malley (2000)

state's version of this responsabilisation strategy. It is prudent to take action against a risk once that risk is identified, particularly if the expertise is available to enable any risk to be noted and calculated. Not to take action against a known risk is careless, even negligent, and gives rise to blame. Although the state in most cases is not the direct victim, the politics of criminal justice are tautly strung and any failure of the system is resonates loudly in the media and in party political rhetoric. The combination of the state's responsabilisation strategy applied to itself and the availability and confidence in technologies of risk assessment and actuarial calculation mean that the state is compelled to act to incapacitate those it identifies as posing a threat.

With the backdrop of a seemingly limitless increase in serious and violent crime, the state will still respond to the commission of crime, *i.e.* record, investigate, detect and apprehend the offender, arrange the trial and administer punishment, but the citizen is primarily responsible for his or her personal security and the organisation of and payment for private crime prevention measures. This self-reliance which is expected of citizens in the sphere of crime prevention is noted by O'Malley⁴⁹⁰ and Ewald⁴⁹¹ as being part of a growing culture of prudence brought about by reduction in the promises made by the state with respect to provision of welfare, health care, pensions *etc.* and an increasing expectation that those who can afford to will make provision for themselves. Indeed for both practical reasons, *i.e.* dissatisfaction with the level of provision, and political reasons *i.e.* an expectation that taxation resources should be targeted at the needy rather than the rich, a culture of prudence ensured that those who could were told that they *should* ensure their own well-being in the face of the diminishing role of the state⁴⁹². The increased expectation that citizens are responsible for their own safety and security gives rise to a heightened sense of the risk of crimes as routines of crime prevention become familiar. This expense and behavioural changes this brings about increases public antipathy to offending behaviour and increases levels of popular punitiveness.

The history of similar disproportionate detention provisions reminds us that, although s. (2)(2)(b) of the 1991 Act is distinctive in its symbolic and cultural force from the Acts

⁴⁸⁹ Garland (1996)

⁴⁹⁰ O'Malley (2000)

⁴⁹¹ Ewald (1991)

that preceded it, in practice the provision is doing very little that is new. As a result it could be expected that, like its predecessors, it will fail to satisfy public and political demands for enhanced protection from serious offenders. However, the 1991 Act came into being a time when levels of crime and levels of punitiveness were high. Media attention makes crime seem prevalent and very personal. So unlike the Acts that preceded it, the 1991 Act is not likely to fall out of use because it is punishing petty offenders too harshly. The penal climate of the 1980-90s was such that since this time there is no such thing as a petty offence or a nuisance offender. In such a climate, increased punitiveness combines with a call for increased protection from offenders, and a policy of longer than normal imprisonment receives public and political support.

The 1991 Act invoked a bifurcated sentencing policy endorsing financial and community punishments for the majority of offenders and reserving sentences of imprisonment for cases where it was justified by the seriousness of the offence or the dangerousness of the offender. The 1991 Act placed enormous significance on the concept of proportionality, which had the potential to reduce sentencers' use of imprisonment, as indeed it did temporarily following the introduction of the Act. However as the penal policy underlying the 1991 Act could be perceived as promoting less severe sentences, the policies had to be augmented by an increase in punitive rhetoric. Windlesham noted 'If the belief, that had obtained such a hold on the British mind, that imprisonment was the only real punishment for criminal offences and anything else was a soft option was to be loosened, arguments with the power of dynamite were called for.'⁴⁹³ The government had to provide evidence and reassurance that it was fulfilling its duty of protecting the public and enabling longer than normal sentences for 'dangerous' offenders was a way of providing such evidence.

In chapter three it was argued that the liberal state must justify any curtailment of citizens' liberty on the basis that the state's action will either increase the overall liberty of the individual involved or increase the liberty of other individuals. Liberalism requires that utilitarian judgements be constrained, to protect those citizens whose interests and desires are different from those of the majority. Nevertheless, the modern state takes as

⁴⁹² This is apparent through state support for private crime prevention organisations such as Neighbourhood Watch

⁴⁹³ Windlesham (1993a) p253

its legitimate responsibility the protection of citizens and justifies its formal monopoly over crime control and punishment as being constitutive of this responsibility. The state's responsibilities to its citizens are to help citizens attain their own version of the good life in so far as this does not interfere with others' efforts to achieve their own, different version of the good life. But liberal states can do this in a number of ways, by withdrawing from citizens' lives as far as possible, or by intervening to facilitate, through the provision of a level of minimum services, to provide citizens with the ability to determine their version of the good life. Following Isaiah Berlin, the former is called 'negative' liberty, the latter 'positive' liberty.

The UK is an example of a state that provides positive liberty in the form of welfare, healthcare and education for citizens. However, the provision of benefits necessarily involves the state intervening in the lives of citizens. Where this intervention acts upon an individual and provides a benefit for that individual, a first-order benefit results. Where the state intervention acts upon an individual but the benefits are produced for one or more *other* people, a solely second order benefit is the result. State intervention which aims to prevent offending produces first and second order benefits, intervention which aims to prevent re-offending tend to produce second order benefits. The main argument of this section is that longer than normal punishment of the 'innocent' exemplified by s.2(2)(b) of the *1991 Criminal Justice Act* gives rise to a solely second order benefit. As s.2(2)(b) is a unique provision based on predictive judgements which are difficult to measure or verify, and is applied to offenders on a discretionary basis, the use of s.2(2)(b) redistributes the benefits of state intervention in an unequal way. The offender who is subject to a longer than normal sentence is not treated in the same way as other citizens or even other offenders. The provision is therefore illiberal and its use cannot be justified in a liberal state.

Chapter four looked at the role of science in criminological and criminal justice discourse and practice. As was noted in chapter two, positivist criminological theory was the predominant explanatory paradigm for most of the 20th century. From the mid 1970s however, this paradigm became discredited although both criminologists and policy makers continue to rely on scientific methodology in the pursuit of harm prevention

strategies. Scientific concepts, like their legal counterparts, are social constructions and can be exploited for political or cultural reasons. The use of the notion of 'risk' in the criminal justice context offers a spurious scientific credibility to the determination of 'dangerousness', a term so vague as to be meaningless. It is also, for the most part an unnecessary term, as, under the 1991 Act serious violent or sexual offending will naturally attract a proportionate, long (and hence incapacitative) sentence of imprisonment.

Norbert Elias' theory of the civilising process explains why there is an element of emotional, non-rational response to criminality. But the modern state cannot punish or incapacitate offenders on the basis of the emotional response that their offending arouses. Sacred scientific concepts are thus utilised in the determination of 'the dangerous' notwithstanding the demise of belief in positivist criminological theories. However, although social changes explain the development of policy of social defence, this policy does not justify the use of disproportionate, predictive, incapacitative sentences of imprisonment, for 'dangerous' offenders. This measure gives rise to solely second order benefits and, as was argued in chapter three, is thereby ruled out as being inappropriate for a liberal state.

It has been argued⁴⁹⁴ that the 1991 Act contains within it a vision of the individual offender as not 'morally' guilty. Rather the Act conceives of offenders as more or less 'dangerous' as a result of the use of aggregate notions of risk and insurance. This may be partially true, however in a period of heightened concern over levels of crime, distinctions between more and less dangerous offenders become redundant. All offenders are considered to be straightforwardly dangerous and liable to severe sentences. There have been several approaches taken to try and identify those offenders who are felt to pose a threat to the public. These attempts fit within a policy of social defence which seeks to protect the public from the harm of criminal activity in any way that is believed to be effective, regardless of ideology. The characteristics of those whom it is thought necessary or beneficial to identify as 'the dangerous' vary, as we have seen, but the requirement to identify and symbolically separate the group of people to be controlled

⁴⁹⁴ Robinson (1996) p125

from the general community, endures. And the discourses of risk, danger and insurance do not replace the older emotional and non rational response to offending and to offenders, as is shown by the tone of crime reporting in many English newspapers.

Yet this division of people into those who are and who are not worthy of inclusion within a society which offers respect, rights and the status of citizens is, in modern liberal political theory, problematic. Liberal political systems start from the fundamental premise that all humans are equal. In other words all people share equal rights and status. This premise underpins the freedoms that all citizens of the liberal state are held to enjoy - at least in principle. It has been argued that when the individual cannot participate in the liberal political processes as a result of a lack of rationality, some civil incapacitative disposals may be justified and appropriate. However, the development of longer than normal sentences and other forms of pre-emptive incapacitation withdraws the rights of rational citizens to presumptions of innocence which apply to all other citizens and all other offenders. Those subjected to such provisions find their status as rational human beings revoked despite not having done anything that would normally require the repeal of rights and citizenship.

Scientific conceptions of the 'dangerous' exist in the medical context as well as the criminal justice sphere where the equivalent concept to incapacitation is quarantine. Quarantine is imposed upon a disease sufferer when nothing that that person could do short of submitting to quarantine will prevent the transmission of the harmful disease. The equivalent case in the criminal justice sphere is a 'dangerous' offender whose actions are so uncontrollable, that nothing the offender (or anyone else) can do, short of submitting to an incapacitative disposal, will nullify the threat that this offender poses. The offender who fits this profile is non-rational as his or her behaviour is not amenable to any influence, and the offender is not responsible for his or her harmful actions. As a result of the offender's lack of responsibility, culpability, and liability for an offence, a criminal justice sentence is not appropriate. However, if evidential factors point to an imminent act with a high probability of serious harm, then such a person may be liable to an incapacitative civil measure in order to prevent the commission of harm to others. Unfortunately for advocates of pre-emptive incapacitation such as s.2(2)(b) of the *1991 Criminal Justice Act*, the evidential difficulties are too great to justify such a measure and are sufficient to exclude the use of longer than normal imprisonment.

For the rational offender, pre-emptive incapacitation does not correspond with the medical concept of quarantine and any coercive act which relies on a prediction or judgement of a person's future behaviour, assumes that the person subjected to such measures will not use his or her rational capacity to make choices whether or not to commit prohibited acts. Predicting the behaviour of rational citizens and co-ercively intervening in their lives is a non-liberal act which threatens citizens' essential humanity by depriving them of the opportunity to exercise rational choices. On this basis s.2(2)(b) of the 1991 Act is ruled out as invasive and illiberal.

This thesis has shown that whilst the use of longer than normal sentences of imprisonment imposed on offenders predicted to be dangerous can be explained by the social, political and epistemological developments that occurred in England and Wales at the end of the 20th century, such measures cannot be justified under liberal political principles. That this measure was introduced and has been adopted without public disapprobation is explicable only in the context of a society experiencing a heightened awareness of and fear of crime. That this measure has remained largely unchallenged for over a decade suggests that it is unlikely to be abolished in the near future. Indeed, pre-emptive incapacitative disposals are likely to become more common in both the medical and criminal justice contexts. It is therefore essential that the threat that such measures pose to liberal political structures is made apparent. It is not sufficient to say that in a democracy, the acquiescence of citizens to illiberal measures validates these illiberal measures. S. 2(2)(b) of the *1991 Criminal Justice Act* provides an example of the extent to which the state is prepared to depart from important legal and political principles. To the extent that such departures go largely unchallenged in the public domain, then the danger is that 'dangerousness' provisions will undermine the liberal basis of modern society.

BIBLIOGRAPHY

- Advisory Committee On the Penal System (1978) *Sentences of Imprisonment: A Review of Maximum and Minimum Sentences* London, HMSO
- Allen F A (1981) *The Decline of the Rehabilitative Ideal*, New Haven, Yale University Press.
- Ancel M (1962) 'Social Defence' *Law Quarterly Review* Vol. 78, 497-503
- Ancel M (1965) *Social Defence: A Modern Approach to Criminal Problems* London, Routledge and Kegan Paul, (Translated and revised from the French *La Nouvelle Défense Sociale* (1954))
- Ancel M (1987) *Social Defence: The Future of Penal Reform* Fred B Rothman & Co, Littleton, Col.
- Andenaes J (1952) 'General Prevention - Illusion or Reality?' *Journal of Criminal Law, Criminology and Police Science* Vol. 43 No. 2, 176-198
- Anderson D C (1995) *Crime and the Politics of Hysteria* Random House, New York
- Ashworth A (1977) 'Changes in Sentencing Law' *Criminal Law Review* 1
- Ashworth A (1989) 'Criminal Justice and Deserved Sentences' *Criminal Law Review* 340
- Ashworth A (1990) 'The White Paper on Criminal Justice Policy and Sentencing', Editorial, *Criminal Law Review*, 217
- Ashworth A (1992a) 'The 1991 Criminal Justice Act' in Munro C and Wasik M (eds.) (1992) *Sentencing, Judicial Discretion and Training* Sweet and Maxwell, London
- Ashworth A (1992b) *Sentencing and Criminal Justice*, Weidenfeld and Nicolson, London
- Ashworth A (1992c) 'Face the 1991 Act' Editorial, *Criminal Law Review* 229
- Ashworth A (1995) (2nd ed.) *Sentencing and Criminal Justice* Butterworths, London
- Ashworth A (1996) 'Crime, Community and Creeping Consequentialism' *Criminal Law Review* 220
- Ashworth A (1999) (3rd ed.) *Principles of Criminal Law* Oxford University Press, Oxford
- Ashworth A (2000) (3rd ed.) *Sentencing and Criminal Justice* London, Butterworths
- Ashworth A (2002) 'Sentencing' in Maguire M, Morgan R and Reiner R (eds.) (3rd ed.) *The Oxford Handbook of Criminology* Oxford, Oxford University Press,

- Ashworth A, Cavadino P, Gibson B, Harding J, Rutherford A (eds.) (1992) *Materials on the 1991 Criminal Justice Act* Waterside Press, Winchester
- Ashworth A and Gibson B (1994) 'Altering the Sentencing Framework' *Criminal Law Review* 101
- Ashworth A and Hough M (1996) 'Sentencing and the Climate of Opinion' *Criminal Law Review* 776
- Ashworth A and von Hirsch (1997) 'Recognising Elephants: the problems of the custody threshold' *Criminal Law Review*, March 187-200.
- Ashworth P (1991) 'Release of Discretionary Lifers' *New Law Journal* 141, 1085
- Bailey V (1987) *Delinquency and Citizenship: Reclaiming the Young Offender 1914-1948* Oxford, Clarendon Press
- Bartlett P and Sandland R (2000) *Mental Health Law, Policy and Practice*, London, Blackstone Press
- Bauman Z (1989) *Modernity and the Holocaust*, Cambridge, Polity Press
- Beauchamp TL and Childress JF (1983)(2nd ed.) *Principles of Biomedical Ethics* New York, Oxford University Press
- Beck U (1992) *Risk Society*, Sage Publications, London
- Bell J (1992) 'Discretionary Decision Making: A Jurisprudential View' in Hawkins K (ed.) (1992) *The Uses of Discretion* Oxford, Clarendon Press
- Belloni F P and Hodgson J (2000) *Criminal Injustice: An Evaluation of the Criminal Justice Process in Britain* London, St Martin's Press
- Berlin I (1969) 'Two Concepts of Liberty' in *Four Essays on Liberty*, Oxford University Press, London
- Black J S W (1992) 'The Quality of Mercy...' *Justice of the Peace* 156, 643-644
- Bloor D (1991)(2nd ed.) *Knowledge and Social Imagery* Chicago, University of Chicago Press
- Booth D M and Pirie N F F (1973) *The New Powers of Sentencing* Butterworths, London
- Bottoms A E (1983) 'Neglected Features of Contemporary Penal Systems' in Garland D and Young P (eds.) (1983) *The Power to Punish: Contemporary Penalty and Social Analysis*, London, Heinemann Educational Books.
- Bottoms A E (1977) 'Reflections on the Renaissance of Dangerousness', *Howard Journal of Penology and Crime Prevention* Vol. XVI No. 2, 70-96

- Bottoms A E (1995) 'The Philosophy and Politics of Punishment and Sentencing' in Clarkson C M V and Morgan R (eds.) *The Politics of Sentencing Reform* Oxford University Press, Oxford
- Bottoms A E and Brownsword R (1982) 'The Dangerousness Debate after the Flood Report' *British Journal of Criminology*, Vol 22, 229-254
- Bottoms A E and McWilliams W (1979) 'A Non-treatment Paradigm for Probation Practice' *British Journal of Social Work* Vol 9, 159-202
- Bottoms A E and Wiles P (2002) 'Environmental Criminology' in Maguire M, Morgan R and Reiner R (eds.) (3rd ed.) *The Oxford Handbook of Criminology* Oxford, Oxford University Press
- Bowlby J (1946) *Forty Four Juvenile Thieves: Their Characters and Home Life* London, Bailliere, Tindall and Cox
- Box S (1987) *Recession, Crime and Punishment*, MacMillan Education, Basingstoke
- Brody S (1976) *The Effectiveness of Sentencing: A Review of the Literature* Home Office Research Study No. 35, HMSO, London
- Brody S and Tarling, R (1980) *Taking Offenders Out of Circulation* Home Office Research Study No. 64, HMSO, London
- Brownlee I (1994) 'Taking the strait-jacket off: persistence and the distribution of punishment in England and Wales' *Legal Studies* Vol. 14, no. 3, 295-312
- Briggs R (1996) *Witches and Neighbours: The Social and Cultural Context of European Witchcraft*, London, Penguin
- Burney E (1985) *Sentencing Young People: What Went Wrong With The Criminal Justice Act 1982?* Gower, Aldershot
- Burt C (1931) *The Young Delinquent* London, University of London Press
- Butler D and Kavanagh D (1980) *The British General Election 1979* Basingstoke, Macmillan
- Campbell J C (ed.) (1995) *Assessing Dangerousness: Violence by Sexual Offenders, Batterers and Child Abusers*, Sage Publications, Thousand Oaks Ca.
- Canals J M (1960) 'Classicism, Positivism and Social Defense' *Journal of Criminal Law, Criminology and Police Science* Mar-Apr, 541-550
- Carlen P (1983) *Women's Imprisonment* London, Routledge and Kegan Paul.
- Carlisle Committee (1988) Report, *The Parole System in England and Wales*, Cm. 532 HMSO, London

- Carr-Hill R (1970) 'Victims of our Typologies' in Oxford University Penal Research Unit, Occasional Paper Number One *The Violent Offender - Reality or Illusion?* Basil Blackwell, London
- Cavadino M and Dignan J (1992) *The Penal System: An Introduction* London, Sage.
- Cavadino P (1990) 'The White Paper - Will it Achieve its Objectives?' 80 *Prison Service Journal*, 5
- Cavadino P (1992) 'In defence of Section 19' *Justice of the Peace* 156, 470-472
- Christoph J B (1962) *Capital Punishment and British Politics: The British Movement to Abolish the Death Penalty 1945-57* George, Allen and Unwin, London
- Clarke R (1995) 'Situational Crime Prevention' in Tonry M and Farrington D (eds.) *Building a Safer Society* Chicago, University of Chicago Press
- Clarkson C M V (1994) 'Law Commission Report on Offences against the person and General Principles: (1) Violence and the Law Commission' *Criminal Law Review*, 324
- Clarkson C M V (1997) 'Beyond Just Deserts: Sentencing Violent and Sexual Offenders' *Howard Journal of Criminal Justice* Vol. 36 No. 3, 284-292
- Clarkson C M V and Keating H M (1994) *Criminal Law: Text and Materials*, Sweet and Maxwell, London
- Clarkson C M V and Morgan R (eds.) (1995) *The Politics of Sentencing Reform* Oxford University Press, Oxford
- Cochrane D, Pratt D and Winter K (1993) 'Who sets the scene for seriousness?' *Probation Journal* 40 (1) 9-14
- Cohen S (1973) *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*, St Albans, Paladin.
- Cohen S (1979) 'The Punitive City: Notes on the Dispersal of Social Control' *Contemporary Crises* Vol. 3 No. 2, 287-296
- Cohen S (1985) *Visions of Social Control: Crime, Punishment and Classification* Polity Press, Cambridge
- Cohen S and Scull A (eds.) (1985) *Social Control and the State* Oxford, Basil Blackwell
- Collett S (1993) 'Beyond Reason and Understanding; The everyday understanding of crime' *Probation Journal* 40 (4) 184-187
- Conrad J P (1982) 'The Quandary of Dangerousness: Towards the Resolution of a Persisting Dilemma' *British Journal of Criminology* Vol.22, No. 3, 255-267
- Conservative Party (1979) *The Conservative Manifesto* London Conservative Party

- Conservative Party (1987) *The Next Moves Forward*, Conservative Party, London
- Copas J B (1994) 'On Using Crime Statistics for Prediction' in Walker M (ed.) *Statistics of Crime* Oxford University Press, Oxford
- Croft J (1982) *Concerning Crime* Home Office Research Study No. 75, HMSO, London
- Crow I, Johnston V, Dignan J and Cavadino M (1994) 'Magistrates' Views of the 1991 Criminal Justice Act' *Justice of the Peace and Local Government Law* 158 (3) 37-40
- Davies F G (1994a) 'Sentencing under the 1991 Criminal Justice Act-I' *Justice of the Peace and Local Government Law* 158 (30) 477-480
- Davies F G (1994b) 'Sentencing under the 1991 Criminal Justice Act-II' *Justice of the Peace and Local Government Law* 158 (31) 493-495
- Davis M (1990) *City of Quartz* London, Vintage
- de Tocqueville A (1968) *Democracy in America* Fontana, London
- Dine J and Gobert J (1998) *Cases and Materials on the Criminal Law* 2nd ed. Blackstone Press, London
- Dingwall G (1998) 'Selective Incapacitation and the 1991 Criminal Justice Act: A proportional response to protecting the public?' *Howard Journal of Criminal Justice* 37 (2), 177-187
- Dobash R P, Dobash, R E and Gutteridge S (1986) *The Imprisonment of Women* Oxford, Basil Blackwell
- Dodds M D (1992a) 'The Restrictions on custodial sentences in the 1991 Criminal Justice Act - Sentencing Guidelines from the Criminal Justice Act 1982' *Justice of the Peace* 156, 691-694
- Dodds M D (1992b) 'The Restrictions on custodial sentences in the 1991 Criminal Justice Act - Sentencing Guidelines from the Criminal Justice Act 1982' *Justice of the Peace* 156, 710-712
- Dodds M D (1992c) 'The Restrictions on custodial sentences in the 1991 Criminal Justice Act - Sentencing Guidelines from the Criminal Justice Act 1982' *Justice of the Peace* 156, 726-728
- Douglas J D (ed.) (1970) *Deviance and Respectability* New York, Basic Books,
- Douglas M (1992) *Risk and Blame: Essays in Cultural Theory* London, Routledge,.
- Downes D (1989) 'Summing Up' in Rees H and Hall Williams E (eds.) (1989) *Punishment, Custody and the Community: Reflections and Comments on the*

- Green Paper* Suntory Toyota International Centre for Economics and Related Disciplines, London, The London School of Economics and Political Sciences
- Downes D and Morgan R (1994) 'Hostages To Fortune? The Politics Of Law And Order In Post War Britain' in Maguire M, Morgan R and Reiner R (eds.) *The Oxford Handbook of Criminology* Oxford, Oxford University Press
- Downes D and Morgan R (2002) 'The Politics of Law and Order' in Maguire M, Morgan R and Reiner R (eds.) (3rd ed.) *The Oxford Handbook of Criminology* Oxford, Oxford University Press
- Downes D and Rock P (1982) *Understanding Deviance* Oxford, Clarendon Press
- Duff R A (1986a) 'Punishment in the Community - A Philosophical Perspective' in Rees H and Hall Williams E (eds.) (1989) *Punishment, Custody and the Community: Reflections and Comments on the Green Paper* Suntory Toyota International Centre for Economics and Related Disciplines, The London School of Economics and Political Sciences, London
- Duff R A (1986b) *Trials and Punishments*, Cambridge, Cambridge University Press.
- Duff R A (1998) (ed.) *Philosophy and the Criminal Law: Principle and Critique*, Cambridge, Cambridge University Press
- Duff R A (1998) 'Principle and Contradiction in the Criminal Law' in Duff R A (1998) (ed.) *Philosophy and the Criminal Law: Principle and Critique*, Cambridge, Cambridge University Press
- Duff R A and Garland D (eds.) (1994) *A Reader on Punishment* Oxford, Oxford University Press
- Dunbar I and Langdon A (1998) *Tough Justice: Sentencing and Penal Policies in the 1990s*, Blackstone Press, London
- Durkheim É (1902) 'Two Laws of Penal Evolution' reprinted in Lukes, S. and Scull, A (eds.) (1983) *Durkheim and the Law*, Oxford, Oxford University Press.
- Durkheim É (1938) *The Rules of Sociological Method*, New York, The Free Press, (8th ed. 1966).
- Duster T (1970) *The Legislation of Morality: Laws, Drugs and Moral Judgement*, New York, The Free Press.
- Dworkin R J (1978) *Taking Rights Seriously*, London, Gerald Duckworth and Co.
- Dworkin R J (1986) *Law's Empire* Harvard University Press, Cambridge
- Elias N (1939 reprinted 1978a) *The Civilizing Process: Vol. 1. The History of Manners*, Oxford, Basil Blackwell.

- Elias N (1939 reprinted 1978b) *The Civilizing Process: Vol. 2. State Formation and Civilization*, Oxford, Basil Blackwell.
- Ewald F (1991) 'Insurance and Risk' in Burchell D, Gordon C and Miller P (eds.) *The Foucault Effect* Brighton, Harvester
- Farmer M E (1967) 'The Positivist Movement and the development of English Sociology' *Sociological Review* Vol. 15:1
- Faugeron (1989) 'The Problems of Imprisonment' in Hood R (ed.) *Crime and Criminal Policy in Europe*, Centre for Criminological Research, Oxford
- Feeley M and Simon J (1994) 'Actuarial Justice: the Emerging New Criminal Law' in Nelken D (ed.) (1994) *The Futures of Criminology*, London, Sage.
- Feinberg J (1970) *Doing and Deserving: Essays in the Theory of Responsibility* Princeton University Press
- Flew A (1969) 'The Justification of Punishment' in Acton HB (ed.) (1969) *The Philosophy of Punishment* London, MacMillan
- Floud J (1982) 'Dangerousness and Criminal Justice' *British Journal Of Criminology* Vol. 22, 159
- Floud J and Young W (1981) *Dangerousness and Criminal Justice*, Cambridge Studies in Criminology XLVII, London, Heinemann Educational Books.
- Foucault M (1977) *Discipline and Punish: The Birth of the Prison*, Harmondsworth, Penguin Books.
- Fox L W (1952) *The English Prison and Borstal Systems* Routledge and Kegan Paul, London
- Freeman M D A (1994) *Lloyd's Introduction to Jurisprudence* London, Sweet and Maxwell
- Fukuyama F (1993) *The End of History and the Last Man* London, PenguinBooks
- Galligan D J (1981) 'Guidelines and Just Deserts: A Critique of Recent Trends in Sentencing Reform' *Criminal Law Review* 297
- Gamble A (1994)(2nd ed.) *The Free Economy and the Strong State: the Politics of Thatcherism* Basingstoke, MacMillan
- Gardner J (1998) 'On the General part of the Criminal Law' in Duff R A (1998) (ed.) *Philosophy and the Criminal Law: Principle and Critique*, Cambridge, Cambridge University Press
- Garland D (1985) *Punishment and Welfare*, Aldershot, Gower

- Garland D (1989) 'Critical Reflections on 'Punishment, Custody and the Community' in Rees H and Hall Williams E (eds.) (1989) *Punishment, Custody and the Community: Reflections and Comments on the Green Paper* Suntory Toyota International Centre for Economics and Related Disciplines, The London School of Economics and Political Sciences, London
- Garland D (1990) *Punishment and Modern Society: A Study in Social Theory*, Oxford, Clarendon Press.
- Garland D (1994a) 'Penal Modernism and Postmodernism' Typescript, CCSPSL, Edinburgh University.
- Garland D (1994b) 'Of Crimes and Criminals: The Development of British Criminology' in Maguire M and Morgan R (eds.) (1994) *The Oxford Handbook of Criminology* Oxford, Clarendon Press.
- Garland D (1995) 'Penal Modernism and Postmodernism' in Blomberg T and Cohen S (Eds.) *Punishment and Social Control: Essays in Honour of Sheldon L Messinger* New York, Aldine de Gruyter
- Garland D (1997a) 'The Punitive Society: Penology, Criminology and the History of the Present' in *The Edinburgh Law Review* Vol. 1, 180-199
- Garland D (1997b) 'Of Crimes and Criminals: The Development of Criminology in Britain' In Maguire M, Morgan R and Reiner R (eds.)(1997) *The Oxford Handbook of Criminology* 2nd ed. Oxford, Oxford University Press
- Garland D and Young P (1983) *The Power to Punish: Contemporary Penalty and Social Analysis* Heinemann Educational Books,
- Geraghty J (1991) *Probation Practise in Crime Prevention* Home Office Crime Prevention Unit Paper 24, HMSO, London
- Gibbons J (1994) 'Discretionary Life Panels' *New Law Journal* 22 April, 524, 526
- Gibson B (1992a) 'Information and Pre-sentence Reports' 89 *Law Society Gazette* 28
- Gibson B (1992b) '1991 Criminal Justice Act - 7: Reasons for Decisions' *Justice of the Peace* 156, 563-565
- Gibson B, Cavadino P, Rutherford A, Ashworth A, Harding J (1992) *Materials on the 1991 Criminal Justice Act* Waterside Press, Winchester
- Gibson B, Cavadino P, Rutherford A, Ashworth A, Harding J (1994) *Criminal Justice In Transition* Waterside Press, Winchester
- Gladstone F J (1980) *Co-ordinating Crime Prevention Efforts* Home Office Research Study No. 62, HMSO, London

- Glover-Thomas N (2002) *Reconstructing Mental Health law and Policy*, London Butterworths
- Goffman I (1961) *Asylums* London, Anchor Books
- Gordon G H (1981) *The Criminal Justice (Scotland) Act 1980* W Green and Son, Edinburgh
- Gordon R A (1982) 'Preventive Sentencing and the Dangerous Offender' *British Journal of Criminology* Vol.22, No. 3, 285-315
- Gray (1995) (2nd ed.) *Liberalism* Open University Press, Milton Keynes
- Gray J (2000) *Two faces of Liberalism* Polity Press, Cambridge
- Green T H (1988) *Works* Nettleship R (ed.) Oxford University Press, London
- Greenberg D (1975) 'Problems in Community Corrections' in *Issues in Criminology* Vol 19 pp 1-34
- Gunn J (1996) 'The management and discharge of violent patients' in Walker N (ed.) *Dangerous People* London, Blackstone Press
- Hale L (1961) *Hanged in Error* Harmondsworth, Penguin
- Hall S (1980) *The Drift to a Law and Order Society* London, Cobden Trust
- Hammond W and Chayen E (1963) *Persistent Criminals: A Study of All Offenders Liable to Preventive Detention in 1956* HMSO, London
- Hampsher-Monk I (1992) *A History of Modern Political Thought : Major political thinkers from Hobbes to Marx*, Oxford, Blackwell
- Harding C, Hines W, Ireland R and Rawlings P (1985) *Imprisonment in England and Wales: A Concise History* Beckenham, Croon Helm
- Harding C and Koffman L (1995) (2nd Ed.) *Sentencing and the Penal System: Text and Materials*, Sweet and Maxwell, London
- Hart H L A (1973) *Punishment and Responsibility* Oxford, Oxford University Press
- Hawkins K (ed.) (1992) *The Uses of Discretion* Oxford, Clarendon Press
- Hawkins K 'The Use of Judicial Discretion: Perspectives from Law and Social Science' in Hawkins K (ed.) (1992) *The Uses of Discretion* Oxford, Clarendon Press
- Hay D (1977) 'Property, Authority and the Criminal Law' in Hay D, Linebaugh P, Rule J, Thompson E P and Winslow C (eds.) *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* Harmondsworth, Penguin
- Hayward K (forthcoming 2003) *City Limits: Crime and Excitement in Urban Britain* London, Cavendish
- Hayek F (1944) *The Road to Serfdom* University of Chicago Press, Chicago

- Heidensohn F (2002) 'Gender and Crime' in Maguire M, Morgan R and Reiner R (eds.) (3rd ed.) *The Oxford Handbook of Criminology* Oxford, Oxford University Press
- Heimer C A (1985) *Reactive Risk and Rational Action: Managing Moral Hazard in Insurance Contracts* Berkeley, University of California Press
- Henham R (1994) 'Attorney General's References and Sentencing Policy' *Criminal Law Review*, 449
- Henham R (1996a) *Criminal Justice and Sentencing Policy* Dartmouth, Aldershot
- Henham R (1996b) 'Sentencing Policy, Appellate Guidance and Protective Sentencing' *Journal of Criminal Law*, 424-446
- Henham R (1996c) 'Truth in Sentencing: Some Problems of Enforcement Strategy' 3 *Web Journal of Current Legal Issues* (<http://www.webjcli.ac.uk>)
- Henham R (1997a) 'Child Victims and Sentencing Policy for Violent and Sexual Crimes' 5 *Web Journal of Current Legal Issues*, (<http://www.wjcli.ac.uk>)
- Henham R (1997b) 'Sentencing Policy and the Abolition of Parole and Early Release' *International Journal of the Sociology of Law* 25(4) December 337-61
- Henham R (1998) 'Human Rights, Due Process and Sentencing' *British Journal of Criminology*, Vol.38, No. 4, 592-609
- Heywood A (1998)(2nd ed.) *Political Ideologies: An Introduction*, Basingstoke, MacMillan Press
- Hinton J W (ed.) (1983) *Dangerousness: Problems of Assessment and Prediction* George, Allen and Unwin, London
- Hobbes T (1991) Tuck, R (ed.) *Leviathan*, Cambridge, Cambridge University Press
- Hobhouse L T (1964) *Liberalism* Oxford University Press, New York
- Hodgson J and Belloni F (2000) *Criminal Injustice: An Evaluation of the Criminal Justice Process in Britain* Basingstoke, MacMillan
- Holden B (1993) (2nd ed.) *Understanding Liberal Democracy* Harvester Wheatsheaf, Hemel Hempstead
- Home Office (1963) *Preventive Detention* Report of the Advisory Council on the Treatment of Offenders, HMSO, London
- Home Office (1964) *The Sentence of The Court: A Handbook for Courts on the Treatment of Offenders* HMSO, London
- Home Office (1986) *Criminal Justice: A Working Paper* HMSO, London
- Home Office (1988) *Punishment, Custody and the Community* Cm 424, HMSO, London
- Home Office (1989) *Tackling Crime*, HMSO, London

- Home Office (1990a) (5th ed.) *The Sentence of the Court: A Handbook for Courts on the Treatment of Offenders* HMSO, London
- Home Office (1990b) *Partnership in Crime Prevention* HMSO, London
- Home Office (1990c) *Electronic Monitoring: The Trials and Their Results* HMSO, London
- Home Office (1990d) *Crime, Justice and Protecting the Public* Cm 965, HMSO, London
- Home Office (1991) *1991 Criminal Justice Act: Custodial Sentences and the Sentencing Framework*, Home Office, London,
- Home Office (1993) *Life Licensees and Restricted Offenders' Reconvictions: England and Wales 1990* Home Office Statistical Bulletin 3/93, Home Office, London
- Home Office (1995a) *Criminal Statistics for England and Wales. Supplementary Tables. Volume 2* HMSO, London
- Home Office (1995b) *Strengthening Punishment in the Community: A Framework for Action* London, HMSO
- Home Office (1996) *Protecting the Public* White paper, London HMSO
- Home Office (2001) *Making Punishments Work: Report of the sentencing framework for England and Wales* London, Home Office
- Home Office (2001b) *Prisons Statistics for England and Wales 1999*, Cmnd 5250, London, Home Office
- Home Office (2002) *Justice for All* Cmnd 5563, London, Home Office
- Home Office, Department of Health and Social Security (1975), *Committee on Mentally Abnormal Offenders, Report*, Cmnd 6244, London, HMSO.
- Honderich T (1976) *Punishment: The Supposed Justifications* Harmondsworth, Penguin
- Honderich T (1982) 'On Justifying Protective Punishment' *British Journal of Criminology* Vol. 22, No. 3, 268-275
- Hood R (1976) *Tolerance and the Tariff* London, NACRO
- Hood R (ed.) (1989) *Crime and Criminal Policy in Europe* Centre for Criminological Research, Oxford
- Hood R and Shute S (1996) 'Protecting the Public: Automatic Life Sentences, Parole and High Risk Offenders' *Criminal Law Review*, 788
- Hood R and Shute S (1996b) 'Parole Criteria, Parole Decision and the Prison Population; Evaluating the Impact of the 1991 Criminal Justice Act' *Criminal Law Review* February, 77-87

- Hough M and Roberts J (1998) *Attitudes to Punishment: Findings from the British Crime Survey* Home Office Research Study 179, Home Office, London
- House of Commons (2001) 'A Brief Chronology of the House of Commons' HC Factsheets, General Series No. 3:
(<http://www.parliament.uk/commons/lib/fs39.pdf>)
- House of Lords (1989) *Report of the Select Committee On Murder and Life Imprisonment (Nathan Committee)*, HL Paper 78-11
- Hudson B (1984) 'The Rising Use of Imprisonment: The Impact of 'Decarceration' Policies' in *Critical Social Policy* Vol. 11, 46-59
- Hudson B (1987) *Justice through Punishment: A Critique of the Justice Model of Corrections* Macmillan, London
- Hudson B (1993) *Penal Policy and Social Justice* The Macmillan Press, London
- Husak D (1998) 'Does Criminal Liability Require an Act?' in Duff R A (1998) (ed.) *Philosophy and the Criminal Law: Principle and Critique*, Cambridge, Cambridge University Press
- Jackson R M (1967) *Enforcing The Law* Macmillan, London
- Jasanoff S (1995) *Science at the Bar: Law, Science and Technology in America* Twentieth Century Fund Inc, Harvard University Press, Cambridge Mass.
- Jefferson M (1999) (4th ed.) *Criminal Law* London, Pearson education
- Johnson S and Taylor R (2000) *Statistics of Mentally Disordered Offenders - 1999 England and Wales* Statistical Bulletin 21/00, London, Home Office Research and Statistics Directorate
- Johnstone G (1996) *Medical Concepts and Penal Policy* Cavendish Publishing, London
- Jones K (1972) *A History of Mental Health Services* London, Routledge and Kegan Paul
- Jones K (1993) *Asylums and After* London, Athlone Press
- Jones S (2001)(2nd ed.) *Criminology* London, Butterworths
- Justice (1989) *Sentencing: A Way Ahead*, Justice, London
- Justice (1996) *Sentenced for Life: Reform of the Law and Procedure for those Sentenced to Life Imprisonment* Justice, London.
- Keating (1987) 'Fatal and Non-fatal Offences against the Person under the Draft Criminal Code' in Dennis I H (ed.) *Criminal Law and Justice*, Sweet and Maxwell, London
- Kelly D (1993) *Criminal Sentences* T & T Clark, Edinburgh

- Kelman M (1987) *A Guide to Critical legal Studies*, Harvard University Press, Cambridge
- Kinzig J (1997) 'Preventive Measures for Dangerous Recidivists' *European Journal of Crime, Criminal Law and Criminal Justice* Vol. 5(1), 25-57
- Lacey N (1983) 'Dangerousness and Criminal Justice: The Justification of Preventive Detention' *Current Legal Problems* Vol. 36, 31-49
- Lacey N (1992) 'The Jurisprudence of Discretion: Escaping the Legal Paradigm' in Hawkins K (ed.) (1992) *The Uses of Discretion* Oxford, Clarendon Press
- Lacey N (2002) 'Legal constructions of crime' in Maguire M, Morgan R and Reiner R (eds.) (3rd ed.) *The Oxford Handbook of Criminology* Oxford, Oxford University Press
- Laing JM (1999) *Care or Custody?: Mentally Disordered Offenders in the Criminal Justice System*, Oxford, Oxford University press
- Law Commission *Legislating the Criminal Code: Offences against the Person and General Principles*, Consultation Paper No. 122 (1992), HMSO, London
- Lemert E (1951) *Social Pathology* New York, McGraw-Hill
- Lees S (1997) *Carnal Knowledge: Rape on Trial* Harmondsworth, Penguin
- Leng R and Manchester C (1991) *A Guide to the 1991 Criminal Justice Act*, Fourmat Publishing, London
- Light R (ed.) (1989) *Public and Private Provisions in Criminal Justice*, Bristol Centre for Criminal Justice, Bristol
- Lilly J R, Cullen F T and Ball R A (1997)(2nd ed) *Criminological theory: Context and Consequences* Thousand Oaks, Sage
- Lloyd C, Mair G and Hough M (1994) *Explaining Reconviction Rates: A Critical Analysis* Home Office Research Study No. 136, HMSO, London
- Locke J (1952) *Second Treatise of Government*, Bobbs-Merrill, Indianapolis
- McGuigan J (1999) *Modernity and Postmodern Culture* Buckingham, Open University Press
- McWilliams W (1986) 'The English Probation Service and the Diagnostic Ideal' *Howard Journal* Vol 25, 241-260
- Mackie A (1995) *Punishment in the Communities: A Punitive Response to Crime and Criminals* University of Edinburgh, Unpublished MSc dissertation
- Maguire M (2002) 'Crime Statistics' in Maguire M, Morgan R and Reiner R (eds.) (3rd ed.) *The Oxford Handbook of Criminology* Oxford, Oxford University Press,

- Maguire M, Morgan R and Reiner R (eds.) (1994) *The Oxford Handbook of Criminology* Oxford University Press, Oxford
- Mair G (1991) 'What Works - Nothing or Everything? Measuring the Effectiveness of Sentences.' Home Office Research Bulletin, No. 30, 3-8.
- Mair G and May C (1995) *Practitioners' View of the 1991 Criminal Justice Act: A Survey of Criminal Justice Agencies*, Home Office, London
- Makela K (1974) 'The Societal Tasks of the System of Penal Law', *Scandinavian Studies in Criminology*, Vol. 5, 47-65.
- Marcuse H (1964) *One Dimensional Man: Studies in the Ideology of Advanced Industrial Society*, Boston, Beacon.
- Martinson R (1974) "'What Works?' - Questions and Answers about Prison Reform', *The Public Interest*, 35, 22-54.
- Martinson R (1979) 'New Findings, New Views: A Note of Caution Regarding Sentencing Reform' *Hofstra Law Review* Vol 7 pp243-257
- Mathiesen T (1965) *The defences of the Weak: A Sociological Study of a Norwegian Correctional Institution*, Tavistock, London
- Matravers M (2000) *Justice and Punishment: The Rationale of Coercion*, Oxford, Oxford University Press
- Matza D (1964) *Delinquency and Drift* New York, Wiley
- McAlinden A-M (2001) 'Indeterminate Sentences for the Severely Personality Disordered', *Criminal Law Review* February, 108-123
- McCall Smith RAA and Sheldon D (1992) *Scots Criminal Law* Butterworths, Edinburgh
- McLaren V A and Spencer J W (1992) 'The 1991 Criminal Justice Act: A Critical Perspective' *Justice of the Peace* 156, 312-314
- Merton R (1957) *Social Theory and Social Structure* Glencoe, Free Press
- Melossi D (1994) 'The 'Economy' of illegalities: Normal Crimes, Elites and Social Control in Comparative Analysis' in Nelken, D. (ed.) *The Futures of Criminology*, London, Sage.
- Mill J S [1959](1972) *Utilitarianism, On Liberty and Consideration on Representative Government*, London, Dent
- Monahan J (1981) *The Clinical Prediction of Violent Behaviour* USA Department of Health and Human Services
- Morgan R (2002) 'Imprisonment' in Maguire M, Morgan R and Reiner R (eds.) (3rd ed.) *The Oxford Handbook of Criminology* Oxford, Oxford University Press

- Morris N (1951) *The Habitual Criminal*, Longmans, Green and Co., London
- Morris N (1976) *Punishment, Desert and Rehabilitation*, Washington DC, US Government Printing Office
- Morris N (1982) 'Dangerousness' and Incapacitation', in Duff, R. A., and Garland, D. (eds.) (1994) *A Reader On Punishment*, Oxford, Oxford University Press.
- Morris T (1989) *Crime and Criminal Justice since 1945* Basil Blackwell, Oxford
- Morrison A and Hughes E (1952) (2nd ed.) *The Criminal Justice Act 1948* Butterworth & Co., London
- Morrison W (1997) *Theoretical Criminology: from Modernity to Post-modernism* London, Cavendish
- Mulhall S and Swift A (1996) (2nd ed.) *Liberals and Communitarians*, Oxford, Blackwells
- Munro C and Wasik M (eds.) (1992) *Sentencing, Judicial Discretion and Training* Sweet and Maxwell, London
- Nash M (1992) 'Dangerousness Revisited' *International Journal of the Sociology of Law* 20 (4) 337-349
- Nelken D (1989) 'Alternative Logics in Criminal Justice' in Light, R (ed.) (1989) *Public and Private Provisions in Criminal Justice*, Bristol Centre for Criminal Justice, Bristol
- Newburn T (1995a) 'The Politics of Sentencing Reform and the 1991 Criminal Justice Act' *Policy Studies* 16 (3) 26-36
- Newburn (1995b) *Crime and Criminal Justice Policy* Harlow, Longman
- Newburn (2001) 'The Commodification of Policing: Security Networks in the Late Modern City' *Urban Studies* Vol. 38, Part 5, pp829-848
- Newburn T (2002) 'Young People, Crime and Youth Justice' in Maguire M, Morgan R and Reiner R (eds.) (2nd ed.) *The Oxford Handbook of Criminology* Oxford, Oxford University Press
- Norrie A W (1991) *Law, Ideology and Punishment: Retrieval and Critique of the Liberal Ideal of Criminal Justice*, Kluwer Academic Publishers, Dordrecht
- Norrie A (1993) *Crime, Reason and History* London, Weidenfeld and Nicholson
- Nozick R (1974) *Anarchy, State and Utopia*, New York, Basic Books
- Nunn S (1992) 'Pre-sentence Reports - A Defence Perspective' 156 *Justice of the Peace*, 755 Oxford University Press, 1983.

- O'Malley P (2000) 'Risk Societies and the government of crime' in Brown M and Pratt J (eds.) *Dangerous Offenders* London, Routledge
- Padfield N M (1993) 'Parole and the Life Sentence Prisoner' *Howard Journal of Criminal Justice* 32 (2) 87-98
- Padfield N (2002) (3rd ed.) *Criminal Law* London, Butterworths
- Parkin T (1994) *Just Deserts or Just Cutting Costs: The 1991 Criminal Justice Act*, Unpublished MA Dissertation, University of Durham
- Patten J (1991) 'The 1991 Criminal Justice Act' *Justice of the Peace* 155, 745-748
- Pease K (1994) 'Cross-National Imprisonment Rates' *British Journal of Criminology*, Vol 43, Special issue, 117
- Pease K (2002) 'Crime Reduction' in Maguire M, Morgan R and Reiner R (eds.) (3rd ed.) *The Oxford Handbook of Criminology* Oxford University Press, Oxford
- Peay J (1997) 'Mentally Disordered Offenders' in Maguire M, Morgan R and Reiner R (eds.) (2nd ed.) *The Oxford Handbook of Criminology* Oxford University Press, Oxford
- Peay J (2002) 'Mentally Disordered Offenders, Mental Health and Crime' in Maguire M, Morgan R and Reiner R (eds.) (3rd ed.) *The Oxford Handbook of Criminology* Oxford University Press, Oxford
- Perry C and Pease K (1992) 'The 1991 Criminal Justice Act and the scaling of sentence severity' *Justice of the Peace* 156, 452-454
- Peters A A G (1988) 'Main Currents In Criminal Law Theory' in Van Dijk, J. J. M. (ed.) (1988) *Criminal Law In Action*, Deventer, Kluwer.
- Phillpotts G J O and Lancucki L B (1979) *Previous Convictions, Sentence and Reconviction: A Statistical Study of a Sample of 5000 Offenders Convicted in January 1971* Home Office Research Study No. 53, London HMSO
- Pilgrim D and Rogers A (1999) (2nd ed.) *A Sociology of Mental Health* Oxford, Oxford University Press
- Plant R (1991) *Modern Political Thought*, Oxford, Blackwells
- Pratt J (1997) *Governing the Dangerous: Dangerousness, Law and Social Change*, Federation press, Sydney
- Primoratz I (1989) *Justifying Legal Punishment* New Jersey, Humanities Press
- Prins H (1986) *Dangerous Behaviour, The Law, and Mental Disorder*, London, Tavistock Publications.
- Prins H (1995) *Offenders, Deviants or Patients?* Second edition, London, Routledge.

- Prison Reform Trust (1991) *The Woolf Report: A Summary of the Main Findings and Recommendations of the Inquiry into Prison Disturbances* Prison Reform Trust, London
- Prison Reform Trust (1992) *The 1991 Criminal Justice Act: A Guide* Prison Reform Trust, London
- Prison Reform Trust (1997) *Sentencing: A Geographical Lottery*, Prison Reform Trust, London
- Rabinow P and Sullivan W M (eds.) (1987) *Interpretive Social Science: A Second Look* Berkeley, University of California Press
- Radzinowicz L and Hood R (1981) 'Dangerousness and Criminal Justice: A Few Reflections' *Criminal Law Review* 756
- Radzinowicz L and Hood R (1986) *A History of English Criminal Law and its Administration from 1750: The Emergence of Penal Policy* Stevens and Sons, London
- Raine J W and Willson M J (1993) *Managing Criminal Justice*
- Ranyard R, Heberton B and Pease K (1994) 'An analysis of Guideline Cases as applied to the offence of Rape' *Howard Journal of Criminal Justice*, 203
- Raynor P (2002) 'Community Penalties' in Maguire M, Morgan R and Reiner R (eds.)(3rd ed.) *The Oxford Handbook of Criminology* Oxford, Oxford University Press
- Rees H and Hall Williams E (eds.) (1989) *Punishment, Custody and the Community: Reflections and Comments on the Green Paper* Suntory Toyota International Centre for Economics and Related Disciplines, The London School of Economics and Political Sciences, London
- Rock P (2002) 'Sociological Theories of Crime' in McGuire M, Morgan R and Reiner R (eds.)(3rd ed.) *The Oxford Handbook of Criminology*, Oxford, Oxford University Press
- Rorty R (1979) *Philosophy and the Mirror of Nature*, Princeton, Princeton University Press
- Rose N (2000) 'Government and Control' in Garland and Sparks (eds.) *Criminology and Social Theory*, Clarendon Press, Oxford
- Ross W D (1930) *The Right and the Good* Oxford
- Royal Commission on Capital Punishment (1953) Cmnd 8932 *Report* London

- Rumgay J (1993) 'Seriousness, Sentencing and Social Work' *Justice of the Peace* 157(29) 454-456
- Rusche G and Kirchheimer O (1939) *Punishment and Social Structure*, New York, Russell and Russell.
- Samuels A (1992) 'Serious: What is a serious offence?' *Justice of the Peace* 156, 59-60
- Sarbin T (1967) 'The Dangerous Individual: An Outcome of Social Identity Transformations' *British Journal of Criminology* Vol. 7, 285-295
- Savage S R (1992) '1991 Criminal Justice Act - Sentenced by Seriousness' *Justice of the Peace* 156, 550-552
- Searle J (1978) 'Prima facie Obligations' in Raz J (ed.) *Practical Reasoning* Oxford, Oxford University Press
- Schichor D and Sechrest D (1986) *Three Strikes and You're Out: Vengeance as Public Policy* Sage Publications, Thousand Oaks California.
- Schneider C E (1992) 'Discretion and Rules: A Lawyers View' in Hawkins K (ed.) *The Uses of Discretion* Oxford, Clarendon Press
- Scott R A (1970) 'The Construction of Conceptions of Stigma by Professional Experts' in Douglas J (ed.) *Deviance and Respectability: the Social Construction of Moral Meanings*, Basic Books, New York
- Scottish Advisory Council on the Treatment of Offenders (1960) *Use of Short Sentences of Imprisonment by the Courts* HMSO, Edinburgh
- Scottish Council on Crime (1975) *Crime and the Prevention of Crime*, Edinburgh, HMSO.
- Scruton P (ed.) (1987) *Law, Order and the Authoritarian State* Milton Keynes, Open University Press
- Scull A (1977) (Revised Ed. 1984) *Decarceration: Community Treatment and the Deviant - A Radical View* New Jersey, Prentice Hall
- Scull A (1983) 'Community Corrections: Panacea, Progress or Pretence' in Garland D and Young P (eds.) (1983) *The Power to Punish: Contemporary Penalty and Social Analysis* London, Heinemann Educational Books
- Searle J (1978) 'Prima facie Obligations' in Raz J (ed.) *Practical Reasoning*, Oxford, Oxford University Press
- Sentencing Advisory Panel (2002) *Minimum Terms in Murder Cases: The Panel's Advice to the Court of Appeal*

- http://www.sentencing-advisory-panel.gov.uk/c_and_a/advice/minimum_terms/minimum_terms.pdf
- Shaw M (1974) *Social Work in Prison* London HMSO
- Shearing C and Stenning P (1987) 'Say Cheese: The Disney Order that is not so Mickey Mouse' in Shearing C and Stenning P (eds.) (1987) *Private Policing*, Beverly Hills, Sage
- Simon J (1988) 'The ideological effects of actuarial justice' *Law and Society Review* Vol 22:4, pp 772-800
- Simon J and Feeley M (1995) 'True Crime: The New Penology and Public Discourse on Crime' in Blomberg T and Cohen S (eds.) *Punishment and Social Control* New York, Aldine de Gruyter
- Simmonds N E (1986) *Central Issues in Jurisprudence: Justice, Law and Rights*, London, Sweet and Maxwell
- Singleton N, Meltzer H and Gatward R (1997) *Psychiatric Morbidity among Prisoners in England and Wales* London, Office for National Statistics
- Smith D (2002) 'Crime and Life Course' in Maguire M, Morgan R and Reiner R (eds.) (3rd ed.) *The Oxford Handbook of Criminology* Oxford, Oxford University Press
- Smithies E (1982) *Crime in Wartime: A Social History of Crime in World War II* London, George, Allen and Unwin
- Solomka B (1996) 'The Role of Psychiatric Evidence in Passing 'Longer Than Normal' Sentences' *Journal of Forensic Psychiatry* 7 (2) 239-255
- Sparks R (1992) *Television and the Drama of Crime: Moral tales and the place of crime in public life*, Buckingham, Open University Press.
- Stenson K and Sullivan R (2001)(eds.) *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* Cullompton, Willan Publishing
- Stevens R (1993) 'Changes in Sentencing: Back to the Drawing Board' *Justice of the Peace* 157 (46) 724-726
- Stone N (1992) 'Pre-sentence Reports, Culpability and the 1991 Act' *Criminal Law Review*, 558-567
- Stone N (1994a) 'Puzzling Section 29(1)' *Probation Journal* 41 (1) 23-26
- Stone N (1994b) '1991 and All That' *Probation Journal* 41 (4) 215-218
- Straw J (1996) *Honesty, Consistency and Progression on Sentencing* Labour Party, London
- Sutherland E (1937) *The Professional Thief*, Chicago, University of Chicago Press

- Szasz T (1993) 'Curing, co-ercing and claims making - a reply to critics' in *British Journal of Psychiatry*, Vol. 162:797-800.
- Tata C (1997) 'Conceptions and Representations of the Sentencing Decision Process' *Journal of Law and Society*, Vol 24, 225-276
- Tata C and Hutton N (1998) 'What 'Rules' in Sentencing? Consistency and Disparity in the Absence of 'Rules'', *International Journal of the Sociology of Law*, Vol 26, 339-364
- Taylor I, Walton P and Young J (1973) *The New Criminology*, London, Routledge and Kegan Paul.
- Taylor Lord (1993) 'Judges and Sentencing' *Journal of the Law Society of Scotland* 129
- Taylor R S (1960) 'The Habitual Criminal: Observations On Some Of The Characteristics Of Men Sentenced To Preventive Detention' *British Journal of Criminology* Vol. 1 No. 1 21-36
- Teubner G (1986) 'The Transformation of Law in the Welfare State' in Teubner G (ed.) (1986) *Dilemmas of Law in the Welfare State*, Berlin, Walter de Gruyter.
- Thane P (1996) *Foundations of the Welfare State* London, Longman
- Thomas D A (1978) *The Penal Equation: Derivations of the Penalty Structure of English Criminal Law* University of Cambridge Institute of Criminology, Cambridge
- Thomas D A (1979) (2nd Ed.) *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division*, Heinemann, London
- Thomas D A (1982b) 'The Justice Model of Sentencing - Its implications for the English Sentencing System' in Thomas D A (ed.) (1992a) *The Future of Sentencing* Institute of Criminology, University of Cambridge
- Thomas D A (1992) 'The 1991 Criminal Justice Act: (1) Custodial Sentences' *Criminal Law Review*, 232
- Thomas D A (1996) 'Longer Than Commensurate Sentences' *Archbold News* Issue 5, June 4, 5-8
- Thomas D A (1982a) (ed.) *The Future of Sentencing* Institute of Criminology, University of Cambridge
- Thorpe D H, Smith D, Green C J, Paley J (1980) *Out of Care* London, Allen and Unwin
- Tierney J (1996) *Criminology: Theory and Context* Hemel Hempstead, Prentice Hall, Harvester Wheatsheaf,
- Timasheff N S (1939) 'The Treatment of Persistent Offenders Outside of the United States' *Journal of Criminal Law and Criminology* Vol. XXX, 455-469

- Tonry (1998) 'Interchangeability, desert limits and equivalence of function' in von Hirsch A and Ashworth A (eds) *Principles Sentencing: Readings on Theory and Policy* (2nd ed) Oxford, Hart Publishing
- Tonry M (1994) 'Proportionality, parsimony and interchangeability of punishments' in Duff A, Marshall S, Dobash R E and Dobash R P (eds) *Penal Theory and Practice: Tradition and innovation in criminal justice* Manchester, Manchester University Press
- Van Ness D W (1995) 'Anchoring Just Deserts' *Criminal Law forum* 6 (3) 507-517
- Von Hentig H (1948) *The Criminal and His Victim* New Haven, Yale University Press
- Von Hirsch (1976) 'Deservedness and Dangerousness in Sentencing Policy' *Criminal Law Review*, 79
- Von Hirsch A (1993) *Censure and Sanctions* Oxford, Oxford University Press
- Von Hirsch A and Ashworth A (1996) 'Protective Sentencing Under Section 2 (2) (b): The Criteria For Dangerousness' *Criminal Law Review*, 175-183
- Von Hirsch A (1986) *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*, Manchester, Manchester University Press.
- Von Hirsch A, Bottoms A E, Burney E and Wikström P-O (1999) *Criminal Deterrence: An Analysis of Recent Research* Oxford, Hart Publishing
- Walker M (ed.) (1994) *Statistics of Crime* Oxford University Press, Oxford
- Walker N (1982) 'Unscientific, Unwise, Unprofitable or Unjust? The Anti-Protectionist Arguments' *British Journal of Criminology* Vol. 22, No.3 pp276-284
- Walker N (ed.) (1996) *Dangerous People* London, Blackstone Press
- Walker N D (1983) 'Protecting People' in Hinton, J. W. (ed.) (1983) *Dangerousness: Problems of Assessment and Prediction* London, George, Allen and Unwin.
- Walker N, Hammond W and Steer D (1970) 'Careers of Violence' in Oxford University Penal Research Unit, Occasional Paper Number One *The Violent Offender - Reality or Illusion?* Basil Blackwell, London
- Wasik M (1992) 'Rethinking Information and Advice for Sentencers' in Munro C and Wasik M (eds.) (1992) *Sentencing, Judicial Discretion and Training*, Sweet and Maxwell, London
- Wasik M (2001) *Emmins on Sentencing* London, Blackstone Books
- Wasik M and Taylor R (1994) (2nd ed.) *Blackstone's Guide to the 1991 Criminal Justice Act* Blackstone Press, London

- Wasik M and Turner A 'Sentencing Guidelines for the Magistrates' Courts' *Criminal Law Review*, May 1993, 345-356
- Wasik M and Von Hirsch A (1990) 'Statutory Sentencing Principles: The 1990 White Paper' *52 Modern Law Review*, 508
- Wasik M and Von Hirsch A (1994) 'Section 29 Revisited: Previous Convictions in Sentencing' *Criminal Law Review*, 409
- Webb S and B (1922) *English Prisons under Local Government* unpublished special edition - British Library
- Wesson A M (1994) 'You Have Got to Be Serious' *Justice of the Peace and Local Government Law* 158 (4) 53-54
- West D (1963) *The Habitual Prisoner* MacMillan & Co., London
- Wikström P-O (1991) *Urban Crime, Criminals and Victim: The Swedish Experience in an Anglo-American Comparative Perspective* New York, Springer Verlag
- Wilkins L (1964) *Social Deviance* London Tavistock
- Williams K (1997) (3rd ed) *Textbook on Criminology* London, Blackstone
- Wilson H (1980) 'Parental Supervision: A Neglected Aspect of Delinquency' in *British Journal of Criminology*, 20
- Wilson J Q (1975) *Thinking About Crime*, New York, Basic Books.
- Windlesham Lord (1988) 'Punishment and Prevention: the Inappropriate Prisoners' *Criminal Law Review* 140
- Windlesham Lord (1993a) *Responses to Crime (vol. 2): Penal Policy in the Making* Clarendon Press, Oxford
- Windlesham Lord (1993b) 'Life Sentences: Law, Practice and Release Decisions, 1989-1993' *Criminal Law Review*, 644
- Windlesham Lord (1996) *Responses to Crime (vol. 3): Legislating with the Tide* Clarendon Press, Oxford
- Wolfgang M (1958) *Patterns in Criminal Homicide* Philadelphia, University of Pennsylvania Press
- Wood D (1988) 'Dangerous Offenders and the Morality of Protective Sentencing' *Criminal Law Review* 424
- Woolf Sir H (1991) *Prison Disturbances, April 1990: report of an Inquiry (with Judge Tumin)* HMSO, London
- Zedner L (1991) *Women Crime and Custody in Victorian England* Oxford, Clarendon Press

Zedner L (2002) 'Victims' in Maguire M, Morgan, R and Reiner R (eds.) (3rd ed.) *The Oxford Handbook of Criminology* Oxford, Oxford University Press

Zimring F E and Hawkins G (1995) *Incapacitation: Penal Confinement and the Restraint of Crime* New York, Oxford University Press