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# Children Talking about Justice and Punishment

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RICHARD SPARKS, EVI GIRLING & MARION SMITH
*Keele University*

## Introduction

In this paper we aim to show how our recent research on nine year-old children's talk about justice and punishment might inform current public policy debate in criminal justice, social work and education. In fact this research was not in the first instance driven by immediate policy questions. Rather our starting points were primarily theoretical and empirical. We began from a concern to extend certain debates in the sociology of punishment about the ways in which the 'sensibilities' (Garland, 1990) towards punishing characteristic of a given community or political culture are communicated and socially shared. We set out certain aspects of this theoretical background shortly. For reasons that we hope will become clear we took as a starting point the view that perspectives on childhood, and more specifically the perspectives *of children themselves*, were a key element in understanding the questions of transmission and change in penal culture, yet a relatively unexamined one. We resolved at an early point that the best means of grasping these perspectives was through a series of conversations and debates with groups of children. Below we also summarize aspects of this methodological strategy. The dangling question would therefore seem to be (something like): in what ways can a study of children's talk (one that is self-admittedly driven by conceptual interests and empirical curiosity at least as much as by problem-solving or reformist agendas) inform policy discussion?

The answers to this question turn out, we suggest, to be by no means as oblique as they might seem. We are given to understand that we now live in a time of 'evidence-led' policy. That term recurs frequently in ministerial pronouncements and government consultation documents, and in injunctions and invitations to academics to involve themselves in policy formulation and to bid for research monies. It has also been the case in recent years that the needs, interests and capacities of children have been amongst the most intensely debated fields of social policy, perhaps especially in respect of criminal justice and penal policy. There have been sweeping changes affecting, *inter alia*, the question of children's criminal responsibility, the powers avail-

able to the Youth Court, the expectations laid upon professionals working in the youth justice system and the organizations and settings within which they are to deliver their services. Moreover, many of these revisionary changes have been premised upon an insistence that the new order of things will be better able to *communicate effectively* with children (but to communicate *what* exactly?) and that their predecessor bodies, rules, court orders and ways of working have been failing in these communicative tasks. In other words the question of penal communication, especially with regard to children, young people, their families and communities, has assumed a position close to the heart of policy and debate and has, moreover, been invested with an uncommon weight of ideological passion and significance. How and why has this come about? And with what consequences for the tenor of criminal justice and penal policy? We might suggest at the outset, insofar as the relevance of our own study is concerned, that in all matters touching children's welfare, and perhaps especially those concerning their moral and educational well-being, children's own perspectives provide a crucial form of 'evidence'. This much seems uncontentious. But just how are those perspectives to be accessed, recorded, interpreted and taken into account? Before turning to the arena of the new youth justice we begin by outlining our methods of initiating and analyzing conversations with children about justice and punishment; and we give a brief demonstration of the kind of evidence that these procedures produce.

## I. Talking with children about punishment

Like many research projects ours began with mixed feelings of curiosity, puzzlement and dissatisfaction. We had formed the view that while children were much discussed whenever questions of rules, sanctions and penalties arose, and whilst immense practical effort (in both formal/institutional and informal/familial settings) was devoted to relevant aspects of their moral education, the views and responses of children themselves on these matters occupied a distinctly subsidiary position in the debates. The latter group of questions has become if anything more salient during the lifetime of the research as discussion has developed around the position of children *vis a vis* such matters as restorative justice/mediation, citizenship education and so on. Yet it seemed to us that there remained a prior set of questions regarding children's positions and understandings in respect of crime, justice and punishment to be addressed in order for such discussion to proceed on an informed and intellectually defensible footing. How, we have asked, do children relate to the world of adult authority and rule-making in respect of criminal justice or school and familial disciplines? What conceptions of

rules and penalties are active and meaningful for them, and what images of institutions and practices (of prisons, for example) figure in their discourse?

Whilst we take the practical bearing of this work to be potentially quite considerable, our primary contributions are in the first instance empirical (in that we set out to explore a relatively poorly documented universe of discourse), methodological (in that we sought to develop a rigorous and analytically intensive approach to that exploration) and theoretical. We report the principal dimensions of our *methods* and *results* below. First, however, a few words by way of clarification of the *theoretical* contribution of this work are in order.

Students of penality, we argued in proposing this research, have increasingly begun to emphasize the *cultural* dimensions of their topic. That is, as well as studying the practical effects (successes, failures, costs, benefits, intended and perverse outcomes) of the application of penal measures (roughly speaking the traditional domain of the discipline of penology) scholars have also posed questions about the involvement of the penal realm in political culture – in the formation of world-views, dispositions towards order and authority, changing understandings of the legitimate scope of the state and what is tolerable or otherwise in its name and so on.

One influential attempt to come to terms with the position of punishment in contemporary culture is Garland's (1990) account of penal 'sensibilities' (discussed in more detail in Smith et al., 2000). Garland uses this term to denote the ways in which historically specific 'feelings, sensibilities, behavioural proprieties and values' (1990, p. 197) have a 'determinative capacity' in shaping our basic dispositions towards what we take to be tolerable, plausible or otherwise in responding to breaches of social and legal rules or expectations. Garland and other analysts have provided numerous discussions of the ways in which the circulation and contestation of penal discourses have served to locate, shift or reproduce the social meanings of punishment. In our view, however, such analyses had not in general given sufficient attention to the special significance of children and childhood. Although the 'cultural turn' in the sociology of punishment expressly raises the problems of societal reproduction and change it has not much examined what is also entailed in the uses of such terms, namely their transmission, assimilation or subversion across time and in the context of relations between the generations. If we are to take seriously the project of accounting for changing societal sensibilities towards punishment, therefore, we need to explore how children relate to the world of adult authority, rule making and rule breaking in respect of criminal justice, school and familial disciplines. If, that is to say, one overarching aim of a research programme such as *Children 5–16*[1] is to discover what is at stake in 'growing into the twenty-first century' one question that can

usefully be addressed is 'what sort of *penological* world is that?'. How do the practices and justifications that characterize the penal realm look from the vantage point of children – i.e. those subjects of penality who at present stand on the threshold of assuming its burdens of legal responsibility and the entitlements and obligations of citizens?

We thus saw as our primary task the need to produce an account of children's penal sensibilities that was as faithful as possible to their discursive and cultural complexity. This would entail a detailed account of the ways in which the categories, distinctions and evaluations that compose the penal realm are received, responded to and deployed amongst children. By posing these questions our research has begun to focus on considering the children's positions within certain 'cultures' of punishment. These concerns dovetailed into a number of alluring methodological and theoretical issues for criminology, and for the sociology of punishment in particular, a key aspect of which has been to bring the discussion in those disciplinary arenas into closer dialogue with the concerns of the new social studies of childhood. For us the methodological concerns stipulated by such a research agenda have been particularly salient, and we therefore discuss these in some detail below.

*Methodological and ethical concerns*

*Methodological innovation and the sociology of punishment*
The attempt to generate methodological innovation and development has been an intrinsic part of our research aims, one that is moreover not sharply separable from our theoretical concerns. As we have noted above the political sensitivity of penal questions is part-and-parcel of the intensification of research interest in penality. Within the growing body of sociological analyses of penal politics and public discourse the question of 'public opinion', and in particular its apparent disposition towards 'punitiveness' looms large. In the main the interrogation (and querying) of such popular responses has been conducted via public opinion polls and surveys, and these have focused overwhelmingly on adults (see further Smith et al., 2000). Whilst some of this work is quite sophisticated and insightful (for the best and most influential example of work in this vein see Tyler and Boeckmann's (1997) discussion of public responses to 'three strikes' statutes in the United States) there has to date been both a methodological and a substantive restriction. Methodologically the question arises as to whether the survey method alone can broach the dimensions of social context, language and shades of symbolic meaning implied by the notion of penal 'sensibilities'. Substantively the exclusive focus on adult responses to crime and punishment leaves to one side the issues of cultural transmission and induction that we have iden-

tified as significant. For us the study of sensibilities towards punishment needed a distinct injection of 'methodological energy' and re-imagining. In the context of this research this has meant the twin tasks of (i) seeking to give proper attention, for reasons outlined further below, to the detail and dynamics of conversation (or what Duranti (1997) terms the 'ethnography of speaking') and (ii) conducting those conversations with children rather than adults. Put slightly differently, we have been concerned to consider children as what Sasson (1995) calls 'everyday orators', and it is increasingly apparent that the study of people's 'everyday orations' is central to the task of grasping the meanings-in-use of criminological and penological issues.

*Methodological quandaries*

One possible way to find out what children think about moral and penal issues is to ask them. However, such a straightforward approach faces a number of methodological quandaries. First, children are used to being asked questions by adults, and in their experience such questions usually have a 'right' and a 'wrong' answer, and there is usually some consequence attached to whichever answer is given (see Edwards and Westgate, 1994). Children, who necessarily spend a large proportion of their daily life in the classroom, know that when adults ask a question they usually do so having a particular answer in mind that they want the child to reproduce for them.

A second and related problem is that any adult who wants information from a child appears (to the child interviewee) to be in the position of greater power, authority and knowledge. This could have a range of effects in the children's responses to our questions from inhibition to bravado. The quandaries of child – adult relationship in interviews exacerbated a third more general methodological problem. If you ask a discrete question, you are likely to get a decontextualized answer. In other words the questioner is unlikely to know *how* the child arrived at that answer, what factors he or she took into consideration, whether part of the question appeared more salient to them and so swung the answer in a particular direction, and what status the question or the answer has for the child. A discussion, rather than a question and answer session might resolve some of these concerns. Questions may call forth opinions and a display of factual information. While this is interesting in itself, what we really wanted to study are *sensibilities*, cultural forms that have some degree of shared discursive availability. We wanted to see how the children make use of them – and the way to do this would be to catch the children's arguments about justice, punishment, fair treatment etc actually *being constructed* through talk.[2]

It is in the children's talk that we hope to find the collective reactions that will show us what are the givens in the moral/penal world of these nine year olds (cf. Romaine, 1984; Bennett-Kastor, 1988). Talking is an inherently social activity: it is simultaneously a resource for social interaction and the product of it. Duranti (1997: 21) stresses the "social, collective, and distributed quality of speaking" – it is a shared endeavour and the achievements or outcomes of the encounter are jointly – hence socially – constructed. By paying close attention to linguistic features of the conversations (aspects of vocabulary, turn-taking, directness and indirectness of expression, types of speech act, uses of silence etc.) we can inform our understanding of the ideational processes at work.

In the course of our research we visited three different primary schools, two in Macclesfield in Cheshire and one in Biddulph in North Staffordshire. After obtaining consent from the parents, head teacher and class teachers we spoke to more than 150 eight and nine year old children in groups of four in half an hour to an hour sessions. The groups were roughly divided into single-sex and mixed sessions. The conversations took place in the schools but away from the children's classrooms and teachers in a private comfortable room. The discussions were tape-recorded, and subsequently transcribed.[3]

We tried a number of different stimuli (computer animations, direct questions, short scenarios) to start the discussions off. We felt that one of our scenarios was particularly well suited for our methodological and theoretical research interests and we adopted it for the majority of our focus groups. This was a short story-like introduction in which the children were invited to imagine waking up one morning to find that all adults had disappeared. It is a world of young people, and they can behave and arrange things how they like. Most crucially, it remains *their* world, the environment and material infrastructure remain the same. This is not a 'Lord of the Flies' scenario; the trappings of society are all still there, but it is for them to order and regulate it, if they so choose. They are told that they can expect the adults to reappear at some point in the future, so there is a definite sense in which they are the guardians of society. The scenario is flexible: the children can comment on the real world of their experience while they deliberate on the hypothetical young people's world. Most groups of children embraced this challenge enthusiastically and imaginatively, and a lively discussion ensued, moving back and forth between mundane and imagined concerns.

*Results*

*Punishment and the condition of childhood: Dreams and nightmares*
Through this scenario we invited the children to 'take the world insunder' (in Hobbes's phrase). In their responses we begin to unravel their view of this adult world – what keeps the world together or alternatively what threatens to pull it apart. For example, 'teenagers', who for many decades have populated the fears of middle England, are also a source of wonder, fear and 'trouble' in the adultless world. The children talked at length about the need for 'fair distribution' of scarce resources – and it was in these discussions that 'rule-breakers' were first identified. Most of the children acknowledged responsibility to those 'weaker' than them (babies, pets etc) but also were profoundly aware of their vulnerability as 9 year olds to the might and whims of 'the teenagers'. In certain respects, therefore, the 'troubles' that the children identified resonated with adult concerns about fighting, graffiti, smoking, stealing and drugs. They were adept at identifying 'signs of disorder' which are part of our cultural repertoire about crime and 'troublesome others'.

Inviting children to deliberate about sanctions and penalties has revealed salient aspects of their social situation. In their response to the 'adultless world' scenario it is sometimes the heady prospect of exercising power that comes to the fore. The fun that inheres in turning the tables and taking possession of an arbitrary and untrammelled power may well be indicative with regard to children's experiences of what punishment is. At the same time there is a persistent sense of vulnerability. The adultless world often also conjures prospects of running, hiding, locking oneself in. In most of our conversations the exciting but alarming and anarchic prospects of the adultless world soon give way to more deliberative discussion of what is proper, legal or feasible. For example, questions of capital punishment or the infliction of physical pain lead directly to a central and abiding dilemma (which is not just a child's dilemma) about how one punishes without being bad oneself. In the following brief example four girls begin to confront this issue:[4]

    **Ad2:** So what will you – what what can you do with the children who break the rules?
    **Ella:** Get a (note of) them so all the police knows (what they do)
    **Zena:** I know.
    **Kay:** Get rid of them.
    **Ad2:** How would you get rid of them?
    **Zena:** I know.
    **Kay:** I'd shoot them with guns.
    **Anne:** But that's being bad as well, ain't you?

**Ella:** No, that's even- you're killing people, you're the one that's being worse=

**Kay:** =Me!=

**Zena:** ((Laughs))

**Ella:** =You're the one that's being bad if you're killing somebody

**Kay:** She's calling me bad!

**Zena:** ((Laughs))

*The prison as a key symbolic site of punishment*

In children's – as in much adult – talk about punishment the prison remains a focal image. It is the institution that springs most readily to mind when punishment is discussed, and it is one that can be pictured and described in certain definite ways. Once the use of violence had been discounted (albeit that it was not *always* discounted: see further Smith, 2000) it is often some form of confinement that next presents itself for consideration. As Garland (1990, p. 196) reminds us prisons can be ways of "saying things with walls". What kinds of things are the children saying with these walls?

*(a) the 'intimacy' or familiarity of prisons:* Children's talk about prisons reminds students of penality that 'prisons' are real, culturally intimate and familiar places (see also Duncan, 1996). The children spoke with a characteristic readiness about prisons – they described prisons with an immediacy and fine level of detail, mostly of 'built-in' discomfort. Children can envision the smells and sounds of prisons, and they can envisage planning prisons.

*(b) the persistence of less eligibility:* The regimes of prison, the preponderance of rules, the rations were frequent topics of conversation amongst the children. Discussion of 'regimes' that would make prison life bearable were interrupted by calls for 'austerity' – 'not too comfortable' beds, 'not too big rooms', 'only porridge and lettuce'. Such concerns and debates (as Sparks (1996) and others have argued) have profoundly shaped the historical development of penal institutions and the characteristic features of their regimes. The appearance of these themes in the children's talk is suggestive of their continuing effectivity and ideological weight in contemporary penal culture.

*(c) time and prisons: nostalgia and futurology:* There is a certain excitement in discussing the restriction of others' liberty against their will. We have shown that the children (like other penal commentators, including some of our more populist politicians) are able to draw on a large repertoire of images and precedents to dress out the carceral space that they envision. Simon (1995) argues that appeals to a nostalgically imagined past have a special place within present-day penal discourse, especially *vis a vis* the appeal of

what would appear from the vantage-point of rationalist criminology to be 'anachronistic' sanctions, such as curfews, boot camps and capital punishment. We think that our data provides some support for this thesis and that these aspects of the children's talk provoke further reflection on the imaginative pull of certain popular images of order and security in contemporary political culture. At the same time when they discuss *how* one goes about restricting liberty (an exciting but sometimes disconcerting topic) the imaginative repertoire of images on which the children draw also frequently includes science-fiction scenarios, sometimes with a filmic or video-game quality. For example one group of boys envisioned 'cobwebs', 'darkness' and 'rusty bars' but also 'laser beams across the doors'. One mixed group imagined a prison with a 'massive force shield' around it. We term this aspect of the children's diction 'laser dungeons'. One might argue that the laser dungeon belongs to a scary and dystopian future world, yet it is also in a quite strong sense an *archetypal* prison.

### Stock phrases and 'short, sharp words'

One of the more striking features of the children's penal discourse (and for reasons outlined above we take this to be one of the main advantages of studying the cultural significance of punishment from the perspective of conversation) was the recurrence of certain 'stock' expressions – formulae that came readily to hand as 'easy' or 'obvious' responses. Some of these, especially those that we characterize as 'short, sharp words', relate primarily to imprisonment: 'lock them up', 'throw away the key'. Others had mainly historical resonances: 'behead them', 'banish them', 'let them rot'. This might seem to reflect a general tendency of penal discourse to reduce to slogans ('Prison Works!'). At the same time some expressions record the traffic between penological diction and other domains of practice and experience including such mundane and familiar ones as education ('teach a lesson') and sport ('three strikes and you're out'). What is at issue here, we suggest, is the sense-making force of such homely and everyday associations in rendering whatever is being posited at the time seem natural and self-evident.

However some 'stock' phrases were much more open and ambiguous in application. One of these, which we have found particularly provocative, is 'teach them a lesson'. We have spent some time and effort teasing out what is meant in the children's conversations by this term. This is undoubtedly for them an aspect of 'common sense', yet it turns out to be neither obvious nor unambiguous (see further Smith et al., 2000). Teaching lessons is what children primarily take punishment to do, but precisely what this entails (and, for example, whether it is a deterrent, corrective or rehabilitative lesson that

one learns) is a topic that repays close examination, and whose relevance is not confined to work on or with children. On some occasions the lesson consisted in hard treatment – a bitter experience that one would not wish to repeat. Sometimes it means 'more of the same' – if a person repeats their offence put them in prison *for a longer time*. Alternatively the lesson can be something much more like a school lesson, involving book-learning and tests – we prove we have 'learned our lesson' by passing an exam. But sometimes the lesson refers to something more personal and challenging – a change of heart or outlook associated with coming to understand another's hurt. On these occasions the lesson becomes something that is about talking rather than confining or depriving – it involves 'Telling them what they've done and how everyone feels'; 'like a private conversation . . . and have really, really strong words with them' and other attempts to communicate, and to gauge how the other is feeling or responding. For example, one girl observed:

> Even though they're, like, nasty people, I would still like to help them as much as possible . . . so that he would become, like, more better and then when he's done that, he might learn a lesson and then he might, erm, that person might start to become like us and try and help other people.

These are more complex responses, and often more tentatively expressed. They are less generic in character than many initial responses. They require an offender whom you can picture as another individual, one with whom you might converse on serious subjects.

*Lessons we have learned*
The implications of these results (the lessons *we* have learned from them) do seem to us to be fairly substantial. First (and this is in part to reiterate our methodological argument) there are aspects of mobilization of penal terms, images and ideas that are best grasped ethnographically and from the perspective of conversation; indeed some of these cannot really be disclosed in any other way. We hope thereby to have recovered some of the subtlety and semantic density of children's discourse from the condescension with which it (like indeed adult 'lay' understandings) is commonly treated in criminological and penological debates. At the same time the familiarity and concreteness with which certain institutions (prisons especially) are pictured, and the ease – and sometimes excitement – with which certain stock expressions and 'short, sharp words' are exchanged indicates the cultural embeddedness and 'obviousness' of established ways of thinking about punishing.

If we are to give guidance or encouragement to attempts to think otherwise about how societies address troublesome people and acts it is here

(in the bluntness and concreteness but also many-layered complexity and ambiguity of ordinary language) that we may have to begin. If we follow Henry and Milovanovic (1995) in regarding such ways of thinking otherwise as candidate 'replacement discourses', then their prospects for making headway (their 'life chances' as it were) would also seem to depend on their capacity to chime with some aspect of our sensibilities, to enter the realm of our moral common sense. Whilst the predominance of certain 'short, sharp words' in the children's talk and in the larger penal culture counsels caution in assessing the life chances of replacement discourses it is nevertheless also the case that there are resources within our penal language games (the importance of saying sorry, the possibility of picturing the offender as a real other being, the possibility of imagining oneself in their shoes) that disclose more optimistic prospects. The ways in which many children have come to understand the issue of bullying provides a case in point, as does the appearance in some of their deliberations of themes that are quite consonant with the principles of restorative justice. This is one of the reasons why we have devoted so much attention to the semantics of expressions such as 'teach a lesson'. Whilst its dominant interpretation may be that of classical deterrence it also enables other possibilities – those entailed in seeing the process of penological education as consisting in relations between real persons – which lead us on to new terrain. It is at this point, therefore, that we turn to consider – in however preliminary a form – some implications of our work for the current politics of youth justice and more particularly the prospects therein for children's participation and other possibilities for change.

## II. Talking with children about policy

As we indicated at the outset, whilst producing policy advice was not our primary objective at the inception of this research we have nevertheless come to believe that the implications of this work for practice are quite substantial. We should also at this point confess that such considerations were never entirely absent from our thinking. For example, our decision to undertake this work with nine-year olds was not accidental in view of the fact that it is on their tenth birthdays that they assume the burden of criminal responsibility in English law. Moreover, in light of the various controversies surrounding the presumption of *doli incapax*, leading to its eventual abolition in the Crime and Disorder Act 1998, that particular transition is likely to play a more fateful role in the lives of at least some children of this age than has hitherto been the case. In short, the questions of how the criminal justice system and other societal institutions communicate with children and of what it is

that they are supposed to communicate *about* have entered a phase of heated controversy, politicization and systemic change. How then can a programme of research such as ours speak to this altered and newly contentious environment?

The idea that punishment is a communicative arena is scarcely news to penal theorists. In most articulate conceptions of punishment it is presupposed that *something* (a message of reproof or censure; a deterrent warning; an offer of help on certain terms) is conveyed through the imposition of a sanction and its attendant homilies, admonitions and symbolic gestures. In at least some interpretations of these matters the issue of how a given community encapsulates its offended rules and values in penal form, and its effectiveness in transmitting these to the wayward citizen is regarded as pivotal to any justified form of penalty (see for example Duff, 1999). Neither is this any novelty from the vantage points of those charged in more practical ways with the administration of criminal justice, especially as regards children and young people. The detached youth worker, the police officer administering a caution, the youth court magistrate, the youth justice social worker, the probation officer and all other parties involved in this field have long known that relating, communicating and transmitting are part-and-parcel of their work, however differently they may have interpreted their tasks and whether or not the task has been articulated in quite those terms (see *inter alia* Pitts, 1999). Amongst the distinctive features of the current penal landscape, however, are: the fervent political investment in all matters touching the supervision, control and punishment of the young; the officially-stated view that the agents of the youth justice system have been *failing* in their communicative tasks and related responsibilities and the evident readiness of Government to legislate in order to ensure that these jobs are carried out to its greater satisfaction.

This is not the place for a proper exposition or critique of the new framework of policy on children and young people in trouble, nor for a descriptive account of that which it supersedes. Those tasks are already well in hand elsewhere (see for example Muncie, 1999; Goldson, 1999). Certain contextual remarks are, however, in order.

For much of the last two decades (but perhaps especially since around 1993), in Britain as in the United States, penal politics have assumed a central and increasingly impassioned place in public discourse and policy dispute. There are complex reasons in culture, ideology and political expediency why this should be the case and which exceed our scope here (see, for example, Garland, 1996, 2001; Sparks, in press; O'Malley, 1999). Suffice to note that in the process of the erosion and eventual collapse of the Conservative ascendancy in British politics and the assumption of power by New Labour in 1997

crime and punishment, and more especially the crimes and punishments of the young, played a very significant role. The battle for the hearts and minds of 'Middle England' between the main parties throughout the 1990s was fought in no small measure on this terrain. For the Tories the politicization of penal politics (especially after 1993 – the year, not coincidentally, of the Bulger murder, of Michael Howard's 'Prison Works' speech and other tumults) was, in John Gray's apt expression part of the 'endgame' (Gray, 1997). The Conservatives and Labour, and in particular the then Home Secretary Michael Howard and his shadow Tony Blair each mounted emphatic bids to capture the law and order issue. These bids – whatever their electoral intentions – can also be seen as competing bids for 'meaning making' in criminal justice. For the Conservative Home Secretary, Michael Howard, the slogan 'Prison Works' and its attendant legislative programme claimed justification both in the instrumental aims of incapacitation and deterrence and sought to target a fund of public anger and resentment to promote a view of richly merited severity. His Labour Shadow Tony Blair sought to recapture the issue on somewhat different terms. Blair's sound-bite 'Tough on crime, tough on the causes of crime' offered a rhetoric that juxtaposed the toughness on crime with a commitment to social reconstruction. This rhetoric was to become the cornerstone of New Labour criminal justice politics. Mr Blair had little difficulty in castigating the position of his Conservative opponents as posturing and belied by the failures of their record. But he also took the bolder strategy of distancing his party from its own former commitments, alliances and 'hostages to fortune' (Downes and Morgan, 1997). Is this merely another case of deploying the promise of firmness in criminal justice matters for electoral effect and hence, as some observers have alleged, a continuation of 'authoritarian populism' under a new guise? Youth Justice with its endless suspension between welfare and justice, care and control, child-centredness and fear and suspicion of children was to prove fertile ground for New Labour's slogan. New Labour repeatedly asserted that criminal justice, and more especially youth justice, was itself failing and in need of thoroughgoing reappraisal and reinvigoration.

Allegations of past failure are often a salient feature of projects aiming to seize and redirect political initiative. In the present case the seizure of the youth crime question provided a prime site for intervention. It connected with a series of failures: of political will and 'toughness', of societal determination to inculcate proper values, of families, and of an ossifying and complacent public sector. These allegations of failure crystallized around the notion of 'excuses'. In New Labour language such excuses (the alibis that a failing system provides for itself and the misplaced tolerance of bad behaviour that

it extends to young people) amount to a betrayal of the very people that the system exists ultimately to serve, namely the young themselves. Hence:

> An excuse culture has developed within the youth justice system. ***It excuses itself for its inefficiency and too often excuses the young offenders before it, implying that they cannot help their behaviour because of their social circumstances***. Rarely are they confronted with their behaviour and helped to take more personal responsibility for their actions. The system allows them to go on wrecking their own lives as well as disrupting their families and communities (Home Office, 1997c).

In this vision no distinction is allowed between the language of helping and that of 'confronting' and '*responsibilizing*'. The old dichotomy between toughness and care is abolished as obsolete and, moreover, as contrary to 'common sense'. What results is a juxtaposition of toughness and love (whereas the misguided 'tolerance' attributed to the exisiting youth justice system and its apologists is equated now with indifference, with excusing and with 'walking away').

Each of the New Labour proposals concerning young people and children was introduced in a vernacular of common sense – albeit a common sense which according to New Labour often finds support in research (mainly from across the Atlantic). This in some ways was the most potent vernacular of all: this was common-sense-research-driven-policy. Even the fundamental change in the doctrine of *doli incapax* was introduced in the language of common sense:

> The government believes that in presuming that children of this age generally do not know the difference between naughtiness and serious wrongdoing is contrary to common sense. (Home Office, 1997b, p. 12)

As for parenting orders the Home Secretary assured us 'this is not rocket science this is common sense'. The Crime and Disorder Act claims to talk to the children directly and it appeals to common sense to convince us that it knows how to speak to children: they are to know what it means when they get punished; the message is clear. That is why there has to be a 'common sense' element to the punishment – 'curfews', 'reparation orders', yellow cards, red cards:

> All of us parents know that if you are trying to get your kids to accept there are rules, it's not about belting them or being harsh, it's about being consistent. These kids think there are no consequences and they are right about that at the moment. So you do have a hierarchy, you give a warning, a yellow card. If you do it again there'll be a red card and you will be in court. The court will give you a non-custodial punishment but if you go

on like this we will have to lock you up. Not only in the interests of the community but in your interests.

(Home Office, 1997b)

Common sense is, famously, amongst the most powerful of all rationales for action. It lays claims both to robust realism and to morality. If I wish to intervene forcefully in your life I do so more effectively with common sense on my side. At the same time the invocation of common sense says: 'What I am doing now is unambiguously communicable. You *ought* to understand and comply. If you do not I will feel entitled to assume you are doing so wilfully'.

Here we rejoin the question of the implications of our data for the problem of penal communication with children. Many of the now-familiar items on the menu of interventions included in the Crime and Disorder Act 1998 and the Youth and Criminal Evidence Act 1999, we are arguing, partake of this striking self-assurance in the ready communicability of their messages. But can we so easily make this assumption? May there not be more effort of translation required in mediating between the official 'common sense' and that which children themselves can recognize and acknowledge? Or to put the matter differently again, if we seriously wish to engage with children, to enjoin them, to invite their comprehension and agreement may we not in fact have to find somewhat different terrain on which to do so?

These are for us very much open questions. They do not require us to take up a stance of flat rejection of the drift of recent policy. However, we do take the view that there are grounds for hesitancy in at least certain key respects. Children's responsible agency is in some sense a common thread amongst these diverse developments. But 'responsibility' can be read punitively (as in attributions of criminal liability), paternalistically (as in designations of children as needy and at-risk) or democratically (as an invitation for children to participate in decisions that affect their lives). In order to be considered successful many of the more innovative recent policy interventions *presuppose* an ability to engage with children and to enlist their participation and consent. But perhaps such 'success' cannot be presupposed or left unanalyzed. If we are to move beyond the old antinomies between 'punishment' and 'welfare' we may need something more strenuous than simple goodwill and preparedness to 'listen'. We need instead to think about the conditions under which children's deliberative participation can occur, and about the efforts of translation involved in mediating between children's and adults' frames of meaning.

We took some pains in our research to create conditions in which the children felt at liberty to speak openly, imaginatively and at length, with one another at least as much as with ourselves. It is questionable whether court rooms, police interview rooms, magistrates' courts and the rest could

in principle ever be comparable settings. Yet these are places in which hugely important constructions may be placed on the child's speech or silence. Moreover many policy innovations in criminal justice and elsewhere (consider the Scottish Children's Hearings or more recently some of the formats involved in 'restorative justice', 'family conferencing' and so on) rely upon the child's participation and 'voice'. We hope to have contributed to practice by indicating some of the ways in which children give voice to their moral sensibilities about punishing. We see a clear need for further research and reflection on these arrangements (and on more traditional ones) as *social settings and interactions*. What kinds of conversations are these? How is the child's voice solicited and interpreted?

**Conclusion**

Whilst it is quite clear that discoursing about punishment is something of lively interest to children and of which they are well capable, it is not so clear either that such discourse can in principle be unambiguous nor that the conventional institutions of criminal justice can be an appropriate site in which to attempt it. This may be a point of major significance. When we adjust criminal justice institutions in ways that purport to make their intended meanings clearer to children (by demanding that they speak, by requiring their consent to contractual conditions, for example) we may incur the risk of sacrificing some of the peculiar virtues of such institutions (their procedural propriety and associated legal protections of representation, proportionality and appeal) without really putting anything genuinely viable in their place. In this respect what Pitts terms the 'erosion of youth jurisdiction' (associated not simply with such obvious steps as the abolition of *doli incapax* but also with a wider de-formalization of norms and procedures) may be a significant source of risk to some children without in fact accomplishing the expected gains in communicative effectiveness.

By contrast it does now seem quite well attested that the creation of more fully appropriate discourse conditions (best practice in arriving at school-level anti-bullying strategies, for example) is sometimes both feasible and fruitful. Outside the imagination of criminal justice policy-makers 'responsibility' is not, so far as we can gather, a very meaningful notion to the under-tens and certainly not one that they themselves volunteer. But certain other, arguably more morally fundamental, ideas (teaching lessons, keeping promises, saying sorry, being fair) very much are. In recent work in Swansea secondary schools Haines et al. (1999) indicate that the priorities for the young people involved in designing a system of sanctions for misbehaviour were (i) fairness in application and (ii) 'a way back' for the offender. But,

Haines et al. further note, the *responsibility* for delivering fairness and the 'way back' was seen as lying firmly with the adults concerned.

Perhaps what we see here, arising both from our own work and that of others (Pitts, 1999; Haines et al., 1999) is really a version of a very old concern indeed, namely the conditions necessary for the legitimate operation of power. Legitimacy has its primary application to the actions and decisions of power-holders but relates to the needs and understandings of subordinates. In one influential recent conception (Beetham 1991) it is an aspect of all power relationships and includes three primary elements: (i) conformity with rules or norms (without which power may be said to be *illegitimate*); (ii) justification in terms of beliefs acknowledged by both the powerful and the subordinate (without which a *legitimacy deficit* may arise) and (iii) legitimation through expressed consent (without which a process of *delegitimation* may ensue, perhaps assuming critical proportions). In the absence of (iii) (opportunities for the open expression of consent or acquiescence) it may be difficult for the powerful even to know whether (ii) (recourse to justification in shared belief) applies or not. Moreover the absence of (ii) or (iii) need not always result in open revolt. Rather in particularly steeply hierarchical power relationships something closer to mute and ostensibly passive withdrawal may be more probable. This schema has been applied both to democratic and autocratic political regimes. It (or something very like it, cf. Tyler, 1990) has also lately been applied to criminal justice institutions, especially prisons (Sparks et al., 1996). Yet in many aspects of our relations with children we seem particularly immune to the need for this kind of analysis. Perhaps indeed our *presumption* that children not only understand but share our views and trust in the benevolence of our intentions is itself the measure of the extent of our power and their dependency. But the more we require from them not only compliance but also 'performance' (in the form of behavioural change, desistance from offending, meeting contractual conditions and so on) the more we expose ourselves to these exigencies. In sum, the more activist and interventionist the youth justice system becomes the less it can rely on its own common sense to guarantee its success. It cannot properly presuppose its inherent communicative efficacy. Rather it generates a need to ask what makes penal 'sense' to children, and to hear them when they answer.

**Notes**

[2] A 'focus-group' style discussion presented itself as having a number of merits addressing the range of problems that this research entails.

1) Several children together may experience themselves as more powerful in an encounter where they outnumber the adults.

2) Having two adults present may signal to the children that this is not the standard one-adult-to-many-children ratio experienced in school working groups.

3) The presence of two adults in the focus group also addressed recent concerns over the vulnerability of children and researchers in one-to-one settings.

4) In the group format it is not necessarily the adults who ask all the questions or introduce the precise topics that are discussed. The children can play an active part in shaping the discussion and in controlling where it goes. The children have to justify what they say to each other, and on each other's terms. They use their own shared knowledge and experience to draw in elements that help them make their point. They can participate in a jointly-constructed narrative, or pull each other up with frank disagreement, defining and regulating what others say and arguing out the why and wherefore.

5) The focus group format helps the contextualization problem. We can see the linguistic hinterland – what led up to it and what followed – of both the question, or issue under discussion, as well as the response or contribution. We can see how particular aspects of the discussion assume importance and the effect they have on what is said and how it is said.

[3] Obtaining the children's full and informed consent as participants in the research is a difficult issue in the sociology of childhood. On each occasion we gave a short account of our research interests to the children and emphasised that we really wanted to know what children like themselves thought about these issues. We asked for volunteers and once we were in the interview room we once again re-iterated our interests, explained who will be using the research, promised that all names and identifiers would be changed and offered to escort any children who did not want to take part back into the classroom – none of the children took our offer. They were reminded that they could go back to the classroom at any time and on one occasion a child chose to do so. At the end of each session the children were encouraged to ask questions about the session and our research and sometimes they did. The open discussion format of the focus group interview also meant that the children were able to ask us direct questions about our research and occasionally to ask us about our views on these issues.

[4] In this extract, as elsewhere, we use certain widely observed transcription notations. Text in single parentheses shows that the item was unclear and there is some doubt as to its accuracy. Text in double parentheses ((Laughs)) describes a non-verbal reaction. = denotes adjacent utterances with no discernable interval between them.

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