

# Youth Justice in the United Kingdom

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## Abstract

This paper sketches out some of the main themes and controversies that characterise approaches to youth justice in the United Kingdom. Historically, there has been a tension between approaches that prioritise the ‘welfare’ of children and young people in trouble with the law and those which advocate principles of ‘justice’ as essential legal safeguards ensuring the rights of children against arbitrary or disproportionate forms of punishment. The conflicts between these two approaches have structured much debate and while there are many question marks over whether the New Labour government, in power from 1997 to 2010, ushered in a new era of new youth justice, it is certainly the case that the numerous policies it has introduced have been a bewilderingly complex and uneasy mix. They range from the punitive and criminalising to more inclusionary and restorative based practices.

## 1. Introduction

The measures introduced by the New Labour government in the field of youth justice in the UK include the setting up of the Youth Justice Board, the creation of Youth Offending Teams, and the restructuring of the non-custodial penalties available to the youth court (including elements of restorative justice) that have intensified community programmes in some quite innovative efforts to reduce offending.<sup>1</sup> At the same time, the Labour government vigorously pursued a campaign against antisocial behaviour, which some argue was virtually invented by New Labour,<sup>2</sup> and has seen ‘a ninefold rise in the number of children under 15 being sentenced to custody’.<sup>3</sup> More recent figures have shown that the number of 15-17 year olds in prison has more than doubled in the last ten years.<sup>4</sup> Overall, then, the myriad developments in youth justice

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<sup>1</sup> R. Morgan and T. Newburn, ‘Youth Justice’ in M. Maguire, R. Morgan and R. Reiner (ed.), *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 2007), 4th Edition, pp. 1047-1052.

<sup>2</sup> M. Tonry, *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy* (Cullompton: Willan, 2004).

<sup>3</sup> M. Bright, ‘Youth hit hardest by wave of new laws’, *The Observer*, 13th April 2003, p.9.

<sup>4</sup> Prison Reform Trust, *Bromley Briefings: Prison factfile November 2006* (London: Prison Reform Trust, 2006), p.21.

policy must be situated in this broader picture of penal expansion, which is starkly illustrated by the sharp rise in child prisoners.

Although some have suggested that the conflicts between ‘welfare’ and ‘justice’ approaches belong to an era that has now passed,<sup>5</sup> I want to argue that the underlying assumptions informing each approach can have a significant impact on efforts to develop a ‘rights-based agenda’ that challenges the criminalization of children and young people.<sup>6</sup> I will begin with putting these approaches in context, then give some snapshots of contemporary practices before concluding with some of the problems and prospects surrounding the realisation of rights in these settings.

## 2. Welfare, Justice and Rights

Applying the full force of the criminal law to children and young people has long been held to be controversial. In the United Kingdom the age of criminal responsibility is ten in England and Wales (in Scotland it is eight, owing to a rather different juvenile justice system<sup>7</sup>). This is unusually low in contrast to the rest of Europe where in Denmark and Scandinavia the age of criminal responsibility is fifteen, while in Germany it is fourteen and France it is thirteen.<sup>8</sup> This has given rise to a series of questions over the extent to which children can be held responsible for their behaviour in criminal law – and if they are held to be accountable, then why should prison be the place to deal with their offending? It is partly in response to these kinds of concerns that welfare approaches initially developed to divert children away from the criminal justice system toward more ‘treatment’-oriented programmes that recognise the vulnerability of children and young people.

Indeed, one of the defining characteristics of youth justice throughout much of the twentieth century has been the unshakeable faith in the virtues of welfare. In youth justice, welfare is based on the assumption that intervention should be on the basis of meeting young people’s *needs* rather than punishing their *deeds*.<sup>9</sup> In the immediate post-war decades of the 1950s and 1960s, welfare policies were supported by both Labour and Conservative governments. Youth crime was

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<sup>5</sup> See B. Hudson, *Justice through Punishment* (Basingstoke: Macmillan, 1987) and R. Smith, ‘Actuarialism and Early Intervention in Contemporary Youth Justice’ in B. Goldson and J. Muncie (ed.), *Youth Crime and Justice* (London: Sage, 2006).

<sup>6</sup> P. Scraton and D. Haydon, ‘Challenging the Criminalization of Children and Young People’ in J. Muncie, G. Hughes and E. McLaughlin (ed.), *Youth Justice: Critical Readings* (London: Sage, 2002) and E. Carrabine, ‘Punishment, Rights and Justice’ in L. Morris (ed.), *Rights: Sociological Perspectives* (London: Routledge, 2006).

<sup>7</sup> L. McAra, ‘Welfare in Crisis? Key Developments in Scottish Youth Justice’ in B. Goldson, B. and J. Muncie (ed.), *Youth Crime and Justice* (London: Sage, 2006). The Scottish system of juvenile justice, with its commitment to welfarism, has historically provided a strong contrast to the approaches favoured south of the border. Since 1971 the ‘children’s hearing system’ (based on what became known as the Kilbrandon philosophy) was organised around the principle that the criminalization of children should be avoided wherever possible, while advocating early and minimal intervention to meet the ‘best interests of the child’ as the primary concern in all decision making. Recent years though have seen punitive politics recast Scottish juvenile justice, though ‘this process has been more recent and arguably less dramatic than the changes that have refashioned youth justice in England and Wales’ (Morgan and Newburn, ‘Youth Justice’, p.1029. See fn.1).

<sup>8</sup> R. Morgan, ‘Children and Young Persons’ in Y. Jewkes (ed.), *Handbook on Prisons* (Cullompton: Willan, 2007), p.208.

<sup>9</sup> J. Muncie, *Youth Crime: A Critical Introduction* (London: Sage, 2004), 2<sup>nd</sup> Edition, p.257.

understood to be a symptom of deep-seated social and psychological problems, such as poor housing, dysfunctional families, damaged personalities and so on.

However, these attempts to ‘decriminalise’ youth crime –in other words, to take it out of the hands of magistrates, lawyers and the police, and put it in the hands of psychologists, social workers and youth workers – met with strong resistance from the legal establishment and the probation service.<sup>10</sup> Criminologists had also been critical of welfarism as they argue that behind the talk of benevolence and humanitarianism there is the denial of legal rights that actually encourages greater state intervention.<sup>11</sup> In particular, young women and young children are supposed to be at greater risk than young men so that ‘wayward girls’ have found themselves committed into local authority residential care without actually having committed any offences at all.<sup>12</sup>

The 1970s mark a crucial turning point, when many of the fundamental assumptions underpinning welfarism came under sustained attack from all shades of the political spectrum. The call that we ‘return to justice’ came from both left (who saw welfarism as an erosion of civil liberties) and right (who viewed it as ‘soft and ineffective’). Critics argued that children’s legal rights were inadequately protected under welfarism on both theoretical and practical grounds. Theoretically, it was never possible to identify which criteria should count as acting in a child’s ‘best interests’, for too often, it was argued, a ‘rhetoric of therapy’ is used when ultimately ‘what is being exercised is a very subtle form of social control’.<sup>13</sup> Practically, the ‘return to justice’ movement argued that welfarism abandons important legal and judicial safeguards and thus leaves children and young people susceptible to the discretionary powers of professionals.

In addition, there was the explicit demand in the ‘return to justice’ movement that all offenders must be held responsible and punished for their criminal actions, no matter what their age. The implication was that the ‘measures imposed on children should be offence- (rather than child-) orientated and that children can, therefore, be legitimately punished for what they have done’.<sup>14</sup> Initially, the implication was that only in a system where children are punished for what they have done can their rights best be protected. However, as the 1970s progressed, welfarism was further undermined by a punitive ‘just deserts’ turn in criminal justice policy generally which was intent on punishing the offence rather than meeting the individual needs of the offender. It became obvious that a process of bifurcation, or a ‘twin-track approach’,<sup>15</sup> was occurring in that custodial sentences increased for serious juvenile offenders while the use of cautions was adopted for less serious offenders.

The election of a Conservative government in 1979 that took a pledge to ‘stand firm against crime’ saw the return of traditional criminal justice values enshrined in the Criminal Justice Act

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<sup>10</sup> A. Bottoms, ‘On the Decriminalisation of English Juvenile Courts’ in J. Muncie, G. Hughes and E. McLaughlin (ed.), *Youth Justice: Critical Readings* (London: Sage, 2002).

<sup>11</sup> A. Platt, ‘The Triumph of Benevolence: The origins of the juvenile justice system in the United States’ in J. Muncie, G. Hughes and E. McLaughlin (ed.), *Youth Justice: Critical Readings* (London: Sage, 2002).

<sup>12</sup> Muncie, *Youth Crime*, p.261. See fn.9.

<sup>13</sup> S. Asquith, ‘Justice, Retribution and Children’ in J. Muncie, G. Hughes and E. McLaughlin (ed.), *Youth Justice: Critical Readings* (London: Sage, 2002), p.276.

<sup>14</sup> Asquith, ‘Justice’, p.276. See fn.13.

<sup>15</sup> A. Bottoms ‘Reflections on the Renaissance of Dangerousness’, (1977) *Howard Journal of Criminal Justice* 16, pp.70-96.

1982. As Gelsthorpe and Morris argue, the 1980s witnessed ‘a period of “law and order”‘ when crime control policies were ‘designed to reassert the virtue and necessity of authority, order and discipline’.<sup>16</sup> General concerns over increases in juvenile crime in the 1990s, fuelled by joyriding in deprived council estates, widespread publicity over persistent young offenders and the murder of two-year-old James Bulger by two ten-year-old boys, forced the main political parties into rethinking their positions on crime and punishment into what has become known as ‘populist punitiveness’.<sup>17</sup>

For example, the principle that children and young people under a certain age are *doli incapax* (incapable of evil) has come under sustained critique since the mid 1990s from both major political parties. It is a common law presumption, which has been enshrined in law since the fourteenth century, and was crucial to New Labour’s efforts to reform and ‘remoralise’ (by focusing on individual responsibility) criminal justice. The Home Secretary announced that the principle would be abolished in the Crime and Disorder Act 1998, so as to ‘help convict young offenders who are ruining the lives of many communities’ on the basis that ‘children aged between 10 and 13 were plainly capable of differentiating between right and wrong’.<sup>18</sup> The measure drew much criticism when first suggested and has drawn more recently. The Council of Europe Commissioner for Human Rights described it as an ‘excessive leap’ and even recommended that the age of criminal responsibility be raised ‘in line with norms prevailing across Europe’.<sup>19</sup>

Overall, then, the decades since the 1970s have seen a period of authoritarian drift and neo-liberal styles of governing that have seen further backlashes against welfare principles. The arguments have been summarised as follows:

Beginning with von Hayek’s immediate post-war critique of welfare interventionism as inefficient, self-defeating and totalitarian, the principle of freedom based on individual responsibility became firmly entrenched. The economic argument that the welfare sector was unproductive and parasitic on market capitalism fed into a range of critiques social government as arrogant, overloaded and failing to ameliorate social inequalities. Welfare practice and professionals were attacked from all parts of the political spectrum as unaccountable, overbearing and destructive of other forms of support such as community and the family.<sup>20</sup>

For many commentators, one of the distinctive features of the New Labour project has been its enthusiastic adoption of the New Public Managerialism as the path to public sector reform along

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<sup>16</sup> L. Gelsthorpe and A. Morris, ‘Restorative Justice: The last vestiges of welfare’ in J. Muncie, G. Hughes and E. McLaughlin (ed.), *Youth Justice: Critical Readings* (London: Sage, 2002), p.240.

<sup>17</sup> See A. Bottoms, ‘The Philosophy and Politics of Punishment and Sentencing’ in C. Clarkson and R. Morgan (ed.), *The Politics of Sentencing Reform* (Oxford: Clarendon Press, 1995) and J. Pratt, *Penal Populism* (London: Routledge, 2007).

<sup>18</sup> Muncie, *Youth Crime*, pp.251-252. See fn.9.

<sup>19</sup> Cited in Morgan, ‘Children and Young Persons’, p.218, see fn.8.

<sup>20</sup> J. Muncie, G. Hughes and E. McLaughlin, ‘Positivism and Welfarism’ in J. Muncie, G. Hughes and E. McLaughlin (ed.), *Youth Justice: Critical Readings* (London: Sage, 2002), p.8.

cost-effective lines.<sup>21</sup> Shortly before New Labour came to power the highly influential Audit Commission published in 1996 a report, *Misspent Youth*, which was very critical of the youth justice system and concluded that it was expensive and inefficient. Once in government the Home Office published a White Paper in November 1997, *No More Excuses*, which promised a radical overhaul of the system that led to the Crime and Disorder Act 1998.

The Act was a pivotal and wide ranging piece of legislation, which controversially abolished *doli incapax* and included the introduction of the following:

1. Youth Justice Board,
2. Youth Justice Service,
3. Youth Offending Teams,
4. A system of pre-court reprimands and final warnings,
5. Parenting Orders,
6. Anti-Social Behaviour Orders,
7. Child Safety Orders,
8. Local Child Curfews,
9. New kinds of Community Order, and
10. A new custodial penalty: Detention and Training Order.<sup>22</sup>

It is significant that these measures involve elements of both punishment and welfare, exemplifying the hybridity of youth justice systems. Consequently, it is important to recognise that the dynamics of “welfare” and “justice”, “rights” and “responsibilities”, “informalism” and “punitivism” *co-exist*, however uneasily.<sup>23</sup> New Labour’s understanding of welfare though has been strongly informed by a moralising agenda that seeks to target disorder in the family and community through appeals to the work ethic. At the same time, their recognition of rights (as in the Human Rights Act 1998) is couched in a contractual language emphasising that individual rights and entitlements are offered in return for duties and responsibilities to the broader community. I will return to this change at the end of the paper to explain how this understanding of rights differs from a ‘positive rights agenda’<sup>24</sup> that can offer a more just approach to crime control and social exclusion. Now, though, I turn to some of the more controversial aspects of current youth justice practice.

### 3. Anti-Social Behaviour

Some have argued that New Labour virtually ‘invented’ the concept of ‘Anti-Social Behaviour’ and have shown it is intimately bound up with the government’s politics of crime and disorder.<sup>25</sup>

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<sup>21</sup> E. McLaughlin and K. Murji, ‘Lost Connections and New Directions: Neo-liberalism, New Public Managerialism and the “Modernization” of the British Police’ in K. Stenson and R. Sullivan (ed.), *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* (Cullompton: Willan, 2001).

<sup>22</sup> M. Davies, H. Croall and J. Tryer, *Criminal Justice: An Introduction to the Criminal Justice System in England and Wales* (Essex: Pearson Longman, 2005), 3rd Edition, pp.222-223.

<sup>23</sup> B. Goldson and J. Muncie, ‘Critical Anatomy: Towards a principled youth justice’ in B. Goldson and J. Muncie (ed.), *Youth Crime and Justice* (London: Sage, 2006), p.206.

<sup>24</sup> Scraton and Haydon, ‘Challenging the Criminalization’. See fn.6.

<sup>25</sup> M. Tonry, *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy* (Cullompton: Willan, 2004).

It is important, though, to recognise the major impact of the neo-conservative criminologist, James Q. Wilson, who had influentially argued that poverty does not cause crime.<sup>26</sup> Despite the huge investment in welfare programmes in the 1960s and rising affluence over that decade, the crime rate soared. He took this quite startling fact as proof that sociological thinking on the causes of and solutions to crime were seriously mistaken. Instead, he claimed crime was dramatically rising on account of the collapse of the civic socialization of young people, community failure and family breakdown. With his colleague George Kelling he published one of the most influential articles in American criminology, where their ‘broken windows’ image is used to explain how neighbourhoods descend into crime and disorder.<sup>27</sup> They argued that if minor incivilities like vandalism, graffiti, begging and drunkenness go unchecked, they set in motion a cycle of decline. This argument has achieved a certain orthodoxy amongst policy makers: since the 1990s anti-social behaviour has been understood as a form of pre-delinquent nuisance that demands early intervention to prevent neighbourhood decline and promote community safety through ‘nipping crime in the bud’.

Anti-social behaviour orders (ASBOs) were introduced by the Crime and Disorder Act 1998 (and subsequently amended in the Police Reform Act 2002 and the Anti-Social Behaviour Act 2003), but what might constitute anti-social behaviour is notoriously difficult to define and legally imprecise.<sup>28</sup> An ASBO is a civil order that can be made by the police, local authority and several other agencies (since 2002) on anyone over the age of ten whose behaviour is thought likely to cause alarm, distress or harassment. Their most controversial aspect is that the breach of this civil order is punishable by up to five years imprisonment, even when the original ‘offence’ was non-imprisonable. It has been estimated that around 42% of ASBOs made against juveniles are breached and 46% of those breaches receive a custodial sentence – with some 50 children a month imprisoned under ASBO.<sup>29</sup>

Andrew Ashworth argues that ASBOs are ‘incoherent’ and questions whether the conversion of a civil order by ‘sleight-of-hand’ into a criminal penalty has led to ‘a subversion of fundamental legal values?’<sup>30</sup> Jill Peay has raised a number of concerns over the inappropriate application of ASBOs to those with mental and behavioural disorders.<sup>31</sup> She notes how one survey revealed that of the ASBOs imposed on those under the age of 17 from April 2004, indicated that 35 per cent of the children were diagnosed with a mental health disorder or a learning difficulty. The following two examples from the survey conducted by the British Institute for Brain-Injured Children sadly demonstrate her concerns:

First, the case of a 14-year-old child with the cognitive ability of a 7 year old, learning difficulties, a language impairment and suspected attention deficit hyperactivity disorder. He had a nine o’clock curfew imposed on him, yet he could not tell the time. Not

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<sup>26</sup> J. Q. Wilson, *Thinking about Crime* (New York: Vintage Books, 1975).

<sup>27</sup> J.Q. Wilson and G. Kelling, ‘Broken Windows’, *The Atlantic Monthly*, March 1982, pp.29-37.

<sup>28</sup> G. Hughes and M. Follett, ‘Community Safety, Youth and the “Anti-Social”’ in B. Goldson and J. Muncie (ed.), *Youth Crime and Justice* (London: Sage, 2006).

<sup>29</sup> Goldson and Muncie, ‘Critical Anatomy’, pp.37-38. See fn.23.

<sup>30</sup> A. Ashworth, ‘Is Restorative Justice the Way Forward for Criminal Justice?’ in E. McLaughlin, R. Fergusson, G. Hughes and L. Westmarland (ed.), *Restorative Justice: Critical Issues* (London: Sage, 2003).

<sup>31</sup> J. Peay, ‘Detain – Restrain – Control: Sliding scale or slippery slope?’ in D. Downes, P. Rock, C. Chinkin and C. Gearty (ed.), *Crime, Social Control and Human Rights: From Moral Panics to States of Denial, Essays in Honour of Stanley Cohen* (Cullompton: Willan, 2007).

surprisingly, he repeatedly breached the curfew and had spent the 13 of the previous 24 months in custody for breach. Yet, during this period, he committed no other criminal offence. Secondly, the case of another young man with learning difficulties whose ASBO banned him from a particular street: on questioning, he said it was ok if he ran down the street because he was not stopping. Whether this is the interpretation of a budding lawyer, or a simple misunderstanding, the potential for breach is obvious.<sup>32</sup>

Critics of New Labour's youth justice policy are especially concerned with the government's continuing reliance on custodial sentences for young offenders, with campaigners arguing 'that the Government's "obsession" with teenagers on street corners had contributed to the sharp rise in the number of young people in prison'. In particular, there has been 'a ninefold rise in the number of children under 15 being sentenced to custody'.<sup>33</sup> More recent figures have shown that the number of 15-17-year-olds in prison has more than doubled in the last ten years.<sup>34</sup> It has been estimated that forty per cent of young people in prison have been in local authority care while a staggering ninety per cent have mental health or substance abuse problems. Nearly a quarter have literacy and numeracy skills below those of an average seven-year-old and a significant proportion have suffered physical and sexual abuse.<sup>35</sup> Some of the tragic consequences of youth custody are detailed in the next section.

#### 4. Child Deaths in Custody

In August 2004, 14 year-old Adam Rickwood became the youngest child to die in penal custody in recent memory. Between 1990 and 2005 29 children died in penal custody. All but two of the deaths were apparently self-inflicted. The extent to which imprisonment is a psychologically damaging experience is revealed, for example, by the fact that between 1998 and 2002 there were 1,659 reported incidents of self-injury or attempted suicide by child prisoners in England and Wales.<sup>36</sup>

There has also been considerable media attention and outrage over the routine use of physical restraint in penal custody:

Restraint techniques vary according to the type of institution. They include inserting a prison officer's knuckles into a child's back to exert pressure on their lower ribs and using the back of an officer's hand in an upward motion on the child's nose. Such techniques can legally be applied for up to half an hour.<sup>37</sup>

Hundreds of children are still subject to these restraints, despite the death of 15-year-old Gareth Myatt, who died in a Home Office approved restraint technique called a 'double seated embrace'. Seven-stone Gareth choked to death on his own vomit as two male members of staff

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<sup>32</sup> Peay, 'Detain – Restrain – Control', pp.231-2. See fn.31.

<sup>33</sup> M. Bright, 'Youth hit hardest by wave of new laws', *The Observer*, 13th April 2003, p. 9.

<sup>34</sup> Prison Reform Trust, p.21. See fn.4.

<sup>35</sup> H. Kennedy, *Just Law* (London: Chatto and Windus, 2004), p.292.

<sup>36</sup> B. Goldson, 'Penal Custody: Intolerance, Irrationality and Indifference' in B. Goldson and J. Muncie (ed.), *Youth Crime and Justice* (London: Sage, 2006), p.148.

<sup>37</sup> J. Doward, 'Outcry over "Routine" use of Restraints on Child Prisoners', *The Observer*, 18 February 2007, p.13.

and a female colleague held him down on his bed at Rainsbrook Secure Training Centre in Northamptonshire in April 2004. The subsequent inquest recorded a verdict of accidental death, but was critical of the Youth Justice Board (YJB) and the private company that runs Rainsbrook. A report by the YJB offered to the inquest as evidence estimated that as many as ‘30 per cent’ of restraint techniques were used to counter ‘non-compliance, specifically resistance to going to bed or moving from one location to another’.<sup>38</sup>

Penal reformers have argued that little has changed since the publication of an independent inquiry into the treatment of young offenders in custody by Lord Carlile in 2006, which not only criticised the routine use of physical restraint, but also condemned the forcible strip searching and solitary confinement that have been used to manage the behaviour of children in prison. In January 2005 Gareth Price, a 16-year-old, died while being isolated in the segregation unit at Lancaster Farms young offenders’ institution in Blackburn. At Stoke Heath in Shropshire, for example, the inquiry found that between April and September 2005 children were placed in solitary confinement for up to seven days on 73 occasions. Eighteen of these were held for between 7 and 28 days and, quite incredibly, four for more than 28 days.

The Prison Service is still under scrutiny following the official inquiry into the racist murder of Zahid Mubarek in March 2000 by his white racist cellmate in Feltham Young Offender’s Institution. The finding that institutional racism pervaded Feltham led to the Prison Service inviting the former Commission for Racial Equality<sup>39</sup> to carry out a formal inquiry into racism in prisons. The 2003 report identified twenty ‘systemic failures’ by the Prison Service to prevent the murder.<sup>40</sup> The government resisted the demand by Mubarek’s family for a full public inquiry: an independent public investigation into Zahid’s murder was set up only after the House of Lords ruled that human rights law justified their campaign for such a report. The three-volume report heard evidence of a persistent culture of racism not only at Feltham but of similar patterns of racial prejudice throughout the prison system. It heard, for instance, reports of ‘gladiator games’ where officers were accused of putting white and black prisoners in a shared cell and then placing bets on how long it would take before violence would break out between them.<sup>41</sup> It has also been argued that the brutal deaths of ethnic minorities while in prison custody are similar to the deaths of African/Caribbeans in police custody, as there is ‘a tendency for prison staff to overreact to disruptive behaviour by African/Caribbean prisoners, whereby the stereotype of “Big, Black and Dangerous” seems to predominate in determining their response’.<sup>42</sup>

## 5. Prisoners and Rights

The modern prison was born in the late eighteenth century and since then it has been justified according to the utilitarian aims of deterrence, incapacitation and rehabilitation or the retributive principles of just desert, hard labour and less eligibility. Each of these often conflicting goals has

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<sup>38</sup> Cited in J. Doward, ‘Children “at risk” from Jail Restraint’, *The Observer*, 8 July 2007, p.6.

<sup>39</sup> The Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission have been replaced by the all-encompassing Equality and Human Rights Commission in October 2007. See <http://www.equalityhumanrights.com/>. Last access 23 October 2010.

<sup>40</sup> Available at <http://www.zahidmubarekinquiry.org.uk>.

<sup>41</sup> N. Temko, ‘Jail Racism Rife, Says Inquiry’ in *The Observer*, 11 June 2006, p.5.

<sup>42</sup> B. Bowling and C. Phillips, *Racism, Crime and Justice* (Essex: Longman, 2002), p.208.

come to prominence at some point over the last 200 years, and they have been combined in uneasy compromises ever since. The paradox is that throughout Europe up until the eighteenth century trials were usually held in secret, with the accused often unaware of the specific details of the case against them, while torture was routinely used to extract confessions. As Foucault emphasised, this intense secrecy stood in stark contrast to the sheer visibility of punishment as a public spectacle.<sup>43</sup> Although the legal rights of the accused (rights to a fair trial, innocent until proven guilty, due process constraints and so forth) have since become regarded as essential defences against arbitrary and oppressive practices the convicted are still tainted by the feudal doctrine of ‘civil death’, which was based on the assumption that the proven criminal was an ‘outlaw’ without any legal rights.<sup>44</sup>

Many critics have argued that prisons have remained ‘lawless agencies’<sup>45</sup> and that in ‘Britain...the law for most purposes tends to stop at the prison gates, leaving the prisoner to the almost exclusive control of the prison authorities’.<sup>46</sup> The continuing irony is that while there is a complex web of rules and regulations surrounding a prisoner’s daily life, the institution itself possesses enormous discretion with the rule of law practically nonexistent. The authorities enjoy considerable power over the confined as the rules themselves are not only extensive and vague but prisoners are often unaware of their specific content. Indeed, they are frequently denied access to the mass of standing orders, circular instructions and service standards that supplement the statutory rules. The formal rules do not, in any case, provide a code of legally enforceable rights for prisoners and the courts have generally been reluctant to intervene in prison life even when prisoners have had solid grounds for challenging decisions.

Such factors reveal the continuing legacy of ‘civil death’ and compound the arbitrary character of prison regimes as legal authority offers no defence against the highly discretionary power of the custodians. Lord Denning’s 1972 ruling in *Becker v. Home Office* that the Prison Act did not give ‘any colour of right’ to a prisoner confirmed the longstanding judicial view that prison managers should be left to manage and that prisoners are unreliable troublemakers. Hence his comment that if ‘the courts were to entertain actions by disgruntled prisoners, the governor’s life would be made intolerable’ as the ‘discipline of the prison would be undermined’.<sup>47</sup> However, the last thirty years has seen some important developments in prison law and the emergence of some judicial recognition of prisoners’ rights.<sup>48</sup> The current status of the rights of prisoners is contained in Lord Wilberforce’s declaration that ‘under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication’.<sup>49</sup>

It is important to put this judicial activism into sociological perspective. Although many of these cases have been hard won, their actual impact on prisoners’ lives has been very selective, and

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<sup>43</sup> M. Foucault, *Discipline and Punish: The Birth of the Prison* (Harmondsworth: Penguin, 1977).

<sup>44</sup> P. Tappan, ‘The Legal Rights of Prisoners’ (1954), *The Annals* 293, p.99.

<sup>45</sup> D. Greenberg and F. Stender, ‘The Prison as a Lawless Agency’ (1972), *Buffalo Law Review* 21, pp.799-839.

<sup>46</sup> G. Zellick, ‘Prisoners’ Rights in England’ (1974), *University of Toronto Law Review* 24, p.331.

<sup>47</sup> Cited in J. Schone, ‘The Short Life and Painful Death of Prisoners’ Rights’ (2001), *The Howard Journal of Criminal Justice* 40(1), p.72.

<sup>48</sup> Carrabine, ‘Punishment, Rights and Justice’. See fn.6. See also D. van Zyl Smit, ‘Prisoners’ Rights’ in Y. Jewkes (ed.), *Handbook on Prisons* (Cullompton: Willan, 2007).

<sup>49</sup> Cited in van Zyl Smit, ‘Prisoners’ Rights’, p.569. See fn.48.

this highlights the difficulties of relying on the legal establishment to defend and define rights<sup>50</sup>. The successes have been restricted to residual individual liberties such as correspondence with lawyers, access to courts, disciplinary hearings and release procedures – all matters which the judiciary is confident in dealing with. In contrast, the courts have not intervened in controversial administrative issues, such as transfers, segregation and living conditions which have a debilitating effect on prisoners. The fact that the courts have had such a negligible impact on most areas of prison life is partly explained by the longstanding scepticism towards natural rights in English political life, while the continuing deference to parliamentary sovereignty ensures that ‘the statutory regime governing prisons in England is concerned, not with the definition of the prisoners’ legal status or the creation of legally enforceable rights, but with clarifying lines of political control and accountability’.<sup>51</sup>

Of course, prisoners do not attract much public sympathy, nor is there any political capital to be gained in the cause of prisoner’s rights. But it is precisely because of their marginalisation and vulnerability that the confined need protection. As the Chief Inspector of Prisons, Anne Owers, has explained:

It is particularly the marginalised who need the protection of human rights: by definition, they may not be able to look for that protection to the democratic process, or the common consensus. And most of those in our prisons were on the margins long before they reached prison (look at the high levels of school exclusion, illiteracy, mental disorder, substance and other abuse); and may be even more so afterwards (with difficulty in securing jobs, homes, continued treatment, and even more fractured and community ties). Prisons exclude literally: but they hold those who already were and will be excluded in practice.<sup>52</sup>

It is significant that she goes on to document, amongst other things, the human rights abuses that routinely occur to children in English prisons (such as strip-searching, segregation and intimidation) while highlighting the systemic failures that lead to deaths in custody and recognising ‘that much of what I am describing would not found a successful human rights challenge in the courts’.<sup>53</sup> Her implicit argument is that human rights are not simply legal entitlements, but are moral obligations that ‘ought to condition social relations in and beyond prison walls’,<sup>54</sup> a point to which I will return in the conclusion.

## 6. Restorative Justice

It would be mistaken, though, to insist that the New Labour Youth Justice project has been entirely about punishment, as there have been attempts to introduce elements of restorative justice into UK policy. Over the last fifteen years the principles of restorative justice have moved

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<sup>50</sup> Carrabine, ‘Punishment, Rights and Justice’, p.202-3. See fn.6.

<sup>51</sup> L. Lazarus, *Contrasting Prisoners’ Rights: A Comparative Examination of Germany and England* (Oxford: Oxford University Press, 2004), p.251.

<sup>52</sup> A. Owers, BIHR Human Rights Lecture, *Prison Inspection and the Protection of Human Rights* (Home Office, 2003). Available at <http://www.homeoffice.gov.uk/docs2/bihrlecture.html>. Last access 26 October 2010.

<sup>53</sup> Owers, ‘BIHR Human Rights Lecture’, p.4. See fn.52.

<sup>54</sup> Carrabine, ‘Punishment, Rights and Justice’, p.204. See fn.6.

from the margins of criminology to the centre of lively debates, not only in the discipline but also in criminal justice policy. The origins of restorative justice are diverse, and yet all arise from disillusionment with modern systems of criminal justice. Its supporters include penal abolitionists, social theologians, postcolonial critics, and the victims movement, who are united in their efforts to redefine justice as a process of shoring up rifts in communities through helping the victim and offender overcome their trauma through forms of ‘reintegrative shaming’.<sup>55</sup> Scandinavian penal abolitionists<sup>56</sup> have been arguing since the 1970s that state punishment is oppressively authoritarian and ought to be based on an alternative conceptualisation of ‘redress’ that disperses decision-making amongst a much more heterogeneous community.<sup>57</sup>

Another important set of developments has been the ‘re-discovery’ of distinctive indigenous systems of justice. For instance, ‘family group conferences’ arose through Maori criticism of the dominant Western juvenile justice system that had stripped the community of responsibility for dealing with its young, while ‘sentencing circles’ were revived in the Yukon Territory, Canada, and are ‘an updated version of the traditional sanctioning and healing practices of Canadian Aboriginal peoples’.<sup>58</sup>

Although there have been scattered mediation schemes in England and Wales since the 1970s, the Crime and Disorder Act 1998 and the Youth Justice and Criminal Evidence Act 1999 have formally introduced elements of restorative justice as a mainstream response to youth offending in a number of different ways, including family group conferences based on the New Zealand model, reparation orders for offenders aged 10 and older, and consultation with victims before any reparative intervention is organised.<sup>59</sup> However, the main attractions of restorative approaches for the Home Office and Youth Justice Board are their utility in ‘forcing’ young people to take responsibility for their actions (Home Office, 2003).

Making offenders face up to their wrong doing can lead to some serious abuses of power, as critics suggest:

The potential for coercion and even bullying of young people, outnumbered and outwitted by a “room full of adults”, none of which has direct responsibility to safeguard and promote the best interests of the child and, moreover, where they may be a collusion of interests on the side of the victim, must be recognised and must be actively prevented by the “good practice” of participants (as there are few built-in legal or procedural safeguards).<sup>60</sup>

There are few safeguards to protect the most vulnerable groups from the pious moralizing of reintegrative shaming. This absence of accountability compounds the lack of protection for the

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<sup>55</sup> J. Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989).

<sup>56</sup> N. Christie, ‘Conflicts as Property’ (1977), *British Journal of Criminology* 17(1), pp.1-15.

<sup>57</sup> W. de Haan, *The Politics of Redress: Crime, Punishment and Penal Abolition* (London: Sage, 1990).

<sup>58</sup> G. Bazemore and C. Taylor-Griffiths, ‘Conferences, Circles, Boards, and Mediations: The “new wave” of community justice decisionmaking’ in E. McLaughlin, R. Fergusson, G. Hughes and L. Westmarland (ed.), *Restorative Justice: Critical Issues* (London: Sage, 2003), p.78.

<sup>59</sup> Gelsthorpe and Morris, ‘Restorative Justice’, p.246. See fn.16.

<sup>60</sup> K. Haines and D. O’Mahony, ‘Restorative Approaches, Young People and Youth Justice’ in B. Goldson and J. Muncie (ed.), *Youth Crime and Justice* (London: Sage, 2006), p.119.

offender in terms of appeals to legal process and due rights,<sup>61</sup> while a former supporter has become highly sceptical of the claims made by the more evangelical advocates.<sup>62</sup> Others argue that it is only human rights that can guarantee fair treatment where sympathy, understanding and limits are breached; it is here that formal court procedures ‘should stand behind restorative justice processes to ensure that outcomes are in accordance with due process and proportionality rights’.<sup>63</sup>

## 7. Conclusion: Realising Rights?

To conclude, this is by no means a comprehensive survey of the current controversies surrounding youth justice in the UK, yet what it does illustrate is that ‘democratic states with strong legal institutions and rights traditions can and do abuse the human rights of their citizens’ and that they ‘can do so with perfect legality’.<sup>64</sup> Human rights are social inventions. They are not intrinsic to individuals but are attached, created and removed by external forces. The politics of rights is itself contested, with critics pointing out how the existing economic, cultural and political inequalities of societies render the equal rights talk of liberal discourse as pure rhetoric incapable of being realised in substantive practice,<sup>65</sup> while others have emphasised that what appear to be abstract and universal principles are western fabrications that are in reality merely partial and excessively individualistic in ethos.<sup>66</sup> On this reckoning the discourse of rights is little more than symbolic gesturing that ignores structural inequalities.

In addition, the practice of rights is often ‘over-reliant on the rule of law to redress complex wrongs derived in difficult circumstances’.<sup>67</sup> At the same time there is no settled agreement over which rights should be properly counted as human rights. Some argue that there is a small core of ‘basic and inalienable’ human rights, and that to ‘invoke the discourse of human rights to cover a much wider range of civic rights and standards of treatment is to devalue the currency of basic human rights’ (Hudson, 2005:66). Others highlight the failure of international human rights jurists to include violations of women within the category of ‘gross abuses’, as the debates over rape during warfare exemplify (MacKinnon, 1993).

It is important that these difficulties and dilemmas are addressed, but it is also important not to forget that a ‘regime of rights is one of the weak’s greatest resources’ (Freeman, 2002:280). Some fifteen years ago the criminologist Stan Cohen argued that human rights should become

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<sup>61</sup> Ashworth, ‘Restorative Justice’, see fn.30.

<sup>62</sup> K. Daly, ‘Restorative Justice: The real story’ (2002), *Punishment and Society* 4(1), pp.55-79.

<sup>63</sup> B. Hudson, ‘The Culture of Control: Choosing the future’ in M. Matravers (ed.), *Managing Modernity: Politics and the Culture of Control* (London: Routledge, 2005), p.66.

<sup>64</sup> M. Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000), pp.37-38.

<sup>65</sup> The scepticism of sociologists toward rights can be traced to Marx’s 1844 essay, ‘On the Jewish Question’, which wondered what bearing the French Declaration could have on the discrimination experienced by Jews. His formidable critique is that the ‘rights of man’ are simply the rights of ‘egoistic man’, divorced from community, motivated only by whim and self-interest. Subsequent Marxists have then regarded human rights as ideological constructs that seek to universalise capitalist values, like freedom of enterprise at the expense of social responsibility, while concealing the structured inequalities of class divided societies.

<sup>66</sup> Carrabine, ‘Punishment, Rights and Justice’. See fn.6.

<sup>67</sup> Scraton and Haydon, ‘Challenging the Criminalization’, p.323. See fn.6.

‘the normative political language of the future’<sup>68</sup> and while there has been some criminological interest in the theory and practice of rights since then, there remains much to be done. The crucial problem is one Kant introduced over two hundred years ago, when he made a crucial distinction between what it would be normatively *good* to do and what we have a just *right* to do.<sup>69</sup> For instance, in criminal justice it is recognised that the pursuit of crime prevention (as a general good) must be subject to the specific constraints of procedural justice so that the innocent are not deliberately punished nor the guilty excessively punished.<sup>70</sup> These perennial tensions between the crime control and due process orientations of criminal justice are often compared to pendulum shifts between two competing values, with neither quite extinguishing the other, but a changing balance between them.

It has been argued that human rights should become the core value system for criminal justice<sup>71</sup> and can provide a more just balance:

[T]oo little attention to crime control would mean that the rights of the public to be protected from violation of its safety and property are being neglected, but commitment to the rights of offenders means that public protection cannot be at the expense of fundamental rights of offenders to fair trials and to punishments that are not degrading, cruel or unusual.<sup>72</sup>

It should be clear that at the moment the balance is skewed toward crime control and, to return to the question of anti-social behaviour, which New Labour have described as ‘the number one item of concern on many doorsteps’,<sup>73</sup> with the crusade pursued despite the fact that it is responsible for the increasing numbers of young people and children finding themselves in prison for breach. One cannot help but wonder if the best way to deal with neighbourhood decline and disorder might be through regenerating deprived communities rather than criminalising the children of the poor and marginalised,<sup>74</sup> and whether the language of rights can open up questions of social justice as a normative project.

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<sup>68</sup> S. Cohen, ‘Human Rights and the Crimes of the State: The culture of denial’ (1993), *Australia and New Zealand Journal of Criminology* 26, pp.95-115.

<sup>69</sup> J. G. Murphy, ‘Marxism and Retribution’ in R. Duff and D. Garland (ed.), *A Reader on Punishment* (Oxford: Oxford University Press, 1994).

<sup>70</sup> R. Duff, ‘Penal Communications: Recent work in the philosophy of punishment’ in M. Tonry (ed.), *Crime and Justice: A Review of Research* 20 (1995), p.3.

<sup>71</sup> A. Ashworth, ‘Principles, Practice and Criminal Justice’ in P. Birks (ed.), *Criminal Justice and Human Rights, Pressing Problems in the Law, Volume 1* (Oxford: Oxford University Press, 1995).

<sup>72</sup> Hudson, ‘The Culture of Control, pp.65-66, see fn.63.

<sup>73</sup> Cited in Morgan, ‘Children and Young Persons’. See fn.8.

<sup>74</sup> Goldson and Muncie, ‘Critical Anatomy’, p.39. See fn.23.