Missed opportunities and new risks: penal policy in England and Wales in the past 25 years

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Abstract

This paper discusses trends in criminal justice and penal policy over the past 25 years. This period has been characterized as a time of penal populism, which originated in the failure of the 1991 Criminal Justice Act, and the competition between the main political parties to be 'tough on crime'. However, this is not the only trend to be found in penal policy. There has continued to be a strong undertow of support for rehabilitation and community penalties, including restorative justice. There has been pressure from the left as much as the right to take domestic violence, sexual offences against women and children and hate crimes more seriously. There have been pressures to meet performance targets – which gradually transformed into calls to build the legitimacy of the justice system. Finally there have been pressures to privatize criminal justice agencies. These various impulses have sometimes amplified and sometimes counteracted the pressures towards tough penal policy. If the period of intense penal populism ran from 1993 to 2007, inertia in the system has ensured that there have been no significant attempts to row back from tough policies, and to reassert the values of penal parsimony. Given that money has been tight since 2007 and crime has continued to fall, this must amount to a lost opportunity of significant proportions.

Key words: penal policy, sentencing, populism, sentencing guidelines

Introduction

This paper considers trends in criminal justice and penal policy in England and Wales over the last quarter of a century. The period since 2010 is of primary concern to us here, but in order to make sense of policy over the past seven years we need a longer perspective, and our starting point is 1993. This was the year when the policies underpinning the 1991 Criminal Justice Act started to unravel, and a marked disjunction from previous policies – and political mindsets about justice – began to emerge. The 1991 Criminal Justice Act was the culmination of political initiatives to embed a low-key penal policy that stressed parsimony in the use of imprisonment. A year after the Act's introduction in 1992 the two main political parties started to lock themselves into a competition to 'out-tough' each other on penal policy. A simple reading of the following twenty-five years is that this punitive turn has characterized penal policies ever since.

This article offers a 'yes, but…' qualification to this generalization. We shall identify five political impulses that have been present in penal policy throughout this period: the impulse to punish and protect; the impulse to reform, rehabilitate and restore; the impulse to use the justice system to improve the quality of social relations; the impulse to enhance accountability and legitimacy of criminal justice agencies; and the impulse, grounded in neo-liberalism, to reduce the size of the state and privatize public services. The impulse to punish and protect has been amplified by aspects of the other impulses, while there are also obvious tensions within and between these differing trends. The article proceeds as follows. First, we trace the various manifestations of the impulse to punish over the last twenty-five years, arguing that the 'punitive turn' has been manifest in a consistent pressure on politicians to adopt tough penal policies. Then we examine how the other four impulses have played out over the period. We conclude the article with some thoughts on directions that penal policy could take over the coming twenty-five years that would avoid – or a least contain – the penal excesses of the last quarter-century.

The pre-history to the 'punitive turn'

Before the 1990s, Conservative and Labour politicians alike generally avoided eye-catching penal policies. Admittedly, the Conservatives presented themselves as the 'party of law and order', but they did very little of substance that could be read as populist penal policies. One exception to this was when in 1979 the then Home Secretary William Whitelaw announced his 'short sharp shock' policy of toughening up detention centres for young offenders. The tough quasi-military regimes in pilot institutions turned out to be ineffective, and the policy was abandoned. Despite rising crime, he and his successors, Leon Brittan and Douglas Hurd, subsequently pursued policies that aimed to reduce the use of imprisonment, contain expenditure and deal with prison overcrowding – a policy approach that has sometimes been called 'doing good by stealth'[i]. This had some success, especially in relation to young offenders. In the late 1980s, attention shifted to penal policy for adult offenders, and the Home Office developed a set of policies designed to create a new sentencing framework that would simultaneously deflect offenders from custody, reduce re-offending and end prison over-crowding. Key elements were discouraging sentencers from passing prison sentences and promoting 'punishment in the community' as an alternative, with new and tougher penalties overseen by the probation service. At the time, stressing the punitive element of sentences provided by the probation service was regarded as a dramatic shift in policy, and was resisted by many probation officers – even if the thrust of the policy was to reduce the prison population.

The Conservatives were probably able to get away with this sleight of hand, initially at least, because the Labour opposition were reluctant to challenge them on this, reckoning that their core supporters had little appetite for tough penal policies. In the late 1980s Douglas Hurd and his officials laid the

groundwork for what was intended to be a landmark piece of legislation – the 1991 Criminal Justice Act, which sought to establish a clear sentencing framework and to consolidate a parsimonious approach to the use of custody as a sanction. The Act was implemented in late 1992, by which time Ken Clarke was Home Secretary. Early indications were that the provisions of the Act were operating exactly as intended: prison numbers started to fall. Home Office officials took some satisfaction in their success in getting a progressive piece of legislation onto the statute book[ii].

The emergence of the punitive impulse

By Easter 1993, the 1991 Act was in tatters. Recorded crime had continued to rise steeply in 1992, and public anxiety had been further heightened by two very high-profile crimes: first, in January 1993, the shooting and death of a fourteen-year-old boy, Benji Stanley, in Moss Side in January 1993 and then, in February, an even more shocking murder by two ten-year-olds of a two-year old boy, James Bulger. The media portrayed crime as being out of control, and the 1991 Criminal Justice Act became one of their targets, as being simultaneously soft and incompetent. There was no serious political defence of the Act from Home Secretary Ken Clarke, who quickly distanced himself from it. Tony Blair, then shadow Home Secretary, was placing further pressure on the Government with his effective advocacy of polices that would be 'tough on crime, tough on the causes of crime'. Ken Clarke used the 1993 Criminal Justice Act to dismantle key parts of the 91 Act; however, what was really lost in the process was not so much the specific provisions, but the underlying philosophy, that parsimony in the use of custody should be a central plank of penal policy. Michael Howard took over from Ken Clarke in May 1993, and delivered his 'Prison Works' speech at the Conservative Party conference later that year, which was an unapologetic call for greater use of imprisonment. And this is exactly what happened.

The fiasco associated with the 1991 Criminal Justice Act marked a very clear turning point in penal politics. Thereafter, neither of the main political parties has been prepared to run the risk of being seen to be soft, or incompetent, on crime. Both parties will have drawn the lesson that it does not take much to destroy the credibility of a government's record on crime – and that the objective reality may not offer much protection against this. The 'public mood' whether real or created by the media, can be more significant. Both parties shifted from a long-standing approach that involved *managing* public opinion about crime and justice to one of *responding* to public opinion[iii]. Also important is that the public reception of the Act damaged levels of trust between Home Office ministers and their officials, and reduced the standing of the various experts – senior civil servants, their in-house researchers and academics – who had hitherto made a significant contribution to the formation of penal policy.

Certainly, in radio interviews, Michael Howard's accounts of the briefings he received from Home Office official show little regard for their expertise.

From 1993 onwards the Conservative government faced an effective challenge from New Labour on crime. Both Tony Blair, as leader of the Labour Party from 1994, and Jack Straw, as shadow Home Secretary, continued to talk 'tough on crime' until Labour's election victory in 1997. Many of us hoped that once in power, Labour would continue to talk only as tough as was necessary, whilst doing good by stealth. As things turned out, Jack Straw and his successor, David Blunkett, put in place a series of penal reforms that were just as tough as they had promised; another tough-minded Home Secretary, was John Reid, succeeding Charles Clarke in 2006; Reid declared the Home Office 'unfit for purpose', announced 8,000 more prison places and laid plans to set up a separate Ministry of Justice. After his resignation in 2007, when Gordon Brown became Prime Minister, Jacqui Smith served for two years without distinction, and Alan Johnson took over after her resignation over an expenses scandal. Jack Straw was the first Secretary of State for Justice from 2007 to 2010. Over the latter years of the Labour administration there was no attempt to return to penal parsimony.

Box 1 summarizes many of the key political initiatives that are recognizably 'tough on crime', covering the Conservative administration from 1992 to 1997, and the three Labour governments from 1997 to 2010.

Box 1: Key penal moments since 1992

1993 1991 Criminal Justice Act amended by 1993 Criminal Justice Act.

1993 Tony Blair announces Labour's Policy of 'tough on crime, tough on the causes of crime'; Michael Howard announces that 'Prison works'.

1997 Crime (Sentences) Act introduces automatic life sentences for second serious violent and sexual offences and mandatory minimum terms for third-time drug traffickers and burglars.

1998 Crime and Disorder Act introduces: Anti-Social Behaviour Orders; racially and religiously aggravated offences; and executive recall to custody for offenders on medium-term sentences.

2000 Prison population shows 41% increase on 1990

2003 Tony Blair and David Blunkett launch the Anti-Social Behaviour White Paper and Action Plan.

2003 Criminal justice Act introduces: indeterminant sentence of Imprisonment for Public Protection (IPP), extended tariffs for life sentences (Schedule 21), mandatory minimum terms for possessing an illegal firearm; tougher provisions on post-custody licence and recall; harsher sentences for offences motivated by hostility towards disability or sexual orientation; and doubling of the maximum sentence for causing death by dangerous driving and related offences.

2003 Sexual Offences Act reforms the law on sexual offences and strengthens public protection measures.

2004 Domestic Violence, Crime and Victims Act extends legal measures to tackle domestic violence and protect victims. Includes provision for the Code of Practice for Victims of Crime, the first edition of which is issued in **2005**.

2005 Launch of 'Community Payback': a national strategy to make unpaid work by offenders on community sentences more visible.

2006 Violent Crime Reduction Act includes provisions relating to alcohol-related crime and disorder and offensive weapons

2006 Road Safety Act introduces offence of causing death by careless driving and related offences.

2008 Emphasis on deterrent sentencing for possession of knives through landmark case of *R v Povey & others* and Sentencing Guidelines Council guidance for magistrates' courts on *Possession of bladed article/offensive weapon*

2008 Launch of Youth Crime Action Plan – cross government initiative tackling youth crime, with 'punishment and enforcement', 'prevention' and 'support' strands.

2010 Prison population shows 85% increase on 1990.

As is often the case in policies that have a flavour of populism about them, it is hard to judge the balance of motivation between sincere conviction and political calculation lying behind the tough penal measures introduced by Tony Blair and his successive Home Secretaries. Only an incompetent politician would leave a clear audit trail of the latter. However New Labour were – more than most administrations – preoccupied with the message as much as the substance of policy. This is well illustrated by a leaked memo from Blair in 2000, when there was a panic about street crime, which read: "We should think now of an initiative, for example, locking up street muggers. Something tough, with immediate bite which sends a message through the system".

In interviews about their periods as Home Secretary, Michael Howard, Jack Straw and David Blunkett have never recognised that they collectively fueled a penal frenzy that needlessly doubled the prison population (from around 44,000 in 1993 and to nearly 87,000 in 2012[iv]). Howard continues to take credit for reversing the upward trend in crime by encouraging greater use of custody – even if the same crime trends have been observed across industrialised Western countries. Jack Straw has shown no misgivings about his foray into mandatory imprisonment – or indeed about his youth justice policies, now corrected, that swept large numbers of teenagers unnecessarily into the formal justice system (see below). David Blunkett has recognised that his IPP sentence was poorly implemented – but not poorly conceptualized, and has certainly not retreated on his decision to ratchet up massively the tariffs for life sentences in Schedule 21 of the Criminal Justice Act 2003.

The punitive impulse should not be characterized as being about punishment alone: protection of the public has been an abiding theme within punitive penal policy. The IPP sentence provides a vivid example of this, as the sentence explicitly comprised a punitive component (the minimum custodial term, or tariff) and a protective element (the indeterminacy of the sentence, which meant that IPP prisoners could only be released once Parole Board judged that they represented no danger to the public). More broadly, the laudable goal of public protection has been a recurring feature of many criminal justice policy initiatives. From the mid-1990s to late-2000s, anti-social behavior was a particular focus of government, and much of the associated political rhetoric placed a heavy emphasis on the need for local 'communities' to be helped to tackle the individuals and behaviours that were causing them harm. A related strand of punitive policy has been to improve provision for victims of crime, based in part on arguments for 'rebalancing' of the justice system away from a perceived over-emphasis on the rights of defendants or offenders. Victim-oriented initiatives include the introduction of Victim Personal Statements in 2001, and the production by the Home Office of the *Code of Practice for Victims of Crime* in 2005. 2011 saw the appointment of Louise Casey as the first Victims' Commissioner.

The period from 2010 onwards has not been characterized by notable tough penal initiatives – but neither has there been any determined effort to pull back from the penal rhetoric of the previous two decades. The main reason for this is probably to be found in the fact that whilst not all politicians are prepared to reap an electoral harvest from penal populism, very few are prepared to sacrifice their political careers by correcting the penal excesses of their predecessors. Admittedly, at the start of the coalition government, Ken Clarke expressed his astonishment on becoming Justice Secretary at the doubling of the prison population since his time as Home Secretary, and suggested that less use could be made of short prison sentences. He also took a principled stand on IPPs – one of David Blunkett's worst penal excesses – and abolished the sentence. (However, no one has yet done anything to address the fact that very large numbers of IPP prisoners are still serving grossly disproportionate sentences.)

Ken Clarke's period as Justice Secretary seemed for a time like the prologue to a more serious debate about reducing the prison population – but the debate never really started, and in 2012 he was replaced by Chris Grayling. Grayling adopted a much tougher tone on penal policy – even if he steered away from any significant changes to the sentencing framework. Most of his energies appeared to be directed towards plans to privatize elements of the prisons and probation services, discussed below; however, he also notoriously reduced prisoners access to books, and introduced a manifestly unjust system of court charges. His successor, Michael Gove, reversed the books policy and abolished the worst features of the court charges. Gove was in office for little more than a year, being sacked after the Brexit vote in July 2016. During this time, however, his track record on justice gained him unexpected – if tentative – support from liberal reformers. The two justice secretaries appointed by Theresa May, Liz Truss and David Liddington, have not changed the penal landscape significantly (the latter having been in post for only a few months at the time of writing).

The period from 2010 onwards has thus seen elements of continuity and some signs of change – at least at the level of political debate. In terms of changes in penal practice little has happened. The prison population has remained at historically high levels (despite continued falls in crime). There were some signs of rediscovery of penal parsimony, but these were rapidly extinguished. What this suggests is that once the genie of penal populism is released from the bottle, it is very hard to force it back in. The past decade has offered an ideal opportunity for both the main political parties to do something constructive to tackle overuse of custody: there was a fiscal crisis, and public acceptance of the need for 'austerity'; crime had fallen by unprecedented amounts; and public concern about crime was much lower than in the 1990s – as evident in the fact that crime and criminal justice barely featured in the 2015 and 2017 national electoral campaigns and debates. Yet nothing of significance happened – surely a missed opportunity. However, as we indicated earlier, the punitive turn and its consequences do not by themselves account for trends in penal policy.

The impulse to rehabilitate

A striking fact of the development of penal policy over the last twenty-five years is that the impulse to punish has co-existed – albeit uncomfortably – with the aims of rehabilitating offenders and of promoting restorative justice (RJ). The principle of 'punishment in the community' that was an integral part of the 1991 reforms was not abandoned by Kenneth Clarke and Michael Howard, and it was also adopted by the three Labour administrations. And over the decade from 1992, the use of community penalties continued to grow in parallel with the increase in custodial sentences. The 2003 Criminal Justice Act established a new structure for community-based sentencing, with the introduction of the new Community Order to replace various existing community sentences, and revival of the suspended sentence in the form of the Suspended Sentence Order. Both types of sentence were meant to provide a robust alternative to the use of short-term prison sentences, and provided for a wide range of requirements (relating, for example, to drug, alcohol or mental health treatment) to be attached to any individual order. The numbers of both sentences passed by the courts rose rapidly in the years after implementation of the Act – without, however, exercising the downward force on the prison population that was anticipated.

One might question whether the political commitment to rehabilitation was any more than skin-deep over this period. Certainly, the push for better punishment in the community was an integral part of the 1991 reforms, and associated work continued on this well into the 2000s, with tough-sounding policies providing sufficient cover to let the Home Office carry on 'doing good by stealth'. It should also be remembered that New Labour attached priority to tackling drug-related crime, and invested heavily in probation programmes for dependent drug users as well as in third-sector drug treatment services – arguably a wise investment, according to Home Office research into the causes of the crime drop. There have also been determined efforts to reduce the number of people with mental health problems coming before the courts, as exemplified by the Bradley Review and the development and widespread roll-out of police- and court-based criminal justice liaison and diversion schemes, as well as initiatives to reduce the number of women being sent to prison, and to ensure that they have better community-based services. It has to be said that political will to make these initiatives successful has fluctuated, and their funding has often fallen casualty to 'austerity', as was the case with 'Corston one-stop-shops' that provided support for women offenders.

Whatever the case, a great deal of energy within the Home Office and probation service was expended on structural reforms designed to enhance probation capacity. In the 1980s the service had become firmly aligned with social service values and practice. The workforce – and the National Association of Probation Officers (NAPO) – were professionally and ideological hostile to the more penal role that

was being designed for them, even if senior probation managers 'saw the writing on the wall' and after some resistance caved into to Home Office demands. A series of centralizing initiatives that gave more power to the Home Office and more central government control over policy and practice. The (unfortunately named) National Offender Management Service (NOMS) was set up in 2004. The reform process continued, culminating in 2017 in the replacement of NOMS with the National Prison and Probation Service.

It is hard to offer clear evidence to this effect, but it seems to us that the probation service was badly incapacitated in the course of this process – which was, of course, intended to enhance capacity. Senior managers were preoccupied with successive reorganisations, and the workforce was demoralized. This is not to say that demands on them dried up. The reverse was the case, as both prison and probation services grew, at the expense of other less serious disposals, notably fines. With the wisdom of hindsight, community penalties and the rehabilitative ambitions of successive governments would have been better served by incremental change, rather than a rolling boil of reform. Significantly, the process also involved the part-privatization of the probation service, but that will be considered later in the paper.

A further dimension to policies driven by the impulse to rehabilitate is to be found in the promotion of restorative justice. Both New Labour and the Coalition government lent their support to restorative justice initiatives – particularly, but not only, within the youth justice system. Twenty years on, there is not a great deal of effective practice to show for it. Politicians and practitioners alike were convinced by the evidence in favour, which provides instrumental reasons for its use that are at least as persuasive than those for imprisonment or conventional rehabilitative programmes, and they were also attracted to the moral case for principles of restorative approaches. The disappointing levels of implementation are to be found partly in practical problems, exacerbated by resource shortages within probation, police and third sector bodies that might provide RJ. The likelihood is that RJ will only implemented on any scale when it is routinely mandated by the courts.

The impulse to improve social relations

One significant facet of cultural change over the past 25 years has been a decline in levels of social tolerance of a range of violent and sexual behaviours, which has led to greater use of the criminal process to tackle these behaviours. These include domestic abuse, which is now conceptualized in a much broader way than in the past, and in relation to which a range of policy and practice developments have promoted greater reporting by victims and increasingly robust prosecution and sentencing. Predatory sexual behavior, particularly by adults towards children, has been an even greater focus of

public attention and criminal justice activity, and reporting and prosecution of historic sexual offences against children has grown exponentially – particularly in the wake of high profile cases involving 'celebrity' offenders, most notably Jimmy Savile. The digital revolution, meanwhile, has introduced entirely new forms of sexual offending and new social problems (and types of criminal evidence) with which the justice system must grapple, as in the case of the exchange of explicitly explicit images, or 'sexting', among children via social media platforms. Hate crime has also become more prominent on the policy agenda and, like domestic abuse and sexual offending, is subject to widening definitions – for example, while the Crime and Disorder Act 1988 introduced the category of racially and religiously aggravated offences, a statutory obligation has since been imposed on the courts to increase sentencing for offences motivated by hostility towards disability, sexual orientation and transgender status. The internet and social media have also multiplied the ways in which hostility can be expressed, and hence widened the range of hate crimes that are prosecuted by the courts.

However, it would be a mistake to describe the growing policy emphasis on domestic abuse, sexual offending and hate crime as simply part of the 'punitive turn'. The sentiment underlying the push for formal and tougher action against these behaviours is in large part a desire to recognize and address the harms caused to victims, including those who are highly vulnerable. Accordingly, what might previously have been tolerated or largely overlooked forms of bad behavior are now treated as crimes, with the expectation that perpetrators should be brought to justice - albeit many cases, especially those involving allegations of historic abuse or in which the central question is whether there was consent to sexual activity, raise profound evidential difficulties. In other words, this impulse to utilize the criminal justice system to improve the quality of social relations stems from entirely different motivations to the populism that has driven the 'punitive turn'. Nevertheless, while many of the – generally liberal and left-learning – advocates of firmer action against domestic violence, sexual crime and hate crime are likely to have little sympathy for other 'tough on crime' measures, their efforts have necessarily contributed to the overall increase in the quantum of punishment meted out by the courts.

While the scope of formal criminal justice responses to social harms has vastly expanded over the past 25 years, the way that the justice system operates is itself often regarded as contributing to social inequalities and exclusion. In particular, an abiding feature of system is the marked disproportionate representation of black and minority ethnic (BAME) groups within it. However, there have been signs of political will to tackle BAME over-representation in the criminal process. Examples of this can be found in Theresa May's position, when Home Secretary, on the over-use of stop-and-search tactics, and the commissioning by David Cameron, as Prime Minister, of a review by the Labour MP David Lammy into over-representation of Black and Minority Ethnic groups in the criminal process.[v]

The impulse to manage performance and enhance accountability

Although the Thatcher administration set a great deal of store in securing 'value for money' from public services, the justice system managed until the early 1990s to escape the managerialist regime of targets and key performance indicators that was imposed elsewhere, notably in health and education. Under both the Major and Blair administrations, however, the probation and prison services, and the courts service and the police service, in particular, were subject to elaborate systems of performance management. The techniques of New Public Management have since been largely discredited: the quantitative targets usually failed to capture the central purposes of the organisations being managed, and the workforces involved were usually adept enough to 'game' the system. Overall, the impact of NPM on policing was malign, damaging to relations between police and public. Whilst there were various unintended consequences that depressed the quality of policing, some targets had a particular impact on the criminal process. "Bringing offenders to justice" became an increasing salient target in the early and mid 2000s, and interacted with juvenile justice reforms that limited the use of informal and formal warnings, to sweep large numbers of teenagers and young adults unnecessarily into the courts.

As the unintended consequences of poorly thought-through targets was increasingly recognized, greater priority was given to policies designed to improve 'public confidence' or trust in the justice system. When Gordon Brown became prime minister in July 2007, an early initiative was to announce a 'bonfire of public sector targets'; within criminal justice, public confidence targets for the police were some of the few that survived. The importance of securing and maintaining public trust in the police has remained salient in the coalition and Conservative governments from 2010 onwards. HM Inspectorate of Constabulary (HMIC) mounted a series of inspections on stop-and-search practice, for example, that informed the robust approach by Theresa May as Home Secretary to ensure that these powers were used legally, and in ways that did not squander police legitimacy. HMIC now routinely rates police forces on their policies for ensuring their legitimacy as part of their PEEL assessments[vi].

An associated policy trend entailed efforts to ensure that services were 'responsive' to the needs, priorities and expectations of local people and to secure this through mechanisms by which local people held the services 'to account'. This was evident, for example, in neighbourhood policing initiatives over the course of the 2000s, which placed a heavy emphasis (in theory, at least) on responding to specific needs identified by local communities. Under the Coalition government, the principles of responsivity and accountability were reiterated within policing policy. Most significantly, 2012 saw the introduction of elected Police and Crime Commissioners (PCCs), although limited public interest in, or awareness of, the role was evident in a mere 15% turn-out rate at the first PCC elections.

Although the courts system had (and still have) targets relating to timeliness, sentencers were not exposed to any direct form of control over this period, although the establishment of the Sentencing Guidelines Council in 2003 and its replacement body the Sentencing Council in 2010 were significant developments. Reflecting the limited resources available to it, the Sentencing Council has focused its efforts on producing guidelines. It has taken a cautious review of its remits, and has aimed simply to codify and reflect current sentencing practice. This would have been no bad thing if the guidelines had been produced in the 1980s, but the Council's overall approach ensured that the consequences of the punitive turn from 1993 onwards were incorporated into their guidance. This problem may have been compounded by the possibility that sentencing guidelines tend to draw lenient sentencers up to the going rates embedded in the various guidelines, whilst their more tough-minded colleagues continue to sentence well above the going rates.[vii] There has been no review of the Council's performance. A more robust – or better resourced – Sentencing Council might be able to undertake more imaginative work, such as examining the scope for reducing prison sentences in general, or assessing the full impact on sentencing of the life-sentence tariffs set out in Schedule 21 of the 2003 Criminal Justice Act. The Council could undertake such exercises only if it could rely on significant political will to reassert principles of penal parsimony, and to date this has not been forthcoming.

The impulse to shrink the state and to contract out public services

The impulse to shrink the size of the state, and to transfer functions discharged by public services to non-statutory and particularly private providers, has been on the political agenda since the 1990s. Within criminal justice, there were moves to establish private prisons, or to have prisons managed by the private sector, since the 1990s. If one can accept the premise that the state's duties to exercise coercive power can properly and ethically be contracted to private companies, then early experience of privatization was not catastrophic. Private prison staff emerged as exercising authority less effectively than employees of the Prison Service, but at least in some, the quality of treatment of prisoners was better, judged on criteria of civility and respect. However, experience since 2010 has shown serious failures in standards of treatment that various private sector providers have delivered in prisons, secure training centres and immigration detention centres.

Opening up the delivery of public services to non-statutory providers was a core policy commitment throughout the New Labour administration, with the rationale that this would deliver greater effectiveness, efficiency and innovation. Key developments included the creation of NOMS in 2004, among the aims of which was the introduction of greater 'contestability' within prison and probation services. The Coalition government sustained the momentum on the contracting out of criminal justice provision (as has the current administration), as evident for example in the local structures for

commissioning victims' and community safety services that were established with the Police and Crime Commissioner role. Arguably the most obviously ideological commitment to privatisation was apparent during Chris Grayling's tenure as Justice Secretary. His decision to open up the majority of community-based probation services to competition under the Transforming Rehabilitation programme, which split functions between new 'community rehabilitation companies' and a rump National Probation Service, has been much criticized. It is hard to say whether the shift from statutory to non-statutory delivery of criminal justice services has amplified or contained the dominant punitive tendencies in penal policy. In our view, however, the damage done to the probation service has very probably damaged its capacity to provide effective alternatives to custody.

Conclusions: assessing penal policy since 2010

We have argued that the period since 2007, when the financial crisis emerged, and especially since 2010, offered clear opportunities to any reforming government. Crime had been falling for over a decade, and the public were becoming less concerned about crime. People showed signs of tolerating the need for 'austerity' following the financial crisis. It was surely an ideal time for floating the idea – as Ken Clarke tentatively did in 2010 – that the justice system might be making excessive use of custody. But nothing came of this, and the inertia of the penal system ensured that a very high rate of imprisonment continued. One can find excuses for this failure. The coalition government was insecure, and David Cameron's Conservative government had a majority of only twelve seats. Penal policy was certainly not a priority.

If opportunities to move away from 'more of the same' have so far been missed, the next few years may yet offer a real chance of more coherent policy development and the emergence of a justice system that is nimbler and fairer – if crime levels remain at current levels, the numbers of offenders entering the justice system continue to fall, and the temperature of public debate about crime and punishment does not start to rise. However, we do not hold out much hope for optimism. Whatever happens over the next five years, Brexit is likely to dominate the political agenda, and whichever government is in office, they are likely to shy away from risky policies in less contentious arenas that aren't attracting public concern.

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[i] Green, D. (2016) 'Liberty, Justice and All: the Folly of Doing Good by Stealth', in (eds.) Dzur, A. W., Loader, I. and Sparks, R., *Democratic Theory and Mass Incarceration***.** Oxford: Oxford University Press.

[ii] For a fuller account of penal policy then and thereafter, see Faulkner, D. (2006) *Crime, State, and Citizen: A Field Full of Folk*. Winchester: Waterside Press**.**

[iii] For a fuller discussion of public opinion on penal issues, see Hough, M. and Roberts, J. V. (2017) 'Public Knowledge and Opinion, Crime, and Criminal Justice', in (eds, Liebling, A., McAra, L. and Maruna, S.) *The Oxford Handbook of Criminology. Sixth Edition***.** Oxford: Oxford University Press.

[iv] Figures taken from the World Prison Brief: http://www.prisonstudies.org/

[v] *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*, reported in September 2017.

[vi] PEEL stands for HMIC's police effectiveness, efficiency and legitimacy programme.

[vii] For a fuller discussion, see Allen, R. (2016), *The Sentencing Council for England and Wales: brake or accelerator on the use of prison?* London: Transform Justice.