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Regulate or abandon: two-speed tracks to criminalisation

Ross Fergusson assesses the fast-shifting frontiers of legislation that criminalises vulnerable young people

Two unlikely legislative bedfellows have recently defined a new terrain upon which conflicting political approaches to the criminalisation of ‘precarious’ (Lea, 2013) young people are being played out.

The attempts of the coalition government to rework the antisocial behaviour legislation through the *Antisocial Behaviour Crime and Policing Act, 2014* (ABC&P) are a predictable territory for such conflict. The government’s loudly hailed early visions of dispensing with Antisocial Behaviour Orders (ASBOs) focused on avoiding the needless criminalisation of young people as well as making responses to antisocial acts speedier, easier to initiate, locally determined and victim-oriented. Much less predictable was the party-political battle conducted in the wings of the legislation to increase the age up to which young people are obliged to participate in education and training. New Labour’s proposals for raising the participation age to 18 passed into law without public controversy. However, beneath the calm surface of the passage of the *Education and Skills Act 2008* (ESA) lay some strong, well-founded objections from opposition parties. Incongruous as they may seem when juxtaposed, these two Acts have revealed complex tensions between the two main political parties’ positions on criminalising responses to certain groups of young people, and some highly ambivalent policy intentions in both parties.

New Labour, antisocial behaviour and participation age

It is well established that the *Crime and Disorder Act 1998* (CDA) and subsequent legislation led the New Labour government into a vortex of criminalisation in its quest to deter breaches of ASBOs (Matthews and Briggs, 2008; Crawford, 2009). The Act opened up a pathway from sometimes minor

antisocial behaviours to a criminal record in response to breaches of ASBO conditions, to little avail. It was an error of judgement to replicate this disproportionately punitive approach in new policies for raising the participation age. Whether motivated by benign notions of social progress towards an ever better educated citizenry, by the global competitiveness rhetoric, or by the international shame of having the fourth worst record of non participation in employment, education and training amongst the 16-25 year olds among the world's richest nations (OECD, 2008), the case for raising the legal minimum age of participation was compelling. But in classic hyper-interventionist New Labour regulatory mode, the procedures for monitoring, oversight, accountability and enforcement of participation were complex and over-zealous. Previous legislation to raise the school leaving age was enforced using welfare-oriented measures, not criminal law. This time, the government legislated for an enforcement regime based on much the same graduated criminalising response to recurrent breaches of Attendance Notices and Youth Default Orders (Sections 54-61 of the 2008 Act) as it had used to enforce ASBOs.

The *ESA 2008* established a requirement to participate in education or training (including on part-time release) up to the age of 17 (with under-18s to be similarly required in 2015). The enforcement elements of the Act have never been tested. Between its Royal Assent and its first implementation, the Coalition re-opened the battle over criminalisation, by moving to undo the New Labour architecture of monitoring, regulation, local accountability and enforcement. With surgical expedition, Section 74 of the Coalition Government's new *Education Act 2011* deferred parts of New Labour's 2008 Act. It suspended the implementation of criminal proceedings for failure to comply with the new Notices and Orders, along with a number of monitoring obligations on employers and local authorities, pending review in 2016.

The case for deferral had been rehearsed in protracted parliamentary debates objecting fiercely to the criminalisation clauses when the *Education and Skills Bill* was being debated. The primacy of the liberty of the individual from the intrusions of an excessively regulatory and juridifying state had been vigorously protested by Conservatives. The social justice benefits that might arise from a mandatory extended education experience were unequivocally ranked

subordinate to young people's right to choose *not* to participate. But behind the Conservative's highly principled criticisms of criminalisation lay other interests, notably an express wish to spare employers the costs of releasing young workers for training, and of monitoring their attendance (backed in the *ESA* by the threat of fining employers for non-compliance).

Coalition antisocial behaviour policy

The Coalition's parallel antisocial behaviour legislation has been as complex and ambivalent as the struggle over criminalising non-participation was simple and polar. Under the *2013 ABC&P Bill*, ASBOs were to be abandoned in favour of Injunctions to Prevent Nuisance and Annoyance (IPNAs), and Criminal Behaviour Orders (CBOs, or, inevitably, 'crimbos'). IPNAs are civil disposals reserved for certain antisocial behaviours, extraordinarily loosely defined as 'causing or capable of causing nuisance and annoyance'. CBOs are 'orders on conviction' that may be made as a result of a criminal conviction for behaviour that 'causes, or is likely to cause, harassment, alarm or distress'.

The likelihood of the *ABC&P Act* reducing the criminalisation of antisocial behaviour was never strong, and it weakened rapidly as the legislative process progressed. Lowering the threshold for IPNAs to 'nuisance and annoyance' promised extensive net-widening. In the event, a strongly-supported eleventh-hour amendment in the House of Lords blocked the change. Bemused by the subjective nature of what behaviours may be judged to constitute nuisance and annoyance, and by the dangers of subjecting the conduct of bell-ringing parishioners and innocent trick-or-treaters to the force of law, the Lords insisted that the 'harassment, alarm or distress' threshold for issuing injunctions be applied, while leaving the low civil standard of proof in place. In all but name, injunctions will be the same as ASBOs, and precisely as exacting. They will not prosecute minor nuisance, but they will continue to be issued on the 'balance of probability'. There is therefore no reason to expect them to be any less criminalising. Furthermore, the Lords' amendment opens up significant uncertainties as to how CBOs, which operate to the same high threshold and apply the higher standard of proof, will fare alongside injunctions. Since actual or 'likely' harassment, alarm or distress must anyway be demonstrated, if the proof is strong, some will take the view that acts of

harassment etc should be prosecuted as criminal, and then followed through with a CBO on conviction. The net effect may yet be to increase the incidence of criminalising young people.

Two-speed criminalisation

In its seeming determination to improve the lot of the most precarious young people by deterring minor misconduct and early withdrawal from education and training, New Labour's *CDA of 1998* and its *ESA of 2008* extended the possibilities for criminalising such groups beyond anything previously imagined. To the defenders of that regime, this was an uncomfortable paradox. To its detractors, it was the regulatory-authoritarian face of New Labour.

The rhetoric of Conservative ambitions to reduce criminalisation were not borne out by the government's (ultimately unsuccessful) efforts to make trivial annoyances subject to injunctions, which would have had actual or quasi-criminalising effects. Much-vaunted Conservative principles of the primacy of liberty against the intrusive state that fronted the most rhetorical objections to the *ESA of 2008* are notably absent from the later debating rhetoric of the *ABC&P Bill*. Making prosecutions easier and speedier by attempting to lower thresholds while also maintaining the civil standard of proof were its sponsors' driving concerns – not decriminalisation. Sparing employers, local authorities and government additional costs, at least as much as ambitions to decriminalise, were major drivers of Coalition amendments to the age of participation legislation.

So what, after all, differentiates the policies of two political parties that are both responsible for increasing criminalisation, albeit via different routes and logics? New Labour's attempts to mitigate or mask the most conspicuously un-equalising effects of its neoliberal policy priorities apparently left it unable to imagine an alternative to criminalising those young people who refused to accept the benefits of a raised participation age. For the Conservatives, longstanding historical tensions within the party between prioritising individual liberty, the authority of the strong state and the neoliberal facilitation of free markets play out in ambiguous and ambivalent responses that simultaneously

seek to reconcile young people's rights to choose with the protection of ordinary citizens and the pro-business minimisation of regulation and taxation.

When it suspended New Labour's flawed powers to enforce participation age legislation, the Coalition took another step to subordinating the needs and prospects of the most disadvantaged young people (Fergusson, 2014). The regulatory preoccupations of New Labour and the Conservatives' abandonment of the most vulnerable young people to their fortunes are differentiated only by the speed at which their preferred measures ensure that the most recalcitrant denizens of this new young precariat can be called 'criminal'. New Labour's fast track route to criminalisation would have punished those who would not allow themselves to be helped – and may yet do so if enforcement is reinstated in 2016. The Conservatives' slow track leaves young people freer to choose and (fortuitously) less micro-managed when their behaviour annoys others – but wide open to targeted criminalisation as soon as their actions show potential to cause alarm or distress. To young people without work, incomes or prospects, fast or slow criminalisation is no choice at all.

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