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New Labour, New Legitimacy?

The 'making punishment work' agenda and the limits of penal reform

Dr David Scott

In this paper I consider the thorny question of whether the policies and penal reforms undertaken by the New Labour government in the last ten years have made the penal system more legitimate. Penal legitimacy has always been important, but in a time when the massive growth in prisoner populations shows no signs of abating, questions of the validity of the penal institution itself become ever more pressing. To answer this question requires first a definition of what we mean by the term legitimacy. I understand penal legitimacy to exist when the application and distribution of the ways and means of dealing with wrongdoers successfully attain both *political validity* and a sense of *moral rightfulness* (Scott, 2006, 2007a). This dictates that there are both political and moral dimensions to considerations of an appropriate response to dealing with wrongdoers, and the current way of achieving this through punishments in the criminal justice system.

For a number of liberal penologists penal legitimacy is intimately tied to prisons and the criminal justice system conforming to public opinion, meeting certain practitioner expectations, fulfilling given administrative goals and targets, or meeting certain ends such as crime reduction, public protection or the rehabilitation offenders (Sparks et al., 1996). By contrast, radical penal activists and [neo] abolitionists have looked beyond the criminal justice system when thinking about legitimacy, pointing to wider concerns about the moral and political limitations of the power to punish, ultimately raising concerns about who we punish, why, and even if we should punish at all (Fitzgerald & Sim, 1979; Hudson, 2003; Scott, 2006). In this paper I highlight the inherent limitations of recent penal reforms by 'New Labour' since 1997 and point tenuously towards new directions and alternative visions for thinking about responding to wrongdoers rooted in the principles of accountability, democracy, human rights, and social justice.

New Labour governance

When New Labour won the general election in May 2007 it had successfully distanced itself from its traditional image of being soft on crime. The new tougher rhetoric of Blairism led in office to both continuities and differences between New Labour penal policy and what had come before. Though, as Joe Sim put it back in 2000, there was 'clear red water' between the parties, it is apparent that New Labour genuinely embraced at least some aspects of the previous administration's thinking. Conservative Home Secretary Michael Howard in 1993 had famously claimed that 'Prison Works' in terms of deterrence and incapacitation, promoting an orientating penal ethos of public protection. Significantly, this principle has not been rejected by New Labour, but supplemented with the further gaol of reducing re-offending. The Mantra subtlety changed from one of *prison works* to *making punishment work*.

Making punishment work?

Perhaps the most significant policy documents on prisons and punishment under New Labour are the 2001 Halliday Report *Making Punishments Work* and the subsequent *2003 Criminal Justice Act*. Halliday (2001) advocated a form of punitive rehabilitation that brought together both imprisonment and

community punishments. The poorly managed prisons under the Conservatives may not have worked, but with appropriate reforms they could be made to do so. This ethos tapped into New Labour's almost evangelical mission to turn the prison into a *special place*, working to 'rescue or save' the unrespectable poor. Originating from a distinctly communitarian political vision, prioritising self discipline, individual responsibilities and mutual obligations, the prison is conceived as an expensive way of making people better. Incarceration is consequently a major opportunity that should be profited upon. In the words of Tony Blair (2002: 3)

> '[w]e are failing to capitalise on the opportunity prison provides to stop people offending for good … We need to make sure that a prison sentence punishes the offender, but also provides the maximum opportunity for reducing the likelihood of re-offending … And above all, prisoners must have the consequences of their actions and their responsibilities brought home to them.'

Through the rhetoric of opportunities and responsibilities the message is clear: prisoners should be given opportunities to make choices that help them learn how to behave responsibly, and if this process is effectively managed the wider community and victims, for whom the prisons serve, will be protected. This 'making punishment work' approach can be divided into six broad strands.

i) rehabilitation
Rehabilitation today in effect means accredited programmes rooted in the principles of cognitive behaviouralism and the 'what works' movement, signalling a resurgence of criminological positivism, crime science, and an increased trust in psychological knowledges. Indeed the potentially progressive *questioning* of 'what works?' when responding to wrongdoing was quickly transformed into an assertion of 'what works' for offenders (Robinson, 2005; Sim, 2005).

However, like previous rehabilitative initiatives, it fails to account for either the constraints of the punitive environment it operates within, or the contexts shaping prisoners' social circumstances and choices. The obfuscation of social inequalities are reinforced

further by its moralisation of individualised blameworthiness, creating a logic whereby prisoners are 'othered' as cognitively different to law abiding citizens. In short, the new rehabilitation and 'what works' agenda cloaks the authoritarian nature of imprisonment within an apparently humane and benevolent face. This can lead to humanitarian justifications and the belief prison can do some good, despite centuries of failure and recidivism rates that blatantly contradict that prisons reduce 'crime'. The truth is prisons do not work when understood as a means of reducing offending.

ii) responsibilities
Prisoners have failed to act responsibly and make wise choices to the opportunities that they have been given. Prison becomes a place where those responsibilities can be re-learnt. Prisons can rehabilitate if they can re-responsibilise though embedding a culture of contracts, compacts and incentives and earned privileges. It is within this context that the one of the most progressive policy decisions of New Labour should be contextualized: the *Human Rights Act 1998* (HRA), which came into force in October 2000. Adopting a minimalistic approach from the start, the prison service largely ignored the legislation and gave staff virtually no training. In a number of key statements the introduction of the HRA was contextualised as being involved in a balancing act with the responsibility of the prison service to protect the general public

> *'The Government's objective is to promote a culture of rights and responsibilities throughout our society. The act will make people **more aware of the rights they already have** but also balance these **with responsibilities to others**'. (Prison Service, 2000: 1, emphasis added)*

The legislation should therefore be understood as working towards the enhancement of existing practices whereby prisoner responsibilities are not just prioritised above their rights, but where the prison service should be proactive as an inculcator of responsibilities that they owe to society (Scott, 2006).

iii) performance

There has been much talk under new labour of improved offender management and better performing prisons. Improved prison performance is part of a wider managerial ethos knitted to Thatcherite logic of public sector reform, the privileging of privatisation and moves towards a more minimal but coercive capitalist state. The argument goes that if prisons were only better managed, probably by a private sector provider, many of the poor performance currently charactering in the public sector parts of penal system would magically disappear.

Perhaps the most significant change here was the introduction of the National Offender Management Service (NOMS) in June 2004. This re-organisation introduced the concept of 'contestability' (Carter, 2003), intended to encourage the privatisation of rehabilitative services in both the community and the prison. In future if a prison should fail to work in reducing re-offending, the problems can be identified as the combination of a problematic prisoner with failings on the part of the delivery of rehabilitative programmes. By identifying and testing the performance of prisons in a competitive market, governments can avoid damaging critique by simply replacing the failed providers of correctional services with others deemed more efficient, effective, or economic in the management of the responsibilisation of offenders. When things go wrong, it is not the capitalist state which is to blame, but the provider of services (Clarke and Newman, 1997). The solution is to replace poor performers, providing yet another barrier to genuine penal accountability.

iv) decency

The decency agenda was initiated by Martin Narey (Director General, 1999 - 2003) and his successor Phil Wheatley.

'The decency agenda is intended to run like a golden thread through all aspects of the services work. Decency means treatment within the law, delivering promised standards, providing fit and proper facilities, giving prompt attention to prisoners concerns and protecting them from harm. It means providing prisoners with a

regime that gives variety and helps them to rehabilitate. It means fair and consistent treatment by staff.' (HM Prison Service, 2003: 29)

This definition is very broad, including a number of different factors which are neither new, and would appear to promote a concept that mean all things to all people. In addition, decency is largely rhetorical, as none of the above commitments can be enforced. Perhaps most damning of all, however, is that the word decency appears to be used as a means of responding to a myriad of other problems, such as in recent years acknowledging institutional racism, prison officer brutality and responding to horrendous suicide rates. Again, is this term merely a means of trying to make the prison sound better than what it really is? In short, the decency agenda appears to be much more useful as a means of providing a new cloak of penal legitimacy than mitigating the inherent harms of imprisonment that confront prisoners on a daily basis.

v) victims
In the last few years it has become clear that it is the victim who is the real customer of the correctional services. The government wishes to bring about a cultural change to improve customer services and reduce offending in the interests of victims. For Tony Blair (2004: 5-6),

> *'[s]entencing will ensure the public is protected from the most dangerous and hardened criminals but will offer the rest the chance of rehabilitation… This whole programme amounts to a modernising and rebalancing of the entire criminal justice system in favour of victims and the community.'*

The prison is a place for reducing crime and punishments pursued for wider utilitarian interests. They are not to serve the needs of prisoners, the flawed consumer who has made inferior choices but to achieve goals which meet the requirements of victims, witnesses and its other legitimate consumer, the general public.

vi) expansionism
When New Labour took office in May 1997 they inherited an average daily prison population of 60,131. At the end of June

2007 the population breached the 81,000 mark for the first time, leading to a prison population of 81,007 in the week when Gordon Brown became prime minister. Between June 2006 and June 2007 the average daily population of prisoners increased by over 3,000 people.

But let us go a little further back to December 1992 when there were 40,600 prisoners in the prisons of England and Wales, the lowest recorded rate in recent times. In fifteen years, ten of them under a Labour government, the average daily prison population has *doubled*, and this of course is ignoring a number of detainees which are not included in the official figures. The solution to the problems created by the prison, it would seem, is more prison. Penal expansionism is highly significant means of shoring up claims to its utility, appearing more natural, indispensable and inevitable. Growth in the use of imprisonment is one way to sediment the idea that we cannot live without imprisonment.

But who is contained within? At any one time approximately 65% of people in prison are there for a property related offence and this percentage increases when you consider who is actually sentenced. These people are also largely from impoverished backgrounds, with 67% of prisoners unemployed and 72% in receipt of benefits immediately before entry to prison, and one in 14 prisoners homeless at the time of imprisonment. These people are often more vulnerable than dangerous. 27% in care as child, 80% have writing skills, 65% numeracy skills, and 50% reading skills at or below the level of an 11 year old child and 80% of prisoners have mental health problems (Social Exclusion Unit, 2002; Scott, 2007b). Despite making the claim that prisons are *protecting the public*, this does not really appear to be the case at all.

New directions and the limits of reform

From a 'neo-abolitionist' perspective (Swaaningen, 1997; Scott, 2006) the current appliance of the power to punish can be considered to be illegitimate. This implies that prison reform itself is profoundly limited. Imprisonment cannot be understood outside of social context, that is, the social divisions and structural inequities of society around racism, sexism and poverty. In addition

the moral legitimacy of imprisonment has also been questioned, for imprisonment must be understood within the wider debates on punishment (the intentional imposition of suffering). The very deployment of the punitive rationale and punishment itself, rather than the liberal reductionist concerns with prison conditions or standards, become the central focus of a moral critique.

So where do we go from here when we think about legitimate responses to dealing with wrongdoers? Well first of all we need a much greater political commitment to social justice and recognition that our current penal system actually increases social injustice. Current policies are increasing further human need and social problems rather than solving them. Social justice therefore must entail a commitment to redistribution of the social product rather than just the provision of opportunities and choices for the socially excluded. Second we need a much greater recognition of wrongdoers human rights and the fact that they should be recognised as fellow human beings, whatever they have done. Their suffering and hardship must be fully acknowledged alongside their shared humanity (Cohen, 2001; Scott, 2007c). It is a moral imperative that the human rights of the powerless and vulnerable should not be dependent upon responsibilities.

Third we need a commitment to legal accountability, due process, and the rule of law. This should entail government agencies meeting the legal entitlements of all citizens and providing enforceable mechanisms to hold the powerful to account. Fourth we need a commitment to genuine social democracy, when all voices, including the discredited and marginalised views of offenders and deviants, are heard and given an opportunity to shape societal norms and values. I believe that any truly legitimate response to dealing with social harms, wrongs, troubles and problematic behaviours must be rooted in these four principles. We must continue to highlight dehumanising penal realities and fully develop our critical imagination (Barton et al., 2007), providing alternatives that go beyond the use of that most 'detestable solution', the prison.

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Dr David Scott is course leader of the MA in Criminology and Criminal Justice at the University of Central Lancashire. His main research and teaching interests are critical approaches to imprisonment, poverty and the sociology of punishment. He is author of *God's Messengers Behind Bars* (CSCSJ: 1997) and submitted his PhD, entitled '*Ghosts Beyond our Realm: a neo-abolitionist analysis of prisoner human rights and prison officer occupational culture*' in April 2006. Recent publications include *Expanding the Criminological Imagination* (Willan, 2006), *The Sage Course Companion: Penology* (Sage, 2007) and *Controversial Issues in Prison* (Open University Press, 2008/forthcoming).

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