

# ***The Politics of Punishment***

*A historical analysis of sentencing policy in England and Wales  
between 1990 and 2010*

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# Contents

The Politics of Punishment.....	I
Acknowledgements .....	II
Contents .....	III
List of tables, graphs and figures.....	VI
Abstract.....	1
Introduction .....	2
Chapter 1 .....	8
Literature Review .....	8
1.1 Introduction .....	8
1.2 The Punitive Turn Thesis .....	9
1.3 The Critics .....	24
1.4 Contribution of this thesis .....	30
Chapter Two .....	37
Research Design .....	37
2.1 Introduction .....	37
2.2 Aims and Objectives.....	38
2.3 Approach to the data.....	42
2.4 Research design .....	45
2.5 Data analysis.....	53
2.6 Limitations and ethical considerations .....	62
Chapter 3 .....	67
The Conservative Government 1990-1997 .....	67
3.1 Introduction .....	67
3.2 Criminal Justice Act 1991 .....	68
3.3 Dispositional powers .....	69
3.4 Resistance .....	77
3.5 Powers of change.....	79
3.6 Criminal Justice and Public Order Act 1994 and Crime (Sentences) Act 1997 .....	88

3.7 Dispositional Powers .....	89
3.8 Powers of Change .....	102
3.9 Conclusion .....	107
Chapter 4 .....	108
The Labour Party 1997-2005.....	108
4.1 Introduction .....	108
4.2 New Labour’s law and order agenda.....	109
4.3 Dispositional powers .....	111
4.4 Powers of change.....	129
4.5 Conclusion .....	136
Chapter 5 .....	138
Labour Government 2005 – 2010.....	138
5.1 Introduction .....	138
5.2 Labour’s third term; 2005-2010 .....	139
5.3 Dispositional Powers .....	140
5.4 Powers of change.....	159
5.5 Conclusion.....	165
Chapter 6 .....	167
Discussion.....	167
6.1 Introduction .....	167
6.2 The nature of dispositional powers.....	170
6.3 The Politics of Punishment.....	174
6.4 Implications of this study .....	180
6.5 Conclusion.....	185
Chapter 7 .....	188
Conclusion .....	188
7.1 Main findings.....	188
7.2 Reflective comments .....	191
7.3 Implications of the study .....	194
Bibliography of data.....	197

References .....	206
Appendix I.....	214
Appendix II.....	216
Appendix III .....	237
Appendix IV .....	241

## *List of tables, graphs and figures*

Table 1:	List of interview participants	p.50
Table 2:	Diagnostic Tool for Sentencing Policy Dispositions	p.58 & p.172
Table 3:	Distinguishing Types of Power	p.177
Graph 1:	Prison population and Crime Rates in England and Wales between 1960 and 2010.	p.38
Figure 1:	Passage of a Bill through Parliament	p.48
Figure 2:	Representing the Circuits of Power	p.56

## *Abstract*

The punitive turn thesis contends that Western liberal democracies witnessed a change in the intellectual foundations of penalty towards the end of the twentieth century. According to authors of a punitive turn, an increase in the length of sentences has been accompanied by a change in the purpose and methods of punishment, which are characterised by an increase in tolerance for the suffering of criminals. Despite becoming one of the most cited phenomena in contemporary penalty literature, the thesis is criticised for lacking in definitive core components, grounded explanation and supporting empirical evidence. Critics warn that we are in danger of becoming lost in a false paradigm of theoretical abstraction and general assumptions which exaggerate the impact of transformations concerned without any credible support.

This thesis contributes to this debate by constructing a middle-range theory of integrating rich empirical evidence with theoretical claims of the punitive turn, in order to support, dismiss or adapt claims of the punitive turn thesis. An investigation into sentencing legislation in England and Wales between 1990 and 2010 explores the decision-making process at the level of structural processes and organisational agency. Exploration into actual penal developments in England and Wales during the time period covered concludes that there are significant episodes of punitiveness. However, the investigation reveals a number of other, co-evolving and sometimes countertendencies of crime control strategies.

This empirical level of analysis suggests that policy outcomes, such as those identified by the punitive turn, are a result of political competition. A multi-centred concept of state governance is utilised in order to explore the complexities of penal policy making and political power. Punitiveness is conceptualised as one of many dispositional powers, which adheres actors to certain 'rules of meaning and membership' of concepts of risk and justice. Political competition between dispositions demonstrates political dilemmas and wider policy domains in overcoming them. Thus, penal policy outcomes are the result of negotiations and compromises within the legislative arena. In this way, punitiveness is not beyond the political process and is not an immutable or inevitable state.

## *Introduction*

This thesis was developed from the ongoing argument between advocates and critics of what is known as ‘new punitiveness’, or the punitive turn thesis. This refers to observations of a change in the institutional settings and intellectual foundations in Western liberal democracies in the last three decades of the twentieth century. An abandonment of long-standing limits to punishment is characterised by an increase in the length of punishment and a change in the purpose and methods of punishment, which are characterised by an increase in tolerance for the suffering of criminals. Previously extinct methods of punishment have re-emerged in contemporary society as accepted responses to crime, which are no longer associated with the aim of rehabilitation and reintegration of offenders back into the community. Instead, offenders are subject to longer lengths of imprisonment, in which prison conditions have deteriorated and prison regimes offer little in the form of purposive and constructive punishment and rehabilitation. Punishment has become an excessive and wasteful phenomenon, justified by an increase in the suffering of the individual and to marginalise the deviant.

Inspiration for this thesis came from Matthews’ (2005) criticisms of the punitive turn thesis, which approached the concept from a more realist perspective. Thus, this thesis became grounded in the aim of making the punitive turn thesis more ‘real’ in the way that Matthews has argued was lacking. If new punitiveness could be identified on a more concrete level of abstraction than was currently presented, its aetiology could be better understood and possibilities for change could become a reality. As the punitive turn thesis is very pessimistic in its outlook for the future, this thesis sets out to present a more optimistic vision for the future, rooted in a new level of analysis which could provide a better understanding, and therefore more control, of penal policy decision-making processes and outcomes.

This thesis argues that advocates of the punitive turn thesis have not explored the empirical details of the formation of specific crime control policies, and hence the concept of punitiveness has been criticised for being too broad in its argument and vague in its aetiology. The thesis confirms that punitive turn advocates are correct in diagnosing an increase in penal severity but fail to discuss in detail the mechanisms and contingencies that led to such changes. Instead, sweeping references are made to more diffuse social and cultural shifts and presenting these changes as inevitable rather than contingent. Thus, there was a shift towards more



punitive legislation. Therefore, this thesis will attempt to contribute to the debate by exploring actual developments of sentencing legislation at the level of decision-making processes, structural processes and organisational agency. An exploration of how legislation is produced provides new insight into what the core components of punitiveness actually are, as well as the reasons for their use in penalty in England and Wales.

A focus on sentencing legislation in England and Wales, between 1990 and 2010 will demonstrate the complexities and nuances of penalty, which the punitive turn thesis does not account for. A multiple-embedded case study will approach each government administration as its own case study; the Conservative government between 1990 and 1997 and, the three Labour governments succeeding it from 1997 to 2010. These governments were chosen due to initial reading around developments in penalty during this time and how they are often used to evidence a punitive turn in England and Wales. Criminal Justice Acts which significantly affected a change were used as units for analysis. Analysis of these key legislative changes will help to illustrate and explain the unstable and often contradictory nature of penalty. The thesis confirms that there was a shift towards more punitive legislation, thus confirming the punitive turn that there was an increase in penal severity. However, the thesis will suggest that authors of the punitive turn have failed to account for how punitiveness co-exists with other approaches to criminal justice. Furthermore, the punitive turn thesis has not discussed in detail the particular mechanisms and contingencies which has resulted in 'punitiveness'. Instead, they have focused on general sweeping assumptions to more diffuse social and cultural shifts and presenting these changes as inevitable rather than contingent. This thesis will contribute to the debate via the utilisation of a more concrete level of analysis of policy at the level of 'decision'. A focus on the institutional structures and processes that penal policy outcomes are contingent with, along with its relationship with exogenous, environmental contingencies will conclude that penal policy is an outcome of negotiations and compromises between key players which make up the political network.

To make sense of this political network, Stuart Clegg's (1989) *Framework of Power* will provide a method of articulation for the groups within the legislative arena, or as Clegg terms, the 'circuit of power' to be identified. His different types of power provide an analytical framework to understand the inherent nature of political competition within the policy making process. Embedded in the resistance which power depends on, this theory of political competition has made sense of empirical evidence gathered here, suggests adaptations for

advocates of the punitive turn thesis to consider. These adaptations involve an appreciation of the policy making process; how policy is an outcome of political negotiations and compromises between actors who are bound by social types of power associated with different styles of justice. The empowerment of such styles of justice are dependent on the relationship between internal dynamics of organisational agency and changes in the external, environmental contingencies. Thus, it is the relationship between these types of powers which results in certain legislative outcomes and which can be explained by causal mechanisms of the duality between structure and agency. In this way, the thesis will argue that punitiveness is not beyond the political process.

Chapter 1 will review the arguments for and against the punitive turn thesis. A deconstruction of the punitive turn thesis will demonstrate the high level of abstraction that characterises existing literature on the punitive turn, and the issues associated with that. Its core components are described, including its implicit assumption that punitiveness is an all-encompassing state. This is followed by explanations of the origins of a punitive turn, as argued by its authors. Subsequently, criticisms of the theory will be described in order to illustrate the debate towards which this thesis contributes. These criticisms surround the broadness of what is described as a punitive turn, as well as the vagueness of explanations. The grand narrative of punitiveness calls for more in-depth understanding of how punitiveness has changed, which avoids the sweeping assumptions made and reductionism of structural accounts. The Chapter will finish with the rationale for this thesis, which is described via its key contribution in not only providing a different level of abstraction to existing punitive turn authors, but also in the granularity of approach to empirical evidence of the emergence and shaping of concrete sentencing policies in the legislative arena.

Chapter 2 sets out the research design and methods that were deployed in this study. It will describe how the thesis conceptualised the claims, in order for them to be operationalised for investigation. Aims and objectives are described, followed by the research methods used to achieve them. A multiple-embedded case study is explained and justified, which is followed by the use of secondary data and the use of different data sources to triangulate findings. The chapter continues with a description of how critical realism and adaptive theory worked in conjunction to allow analysis of the data to be conducted without any prior bias to that which would be found. The chapter finishes with an explanation of the diagnostic tool, which was created during the investigation, and was used to analyse the data by the identification of

competing dispositional powers and the rules of meaning and membership by which actors were constrained. Edward's (2016) transposition of Clegg's framework into a model of a 'multi-centred governance' will be used here to understand how political power goes beyond the will of the Government.

Chapter 3, 4 and 5 are empirical chapters, which describe the findings of the thesis. The Chapters are divided by Government administrations, as well as the dominant dispositional power committed to be key political actors.

Chapter 3 investigates the Conservative government, between 1990 and 1997. The thesis begins in 1990 due to the Criminal Justice Act 1991 implementing penal policy which goes against the claims made by the punitive turn thesis. Exemplifying a model of sentencing based on 'just deserts' and penal welfarism, the 1991 Act provides a point for relative change to be identified in the subsequent 'flagship' Acts. The chapter will discuss the rules of meaning and membership of a 'just deserts' disposition, which influenced penalty in the first few years of John Major's administration. This will be followed by a description of a contingent set of facilitative events which empowered a punitive disposition. A change in the social circuit of power is indicated by subsequent sentencing legislation; Criminal Justice and Public Order Act 1994 and; Crime (Sentences) Act 1997. These Acts exemplified a 'punitive turn' in England and Wales by implementing longer sentences for the same types of crime, which were justified on the basis of expressive justice rather than instrumental efficiency. However, the chapter will finish with an analysis of how the changes implemented by the 1997 Act were considerably 'watered down' by other actors adhering to a 'just deserts' disposition within the legislative arena. Thus, this chapter will demonstrate a shift towards a 'punitive' disposition, but one which was always in contention with, and resisting a 'just deserts' disposition. Therefore, although there was a general trajectory towards punitiveness, it was not immutable, and was dependent on facilitative powers in the wider environmental policy domain to empower punitive policy outcomes.

Chapter 4 will describe Labour's first and second terms in administration, between 1997 and 2005. A focus on the Crime and Disorder Act 1998 and the Criminal Justice Act 2003 will explain how there was a continuation of 'punitive' policy outcomes, but which was augmented by a co-existence of 'risk' and 'reform' dispositions. This illustrates Labour's 'third way' approach to crime control which was to achieve the political slogan 'tough on crime, tough on

the causes of crime'. Tough on crime meant short, sharp bursts of punishment for petty deviance and anti-social behaviour which are associated with punitive developments. A focus on the social causes of crime developed into what became known as 'criminogenic needs', which was fused with a new meaning of risk. Risk was problematised in a way that was more dynamic and changeable than had previously been thought. This, as well as external events in the wider policy domain, empowered a new concept of 'risk' to augment an expressive, populist agenda by New Labour. Despite initial investment a 'reform' disposition, the empowerment of a 'risk' disposition via an auxiliary 'reform' disposition resulted in a punitive policy outcome via indeterminate sentences, justified by the concept of reforming offenders in custody and reducing their chances of reoffending. The unanticipated use of this type of sentencing resulted in a prison system which could not meet the demand of providing interventions directed at reducing the risk of re-offending. This Chapter will conclude that there was a general trajectory towards punitiveness, but it was encompassed within a political strategy of new concepts of risk and justice.

Chapter 5 concludes the empirical chapters with an analysis of key policy developments during the third Labour administration, from 2005 to 2010. The data will evidence how this administration was bound by the consequences of the Imprisonment of Public Protection (IPP) sentence which paralleled with the timing of an economic recession. This empowered both 'punitive' and 'just deserts' dispositions with the co-existence of expressive, types of punishment to satisfy popular sentiment, as well as a re-emergence of proportionate levels of punishment by the Criminal Justice and Immigration Act 2008. The co-evolution of incapacitative and proportionate methods of punishment demonstrate the complexities of Labour's political strategy. Furthermore, eventual accusations of infringing the civil rights of the public would suggest that there was the beginnings of a disruption to the dispositions identified here. Not only bringing the empirical study to a close, this concluding disruption illustrates the ebb and flow of penal policymaking, and the constant change and continuity that is the nature of the politics of punishment.

Chapter 6 will provide a discussion regarding the overarching themes identified in the previous findings chapters. These will be discussed in relation to what, in effect, these findings mean for the punitive turn thesis. The dominant dispositions evidenced in this thesis are discussed, which provokes implications for the punitive turn thesis. The Chapter will emphasise the core contribution of this thesis, which is a theory of political competition and a way of empirically

investigating penal policymaking processes in a particular time period. The chapter will reflect on the political dilemmas of each dispositional power, which will demonstrate the tensions and contradictions inherent in sentencing policy. It is these dilemmas of dispositions which explain why there is never one disposition which can solve the problem of delivering justice and why political competition is so inherent within policy formation. Consequently, the chapter will conclude with the main implications of the thesis, including methodological considerations for a more granular level of analysis and benefits of middle-range theory, as well as theoretical considerations for the punitive turn and its contingent nature on the wider policy domain and the politics of the policymaking process.

Chapter 7 concludes the thesis with a summary of the main findings and what this means for the punitive turn argument. By evidencing how punitiveness is not beyond the political process but which emerges from contextually-shaped political negotiation, the thesis calls for a level of abstraction which considers the relationship between structural processes and organisational agency. Political competition is inherent within these processes. Policy outcome is a consequence of such competition and the relationship between the three different types of power analysed here; dispositional (social adherence to rules of meaning and membership), causal (internal dynamics and constitutional-legal powers of individual actors) and facilitative (external, environmental contingencies). This thesis has endeavoured to illustrate the importance of these types of powers within the 'circuit of power' and the impact they have on policy outcomes. The Chapter will finish with limitations of the research and further research questions which have emerged from this thesis, thus situating the thesis within the wider debate of policy decision-making processes and the need to incorporate political analysis within the field of criminology.

# *Chapter 1*

## *Literature Review*

### **1.1 Introduction**

Within the social sciences there can be a tendency towards what Gordon (1986:78, in O'Malley, 2000:153) has called “semiologies of catastrophe – genealogies of transformation and rupture, usually pessimistic, that imagine us to be on the brink of global social and political watershed”. Criminology is no exception. Discussions of contemporary penalty have historically warned its readers of worldwide, irreversible changes with colossal consequences, which are only to be replaced with even more dramatic shifts in governance and political rationality. These macro level theories not only propose more or less complete transformations in criminal justice and penalty but regard these changes as reflecting major, irreversible changes in the organising principles of society and governance. An example of this is how changes in post-war liberal democratic penalty has consumed the imagination of criminologists, historians and social scientists. One of the biggest surprises in this literature has been the unexpected re-birth of the prison as the main source of response to deviance in the twentieth century. What was once invented for the purposes of incarceration and then rehabilitation during the era of penal welfarism, has been transformed into an institution which is part of wider changes in the ever-expanding penal network, involving new purposes and methods of punishment. These changes have been acknowledged within criminology under the label of the punitive turn thesis.

However, the punitive turn thesis has been criticised for proposing these types of changes with little empirical evidence of how and what changes have occurred. Therefore, the theories of punitiveness have become very indefinite and unclear as to what defines a country as ‘punitive’ and, subsequently the usefulness of the theory is questioned as becoming another ‘criminology of catastrophe’ (O'Malley, 2000).

This chapter will review the literature on the new punitiveness, to which this thesis aims to contribute. The main claims of the punitive turn thesis will be deconstructed with a discussion of its features and explanations from differing approaches to political analysis. Subsequent to

criticisms of the punitive turn thesis, the chapter will continue with the contribution of this thesis. Specifically, it will focus on the lack of empirical evidence for the claims of the ‘new punitiveness’ due to the high level of abstraction used as methods for observation and articulation, this thesis develops another method of articulation for change and continuity in penalty. A theory of politics is introduced with its analytical focus on the political process and the competition and negotiations which results in certain political outcomes and is determined by a combination of political agency and actors actively participating within the institutional setting of the legislative arena.

## **1.2 The Punitive Turn Thesis**

This section will deconstruct the main components of the punitive turn thesis as described by its proponents. Similar features of punitiveness are described and how the shift from welfarism to this new epoch of penalty has been identified and explicated. Different but complimentary explanations for how and why punitiveness has developed is discussed via governmental criminology (David Garland, Jonathan Pratt and Jonathan Simon) and structural-functionalists (Simon Hallsworth and Loic Wacquant). This will lead onto the criticisms of such claims, including the limitations highlighted by this thesis, created by an absence of a theory of political process and the inherent competition within this process.

The punitive turn refers to trends in the punishment of crime which move away from the post-war penal-welfare state characterised by correctionalism and rehabilitation. Drawing on a combination of punishment and welfare, but with an overall aim of individual treatment via expert advice, these distinct motifs provided a framework for twentieth century penalty. With the inherent belief that society can be crime-free, methods of punishment were structured around rehabilitation and reform, as well as the importance of reintegrating the offender back into society. Characterised by a time when public and official sensibilities had moved away from the suffering of offenders, penal welfarism was against imprisonment due to the perception that it was not successful in reforming the offender. Only used as a last resort, custodial regimes stressed education and the importance of reintegration upon release were preferred. There was an ongoing project to ameliorate prison conditions in order to implement such regimes.

A commitment to correctionalism by the expansion of the penal network to include social authorities and professional groups to provide expert opinion and institutional interventions were included within criminal justice, such as probation, juvenile courts with welfarist policies and individualisation of treatment. Penal welfarism included the importance of criminological research in providing knowledge of how best to address the problem of crime. Experts and professional groups in the field were trusted as being uplifting and, in a stigmatised world of criminals, non-judgmental figures, with the aim of relieving individual suffering (Garland, 2001). Penal power configurations characteristic of modernity are described as “the modern bureaucracies staffed by experts providing authoritative guidance to politicians, with the public as outsiders” (Pratt, 2000:432). This demonstrated the level of belief and confidence in state institutions during this time, with the public having less of an involvement in penal policy formulations.

### **1.2.1 Features of a punitive turn**

This review will split into three sections: the first briefly describes general descriptions and features of a punitive turn that have been referred to by all proponents being reviewed; the second describes approaches of political rationalities and Foucauldian studies of governmentality which have attributed the punitive turn to changes in cultural assumptions and social structures and political realignments of the New Right. The last section will discuss structural-functionalist approaches which explain punitiveness as an artefact of state formations, namely neoliberalism and the shift towards a security state. A review of these claims aims to highlight how, although countertendencies are acknowledged by these proponents, it is not clear how such countertendencies exist within the accounts of punitiveness argued here. Whilst Foucauldian studies appear to reduce politics to particular kinds of political agency and discourse such as a neoliberal political rationality, structural accounts reduce politics to determinant structures of specific state formations. This thesis argues that both approaches have an overarching emphasise on the abstract and teleological accounts that presume there is an inevitable and inexorable logic at play and would benefit from a more realist, middle-range approach to the political process.

Observers of a punitive turn argue how the ‘golden era’ of treatment and rehabilitation of the 1950s and 1960s has been replaced with a new set of arrangements in responding to crime. Differing from the foundations of the welfare state, the rejection of penal-welfarism has



resulted in a new set of values and cultural expectations which have shifted penal policy towards an intensification in the severity of punishment (Pratt et al., 2005). Coming into fruition in the 1990s, punitiveness is identified via harsher responses to criminality with the use of different statutory developments and criminal practices, a change in official and public discourse as well as a shift in penal sensibilities which mirror that of pre-modern times. This thesis refers to the punitive turn proponents as; Jonathan Pratt (2000; 2002; 2005), David Garland (2001), Jonathan Simon (2007), Simon Hallsworth (2002; & John Lea 2011; 2012) and Loic Wacquant (2001; 2009). The arguments have a common thread, that of an increase in the use of penal sanctions over welfare and mass imprisonment that does not correspond with a rise in crime, the rise in penal populism due to a public fear of crime and the rise of neoliberalism associated with the deregulation of the economy alongside authoritarian regulation of the poor and marginalized.

The general narrative of a punitive turn has been rooted in writings on punishment in Western and Anglophone countries and how a decline in the rehabilitative ideal has been replaced with punitive sanctions which do not fit into a 'modern' code of punishment. New techniques of punishment have become visible in Western societies, more specifically in America, the UK, Australia and New Zealand. Loic Wacquant (2009) also includes Western Europe. These techniques include an expansion of the penal system, with harsher laws, measures of criminality and punitive responses. New types of offences are created such as 'three-strikes' laws and mandatory minimum sentencing; zero-tolerance policing techniques and a general increase in police powers; penal practices such as bootcamps and youth detention centres for young offenders; curfews and a range of community penalties, in addition to the prison becoming a mainstream institution for holding an increasing amount of offenders who have been caught up in the widening penal network. These sanctions reflect an excessive level of punishment which goes beyond the principle of punishment being proportionate to the harm caused by the crime, and which "abandon long-standing limits to punishment in modern societies" (Pratt et al., 2005:xii). These new measures are associated with new objectives, new techniques and, for some new targets in the population. As Foucault (1977 in Pratt et al, 2005:xii) suggests, in the Enlightenment period of the 19<sup>th</sup> Century, techniques of punishment aimed to be "productive, restrained and rational". Proponents argue that these techniques have been replaced by features of excessive levels of punishment, objectives of warehousing, as well as shaming and debasement of offenders, making it unlikely that they will become law-abiding citizens in the future.

New objectives and accompanying techniques illustrate the shift away from reform and correction, to pre-modern attempts of physically warehousing and psychologically shaming and humiliating offenders. The increased amount of people involved in the criminal justice system are treated in accordance with such objectives. For example, Simon and Feeley's (1992) *New Penology* describes new spartan and austere prison regimes, as a "means of incapacitation and punishment that satisfies popular political demands for public safety and harsh retribution" (Garland, 2001:14), or even just a "human warehouse ... a kind of social waste management facility" for the purposes of protecting the rest of society (Simon, 2007:142). Prison conditions are to match these objectives. Pratt (1998; 2002) describes the abandonment of ameliorative projects for prison conditions in the 1970s, in favour of more spartan and austere prison conditions and regimes. The prison architecture was altered in light of a changing emphasis towards security rather than correction and prison conditions began to "depart from the standards expected of civilized societies" (2002:156). As the objective of prison moved away from correctionalism, facilities and resources to achieve such objectives were no longer a priority. Conditions worsened as prison resources could not accommodate the dramatic rise in offenders entering prison. Furthermore, Wacquant (2001) describes prison conditions and its regime as symbiotic with the new 'hyperghetto' as social spaces for warehousing African American disadvantaged populations. Simon (2007) goes one step beyond this, arguing that the increasing use of prison as a waste management system threatens democracy by sacrificing privacy for security, and at the ultimate expense of exiling the 'undesirables' to such institutions with little hope of reform.

Another feature of punishment that was thought to be extinct in the modern era involve methods of punishment which aim to humiliate and shame offenders. Pratt et al (2005) developed this observation to argue that the new philosophy of punishment has resulted in a change in the character and purpose of punishment. Pratt (2000) and Garland (2001) emphasise the emotive and expressive forms of punishment which allow for the release of human emotion towards offenders and victims. On both sides of the Atlantic a new set of public sentiments which demand draconian measures have been documented which are linked with the crime victim and a language of condemnation against the offender. Not quite a resurrection of the gallows and pillories, modern examples include public humiliation such as the sex-offender register, chain gangs, redrawing of legislation to trial youths like adult offenders, greater numbers of women being sent to prison in England and US and stigmatic clothing for offender undertaking

community sentences all of which illustrate the new objectives of the punitive turn having replaced the correctionalist and reformatory methods of the penal-welfare state.

These techniques illustrate a change in the normative value of justice to include *symbolic* and *expressive* types of justice as well as new *actual* and *material* values of higher imprisonment rates and a reduction in crime rates via incarceration rather than due to reformation. Alongside material forms of justice such as those described above, other types of sentencing that have been developed have the goal of communicating public and official anger towards criminality. Although practical application is limited in that they do not generate significant numbers in prison, these vengeful types of laws are used for their symbolic roles (Wacquant, 2009). For example, in an era of ‘populist punitiveness’ (Bottoms, 1995), Pratt (2002) documents the move away from a bureaucratic approach to dealing with an offender to a more populist approach as a result of a new relationship between the public and the state in crime control strategies. Illustrated by the change in Government discourse, a new penal configuration meant that citizens were given a more active role in crime management and prevention. Penal policies emerged that reflect public concerns rather than scientific rationality. As the decline in the rehabilitative ideal resulted in a loss of faith in the penal experts who implemented it, an emotive public with the electoral power took its place as being instrumental in the defining moments of introducing new punishment techniques. Proponents have used examples of political soundbites to illustrate the change in official discourse on crime in Britain and the USA, including ‘Three Strikes and You’re Out’, ‘Truth in sentencing’, ‘Adult time for Adult crime’ and ‘Tough on crime, tough on the causes of crime’, some of which did not follow with any substantive policies. This new dominant voice illustrates what were usually politically polarised positions that have merged towards a new centre of gravity of policy proposals. “A new rigid consensus has formed around penal measures that are perceived as tough, smart and popular with the public” (Garland, 2001:14).

The following explanations are divided by approaches to political analysis in criminology and to which this thesis attempts to contribute. Determined by concepts of power and focus of analytical and empirical attention, the main proponents cover different traditions of political analysis, including ‘Governmental criminology’ and ‘Structural-functionalist Marxism’. As will be described below, the former approach implies a Foucauldian concept of power as productive: an emphasis on ‘discourses’ such as ‘political rationalities’ which “define how problems of government are translated in accordance with certain values and interests”, and

which have recently revolved around ‘neo-liberal’ rationalities and forms of risk management (Edwards & Hughes, 2012:442). Structural-functionalist Marxism is underpinned by Poulantzas’s (1978) account of an authoritarian state emerging from post-war settlements. Subsequent research has attempted to identify the processes of criminalisation that has developed from this new state formation and responses to it. After describing existing literature on the emergence of a punitive turn, this chapter will discuss how this thesis aims to contribute to the standing debate, via a new approach to political analysis which highlights the importance of political competition in understanding social change and continuity.

### **1.2.2 Governmental criminology**

Jonathan Pratt (2002), David Garland (2001) and Jonathan Simon (2007) identify a similar trajectory of events which led to new social arrangements and cultural assumptions that the criminal justice system was grounded in. They describe the demise of the welfare state within the context of: high crime rates which resulted in a loss of faith by the public in state authorities, expert knowledge and the welfarist model of punishment and how punitiveness emerged as a way of the state re-establishing the state to punish in society.

Pratt and Garland describe how, ironically, it was the conditions brought about by welfarism, or for Pratt the civilizing process, that resulted in consequences opposed to those intended. For Garland, this resulted in the new culture of control and, for Pratt, the result was a set of trends pertaining to a decivilizing process. These investigations of new crime control strategies situated trends in the contradictory political rationalities of neoliberalism and neoconservatism. Within the context of growing public anxiety over crime, a reactionary politics developed which shifted the ways in which crime was thought about and thus, how authorities should react to them.

Garland’s ultimate book in his trilogy of writings on punishment refers to a new ‘culture of control’ (2001) which has replaced the liberal, penal-welfare state that he discusses in the first of his two books on punishment (1985; 1990). This latter book describes changes in social and cultural life in the USA and, to a lesser extent in the UK post World War Two. Garland organises these new conditions as features of ‘late modernity’, a new epoch characterised by the rise of capitalism and a state of consumerism. Summarising forces which changed the fabric of social, cultural and economic life in the second half of the 20<sup>th</sup> century, Garland highlights

the consequences of a capitalist society, “all the way up to global economic markets and the nation-state system, all the way down to the daily lives and psychological dynamics of families and individuals” (2001:78). Garland describes the trajectory of capitalism and how it transformed the golden era of the 1960s. A change in the economic market meant a restructuring of the family and the replacement of the ‘nuclear family’ with a more diverse family structure of the woman going to work and single-parent households. Developments in transport resulted in more people living outside the centre of the city and commuting to work. This changed the ecology of the city as poor and minority populations were housed in tower blocks and housing estates - social spaces akin to a ‘ghetto’. Developments in technology and mass media created more awareness of economic and social inequality and the democratisation of social and cultural life created rising demand for more equality.

The changes described above not only posed new social problems, they contributed to new opportunities to commit crime. The change in the ecology of the city, the change in the structure of the family and the household provided new opportunities for a new generation of teenagers who, having been brought up in the capitalist society and consumerist state, had the opportunity to commit crime. Lessening levels of informal social control, as well as a weakening government due to the democratisation of social life (which had been created by the welfare state), meant that welfarism came under attack. What had fuelled the new conditions of ‘late modernity’ was now being seen to fail in providing enough welfare to a society which was constantly being reminded of what they didn’t have and what they could have via electronic mass media. Rather than being praised for the opportunities it was giving, the welfare state was criticised for what it couldn’t provide with the realisation of social and economic inequality that new social conditions were creating and highlighting. The working classes believed that the welfare state was not providing enough, and the middle classes were concerned that the welfare state would not be able to contain the new problems of the late modern conditions. Anti-war protests, civil rights campaigns, race riots and an economic recession in the 1970s highlighted the issues of the welfare state, which the general population believed could not be contained by existing state structures.

The effects of these social and cultural changes on discourses of crime and strategies of control are conceptualised by Garland’s depiction of a new ‘criminology of everyday life’. In response to high crime rates becoming normal, everyday routines and practices changed in response to the new predicaments faced. A new discourse on criminology, public perceptions of crime and

new government responses resulted in a contradictory criminological thought. Garland (1996) organises these different responses into *adaptations* and strategies of *denial*, which are grounded by two opposing criminologies of the *self* and the *other*. Adaptive strategies seek to play down public expectation of crime control and manage the problem of crime via preventative measures, responsabilisation strategies and controlling the criminal justice budget. At the same time, criminologies of the *other* describes the offender as an “alien other” which has little resemblance to the law-abiding citizens of ‘us’. Garland (1996:461) describes strategies of punitive denial which accommodates a more politicised approach to crime rather than a knowledge-based approach evoked by the criminology of the self. Images and rhetoric of the criminal as a ‘job’, ‘predator’, ‘wicked’ and a ‘suitable enemy’ conjure punitive policies which seek to reassert the capacity of the sovereign state to control crime and to show that ‘something is being done’ about crime, which is now seen as a normal social fact in the conditions of late modernity.

Pratt (1998; 2000; 2002) documents the same changes in social and cultural values of the Western world through Norbert Elias’ (1939) concept of the ‘civilisation process’. Pratt’s (1998) reasoning for a change in penalty is based on the belief that cultural values shape and provide parameters to penal limits. Thus, a change in cultural values provides an opportunity for a new set of arrangements and techniques of punishment. He argues that such cultural changes interact with social structural change, changes in social habitus and modes of knowledge. For example, the civilising process of modernity (cultural change) was identified by the centralisation of state authority and a monopoly over legitimate violence and the power to punish (social structural change), the growth of manners and the developments of social interdependencies (social habitus), which meant that people became increasingly interconnected as they relied on each other for trades of goods and services (modes of knowledge). The ‘modern’ penal framework reflected the new values of a civilising process in the shape of a growing distaste for the suffering of others and the privatisation of disturbing events. These changes in the penal apparatus represented an overall shift in cultural and societal values, after gallows, pillories and torture were deemed as barbaric and inappropriate and the prison was removed from mainstream society.

However, a change in public sensibilities due to high crime rates, prison disturbances and a growing anxiety about crime resulted in a breakdown of many features of the civilising process. Using the prison as an example of this breakdown, Pratt (2002) is in accordance with Garland’s

(2001) descriptions of significant changes in social structures and cultural traditions, which for Pratt, threatened the foundations of a civilised society. For Pratt, the breakdown of the civilising process, identified by an increase in the imprisonment rate in countries concerned, began with disturbances in prison. Similar to Garland's argument of the welfare state creating conditions which led to its own demise, Pratt illustrates how features of the civilising process created the conditions for a shift towards an opposing, excessive level of punitiveness to occur. What he terms the 'de-civilising' trend to refer to the punitive turn, reflects a change in penal sensibilities caused by the perceived failure of state bureaucratic authorities to dissolve the threat of crime. Tensions rising between the central state and its own authorities caused a new axis of penal power to emerge between the central state and the increasingly anxious public, with bureaucratic authorities left to one side.

Furthermore, Pratt and Garland's approaches include the influence of a realignment of political rationalities. Garland (2001) argues that the reactionary response to these changing conditions and the new problems associated with them were influenced by the political realignment of neoliberalism and neoconservatism. Agreeing with the claims of O'Malley (1999), this combination of contradictory elements resulted in a New Right politics, which was responsible for the punitive law and order strategy as a response to conditions of late modernity (instead of reforming the welfare model). Garland (2001) argues that without this political realignment, the response to a perceived failure in correctionalism would have been an improvement of such services, rather than an all-encompassing reversal because it reflected a change in penal sensibilities and interests, which resulted in new group relations and a new social terrain for penal policies to emerge. In light of the emerging limitations of the welfare state, the Republican and Conservative parties grasped their opportunities and articulated such weaknesses in their political strategies as justifying a new political strategy. Pratt (2002) reinforces the causal relationship between populist punitiveness and neoliberal forces, which he argues is identified in the changing relationship between the central state and the increasingly anxious public. As the new axis of penal power shifted away from the "bureaucratic rationalism of the state and towards the emotive punitiveness of the general public", a feature of neo-liberal polity emerged via a strong central state which is re-affirming its sovereign power.

Jonathan Simon's (2007) explanation for a punitive turn is consistent with Pratt and Garland's use of neo-liberal political rationalities, but he is more specific in his explanations of changes

occurring in the USA via the re-shaping of political authority around crime; what he terms *Governing Through Crime*. Simon (2007) emphasises the central position of crime in new techniques of governance, whereby policy transition from welfare to workfare is framed by the problem of crime against the background of other social issues. Drawing on the theoretical work of Garland (2001) and the ‘experience’ of high crime societies, Simon explains the rise in punitive sanctions in America via a political shift towards ‘governing through crime’, where crime is used to frame political strategies for other social issues, becoming an organising principle for social institutions including education, the workplace and the domestic relations. Simon (2007) describes features of a more punitive model of crime control in America as crime control policies which spill into communities and affecting daily lives. Simon argues that American society is becoming less democratic and more racially polarised as a consequence of *governing through crime*, which he describes as “using crime to promote governance by legitimising and/or providing content for the exercise of power” (2007:5). As crime gained a central status in governing arrangements and organising principles, fiscal and administrative resources are repositioned towards the criminal justice system. These changes demonstrate the emergence of a new political order that has been shaped around the issue of crime, which justifies more authoritarian responses to social problems and how new rationalities are produced which affects the operation of social institutions and everyday experiences of American citizens.

Specific to American history, the crisis of the New Deal political order, both politically and in its capacity to exercise sovereign power effectively, crime became the solution around which the new political order would be framed. Amongst other high priority issues at the time, including cancer, mental health, consumer safety and violence, crime was prioritised due to; first the *experience* of crime increasing and knowledge of crime from the media and politicians and; second how increasing crime rates interacted with political strategies and agendas, such as liberal President Robert Kennedy’s needs to justify a new government strategy that was less tied to centralised bureaucracies than the traditional New Deal model and white Southern politicians using crime to distance themselves from supporting legal racial segregation in education and other public accommodations. “Politicians began to turn to crime as a vehicle for constructing a new political order” (2007:25).

The crimes that were increasing were those that affected the daily lives of the middle and upper classes, such as robbery and theft. As documented by Garland (2001), the ‘experience’ of high



crime societies led to a culture of fear of crime. For Simon, this crime fear was manipulated by governing officials to create the image of a citizen as an 'ideal victim' and was used to justify more draconian laws and penal sanctions, whereby civil liberties were surrendered for security and social issues controlled via punishment rather than welfare. As political leaders reframed the ideal citizen as a potential victim, social institutions that manage our everyday lives such as schools, workplaces and families became governed through crime. Crime becomes a strategic issue, which determines how social institutions are structured in the 'late modern' era and it used to prioritise agendas that have other motivations. Rather than crime being *one* social problem, crime is used as a motivator for change. This creates an alignment between political parties of what the appropriate response to such problems are, which surround "a cluster of treasured values in the always symbolically rich territory of crime and punishment" (2007:11).

As crime became the central concern for government, new and distinctive styles of law-making were implemented that are described above. These resulted in a higher prison population involving a disproportionate amount of the already marginalised and socially excluded populations of society. A shift away from the New Deal era of democracy towards a more polarised racial culture provides a state formation which breeds social and racial inequality. This over-representation is self-sustaining in the stigmatisation of such communities and, within a culture of fear, creates a division between the middle-class and the deviant lower-class. For the former, choices of living are based around crime and the perceived likelihood of victimisation. A "securitised environment" of gated communities and the demand for private security creates distance between class and race, which seeks further reliance on this new form of governance and control.

Simon (2007:6) concludes that the new forms of governing through crime threatens American democracy and produces a more polarised society. "It is exhausting our social capital and repressing our capacity for innovation". Ironically, although security measures are increased, Simon argues that it does not make the American citizen safer. Methods for governing through crime fuel the culture of fear which lowers the threshold of fear, thus justifying the need for more safeguarding measures which emulate techniques of governing through crime.

### 1.2.3 Structural-functionalist criminology

Implicit in the above literature is how political power is “used to accomplish governing programmes for citizens” within a particular political rationality (Edwards & Hughes, 2012:433). The following proponents imply that political power is something which is “used over citizens for the purposes of social control” (ibid). Simon Hallsworth (2002; 2005) and Loic Wacquant (2001; 2009) emphasise the controlling nature of punitiveness as a consequence of political manipulation within new state formations. These proponents identify the same developments of public anxiety and fear that Pratt and Garland have documented. However, public anxiety played a part within wider changes of slowing economic growth, larger social inequality and changing state formations that centred around immediate security rather than investment in welfare and social integration.

Changes in the style of law-making encourage the targeting of ‘problem’, ‘surplus’ or ‘excess’ populations that transgress the productive, white middle-class dominant society. This new state formation is characterised by a transition from ‘welfare to workfare’ and risk management, whereby social issues of poverty and marginalised populations are criminalised, in an economy where inequality becomes increasingly polarised. This self-reinforcing ‘security state’ threatens Western democracy and creates a state where “policies that would have been unthinkable during the welfare state are now accepted and celebrated” (Hallsworth & Lea, 2012:153). The transition from welfare to workfare results in penal expansion as a vehicle for social control, with a range of new harsher custodial sentences, the creation of new categories of offences and offenders and a range of penalties which result in pre-emptive criminalisation.

The criminalisation of social policy is also highlighted by Hallsworth (2002) who agreed with Simon regarding the importance of Garland’s account of the ‘criminology of the other’. For Hallsworth, this change in official criminology marked a decisive attack upon attributes of modernity. Hallsworth explains this development of the criminal as the ‘alien other’ as a consequence of a change in capitalist states – from a ‘restricted economy of limits’ to ‘an economy of excess’. Under the aegis of the welfare state, the previous system worked under the assumption that offenders were understood as being capable of being rehabilitated into society for useful purposes. The working class were thought to structure their own informal methods of control and crime was thought to be caused by social deprivation and poverty that would be solved by the welfare state. However, in a globalised world of slowing economic

growth, increasing social inequality and an “increased mobility of capital”, the Keynesian state was no longer able to invest in its poorest populations. “Different national states and regions compete to attract nomadic global capital by providing a labour force and an attractive environment that might just tempt it to invest”.

Hallsworth uses George Bataille’s organising principles of characterising the modern industrial order, *homogenous* and *heterogenaic* elements of societies, to understand how this economic shift has impacted on criminal justice strategies. Under the aegis of the welfare model of state regulation, homogenous projects were associated with political and social action which sought to include the socially deviant population. Heterogenous forces seek to exclude such populations but were subsumed by inclusive measures of welfarism and modernity. However, under emerging neoliberal conditions towards a logic of exclusion rather than inclusion, these new transgressive forces are active in economic and political processes to produce surplus and redundant populations which are no longer able to consume legitimately in a free market society. Subsequently, the poorest communities become “surplus to economic requirement” (Hallsworth, 2002:160). It is within this new economy that a “return of penalty organised around unproductive and excessive practices” become apparent, which is marked by Garland’s ‘criminology of the other’ (ibid).

In this way, the administration of punishment is repositioned from the homogeneous to the heterogenaic part of society, which results in the types of punishment associated with the punitive turn such as Western style ‘gulags’ and the general use of punitive sanctions increasing. Therefore, those who cannot be accommodated by the homogenizing effect are relegated to the now separate ‘heterogenaic’ project because, under a new economy of excess, they are not ‘subsumable to the logic of utility and productivity sanctioned by the restricted economy’. Political discourse of outsider toxicity and insecurity in a neoliberal, free world generates the need for such punitive methods. As Hallsworth (2005:253) puts it, to “defend the inside of society from the outside that its political and economic structure produce”.

The notion of ‘surplus populations’ is also referred to in Loic Wacquant’s (2009) analysis of how a neoliberal government of social insecurity not only creates its own “state-sponsored poverty” but responds in a way which is self-reinforcing via liberal-paternal tendencies of a free market and authoritarian approach to crime management. Focussing on the USA’s racial division, Wacquant sought to explain why there was a disproportionate amount of black people

in prison ‘in four short decades’ (from 1960s on) and why the rate of imprisonment of African Americans had increased. He highlighted how the number of African Americans incarcerated had doubled between 1980 and 1995; making up 55 percent of cohorts entering prison in 1995 when they made up a mere 7 percent of the general population and the rate of imprisonment of black people was ten times more the rate of white people since President Ronald Regan’s ‘War on Drugs’.

Tracing a nexus of class, race and liberal-paternalist developments in the US, Wacquant (2009) argues that the punitive turn was a consequence of a new ‘Government of social insecurity’. A racial backlash in the 1960s against social advances which were seen as rewarding criminal behaviour was coupled with deindustrialisation which caused a polarising shift in the class structure. As unemployment and economic deprivation increased in a changing wage-labour market, there was a general feeling of fear and anxiety about those who were becoming marginalised by changing economic conditions. This new state formation, described as ‘liberal-paternalist’ is one which emphasises the authority of the state in the management of crime, but which steps back from the responsibility of the economy, therefore providing efficient police and a free market.

As a response to *social*, rather than *criminal* insecurity, there was a merging of welfare supervision and punitive sanctions into a single apparatus to control the growing urban marginal populations. He documents an increase in the surveillance and control of criminals as well as welfare dependents in the community and how these two marginalised groups are being controlled under the aegis of a now single apparatus of welfare supervision and penal severity. Using Pierre Bourdieu’s analogy of the state, Wacquant describes how the ‘left hand’, which represents education, health and welfare, was supplemented by the ‘right hand’ of police, justice and correctional facilities in controlling the working classes (p.6). Wacquant (2009:6) supports Hallsworth’s notion of surplus populations, which is made up of those who fail to live up to the “abstemious ethic of wage work and sexual self-control”. Evoking Weber’s concept of the *protestant ethic* within an emerging neoliberal political economy, those who refuse to accept individual responsibility, and those who are “caught up in the turbulence of economic deregulation” are subject to a new politics of poverty (p.11). Thus, rather than an increase in crime rates, Wacquant explains the increase in penal sanctions as a consequence of “the dislocations provoked by the social and urban retrenchment of the state and by the imposition

of precarious wage labour as a new norm of citizenship for those trapped at the bottom of the polarising class structure” (2009:xv).

Wacquant (2009:xvi-xvii) describes three levels of inter-related functions of a ‘liberal-paternalist’ state, which correspond with a new level of ‘class’ within an increasingly polarised structure. For those at the lowest of the social ladder, prison is used to warehouse and neutralise offenders who are seen as the most stigmatised fraction of the community. One step above in the class structure, the expansion of the penal network including the police and correctional institutions serves the purpose of imposing discipline amongst the proletariat, or for those subject to that which Wacquant calls “desocialised wage work”. For the upper class as well as the rest of society, criminal justice institutions are in order to reaffirm the sovereign power of the state as well as to emphasise a newfound boarder between the ‘deserving’ and the ‘undeserving’ poor; those who are worth including in a “circuit of unstable wage labour” and those who should be banished (ibid). This latter function is a symbolic aspect of punitiveness is punishment which doesn’t have a significant impact on prison numbers but is one which reinforces the state’s affirmation of their sovereign power against the ‘undeserving poor’ and the urban marginal populations who have not been involved in criminality. He discusses how half of the population in the criminal justice system are not in prison but are under constant surveillance and monitoring on parole or probation. This acts as a strong reminder to others in the subpopulation about the need to practice personal responsibility and become ‘market-compliant actors’ by following the rules of the white, middle class society. Therefore, this disciplinary regime works beyond the criminal populations as a symbolic reminder of what happens when the rules are not followed by marginal populations.

In conclusion, proponents of a punitive turn describe new techniques, objectives and purposes of punishment which have emerged that do not fit into the ‘modern’ paradigm of penality. Excessive levels of punishment are applied which no longer seek to reform the offender but seeks to meet the desires and demands of changing public sentiments and public involvement in how punishment should be dispensed. An expansion of the penal network, warehousing of surplus populations, and the politicisation of penality are features of a new kind of penal regime which is rooted in the demise of the rehabilitative ideal and the increasing fear and public anxiety of crime and victimisation. These changes have been situated within the context of an emerging neoliberal influence. Whilst Garland, Pratt and Simon explain the punitive turn via political realignment as a response to public anxiety over crime, Wacquant and Hallsworth

emphasise the repressive nature of punitiveness as a consequence of a change in state formations in capitalist societies. The first section of this chapter has attempted to highlight the limitations of both approaches to political analysis in criminology; whilst post-structural accounts reduce changes in penalty to causal agency of political actors, structural-functionalists reduce politics to determinant societal structures. The following section will explicate how a theory of politics can move beyond these binary features, to develop a non-reductive theory of politics in the legislative arena of British penal policymaking.

## **1.3 The Critics**

This area has been dominated by broader, macro-level analysis and approaches to theorisation. As valuable as these approaches are, being constrained to this level of analysis has presented certain definitions of the punitive turn, as well as significant issues with validation via the use of empirical evidence. The next section introduces the critics of the punitive turn thesis, who have described punitiveness as a sweeping generalisation based on a selection of particular developments in penalty in Western liberal democracies. The criticism is due to the vague definition of punitiveness, which is founded upon unconvincing evidence.

### **1.3.1 Loose knit definition**

Matthews (2005:175) highlights many issues that have come out of the above literature and how the consensus of a punitive turn has become too “loose-knit” (2005:175). Although the prominence of the term is without doubt, it is often not defined very clearly. Without proper understanding of the term, the aetiology of its origins and its relationship with other dominant trends, the profoundness of the punitive turn is on unstable grounds.

Also, Matthews (2005:188) goes as far as to say that the punitive turn has simply not occurred, due to a lack of punitive intent. For example, he suggests that the expansion of the prison could be due to a lack of community responses in supporting those most vulnerable. He highlights how the prison is being increasingly used as a “dumping ground for those for whom the state is unable or unwilling to provide suitable care and support”. Therefore, the criminal justice system may be changing due to other unanticipated social issues within society, which have nothing to do with the intention of punishment.

Furthermore, Matthews (2002:224) argues that crime control has been lost among the other social hazards in society within a wider framework of community safety, concluding that society is "witnessing a de-centering of crime control" in favour of mechanisms for managing the 'underclass'. Also, Zedner (2002) criticises Garland's (2001) thesis of the culture of control, believing that there have been significant changes to advanced capitalist states, however, which have little to do with criminal justice matters. Therefore, the socio-economic underpinnings of the punitive turn, including neoliberal influences and the changing of attitudes of the public towards certain social groups, are argued to be not as significant as advocates of the punitive turn believe.

### **1.3.2 Countertendencies**

The literature described above acknowledges the existence of contradicting tendencies in the response to crime and punishment. Although Hallsworth and Lea (2008) have acknowledged that there are other developments in criminal justice in the UK and USA which do not fall under the guise of a punitive turn, he simply replies that there is "still a general shift towards punitiveness". This thesis argues that this does not explain how other developments such as restorative justice and techniques of rehabilitation and treatment can be applied within the new 'security state', instead tending towards a dystopian criminology by focussing on the most punitive of sanctions.

For example, Braithwaite (1989) describes the emergence of reintegrative shaming approaches in Western culture. Via methods to reintegrate offenders into society, this philosophy of punishment distinguishes itself from the stigmatising and exclusionary sanctions of punishment described by proponents of the punitive turn, and by condemning such methods of punishment as 'counterproductive' and 'nihilistic'. These methods divert offenders away from custody, choosing to respond to crime in the community rather than the state. Describing it as a process of 'healing' within the community, restorative justice involves those who were affected by the crime, who can take part in how the harm done by the crime can be repaired. These methods have been identified in countries associated with neoliberal economies, such as New Zealand, Australia and the UK (Braithwaite, 2004).

Other diversionary tactics have included efforts at prevention. There is a voluminous amount of work on the developments of preventative and community safety methods in Western cultures (see Crawford 2007; Gilling 2007; Stenson and Edwards 2004). Garland (2001)

includes the emergence of preventative techniques in his twelve indices of change which make up the *culture of control*. Edwards & Hughes (2009) discuss the developments of a 'preventative turn' in England and Wales, and how preventative methods have been institutionalised over the past three decades.

Furthermore, Feeley & Simon (1992; 1994) discuss the emergence of a new ideology that aimed for new practices and objectives within the criminal justice system. This became known as 'The New Penology' and later as actuarial justice. Evidenced by distinctive features of categorisation, management and assessment of offenders, based on their risk and dangerousness, this new ideology transforms penal practice in three ways; new discourses that are primarily concerned with risk management and probabilities, new objectives that increase efficiency of systematic processing and new techniques that employ these discourses and succeed in the objectives which target offenders as unequal categories in society (Feeley & Simon, 1992). It is argued that these new discourses, objectives and techniques replace those of traditional penal practice that encompass "clinical diagnosis and retributive judgement" and which aim for "rehabilitation and crime control" of individual offenders who are thought of as equal with the rest of society (Feeley & Simon, 1992:450). Therapeutic and diagnostic tools which are valued by traditional penal discourse are replaced with systematic processes of control, surveillance and confinement.

The structural-functionalist approach described above has been criticised for being too selective of the injustices that it seeks to intervene, focussing on crimes of the powerful and ignoring social injustices and conventional crime issues (Edwards & Hughes, 2012). McLaughlin (2010:170-1) describes its "tendency to slip into sweeping generalisations that push aside tensions and contradictions". Although countertendencies of political forces are acknowledged, the authoritative state has the 'loudest refrain' within contemporary government programmes (Hall & Taylor, 2011). This leaves little room for explanation of how countertendencies co-exist within the same crime control regime. Rather, Edwards and Hughes (2012) suggest a conceptual framework which needs to explain how other forces have been drowned out – if they have. They argue for an analysis of public safety 'regimes' to signal the point that responses to crime and punishment are the outcome of ongoing political competition, thus shifting the analytical focus to 'regime' and 'competition' instead of state formations and their 'function' or political 'rationality' and 'discourse'. They argue that this approach does not do that. In response to countertendencies of punitiveness, they argue that there has been no



attempt at disproving these socio-economic changes but ask if there are other changes more powerful which maintain the survival of penal welfarism? Maybe a punitive turn is only produced in certain circumstances or is one of a number of possible adaptations depending on the history of individual countries and political systems. In fact, Meyer and O'Malley (2005), who have disputed the existence of the punitive turn in Canadian criminal justice, already engage with these issues and reveal an awareness of tensions and countertendencies behind the survival of penal welfarism. They demonstrate how Canada initiates a 'balance' of maintaining a gap between them and the frowned upon state of the American punitive justice system, as well as responding to serious crimes with a relatively punitive intent, thus demonstrating the existence of contradictory policies.

Proponents from a political rationality approach have provided their own arguments for countertendencies amongst the general trend towards punitiveness. Garland (1996) claims that between these two dualistic and ambivalent extremes of penality lies the previously dominant penal-welfare model, but that this type of criminology no longer fits into the new social and cultural fabric of late modernity. His concept of a new 'criminology of every day' includes two contradictory approaches of the *self* and the *other* as co-existing in late modernity. Whilst the more subtle techniques of the 'criminology of the self' works to invoke rational, effective and economical approaches to crime, the 'criminology of the other' denotes the criminal and a demonic other which justifies the need for more draconian methods of punishment and to support state, sovereign power in the fight against crime.

Furthermore, Pratt (2000) acknowledges other trends of managerialism and actuarial justice which demonstrate a continuation of modern penal frameworks which counter the emotive and ostentatious displays of punishment. He explicates these contradictory developments as a typical feature of postmodern penality and the possibilities of there being a disruption and discontinuity on the one hand but enhanced continuity on the other. Continuities of such penal apparatus that has been embedded deeper into societal culture may have an increased likelihood of remaining in mainstream penality. He claims that the contradictory methods of punishment suggest that there has been "a new configuration of penal power reflecting both civilising and decivilizing influences and thereby pulling the possibilities of punishment in competing and contradictory directions" (p.431). Thus, the contradictory elements found in contemporary penality are due to the civilising process trajectory developing in one way but reversing in

others such as the central state of power remaining and able to use rational, bureaucratic tendencies on one hand but also to demonstrate that it is listening to the public demands because it has shed responsibility for security in other areas. The nature of the changes is dependent on local contingencies and can differ in the nature and intensity of change, this agreeing with Garland (1996) and O'Malley (1999) that penal effects can be contradictory and volatile by nature. "The interplay of the above two forces is going to be reflective of the particular intensity of the features of the civilising process at any given time" (Pratt, 2000:422).

Despite these attempts at explaining countertendencies within the same narrative, by criticising a single framework approach to explaining penality, O'Malley (2000:153) criticises authors of the punitive turn for chasing a chimera. He criticises frameworks of analysis which resulted in grand narratives of the punitive turn thesis, such as 'the death of the social' and 'postmodern penality' for ignoring impacts of resistance, the instability of criminal justice approaches and their tendency towards hybridity. "Such theoretical schema need to be regarded more as resources for a politics of crime and penality, than predictions of catastrophic change and maps of the future" (ibid). These often-contradictory elements of punishment illustrate the inconsistencies of penality that are difficult to account for under a single framework. He argues that it is due to the amalgamation of neo-conservative and neoliberal political economies. O'Malley (2000:164) later argues for an appreciation of such politics, which has been neglected in favour of structural changes, and which do not consider the impact that resistance and contestation. "If we recognise that rather than being driven by irresistible logics, they are the subjects of political contests, restraints on resources, and so on, then we should expect inconsistencies and unevenness to characterise the field of criminal justice". But what do these inconsistencies mean for the punitive turn thesis?

These arguments suggest that although there is an acknowledgment of countertendencies to punitiveness by advocates of the punitive turn, there is a lack of understanding about how they co-exist with each other and what this means for claims of the punitive turn thesis.

### **1.3.3 Lack of evidence**

Furthermore, the lack of empirical investigation is highly scrutinised (Matthews, 2005; McAra, 2011; Nelken, 2011). After criticising the lack of empirical particulars in the punitive turn literature, Matthews (2005) criticises the sparse 'evidence' that is used. Pointing to the

assumption made by advocates that a driving force of the punitive turn is an increasingly anxious public who demands tougher responses to crime, Matthews highlights research which concludes with the complete opposite; that the public want a fair and mixed approach to crime which includes principles of treatment and rehabilitation (Roberts & Hough, 2002). However, it could be argued that the *perceived* public opinion is more punitive than reality. But this begs the question of why governments would choose to perceive public opinion in opposition to evidence resulting from research findings.

McAra (2011:100), supported by Nelken (2011), points out the inaccuracies of depending on imprisonment rates per percentage of the population. She argues that imprisonment does not necessarily mean a punitive response to crime, as the purposes behind the incarceration method could be to reform and rehabilitate. Therefore, she concludes that “the symbolic meaning of prison is a somewhat slippery category in contemporary penalty”. McAra (2011) also argues that the taxonomy approach of political economies used by Cavadino and Dignan (2007) ignores the multi-level character of each country’s state. She suggests that it is too narrow to simplify a country’s method of governance into a category, which tends to ignore what goes on beyond and beneath the level of the state. Rather, comparative studies need to take into account the “multi-layered sensibilities which inhere in ostensibly inclusionary or exclusionary modes of punishment” and the need to make sense of contradictory environments within which penal systems are situated. “Scholars need to step outside the strictures of taxonomy and adopt a more critical pluralist reading of the social and political phenomena which enmesh our lives” (McAra, 2011:102).

In addition, a critique of the sparse number of, to borrow Garland’s (2013) term, ‘empirical particulars’ which support the punitive turn is that they provide only a ‘snapshot’ of government responses to crime at one particular time. For example, Cavadino and Dignan (2007) do not take into account how their figures of incarceration rates may change over time. Although Cavadino and Dignan (2006) acknowledge this limitation with respect to changes from the effects of globalisation, their study remains as a snapshot in time and, as they admit, does “not give us the whole story” (2006:452).

## 1.4 Contribution of this thesis

After reviewing the arguments for and against the punitive turn, it seems that this area of criminology is chaotic. Arguments are originating from various perspectives and appearing from different sources, taking a multitude of variables into consideration and coming out with different formulae for what makes a society punitive. Instead of a single 'punitive turn thesis', there appears to be several different meanings to Foucauldian and Marxist thinkers. This would explain the definitional imprecision and lack of empirical evidence to support and explain these grand notions. Given these criticisms (elaborated in section 1.3), this thesis understands penal policy as the emergent outcome of processes of political competition rather than as an epiphenomenon of a political rationality or a state function. In turn this requires a theory of political competition and a concomitant methodology for its empirical observation in particular contexts and historical moments. This contribution can be elaborated in terms of the importance of middle-range theory, cognate developments in political analysis and the need to understand both change and continuity in the political competition over crime and punishment in the policy process of liberal democracies such as England and Wales.

Compared with the 'Golden Age' of penal modernism in which rehabilitation and treatment were hegemonic, Meyer and O'Malley (2005) suggest that the new catastrophe criminology is a 'Dark Age' of criminal justice characterised by the death of penal modernism. Features of the decivilising process (Pratt, 1998), economies of excess (Hallsworth, 2002) and populist vengeance (Garland, 2001) which characterise this new method of punishment justify the need for further research (Cavadino & Dignan, 2007). The promotion of market societies and an anti-statist foundation have been shown to generate rising inequality levels, material deprivation and a socially exclusive culture which provides a breeding ground for increasing crime rates and social deviance (Currie, 1997; Taylor, 1999). Alarming these economic changes have been identified as the reversal of modernising processes of civilisation, rationalisation (Garland, 2001) and societal processes (Simon, 2007).

A language of a 'Dark Age' begins to give justification to this thesis. As demonstrated above, the punitive turn thesis is based primarily on theoretical assumptions with limited forms of rigorous, empirical support. Due to the wide use of these assumptions and suggestions of a 'Dark Age' of criminal justice, should there not be a way of clarifying these features and characteristics of a new method of punishment?

Theoretical propositions of the punitive turn create a bleak image of Western crime control since the end of the twentieth century. As proposed by the theories that this study will test, neoliberalism has created the political, economic and social climate for the punitive turn to take effect. Grand narratives of the punitive turn, in its many forms and shapes, offers large scale hypothesis about the conditions in which the turn has arisen – whether it be labelled as ‘late modernity’ (Garland, 2001) or ‘postmodernity’ (Pratt, et al., 2005; Simon, 2007). Pratt (2000:141) argues that penalty has moved into a postmodern state where “new boundaries, criteria and possibilities emerge”. New punitiveness reflects these new possibilities. If England and Wales have witnessed a move towards the new punitiveness, it is important to understand what these new possibilities are. Also, proponents suggest ways in which the punitive turn has manifested itself in contemporary penalty, such as a rise in imprisonment rates, harsher sentencing practices and community penalties aimed at humiliating the offender which are beholden to policies founded in populism. However, they fall short of an advisory comment on reform. “If the dynamics of penal populism are a structural feature of ‘late modern’ society, all avenues for institutional reform designed to counter the culture of control seem blocked” (Lacey, 2008:25).

Therefore, it is argued that criminology should be more than a ‘counsel of despair’ (Lacey, 2008) and in order to change policy trajectories, we need to have a more nuanced and empirically informed sense of how and why penal policy comes to be the way it is. A better understanding of the influences of penal policy making could result in suggested ways of improvements. This thesis will attempt to investigate this question. By breaking the punitive turn thesis into its component parts and setting out the evidence and theory for arguments for and against this thesis, the project has, so far, attempted to deconstruct this well-known phenomenon. This is in the hope of either dismissing the thesis as another ‘criminology of catastrophe’ or highlighting its usefulness in explaining contemporary criminal justice.

### **1.4.1 Middle-range theory**

One of the fundamental standing debates surrounding the punitive turn is the relationship between punitiveness and how it co-exists with other countertendencies which, to differing extents, contradict the aforementioned features of punitiveness. Proponents describe general tendencies and grand narratives of what is sometimes assumed to be all-encompassing, either

as a neo-liberal state formation, or political rationality. However, the consensus of co-existing contradicting tendencies raises questions of how they exist together and what are the dynamics of the relationships within this realm of punishment philosophies?

With this in mind, and the need to understand the dynamics of philosophically different but co-existing developments in penality, this thesis evokes ideas of ‘negotiated orders’ whereby change and continuity can be analysed within historical processes in specific periods of time. With ‘negotiations’ implying actors with agency actively participating in procedure, resulting in compromise and transformation being possible, ‘order’ reminds us of the constraints of political systems and classifications and a sense of continuity and stability. As Henry and McAra (2012) highlight, this approach is a reminder to the possibilities of change and/or resistance to change within political and social settings. This is imperative when understanding a phenomenon such as the punitive turn which is founded on the assumption that there has been a change in penality. Such ‘negotiated orders’ need to be understood at the level of actors within social settings and political systems.

To contribute to this issue within the parameters set by the research questions, this thesis evoked a Mertonian middle-range theory approach. This allows for a manner of research which “subjects theories to empirical testing and the way in which it feeds the results of such empirical testing back into a reconfiguration of a theory” (Henry & McAra, 2012:344). Rather than assuming that actual developments in penality during the case study are due to one unified theory, a middle-range theory allows for the construction of a network of theories to explain such developments. In this way, the thesis never set out to either corroborate or dismiss punitiveness in its entirety as described above. Countertendencies could be identified and accounted for as separate entities, rather than being included or excluded depending on their adherence to the punitive turn features, with the aim to understand how contradictory tendencies can exist at any one time.

This project is founded upon the statements of Matthews’ (2005), who argues that the punitive turn definition is too ‘loose-knit’. After a review of the literature advocating a punitive turn, the thesis concluded that there is a wide variety for what the punitive turn actually means and is arguably based on a certain discourse which has no empirical value (Brown, 2005). Although existing accounts succeed in reconnecting penology with broader social theory, they tend towards sweeping generalisations that have been accused of US exceptionalism. Brown

(2005:28) suggests that they would benefit from a more “empirically based assessment of both transformations and continuities in the penal practices over recent decades”. A reason for this lack of empirical value could be due to the level of analysis used to identify punitiveness and explain its aetiology. Proponents of the punitive turn thesis concentrate their efforts on macro level analysis of political economies and socio-cultural environments. This thesis argues that an approach grounded in organisational processes and governmental arrangements is lacking. Garland notes the tension between “broad generalisations and the specification of empirical particulars” in the study of social life (2001:vii). Due to the large number of broad generalisations already made about a punitive turn, this thesis takes the approach of identifying ‘empirical particulars’ which appear to be lacking in either supporting or dismissing the punitive turn thesis.

This thesis has borrowed Garland’s concept of ‘proximate causes’ to think about punitiveness in a new way. What are these processes that produce a punitive outcome in response to criminality? What about the immediate causes, *within* the structure of the penal state, that cause punitive penal policies? Due to the level of analysis concentrating on more macro developments, existing literature has not been able to identify what are the ‘proximate causes’ of punitiveness. A focus on state institutions and processes, revealing ‘proximate causes’ of an increase in punitiveness provides a more grounded, middle-range theoretical approach to the debate, which can gather empirical evidence to either support, dismiss or suggest possible adaptations to the punitive turn thesis.

#### **1.4.2 Political analysis in criminology**

This study will contribute to the growing subject of political criminology. Matza (1969) has documented how the study of crime has been separated from political science. Nearly twenty years later, Reiner (1988:139) agreed, arguing that there is a “parallel blindness” between political theory and criminology. He highlights how criminology has separated the criminal from the state, which is surprising considering that it is the state that has labelled both the criminal and the acts of criminality. Crime control has become more politicised (Faulkner & Burnett, 2012:1). Punishment is now conceived as social and political choice. “The rate of imprisonment is not beyond government control. It is ultimately a matter of political choice” (Morgan & Liebling, 2007:1107). Political actors are becoming increasingly motivated by crime control policy and penal actors are increasingly playing politics (Campbell & Schonfeld,

2013). This gives justification for the exploration of political themes running through crime control and the effects these have on past, present and future policy.

Although Colquhoun's salesmanship of what is now known as modern policing was that the cause of crime was located in the overall structure of economy and society, criminology has since moved away from the political orientation in which Colquhoun framed it (Reiner, 1988). When positivism replaced classicism as the primary doctrine of criminology during the early 19<sup>th</sup> century, the state and police were replaced with a focus on biological arguments of the individual who is born to be a criminal (McLaughlin, 2010:303). However, with the emergence of radical criminology, the state came back into configurations during the 1960s. Despite this emergence towards the end of the 20<sup>th</sup> century, Reiner (1988) convincingly argues that there remains a significant gap between the study of crime and political theory. With the exception of Left Realism (*see* Young, 1986), criminology and political analysis of the state has been deemed insignificant.

The importance of politics is emphasised by Garland's most recent approach to the sociology of punishment. Garland (2013) argues that existing literature has focussed too much on broader social processes and argues for a shift in the focus of attention onto the state. In understanding the causes of penal policy outcomes, Garland moves away from the "sociological bias" which can characterise existing literature (including his own). Whilst the same social forces have been identified in countries other than America, it is American penalty that has responded in a specific way – increasing crime rates, death penalty etc. "Social current may ebb and flow, but they have no penal consequence unless and until they enlist state actors and influence state action" (p.494). Therefore, in order to grasp the key determinants of penalty, we need to focus on how these social forces, and the specific pressures that they bring, are translated into specific penal effects.

Garland suggests that this can be understood with a narrower focus of the penal state, where pressures are translated into effects. This thesis borrows Garland's definition of the penal state, which is described as "aspects of the state that determine penal law and direct the deployment of the power to punish" (2013:495). The penal landscape and its authority include, the legislature, executive and judiciary together with the leadership of penal agencies who shape policy and direct its daily implementation. Therefore, social currents – that have been the focus of his previous investigations – only have consequences when they reach the state and its



actors. It is how they are translated into specific penal outcomes and this process within the penal state that should be the focus of inquiry. In seeking to explain this process of translation requires an exploration into the more immediate ‘proximate causes’ of change and continuity in punishment (p.484). These are found in the *character* of the penal state; determined by the structure, its powers and capacities, autonomy or openness to political pressure, internal division and restraints and interest and incentives of legal actors (ibid).

This thesis adopts Garland’s approach. Rather than adding to the superfluous amount of literature on social, economic and cultural forces of society, this thesis tackles the concept of punishment from a new angle – the penal state and how social pressures are translated within the “governing institutions that direct and control the penal field” (Garland, 2013:475). The research explores how these institutions are structured and how power is distributed amongst those who can influence legislation at the level of decision-making; what the processes are for proposed changes to legislation and who is involved; how social problems are defined and what justifies responses on the floor of the legislative arena at Westminster; how external influences such as public opinion influence these processes.

### **1.4.3 Social change and continuity**

In this way, this thesis helps to address a gap in the literature on the political economy and punitiveness. Although this work, such as Lacey (2008) relates punitiveness to wider institutional features of different political economies – which is distinctive from the more abstract grand narratives described above – analyses remain ‘static’ in the sense that they do not empirically investigate the mechanisms via which particular features of political-institutional structures help to shape penal policy outcomes over time. This thesis argues that such theories are conjectural and can only account for episodic features of penalty, without regard for the historical contexts from which such features have emerged. Thus, a focus on penalty over a period of time, which addresses such features of political-institutional structures, may complement existing work on the political economy and explanations of punitiveness with the added benefit of a historical approach which can accurately identify mechanisms for change.

Thus, in the same way that proponents of the punitive turn thesis are criticised for not appreciating middle-range accounts of the political process, existing middle-range accounts are

conjectural in their explanations of snapshot of particular features of penalty, which cannot fully explain this phenomenon. Such ‘presentist’ arguments have approached the past using concepts and issues of the present, assuming that they had the same relevance and significance in the past as they do in the present day (Garland, 2014). Without an investigation into the historical context and an appreciation for the significance of concerns in that particular historical context, how can a punitive ‘turn’ be fully understood and explained in relative terms? This thesis illustrates the importance of understanding social change – via a historical analysis of legislation, an investigation into why changes do and do not occur in a consistent institutional setting. An advantage of a theory of political competition and the political process is its historical appreciation of the changes and continuities over the past three decades and its methodological implications for avoiding ‘presentist’ arguments of a punitive turn.

## *Chapter Two*

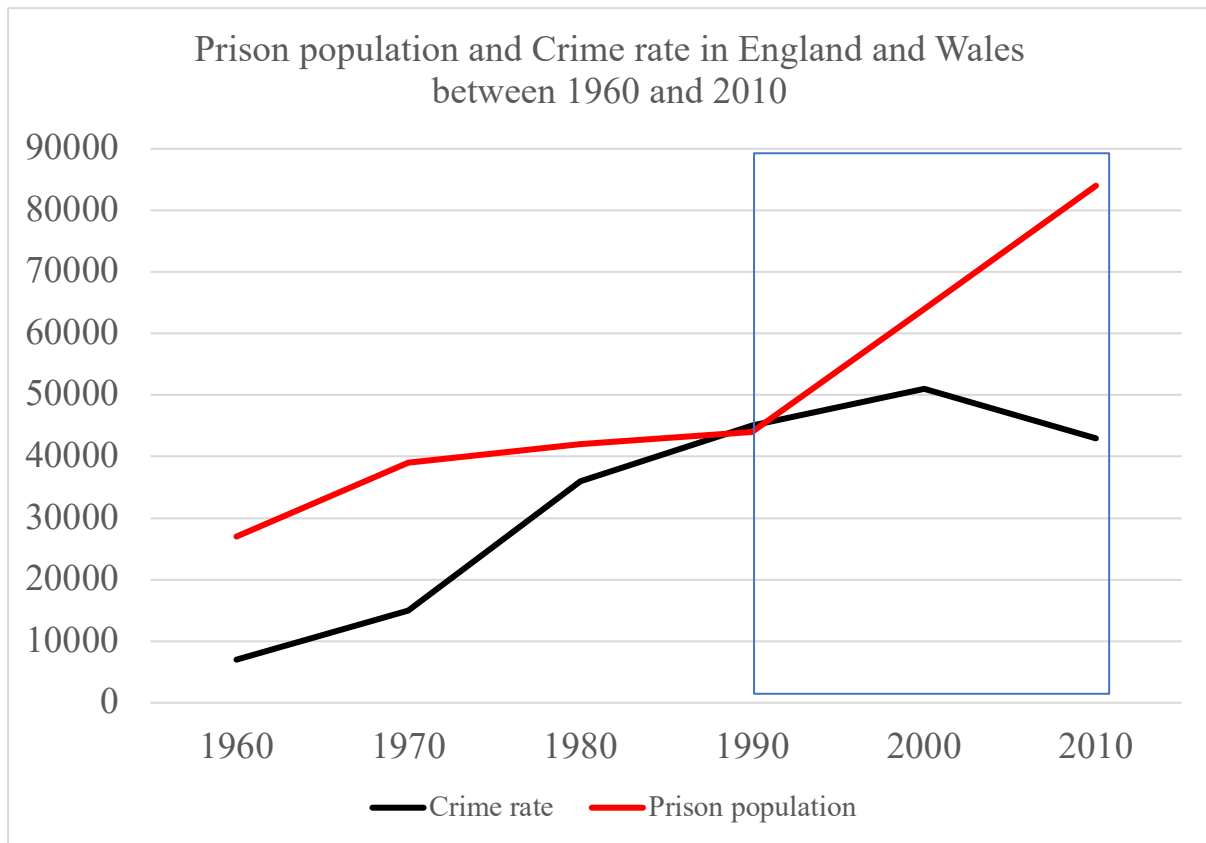
### *Research Design*

#### **2.1 Introduction**

As the previous chapter illustrates, the punitive turn thesis has been an influential feature of debates about punishment in Western societies. However, features and origins of a punitive turn have been criticised for lacking in empirical evidence and being too “loose-knit” in its definitions (Matthews, 2005; Brown, 2005). Or, to borrow Garland’s (2013) phrase, there are a lack of ‘empirical particulars’ supporting the punitive turn thesis and the more direct, ‘proximate causes’ are unknown. The previous chapter also highlighted how there are multiple theses of a punitive turn, with different meanings to different kinds of thinkers, and which can explain the definitional imprecision. This chapter will describe how this thesis has attempted to address these issues. After describing the aims and objectives of the research, this chapter will outline the research process and the methodological approach adopted. The chapter will conclude with a description of ethical concerns and ways of overcoming them.

The primary aim of this research study was to explore the ways in which (and the degree to which) the penal system in England and Wales can be said to have experienced a ‘punitive turn’ over recent decades, as described by proponents. Empirical evidence was collated and analysed in order to support, dismiss or adapt the punitive turn thesis in light of such evidence. This involved investigating actual developments in penal policy which represented a change or continuity to sentencing legislation.

Sentencing legislation was chosen after existing research suggested that changes in this area of policy was a key reason for the rise in the prison population in England and Wales. Although sources point to the 1970s as a time when a punitive turn took effect in the USA, a significant rise in the prison population in England and Wales was the 1990s and beyond. Graph 1 shows this acceleration, which also includes the crime rate for context:



*Graph 1*

*Prison population (Ministry of Justice, 2013)*

*Recorded crime rates (Office for National Statistics, 2015)*

The box indicates the time period selected for this thesis, which shows an acceleration in the rise of the prison population despite a decline in the crime rate.

## **2.2 Aims and Objectives**

The objectives of the study were to conduct a historical analysis of sentencing policy in England and Wales, between 1990 and 2010. As described in Chapter 1, proponents of the punitive turn thesis claim that a new kind of populism has emerged, resulting in “the policy-making process [becoming] profoundly politicised and populist” (Garland, 2001:13). However, there has been little empirical evidence to support this beyond the change in political rhetoric that is attached to being ‘tough on crime’. Thus, understanding the causal mechanisms of apparent changes required an in-depth analysis of the sentencing framework’s underlying policy, as well as investigating the decision-making process which led to such policies being implemented.

Due to this focus, the objectives of the thesis were to investigate the governing arrangements and policymaking processes of a sentencing Bill receiving Royal Assent. Therefore, policy at the level of ‘decision’ was the focus of investigation.

As the research developed, a subsequent objective included an exploration of the political context of penal policy formation, including how specific actors influence decision-making processes, as well as how the structure of political processes constrains certain individuals into adhering to certain rules and regulations of political groups.

### *Empirical investigation*

Although the prominence of the term ‘punitive turn’ is without doubt, the definition of the term is not clear (section 1.3). Literature demonstrates that the punitive turn thesis has reached the status of a knowledgeable claim without having gone through the rigorous procedures which Merton (1973) suggests are necessary for such a status to be obtained. Thus, as an exercise grounded in Merton’s (ibid) ‘organised skepticism’, the claims of the punitive turn thesis were tested in light of empirical evidence. Thus, the thesis created a diagnostic tool to assist in identifying punitiveness in the legislative arena, over a period of time. This tool complemented the objective for more empirical investigation into actual developments of penal policy, which can be identified as evidencing punitive or other tendencies.

### *Level of analysis*

Due to the already sufficient amount of literature – which is without rigorous evidence - on macro level explanations of the social and economic forces leading to a punitive state, this study adopted a different approach. This project intended to provide an investigation with a more grounded focus, exploring the “institutional processes that directly produce specific penal outcomes” in England and Wales (Garland, 2013:483).

Taking Garland’s (2013:494) recommendations for future study of penal policy, the aims of this project were to be achieved via the “immediate focus of the structure and agency of the penal state; its powers and capacities, its autonomy or openness to political pressures, interests and incentives of legal actors, as well as its institutional and operative features”. Other sources of influence such as significant events in the wider policy domain, such as crimes and economic developments, were taken into consideration as impacting on the political context within the

legislative arena. Thus, although the level of abstraction was at the level of governing arrangements, it included the wider policy environment.

Pollitt (2001) distinguishes between the different dimensions of policy; talk which refers to policy rhetoric and discourse, decisions that lead to actual concrete manifestations of policy in the form of specific written policies or legislation and action being the process of implementing policy on the ground. The study investigated policy at the level of ‘decision’, which the level of ‘talk’ was inherently related; what influenced the policy to be formed and how the political process resulted in maintenance or adjustment or policy outcomes. These dimensions were helpful in distinguishing between what was purely rhetorical or whether actual legislative changes were made. Although it is acknowledged that policy ‘talk’ is important, it was important to differentiate between ‘talk’ and what resulted in actual developments that can be used to evidence punitiveness. It is argued that ‘talk’ by itself cannot constitute punitiveness without actual changes in sentencing legislation. The expressive nature of punitiveness is acknowledged as a key feature for authors of the punitive turn. Thus, distinguishing between ‘talk’ and ‘decision’ can provide a means of identifying the expressive form of justice without legislative change. The third dimension ‘action’ was not under the premise of this study due to the different processes and structures attached to this level of policy.

### *Continuity and change*

This study is positioned in the wider context of a continuing debate within sociology – the sociology of social change. With its primary purpose being to establish decision making processes of sentencing procedures, this study will track the apparent punitive turn in light of counter, co-evolving tendencies within sentencing policy. As well as attempting to empirically investigate this apparent turn, this study places the punitive turn debate within the wider sociological argument that change is possible, and, if so, how it can be observed and measured.

Although the aforementioned literature provides an excellent starting point for empirical research into the nature of, and key influences over, penalty in different national contexts, it says little about the processes via which these supposed outcomes emerge. Thus, existing descriptions are a static snapshot, rather than a dynamic exploration of the policy process. Therefore, with a critical appreciation of the counter, co-evolving tendencies at work within England and Wales in a particular historical context, the study explored the processes and influences of decision-making processes within the sentencing framework.

Within this context, there were clear continuities and change in penal policy. This gives justification to ask the question whether a punitive *turn* can be established. Considering the variety of co-developments in the branches of crime control, was there a definitive turn in penal policy in England and Wales? This provides strong justification for the principle of ‘organised skepticism’ to be implemented. Rather than joining existing literature in assuming an immutable punitive state, this study questioned the relevance and effectiveness of the punitive turn thesis in respect of other tendencies. In the attempt to gather a more accurate ‘feel’ for policy conflict and policy formation (Farrell & Hay, 2010), the research addressed continuities and discontinuities of penal policy trends and its politics with this in mind. Trends and patterns were identified and matched with theoretical assumptions on past and present crime control, including the punitive thesis and other ‘rival’, potentially co-evolving tendencies.

The research questions explored the usefulness of the punitive turn thesis, with an empirical investigation being applied to penal policy developments in England and Wales over 20 years. Both concepts of the term were scrutinised; the characteristics of a punitive state as well as the operative word of ‘turn’ used within the concept. These aims attempted to establish how far and in what ways England and Wales can be acknowledged as a nation which has experienced a ‘turn’ in crime control techniques, in the direction which can clearly and empirically be categorised as punitive.

### **2.2.1 Research questions**

The research questions included:

- Is the punitive turn thesis ‘real’?

Can the punitive turn thesis be falsified or supported in light of empirical evidence and to what extent can its claims be applied to England and Wales between 1990 and 2010?

- What are its conditions of existence?

As new punitiveness has been identified in specific countries, what social, economic, cultural or political forces were seen as driving the punitive turn? What are the conditions upon which punitiveness is dependent?

- What have been the counter, co-existing tendencies within England and Wales sentencing frameworks? To what extent and in what ways is there empirical evidence of countertendencies to ‘punitiveness’ within the political competition over penal policy?

Section 1.3.2 highlighted how co-evolving but countertendencies have been identified and acknowledged by proponents of the punitive turn thesis. However, there are discrepancies in accounts of how they are able to co-exist and what this means for the claims of the punitive turn thesis. Thus, this thesis endeavoured to contribute to this part of the debate.

Rather than adding to the already superfluous amount of descriptive narratives of penal policy of the past 30 years, this study critically investigated a period of history with a holistic approach. It explored the dominant and counter, co-evolving tendencies, which historical narratives of the punitive turn may have ignored or downplayed. Therefore, a critical approach to history was taken to explore the forgotten, but arguably significant countertendencies of penal policy (see section 1.4).

## **2.3 Approach to the data**

The study adopted a critical realist approach to the investigation of changes and continuities in sentencing legislation during the case study. This section will explain why critical realism was used and how it enabled analysis of the data to understand causal mechanisms of change and continuity that other methodologies would not.

### **2.3.1 Realism**

Realism aims to develop an approach that is “theory driven while being evidence-based” (Matthews, 2014:29). It does not look to claim objectivity in the representations it constructs. Rather, it believes that there is an objective world independent of our perception of it, but that it can only be observed via our perception and is therefore a ‘second hand’ representation is given. Consequently, realities exist independently of the knower, but the knower can only approach these realities in a theory-laden manner (Bottoms, 2008). Ontological attention shifts from events to mechanisms of social change, thus creating space to study more than just observable phenomena, but also what causes them (Danermark et al., 2019).



Realism is appropriate for this study for two reasons; the most immediate is how realism seeks causal explanations of social change and continuity. The second is how realism distinguishes between different levels of reality, which opens up the possibility to go beyond the immediate appearances of the social world to understand the underlying, implicit but important mechanisms which have caused observable events and outcomes. The domain of the ‘real’ refers to the structure and mechanisms of something that makes possible its existence; the domain of the ‘actual’ is the mechanisms that can generate an event, and the domain of the ‘empirical’ is the observable outcome (Danermak et al., 2019). Therefore, a realist approach suits the questions of the research project as it attempts to go beyond the static boundaries to look at the ‘diverse determinants’ of social phenomena (Marx, 1973). There is an appreciation of the complex realities that are being observed which neither positivism nor interpretivist positions acknowledge. Capturing phenomena (i.e. punishment) under investigation within social, cultural and political constructions (i.e. of the construction of crime as a problem and how it should be responded) is appreciated. Moving away from a linear or successionist assumption of causal processes, realism opens up the possibilities for a multi-faceted set of diverse determinants to understand complex social reality in particular places at specific moments, to understanding social change. The determinants of sentencing policy are crucial to the foundations of this project (Sayer, 2000).

In understanding causal mechanisms, realism makes the distinction between contingent, necessary and causal relations. Rather than focussing on repetition and correlation, realism focusses on generative causal mechanisms which explain the process involved. A realist framework recognises the role played by the “non-necessary interaction of different causal chains [in producing an] outcome whose own necessity originates only in and through the contingent coming together of these causal chains in a definite context” (Jessop, 1990:11). With this in mind, it is important to ask what causes the outcome of a punitive turn, as well as what constitutes this particular outcome. As the punitive turn thesis currently stands, this outcome has not been specified, nor has the causal chain which produced such an outcome (Matthews, 2005).

Therefore, a realist approach provides this research with the intellectual resources to answer the questions posed above, specifically the distinction between necessary and contingent relations, the former being those that are, by definition, independent of any one person’s

perception or concept. As the science fiction writer Philip K Dick (1985) states, ‘Reality is that which, when you stop believing in it, doesn’t go away.’

### **2.3.2 Critical Realism**

As mentioned above, in order to understand the extent to which England and Wales have experienced a punitive turn, the study has attempted to operationalise the theory of punitiveness by developing a more accurate way of measuring levels of punitiveness and understanding the mechanisms which could produce punitiveness. The premise of critical realism has provided the thesis with various intellectual resources for answering the above questions. The study adopted a critical strategy in the sense that it aimed to deconstruct ‘taken for granted’ assumptions of types of punishment, such as features of punitiveness, into component parts in order to identify their meaning (Matthews, 2013).

The study starts from the position that methods of crime control are socially constructed and have been constructed within historical, social and political settings which need to be deconstructed in order to understand the causal mechanisms behind their development. However, it avoids the relativism that social constructivism is criticised for. A critical realist perspective allows an ontological reality for crime control measures as being grounded in social and political forces, critically investigating the material circumstances and practical contexts in which social meaning is communicated (Danermark et al., 2019). Rather than searching for empirical data which corroborates with claims of the punitive turn thesis, the research position was to collate empirical evidence which *either* corroborated or dismissed such claims. Thus, a critical perspective was fundamental in achieving this goal by taking a holistic approach to the time period under investigation and to avoid a shift towards a dystopian criminology that current explanations have been criticised for (see section 1.3.2).

### **2.3.3 Adaptive theory**

In order to test propositions of the thesis, the project implemented an adaptive theory approach. Critical realism partners well with adaptive theory which builds and adapts theory through trial and error and reinforces the attempt at constructing a middle-range theory of integrating theory and empirical research (section 1.4.1). Complementing the principle of realism, this framework is based on the proposition that theories are open to revision because they are only partial discourses of the real world. It seeks to transcend the binary opposition of induction and

deduction, combining “an emphasis on prior theoretical ideas ... which feed into and guide research while ... attending to the generation of theory from the ongoing analysis of data” (Layder, 1998:19). In this sense, existing theories should not be viewed as unchangeable, but be seen as a type of ‘scaffolding’ which can be adopted in response to new interpretations of the data which challenge their basic assumption. This scaffold can adapt in response to the discovery of new information and interpretations of the data which challenge the basic assumption of the scaffold. Therefore, this theoretical scaffold cannot be perceived as absolute.

The key propositions of the ‘punitive turn’ thesis drawn out in section 1.2.1 were used as the theoretical scaffold. The main assumptions of the theory were deconstructed and tested in the context of England and Wales penalty. This allowed for inductive and deductive approaches to be mutually influential on each other. The combination of the “use of pre-existing theory and theory generated from data analysis” was used in the hope of bridging social theory and empirical research (Layder, 1998:1). Theory and observation were combined with each other in order to allow for possible adaptations being made to the theory in light of the observations.

It is argued that the advantages of theory and empirical research are enhanced to create a middle-range theory that integrated theory with empirical evidence as an approach for theory construction. Whilst theory provides more of an explanatory capacity for empirical research, the theory of explanation becomes more robust from the support of the research. Furthermore, empirical research, when coupled with theory, becomes a more sophisticated form of analysis and the generalizability and applicability of that research is enhanced (Layder, 1998). Therefore, it is argued that this policy-orientated research benefitted from taking a more explicitly theoretical objective.

## **2.4 Research design**

This section will describe the research design of the thesis, including reasons for choosing a multiple-embedded case study and the sources of data used for analysis.

### **2.4.1 Multiple-embedded case study**

The time period covered included the following administrations:

- *Conservative Government (1990-1997)*
- *Labour Government (1997-2010)*

These time periods were chosen because they demonstrated a significant amount of change in sentencing policy, both within and between governments. The study began by becoming familiar with the developments of the case studies; sentencing legislation, political strategies, key actors entering the field and external events related to penal policy and how they affected the prison population.

In order to address the aims and objectives of this research, a rich and in-depth analysis of political structure and decision-making processes were framed within a case study research design. Each administration was assigned as its own case, which gave structure for the organisation of a large amount of data to benefit data collection and analysis (Yin, 2009). This research design allowed for the case to be analysed independently, as well as its intertextuality with its former and latter periodisation. Referring to Coffee and Atkinson's (2004) intertextuality concerns the administration forming part of a context or background to its subsequent government. Looking at "operational links over time" (Yin, 2009:9), the complexity and specific nature of each administration could be appreciated and scrutinised (Stake, 1995).

Prior to the collection of data, the case study was chosen based on descriptions of penal policy in England and Wales within existing literature. Although most literature is based on policy within the United States, there is a significant amount of literature pertaining to political developments in England and Wales (*see* Downes & Morgan, 1997; 2007; Tonry, 2003; 2004; 2007; Ryan, 1983; Dunbar & Langdon, 1998; Faulkner, 2006; Faulkner & Burnett, 2012). A revision of these narratives pointed to the most substantive and politically contentious moments in penal policy history. These significant points have been noted and presented in a graph (*see* appendix I) which better illustrates the appropriateness of the time period and multiple case studies.

#### **2.4.2 Units of analysis**

A broad period of time was chosen for analysis due to the objectives of tracking continuity and change of sentencing policy. A narrower time period would not be able to do this as successfully. Although resources did not allow the period to be analysed fully in detail, certain points in time were selected as a reflection of that surrounding time period. This was achieved by 'flagship' Criminal Justice Acts which made significant changes to sentencing legislation

during the time period studied. A review of the criminal justice legislation and sentencing principles and practice resulted in the following Criminal Justice Acts being chosen as units of analysis, with specific focus on relevant sections of each criminal justice act relating to sentencing principles and/or practices (see appendix II):

- *Criminal Justice Act 1991*
- *Crime and Public Order Act 1994*
- *Crime (Sentences) Act 1997*
- *Crime and Disorder Act 1998*
- *Criminal Justice Act 2003*
- *Criminal Justice and Immigration Act 2008*

Each Act was chosen due to its relevance to sentencing legislation, and the changes that each Act made to sentencing policy outcomes. The relevancy of the sections within the Act were determined by its focus on how a criminal act is punished. This includes new offences but also how those offences were responded to. The point of relevance is when conviction has been achieved and the sentence is handed down. This is due to the nature of the punitive turn claims; how punishment has become more severe and how criminal justice is replacing social welfare as a means of managing society. Also, each of the flagship Acts witnessed significant resistance and opposition to their implementation. This is a coincidence, as the Acts were not chosen on this premise. Rather, the resistance identified in initial data analysis justifies the direction taken in this thesis.

For each criminal justice Act, the passage of the Bill through Parliament was followed. This passage is illustrated by Figure 1:



Figure 1 – Passage of a Bill through Parliament  
<https://www.parliament.uk/about/how/laws/passage-bill/>

### 2.4.3 Data collection

Data collection involved a cross-referencing of sources in order to gain an accurate understanding of the time period and its developments.

Data included:

- 40 Parliamentary debates of relevant legislation (see appendices III) which corresponded with the stages as shown in Figure 1.
- 17 speeches by key actors in the political field
- 8 primary interviews
- Transcripts of 10 secondary interviews conducted by the Justice Select Committee
- 16 government documents surrounding relevant legislation
- 9 third party documents on relevant legislative provisions
- 17 media articles (as sources of information)
- 8 autobiographies and biographies of key actors

Key actors/organisations included:

- The Prime Minister
- Political advisors
- Home Secretary (pre 2007)
- Secretary of State for Justice and Lord Chancellor (post 2007)

- Minister of Prisons
- Ministry of Justice Under Secretaries of State
- Leaders of the opposition parties
- Civil Servants who worked in the Home Office Research and Planning Unit
- Penal Reform Charities
- Home Affairs Select Committee

### *Documents*

Initial data collection involved secondary analysis of government archives. Documents concerning the above ‘flagship’ Acts of Parliament were analysed using content analysis of methods, objectives and justifications for punishment being suggested, in order to establish trends of crime control doctrines during that time period. Organising the documents into chronological order and into theoretical themes allowed the genealogy of ideas to be traced, as well as to see the processes of how certain decisions were made and the reasons behind particular policies being formed and implemented (Gidley, 2004).

Collection of the legislation and Government documents surrounding the legislation informed the study of the dominant agenda and what the new legislation intended to propose. Manifestos and speeches from political leaders were collected in order to explore the rhetoric, priorities and agendas of the speakers in the House of Parliament. Collection of relevant discussions in Hansard, the minutes of sessions of the Home Affairs Select Committee, documentation from pressure group activity and representations highlighted resistance, competition and negotiation of the dominant agenda – thus shedding light on the ‘politics’ behind the decision-making process. Additionally, political memoirs were collected in order to appreciate the full extent of specific concerns by influential policymakers and political leaders and what frustrations they came up against when trying to operationalise a specific agenda.

Media articles via the *Nexis* search engine were utilised in order to access relevant data sources, including extracts from speeches and debates that were not available from any other source. Therefore, the media articles were used as a source of identifying further opportunities for data, rather than data in themselves.

### *Semi-structured interviews*

After familiarisation with the main developments of penal policy and the documents collected, the intention was to cross-reference analysis of documentary data with primary semi-structured interviews with key actors in the decision-making process during the time of study, as well as to attain a deeper level of understanding of developments within the organisation in relation to policy formation. Purposive sampling of those believed to be key actors in the decision-making process was initiated with the intention of creating a snowballing effect. Interviews were conducted with four retired Home Office researchers (two were interviewed at the same time), one retired member of the Sentencing Advisory Panel and distinguished criminologist who has had experience in the legislative arena, and one Chief Executive of a penal lobbyist group (see appendix IV for letter of request and consent form). Interviews were conducted between May 2017 and February 2018.

Interview A	Retired member of the Home Office Research and Planning Unit (HORPU)
Interview B*	
Interview C*	
Interview D	
Interview E	Chief Executive of a penal reform group
Interview F**	Retired member of the Sentencing Advisory Panel

\*Conducted at the same time

\*\* Telephone interview

*Table 1 – List of interviewee participants*

The interviews consisted of a general discussion around the respondents' position within the field and changes in sentencing legislation that occurred during their time in their respective positions. Questions were semi-structured and open, in order to offer the opportunity for elite respondents to discuss anything which they felt was important or relevant to the topic (Harvey, 2011). Theoretical propositions outlined by proponents of the punitive turn were translated into suitable questions, in order to reflect on the respondent's opinion of how accurate the propositions were.



There were benefits and limitations to the interviews. Richards (1996) highlights how interviews can help to understand the context of the research area and to interpret documents/reports, as well as personalities who were involved in relevant decision-making processes. This was achieved with some participants who had direct involvement and communication (or lack of) with key players in the field. This was cross-referenced with what was implied by other sources of data such as Parliamentary debates, autobiographies and secondary interviews with the key players in question (discussed in the empirical chapters). Since autobiographies are known for being highly managed and self-serving accounts, the primary interviews were a more direct approach to gathering relevant data that was not managed in the same way.

There are benefits of primary interviews with key actors in the field for understanding political competition of penal policy when augmented with documentary analyses. For example, the interviews conducted revealed important dynamics and types of relationships between organisational agencies and their actors, specifically between Ministers and civil servants in the Home Office Research and Planning Unit (HORPU). This included hostile relationships between Senior Ministers and penal lobbyist groups, identifying not only what was *on* the agenda but also what was mobilised *off*. The interviews were useful in highlighting these relationships to a level of detail and evidenced in a way that could not be achieved via documents. This is important when investigating levels of political competition and the ways in which agendas are reinforced or constrained by such relations. Interviews revealed what the most significant obstacles were in the penal lobbyist group and research groups trying to disseminate their research to the Cabinet and in attempts of having a persuasive effect on the direction of a certain political agenda.

Further benefits included the gaining of information about specific meetings and internal events in relevant departments that resulted in changes to legislation. Although the details of the meetings were not made known, knowledge of these meetings provided a better understanding about the policy process itself, as well as the identity of key players evoking change or continuity in legislation. Also, the research gained a more in-depth access to actor's motivations and perspectives. In this way, interviews provided a unique insight into the policy process and the dynamic relationships between different actors and agencies involved which the documentary sources could not provide.

However, with hindsight, the interviews were conducted too early. The interview questions were too broad due to the interviews proceeding before the diagnostic tool for political competition had been established (see Table 2). A lack of specific questions meant that answers were not always relevant to political competition. Also, there were issues concerning respondents' memories of details relating to earlier Acts and their surrounding political context. Even though participants had an 'elite' status, it was realised during interviews that more was already known about the process of certain legislative Acts than the participant owing to the passage of time and memory lapse. Although this facilitated memory recall of certain time periods, the initial lack of memory questioned the validity of some answers given. Therefore, although there was some useful information that has been included in the empirical chapters of this thesis (and which highlight the advantages of primary interviews in investigations of political competition), the interviews were limited in insight into the decision-making processes of Acts and the political competition that is at the centre of this thesis due to the timing of the interviews being conducted.

Moreover, interview questions relating to later time periods (2003 onwards) resulted in respondents not wishing to add anything to that which was available in Harry Annison's *Dangerous Politics* (2015) on the Indeterminate Sentencing for Public Protection of the Criminal Justice Act 2003. Although ethical restrictions prevented access to Annison's full interviews, his publicised research provided a significant amount of relevant information needed for the latter years of the case study (2001-2008). Another source of information for the latter years of the study was data collected by the Home Affairs Select Committee on its inquiries into changes in sentencing legislation during New Labour - *Towards Effective Sentencing* (2007 - 2008) and *Justice Reinvestment* (2009 - 2010). These documents provided full access to interview transcripts with key players involved in the decision-making processes of relevant changes in sentencing legislation and practice during the time period studied. Thus, with the collation of this large amount of data the decision was made to terminate the interview process. In light of this existing data, it was felt unnecessary to contact key players and ask questions that they had already answered.

The research highlighted issues with oral history and the dependence on participants' memory. As Portelli (in Thomson, 2010:77) argues, "memory is not a passive depository of facts, but an active process of creation of meanings". Government documents and transcripts of Parliamentary debates are written at the time and may reflect a more accurate account of the

political agenda. However, documents cannot be used as a method for objective fact finding either. Official documents are written in a way that provoke certain meanings and are intended to have certain effects on the reader and autobiographies are written in a highly managed setting to portray favourable accounts. The use of interviews in penal policymaking can be cross-referenced in order to question or reinforce such intentions of meaning-making and can provide background information to the documents being written.

Even though interviews were not the most valuable method for this investigation, it is argued that interviews are a valuable method in the study of policy process because they provide access to unique and detailed accounts of what happens ‘behind the scenes’ in the policymaking environment and the agencies involved. Future research into the policymaking process will utilise interviews as a primary source of information which cannot be accessed via documentary sources. Interviews can provide in-depth data regarding actors’ motivations, their perspectives on issues, concerns, agendas and their own perspectives on why things transpired, and which provides a ‘closeness’ to the process being explored that documents cannot provide. They also illustrate how concepts of risk, dangerousness, punishment and rehabilitation are constructed and how punishment techniques are justified when changes to legislation are made.

## **2.5 Data analysis**

The data was stored, coded and analysed in NVivo software. During initial application of the punitive turn thesis claims to the case study, it became clear that there were multiple agendas by key actors in the policy arena. Key players had differing agendas, priorities and objectives, during the passage of a Bill. Unless there was a considerable level of political consensus, which was also identified, the subsequent Criminal Justice Act was usually the result of negotiations and compromises between these players. These different agendas, or ‘camps’, provided the basis of thematic analysis. The ‘rules’ of each camp were identified via the categories created for a ‘punitive’ camp, as described in the literature review – levels of punishment; objective/purpose of punishment; method of punishment and the rationality of how punishment was justified. Agendas and priorities which differed to a ‘punitive’ disposition were organised into their own label, which began to reflect ‘rival’ approaches to crime control - restorative justice, risk management, just deserts and reformatory types of justice.

This network of agendas emphasised the *politics* of punishment and the crime control methods that became an outcome of such politics during this period. Although a ‘punitive’ agenda was identified by headline developments and a ‘camp’ of social actors who agreed on tougher sentencing policies, there were other ‘camps’ of key actors who did adhere to such policies, and who not only resisted punitive ideas, but implemented policy outcomes which demonstrated the existence of co-evolving ‘rival’ agendas. This suggested a level of political competition in the policy domain, which is not consistent with the punitive turn thesis. In this sense, a punitive agenda was not an inevitable state, but was amongst others as being influential in the policy process. The identification of political competition within the policymaking process directed the study towards theories of power, more specifically Stewart Clegg’s *Circuits of Power* framework and his concept of power as relational (1989).

### **2.5.1 Diagnostic Framework**

This justified the utilisation of a diagnostic framework which conceptualised the competing agendas within what appeared to be a ‘multi-centred’ governing arrangement (Edwards, 2016). Stewart Clegg’s (1989) *Circuits of Power* was used as a diagnostic tool to produce a method for articulating the political competition identified. Clegg contrasts the Hobbesian and Machiavellian traditions of thinking about power in modern European political thought in order to acknowledge the limitations of a central authority, in Hobbes’ image of the Leviathan, and to promote Machiavelli’s key insight into power as a strategic relation that needs to be continuously negotiated, as in the coalitions that any ‘Prince’ must forge with a network of supporters in order to access and retain the power to, in turn, influence others. Whereas in Hobbes’ concept, power is a possession to be wielded (as in Leviathan’s sword), Machiavelli regards power as a provisional outcome of strategic negotiation with others.

Reflecting on the Machiavellian concept of power, Latour (1986 *in* Edwards, 2016:244) describes the paradox of power as “the difference between the potential to exercise power and the actual exercise of power is always the actions of others”. Edwards (*ibid*) describes how Clegg re-worked this strategic-relational concept of power in conceptualisations of;

*“circuits that fix and re-fix the rules of membership and meaning that constitute powers of association in these networks and on innovations in the techniques of discipline and production that facilitate the disruption, destabilisation and reformulation of these rules”.*

This concept of power as relational (as opposed to Leviathan traditions of proprietorial power) allows for an exploration of the relationship between structure and agency of governing arrangements in explaining social change. This duality avoids reductionism of either concept, such as neoliberal political economies or the importance of state actor agency in developing penal policy and legislation. This framework of power is not reducible to the agency of people involved, as it emphasises agency of the *organisations* involved in the production of a Parliamentary Bill, as well as key actors involved. This type of agency refers to a collective form of decision-making, which is translated into analysis of Cabinet Ministers, Senior Executives and their special advisors, and power relations with other key positions such as civil servants, the leader of the opposition parties and third parties such as penal reform groups. The agency of the organisation was identified via power relations and dynamics between key positions within constitutional-legal structures and institutional settings. It is because of this type of agency that power will never be fully secured (Clegg, 1989). Neither is it determined by the exogenous events. Instead, circuits of power are underpinned by the context-specific nature of penalty problems.

Seeing power as ‘relational’ opens up ideas of resistance to power and how power is actually dependent on resistance to it. It can only exist in relation to the resistance against it. Without resistance, there is no need to exert such power. “Resistance to power may consolidate itself as a new power and thus constitute a new fixity in the representation of power, with a new relational field of force altogether” (Clegg 1989:207). He uses the term ‘circuit’ to order these levels of power into an integrated relationship, where an appreciation of the complex nature of power dependence can be investigated. This circuit is illustrated via Figure 1:

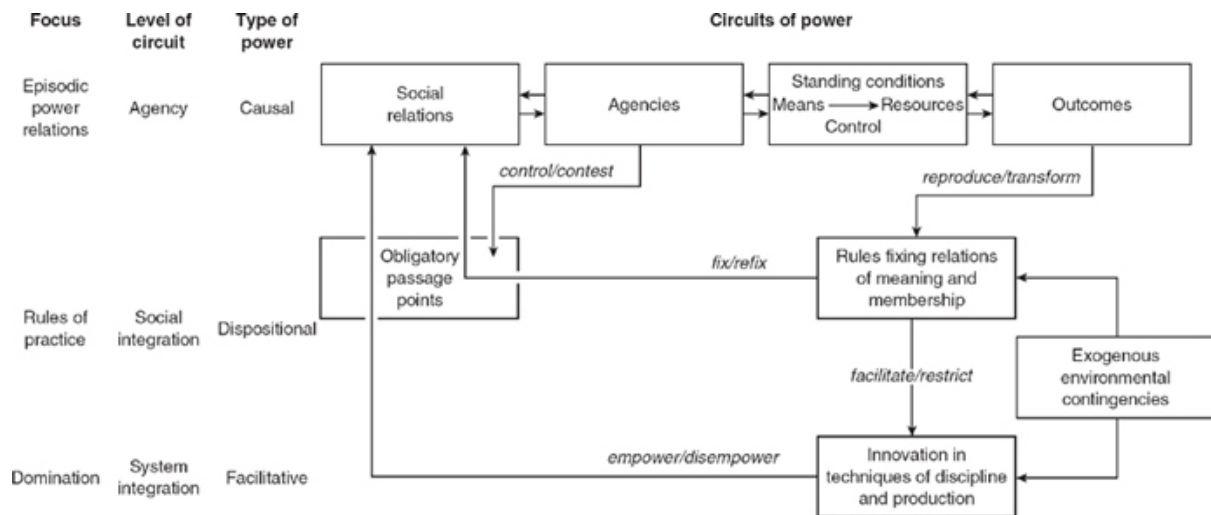


Figure 2 – Representing Circuits of Power  
(Clegg, 1989:214)

Clegg categorised three types of power which explain innovation and change within institutions; dispositional, causal and facilitative. Dispositions are created by the collective privileging of certain meanings which produces a specific organisational field that adheres social actors to fixed ‘rules of meaning and membership’ in order to conform to that disposition, as well as excluding actors from adhering to other dispositions. It is important to note that, in theory, these rules predate the membership of actors and cannot be reduced to such membership. Clegg questions how one disposition can be privileged over another, at one point in time about a particular problem and how it can be subsequently challenged and replaced by another. He argues that the ‘rules’ of a disposition form by tending towards a norm, but this norm can change. Norms are temporal due to the other types of powers – causal and facilitative.

Causal power refers to the agentic power found in endogenous conditions and is attached to certain positions within the legislative arena. Edwards (2016:249) describes it as ‘A’ getting ‘B’ to do something when ‘B’ is resisting. ‘Standing conditions’ attached to the constitutional position of the key actor, in which ‘A’ gets ‘B’ to do something includes “unequal access to financial, organisational, informational and political resources” which can be used as leverage in the quest for certain outcomes (ibid). For the purpose of this study, the differences in access to resources between the executive, the acting executive (e.g. civil servants), the legislature and the judiciary were investigated. The resistance between these three areas of governance illustrates Clegg’s concept of power as relational, and the difference between the power as a capacity and the exercise of such power. If ‘B’ was willing to do something, then ‘A’ would

not need to exert their causal power. In terms of analysis, the objective was to understand what the desires of 'A' are via the actions of 'B', as well as what kind of resistance 'B' had and under what justification. After establishing who is the 'A' and the 'B', the next stage was to identify the standing conditions of both 'A' and 'B'; what position they hold within Government and what kind of constitutional-legal powers this position has, as well as the resources available to them. This type of causal power illustrates Clegg's (1989:187) meaning of the term agency; "agency is not a generic term for people: it may refer to collective forms of decision-making, such as an organisation". Organisations can form a type of collective agency.

Clegg (1989) highlights that without dispositional power, causal powers only describe the potential power that can be exerted. Dispositional powers result in actors actually doing something, which is in adherence to the rules and regulations of their disposition. Therefore, dispositional powers provide the conditions for causal powers to be exercised.

Facilitative power refers to changes in the broader policy environment that can disrupt dominant dispositional powers and facilitate the empowerment of rival dispositions. These can include technological advances, political or economic crises which facilitate or disrupt the passage points upon which dominant dispositions depend.

This thesis adopted Edwards (2016) transposition of Clegg's framework for thinking about power into arguments about multi-centred governance of security in liberal democracies and how political power extends beyond the will of governments. In this way, governance is 'multi-centred' rather than centred within one position, and how resistance could be formed (Edwards, 2016).

It is argued that the punitive turn thesis would benefit from adopting a theory of political competition as it has the ability to conceptualise punitiveness in a way which can be tested and, thus, falsified by empirical evidence. Authors' accounts of the punitive turn thesis assume punitiveness to be an all-encompassing state which is inevitable in contemporary society. O'Malley (1999) suggests that punitiveness is one of many tendencies, which provokes the question of how such competing tendencies can co-exist? Clegg's (1989) framework provides some clarity. By conceptualising punitiveness as a disposition rather than as a 'state', which is competing with other dispositions and resistance, a method of articulation was achieved.

Together, Clegg’s framework provides an appropriate diagnostic tool to explain how punitiveness can be conceptualised as a disposition within the legislative arena, and which is dependent on particular conditions of governing arrangements, as well as exogenous environmental factors. Therefore, a theory of politics in punishment can explain how a punitive disposition can co-exist with rival dispositions and under what conditions certain tendencies appear to dominate over others.

## 2.5.2 Diagnostic tool

Clegg’s concept of ‘dispositional power’ has been utilised as a way of deconstructing how punitiveness and rival tendencies can be abstracted on a more substantive level than in current literature, and subsequently identified in the data. For this purpose, the notion of dispositional power allows the identification of punitive and rival agendas in the penal policy arena, and has provided a way of diagnosing the complex processes that can be found in the politics of policy formation and how one disposition might have a ‘louder refrain’ than another within a particular point in time. Thus, it provides a framework to answer the above questions of what a punitive turn ‘looks like’ in realist terms. Below is a table illustrating the diagnostic tool which was developed during the research process:

*Table 2 - Diagnostic Tool of Sentencing Policy Dispositions*

Dispositions	Rules and meaning of membership										
	Level of punishment			Objective			Method			Rationality	
	Excessive	Less	Proportionate	Suffer	Reform	Contain	Coercion	Compliance	Management	Populist	Expert
<b>Punitive</b>	X			X		X	X			X	
<b>Reform</b>		X			X			X			X
<b>Restorative</b>		X			X			X			X
<b>Risk</b>	X					X			X		X
<b>Just deserts</b>			X	X				X			X



The ‘rules of meaning and membership’ described below were formulated by the deconstruction of the punitive turn thesis, as described by its proponents. Once a ‘punitive’ dispositional power had been created within these terms, the following dispositions were added as ‘rivals’ when they were identified in the data and as described by existing literature in penality.

### *Level of punishment*

Directed by the concept that punitiveness is a relative term which is dependent upon the qualitative and quantitative level of punishment (Nellis, 2005). For example, a common feature of punitiveness is a trend towards mass imprisonment. This is accompanied by longer prison sentences which breach the principle that punishment should be proportionate to the harm caused. Therefore, an ‘excessive’ level of punishment is used to label the effects of a punitive turn. This is in contrast to a rival disposition, where members would adhere to that which was thought to be a ‘proportionate’ level of punishment to the crime.

### *Objective*

This refers to both instrumental and moral justification of punishment. One of the contours of the punitive turn is how punishment aims to increase the suffering of the offender (Pratt, 2000). An additional objective, which may be in conjunction with, or as a separate objective, is to contain the offender without prospect of reform. This has similarities to risk management, however the difference between risk and punitive is how the language of the former associated with less expressive forms of justice and, instead, management of aggregate groups of offenders which need to be managed for the purposes of crime reduction. Although objectives of risk management co-exist with and can augment punitive outcomes, these significant differences between the two (as was demonstrated in the data) justify the need for separate dispositional powers to be diagnosed.

A rule of a punitive disposition includes a lack of interest in the amelioration of prison conditions and being in favour of more austere and spartan prison regimes (Pratt, et al, 2005). In contrast, rules of a rival disposition include the purpose of punishment as being to reform, rehabilitate and treat offenders. This is due to the belief that “criminality can be educated or counselled out of individual offenders”, particularly with reference to employment,

accommodation, addiction and family relationships (Nellis, 2005). These objectives are achieved via certain methods discussed below. Thus, methods and objectives are intrinsically linked.

Objectives of a 'reform' disposition involve the targeting of criminogenic needs which are thought to lead to crime in order to reduce crime. This differs from traditional penal welfarist approaches in the sense that the former is targeted at specific groups of people within society, with an instrumental view to crime reduction.

Differing from objectives of other dispositions, objectives of restorative approaches were identified via the rhetoric used to justify the methods of traditional restorative justice, such as restoring harm caused by the crime and the reintegration of the offender by a process involving the parties affected by the crime.

### *Method*

Linked with the objective of punishment, the method of punitiveness is distinguished by the removal of civil liberties due to the belief that offenders cannot be reformed, but deterred into law-abidingness (Nellis, 2005). This can be done by various methods, including imprisonment for incapacitative purposes, community sentences for humiliation purposes and a general attempt at coercing offenders into negative situations, including more militarised policing (Pratt et al, 2005). Whereas rival approaches to punishment adopt types of sentences where the offender is expected to co-operate with the punishment being given and civil liberties are maintained (Nellis, 2005). It is important to recognise here that it is the method used in conjunction with a particular objective which defines the method as punitive. For example, types of custodial sentences are included under this principle; open prisons or intermittent sentences where the offender returns to prison after completing employment or education. Community sentences within a restorative justice approach illustrate how there is a level of cooperation between the offender and society, which members of rival dispositions would advocate. Compared with methods under a punitive disposition, the offender keeps their 'freedom'. The addition of a 'risk' dispositional power determined the addition of 'managing' offenders.

## *Rationality*

Social actors adhering to a punitive disposition would formulate policies that in their view appeal to perceived public opinion (Ryan, 2005). Therefore, it is more vengeful, emotive and visceral in nature (Pratt, 2000) as it is based on the voices of actual and potential victims. In this way, members of a punitive disposition privilege victims over offenders and justify their policies by 'policy-based evidence'. However, members of a rival disposition used evidence-based policy provided by experts in the field in the most effective way of reducing crime (Loader, 2006). Members adhere to a more 'rational' approach to the type of punishment served which is not justified on the emotions of a fearful public.

By abstracting the rules and meaning of membership of these dispositional powers, the identification of a 'punitive turn' was made more rigorous and substantive. A set of granular principles can be elaborated on within this abstraction of the current punitive turn thesis, which can then be identified in the data. These dispositional powers have been identified in the data via an adherence to these rules and demonstrates how punitiveness can be seen as one of many dispositions, rather than an all-encompassing, immutable state. Instead, the punitive turn is conceptualised as a disposition with certain agendas, priorities and objectives which are competing and interacting with other rival dispositions.

By using this diagnostic framework, it allows an exploration in more detail of the nature and form of punitiveness within key legislation, and how this plays out in competition with rival tendencies. As the punitive turn thesis claims that there has been a 'turn' in crime control policy during the time of the case study, the concept of dispositional powers allows the possible diagnosis of such a turn. With the use of Clegg's explanatory types of 'causal' and 'facilitative' powers, it allows for an explanation of *how* dispositional powers become disrupted. In this case, an explanation for how a punitive disposition became the loudest refrain due to exogenous changes in the policy environment as well as changes within the political arena. A dispositional power allows for a systematic approach to the punitive turn thesis; to identify what a punitive disposition would look like; what can confirm a punitive turn; and what would contradict it.

## 2.6 Limitations and ethical considerations

Like all research, there are limitations to this research design. However, measures will be taken to minimise these issues.

### 2.6.1 Limitations

The most imminent limitation of a qualitative approach is the level of subjectivity and interpretation of the data collection and analysis phase. Due to its dependency on theoretical abstraction, there is a high level of subjectivity in interpreting the data, such as the Acts of Parliament chosen and how theoretical perspectives, such as punitiveness, are identified in the data. Furthermore, documentary analysis is highly interpretive, with multiple conclusions possible via different interpretations of the same data. Therefore, using qualitative methodology, the research has inevitably generated a high degree of interpretation.

#### *Level of interpretation*

However, it is argued that the level of subjective interpretation is reduced with the aforementioned research design and the philosophical stance of critical realism. The use of a multiple-embedded case study allows for a structured and detailed analysis of the data. Data extracts are presented within the local context from which they arose. Furthermore, the triangulation of data collected via documentary analysis and the different sources gathered reinforced the reality and actual developments of the time. The added support of semi-structured interviews provided less opportunity for subjectivity to affect the credibility of the findings.

#### *Generalisability*

Although qualitative approaches are sometimes criticised on grounds of non-generalisability, it is accepted that the study makes no claims to empirical generalisation outside of the administrations studied, and that the conclusions made were related specifically to England and Wales penalty between 1990 and 2010 (inclusive). Using the case study method, Yin (2009) argues that the crucial question is not how far the findings can be generalised, but how well the researcher generates theory from the cases in question. This question will be used to measure the credibility of this study. However, the diagnostic tool illustrated in Table 2 is suggested as a framework to analyse further administrations, inside and outside of England and

Wales. Therefore, although the dispositional powers associated with penal developments during each case cannot be generalised, the intention of creating a framework for characterising punitiveness could be generalised for future research.

### *Archival data*

The nature of archival data creates limitations for collecting data. Archival research presents a partial picture due to some sources being lost over time. Also, their intertextuality needs to be acknowledged, including their sequence, hierarchy, and the ways in which they echo or contradict each other. Therefore, explicit and implicit assumptions were acknowledged and highlighted in order to increase the credibility of the documents (Gidley, 2004).

### *Documentary analysis*

Moreover, limitations of documentary analysis include the issue of familiarity with the data when analysing a large amount of it (Bryman, 2008). This is due in particular to the amount of data that will be available on relevant topics. Due to the ease of access to Parliamentary documents and memoirs of key actors, there was a huge amount of information, first to sift through in order to find the most relevant, and second, to become familiar with. However, this limitation was overcome by devoting a significant amount of time to familiarise oneself with the data. Also, it is believed that the advantages of using this technique, such as being easily accessible, unobtrusive and providing the research with a high level of rich, in-depth data, negates the issue of the time needed to be spent with the data.

### *Primary interviews*

Methodological problems of interviews concern the reliability of answers given (Richards, 1996; Harvey, 2011). Information is highly subjective due to a number of reasons, including a lack of memory or ulterior intentions of the participant whilst answering questions. For example, they may adjust events in order to avoid being seen in a poor light. Richards (1996) suggests that the least reliable group are ex-politicians, who encounter difficulty in distinguishing the truth from what they have read. Also, Lilleker (2003) adds the problem of perception when analysing interviews. There is difficulty in interpreting the data as individuals can have different perceptions of the same event.

Another disparity in social status comes from the backgrounds of the interviewer and interviewee. The former being of academic knowledge, the latter being of practical expertise. The target sample included those who were in an existing or having been in a position of power. They had a great wealth of experience as well as practical knowledge, which gave them a raised social stature relative to the interviewer (Zuckerman, 1972).

Hunter (1995) refers to interviewing elites as “studying up”, which creates different methodological challenges from interviewing ‘ordinary’ individuals. First, their social status of being a political elite may mean that gaining access to interview them may be difficult due to their busy schedule or dependent on certain criteria. For example, gaining access to a political elite may include negotiating with gatekeepers regarding certain topics being agreed for discussion, or, to be excluded, which could be detrimental to data collection (Mikecz, 2012). Furthermore, the purposive sample may include those who have a vested interest in the interview topic discussed, especially those still active in the political arena. Due to their career in the political field, the credibility of their answers may be questioned. They can manipulate information to match suitable answers in favour of their political party, rather than give valid information for the purpose of the research. However, due to the nature of the research being analysis of previous governments, these issues were not so much of a concern than had the investigation been into existing political administrations.

### **2.6.2 Ethical considerations**

The following will describe how the thesis considered potential ethical and political considerations.

#### *Informed consent*

During secondary data collection, it was unclear whether consent was needed or had been achieved. There may be implications and challenges arising from the Data Protection Act (1998), due to informed consent not extending to all purposes of the data.

During the interview stage, informed consent was gathered in the first moment of contact with the potential respondent. The aims of the research should not have deterred any information from being divulged with participants or anyone directly and indirectly involved with the research process.

## *Taking sides*

### *i. Punitive or not punitive?*

During the research process, the ethical question ‘what sides are there to take?’ was reflected upon. The side of the punitive turn proponents or the critics? The aim of the research was to provide a more operational understanding of the phenomenon and to test its usefulness in the context of England and Wales penal policy. With this aim in mind, the most straightforward answer would have been to side with the critics. However, it was desirable to enter into the research with an open mind, and to be as neutral as possible. This was made more possible by the use of adaptive theory. Becker (1967:239) argues that this is impossible due to the political and social environment in which the research is conducted. However, this study adopted the position proposed by Weber of value neutrality and relevance, with the awareness of epistemic values in “discovering the truth about social reality” (Hammersley, 2016). From a Weberian perspective, the goal of the research was to minimise values and bias of the researcher and the impact that this might have in the pursuit of factual knowledge. The research was not designed to have political implications or to serve any particular interest. Instead, there was a commitment to the search for progressive social change in the face of proponent’s arguments and the ‘dark age’ of criminology. Taking a critical approach automatically means that taken-for-granted labels are questioned. This includes the assumption that England and Wales have witnessed a punitive turn. However, not so much as to dismiss that this has occurred. As a researcher, double hermeneutics were acknowledged – a level of interpretation occurred between key players during the time of study, as well as during interpretation of the data from the position of the researcher.

The possibility of minimising bias is made more so due to the absence of funding sources for this project and other external forces. Therefore, it is argued that the environment in which the research was conducted did not create bias that would have otherwise prevented the research from continuing.

### *ii. Political affiliations*

The interview stage provides a strong opportunity for biases to occur due to personal political affiliations with particular political parties. This could not only affect the direction of the

interview but could lead to harm for the participants via political debate and scrutiny. However, the aim of the research was neither to discuss nor to criticise the appropriateness of crime control policies, but to establish the influences behind how and why policies were introduced and subsequently implemented.

The thesis will continue with the empirical chapters which report the key findings that emerged from the data analysis. The structures of the chapters will be determined by the Criminal Justice Acts for analysis; what the decision-making process was and the adherence to the 'rules of practice' which suggests the positioning of dispositional powers. This is discussed in relation to punitiveness and whether or not a punitive disposition is identified as a dominant dispositional power. This is followed by the resistance and competition that the main disposition faced during the decision-making process. Any subsequent change is revealed, sometimes in the shape of other legislation, and then discussed in relation to the 'powers of change' which enabled a disruption and subsequent transformation to the dominant dispositional powers described.



## Chapter 3

### The Conservative Government 1990-1997

#### 3.1 Introduction

This chapter will discuss penal policy development in England and Wales between 1990 and 1997. A significant shift in sentencing policy during this period of Conservative rule was identified, away from proportionate levels of sentencing associated with a ‘just deserts’ disposition, to more severe levels of sentencing suggesting the empowerment of a ‘punitive’ disposition. This was justified by instrumental aims of public protection and risk management, as well as a political strategy of expressive and immediate styles of justice. This chapter will describe changes to the decision-making process and reasons behind such changes. The units of analysis were;

- Criminal Justice Act 1991
- Criminal Justice and Public Order Act 1994
- Crime (Sentences) Act 1997

The Criminal Justice Act 1991 illustrates how key actors in the legislative arena had accepted the premise that prisons were ‘universities of crime’ and did not work in reducing crime; so punishment would be proportionate to the crime, would consist of minimal imprisonment and aimed to reintegrate the offender back into society. This exemplified a ‘just deserts’ disposition. However, a significant set of external environmental contingencies put political pressure on the Conservative party, which resulted in the empowerment of a ‘punitive’ disposition influencing subsequent penal policy. The new Home Secretary, Michael Howard’s ‘Prison Works’ agenda and the proceeding Criminal Justice Acts - Criminal Justice and Public Order Act 1994 and the Crime (Sentences) Act 1997 - evidence this policy shift of a punitive turn.

This chapter will argue that it is these crucial, simultaneous changes occurring inside and outside of the legislative arena which empowered a ‘punitive’ disposition during the decision-making process of subsequent penal policy. However, this chapter will evidence how Howard’s

agenda faced considerable negotiation and compromise from key actors committed to other dispositions within the legislative arena. Thus, although a ‘punitive’ disposition is identified, this chapter will stress how the disposition faced resistance in the legislative arena during the policymaking process. The chapter will conclude how a ‘punitive’ disposition implemented significant changes to sentencing policy that matches proponents claims, it was eventually ‘watered down’ by co-evolving, ‘rival’ dispositions.

### 3.2 Criminal Justice Act 1991

The Criminal Justice Act 1991 reflects sentencing policy which is in direct contrast to the claims made by the punitive turn thesis. Assuming that the thesis is correct in that there was a change in penalty, the Act would represent a time *before* a punitive turn.

The 1991 project began in September 1987 after a meeting at Leeds Castle between the then Home Secretary Douglas Hurd senior officials and junior Ministers (Dunbar & Langdon, 1998). Three years later it was presented to Parliament as the Criminal Justice Bill 1991 (HC debate, 6<sup>th</sup> February 1990), and was finalised a year later, receiving Royal Assent in July 1991 and implemented in October 1992. During this time, England and Wales had witnessed three Home Secretaries; from Douglas Hurd to David Waddington in October 1989, to Kenneth Baker in November 1990 and to Kenneth Clarke in April 1992.

Published in February 1990, the white paper *Crime, Justice and Protecting the Public* emphasised changes in the ways that offenders would be dealt with by the courts (Home Office, 1990). Closely following principles of the White Paper, the 1991 Bill provided a new framework for sentencing. Punishment was to be based on a progressive loss of freedom, beginning with monetary fines and ending in the most severe method of custody. Due to the belief that long sentences did not deter crime, the purpose of punishment was based on the premise of a ‘just deserts’ model, whereby the sentence was to be commensurate with the seriousness of the offence and thus, was what the offender deserved. It was a widely held belief that “prison can be an expensive way of making bad people worse” (Home Office, 1990:6). Therefore, custody was reserved for the most serious of offenders, whom the public needed protection from, and where proportionality would be dropped in ‘exceptional’ circumstances of serious, sexual or violent offences. Lastly, new types of community penalties were re-branded ‘*punishment in the community*’, which were seen as punishments in their own right

rather than '*alternatives to custody*' – thus, removing the assumption that methods other than custody were not official punishment.

### 3.3 Dispositional powers

The following analysis of the relevant sections of Criminal Justice Act, 1991 (referred to as the 1991 Act) reflect the influence of a disposition which does not match the claims of the punitive turn thesis. The 'rules of meaning and membership' reflect a 'just deserts' disposition, which is in direct contrast with developments described by proponents of the punitive turn. Proportionate levels of punishment were to be matched with appropriate methods of punishment, which were commensurate with the seriousness of the crime committed. The objective of punishment was to cause a proportionate level of suffering, subsequent to the offender being reintegrated back into society. Furthermore, analysis of the decision-making process that shaped the Act exemplifies how the premise of the Bill was based on research evidence and expert opinion.

#### 3.3.1 Level of punishment

The 1991 Act implemented a new sentencing framework evidenced a 'just deserts' disposition by implementing proportionate sentencing and reducing the length of existing sentences.

##### *i. Proportionate sentencing*

The main argument of the punitive turn thesis is how punishment has become quantitatively more severe. However, Part 1 of the 1991 Act goes against this claim, implementing a new sentencing framework based on the 'seriousness' of the offence, and omitting aggravating effects of previous convictions. These changes were made due to the Government's scepticism about deterrence and rehabilitation as rationales for imprisonment. This was described in the White Paper preceding the Bill;

*"Deterrence is a principle with much immediate appeal. Most law-abiding citizens understand the reasons why some behaviour is made a criminal offence and would be deterred by the shame of a criminal conviction or the possibility of a severe penalty. There are doubtless some criminals who carefully calculate the possible gains and risks. But much crime is committed on impulse, given the opportunity presented by an open window or unlocked door,*

*and it is committed by offenders who live from moment to moment; their crimes are as impulsive as the rest of their feckless, sad or pathetic lives. It is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation. Often they do not."* (Home Office, 1990:9).

Due to deterrence being an ineffective purpose for punishment, the 1991 Act's framework of 'just deserts' would ensure that those convicted of a crime were "punished justly and suitably according to the seriousness of their offences; in other words that they get their just deserts". The White Paper expressed how "injustice is more likely if the courts do not focus on the seriousness of the offence before them" and carefully distinguished between sentencing decisions in individual cases, which should never be subject to government influence (ibid:5). Despite being criticised by Labour for not including measures for crime prevention or to reduce the use of imprisonment for minor offences, the Bill made it through the House of Lords without amendments. The House had already called for a change in the "underlying rationale of sentencing" as current sentencing frameworks were criticised for creating "simply more and longer time in prison and more crime. It is a bankrupt policy" (Lord Hutchinson of Lullington, HL debate, 23<sup>rd</sup> May 1990). The White Paper was described as a "breakthrough" due to its new sentencing framework and new approach to penal reform (ibid).

The proportionality principle was implemented by section 29 of the Act by changing the effect of previous convictions. If an offender was charged with more than one offence, only one other offence which was associated with the current offence could be used in sentencing. Thus, a longer sentence was less likely as the sentence was limited to considering only two offences. The then Home Secretary, David Waddington argued that punishing an offender for a previous offence was "unfair and unjust to punish him twice over by increasing the penalty for a subsequent offence; it seems wrong that petty offenders should be imprisoned merely because they have committed petty offences previously" (HC debate, 20<sup>th</sup> November 1990). This was reinforced by the Minister of State for Home Affairs, John Patten, during the Standing Committee, claiming that "the judge does not have to take [previous convictions] into account if he thinks that it does not meet the course of justice to do so" (Standing Committee A, debate, 4<sup>th</sup> December 1990).

The adherence to a 'just deserts' disposition was also evidenced by the criticisms of prison as a method of punishment (discussed in more detail in 3.3.3). There were many reasons voiced by Ministers and Lords were against the use of imprisonment, but the overall consensus was that it didn't work because;

*"imprisonment of any kind is likely to diminish the offender's sense of responsibility and self-reliance. Prisoners are fed, clothed, and housed with no effort to themselves. They do not have to find a job and they do not have to look after their families. They are admitted to a culture of dependence....it costs over £1000 to keep an offender in prison for a month"* (Home Office, 1990:11).

This emphasis on dependence emphasises a 'just deserts' disposition of justice. Extracts of Parliamentary debates of the 1991 Bill evidence the importance of civil liberties and avoiding this culture of dependence. For example, Lord Windlesham expressed his belief that; "criminals are those that need to acquire more self-discipline and self-reliance; both of which would not be achieved in prison" (HL debate, 12<sup>th</sup> December 1990). This was reinforced by his later claim that "punishment in the community would encourage offenders to grow out of crime and to develop into responsible and law-abiding citizens" (ibid).

#### *ii. Reduction of existing sentence lengths*

Lastly, the 1991 Act reduced punishment for specific crimes, thereby refuting such claims of an increase in the length of punishment. For example, section 26 of the Act reduced certain penalties for serious offences such as burglary (from 10 to seven years) and theft (from 14 to 10 years). Although purely symbolic, as judges had not used the maximum penalties in so many years, judges believed that they would not need it in the future (HL debate, 6<sup>th</sup> February 1990). This suggests a long-term plan for a move away from the prison as a method of punishment and longer custodial sentences.

#### *iii. Protecting the public*

However, section 2a of the Bill illustrated the importance of the need to protect the public, which is not consistent with the proportionality principle. This section allowed the courts to increase the length of sentence in the case of serious, violent and sexual offences. This suggests

the ‘rules of meaning and membership’ of the ‘just deserts’ disposition was manipulated to achieve a political agenda (see section 3.4 for further analysis).

### 3.3.2 Objective

A further claim of the punitive turn thesis is how the purpose of punishment has changed. The new purpose of punishment abandons attempts at reforming the offender by rehabilitation and treatment, in order to reintegrate criminals back into society (see section 1.2.1). However, the 1991 Act refutes this. Content analysis of the data revealed how the objective of the 1991 Act was twofold; to punish as well as to reform the offender. For example, John Patten described “a system that benefits everyone. [The new sentencing regime] relieves feelings of guilt and angst that the convicted person may experience. That can lead to offenders rehabilitating themselves quickly” (Standing Committee A, 4<sup>th</sup> December 1990). This highlights the importance of rehabilitation, and which was echoed in the second reading of the House of Lords;

*“if we really want [offenders] to come out with the ability to get a job and with the self-respect to look for one, then the most important thing is to ensure that they are educated and trained while they are locked up. Naturally the more the training the greater the cost, but surely this must be a good investment if it increases the number of those able to stay out of trouble once they are out”* (Lord Gisborough, HL debate, 12<sup>th</sup> December 1990).

This ‘rule’ continued in the Standing Committee stages in relation to criticisms of the prison not being successful in reforming offenders. Gerald Bermingham, Labour MP, repeated Lord Justice Lawton’s comments on research showing the ineffectiveness of prison regimes and how “unless our prison system is reformatory rather than a matter of containment, as it now is, custody will do no good” (Standing Committee A, 6<sup>th</sup> December 1990).

### 3.3.3 Method

The objective of the 1991 Act is fundamentally linked with the method of punishment. As mentioned above, analysis of Parliamentary debates and government documents revealed negative attitudes towards imprisonment, which should only be reserved for the most dangerous of offenders. The White Paper stated that prison was “an expensive way of making bad people worse” because “imprisonment provides many opportunities to learn criminal skills

from other inmates” (1990:6-11). Reinforcing a ‘just deserts’ disposition, prison was unpopular because it was “a society which requires virtually no sense of personal responsibility from prisoners...the opportunity to learn from other criminals is pervasive”. (ibid, p.6). This attitude towards prison was also evidenced during Parliamentary debates (HC debate, 6<sup>th</sup> February 1990; HL debate, 12<sup>th</sup> December 1990). Criticisms of the prison included a lack of potential in reforming offenders, which reinforces the point above regarding what the objectives of punishment were.

### *Decarceration project*

Despite Waddington insisting that the Bill was not a “prison-emptying exercise” (Standing Committee A, 4<sup>th</sup> December 1990), Parliamentary debates suggest that the Bill was agreed to on the basis that it would reduce the prison population. Those responsible for creating the Bill consistently justified the new sentencing framework on the basis that it “will not imprison or sentence people in a way that results in too many being incarcerated for what could be regarded as trivial offences” (Stuart Randell, Labour MP, ibid).

Methods of punishment were emphasised which needed to be associated with the seriousness of the offence. Methods were introduced to encourage alternatives to custody. For example, section 17 of the Act increased the maximum amount of financial penalties to encourage their use and section 18 introduced a new Unit Fines System that would base the amount of the fine on the income of the convicted person in order to increase the possibility that they could pay it and not be sent to custody due to breach of conditions. Section 6-16 of the Act re-branded community penalties as ‘*punishment in the community*’, in order to make them sound more like viable punishment to sentencers and to the public. These changes were part of a wider attempt at decarceration, which had begun in the 1980’s (Dunbar & Langdon, 1998).

The punitive turn thesis uses an increase in the prison population to evidence an increase in the level of punishment being served (see section 1.2.1). However, the 1991 Act demonstrated a move away from the use of the prison. Between 1990 and 1993 the prison population actually decreased. However, as mentioned above (section 3.1) this Act could evidence a time *before* a punitive turn took effect.

### *Punishment in the community*

As mentioned above, section 6 of the Act re-branded community sentences to become a punishment in their own right rather than as a soft alternative to prison and consequently to seem more attractive to the court and popular sentiment. Community penalties were to be served as if they were commensurate with the seriousness of crime committed, thus, based on retributive principles. The type of community penalty given would be justified by other aims of rehabilitation, depending on what the offender needed. This was an important change for Earl Ferrers, who introduced the Bill to the House of Lords. He stated;

*“If the courts are to send fewer people to prison, they must have other more effective sentences to award. The reason for using those other sentences cannot simply be that we in Parliament urgently wish to keep people out of prison. The courts must be confident that non-custodial sentences are in every respect—for the convicted offender and for society as a whole - more effective than custody, in result certainly and, one would hope also, in cost. The courts must have confidence in the sentences”* (HL debate, 12<sup>th</sup> December 1990).

The emphasis on personal responsibility and the need for self-reliance amongst convicted individuals empowered community penalties to become a more popular method of punishment. Community sentencing worked with a level of compliance and co-operation from the offender who was assumed to have a level of responsibility and self-discipline.

### *Prison building programme*

Although there was a project of decarceration, there was also a prison building programme which had begun in 1980. 21 prisons costing £1.2 billion each were built between 1980 and 1995. However, during the debates about the 1991 Act, it was agreed that these new prisons would implement a new, more positive prison regime for the purposes of rehabilitation and reform. As the then Home Secretary, Kenneth Baker, reiterated in a debate on Lord Woolf's prison report on how current conditions in prison were seen to “degrade and humiliate and strip away their self-respect” (HC debate, 25<sup>th</sup> February 1991). He argued that these circumstances;

*“may have the reverse effect of what is required ... the philosophy of the Government's reforms of prison management is to provide a positive regime for prisoners and ensure that*



*they are involved in education and training ... to provide a busy regime which prepares criminals for their ultimate release” (ibid).*

The prison building programme was justified by this need for a new prison regime, as well as with the wider intent of curbing overcrowding. Overcrowding was also seen as a problem because it prevented reform, as expressed by previous Home Secretary Lord Waddington:

*“less overcrowding means more opportunities in prison for education, training and work. It also means opportunities for far more imaginative regimes than exist now and opportunities for prison officers to carry out more challenging and satisfying work than they are able to do now” (HL debate, 12<sup>th</sup> December 1990).*

The new prisons would be under the more positive regime recommended by Lord Woolf’s report (1991); incentives for good behaviour, better facilities for prisoners to provide consistency of treatment between prisons (p.29) and the provisions of “a range of work to meet the needs and abilities of prisoners, and plan programmes with a mix of work, training and education” (p.31). The Conservative party pledged to make prisons “which are austere but decent, providing a busy and positive regime which prepares prisoners for their ultimate release” (HC debate, 25<sup>th</sup> February 1991). Therefore, although a prison building programme could corroborate a punitive turn– on the basis of a reliance on imprisonment and warehousing – the evidence of a commitment to objectives of reforming the offender illustrate how prisons do not automatically equate to punitiveness because it is the reason behind the use of prison, rather than just prison itself.

A further dispositional rule that has been identified in the data was the assumption which underlined the method of community-based punishments. Prison was not seen as the favoured method of punishment due to three reasons; it was expensive, it did not reform the offender and it encouraged a dependent type of lifestyle. This latter argument demonstrates an assumption that offenders would comply with the law post punishment, which is characteristic of a ‘just deserts’ disposition. Pratt et al., (2005) argue that punishment in the community is characteristic of extending punishment beyond the criminal walls, which would evidence a claim of the punitive turn thesis. However, as Nellis (2005) argues, a punitive disposition is based on coercion rather than compliance. It is the emphasis on freedom that makes a difference between incarceration and punishment in the community. This emphasis between coercion and

compliance is evidenced by the next rule of the ‘rival’ disposition; that the majority of offenders (apart from those who were too dangerous) still needed the responsibility of living a law-abiding life during their punishment.

### 3.3.4 Rationality

A review of the decision-making process that led to the 1991 Act suggests that the Act was based on a rational logic of punishment, supported by expert opinions of those in the field. This goes against the claims of populist punitiveness and the public becoming more involved in the criminal justice process (Bottoms, 1995; Pratt, 2000).

In July 1988, the Green Paper *Punishment, Custody and the Community* was published, looking for views on the provisions of non-custodial disposals and the role of the Probation Service (Home Office, 1988). In September 1989, Hurd held a conference to review progress of the project with the Lord Chancellor, the Lord Chief Justice, the Attorney-General and officials. Soon after this meeting, the White Paper *Protecting the Public* was published in February 1990 (Home Office, 1990). The Act closely followed recommendations in response to both papers. As well as applying research findings of the Home Office Research Unit, the formation of the Bill included thoughts of the main prison reform groups (Criteria for Imprisonment; the Case for Statutory Guidelines on the Use of Imprisonment for Adult Offenders, 1989 *in* Dunbar & Langdon, 1998:87). This demonstrates how the rationality of the 1991 Act was based on the views of those involved in the legislative arena deemed to have a working knowledge and experience of sentencing. Furthermore, in an interview with a retired Home Office official, who worked in the Home Office Research Unit during the formation of the 1991 Act, it was made clear how Douglas Hurd and his then Junior Minister John Patten understood the importance of research;

*“you know people like Patten and Hurd, their approach to research generally contrasted so much with say Michael Howard’s approach... you didn’t often see people like Hurd, but you usually have to see Patten, and Patten might not like research that we did but he was always willing to engage with it. And he never ever said you cannot publish this. I had a couple of things held up ... one for almost two years ... but we eventually published it ... they might not like it, but they would listen”* (Interviewee A)

Also, content analysis of Parliamentary debates of the 1991 Act highlighted a battle between the Houses of Commons and the Lords for a sentencing council. Originally proposed by the academic lawyer Andrew Ashworth in 1982, a separate body to the Court of Appeal would have more resources and help in the goal of consistency for a wider range of offences, as well as having a wider range of perspectives. This reflected how the government was starting to recognise other types of expertise such as prison governors, probation workers and police, apart from the judiciary. Attempts were made by the House of Lords to include a sentencing council in the 1991 Criminal Justice Act after growing public and NGO interest (HL debate, 12<sup>th</sup> March 1991). Although the Government dismissed these efforts because the new framework created by the Act would cover the goals of the sentencing council and the already existing Court of Appeal, (Standing Committee A, 26<sup>th</sup> March 1991), expressions of this nature demonstrate how research was seen as an important influence of policy formation.

### 3.4 Resistance

The data did not show any explicit forms of resistance to the new sentencing framework. Any criticism of the Bill was in the minority, as demonstrated by Terry Dicks, Conservative MP, in the second reading of the Bill in the House of Commons. He began his criticism with;

*“Some of the things that I am about to say will not please the bleeding hearts, the do-gooders or the officials at the Home Office who seem to have a great influence—perhaps too great an influence—on the criminal justice legislation”* (HC debate, 20<sup>th</sup> November 1990).

He was against many of the provisions discussed above, including the need to improve prison conditions because “prisoners chose to go to prison when they decided to break the law”. He questioned why the Government was “spending millions of pounds on improving prison conditions”, arguing that “the better we make them, the easier it will be for them to say, ‘I like going to prison’” (ibid). He also believed that capital punishment should be re-introduced due to its effectiveness in deterrence and was against the omission of multiple offences because the public did not care if taking multiple offences into account meant that someone would be imprisoned for a long time. Mr Dicks’ opposition demonstrates the rules of a more ‘punitive’ disposition, as harsher punishment is justified on the basis of deterrence and the consideration of public opinion in punishment regimes. Prison conditions and the threat of the death penalty

would work on the basis of deterrence – a justification frequently used for more punitive responses.

The existence of a ‘punitive’ disposition in the legislative arena is also evidenced by comments made at the Standing Committee stage (Standing Committee A, 6<sup>th</sup> December 1990). For example, Tim Janman, Conservative MP disputed the need to reduce the level of imprisonment and called for longer and harsher sentences to be served for the purpose of deterrence. When confronted by Gerald Bermingham, Labour MP, about the need to rehabilitate offenders, which prison has so far not achieved, Janman replied that “a significant minority of people are unreformable ... preferring to raise two fingers to any offer of rehabilitation that is presented to them”. Instead, Janman expressed the need to contain offenders via long custodial sentences which would protect the rest of society. “If that means people being put away for a very long time then so be it.” These assumptions made by Janman match a ‘punitive’ disposition which is described in the second half of this chapter.

The Parliamentary debate verbatim transcript evidences how Mr Dicks had little support for his argument. He made a quick exit from the House (indicated by MP Barry Sheerman stating that “it is disgraceful. Mr Dick is leaving the chamber”), demonstrating how a ‘punitive’ disposition was less influential at this moment in time. Mr Dicks’ opposition is important as it demonstrates that there was a minority of back bench MPs who did not adhere to a ‘just deserts’ disposition outlined above, thus illustrating political competition that occurred in the legislative arena.

Furthermore, autobiographies of key players demonstrated how dispositional powers are not reducible to individual agencies. In his memoirs, David Waddington (2012:185) admitted to his support for the death penalty during his time as Home Secretary. However, he appreciated that he was in the minority and that “the chances of capital punishment ever being restored were slight indeed” due to the lack of support for the punishment. This provides evidence for how Waddington had to adhere to the rules of the dominant ‘just deserts’ disposition of the time and illustrates how dispositional power is not reducible to its members, but how this type of power constrains actors from adhering to other dispositions. Waddington (ibid) states how his job was to;

*“do my best to give the public the greatest protection possible without capital punishment and do my best to ensure that those guilty of the worst types of murder stayed in prison, if necessary, for the rest of their lives”.*

His autobiography revealed that it was Waddington who created the sanction of tougher sentences for more serious offenders receiving longer custodial sentences (section 2(2)(b) of the Act). This explains the anomaly in the ‘just deserts’ sentencing framework which his predecessor, Douglas Hurd had created. Although Waddington agreed with the principle of prison being a ‘university of crime’ he personally advocated the use of the death penalty over prison because “there was not the slightest evidence that prison taught people the error of their ways” (ibid). Thus, in the absence of capital punishment, prison was the only tool he had which adhered to the rules of the dominant disposition. Via a slight manipulation of the rules of a ‘just deserts’ disposition, Waddington used the justification of ‘protecting the public’ to implement a more punitive response to crime.

### **3.5 Powers of change**

The above has attempted to highlight how the 1991 Act exemplified a ‘just deserts’ disposition influenced crime control policy during that time. However, due to the interaction between certain facilitative and causal powers analysed below, resistance to the 1991 Act eventually culminated in the reversal of the Act’s clauses in the Criminal Justice Act 1993. The proportionality principle was reversed, and the data evidence a significant change at the level of ‘talk’ and ‘decision’ within Parliament by key players in the field. This suggests that certain facilitative powers empowered another disposition, which caused the Conservative party to change their crime control strategy to suit the dominant disposition. The chapter will finish by describing the new dominant ‘punitive’ disposition, as evidenced by the Criminal Justice and Public Order Act 1994 and the Crime (Sentences) Act 1997. These Acts demonstrate how there was a significant U-turn in penal policy which mirror the claims made by the punitive turn thesis.

#### **3.5.1 Facilitative power:**

Content analysis of Parliamentary debates, media articles and political autobiographies identified how a number of external events provided the opportunity for a ‘punitive’ disposition to replace ‘just deserts’ as a dominant influence in penal policymaking.

### *Crime rates:*

Between 1990 and 1992 there was a 40% increase in the crime rate, with a rise of over 1 million recorded crimes (Home Office, 2012). This put considerable political pressure on the Conservative party. Concerns were already rising during the second reading of the 1991 Bill in the House of Commons. For example, Ieuan Wyn Jones, Plaid Cymru MP, raised this issue of increasing crime rates, which were “increasing at a faster rate under this Government than at any since the Second World War.” Specific attention was given to the number of violent acts against the person having doubled since 1979 and he concluded that “these are startling statistics when we have a Government who were elected on a law and order ticket” (HC debate, 20<sup>th</sup> November 1990). These concerns got worse during the first few years of the 1990s, as did the crime rates. Interview A with a retired official from the Home Office Research Unit (HORU) explained that as a Junior Minister, John Patten was being “constantly reminded by the HORU that crime was increasing every year”. This concern was reflected in debates in the House of Commons. Between 1992 and 1993 there were a number of occasions where John Patten, now as Secretary of State, was asked how the Conservatives were going to combat the increasing levels of crime (HC debate, 7<sup>th</sup> February 1991; HC debate, 23<sup>rd</sup> January 1992; HC debate, 20<sup>th</sup> February 1992).

It was in the context of these increasing crime rates that the Shadow Home Secretary, Tony Blair announced Labour’s new approach to crime and how the Conservative’s approach had been discredited during these years. In an article for the *New Statesman* and a speech to the Labour party annual conference, Blair announced that the Conservatives had “patently and comprehensively failed” on the issue of law and order (Blair, 1993) and how, as crime had risen by 50 per cent in the past three years, “the tide of ideas in British politics is at last on the turn. For the first time in a generation it is the right-wing that appears lost and disillusioned” (Blair, 1994).

Concerns over crime rates were expressed in the House of Lords and voiced by Lord Taylor in his speech to the Annual Conference of the Law Society of Scotland at Gleneagles in 1993. He referred to the “spate of much publicised offending by youngsters” including “car-related offences ... sensationally violent offences committed by the very young, often against the very elderly”. He concluded that “the youngsters in question are behaving in a macho-imitative way for kicks and for kudos among their peers.” With this in mind, he concluded that the 1991 Act

did not supply the judiciary with enough “teeth to cope with present excesses [of crime] and must not be emasculated by having imposed on them a sentencing regime more suited to *gentler times*.” (*Emphasis added*, Taylor, 1993).

Subsequent to these pressures, in his speech to the Conservative party conference in 1993, the Prime Minister, John Major proposed new crime control policies (discussed below) in the context of crime rates rising “remorselessly”. More specifically, crime rates spreading to rural areas of the country “bringing alarm where alarm was never before” had sparked a new approach to crime control (Major, 1993).

### *Signal crimes*

As well as general increases in crime, a two-year-old boy, James Bulger, was murdered by two boys aged ten on 12<sup>th</sup> February 1993. This “signal crime” (Innes, 2004) sparked huge controversy and political competition within the legislative arena. Content analysis of media articles during this time evidenced how the Home Secretary, Kenneth Clarke was facing pressure from Conservative MP’s and in a private meeting in Westminster:

*“About 30 to 40 MPs gave Mr Clarke a rough ride as they pressed for measures such as the return of corporal punishment, a repeal of part of the Criminal Justice Act passed two years ago and a crackdown on drug abuse and teenage drinking ... John Townend, a member of the executive of the Conservative backbench 1922 committee who had earlier called for the return of the cane in schools, said that the wave of national outrage over the murder of two-year-old James Bulger had brought to the surface strong feelings that it was time the government confronted young criminals.”* (Wood, 1993).

It was only three days after James’ body was found when the Conservative party significantly shifted in the rhetoric used for crime control policies. For example, Major gave an interview to the Daily Mail, announcing “we need to condemn a little more and understand a little less” (Holborrow, 1993). In his account of the policymaking process, Lord Windlesham commented on how the Treasury, who had previously opposed to the introduction of secure training regimes for young offenders, were now in agreement to such changes. Five days later, Major’s Home Secretary, Kenneth Clarke, announced that children as young as twelve would be

imprisoned, which eventually led to new crime control measures discussed in the next section (Windlesham, 1996:51).

### *Crime and the media*

Rather than the mere events of rising crime and Bulger's murder influencing the shift in penal policy, more specifically, it was the impact of growing media attention and the resultant rise in the fear of crime. An increase in public awareness on crime was facilitated by developments in the 'world wide web' at the end of 1990, as Mrs Winterton highlights in the second reading of the 1991 bill - "we are all much more aware of the incidence of crime because of instant communications in the media" (HC debate, 20<sup>th</sup> November 1990). Even when crime rates started to decrease in 1993, such events and their media attention had increased the public's fear of crime and of being victimised. Rather than the *actual* crime rate, as was used to justify the 1991 Act, the emerging populist rationality allowed for the *perceived* crime rate to facilitate more punitive strategies. For example, in a speech to the Social Market Foundation, John Major highlighted how, even though crime rates had decreased:

*"it is the fear [that older people] might be jostled, jeered at, made to feel insecure by rowdy or by offensive behaviour, and that minor crime ... can have huge social consequences and make a dramatic impact in the quality of life for many vulnerable people and we need to face up to that particular problem"* (Major, 1994a).

He finished his speech by emphasising that the fear of crime became as important in the new agenda as actual crime; "it is crime, *and the fear of crime*, that most violates our civil liberties." (*emphasis added*, Major, 1994a). A year later at the Conservative party conference, Major used the 'fear of crime' as an issue to justify new crime control methods. Although crime rates had fallen, they needed to concentrate on reducing the "fear of crime" which would be achieved by hitting crime "harder and harder and harder" (Major, 1995).

Furthermore, Lord Windlesham's (1996:45-8) account of sentencing during this period emphasises the effect of the media. During his own study on the impact of the media on sentencing policy, he received letters from the editors of *The Times* and *The Daily Mail*. Both letters provide evidence how the newspapers made an active attempt to change sentencing



policy by informing the Executive of public opinion on crime. A letter dated 14<sup>th</sup> September 1993, by the editor of *The Daily Mail*, Paul Dacre states;

*“The crux of the changing mood is the realisation that legislation and changes in prosecuting practice designed to ease prison overcrowding have only succeeded in deepening the exasperation of those who suffer the effects of crime ... In areas such as these, it is the aim of The Daily Mail to influence government policy. Surely it is salutary for ministers in office to be made aware of the growing anger and anxiety of those who entrusted them with power ... this newspaper does seek to articulate the concern of its readers and, thereby, harden the response from this Tory administration”.*

In a similar vein, the Editor of *The Times*, Peter Stothard, confirmed in a letter to Lord Windlesham on 17<sup>th</sup> September 1993, that it also tried to actively influence policy, taking a more proactive approach rather than reflecting on readers’ opinions (ibid).

### *Conservative party scandals*

The crime wave came at a significantly bad time for the Conservative party, who were being publicly criticised for a flood of party scandals between 1992 and 1994. Tim Yeo having an affair; Alan Duncan for expense scandals on council houses; Neil Hamilton resigned alongside Parliamentary aides Graham Riddick, David Tredinnick and junior Northern Ireland minister Tim Smith, who were all implicated in the scandal of accepting money from Harrods owner in exchange for asking Parliamentary questions between July and October 1994. Those accused of scandals were removed from the political party for fear of the Conservative’s political reputation. This was a significant downfall for the party, which added to the set of events which were beginning to discredit the Conservative leadership. The negative effects of these scandals on the Conservative party was highlighted by Peter Snape, Labour MP, when he said in the House of Commons;

*“Over the past few weeks, there has been much publicity about the activities of Ministers. I will not go down that road. However, in passing, I believe that the fibre of this once great nation of ours is in greater danger from fully and elegantly dressed Ministers in their offices than from the activities over the past few weeks of a well-publicised few —and nowhere more so than with regard to law and order”* (HC debate, 11<sup>th</sup> January 1994).

### *Public opinion*

These scandals are significant due to the negative political implications this has on the Conservative Government and the standing conditions of a liberal democratic political institution. The dependence on public opinion and creates a populist opportunity for policies to become empowered in the right environmental contingency. For example, in his memoirs, Kenneth Baker (1993:428) describes the Home Secretaries position as a “buffer” between the public and the resources of law and order. He describes how “the decisions in this area are, in the widest sense of the word, 'political', though not Party political”, but political in the sense that the public want something to be done. As will be discussed below, perceived public opinion (as described in the media) was used to disrupt the rules of a ‘just deserts’ disposition and to empower a new disposition within the legislative arena. To illustrate the relationship between the public and policy formation, Howard used the idea of public opinion to politically threaten those who did not adhere to the dominant disposition and to discredit those who were against the new policies;

*“The Labour party opposes statutory minimum sentences for burglars and drug dealers, mandatory life sentences for dangerous violent criminals and the ending of automatic early release from prison. Labour will not support our proposals in the Division tonight and will do its best to stop them becoming law. We will make sure that the public understand that a Labour Government would not introduce those proposals. Only this Government can be trusted to do so. Only this Government genuinely believe that tough action is needed to protect the public. Only this Government will take that action.”* (HC debate, 19<sup>th</sup> June 1996).

### **3.5.2 Causal power**

These events in the broader policy environment were influential due to their relationship with the internal dynamics and processes within the legislative arena. The external events created opportunities for new dispositions to be empowered, which was achieved by certain standing conditions within the legislative arena.

### *Labour’s attack*

For example, the data evidence how Labour used these events to gain political credibility (Leathley, 1994). In an interview with a representative from the Prison Service, Shadow Home Secretary, Barry Sherman said “we are on the attack”. He noticed how law and order policies

were weakening Conservative position in the opinion polls, against a rising crime rate which Tories would find “difficult to defend” (1991, 84 Prison Service Journal, 46 *in* Windlesham, 1993:415). In this wider policy environment, Tony Blair announced Labour’s new campaign of being “tough on crime and tough on the causes of crime” (Blair, 1993), which “enraged” the Conservative party. “By the use of one simple slogan ... Tony Blair managed an impressive political rescue. Yesterday John Major began the long fight back, with a speech setting out his Government's achievements on tackling crime” (The Times, 1994)

The impact of the wider environment on the Conservative’s political credibility to control crime was evidenced in an interview with the Chief Executive of a penal reform group (interviewee E), who, when asked what the biggest obstacle was for “putting sentences down” during this time, they responded with “Jamie Bulger ... it was incredibly difficult because as soon as you had [the murder], you had Tony Blair coming in talking about crime as a big thing, making it an election issue”. This demonstrates how the murder of James Bulger facilitated and empowered a ‘punitive’ disposition by Labour, which put the Conservative’s under considerable pressure.

### *Change in Home Secretary*

The pressure of public opinion on the Conservative party is not new and has been documented by previous observers in penality. What is significant here is the changes *within* the legislative arena which allowed such exogenous events to disrupt the ‘just deserts’ disposition. For example, within the Conservative Government, the high turnover of Home Secretaries during its creation and implementation weakened the support for a ‘just deserts’ disposition. Whilst Douglas Hurd (1985-1989), was instrumental in the formation of the 1991 Act, succeeding Home Secretaries have been thought of as not having the “ownership” of the Act that Hurd had shown and were known as “foster parents” in the Houses (Interview A; HC debate, 12<sup>th</sup> December 1990). Whilst Douglas Hurd adhered to a ‘just deserts’ disposition, and had been a key player in its formation, his successors did not have the same devotion.

His immediate successor, David Waddington (1989-1990), had very different ideas about punishment (as described in section 3.4). David Waddington, in particular, was not a fan of the Bill, but, as one retired Home Office official suggested, the Bill had gone “too far forward” for Waddington to be able to stop it (interview A). This suggests that there are certain standing

conditions of the policy process, whereby key actors are prevented from changing a policy at certain points. It also suggests that the position of Home Secretary has certain powers attached to the role that are limited on effecting certain changes to policymaking.

### *The Judiciary*

Analysis of the formation and subsequent amendments to the 1991 Act evidence how the Judiciary were a significant hindrance to a ‘just deserts’ disposition. Their concern was to maintain their judicial discretion, which went against the rigidity of a ‘just deserts’ sentencing framework. From its introduction into the House of Lords in December 1990, there was fierce criticism by the Lords and Judiciary of section 29 of the Act pertaining to previous convictions. When Home Office officials showed the senior judges on the Judicial Studies Board some draft clauses for the Bill, judges were not happy with multiple offences or the use of previous convictions (Windlesham, 1996). After the meeting, Waddington announced that the government would ‘water down’ these proposals due to judge’s criticisms (Cowdry, 1990). However, the Judiciary were still not happy. In 1992, Kenneth Clarke was appointed as Home Secretary. According to a retired Home Office official in a primary interview, Clarke came against great opposition from the judiciary;

*“I think we [in the HORPU] sort of felt that he had decided to [reverse the 1991 Act] because ... you know the notion of buddies at the golf club moaning about the Act sort of tied hands and they couldn’t do this and they couldn’t take previous convictions ... there was always mutterings from magistrates about that.” (Interview A)*

Lord Taylor publicly attacked the Act in a speech to the Law Society of Scotland at Gleneagles for “forcing the judge into an ill-fitting straitjacket” (Taylor, 1993). Along with section 29 and the proposed idea of a sentencing council, he argued that “the court needs to have available the widest range of possible measures, and the broadest discretion to deploy [sentencing measures] either individually or in combination” (ibid). Even after a slight amendment to the Act after its implementation in 1992, Lord Taylor was still not content with the meaning of the ‘seriousness test’ of proportionality and in the case of *Cunningham* going to the Court of Appeal, Lord Taylor twisted the meaning of the words in this section – “commensurate with the seriousness of the offence” means “commensurate with the punishment and deterrence that the seriousness of the offence requires” (Cunningham, 1993, 14 Cr.App.R.(S) 444 *in Dunbar & Langdon*,

1998:104). Thus, the case of *Cunningham* made it acceptable for judges to base sentences on deterrence when the intention of Parliament was to exclude this rationality in favour of proportionality. In effect, this made Section 29 of the 1991 Act redundant. Subsequently, section 29(2) was added to the 1991 Act by the Criminal Justice Act 1993;

*“Where any aggravating factors of an offence are disclosed by the circumstances of other offences committed by the offender, nothing in this Part shall prevent the court from taking those factors into account for the purpose of forming an opinion as to the seriousness of the offence”.*

This new section, which seems to contradict Section 29(1) (*An offence shall not be regarded as more serious ... by reason of any previous convictions*) demonstrates Ashworth’s remarks on how the judiciary;

*“had little compunction about neutralizing those parts of the 1991 Act that they least like – not merely by exercising their discretion in ways that fail to advance the purpose of the act but also by placing an untenable interpretation on a key provision that might otherwise have stood in their way”* (Ashworth, 2001:79).

However, regarding claims of the punitive turn thesis, this competition between the House of Lords and the Executive was not due to the former being more punitive. It was the enforcement of judicial discretion that was important, rather than the level of punishment being served. Therefore, these changes do not reflect a directly punitive disposition but could lead to more punitive responses if the sentence deemed it so. The data evidenced how those in the House of Lords agreed with the criticisms of prison and how it should only be used as a last resort. Described as a “warehousing operation”, Lord Taylor emphasised that it was judicial independence that he was fighting for, rather than more punitive policies (Rose, 1993).

The thesis concludes that it was a culmination of these factors – external pressures of increasing crime rates, signal crimes, as well as political and judicial pressures – which disrupted the ‘just deserts’ disposition. The next section describes subsequent Acts which evidence the empowerment of a ‘punitive’ disposition. However, as the chapter will conclude, this ‘punitive’ disposition was never fully accomplished due to the political competition and negotiation which occurred, as a consequence of internal constraints on the Home Secretaries agenda.

### 3.6 Criminal Justice and Public Order Act 1994 and Crime (Sentences) Act 1997

Subsequent to these events, content analysis shows that a significant change in the rhetoric used by key players in penal policy. The Conservative party won the election in 1992. John Major continued as Prime Minister, but Michael Howard was made Home Secretary a year later in May 1993. In his autobiography, Major described the 1993 Conservative party conference as a “platform for [Michael Howard] to signal a radical break with the past consensus on criminal justice” (1999:389). At the conference, Howard announced his 27-point plan based on the principle that “prison works”, which was in direct contrast to the disposition described above. Major’s conference speech reinforced a change to penalty with his ‘back to basics’ approach to crime control. Major emphasised how past attempts had failed and that the Conservative party of law and order were going to change things. “There have been too many voices excusing crime, explaining crime, and justifying crime. We think that’s wrong ... We have tried being understanding. We have tried persuasion ... it hasn’t worked” (Major, 1993). He described how previously *society* had been blamed for causing criminal behaviour. Now, the individual would be blamed for their own offending behaviour. Under this principle, new emphasis would be on punishment rather than treatment and more prisons would be built to put the “guilty behind bars”. To make his point clear, Major declared that “crime is a priority. We need a bill” (ibid). This Bill was eventually the Criminal Justice and Public Order Act 1994. The 1994 Act would implement 19 of the 27 points and would be;

*“the most comprehensive programme of action against crime that has ever been announced by any Home Secretary. Action to prevent crime. Action to help the police catch criminals. Action to make it easier to convict the guilty. Action to punish them once they're found guilty”* (Howard, 1993).

The Act introduced new secure training detention centres for young offenders and created new crimes of public order offences. Two years later, the White Paper *Protecting the Public* (Home Office, 1996:iv) reiterated Howard’s agenda that prison worked in three key ways; crime reduction by taking criminals out of circulation, protecting the public from dangerous criminals and acting as a deterrent to would-be criminals (1996:4). The new sentencing framework would be based on an increase in the severity of sentencing for persistent offenders and certainty of

being punished via mandatory sentences. This was implemented by the Crime (Sentences) Act 1997. Thus, the 1994 and 1997 Acts evidence how there was a significant U-turn in the Conservative's method of crime control towards an increasingly (quantitatively and qualitatively) severe model of punishment. The 'powers of change' mentioned in the previous sections demonstrate how a 'punitive' disposition was empowered, and which reflects the claims made by the punitive turn thesis.

However, closer analysis of the decision-making process of each Act evidences how this model of punishment came up against significant resistance and competition. In the case of the 1997 Act, this competition resulted in the destabilisation of a 'punitive' disposition by actors adhering to other dispositional powers and certain standing conditions preventing Howard's agenda being implemented as intended. Thus, the process of the 1997 Act suggests that a 'punitive' disposition was one of co-existing dispositions being adhered to within the policymaking environment.

### **3.7 Dispositional Powers**

Both the Criminal Justice and Public Order Act, 1994 (referred to as the 1994 Act) and the Crime (Sentences) Act 1997 (referred to as the 1997 Act) demonstrate a clear intention to increase the severity of punishment. This is consistent with the claims of the punitive turn thesis that punishment became 'harsher' for the same types of crime.

#### **3.7.1 Level of punishment**

Relevant sections of the 1994 Act evidence an indication of criminal law emerging as a strategy for dealing with issues that were previously associated with social welfare. The 1997 Act also evidence an increase in the quantitative level of punishment for particular crimes. Both match claims of the punitive turn thesis.

##### *i. New crimes*

The 1994 Act introduced 39 new offences and increased the maximum penalty for a further 56 crimes. Part Five of the Act amended the Public Order Act 1986 to include a crime 'with intent to cause "intentional harassment, alarm or distress"' (section 154). Although originally raised over concerns about the rise in racial harassment, the order encompassed a broader remit of behaviour. This corroborates literature which observes that the reach of criminal law is being

extended to sanction unacceptable, or unsociable behaviour that would previously not have been seen as a criminal matter (Simon, 2007). Although this was documented in an American context, this legislation suggests that this demonstrates a level of policy convergence across the Atlantic (Jones & Newburn, 2002).

*ii. Tougher sentences*

Sections two, three and four of the 1997 Act created mandatory life sentences for second time serious violent or sexual offences, mandatory minimum sentences of seven years for third time drug dealers of class A drugs and of three years for third time burglary offences. In both cases, courts would retain the discretion to impose higher sentences, but there is no mention of the desire to impose lower sentences. This was the first time that mandatory minimum sentencing had been used in England and Wales apart from the offence of murder.

However, mandatory sentencing for second serious offences and third time burglary were more symbolic in that it was most likely that offenders in those circumstances would have received similar sentences under the previous regime (Home Office, 1996). This is consistent with the features of a punitive turn in that there has been a change in language and rhetoric of ‘tougher punishment’, which is indicative of a more expressive style of crime control (Pratt, 1998). What is more significant is the mandatory sentencing of three years for a third time burglary offence. Due to the predicted impact of this sentence being a significant rise on the prison population, implementation of the provision was suspended until 1999, when the prison service was thought to be able to cope with the predicted rise.

Also, the arrangements for early release under the 1991 Act were to be replaced with section eight of the 1997 Act ‘*honesty in sentencing*’ clause, where time served in custody would match sentences passed by the courts. Again, this was another symbolic change as sentencers were instructed to take this clause into consideration when deciding on sentences, thus passing shorter sentences to accommodate for the increased time to be spent in custody.

Therefore, the changes made to the sentencing framework by both the 1994 and 1997 Act evidence a significant shift towards a ‘punitive’ disposition. New crimes were created, and custodial sentences were increased for existing crimes. Also, the following criticisms of both Acts reinforce the change from a ‘just deserts’ to ‘punitive’ disposition.



## *Criticisms*

The Bills that formulated the 1997 Acts faced significant criticism in both Houses of Parliament. The nature of the criticism reflects how there was commitment to other dispositions by other key actors during the process of the Bill, as well as revealing more implicit assumptions of those adhering to a ‘punitive’ disposition. For example, the argument over deterrence was a consistent theme over the 1997 Bill. Whilst proponents of a ‘punitive’ disposition argued that deterrence would be achieved by longer sentences, and thus more punitive responses could be justified, advocates of ‘just deserts’ argued that it was the likelihood of being caught that carried the greatest deterrence effect (as described in section 3.2). Those in the House of Lords criticised the increase in sentences for dangerous offences. In an appearance on the ‘Question Time’ television programme on 28<sup>th</sup> October 1993, Lord Taylor agreed with the contents of Howard’s conference speech but that he did not approve of the tone. “I don’t think we should send people to prison for longer and longer sentences. Villains don’t ask if they are going to get three to five years. They ask whether they are going to get caught” (Dunbar, & Langdon, 1998:117).

Members adhering to a ‘just deserts’ disposition were also against the principle of mandatory minimum sentences, which was particularly emphasised in debates in the House of Lords. After the white paper was published in 1996, Lord Taylor of Gosforth gave a lecture at Kings College, London, heavily criticising the new sentencing framework:

*“criminals are not, in the main, rational and calculating. As the Home Office itself said in 1990, deterrence is a principle with much immediate appeal ... But much crime is committed on impulse, given the opportunity presented by an open window or an unlocked door, and it is committed by offenders who live from moment to moment; their crimes are as impulsive as the rest of their feckless, sad, or pathetic lives. It is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculations”* (Taylor, 1993).

He argued that minimum sentences were not only “inconsistent with doing justice according to the circumstances of each case” but they “fetter[ed] the judge's discretion to take account of all the circumstances of the burglary and the burglar” (Taylor, 1996). The necessity of “doing

justice” demonstrates the adherence to a ‘just deserts’, which was reinforced in the House of Lords during Parliamentary debates. For example, Lord Williams of Mostyn argued that “it is the justice of the case that should be the engine that drives the sentence and determines the sentence” (HL debate, 23<sup>rd</sup> May 1996). Lord Bingham continues with the importance of just sentencing:

*“It is a cardinal principle of just sentencing that the penalty should be fashioned to match the gravity of the offence and to take account of the circumstances in which it was committed. Any blanket or scatter-gun approach inevitably leads to injustice in individual cases ... There is the same certainty of injustice in individual cases if account cannot be taken of the gravity of the offence, the pattern of offending, the lapse of time between offences and the circumstances of the offender.”* (HL debate, 27<sup>th</sup> January 1997).

It was these criticisms which resulted in a significant amendment being made to the 1997 Act, which is discussed in section 3.8.1.

### **3.7.2 Objectives**

The purpose of punishment had significantly changed from the 1991 Act. The most prominent objective was incapacitation of offenders, with little consideration of reforming offenders via rehabilitation and educational interventions. Prison conditions were to be made more austere and improved security measures replaced reform as a priority.

#### *Incapacitation*

Howard’s agenda of ‘Prison Works’ was justified by the benefits of incapacitation. In his speech to the 1993 Conservative party conference he announced that; “Prison works. It ensures that we are protected from murderers, muggers and rapists” (Howard, 1993). Three years later, the white paper (Home Office, 1996:iv) stated that prison was to have three objectives, two of which was “to take offenders out of circulation” and thus would “protect the public”. This corroborates the claims of the punitive turn thesis which describes how attempts to reintegrate offenders back into society have been abandoned in Western democratic society (see section 1.2.1).

The change in objective is reinforced by extracts of an interview by the *Daily Mail* with John Major. On 21<sup>st</sup> February, in the interview, Major announced how the party would need to “condemn a little more, understand a little less” (Holborrow, 1993). He stated that the Conservatives have “tried being understanding ... [but it] hasn’t worked”. He made his feelings clear on the need for punishment and how it was going to make a comeback in penal policy. This was reinforced in his speech to the 1993 Conservative party conference six months later: “Others told us that every criminal needed treatment, not punishment. Criminal behaviour was society’s fault, not the individuals. Fashionable, but wrong, wrong, wrong”. His ‘back to basics’ idea meant going back to ‘punishment’, which was no longer to be seen as a “dirty word”.

When compared to the data from the 1991 Act, there was a significant lack of mention of reforming offenders during debates for the 1994 and 1997 Acts. A lack of consideration for what happened during custodial sentences mirrors Wacquant’s (2001) argument of Western penality ‘warehousing’ criminals – a characteristic of the punitive turn.

### *Prison conditions*

Aside from the Criminal Justice Acts, it is important to mention other key developments under the Conservative Government of relevance to punitive turn thesis claims. A characteristic of punitiveness is the abandonment of “ameliorating prison conditions” (Pratt et al., 2005:xii). Offenders are subject to “more austere and spartan prison regimes” (ibid). This is clearly demonstrated during Howard’s era. After a series of prison escapes in the previous years, the report recommended a number of resolutions to the lack of security and control in prisons, which were quickly operationalised in prisons in England and Wales. Policy changes included:

*“an increase in internal and perimeter searches, restrictions on temporary release, the introduction of dedicated search teams, mandatory drug testing, restrictions on personal possessions and a new ‘sticks and carrots’ regime of incentives and earned privileges”* (Cavadino & Dignan, 2007:201).

Liebling (2001, cited in Cavadino & Dignan, 2007:201) identified the immediate and negative consequences for prisoners, who had less privileges, less personal property and were subject to more frequent searches. New techniques of control included the shackling of pregnant

female prisoners when giving birth and an increase in the levels of staff violence against prisoners. This violence reached its peak in 1999 when a prison officer was imprisoned for acts of brutality against prisoners for the first time (HM Chief Inspector of Prisons, 1999, cited in Cavadino & Dignan, 2007:201). Between January and June 1999, 44 prison officers were suspended for alleged assaults on prisoners. Despite this not being an explicit government policy, it might be indicative of the change in tone and content of the broader official discourse about prison which provided the conditions in which such abusive behaviour might flourish. On a more substantive level, these developments indicate a ‘punitive’ disposition due to the abandonment of ameliorating prison conditions, and a lack of long-term objective of reforming offenders.

### 3.7.3 Method

Naturally, the method associated with incapacitation was imprisonment. Both Howard and Major expressed their loyalty to the prison system as the central feature of a successful criminal justice system. Signifying a move away from the decarceration project of the 1980’s, in his 1993 conference speech, Howard declared that the new sentencing framework “may mean that more people go to prison ... we shall no longer judge the success of our system of justice by a fall in our prison population” (Howard, 1993). Plans to expand the prison system demonstrates the effects of a ‘punitive’ disposition during this time, with the primary method of crime control being imprisonment via incapacitation and deterrence as described above. An extract from Major’s memoir (1999:378-8) demonstrates his belief system in the prison:

*“An organised system of incarceration is the foundation, the reserve currency, of any system of criminal justice. If other admonishments fail, and if the whole panoply of deterrence, restorative justice and rehabilitation has no effect, prison must be there, a reassurance to the law-abiding and a deterrent to the lawbreaker, a resort of which ministers should not be ashamed, and which the British people wish them humanely but sternly to administer”.*

Furthermore, the need for more prison places was justified by the new sentencing framework implemented by the 1997 Act. The harsher level of sentencing would ensure that these prison places were needed, as offenders were more likely to receive a custodial sentence and would remain in prison for longer periods of time, thus, creating demand on the prison system. Prison places would be available for every offender who required one, as Howard wrote in an article

for The Law Society Gazette in 1995: "If violent or sexual offenders need to be locked up to protect the public, they should be. That is what underpins the statutory framework for sentencing which the government has put in place" (Howard, 1995a). When questioned about the resources needed to build the new prisons in a House of Commons debate, Howard responded with;

*"I accept that [the changes] are likely to lead to an increase in the prison population: the necessary prison places will need to be built, and that will require extra resources. I believe, however, that we simply cannot afford not to take such action"* (HC debate, 3<sup>rd</sup> April 1996).

One point of the '27 point plan' was to build six new prisons. The Conservative manifesto pledged to provide another 8,500 prison places by 2000 (Conservative Party, 1997). However, with predictions relating to the new legislation, the White Paper increased this amount to 24,000 (Home Office, 1996). This prison building programme came after one of the largest prison building programmes of the century (see section 3.3.3). Moreover, Howard introduced the use of secure training centres for persistent young offenders for those between the ages of 12 and 14 years who had failed to respond to community punishment (section 1 - 4 of the Act) and "who, at the moment, can't be locked up at all." (Howard, 1993). Section 17 of the 1994 Act doubled the length of custodial punishments for young offenders, from 12 to 24 months. This is a significant reversal of previous attempts at keeping young people out of prison, and towards more punitive responses to youth offending.

In an interview with Jones and Newburn (2007:88), Howard talks of his agreement with the arguments of right realist academic, Charles Murray and emphasising the importance of prison in reducing overall crime rates:

*"One of my beliefs, which owed something to the American experience, was that if you were able to incapacitate by imprisonment serious and persistent offenders, that would have an impact on crime ... Charles Murray is one of the people whose writings influenced me and I think he demonstrated pretty conclusively that falling crime in the US had been accompanied by increased use of imprisonment. And that's why I said 'prison works' and that sort of thing".*

Thus, the belief that imprisonment rates and the use of prison was directly linked to levels of crime demonstrates how prison was viewed as central to social order, and thus corroborating the punitive turn thesis.

### *Criticisms*

As described in section 3.6, the Bills faced significant criticism by both Houses of Parliament. Criticisms of the 1997 Bill revolved around the lack of emphasis on reforming offenders during their sentence, illustrating the nature of the rules of the increasingly dominant ‘punitive’ disposition. In both Houses there was a significant number of those within the legislative arena who believed that “reform, rehabilitation—or whatever you like to call it—is at any rate part of a correct sentence and of a correct penal objective” (Earl of Longford, HL debate, 23rd May 1996) and that the proposals of the bill were focussed only upon “banging up the criminal”. During Parliamentary debates, Howard was criticised for focussing too much on building prisons and not doing enough to provide a positive regime within them:

*“Although the White Paper contains a chapter on the prevention of crime, its approach as a whole is focused on response rather than prevention; on response primarily in terms of punishment; on punishment primarily in terms of imprisonment; and on imprisonment primarily seen as containment. That whole scheme of things is unbalanced”* (Bishop of Birmingham, *ibid*).

Criticisms from those adhering to a co-evolving ‘reform’ disposition highlight how the primary concern for those adhering to a ‘punitive’ disposition was to “protect the interests of the victim, not the well-being of the offender.” (Richard Spring, MP, HC debate, 4<sup>th</sup> November 1996). This attitude towards prison was rejected and calls were made for more positive reform and rehabilitation of offenders which were currently “nothing to do with the Home Secretaries budget” (Lord Carr of Hadley, HL debate, 23<sup>rd</sup> May 1996):

*“[I]f there really are the resources available for the massive expenditure implicit in the Government's proposals, why spend it all on more prisons? Are they really our priority? Would it not be far better to deploy such resources in a more constructive and positive manner in ways that will in the long run help to starve criminal behaviour of the soil in which it grows? The place where money above all needs to be spent is in the building up of healthy communities in*

*which crime will not flourish, or not flourish so much—that is, on things like families, nurseries, schools, youth work, training, jobs and hope.*” (Bishop of Birmingham, *ibid*).

Alex Carlile, Liberal Democrat MP summarised these criticisms of the Bill;

*“Prison works? Are the Government, who reduced the prison budget by 13 per cent., making prison work? They removed every probation officer from our prisons. Is that making prison work? They are cutting prison education, which enables young men and women who are illiterate when they enter prison to leave literate and able to obtain jobs. Is that the Government making prison work?”* (HC debate, 19<sup>th</sup> June 1996).

This lack of interest in the reformation of offenders corroborates the claim made by the punitive turn thesis, that punishment had a new purpose in society; to punish for the purposes of crime reduction via incapacitation and deterrence, rather than to punish in order to reform the individual.

### **3.7.4 Rationality**

The data evidenced how Howard’s agenda was based on the symbolic aspect of populist appeal rather than instrumental effectiveness, which is consistent with a feature of the punitive turn. On two occasions – a 2011 press release and in an interview on BBC Radio 4 in 2017 – Howard remarks on how, in his first week as Home Secretary, he was shown a graph of the crime rate growing at an average rate of 5% a year over the last 50 years. He described how he was told by civil servants that;

*“there’s nothing [he] can do about it and [his] job is to manage public expectations in the face of what will continue to be this inevitable rise in crime ... I didn’t take that advice and I set up across the board another comprehensive plan to try and reverse that and some involved toughening up but that was a means to an end ... and the end was to turn around what was presented to me as the inevitable continuing rise in crime”* (BBC Radio 4, 2017).

Thus, the ‘means to an end’ was to reduce crime. This was to be achieved via incapacitation and deterrence. Howard argued that his claims were based on research findings. For example, in a written statement to the Law Society Gazette (Howard, 1995a), Howard reported on

research which found that “imprisoning a recidivist burglar may prevent between three and 13 burglaries for every year he spends in prison”. However, the “small sample size and imprecise estimates” of this research were criticised by the Home Office, who added that the research did not take into account other factors such as age and criminal history, which closely influenced reoffending rates (Dunbar & Langdon, 1998). Attacking the Conservative law and order policies, Shadow Home Secretary Tony Blair agreed with the Home Office, concluding that “[i]t is clear that the Home Office statistics department have the severest doubt on the validity and integrity of the statistics he is using.” (Travis, 1994).

Even though critics of the Act cited research which found that longer sentences did not have a deterrent effect (Taylor, 1996; HL debate, 27<sup>th</sup> January 1997), Howard reinforced his adherence to a punitive disposition and the justification of deterrence, with his own argument that “thousands of dangerous criminals are prevented from attacking the community while they are inside. *And many who might commit crime are deterred from doing so.*” (emphasis added, Wood, 1993).

Howard fuelled a punitive tendency of selecting academic research, for political ends, which became known as ‘policy-based evidence’. He believed that “in order to get the policy right you have to understand the evidence and draw the right inferences from it” (Howard, 2011). The data suggest that the “inferences” Howard gleaned from the evidence were ones which were consistent with the aforementioned rules and regulations of a punitive disposition. Research used highlighted how prison worked in the way that Howard had reiterated – to keep offenders off the streets. However, his use of research was limited to this point, as was his relationship with penal reform groups. This was a consistent finding in all six interviews which covered this Home Secretary - Interviews, A, B, C, E and F. For example, interviewee A described Howard’s party as being “more interested in that stage in evidence of what [makes prison] work”.

*“Howard basically had no time for research ... his junior minister David Maclean spent his first year and a half trying to close the unit down, it was just a nightmare. We spent a lot of time trying to fight that one because that was just a pain”* (Interviewee A).

The interviewee described how Howard’s reluctance to listen to the unit resulted in many senior researchers leaving the unit and how it was clear that Howard had an agenda when he first



arrived: “[Howard] was only there five minutes when we were told prison works” and was dismissive of research which did not corroborate this: “[research] was of no interest to Howard. It either helped him or it was kind of ‘bin it’ kind of stuff”. Suggesting that Howard’s agenda was fuelled by the press, “[which] doesn’t show Home Office press releases very often about research”, the retired Home Office official described a time when it was a struggle to publish accurate findings of research which went against the dominant disposition:

*“I was running a study of reconviction rates ... This was ready to go for publication, not long after Howard arrived in the Home Office. I got a phone call one day from one of Howard’s political advisors [and] I spent about 45 minutes on the phone to this guy trying to explain to him that some figure in the report [of] the reconviction study did not show that prison worked, because he wanted me to say it. If you looked at it immediately you might think ‘oh that shows prison works’ and I was trying to explain to him what regression to the mean meant and that we were pretty certain that this was an example of regression to the mean. It did not show that prison worked, absolutely not, and I spent a long time explaining all of this to him and trying to explain the analysis ... then they decided they were going to put out a press release which basically said the report showed prison worked and this went straight to the top. I complained to the head of the unit who made representations to say you can’t put this out because a researcher says not prison works it was something else. Off they went, they put it out. Absolutely astonishing stuff, just because they wanted to prove that being punitive works ... in other words completely ignore what research was saying”*

This is corroborated by interview F, who described how Michael Howard and John Patten as not trusting the research unit: “I don’t think trusted us very much and quite right because I did my little bit to go slow on a lot of the things that he wanted to do and my boss did too”.

As the above illustrates, Howard ignored research which could not be fitted into the rules of a punitive disposition. Howard’s disregard for the HORPU, and its eventual abolition, evidences the claims of the punitive turn thesis – Howard’s era broke with the traditions of the ‘platonic guardianship’. Also, Howard’s rejection of evidence is supported by data from interview ‘E’, when they describe Howard as the “only home secretary who refused to meet us since the 1980s”.

This reinforces one of Garland's (2001:13) 'indices of change' whereby the "policy measures are constructed in ways that appear to value political advantage and public opinion over the views of experts and the evidence of research". A rigid new consensus had formed around penal policy which are perceived as tough and popular with the public. Another example of this was how the Conservative manifesto stated that "those sent to prison are less likely to re-offend on release than those given a community punishment" (Conservative party, 1997). However, this went against a Home Office statistical bulletin on the subject published on the same day that "there is currently no significant difference between reconviction rates for custody and all community penalties" (*in* Dunbar & Langdon, 1998:134). This is consistent with the punitive turn thesis which claims that there has been a replacement of expert and research led policy with what one civil servant described to Loader (2006:578) as "the advent of 'almost hyperactive legislative behaviour'". The 1997 Act was the product of little consultation (compared to the 1991 Act) and research used was selected in order to support the rules of a punitive disposition, and to reinforce Howard's 'prison works' agenda.

This disregard for research evidence suggests that the new sentencing framework was based on populist appeal. This was reinforced in the data, including speeches made by both John Major and Howard. Both political actors demonstrated their need for public acceptance and how a tougher approach to crime would achieve that. For example, Major (1994b) introduced the new law and order campaign during his 1994 conference party speech by emphasising the importance of public opinion;

*"Over the last twenty or thirty years, the criminal justice system has tended to drift away from public opinion. There is a role for professionals and above all for the judiciary to lead but a system that does not carry confidence loses consent and there is now little or no public support for the social orthodoxies of the '60s which still hold sway in social work training and in parts of criminology as well. The public would like to see people have a chance to get out of crime but they would also like to see those who go on offending being dealt with firmly; they want common sense policies, tough and challenging penalties for persistent young offenders, not visits to safari parks as the holiday of a lifetime; they want remand and not bail for people who risk repeating the kind of violent crimes for which they are awaiting trial in the first place".*

A year later, Howard (1995a) continued with this theme of public expectation of the criminal justice system, which was used to justify his aims of reducing crime via incapacitation;

*“The government’s duty is to protect the public ... The public rightly expects protection from serious, dangerous or persistent criminals. In particular, people expect someone who is convicted of a serious crime to receive a suitably severe punishment.... It is why we have not hesitated to increase maximum penalties in response to public concern.... It is also why we have taken a range of measures to toughen and strengthen community sentences. Imposing proper punishment and, in the most serious cases, severe punishment, is vital if public confidence in the criminal justice system is to be maintained ... people expect someone who is convicted of a serious crime to receive a suitably severe punishment ... If violent or sexual offenders need to be locked up to protect the public, they should be ... It is why we have not hesitated to increase maximum penalties in response to public concern about serious crime and why we introduced a power for the Attorney-General to refer unduly lenient sentences to the Court of Appeal.”*

Content analysis of the second reading of the 1997 Bill in the House of Commons showed how the number of times the phrase ‘public’ or ‘constituent’ was made in relation to the justification of more punitive sentencing was significantly greater than during the second reading of the 1991 Act – 48 times compared to 17. This contrasts sharply with the arguments being made in the House of Lords, where leading members defended judges’ right to sentence as they see fit in individual cases and how sentencing should not be driven by public opinion. Lord Ackner echoed the growing belief in the House that “[Howard] is exploiting for party political gain the misapprehension of the public that judges are too soft on crime, which I accept is a commonly held view” (HL debate, 27<sup>th</sup> January 1997)

Therefore, a disregard for the research findings of deterrence, as well as a change in the language and rhetoric towards crime control suggests that Howard’s agenda was based on populist appeal and an expressive type of justice, as described by authors of the punitive turn (Garland, 2001; Pratt et al., 2005)

In conclusion, a comparison between the dominant dispositions underpinning the 1991 Act with the relevant provisions of the 1994 and 1997 Acts provides evidence for a shift towards more punitive responses to crime. A ‘just deserts’ disposition was replaced a ‘punitive’

disposition. The 1994 and 1997 Acts implemented an increase in the level of punishment via harsher sentencing policies. Plans to expand prison capacity would meet the anticipated increase in demand. More austere prison conditions and a tougher regime meant that rehabilitative techniques and aims of reforming the offender were abandoned. Prison would be used to contain offenders rather than rehabilitating them, which was justified by policy-based evidence, rather than evidence-based policy. The abolishment of the HORPU, as well as the selective use of research provides evidence to suggest that there was an element of populism driving the punitive agenda. These developments are consistent with the arguments made by proponents of the punitive turn regarding the shift towards warehousing offenders rather than rehabilitation, as well as the replacement of ‘platonian guardians’ with a populist approach.

So far, this chapter has illustrated how actual and symbolic changes in legislation were consistent with claims of the punitive turn thesis, that “an order of violent dispositions and impulses reawakened by the perceived failure of the modern penal project” (Hallsworth, 2002:159) had emerged in England and Wales. The perceived failure was ‘just deserts’ and rehabilitation and with a political need to maintain the Conservative’s position as the party of law and order empowered a ‘punitive’ disposition to take effect.

However, the next section will explain how a ‘punitive’ disposition was not an accomplished state, as a ‘just deserts’ was constantly resisting punitive policy developments. This is discussed in relation to the institutional structure of the legislative arena and the process of policymaking in a liberal democratic system.

### **3.8 Powers of Change**

The 1994 Act received Royal Assent and was relatively unscathed by the resistance in Parliament. However, the 1997 Act was significantly watered down by a combination of the political process and the timing of an upcoming General Election. This chapter will finish by discussing how the 1997 Act was overruled by adherents to other dispositions, who had the political acumen and necessary constitutional-legal powers to do so. This exemplifies the ongoing political competition between different dispositions within the legislative arena on penal policy, which has not been acknowledged by the punitive turn thesis.

### 3.8.1 Causal power

This section is split into two; first, how the timing of the General Election (to be held in March 1997) prevented Labour from resisting Conservative's crime control approach and second, how this timing eventually disrupted the dominant agenda in implementing certain policy outcomes.

#### *i. Labour's silence*

Labour's lack of criticism of the 1997 Bill empowered Howard's agenda. With an upcoming General Election, the next year, Labour was aware that rejections of Howard's policies could threaten their claim to be the new party of law and order. Howard made this known during a debate in the House of Commons on his sentencing proposals (HC debate, 19<sup>th</sup> June 1996). Howard suggested reasons for Blair's uncharacteristic silence on the issue:

*"As Labour is root and branch opposed to my proposals, why does the hon. Member for Blackburn [Blair] find it so hard to echo that aggressive rhetoric in the House? Why does he confine himself to such weasel words? I will tell the House why the hon. Gentleman has thus far been so muted—because he is under orders from the Leader of the Opposition to avoid any headline saying "Labour opposes tough action on crime". I serve notice on the hon. Gentleman that his tactics are transparent and will fail."*

Labour's unwillingness to oppose the Bill was reinforced by Alun Michael, Labour MP, confirming it in the Committee stages; "An astonishing U-turn by the Opposition was propounded this morning [by Lord Burton] pointing out the huge change in the Opposition's attitude to minimum sentences" (Alun Michael, MP, Standing Committee A debate, 21<sup>st</sup> November 1996). The quietness of the Labour party meant that most opposition was left up to smaller parties including Plaid Cymru and the Liberal Democrats (see below).

#### *ii. Resistance of a 'punitive' agenda*

The process of bringing about legislative change and the powers of both the House of Commons and House of Lords meant that members of the House of Lords had the opportunity to influence the Bill. On 23<sup>rd</sup> May 1996, Lord Taylor initiated an attack on the Bill. He showed his disagreement for the Bill, highlighting how mandatory sentencing impinged on judicial discretion and which would involve a denial of justice. It is not known what happened between then and the second reading of the Bill, but when introduced in the House of Commons for

second reading, the White Papers ‘genuinely exceptional circumstances’ had been changed to just ‘exceptional circumstances’, thus widening the power for judges to ignore the clause in what they deemed to be exceptional circumstances (HC debate, 4<sup>th</sup> November 1996). These changes had made the Bill acceptable for the Lord Chancellor, Lord Mackay of Clashfern. In an interview with *The Times*, he said that the Bill was satisfactory and that it “enables them to deal justly with particular cases” (Gibb, 1996). This was made explicit by Jack Straw in a debate at the House of Commons the day that the white paper was passed:

*“So, by December, [Howard] had to concede, in an interview in The Law Society's Gazette, that the answer to these drug dealers and burglars would not be as simple as that which he had presented to the Tory party conference, and there would be an escape clause. The clarion call about time and crime had by then become, "If you don't want the time, don't do the crime—save where the courts exercise a discretion to waive the minimum sentences in exceptional cases”* (HC Debate, 19<sup>th</sup> June 1996).

When it reached the House of Lords in January 1997, Lord Bingham gave a speech which was to illustrate the magnitude of the Lords disdain for the Bill. This is reflected on in the section above (3.7.1) and demonstrates how a just desert disposition was inherently adhered to in the House of Lords. Part One of the Bill was amended according to just deserts, with Lord Bingham testing the Bill based on four propositions, one being ‘will it be just?’

During the Committee stage, there was disdain for the Bill by Elfyn Llwyd for Plaid Cymru, who was against mandatory minimum sentences due to the nature of different circumstances of an offence. However, his attempts at increasing the influence that ‘exceptional circumstances’ could have on sentencing in individual cases fell on deaf ears and Ivan Lawrence, Conservative MP argued that amendments of that nature would “undermine the purpose of the Bill” (Standing Committee A, 19<sup>th</sup> November 1996). This battle continued in the last debate in the House of Commons, when Llwyd wanted to apply the ‘interests of justice’ provision to all mandatory penalties (HC debate, 15<sup>th</sup> January 1997). This opposition was effective in forcing the government to insert ‘exceptional circumstances’ into the 1997 Act, which would provide the sentence with what was effectively a ‘get out’ clause during individual cases in practice.

During February and March 1997, the House of Lords considered the Bill in committee over five days. Relevant to this study was the amendment moved by Lord McIntosh on 13 February, which gave the courts some discretion on mandatory sentences. For consideration of life sentences, the amendment included the term ‘exceptional circumstances’ as justification for not imposing a life sentence. In the case of mandatory fixed-term sentences, the amendment was a requirement by the court to have regard to the specific circumstances that would make the mandatory sentence ‘unjust in all the circumstances’. Howard was dependent on Labour supporting the rejection of these amendments when it came back to the House of Commons (Travis, 1997a). However, Labour agreed to support the amendments (The Guardian, 1997).

### *General Election*

During this battle, the timing of the General Election created huge time pressure on Howard to get the Bill passed through as legislation. With suspicion that the Lords’ amendment would be reversed in the House of Commons, the Bill was kept in Report stage for longer by the Liberal Democrat Peers (HL debate, 18<sup>th</sup> March 1997). Thus, although the General Election had provided ‘standing conditions’ to empower a punitive disposition due to the lack of resistance from the Labour party (which only went so far), the House of Lords and the process of bringing about legislative change created significant disruption, which forced Howard to accept the changes.

Howard’s frustrations over the Lords’ amendments were expressed in a debate in the House of Commons shortly after the amendment had prevailed, when he argued how the “Lords’ amendments drive a coach and horses through the provisions of the Bill that deal with burglars and drug dealers... [They] would allow the present pattern of sentencing broadly to continue” (HC debate, 19 March 1997).

Evidence for the General Election being instrumental in creating the standing conditions for the 1997 Act is found during an interview with Howard by Jones and Newburn (2007:102):

*"I saw exceptional circumstances as really meaning exceptional circumstances and I would have limited them, required the judge to give reasons and all that sort of stuff. Now, that was made into a bloody great loophole by what Labour did in the run-up to the 1997 election. The answer to one of your questions - would I have done it differently if the election hadn't*

*been imminent - yes, bloody sure I would have done. But I didn't have time. When an election is imminent, you have to make a judgement. And in the end I had to choose between allowing legislation to fall and allowing these changes".*

Therefore, the process of a Bill and the 'standing conditions' of the penal policymaking process disrupted a 'punitive' disposition that was evidenced in the original 1997 Bill. This demonstrates the complexities of decision-making processes in the legislative arena, which the punitive turn thesis does not account for.

### *Existing legislation*

Although it is not in the remit of the study (which focuses on political competition within the legislative arena), it is important to note that the negotiation between dispositional powers continued after the Act had been implemented. As highlighted by Thomas (1998), the provisions did not work within the remit of existing legislation, ironically the 1991 Act which it had attempted to replace. As described above, the phrasing of 'unjust in all circumstances' gave judges more discretion in individual cases than intended by Howard and the legislation could effectively be ignored. In his analysis of the 1997 Act, Thomas (1998) gives several examples of cases where the protective sentencing provisions contained in Section 2(2)(b) of the Criminal Justice Act 1991 prevailed over the automatic life sentences of the CSA (*see* Curry and Taylor CLR 65, 1997 and *Hodgson* case relating to discretionary life sentencing *in* Thomas, 1998). Also, Thomas (1998) emphasises the history of indeterminate sentencing in the form of discretionary life sentences since 1948, an established framework which automatic life sentences did little to change. Thus, existing criteria acted as a standing condition of causal power for other dispositional powers, which a punitive dispositional power could not compete with.

Labour won the General Election in May 1997. Although they implemented the relevant sections of the Act (see HC debate, 30<sup>th</sup> July 1997 for mandatory sentences for drug dealers being postponed until 1999 due to prison resources), they also formulated other Acts of Parliament which would restrict the use of the 1997 Act even further. The Human Rights Act 1998 came into effect in 2000, which provided the standing conditions to weaken the influence of a punitive disposition further, as it gave the Lord Chief Justice, Lord Woolf, the power to reinterpret and widen the meaning of exceptional circumstances in the automatic 2 strikes



clause. The meaning of ‘exceptional circumstances’ was widened to take into consideration if the offender was deemed a risk to the public – if they were not then a life sentence was not passed (Cavadino & Dignan, 2007). These changes resulted in the Act moving further away from the framework that was originally intended in the 1997 Bill and demonstrates how the Act was a product of a series of negotiations and compromises between various parties during the last stages of the Conservative government.

### **3.9 Conclusion**

In conclusion, this chapter has demonstrated how there was a punitive turn during the first years of the 1990s in England and Wales. Analysis of the Criminal Justice Act 1991 identified an amalgamation of ‘just deserts’ and efforts at reforming the individual, which echoed descriptions of penal welfarism. However, this political strategy was disrupted by a change in environmental contingencies and resulting political threats to the Conservative party. A punitive turn could be identified by the change in penal policy by the Criminal Justice and Public Order Act 1994 and the Crime (Sentences) Act 1997. These Acts evidenced a shift towards a ‘punitive’ disposition as well as how this occurred via specific changes in the wider policy environment.

However, a closer analysis of the decision-making process of such sentencing legislation reveals how there was significant competition between a ‘punitive’ and ‘just deserts’ disposition. Although the 1997 Act can be identified as representing a punitive disposition, the competing priorities, agendas and the lack of causal powers in the creation and formulation of the Act meant that punitiveness could not become an accomplished state. This chapter has demonstrated how there was a specific set of contingent events which empowered a punitive disposition when these types of powers interacted with dispositional and causal powers in the legislative arena. However, it was never without resistance from other key actors in the legislation arena. This resistance culminated into a ‘watering down’ of the 1997 Act’s original legislation, as intended by its authors. Therefore, although there was a general trajectory of punitiveness, it was not inevitable and was always facing resistance in the form of key actors committing to other, rival dispositional powers.

## Chapter 4

### The Labour Party 1997-2005

#### 4.1 Introduction

This chapter will continue with an analysis of the first two of the Labour Government's terms in office, from 1997 to 2001 and to 2005. It will include an investigation of two Criminal Justice Acts which can be seen as exemplars of Labour's sentencing agenda; the Crime and Disorder Act 1998 and the Criminal Justice Act 2003. This chapter will demonstrate how Labour adopted aspects of their opponents' policies in ways which made it hard for these opponents to criticise Labour's new approach, but in a way that used their policies to augment their own agenda.

The Crime and Disorder Act 1998 implemented Tony Blair's soundbite statement 'tough on crime, tough on the causes of crime'. Whilst the former referred to short term, more punitive responses to crime, the latter pledged a longer-term strategy to deal with social deprivation and economic inequality which were believed to lead to criminal behaviour. Elements of restorative justice were introduced for young offenders, along with punitive practices which were augmented by an emerging hybrid of 'risk' and 'reform'. A focus on social causes of crime, or what became known as 'criminogenic needs', was later paralleled with developments of risk as a dynamic and changeable concept. Thus, the co-existence of these dispositional powers illustrate the complexities of Labour's political strategy, which the sweeping assumptions of the punitive turn thesis has not accounted for.

Relevant provisions of the Criminal Justice Act 2003 evidence a more accomplished shift away from the proportionality rules of 'just deserts', as the re-conceptualisation of 'risk' as a dynamic measurement justified longer sentences for a wider range of crimes. Offenders could be sentenced to custody for longer periods of time due to the pledge to tackle criminogenic needs during custody, and which would ultimately reduce crime and reoffending. This political strategy eventually resulted in the Indeterminate Sentence for Public Protection (IPP). However, a subsequent lack of commitment to provide therapeutic interventions for IPP prisoners in practice evidences Labour's political strategy and how the IPP was used to justify

more punitive sentences, with consequences of warehousing prisoners with no prospect of release. This is consistent with the claims made by proponents of the punitive turn. Immediate gratification of the expressive and symbolic benefits of the IPP were in favour of instrumental ineffectiveness of the sentence.

This chapter will articulate these developments via an analysis of how co-evolving dominant dispositional powers of 'risk' and 'reform' produced punitive policy outcomes and the use of causal power in the face of resistance. This is followed by a discussion of how certain exogenous events facilitated this political strategy into policy outcomes. Thus, as well as highlighting the complexities of Labour's unique political strategy, the chapter will explain how this shift in penal policy occurred during this particular historical period.

## **4.2 New Labour's law and order agenda**

Labour won the General Election on 1<sup>st</sup> May 1997. Tony Blair became Prime Minister and Jack Straw was appointed as Home Secretary. After implementing selected provisions of the 1997 Act from the previous administration, Labour's own crime control strategy was introduced by the Crime and Disorder Bill in 1998. This was to implement Blair's long-awaited approach of being 'tough on crime and tough on the underlying causes of crime' (Blair, 1993), which would provide the basis for Blair's 'third way', "progressive politics [which] distinguished itself from the conservatism of left or right" (Blair, 1999). The Crime and Disorder Act 1998 (referred to as the 1998 Act) received Royal Assent on 31<sup>st</sup> July 1998 and implemented the White Papers proposition for "nipping offending in the bud" (HM Government, 2001:16). A Youth Justice Board was set up to install a justice system based on restorative methods of punishment. For adult offending, the focus was on low-level, petty disorder before it escalated to criminality. The sentencing framework would be adjusted accordingly, with new community orders being introduced which moved the boundaries between civil and criminal sanctions. What was previously considered as civil disorder could be subject to criminal sanctions. Provisions were also included to target perceived causes of crime such as poor parenting, truancy, substance abuse and unemployment. These developments illustrated the emergence of a sentencing framework inspired by the offender and their 'criminogenic needs'. Lastly, the 1998 Act created the Sentencing Advisory Panel (SAP) in order to encourage consistency in sentencing, consider cost and effectiveness of the sentence, and promote public confidence.

These trends continued into Labour's second term in office. Tony Blair maintained his position as Prime Minister, and Jack Straw was replaced with David Blunkett as Home Secretary. With a belief that there were "serious deficiencies" in the current sentencing framework, John Halliday was asked to conduct a review on the current sentencing framework (Halliday, 2001:i). His review *Making Punishments Work* criticised the 1991 framework for being muddled and inconsistent due to the reinstatement of deterrence and the failure to deal with the relevance of previous convictions. Community sentences needed to become more effective in reducing crime. These recommendations were taken into the white paper *Justice for All* (Home Office, 2002). The Chapter of the report 'Putting the sense back into sentencing' called for a new sentencing framework to ensure tougher community sentences, new types of custodial sentences to address 'criminogenic needs' of offenders and new, extended sentences for 'dangerous' offenders.

In March 2002, Patrick Carter, a businessman who had chaired other Government reviews, was asked by the Home Secretary to complete a review of the correctional services. A year later, Carter's (2003) review *Managing Offenders, Reducing Crime* proposed a new way of managing offenders via departments within the criminal justice system to work closer together. It called for a National Offender Management Service (NOMS) which would be responsible for reducing reoffending via case management of offenders. The Prison Service became part of NOMS (which became part of HM Prison and Probation Service), which became responsible for offender management in the prison and community. Its aims were to manage prison capacity and to ensure that prison conditions are to a required standard in decency and safety.

During the same year of Carter's review, the Criminal Justice Bill 2002 was being processed through Parliament. This enacted many of the suggestions made by the documents described above, including new custodial sentences to address 'criminogenic needs', new types of community orders and new types of indeterminate sentences for dangerous offenders. Developments in more stringent sentencing guidelines would encourage the use of such guidelines in the court. The Sentencing Guidelines Council (SGC) was created to impose a light duty for sentencers to 'have regard to' the SGC guidance and to state reasons for deviating from guidelines when it does so (S174(2)a). The Criminal Justice Act 2003 (referred to as the 2003 Act) was given Royal Assent on 20<sup>th</sup> November 2003, but due to lack of financial resources most of the relevant provisions analysed in this thesis were implemented in 2005.

### 4.3 Dispositional powers

Analysis of Labour's first two administrations revealed co-evolving dispositions at play (which may be attributed to the 'third way' approach adopted by Blair) (Blair, 1999). The new approach to crime was part of how Labour's strategy to 'dump their hostages of fortune' (as well as distancing themselves from trade unions, Downes & Morgan, (2007)). No longer taking the approach that crime was a symptom of underlying social and economic deprivation, their 'third way' style of justice included responsabilisation for own criminal behaviour and an emphasis on social exclusion to those who refused to take responsibility, as well as those deemed too dangerous for the rest of society. Their approach was broad, from Blair's and Straw's personal commitments to 'zero-tolerance' and low-level disorder, to new methods of dealing with 'dangerous' offenders.

Public speeches and interviews with Blair in 1993 - during the time of first announcing Labour's strategy of being 'tough on crime, tough on the causes of crime' – endorsed a significant emphasis on dealing with social deprivation and providing more opportunities for a more inclusive society. Writing for the *New Statesman* in 1993, Blair announced his new strategy on tackling crime. Believing that crime occurs due to disintegration in society, he emphasised the need for better employment rates, provisions for social housing, better schooling and less involvement in drugs. However, 19 months later, at the Labour party conference in 1994, Tony Blair expressed the principle of New Labour's policy; "with opportunity must come responsibility ... the left had undervalued the notion of responsibility and duty too ... it is at the heart of our message about crime." Subsequently, individual responsibility also became an important principle of Labour's crime control initiatives. With the acknowledgement that "crime does not happen in a social vacuum" (Labour, 1997:5), the objective was to build a better social setting, which would ultimately reduce crime. This was combined with stressing the importance of individual responsibility, zero tolerance for disorder and 'no more excuses' for offending (Home Office, 1997). Formal methods of social control were extended, as well as informal social constraints which were seen as weakened by social and economic deprivation.

The following analysis illustrates how the sentencing legislation of Labour's first two terms demonstrates this political strategy at the level of 'talk' and 'decision'. A significant shift away from a 'just deserts' and 'punitive' disposition of the Conservative administration, was

replaced with the fusion of new concepts of ‘risk’ and ‘reform’ dispositional powers. Specific to sentencing, this triangulation of approaches resulted in a shift towards a method of ‘totality’. Sentencing was justified by the situation of the offender rather than the conditions of the offence. Principles of sentencing were to encompass an assessment of the individual’s character, their previous convictions and risk of recidivism and factors thought to contribute to criminality. The core argument of this chapter is that a hybrid of these dispositions was used to augment punitive policy outcomes. Thus, although there was a continuity of punitive policy outcomes, it was due to different dominant dispositional powers, which were empowered via specific external events and contingencies.

### **4.3.1 Level of punishment**

Analysis of the relevant provisions of the 1998 and 2003 Acts evidence a significant shift towards harsher sentencing in the way described by proponents of the punitive turn thesis. Section 58 of the 1998 Act extended length of sentences for violent and serious offences and both Acts added aggravating circumstances of racial, sexual, religious and disability ‘hate crimes’ to justify longer sentences for certain offences (section 28-32 of the 1998 Act; section 145-6 of the 2003 Act). Furthermore, analysis of relevant provisions of both Acts evidence a continuation, and intensification, of making previously social concerns into criminally sanctioned behaviour.

#### *i. Disorder as crime*

The 1997 Labour manifesto criticised the Conservative government for “forgetting the ‘order’ part of ‘law and order’ (Labour, 1997) and that levels of anti-social behaviour had become “unacceptable” to ministers in the Labour party. Thus, section 1(1)(a) of the 1998 Act introduced anti-social behaviour orders (ASBOs) for sanctioning anti-social behaviour “in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself”. A breach of the conditions was punishable by up to five years in custody. What used to be a civil matter was now dealt with by the criminal court, and which resulted in an increase in the severity of punishment served with the threat of custody. Criminalising nuisance behaviour illustrates a shift towards more punitive methods of control, as mentioned in the previous chapter (section 3.7.1).

Section 2 of the 1998 Act created a similar order but specific to those who had been charged with sex offences. This order prohibited the defendant from engaging in certain behaviours and locations for the purpose of protecting the public (section 2(4)). This was to reinforce the recent legislation of the Sex Offenders Act 1997, which created a registration system for sex offenders to provide their name and address with the police. However, the weakness of the 1997 Act was that it only applied to offenders who were serving certain sentences. The 1998 addition added a punitive element, whereby those who had been served with the order could face up to five years in prison and/or a fine if their conditions were breached.

*ii. New community orders*

Furthermore, section 177 – 180 of the 2003 Act created a community order which would enable a combination of the use of probation, community service and curfews. Following suggestions by Halliday (2001), the generic heading of a ‘community order’ could include a number of different requirements. This was with the intention that the judge could tailor a community punishment to the individual’s needs and circumstances (evidencing criminogenic needs). However, the menu of requirements meant that conditions being made were much easier to breach, thereby resulting in a custodial sentence. Also, Mair and Mills (2009) found that the new community sentences were being given for summary offences which were not serious enough to have led to a custodial sentence. Thus, the new community order became a tougher alternative for existing community sentences, and it was more likely to lead to a custodial sentence due to breach of conditions. These developments evidence a continuity of tougher penalties for the same types of crime, thus illustrating a shift towards punitive policy outcomes.

*iii. Totality principle*

An emergence of a ‘reform’ disposition was evidenced via a fresh focus on tackling the social causes of crime. However, what would normally be associated with a ‘reform’ disposition (notably how punishment should reform the offender), was manipulated to implement a principle of ‘totality’ in sentencing policy outcomes. The data suggest that an amalgamation of acknowledging the causes of crime, as well as new concepts of a risk, resulted in a hybrid of what Hannah-Moffatt (2005) terms ‘risk/criminogenic needs’. The principles were evident in Labour documents from 1997 onwards, beginning in the White Paper *No More Excuses* (Home Office, 1997). Chapter 1 of the White Paper includes a list of risk factors which were associated with youth crime – being male; poor discipline in family and at school; having siblings who

offend (ibid:5). The language of ‘risk factors’ continued in Government documents as something which needed to be targeted for intervention in order to reduce re-offending in Labour’s second term (Home Office, 2001). This led to a more holistic framework of sentencing, which was eventually implemented in the 2003 Act. With punishment needed to fit “the crime and the criminal” (Straw, HC debate, 26<sup>th</sup> February 2001), the White Paper *Justice For All* introduced new ‘relevant evidence’ to be taken into consideration when sentencing (Home Office, 2002), which resulted in the modification of the ‘seriousness’ criteria, initially created by the 1991 Act. The criteria for the 2003 Act were modified to include evidence of bad character (section 98-9), which allowed evidence of a person’s ‘bad character’ to be admissible in court, which was either; relevant to alleged facts of the offence or, was evidence of misconduct in connection with the investigation.

The totality principle of sentencing involved: past offences, the character of the offender and an assessment of likely recidivism in deciding on the sentence for a current offence. This is evidenced by sections 224-236 of the 2003 Act, which introduced an Indeterminate sentence for Public Protection (IPP) for sentencing ‘dangerous’ offenders. Under this new scheme, dangerous offenders were classified as having committed a ‘trigger’ offence, which is listed in schedule 15 (65 violent crimes and 88 sexual crimes). Those assessed as dangerous and had been convicted of a trigger offence whose penalty is 10 years or more, could be given an IPP or discretionary life sentence. The trigger offences listed in schedule 15 were different from those on the list of sexual or violent offences formerly in section 161 of the 2000 Act and was ‘listed’ as opposed to defined as ‘violent offence’, (e.g. robbery was now always a violent offence, rather than being determined by the circumstances around it). Trigger offences also covered offences of aiding and abetting crimes. Under the IPP provision, a punitive minimum tariff would be given as retributive punishment. When the tariff expired, the offender was released on licence if the Parole Board deemed that they were no longer a risk to the public. Therefore, it gave the opportunity of giving a life sentence when one would not have been available under the current legislation. Thus, as well as being punished for crimes committed in the past and present, an IPP sentence demonstrates the creation of a new rule and meaning of membership which involved the potential for an individual to commit crimes in the future.

These provisions demonstrate how Labour implemented a new sentencing framework which moves away from the proportionality principle described above. This change was not without



criticism, which evidences the political competition that this political strategy was having to resist, or negotiate with:

### *Criticisms*

#### *i. 1998 Act - ASBOs*

There was little criticism of the 1998 Bill during its progress through Parliament, which demonstrates the successful triangulation of dispositional powers by Labour. The only criticism was against the ASBO provision for the excessive nature and vague definition of the ASBO. As a civil rather than criminal sanction, the standard of proof would be lower and there were concerns that it could lead to implications of targeting eccentric behaviour that did not justify criminal sanctions. Examples were given in the House of Lords during a debate on the 1998 Bill; immigrants acting anti-social in a hostile environment, the elderly population finding the high spirits of young people “intimidating” and working-class children straying into another “nice neighbourhood” be upsetting for those residents. In light of these examples, Lord Rodgers of Quarry Bank asked; “where are the limits? ... We must be careful that we are not introducing into statute wide powers which can be used against anyone who does not conform to a standard pattern of respectable behaviour or a lifestyle which is acceptable” (HL debate, 16<sup>th</sup> December 1997). He concluded that the Bill includes “disturbingly authoritarian overtones of anti-social behaviour” (ibid), which reflected a critique of the provision by six renowned academic lawyers and criminologists. Ashworth et al., (1998) denounced the order as not being carefully targeted, broad in its definitions, and which gave local authorities unlimited discretion in seeking restrictive orders which had disproportionate levels of punishment for breach of conditions. However, criticism was not substantial, and the Bill passed through Parliament relatively uneventfully.

#### *ii. 2003 Act – totality principle*

The 2003 Act faced considerable criticism over the new types of evidence which was admissible in court and for the totality principle discussed above. The totality principle was heavily criticised in the House of Commons, led by Conservative MP Anne Widdecombe and even supported by some Labour Ministers who were against the dismissal of the presumption of innocence, the move away from due process and the advantage it gave to the prosecution. For example, Shadow Home Secretary, Oliver Letwin argued against the Bill, because;

*“It is a central tenet of our justice system that someone must be proved guilty beyond all reasonable doubt. When a person sits in the dock, he is innocent of the crime that is attributed to him until it has been proved beyond all reasonable doubt, irrespective of his previous record. If a person has done nine burglaries in the past three years, it does not follow that he is guilty of the 10<sup>th</sup>”* (HC debate, 4<sup>th</sup> December 2002).

These concerns were widely spread across all parties, as Simon Hughes, Liberal Democrat MP, expressed his concerns of the risk that “people will in future be judged not by whether they have done something on a particular day, but by how they have lived their life and whether they have done things wrong previously”. He continued with his fears that these changes would have serious consequences for the “presumption of a fair trial and the presumption of innocence in a way that [he] cannot accept.” (HC debate, 4<sup>th</sup> December 2002).

Furthermore, concerns in the House of Lords (HL debate, 16<sup>th</sup> June 2003) reflected that of the Commons, that “the Government’s proposals are too seriously prosecution-minded” (Lord Mayhew) and that the balance between the Act’s “probative and judicial effect” was wrong (Baroness Anelay). The consensus of the House was that “a fair society requires that the circumstances of each crime and each convicted criminal be considered individually” (Lord Thomas of Gresford). Individual differences should discern what the offender deserved in terms of punishment, rather than involving an array of considerations which were not related to the current offence. These criticisms were based around the principle of fairness and due process, which reflects adherence to a ‘just deserts’ disposition. They highlight the outcomes which were not made clear by the administration and those creating the Bill. It evidences an excessive level of punishment by the principle of punishing the offender for potential future offences, as opposed to punishing the offence via a method of just deserts.

Furthermore, the progress of the 2003 Bill demonstrates the battles between the Executive and Judiciary and how a tougher agenda faced significant competition. Data sourced from media articles demonstrate the tense relationship between Home Secretary David Blunkett and members of the Senior Judiciary, whom Blunkett felt were overriding his every move regarding sentencing:

*“What I don't understand is the assertion, made by the former industrial relations judge, that somehow there is the right of judges to be engaged in perpetually checking and over-*

*turning processes which a democratically elected parliament lays down. ... The judges are saying that they want to remain in the political debate. They are opposed to us removing them from the House of Lords. They want a supreme court which has the right to overturn the will of parliament ... Judges have their role. I have my role. Their role is to defend what they see as their part of the constitution and to defend their independence. My role is to speak for the people I represent" (Blunkett in interview with Hattersley, 2004).*

Due to the concerns mentioned above, in February 2003, an amendment was introduced to the IPP sentence in the House of Lords. Section 205(3) stated that if the offender met the requirements of an IPP sentence, but the judge considered that a determinate sentence could address the risk of the offender, they could decline the imposition of an IPP sentence. However, this discretion was removed by a subsequent Government amendment, thus, severely limiting the judge's ability to deviate from an IPP sentence. Prisons Minister Hilary Benn argued that this was necessary in order to preserve the purpose of the provision (Standing Committee B, 11<sup>th</sup> February 2003). This suggests that Ministers had learned from the mistake of the creation of the 1997 Act, which had been watered down by the amendments by the House of Lords (section 3.8).

### **4.3.2 Objectives**

Analysis of the data suggest that although there was a continuation of tougher sentences, there was a disruption to a 'punitive' disposition of Howard's agenda that was outlined in the previous chapter due to a change in the objectives of New Labour's strategy. These objectives involved emerging concepts of 'risk' and accompanying notions of 'reform'.

As Shadow Home Secretary in 1993, Blair's letter to the New Statesman commented on the "false and misleading" sides to the law and order debate and how he planned to move "beyond the choice between personal and social responsibility". The purpose of any justice system "should not just be to punish and deter, but also to rehabilitate, for the good of society as well as the criminal". Labour would achieve both punishing the criminal and tackling "poor social conditions in which crime breeds" by being "tough on crime and tough on the underlying causes of crime" (Blair, 1993). This twin track approach referred to short term objectives of sentencing petty, persistent offenders with immediately punitive sentences to 'nip it in the bud' and longer-term strategies to deal with the causes of crime such as social deprivation.

These long-term approaches included social and restorative types of justice which would target what became known as ‘criminogenic needs’. Blair’s letter acknowledged the social conditions which caused criminality, including; “poor education and housing, inadequate or cruel family backgrounds, low employment prospects and drug abuse”. The tackling of these ‘risk factors’ were consistently emphasised in every government document analysed in relation to sentencing and demonstrates a co-evolution of ‘risk’ and ‘reform’ dispositions. This triangulation of Labour’s political strategy illustrates the nuances of penal politics. Under New Labour, the justification for longer punishment was due to the developments in risk and the aim of reforming offenders via tackling their criminogenic needs. Longer custodial sentences were justified by the pledge to make prison regimes more progressive via interventions directed at criminogenic needs, which would reduce the level of reoffending.

*i. Criminogenic needs*

Analysis of government documents from 2001 onwards evidenced a focus on the perceived ‘criminogenic needs’ of offenders. A new aim of sentencing was to tackle these needs in order to reduce re-offending. Halliday’s report and two Government documents reflected on the ‘targeting of risk factors that underlie offending’ (Halliday, 2001; Home Office, 2001a:30; Home Office, 2002):

- School exclusion and truancy
- Family situation, including having criminal parents, siblings or peers
- Poor parental supervision
- Substance abuse
- Poor education and literacy skills

“Intensive, coordinated programmes based on ‘what works’” would be deployed in order to tackle these issues (Home Office, 2001a:30). Part of ‘putting the sense back into sentencing’, sentencers would ensure that they base their sentencing practice on what has been shown to work in reducing reoffending, which would be guided by a pre-sentence report assessing the criminogenic needs of the offender (Home Office, 2002).

Furthermore, at the level of ‘decision’, within a few months of becoming Home Secretary, in response to the findings of the prison audit, Jack Straw gave an extra £43 million to the prison service for the year 1997-8, which was followed by an additional £112 million for 1998-9. This was to be dedicated towards improving prison services in purposeful activity and to ameliorate prison conditions for the purposes of reforming offenders (HC debate, 25<sup>th</sup> July 1997).

*ii. Risk-management*

Objectives of reform were paralleled with rhetoric around risk-management and a new concept of risk. The white paper suggested that “the seriousness of the offence should reflect its degree of harmfulness or *risked harmfulness*” (2002:88). Also, Carter’s (2003:18) review suggested that “sentencing remains poorly targeted on those offenders with no previous convictions” and that a new sentencing framework needed to consider the seriousness of the offence, as well as the risk of re-offending. The criminogenic needs described above would be used to assess such risks and the result of a high risk of future harm could justify a longer sentence. This is evidenced by extracts of interviews by Harry Annison with key players of the IPP sentence (Annison, 2015). The IPP sentence was not seen as a controversial provision because it would solve the issue of offenders being released even though they were still deemed as dangerous. For those with concerns over the sentence, “its reliance upon a detailed risk assessment, represented a ‘more cogent, evidence-based reason for allowing prisoners to have their liberty’” (Annison interview with Minister, 2015:71).

Furthermore, Blunkett announced that the 2003 Bill was to “mix prison and community sentencing in a new, imaginative way to avoid reoffending” (HC debate, 13<sup>th</sup> January 2003). Sections 177-80 of the Act created the umbrella term of community orders, which was seen as being more attractive to judges who could tailor community sentences to what they deemed appropriate for the offender. Custody plus (sections 181-2) and intermittent sentencing (sections 183-6) were implemented in order for the offender to spend less time in custody and more time either gaining or retaining employment. Intermittent sentencing involved offenders serving their custodial sentences on a weekend or the evening, which would not interfere with paid work. For prison sentences of less than 12 months, offenders with an intermittent sentence could serve their sentence intermittently. This was to “allow the offender to continue working and maintain family ties” (Home Office, 2002:86-88). Custody plus meant that an offender would spend less of their sentence in prison due to a proportion of the sentence being served

in the community. This exemplifies how penalty was focussing on the factors thought to lead to criminality and combining dispositional rules of a 'risk' and 'reform' disposition.

The change in government rhetoric was followed by action. A significant amount of effort and funding went into drug treatment which was in association with the drug treatment and testing order of the 1998 Act. In an interview with Jack Straw and the Justice Select Committee (JSC), Straw defended Labour's penal policy of longer sentences by stating the increase in drug treatment programmes (figures not specified) and offender behaviour programmes (from 1,300 in 1996-7 to 7,850 in 2007-8). He continued that there was a reduction in the amount of prisons' education and training facilities failing inspection (from 78% to 16%) and that the budget had been increased from 57 million in 2002 to 168 million by 2007. Lastly, Labour had tackled the low levels of educational attainment amongst offenders by improving the number of basic skills awards achieved in prison over a three-year period from 25,300 in 2001 to 63,500 in 2004-5. He concluded that "this is a record of very significant improvement in practical regime change and that is then leading to improvements in re-offending rates" and evidences Labour's efforts at reforming offenders in custody (Home Affairs Select Committee, 2008b, Qu. 405).

As mentioned above, section 225 of the 2003 Act implemented a new sentencing framework based on indeterminate levels of sentencing known as the IPP. Analysis into the decision-making process reveals evidence of the risk/reform disposition previously identified in government documents. The provision developed out of criticisms of the current mandatory life sentence not taking into account offenders who still pose a risk to public but had to be released after serving their sentence (Annison, 2015). As this sentence made it possible for IPP prisoners to remain in custody for longer than their minimum tariff, it demonstrates how the a 'risk' disposition enabled longer sentences to be justified. Annison's (2015:41) research illustrates how those involved in the making of the IPP were instructed to create a sentence which would "protect the public, minimize the risk of re-offending, help to reintegrate, get them off drugs and those kinds of things".

The data demonstrates how adherence to a 'reform' disposition is different to traditional forms of penal welfarism. Rather than being part of a broader project of solidarity, these 'rules of practice' are based on the premise of targeting certain groups of society with a clear instrumental view of reducing crime. As described by Garland (2001:199), new themes emerge of security and control, which disconnects criminal justice away from social reconstruction.

This hybrid of risk and reform dispositions exemplify a more reactionary function of criminal justice, towards a “less ambitious [goal] of re-imposing control on those who fall outside the world of consumerist freedom” (ibid).

*iii. From the ‘social’ to the ‘criminal’*

The 1998 Act included mandatory orders which were thought to tackle social causes of crime. Parenting orders (section 8), child safety order (section 11) or local curfew orders (section 14) were enforced in situations when criminality was thought to be linked with a lack of supervision. The core theme of these orders was to prevent further criminal behaviour by amending the reasons which were thought to cause the first criminal act. For example, parents’ requirements to attend counselling sessions (section 8(7)). The white paper (2001:14) had previously recommended suggestions including a requirement to escort their child to school or to ensure that an appropriate adult would be supervising the child in the evening, however this was not enforced. These measures were compulsory and were punishable by a fine of up to £1000 alongside other orders or community sentences. This demonstrates how the rights of those under the order were restricted, as failure to comply led to punishment, and strongly illustrates the continuity of a transition of social problems from the social welfare system to criminal justice system.

*vi. Restoration*

The use of restorative justice was adopted as a new approach to youth offending. The white paper explains how attempts at reforming the youth court would be made around principles of restorative justice (2001:para 9.21):

*“restoration: young offenders apologising to their victims and making amends for the harm they have done; reintegration: young offenders paying their debt to society, putting their crime behind them and rejoining the law-abiding community; and responsibility: young offenders – and their parents – facing the consequences of their offending behaviour and taking responsibility for preventing further offending”.*

Labour followed the suggestions of The Audit Commission Report *Misspent Youth* (Audit Commission, 1996), which argued that resources needed to be shifted from the processing of young offenders to tackling their behaviour. Punishment for young offenders was not currently

“worthwhile” and new approaches needed to be implemented. Although this remained in the margins of New Labour’s criminal justice approach, it demonstrates the complexities of their political strategy in triangulating different responses to justice. The different approach to youth justice justified further investigation, which was not under the remit of this study, which focusses on responses to adult offending.

### *Criticisms*

Due to the emphasis on reform of the offender, there was not a substantial level of criticism from social reformists. The only concern was that there would not be enough resources allocated to supply prisons with enough interventions and provisions for rehabilitation and treatment programmes, which demonstrates significant adherence to a ‘reform’ disposition in the legislative arena (HL debate, 16<sup>th</sup> June 2003). Once the IPP had been implemented, fears of resource mismanagement were realised, and strong criticisms appeared from penal lobbyist groups. For example, the Howard League for Penal Reform (2007:18) criticised the “inadequate access to appropriate courses ... IPP prisoners are becoming increasingly aggravated and desperate to undertake resettlement work compatible with Parole Board release requirements”. The Prison Reform Trust echoed these criticisms. The consequences of the lack of interventions for IPP prisoners resulted in the “warehousing of IPP prisoners [which] strikes at the heart of what promotes rehabilitation” (2007:6). These criticisms question the intentions of political actors in formulating such a political strategy, and suggests that such a strategy was born out of popular sentiments but in a way which adhered to the dominant disposition of the time. Such a bias is unclear and needs further investigation.

### **4.3.3 Method**

The methods identified in the data matched the variety of objectives and co-evolving dispositions. Methods developed by the 1998 Act, and which were reinforced by the 2003 Act, resonate with an intensification of punitive measures via an increased use of custody, as well as tougher alternatives to custody.

#### *i. Custody*

New Labour won political leadership at a time when the prison population was significantly rising. Between 1993 and 1998 the prison population rose by 40%. Since 1993 the sentencing



tariff had gone up, the custody rate had risen from 47% to 58% in Crown Court and from 5% to 9% in Magistrates. This put significant pressure on the prison service, which was operating outside its maximum capacity and was seen as being in a 'crisis'. The punitive provisions of the 1997 Act meant that predictions for required prison capacity were in serious need of expansion. On 24<sup>th</sup> March 1998, the then Minister of State at the Home Office Joyce Quin gave an address to the Parliamentary All-Party Penal Affairs Group about the Government's plans for the Prison Service. Standing at 65,000 the prison service was already severely overcrowded. With Home Office projections for a total prison population of nearly 83,000 within seven years, and with the worst-case scenario being 92,600, Joyce Quinn was emphatic that the overuse of custody had to be reversed (Dunbar & Langdon, 1998). As the mandatory life and minimum term sentences had been introduced in the previous year, action was even more urgent (it had not yet been realised that the provision of the 1997 Act would be negligible in their effects) (see section 3.8).

As crime rates were decreasing, this provided the perfect opportunity for a project of decarceration. However, the 1998 and 2003 Act implemented sentencing policy that would place more demand on the prison service. The provisions of the 2003 Act added to the increasingly tough sentencing legislation since 1993. The 'up-tariffing' of sentences for existing crimes and the indeterminate nature of the IPP sentence relied on custody and, as mentioned above (section 4.3.1), tougher community sentences were more likely to result in custody by breach of conditions. The introduction of indeterminate sentencing by the 2003 Act also indicates the increasing amount of pressure placed on the prison system, and the government's perseverance to retain the prison at the centre of penalty (discussed in detail below).

Moreover, content analysis of speeches by Jack Straw demonstrates how political rhetoric had significantly changed from the earlier period of Conservative leadership. It was believed that an increase in the prison population was an indication of a successful law and order regime. More effective policing in detecting crime was followed by a sentencing regime which punished violent and persistent offenders. Consistent with the punitive turn thesis, Straw's attitude evidences how the prison was a "pillar of contemporary society" (Garland, 2001:14), and a central institution to crime control during this time.

## *ii. Alternatives to custody*

As well as increasing prison capacity, Labour created ways in which the demand on the prison could be reduced – thus demonstrating a shift away from Howard’s ‘Prison Works’ agenda and a purely ‘punitive’ disposition. Home Detention Curfews and electronic monitoring were introduced by sections 99-105 of the 1998 Act as a new form of punishment for those who did not pose a risk to society, but who needed to be punished for their crime. Straw justified the use of electronic tagging because it required those who had been released from prison to take responsibility for the daily choices that they make, and this would be a step in the right direction for rehabilitation purposes. Electronic monitoring could provide a transition between prison and leading a law-abiding life. Whilst being justified in relation to rehabilitation and reducing prison population, these types of punishment can also reflect Hallsworth & Lea’s (2011:146) notion of a ‘security state’ – in keeping with the punitive turn thesis – which is “concerned with the management of behaviours perceived as threats to security but lacking criminal status”.

### *Criticisms*

During Parliamentary debates, Ministers and Lords applauded the Bill for the acknowledgement of restorative and preventative techniques. There was approval of the need to target youth offending via methods of prevention, early intervention and reduce the strain on the prison system. However, there was concern that these techniques would not be implemented in full due to the lack of resources and funding that would be needed to put the principles into action (as described above). For example, Lord Bishop of Hereford encouraged the 1998 Bill for its “new and imaginative and creative thinking,” but he continued that “[the Bill] could have built more strongly on established good practice, which cries out for more adequate funding and more active encouragement”. Even though the Social Exclusion Unit had been set up, concerns remained because it was argued that this was “no substitute for properly funded policies to meet the huge shortfall in social housing, to redeem dilapidated sink estates and to transform our inner cities” (HL debate, 16<sup>th</sup> December 1997).

Also, provisions were criticised by National Association of Probation Officers (NAPO) and by the Family Policy Studies Centre, concluding that if the Government was genuinely concerned with the harm to children (what is used to justify youth disorder strategies), it might be better

achieved by real efforts to support and revitalise communities (FPSC, Briefing on the Crime and Disorder Bill, 1998).

It is unclear whether this was directly in response to the concerns of the more liberal camp, but one year after the review of Government spending had been initiated, on 21 July 1998 in the House of Commons, Straw announced that £250 million, out of the £3 billion allocated to the Home Office, would be spent on a crime reduction strategy which focussed on “the social causes of crime through long-term investment in children, families and schools” (HC debate, 21<sup>st</sup> July 1998). This announcement demonstrates the negotiations taking place within the legislative arena as a result of the political competition between conflicting dispositional powers.

Adherence to ‘rival’ dispositions is evidenced by concerns over human rights and how the ASBO contravened with article 5 and 7 of the European Convention of Human Rights. Also, at the level of ‘action’, local authorities and police were, for the most part, reluctant to use the order. In its first two years only 518 ASBOs has been issued (Burney, 2002). This was much lower than the 5000 orders which was predicted by the Home Office. Due to complaints of the lengthy procedure, Straw’s successor, David Blunkett, made amendments to the order in the Police Reform Act 2002. These changes, as well as more experience with the order, helped to pick up the pace of its use.

#### **4.3.4 Rationality**

Data from autobiographies and primary interviews with civil servants and agents close to the decision-making process suggest that Labour had a mixed rationality behind the formulation of the 1998 Act and the first few years in Government. The data suggests that Labour’s crime control agenda was initially based on evidence-based policy and a rational approach to effective sentencing practice. However, elements of populism and the desire to appease popular sentiment and fear of crime overpowered initial foundations of evidence-based policy, resulting in tougher legislation and policy.

Section 81 of the 1998 Act introduced a Sentencing Advisory Panel. This was to; promote consistency in sentencing, take into account the cost of different forms of sentencing and their relative effectiveness in preventing crime and the need to promote public confidence in the

criminal justice system. The need to take into account cost and effectiveness of sentences demonstrates a more rational approach to sentencing in individual cases. Primary interviews revealed how the then Home Secretary, Jack Straw, was interested in the ‘what works?’ approach, rather than finding research which supported his own pre-planned agenda: “When labour came in in 1997, one of the first things was to commission research on deterrence to see whether deterrence worked and that research was delivered by the institute of criminology in Cambridge in 1999” (interviewee F). This was reinforced by other retired officials of the HORPU (interview B), when they recalled how they remembered Straw for increasing the budget of the Home Office from £1 million to £24 million (“or something like that”) in the first year (interviewee C). (Actual figures were 10% of the £250 million budget to evaluations undertaken by external researchers, Maguire, 2004).

*“Initially [Straw’s team] were very keen on gathering the evidence [on crime reduction] and they always had this phrase of what matters is what works, what counts is what works. In other words, they were looking to base their policies on evidence ...the most effective thing ... they said base [the policy] on the evidence”* (interviewee C).

However, the joint interview also revealed how results of the British Crime Survey highlighted the issue of public fear of crime for Straw, which had an effect on Labour’s crime control strategy, and how research into what works to effectively manage crime “didn’t last long”. “One of things that had become apparent, I suppose partly because of the crime survey, was that there was crime but there was also fear of crime, but there was also low-level disorder which people were worried about” (interviewee C). An interview with a member of the then Sentencing Advisory Panel corroborates this trajectory in the use of research, explaining that the direction of policy formulation was changing: “Research was delivered by the institute of criminology in Cambridge in 1999 and then of course never referred to again ... I don’t think Government Ministers referred to it because it didn’t come up with quite the answers that they might have hoped for” (interviewee F).

What Ministers ‘might have hoped for’ is indicated in their autobiographies. Both Tony Blair and Jack Straw had long-term desires for zero-tolerance policy on low-level disorder. Blair (2010:278) “had become a complete adherent of the zero-tolerance analysis”. He justified zero-tolerance by arguing that smaller crimes became larger if they were not stopped at the earlier stages. “[I]f you let people get away with the small offences, the big ones follow. You create a

culture of 'anything goes', of disrespect; of tolerating the intolerable". Straw (2012:212) had similar ideas in relation to residents who terrorised their neighbours and "the inadequacy of existing powers to deal with a dreadful family in Blackburn", which ASBOs were believed to fix. Unfortunately, this went against expert opinion and research findings, (as discussed in section 4.3.1) such as Ashworth et al., (1998) who denounced the order as not being carefully targeted and which gave local authorities unlimited discretion in seeking restrictive orders which had disproportionate levels of punishment for breach of conditions.

Furthermore, with the time taken in developing Labour's crime control strategy (four years) and the nine consultation documents published in the first year of administration, Labour's policies reflect a rationality built on research, evidence and expert opinion. However, Lord Windlesham (2001:78) documented how those involved in the consultation process described it as being "informative rather than consultative". The consultation papers did not provide much scope for comments on the principles underlying the purpose of the new orders and much of the consultative work had been completed before the election, so that only a selection of policy makers was privy to comment.

Notwithstanding the landslide win for Labour with a majority, a member of the previously formulated Sentencing Advisory Panel (interview D) commented on the "banana skin" that law and order remained to be for the party:

*"the one weakness you have to avoid is law and order; it is a big banana skin even if you have a large majority ... I think there was a nervousness and willingness even in that Labour Government with that massive majority to do anything particularly radical about crime and punishment they felt they had to keep to the 'tough on crime tough on the causes of crime'"*

The effect of the 'banana skin' is evidenced in the run up to the 2001 Election, by a leaked memo written by Blair to his ministers:

*"On crime we need to highlight the tough measures ... We should think now of an initiative, e.g. locking up street muggers. Something tough, with immediate bite, which sends a message through the system ... But this should be done soon, and I, personally, should be associated with it" (The Guardian, 2000).*

This corroborates with the punitive turn that populist punitiveness had replaced liberal elitism as an influence of penalty (*see* Loader 2006). This rationality grew stronger with the introduction of David Blunkett as the new Home Secretary in 2001. David Blunkett was famously known for his contemptuous attitude towards evidence-based policy, and who was thought to be appointed with a mandate of being tough by Tony Blair. “In order to get a more activist, populist, political lead in law and order ... [Blunkett] was trying to wrest law and order away from the Tories and make it a Labour issue” (civil servant *in* Annison, 2015:45). Not listening to evidence for the most effective crime control measures, Blunkett also refused to cooperate with penal reform groups. For example, in a primary interview with the CEO of a penal lobbyist group, when describing a campaign against the IPP sentence, interviewee ‘E’ described Blunkett as their “biggest challenge” and was a “complete monster”.

Blunkett’s populist agenda was based on the opinions of a focus group which “incorporates 82,000 men, women and children; ... they constitute the population of Sheffield, Brightside” (HC reading, 4<sup>th</sup> December 2002). Furthermore, in an article written for the Centre for Crime and Justice Studies (Blunkett, 2006b), Blunkett reflected on his time as Home Secretary and commented on the importance of public acceptance and using tough sentences to gain it;

*“the decision that I took to press Parliament to agree that 'life means life' for the most horrendous crimes, sprang from a political imperative to win the confidence of the British people and to have a justice system which people could understand and respect.”*

Furthermore, Annison’s (2015:52) interview with a Home Office official shows the direction of policy making of the 2003 Act:

*“There are two ways in which policy gets developed: One is a bunch of officials are sent away with a problem and come back with a careful analysis and a set of proposals and that gets developed into policy. The other way that policy happens is that a politician comes along and says, ‘I want this, now you go and find the evidence and construct a case to give me that’ And that’s what happened, it was the latter”.*

Although risk management is associated with analysis and evidence-based policy, the evidence gathered in this study supports Annison’s (2015) claims that it was the ‘idea’ of risk rather than actual risk-based techniques which was used to justify the 2003 Act sentencing framework.

Annison points out how those who developed risk assessments for the IPP sentence were not experts, but lawyers. The categories of the Offender Assessment System (OASys) risk assessment – ‘low’, ‘medium’, high’ – were ambiguous when matched with the offender who had committed an offence listed in Schedule 15 of the 2003 Act. Annison’s (2015:61) interviews with Home Office officials reveals the concerns of “having the right evidence to justify such measures”. Regarding dispositional power, the evidence suggests that Blunkett was able to manipulate the dominant disposition of a new concept of risk to his political advantage.

In conclusion, the dominant dispositions of Labour’s first two terms demonstrate a complex triangulation as a unique political strategy. The relevance of this triangulation for the punitive turn thesis is found in the hybrid of ‘risk’ and ‘reform’ rules of meaning and membership, which were manipulated in order to augment a punitive outcome. The totality principle and new types of criminal sanctions to manage behaviour that would have been managed by social welfare institutions were accepted under the rules of the new dominant dispositions. Thus, although there was a shift in the dominant dispositional power, the policy outcomes evidence a continuation of punitiveness due to the manipulation of political strategies and strategic negotiation within the legislative arena. Thus, identification of influential dispositional powers illustrates the complex and contradictory developments between 1997 and 2005 which cannot be adequately captured by the idea of the punitive turn.

## **4.4 Powers of change**

The following section will illustrate how a change in the dominant dispositions occurred. Analysis of external events and standing conditions within the legislative arena demonstrate that the change in sentencing frameworks from proportionate to totality orientated approaches was due to a number of opportunities being created, as well as the developments in how risk was problematised, facilitated the justification for longer sentences to be provided.

### **4.4.1 Facilitative power**

The following describes the changes in the wider policy environment which facilitated a hybrid of ‘risk’ and ‘reform’ dispositions. These include highly publicised events, as well as conceptual changes in ‘risk’ and how it can be operationalised in the policymaking domain.

*i. Events*

The data illustrates how Labour's crime control strategy was being formulated in 1993, years before they won the general election in 1997. Thus, the murder of James Bulger was identified as a facilitative power for Labour to disrupt their own traditional strategies of crime control, which played a large part in regaining political success. As Philip Gould (a political strategist who contributed to Labour's agenda) wrote five years later regarding the murder of James Bulger, "this change in perspective towards crime reconnected Labour with its electoral base" (Gould, 1998:188).

Specific to the co-evolution of the dispositions described above, there were a number of exogenous events which continued to fuel popular sentiment for tougher crime control policies, with a specific focus on dangerous and repeat offenders. Content analysis of Blunkett's autobiography (2006a) evidenced how serious criminal events fuelled media hype and public anxiety about the need for Government to protect the public, thus, forcing state actors as facilitators of major changes in the sentencing framework. For example, the murder of Sarah Payne in 2000 and Holly Wells and Jessica Chapman in 2002, created an environment which was amenable to a tougher approach to crime. Blunkett talks about these events as creating pressure that the Home Secretary "has to bear in a way that no one else in government can imagine, other than the Prime minister" (p.389). After it became known that Sarah's killer had served a four-year custodial sentence for the abduction and assault of an eight-year-old girl, the *News of the World* started a campaign for 'Sarah's Law' (the public disclosure of known paedophiles in England and Wales, similar to Megan's Law in the US, which provokes discussion on policy convergence between states, see Jones & Newburn, 2013).

Furthermore, it was later revealed that Ian Huntly – charged with the murder of Holly Wells and Jessica Chapman – had also been investigated in previous cases of sexual offences and burglary but was still able to work in a school because the accusations had not resulted in convictions. Blunkett describes how the media used photos of Holly and Jessica during debates in Parliament on the 2003 Bill, and how the media blamed him for not taking 'Sarah's Law' far enough. He responded with pledges to toughen up sentences for sex offences. Demonstrating the influence of an external event on sentencing decision making, Blunkett announced that "Sarah's death was a terrible tragedy but I believe her legacy will be a safer society in which sex offenders stay longer behind bars." (Wright, 2001).



Blunkett was also fighting against the release of certain offenders who were still deemed dangerous to society but were eligible for release under the current sentencing guidelines. For example, Blunkett's memoirs evidence his frustration when fighting against the appeals of James Bulger's killers Robert Thompson and John Venables in June 2001 (Blunkett, 2006a). Although Blunkett personally advocated for more to be done with community sentences and more creative types of custodial sentences (custody plus and intermittent sentencing), he felt populist pressure to toughen sentences for more serious offences;

*“sensitive and sensible sentencing for non-violent and less heinous crimes (reducing the pressure on the prison population and doing more remedial and rehabilitative work) ... if they knew that we were really getting serious about those crimes that hurt, distress and anger people the most” (2006a:275).*

Therefore, these events in the wider policy environment created particular exogenous contingencies that empowered a disruption to the co-existing 'just deserts' disposition (its existence in the legislative arena evidenced by critics of the totality principle) which New Labour politicians were having to negotiate and compete against in the policymaking process. These events triggered the need for tougher sentences to be given to those who had committed serious, sexual and violent offences, thus empowering dispositions which provided this option.

#### *ii. Developments in risk*

The data highlighted how developments in the concept of risk facilitated the co-evolution of risk and reform agendas. Carter's (2007:12) review argued that “[i]n recent years public and political attitudes to criminal justice may have also increased levels of risk aversion within the various mechanisms that oversee the release of prisoners”. The concept of risk aversion reflects wider developments which emerged in the late 1990s about how crime was conceptualised. The increasing influence of the mass media coupled with a detachment from liberal elites (Loader, 2006), led to the rise of “manufactured uncertainty” where the growth of knowledge only serves to generate more risk (Beck, 2000:217). In this context, uncertainty becomes “the basic condition of human knowledge” (Ericson, 2006:4). Garland (2001) suggests that this is encouraged by governments, who want to demonstrate their sovereign power, which ultimately

centres around law and order. Within the new risk society, crime is conceptualised as a risk which needs to be managed.

Since risk became more of a focal point in the 1990s, it has developed into second, third and fourth generation assessments on offenders. This research identifies the development of third and fourth generation risk assessments as facilitative powers of justice being reconceptualised as risk management, which is combined with the needs of an individual for the purpose of crime reduction. Hannah-Moffat (2005:31) describes third generation risk assessments as the “strategic alignment of risk with narrowly defined *intervenable needs*”. Second generation defined a risk subject as fixed or static, whereas third generation understands the risk and needs of an offender as changing due to the acknowledgement of individuals as being transformative. Thus, they are amenable to therapeutic intervention. A new type of ‘rehabilitationism’ provided the logic and influence of criminal justice institutions, with principles of ‘criminogenic needs’ being assessed in conjunction with the level of risk that an individual posed. In an announcement to the House of Lords in 2000, the Parliamentary Under-Secretary of State for Home Affairs, John Bassam announced a change in the sentencing framework for England and Wales, which highlighted how risk was facilitating a new approach to crime control:

*“developing programmes, in custody and in the community, which are known to reduce reoffending and building on the opportunities which new technology opens up. Together these developments present an opportunity to consider possible new forms of sentences which better protect the public and reduce reoffending. In particular, they open up the possibility of a more flexible sentencing structure in which the boundaries between custodial and community penalties are less rigid.”* (HL debate, 16<sup>th</sup> May 2000).

Changes to probation and the development of Offender Assessment System were introduced in 2001. The Director General of the National Offender Management Service (OASys), Phil Wheatley, described the system as;

*“building upon the existing ‘What Works’ evidence base. It combines the best of actuarial methods of prediction with structured professional judgement to provide standardised assessments of offenders’ risk and needs, help to link these risks and needs to individualised sentence plans and risk management plans”* (Debidin, 2009).

The OASys facilitated the adoption of offender management techniques by identifying offender-related needs and assisting with interventions targeted at reducing reoffending. If those needs could be met, crime reduction could be achieved – as opposed to welfare-based principles of rehabilitation which is about transforming the offender. This illustrates Hannah-Moffat's (2005:42) description of "a newly configured and implied normative duty of the state to care, intervene, and not simply warehouse".

These developments in technology as an example of facilitative power for a new concept of 'risk' is evidenced by the pursuit of legislation which could fill the gap between the Home Office and Department of Health regarding dangerous and severe personality disorders and offenders for whom compulsory powers under the Mental Health legislation was not appropriate, but who were not eligible to receive a life sentence on the existing framework. The concern was that there was a gap in the system between those who could not be punished by the criminal justice system, nor treated by the mental health system, but posed a risk to society. Despite Halliday's (2001) suggestions of an extended determinate sentence, the White Paper stated that violent or sexual offenders would be served with indeterminate sentences – what became known as the IPP (Home Office, 2002). The individual would then be released back into the community under supervision. Annison's (2015:31) interview with a Prison Inspectorate representative highlighted the issue of determinate sentences within the new context of risk. Those who were released at the end of their determinate sentence were still assessed by the prison authorities as likely to re-offend. "*There are a small number who are released with a pretty certain knowledge that they're going to commit a dangerous offence*" (Prisons Inspectorate representative, in Annison, 2015:31).

Therefore, the developments in the concept of risk created an opportunity for a 'risk' disposition to become dominant, resulting in indeterminate sentences, such as the IPP to be accepted. However, the added pledge of reforming offenders during custody by New Labour suggests that a 'reform' disposition was co-existing in the legislative arena, which Labour was constrained by. Rather than continuing with the preceding 'Prison Works' agenda of incapacitation based on deterrence, New Labour's policies evidence an emerging shift towards 'reform' as a dominant disposition in the legislative arena. Due to the empowerment of 'risk', the co-evolving dispositions could be manipulated by the acumen of key actors, such as Blunkett, to adhere to such dispositional powers, and thus, achieve the desired policy outcomes.

#### 4.4.2 Causal power

The following section will explain the causal power of such actors in manipulating the ‘rules of meaning and membership’ of the dominant dispositions in achieving New Labour’s political strategy.

##### *i. Political consensus*

Labour won a significant majority of 179 seats in the House of Commons of the 1997 election, showing clear political support. The triangulation of dispositions made it difficult to object on any significant basis. Also, the 1998 Act merely extended some provisions which had already been set in existing legislation. For example, under the Conservative Government, the Sex Offenders Act 1997 had already established a system for the sex offender register and the Protection of Harassment Act 1997 had already combined civil and criminal sanctions to create new remedies for anti-social behaviour. The extension of these provisions made opposition from the Conservative party unlikely.

Also, any opposition to the provisions discussed above were masked by other, more controversial matters such as the removal of the double jeopardy clause, evidence of bad character and the increase in magistrates’ sentencing powers. This was evidenced by a paper published by the Select Committee detailing the controversial elements on the Bill. The IPP sentence was not included (Home Affairs Select Committee, 2002).

##### *ii. European Convention of Human Rights*

However, the signing of the European Convention of Human Rights (ECHR) in 1950 created certain constraints to the constitutional-legal powers of the Home Secretary regarding any laws thought to contravene with the human rights of offenders. An example of this constraint was Blunkett losing the power to set minimum terms for life sentences after an appeal in the Anderson case in 2002, due to contraventions with section 6 of the ECHR – “the right of a convicted person to have a sentence imposed by an independent and impartial tribunal” (BBC News 2002). Blunkett announced that if he lost the Anderson case, which would lead to a number of serious offenders being eligible for parole, he would simply create new laws (ibid). Analysis of the progress of the Bill suggested that Blunkett made several attempts at regaining power he had lost in the Anderson case. At the Report stage of the Bill, Blunkett attempted to introduce a series of mandatory minimum sentences in relation to automatic life sentences;

principles that would mean ‘life means life’ (HC debate, 4<sup>th</sup> December 2002). Furthermore, Annison’s (2015:58) research into the construction of the IPP sentence demonstrates the impact that the ECHR had on policy decision-making: “[civil servants] were trying to construct the sentence [with] that in mind – how can we do it in a way that will not do too much damage in terms of the Convention?” (Home Office official). Having already lost the power to intervene in youth trials after an appeal by those convicted of the James Bulger killers, Blunkett announced that he would be setting new laws for ‘life means life’.

### *iii. Political competition*

Analysis of secondary interviews with Blunkett identified how, during his time as Home Secretary, there was significant competition between different departments and key actors within the legislative arena. This included the relationship between Blunkett and his own Home Office officials:

*“[The Home Office] had a policy of their own. I've never experienced anything quite like the first few months [as Home Secretary]. We were running parallel policies. There were my policies and that was what officials called 'Home Office policy', and that was what they worked to. I had to say to them over and over again, 'There is only one policy and it's what we say it is'”* (Blunkett, in Pollard, 2005:274).

Another source of conflict was from other Ministers. For example, the then Lord Chancellor, Derry Irvine put up significant resistance to Blunkett’s agenda, as well as the Lord Chief Justice for England and Wales, Lord Woolf. In an interview on the *Today* programme, Irvine believed that the public were “sophisticated enough” to understand that community sentences could be more effective than prison in rehabilitating the offender. This was just after Lord Woolf had decided that first-time, non-violent domestic burglars should not be sent to prison (Pollard, 2005). In a published interview with Blunkett, he commented on his frustrations about how Irvine tried to impede his progress:

*“we'd done it well. And it was working, people were getting the message. We're tough on dangerous, violent sexual offenders, life means life, all of that. We got sentencing policy across to the public. We were beginning to get it across to the judiciary and magistrates. We were beginning to turn the corner. We'd got a balance between tougher sentences for violent,*

*dangerous sex crimes and first-time offenders being community sentences. And then Derry does his bit upon the Today programme, completely out of the blue. Everything was undone"* (Interview in Pollard, 2005:285).

Analysis of progress of the Bill highlighted how the constitutional-legal powers of the Prime Minister and Home Secretary created standing conditions for Blunkett to successfully draw on rules of the dispositional powers described above to cultivate enough support to implement his agenda. In the case of Lord Irvine, Blunkett was able to consolidate his agenda with the support of the Prime Minister. Any opposition that Blunkett had was overruled by Blair. This was evidenced by Blunkett's admission in an interview; "To fight Blunkett was, ministers soon learned, to fight Blair ... I used [Blair's position] in full [to overcome political competition]", says Blunkett. (Pollard, 2005:284). The issues in the House of Lords were neutralised when Blunkett limited the amount of judicial discretion in individual cases by making the IPP mandatory in certain cases. This is evidenced by an interview with a Home Office official;

*"If it hadn't been for the nature of the relationship between the politicians and the judiciary, I don't think the politicians would have wanted to make [the IPP] mandatory. Because they were trying to curtail judicial discretion, because this was high-profile"* (Annison, 2015:40).

This section has illustrated the relevance of external contingencies and the affect of political competition in the legislative arena on penal policy outcomes. Highly publicised criminal events and wider developments in technologies and conceptions of risk empowered a 'risk' disposition in the legislative arena, which New Labour were constrained by regarding the policies they formulated. The resistance within the legislative arena demonstrated the use of Blunkett's causal power as Home Secretary in how he was able to overcome the political competition of other dispositions and key actors adherence to them.

## **4.5 Conclusion**

In conclusion, analysis of the decision-making processes of the Crime and Disorder Act 1998 and the Criminal Justice Act 2003 provides evidence which supports the claims of a punitive turn taking effect in England and Wales. A continuation of the punitive policies implemented by the previous Government including tougher community sentences, public order offences

and methods of control which were accused of obstructing civil and human rights of the public. These were accompanied by indeterminate types of sentences and a shift towards a totality principle of sentencing. However, other methods which are not consistent with a punitive turn included efforts at diverting offenders from custody via the emergence of restorative justice for young offenders and pledges to tackle behaviour and social circumstances thought to lead to criminality – termed as ‘criminogenic needs’. New types of custodial sentences were created in order to encourage employment and education which would not be interrupted by time spent in custody. This triangulation of approaches suggests that there was a co-existence of dispositional powers in the legislative arena, which New Labour were constrained to in order to avoid political vulnerability or threat. Data analysis of Parliamentary debates, autobiographies and speeches of key actors evidence the influence of ‘risk’ and ‘reform’ dispositional powers.

A ‘risk’ disposition was empowered by significant events in the wider policy domain and developments in risk technologies, which could implement the changing conceptualisation of ‘risk’ as dynamic and changeable in authentic policy outcomes. Subsequently, this conceptualisation empowered a ‘reform’ disposition, which naturally accompanied the new concept of risk due to the understanding of offender’s risk of re-offending could be improved if ‘criminogenic needs’ were tackled. Despite the long-term effectiveness of such a strategy, New Labour satisfied immediate apparent popular sentiment for harsher sentencing, favouring expressive styles of justice over instrumental effectiveness. In this way, although risk management provides a distinct framework of principles for punishment, its application during the Labour administration evidences a continuation of expressive, populist, punitive policy outcomes but which were augmented through a ‘risk’ disposition. Also, notwithstanding initial investment in methods to tackle ‘criminogenic needs’ of offenders during custody, the ‘reform’ disposition was subtly neglected by New Labour. This was increasingly noticeable from criticisms of a lack of ‘action’ as the 2001 General Election approached. This is the subject of the next chapter.

## Chapter 5

### Labour Government 2005 – 2010

#### 5.1 Introduction

This chapter will provide an analysis of Labour's last term in office, from 2005 to 2010. The unit of analysis is the Criminal Justice and Immigration Act 2008. Labour's third term attempted to continue with the political strategy established in its previous administration (see Chapter 4). However, adaptations to Labour's political strategy evidenced a disruption to the co-existence of 'risk' and 'reform' dispositional powers. Similar to Labour's previous terms in office, there was a variety of approaches identified which demonstrated the complexity of Labour's strategy. However, there was a shift towards more 'punitive' strategies which resonated with methods of incapacitation and plans to build larger prisons. Larger prisons were justified by the need to protect the public, and to reinforce Labour's sovereign strength, similar to Michael Howard's 'Prison Works' agenda in 1993 (see Chapter 1) and a 'punitive' disposition. Further evidence of punitiveness is revealed by the use of community penalties which were used as techniques of shaming rather than reintegrating offenders. These developments will be used to highlight the expressive style of justice during Labour's final administration, which seemed more concerned with asserting symbolic sovereignty rather than instrumental effectiveness of crime control policies.

Although the above developments are consistent with claims of a punitive turn, the Criminal Justice and Immigration Act 2008 replaced significant provisions in the 2003 Act considered as too punitive. The Indeterminate sentence for Public Protection (IPP) was amended to restrict the use of the provision in court to more serious offences. Attempts were also made to buffer political interference via a new Sentencing Council implemented a year later in the Coroners and Justice Act 2009. These changes reflect the co-existence of a 'punitive' disposition with a 'just deserts' agenda, first identified in Chapter 1.

The co-existence of theoretically contrasting dispositions is explained via causal and facilitative power. The latter will highlight wider environmental concerns of an economic recession, which constrained a 'punitive' disposition due its dependence on resource intensive



methods, whilst also empowering a 'just deserts' disposition which was used as a tool to amend punitive policy outcomes and to accommodate for measures of austerity. The unanticipated overuse of the IPP sentence (thus, policy at the level of 'action'), resulted in a significant strain on an overcrowded prison system. Due to these contingencies, and due to threats of political vulnerability caused by a pledge to a different agenda (and adhering to a new disposition), Labour was forced to increase prison capacity in the most economically efficient way as possible, as well as emphasising cheaper, but expressively and symbolically punitive, alternatives to custody and community penalties. In this way, changes to environmental contingencies resulted in a disruption of Labour's political strategy.

Therefore, this chapter highlights a dilemma of punitiveness regarding its dependency on fiscal resources and material conditions (discussed in Chapter 6). In this way, punitiveness was not an immutable state and can be disrupted by the empowerment of cheaper and more progressive alternatives in certain environmental contingencies.

## **5.2 Labour's third term; 2005 - 2010**

Labour won their third term in office on 5<sup>th</sup> May 2005. Tony Blair remained as Prime Minister and Charles Clarke kept his position as Home Secretary (from having been appointed in December 2004). The 2005 Labour manifesto pledged to continue the work done by their previous administration and to concentrate efforts on anti-social behaviour, drug-related crime and tackling re-offending. The new National Offender Management Service (NOMS) would ensure surveillance and management for each individual offender. Restorative justice schemes would be extended, and the criminal justice process would be more inclusive of the victim. In 2006 the Government released a *Five Year Strategy for Protecting the Public and Reducing Reoffending* (Home Office, 2006a). A couple of months later another document was released by the new Home Secretary John Reid, *Rebalancing the Criminal Justice System in Favour of the Law-abiding majority* (Home Office, 2006b). These documents reinforced a shift towards restorative justice and, whilst protecting the public was the top priority for government, more needed to be done to reintegrate offenders back into society. Community penalties set out by the 2003 Act were given a new name 'community payback' to reflect the idea that community service was to pay back the harm caused by the offence. A growing prison population meant proposals were made to build 8,000 more prison places by 2012 and introduce tougher penalties for knife crime and low-level offences (ibid).

The IPP sentence was implemented in 2005 as planned. However, rather than being concentrated on a minority of offenders who were convicted of dangerous and sexual offences, in practice it was applied to a much broader range of offenders by the courts. As there was no minimum tariff for the punitive requirement of the sentence, offenders were sentenced for very short tariffs, some of which were 28 days with no release date. With a quick influx of prisoners who were to be managed as ‘lifers’ needing to prove that they were not a risk to the society, the prison system was not provided with enough resources to cater for the growing numbers. In order to be released, the Probation service would expect to see completion of offender management courses and interventions. However, the prison service could not meet the demands of interventions needed due to a state of overcrowding and a lack of monetary resources to provide such interventions. A review of the IPP concluded that there was inadequate provision for IPP prisoners to demonstrate a reduction in risk. Therefore, there would be insufficient evidence for the Probation Service to release offenders (HMCI Prison & HMCI Probation, 2008). This resulted in an unintended rise in IPP prisoners, which created a considerable amount of pressure on an already strained prison system. By 2008, the amount of IPP prisoners was 3,700 which rose dramatically to 5,059 by March 2009. As summed up by a prison lifer governor, the government was “doing its shopping first without buying a fridge” (Strickland, 2016).

This problem emerged at the same time as the announcement of an economic recession in 2009 and a subsequent reduction in the budget for crime control. The resulting prison crisis, and the reduction in the budget for the newly formed Ministry of Justice framed Labour’s penal policy in their final administration. After discussing the dominant dispositional powers of this term in office, this chapter will continue with an analysis of causal and facilitative power which resulted in the co-existence of contrasting dispositions.

### **5.3 Dispositional Powers**

This section demonstrates how Labour began to prioritise their methods and objectives of crime control. The Criminal Justice and Immigration Act 2008 (referred to as the 2008 Act) implemented a number of changes to the sentencing framework, shifting to a more proportionate level of punishment than the totality principles of the 2003 Act. The use of custody and the need to provide prison places were highlighted as a significant priority with

the development of larger prisons. Associated with principles of incapacitation, this development shows adherence to a ‘punitive’ disposition identified in Chapter 3. This disposition is reinforced with the use of community sentences intended to shame and humiliate the offender and illustrating symbolic and expressive justice in the way described by proponents of the punitive turn thesis.

### **5.3.1 Level of Punishment**

During Labour’s third administration, the sentencing framework remained under the provisions of the 2003 Act (Home Office, 2005). There was an element of ‘totality’ in sentencing, as courts could take into account previous convictions and evidence of bad character as mitigating factors which should receive longer sentences. However, there were significant amendments to the more punitive provisions, such as the IPP sentence by the 2008 Act, which is evidence for a disruption to the ‘risk’ disposition of the previous Labour government. Analysis of Parliamentary debates surrounding the Act evidence a shift in adherence towards a ‘just deserts’ disposition and to align the sentencing framework with a level of proportionality identified in the 1991 Act in Chapter 3. For example, section 10-11 of the 2008 Act re-emphasised the use of fines, amendments to the Bail Act 1976 were made to allow for those not deemed a risk to society to be released on bail (section 51). Those who complied would be given an electronic tag. Furthermore, section 13 - 18 of the Act represented a more conservative approach to the use of indeterminate sentencing. A ‘seriousness threshold’ was imposed which restricted the use of IPP sentences to offences which would receive at least two years in custody or where the offender had committed one or more of the trigger offences. The list of trigger offences was considerably reduced. The presumption of risk was removed, and judges were given greater discretion in sentencing individual cases where conditions for an IPP sentence are met. The shift towards a more proportionate use of punishment was evidenced in the second reading of the 2008 Act, when Straw stated that:

*“punishment should fit the crime. If the offence warrants a community penalty or fine, a community penalty or fine should be handed down. Part 2 of the Bill introduces a range of measures to ensure proportionality in sentencing ... We propose to give judges the discretion when they believe that the offence is sufficiently serious to set the sentence that they see fit and not to have to halve the determinate sentence”* (HC debate, 8<sup>th</sup> October 2007).

A few months later, in a debate on prisons, Straw reinforced his adherence to a ‘just deserts’ sentencing framework, believing that “respecting the independence of sentencers to pass the sentence that they believe is appropriate in the individual case is fundamental to the integrity of the judiciary in a free society” (HC debate, 5<sup>th</sup> December 2007).

### 5.3.2 Objective

The data and actual developments evidence how there was a shift towards the incapacitation and warehousing of offenders. Although the tackling of criminogenic needs was still evident, there was a shift in priorities towards a more expressive style of punishment which is consistent with claims of the punitive turn thesis.

#### *i. Criminogenic needs*

The data suggests that these objectives of tackling criminogenic needs continued from the previous administration. Government documents continued with emphasising risk factors of re-offending and the need to target persistent offenders. For example, the Government’s ‘five year strategy’ included the need to identify what makes individuals more likely to re-offend and tackling these criminogenic needs via the end-to-end management of individual offenders. “With much better management of risk; and far better success in giving offenders a chance to change” (Home Office, 2006a:8). Building on the work done by NOMS, the Government aimed to tackle re-offending via understanding the “pathways” which led people to crime.

Furthermore, in an interview with the Justice Select Committee (JSC), when appointed as Secretary of State for Justice, Jack Straw expressed his distaste for ‘warehousing’. He argued that Labour had done a great deal to improve prospects for offenders upon release, such as the increase in the number of offender behaviour programmes between 1997 and 2007 (from 1,300 to 7,850) which aimed to improve skills in education and training (Home Affairs Select Committee, 2010b: Qu.405). In response to a JSC’s consultation document in 2008 (*see* Home Affairs Select Committee 2008a), Labour argued that NOMS had delivered a range of accredited programmes designed to address offender behaviour and over 35,000 programmes were completed in 2008/9. The number of offenders completing drug abuse courses had risen by 26% since 2004/5 and was 15 times greater than in 1997 with record numbers completing treatment. Investment in education had increased from £57 million in 2001/2 to more than £175

million in 2009/10 (HM Government, March 2010). This evidenced how Labour was maintaining their adherence to tackling criminogenic needs, as identified in Chapter 4.

*ii. Incapacitation*

However, Labour also planned to build three new prisons which would hold up to 2,000 prisoners each. Data from interviews by the JSC relating to these developments evidence how a priority for Labour was to protect the public. Despite Straw expressing his aversion to warehousing offenders, interviews by the JSC with key actors evidence how containing offenders would be tolerated if it meant protecting the public. The pressure of the impending recession and the tightening of government budgets forced key players to emphasise their priorities during these interviews. The evidence suggests that fiscal limitations brought about by the recession meant that budgets for addressing criminogenic needs were seen as secondary for those devoted to the aim of simply containing offenders. For example, although the then Minister of State for Justice, David Hanson, echoed Straw's attitude towards prison, regarding plans to build 8,000 more prison places and faced with others' concerns that funds for rehabilitation might be raided to build more prison places, Hanson replied that;

*“The first and overriding aim of the strategy is to make the country safer for law-abiding people. I would like there to be a situation where we need fewer prison places than will otherwise be the case, but that is not the purpose of the policy. The purpose of the policy is to make the country safer for your constituents and mine and, alongside that, to ensure that criminals who commit serious criminal acts are punished for this and, alongside that, to ensure that we reduce their propensity to re-offend”* (Home Affairs Select Committee, 2008b:Qu, 40).

This demonstrates the order of the 'competing priorities' and the ability to 'state-craft' within the legislative arena. This is reinforced in another interview two years later, when Hanson reiterated the objectives of the department:

*“to help support people not to commit further offences and to do so in a way which deprives them of their liberty, deprives them of very important family contacts and occasions in a way that myself and other Members would find very difficult, and deprives them of their liberty at large, but at the same time then hopefully, in their period of incarceration particularly, looks at their literacy, their numeracy, their employability, their problems with drugs or alcohol, their problems with potentially mental health issues and others and tries to*

*focus the interventions on them to make them better people when they come out of prison”* (Home Affairs Select Committee, 2010b:Qu. 574).

The term “hopefully” may be referring to whether finances were available at the end of the prison building programme and reinforces how rehabilitation was secondary to containment. Further evidence to suggest that Labour began to warehouse offenders was found in extracts of Straw justifying more prison places in Parliamentary debates. For Straw, prison was a place for containing dangerous offenders and protecting the public. “If anything, it stops people from committing crime and gives respite to the community ... Above all, [titan prisons] will fulfil our commitment to provide a modernised prisons system that protects the public from the most serious offenders” (Straw, HC debate, 5<sup>th</sup> December 2007). This was reinforced by George Howarth, Labour MP, who argued in a House of Commons debate that “by definition, anybody who is incarcerated is not at large to commit further offences. That is self-evident.” (HC debate, 17<sup>th</sup> June 2008). This echoes arguments by the former Home Secretary, Michael Howard, and his use of prison as a method of containment, and which is also consistent with the claims of a punitive turn that prison has become a method of warehousing offenders (Wacquant, 2005).

### *Criticisms*

Criticisms within the legislative arena came from pressure groups and opposition parties, which reinforced the first priority of Labour’s political strategy to protect the public and second to tackle criminogenic needs.

#### *i. Pressure groups*

There was a considerable amount of criticism from pressure groups and the opposition parties of the lack of emphasis on offender rehabilitation in the Government’s sentencing policy proposals. As described above, Straw had expressed his personal aversion to warehousing. However, pressure groups argued that warehousing was the result of Labour’s change in crime control policies. For example, offender behaviour programmes peaked in 2003/4 at 9,169, but fell in 2004/5, as well as the following year in 2005/6 to 7,445 (Prison Reform Trust, 2007). In their review of the IPP sentence, the Prison Reform Trust (ibid) concluded that:

*“Prison is now being used increasingly not as a place of measured punishment but as a place of containment for public safety. The ‘just desert’ model of sentencing has been*

*replaced by a belief that people can be held indefinitely, for a huge range of offences, until rehabilitation has been administered and somehow proven ... The government is presiding over a shift in the function of prison, from a place of measured punishment to a crude instrument of social engineering and an ineffective, and massively expensive, form of crime prevention”.*

Consultation documents released by pressure groups accused Labour of turning away from objectives of reform and rehabilitation. For example, the proposed a model of ‘*Justice Reinvestment*’ would redirect attention towards addressing criminogenic needs and reducing reoffending via reformation and restorative approaches (Home Affairs Select Committee, 2010a). A report by the Howard League for Penal Reform (2009) reinforced the need to move away from prison towards other methods which would be more effective in reducing reoffending. In an interview with JSC, the Chief Inspector of Prisons, Anne Owers, feared that a focus on larger prisons will result in;

*“more prisoners and worse prisons, a focus on efficiency rather than effectiveness, and also a moving away of resources from those things which are currently leading to the rise in prisoner numbers, in other words things like the over-stretched Probation Service, the under-funded mental health services ”* (House of Commons, 2008b: Qu.349).

#### *ii. Opposition parties*

Prior to the publication of Lord Carter’s review, members of the opposition parties were critical of Labour’s lack of reform in their sentencing objectives, which was resulting in a warehousing effect. Edward Garnier, Conservative MP argued that:

*“We are simply warehousing those people [in prison]; we are not giving them the effective rehabilitation that they need if they are to come out of prison as responsible, law-abiding citizens. It is one thing to incarcerate people to keep them off the streets, and to prevent them from reoffending. However, if that is all we do, and we release them through the back door so that they go back on to the streets, as illiterate and affected by substance abuse as when they went in, it is hardly surprising that they reoffend in the industrial quantities that they do. If we cannot provide purposeful prisons, we are wasting our time and the public’s money,*

*we are abusing victims and we are not doing offenders any good”* (HC debate, 28<sup>th</sup> November 2007).

Parliamentary debates evidence how those adhering to a ‘reform’ disposition were also in favour of more prison places but for different reasons than simply protecting the public. Overcrowding led to restrictions in the level of rehabilitation that an offender could receive. Thus, opposition parties were not against prison in principle, but were against prisons in the condition that they were in. In a Parliamentary debate, Tony Baldry, Conservative MP contended that: “Overcrowding means less training and education. People are leaving prison less qualified and more drugged up than before” (HC debate, 28<sup>th</sup> November 2007). Therefore, more prison places were agreed to on the basis that prison would become a more effective centre for rehabilitation. Conservative MP, David Heath, criticised the current prison system for having “no continuity of care and effective rehabilitative prison work”. He continued with the argument that the prison system needed to be managed better, rather than abolished altogether. His criticism was of building more “conventional prison spaces”, as funding should be better spent reinvesting in “smaller units more suited to task” of reforming offenders (ibid). Prison was seen as an appropriate measure of crime control, as long as it met the criteria of education, reform and treatment of those imprisoned.

This was justified by the estimated costs of re-offending. In a debate on the prison crisis, Conservative MP, Nick Herbert, argued that re-offending should be an important consideration for government, due to it costing an estimated £11 billion a year to the criminal justice system. Re-offending rates caused more prison overcrowding and the cycle of crime continued due to the lack of rehabilitation;

*“If we incapacitate offenders and improve rehabilitation, we will be able to drive down reoffending rates and in that way deal with the problem of crime. The Government are in the worst of all worlds, with a seriously overcrowded prison population and extraordinarily high reconviction rates. As a consequence, prisoners are cycling back into the system and adding to the costs”* (Nick Herbert, HC debate, 28<sup>th</sup> November 2007).

Conservative MP, Charles Walker illustrates many of the attitudes towards prison during the debate;



*“I am all for building more prisons in the short term, but we have to make sure that in the long term people go to prison only once whenever possible, and that while they are in prison they receive the support they need, through education or addiction programmes, to become productive members of society. Prison should not be a revolving door and I hope that the Bill gives us the opportunity to improve the Prison Service to ensure that people are given a chance once they leave prison.”* (HC debate, 8<sup>th</sup> October 2007).

Even Patrick Carter, who suggested larger prisons was aware of the shortcomings and difficulties associated with bigger prisons (2007:38-9):

*“There are some operational challenges associated with large prisons, including the possibility of large scale disturbance, the difficulty in meeting the needs of specific groups of prisoners (e.g. female and young offenders) and the management complexities associated with a large staff complement and challenges of managing a number of potentially different prisoner segments on the same site”*

Despite these issues, the funds for titan prisons were approved, and plans were for the prisons to be completed by 2014. These criticisms suggest that Labour was turning away from the ‘reform’ disposition they had adhered to in their previous tenure, as attention and resources previously awarded to criminogenic needs was used in favour of creating more prison places, even if it meant warehousing and containing offenders.

### **5.3.3 Method**

The data demonstrate how there was political competition between dispositional powers regarding how crime control should be approached within the fiscal constraints of a recession. Imprisonment was a significant method of Labour’s strategy due to its symbolism of sovereign strength. However, there were other approaches of reducing levels of prison overcrowding that evidence the complex nuances of crime control during this time, which arguably are not captured by a universal notion of a ‘punitive turn’.

#### *i. Prison*

A senior research assistant at the Centre for Criminology, University of Oxford, David Faulkner described Labour’s policy as a “predict and provide” approach to crime control during

Labour's last administration (House of Commons, 2008b: Qu.96). It was predicted that more prison places would be needed, thus more would be provided. This is reinforced by Straw believing that there was no chance that the prison population would come down. He told the JSC that those who were in prison *should* be in prison as they had either committed serious enough offences or because community sentences had not worked (Home Affairs Select Committee, 2008b: Qu.35). As well as the data extracts described in the above section, this illustrates Labour's continuity in their use of the prison service. This is reinforced by the new Home Secretary, John Reid's announced of plans for 8,000 more prison places by 2012 and his dismissal of the 'custody plus' and 'intermittent sentencing' policies developed by a predecessor David Blunkett (see section 4.1) (Home Office, 2006). These were introduced to prevent offenders spending maximum time in custody when they were not deemed a risk to the public. However, for reasons discussed below, they were abolished soon after Reid was appointed.

In order to cope with increasing levels of prison overcrowding caused by the use of the IPP, Labour expanded the size of the prison system. As the newly appointed Justice Secretary (after the creation of the Ministry of Justice), Charles Falconer asked Lord Carter of Coles to conduct a second review of the prison system. One of Carter's suggestions was to build three 'titan' prisons which would hold 2,500 prisoners each (Carter, 2007). Plans to build 10, 500 more prison places were already on top of the 9,500 already announced by John Reid (HC debate, 19<sup>th</sup> June 2007). Data from interviews by the JSC with individuals involved in the decision-making process evidenced how the request to Carter was specifically *how to build more prison places with limited resources*. The issue of economies of scale did not leave Carter with many other choices. His plans of three 'titan' prisons were proposed as the most economically feasible way of expanding prison capacity, which is what the review was intended to do, or as Straw put it "looked in very considerable detail at the potential economies and benefits from large prisons" (Home Affairs Select Committee, 2008b: Qu. 398). The Minister of State for Justice, David Hanson told the JSC that prison expansion was not up for review, but simply how these places could be achieved: "We wish to see [Carter] examine the scope for those extra 8,000 places, how we can deliver them, whether we can deliver them in an effective way and what the implications are for the revenue budget, for the capital budget in the Prison Service" (Home Affairs Select Committee, 2010b: Qu.32).

Although it was announced that issues with planning permission meant the new prisons would have to be reduced in size (BBC News, 2009), it evidences Labour's agenda and the adherence to the method of 'prison' as a crime control strategy. Carter was asked specifically to find a way of expanding prison capacity within a tighter budget. This went against Labour's earlier support for the idea of community prisons which would have maintained family and community ties and would have provided effective interventions to tackle re-offending (as described in Chapter 4). Thus, prison has been identified as a primary method of Labour's third term in Government. The change from community prisons (via intermittent sentencing etc) to larger prisons reflects a change in the objective of incapacitation, which is discussed below.

Furthermore, Labour's adherence to incapacitation and the expansion of the prison system is evidenced by Straw using it as a symbol of a successful law and order policy. During the second reading of the 2008 Bill, Nick Herbert, Conservative MP, criticised the Government for not addressing the "issue that the Lord Chancellor [Straw] signally failed to address is that the prisons are full, to bursting point" (HC debate, 8<sup>th</sup> October 2007). Straw argued that the prison population had risen due to the success and efficiency of Labour's law and order policy. In response to criticisms, Straw welcomed how more dangerous offenders were incarcerated for longer and a commitment to build 9,500 more prison places and that the reason for an overcrowded prison system was due to the "effectiveness of [his] investment in the criminal justice system and a toughening up of criminal law" (ibid). Seeing more punitive sentencing as a success reinforces how Labour did not intend to change the direction of their policy and prison was to remain as the centrepiece of their sentencing strategy. This belief of an effective criminal justice system was strongly rejected by members of the opposition parties, illustrating adherence to 'rival' dispositions. For example, David Heath, Liberal Democrat MP argued that:

*"We should not be remotely proud, as a nation, of the fact that we appear to have the unique social conditions, unique criminality and unique culpability that result in our having a higher proportion of citizens in custody than any comparable country. That is a signifier of failure in the system, not of success. A good system would reduce crime, the number of criminals and the number of people in our prisons"* (HC debate, 28<sup>th</sup> November 2007).

However, Straw's public announcements may have been a political strategy, and one in which demonstrated the disposition which he was adhering to. An interview with a retired Home Office official from the HORPU talked of how Straw may not have been as comfortable with

the more punitive legislation as his predecessors were. When asked about the intention of punitive legislation, they responded with: “clearly Howards [intention], I think Blair was comfortable with it and I think Blunkett was, I just don’t know about Jack Straw” (interview D). This is reinforced by the data, which suggests that Straw was not fully adhering to the dispositions of Labour’s third term. In an interview with the JSC, he talked about how he “looked forward to a political party represented around this table or seeking membership of the House of Commons which goes out and says, “If you vote for us we are going to cut the prison population”” (Home Affairs Select Committee, 2010b: Qu.73). As the developments of Labour’s penal policy suggest, this party was not the party that Straw was referring to.

Moreover, in 2007 Straw publicly announced that “we cannot build our way out of prison overcrowding” (Webster et al., 2007). However, in Parliamentary debates his speeches evidence how more funding had been agreed for the expansion of the prison system (HC debate, 5<sup>th</sup> December 2007). This conflicting rhetoric evidences how the dominant disposition is not reducible to individuals and how key actors, in this case the newly appointed Minister of Justice, can be forced to adhere to the dominant disposition if they wanted to maintain their position in the legislative arena.

### *Criticisms*

As described above, Labour’s project of titan prisons was criticised by pressure groups and opposition parties. These criticisms reinforce Labour’s dependence on prison as a main method of crime control. Anne Owers, the Chief Inspector of Prisons, described the report as a “missed opportunity” where larger prisons were being built against the evidence that smaller prisons “work better” (HM Prisons annual report, 2008). In an interview with the JSC, Owers expressed her fear of creating: “more prisoners and worse prisons, a focus on efficiency rather than effectiveness, and a moving away of resources from those things which are currently leading to the rise in prisoner numbers” (Home Affairs Select Committee, 2008b: Qu.349).

The President of the Prison Governors’ Association, Paul Tidball, also reflected in Lord Woolf’s fears, that bigger prisons would lead to “bigger disorder” (House of Commons, 2008b: Qu. 377) and the Prison Officer’s Association principal concern was how Titan prisons seem to be borne out of ideas of warehousing rather than rehabilitation: “Such a resource draining initiative will lead to staff cuts, offender behaviour programmes cancelled and ultimately

prisoners re-offending upon release” (Prison Reform Trust, 2007:4). The Howard League for Prison Reform report *Do Better, Do Less* described the increasing use of prison as a containment for the poor and disadvantaged, and called for a more moderate use of the prison system by advocating “radical and transformational change” including a reduction in the prison population and closure of some prisons and “a clear acknowledgement that criminal justice is a blunt tool which cannot in itself provide lasting solutions to the problem of crime” (2009:6-7).

The JSC (Home Affairs Select Committee, 2010a) proposed a new approach of *Justice Reinvestment* which suggested a redirection of governmental resources into community sentences and alternatives to punishment. However, the Government rejected these proposals and in the opening remarks of their response to the JSC’s proposals, the method of imprisonment was described as a method which would:

*“remain an option for the courts when dealing with the most dangerous, serious and persistent offenders, and that the Government has a duty to provide the capacity to enable this. A prison sentence, long or short, can be essential for demonstrating to law abiding communities that offenders face the full range of punishments, including the deprivation of liberty behind bars. This is a fundamental and non-negotiable principle underpinning the Government’s approach to managing offenders and delivering justice”* (HM Government, March 2010).

This highlights Labour’s dependence on the prison. Although it agreed with delivering better outcomes for victims and communities, it deviated from the operational model of restorative and community methods of justice suggested by the lobbyist groups.

*ii. Alternatives to prison*

The analysis highlighted a shift in Labour’s attitude towards the relationship between prison resources and sentencing. Concerned about political criticism, Labour ministers were reluctant to suggest that sentencing would have to depend on the resources available, rather than the crime itself. The analysis suggests that Straw was the first senior Government Minister to admit publicly that sentencing may have to take into account the resources available. In a debate on prisons in the House of Commons, Straw agreed with the Lord Chief Justice, Lord Phillips,

who had said: “The scale of sentences is now largely determined by Parliament. Where within that scale the facts of a particular offence fall is the judge’s task. Parliament should, when altering that scale, have regard to the resource implications of the changes that are proposed” (HC Debate, 28<sup>th</sup> November 2007).

The 2003 Act had provided a number of alternatives to custody in the form of new community orders. The Government’s Five-Year Plan (Home Office, 2006a) commented on the already existing community penalties available to the court and that more confidence needed to be had by sentencers and the public so that they are used more. The community payback scheme was developed in 2005 as a way of increasing public awareness and to make “unpaid work at the heart of community sentences” (p.20).

Carter’s (2007:33) review included a Sentencing Commission (discussed below) which would take into account the impact of sentencing on the prison population. “The task of ensuring that aggregate sentencing outcomes remain within the envelope of available prison places”. As well as proposing titan prisons, Carter also suggested a change in the sentencing framework which would result in fewer offenders going to prison, thus reducing the long-term demands on the prison service. Measures were suggested which involved better management of the use of custody “so that the projected increase in the need for prison places will reduce by between 3,500 and 4,500 places by 2014” (2007:29). Changes to the sentencing framework are discussed in section 5.2.1. Changes in methods were proposed for those deemed as ‘low-risk’ to the rest of the public should be met with more robust community sentences and a “more sustainable approach to the use of custody”, should give greater attention to the rehabilitation of offenders involved (p.28).

After inheriting John Reid’s plans for expanding prison capacity by 8,000, the first Minister of Justice, Lord Falconer admitted that simply expanding prison places would not be a long-term solution. He implemented the ‘End of Custody Licence’ (ECL) scheme - a temporary scheme under which eligible prisoners serving sentences of between four weeks and four years would be released under temporary licence up to 18 days before their automatic or conditional release date. Although this was supposed to be temporary, it continued to be in use until 12 March 2010 due to the actions of the (by then) Prisons Minister Maria Eagle (Straw, 2012:504). Straw’s memoirs evidence how the ECL was not part of Labour’s strategy. Grateful to Maria Eagle for her “terrier-like pursuit of additional accommodation”, he describes how the abolition of the

ECL was no longer going to be “hung round our neck during the 2010 election campaign” (referring to the criticism by the opposition parties of the scheme (HC debate, 17<sup>th</sup> June 2008)). This demonstrates how the ECL was a reluctant attempt at reducing the prison population due to the symbolic importance of not wanting to appear ‘soft’ on crime. Criticisms within the Labour Party illustrate how the scheme was not seen as being politically safe, however external contingencies of an overcrowded prison population forced Labour to concede and implement the scheme.

During this time, those responsible for criminal justice (either in the position of Home Secretary or Secretary of State) consistently called for alternatives to custody to be used more often. Despite his announcement for the building of 8,000 prison places, John Reid wrote a letter to judges “reminding them” of current legislative options for sentencing and emphasised community sentencing as a viable option for many less serious crimes (Clout & Johnstone, 2007). In the second reading of the 2008 Act, the Minister of State for Justice David Hanson acknowledged that “community penalties are important, because experience has, sadly, shown that prison leads to a higher level of reoffending than community penalties” (HC debate, 8<sup>th</sup> October 2008).

The Sentencing Commission was passed in the Coroner’s and Justice Act 2009, which was to allow for the drivers of custodial sentencing to be assessed, managed and controlled. The Commission would take into account the sentencing framework of the 2003 Act and the total impact on the prison population. When asked by the JSC what the role of the new Sentencing Council would be, David Hanson replied that it would be to “help promote community sentences and help look at particularly the lower end offences in a more productive way” (House of Commons 2010b: Qu. 4).

### *iii. Restorative Justice*

Government documents and Parliamentary debates evidenced how restorative justice methods were increasingly influential amongst key players of penal policy decision-making. The Labour Party manifesto (2005:48) presented restorative justice as a more mainstream approach to crime control, as a way to “address the needs of victims, resolve disputes and help offenders to make recompense to victims for their crimes”. There was a significant development in the

rhetoric on the needs of the victim. The Government's 'Five Year Plan' (Home Office, 2006a) included restorative justice as an approach which can:

*“give a better sense of satisfaction and resolution for the victims than more remote punishments. Restorative justice can be used at any stage of the criminal justice system and can be used alongside other punishments like prison or community sentences. We want to increase the use of restorative justice, where it is appropriate, as part of our efforts to focus the system more on the needs of victims”.*

A year later, community justice was to become a major strategy for Labour. *Re-balancing the criminal justice system* (Home Office, 2006b:21) aimed to move the focus of justice in favour of the victim. Part of that tactic would be to employ community justice methods so that the community is more involved in the process. The report pledged to do more with restorative justice methods “where offenders make amends to the victim or the community for the harm they have caused” (ibid).

A commitment to restorative methods was also found in Parliamentary debates on the prison crisis, as a way of curbing prison overcrowding. For example, arguments against custodial sentences were justified on the basis that those who have committed less serious offences are punished more effectively by “the task of clearing up graffiti in his community or doing other work that restores what he has broken or destroyed” because “it is a scandalous waste of human resource and energy to send a young lad into prison to watch television all day every day, perhaps acquire a drug habit and come out as a confirmed criminal”. (David Heath, MP, HC debate, 28<sup>th</sup> November 2007).

Although there was little actual developments in restorative justice, Labour implemented the community payback scheme, on the premise that unpaid work helps to restore the harm done in communities. Described in the five year plan, restorative justice could be used as an opportunity to “give local people (including victims of crime) faith, and voluntary and civic communities, the chance to say what work offenders should do in the community, with leaflets and websites to encourage people to choose particular schemes” (Home Office, 2005:20). New community methods including community payback evidence a shift in rhetoric towards restorative justice assumptions. The impact of incidents on the community and victim were



included in the victim impact statement (first introduced in October 2001) which could be used to inform sentencing decisions in the court.

However, support for a restorative justice disposition was arguably selective in that Straw appropriated the focus of the ‘victim’ to justify more punitive methods. This focus on the victim and the ‘community’ was followed by more punitive developments in the methods described above. For example, in 2008 offenders would have to wear fluorescent orange vests during their hours of community service in order to make punishment more visible to the public (Whitehead, 2008). This mirrors punitive methods described by Pratt (2000) and his reference to techniques of public humiliation of offenders. Thus, the use of restorative methods and a bending of the rules of a restorative disposition is evident here. The use of restorative rhetoric as a tool for punitiveness is reinforced by critics of the scheme. For example, the Probation Officers’ Union described the wearing of vests as “humiliating and demeaning”, human rights groups condemned them as “medieval justice” and many local councils refused to enforce the wearing of the vests because it put offenders in danger whilst carrying out community service (Whitehead, 2008). Therefore, the use of community practices, with restorative justice rhetoric, was used as a tool for punitive policy outcomes, as a way of avoiding the political vulnerability of being seen as a “soft option” (Straw in Whitehead, 2008). This is consistent with the claims of the punitive turn, whereby methods were used for their symbolic and expressive nature rather than any rationalist argument of their effectiveness of crime reduction.

### **5.3.4 Rationality**

The developments of Labour’s penal policies evidence a mixture of populist and policy-based evidence, as well as attempts at buffering political interference with sentencing decision-making.

#### *i. Populism*

As mentioned above, Labour was criticised for ignoring research associated with large prisons and their negative effects. The Prison Reform Trust provided evidence that smaller prisons are more effective. For example, Straw argued that titan prisons “meet the needs of efficiency, better management of offenders, and reasonable closeness to their homes” (Straw, HC debate, 5<sup>th</sup> December 2007). However, critics of titan prisons argued that these were unfounded arguments. Titan prisons would not be close to the majority of offender’s homes due to the

sparsity of their locations and better management of offenders did not mean more rehabilitation. Interventions to reduce re-offending would not be as effective due to minimal staff required for larger prisons, which would be run by “state of the art technology”. Less staff meant a lack of relationships being developed between inmates and staff, which were crucial to safeguarding both prison officers and inmates (Prison Reform Trust, 2005:7).

An unpublished inspection report by the HM Prisons Inspectorate (2006-7, *in* Prison Reform Trust, 2005:7) highlights the views of prison staff and the difficulties that prisons only half the size of the proposed titans had to deal with. A comparison of large and small prisons, based on 154 factors, revealed that larger prisons are consistently poorer at providing for prisoners needs. These factors reflected four tests for healthy prisons: safety, respect and rapport, purposeful activity and resettlement. Larger prisons scored worse on all counts on average (Prison Reform Trust, 2005:7). Thus, it was the larger prisons about which the Inspectorate was most concerned. This was reinforced by Lord Woolf’s report (1991:17) after the Strangeways prison riots, in which he suggested that a prison should not hold more than 400 prisoners: “The evidence suggests that if these figures are exceeded, there can be a marked fall off in all aspects of the performance of the prison”. Professor Alison Leibling, of the Institute of Criminology, University of Cambridge has completed several studies which provide empirical support for “smaller is better” (Leibling, 2008, *in* Prison Reform Trust, 2008).

Furthermore, evaluations of the Carter review (2007) by penal reformers concluded that the plans were built on evidence which was “inadequate and highly misleading” (Hedderman, 2008) and somewhat selective. The JSC expressed their concerns that the review “does not explain in any detail the evidence or the reasoning behind his conclusions. It is clear that the substantial investment now being made on the basis of those conclusions is not based on solid foundations” (Home Affairs Select Committee, 2008a:14). For example, the Committee obtained a list of people and organisations with which Carter had consulted prior to the review. This included fifty-one organisations. However, only 17 were consulted on Titans, nine of which were private companies with a vested interest in prison building programmes and six were government departments. The final two were the Prison Officers’ Association and the Prison Governors Association. However, it appeared that titan prisons were not discussed during these consultations (Prison Reform Trust, 2008). Thus, the evidence suggests that titan prisons were a preconceived idea with little or no evidence to support it.

Further evidence to suggest that titan prisons were a preconceived idea was in the unexpected growing cost of the project. One of Carter's fundamental arguments was that titan prisons were the most cost-effective way of achieving more prison places. However, the data evidence how the cost was not fully understood before the publication of the review. On 5<sup>th</sup> December 2007, Straw made a statement in which he announced that an additional £1.2 billion had been committed to the programme (HC debate, 5<sup>th</sup> December 2007). On 17<sup>th</sup> December he had to clarify with the JSC that this was just a contribution "towards the cost" and the overall costs was more likely to be "£2.3 billion". He was unable to estimate running costs due to "imponderables" and "a number of assumptions" (Home Affairs Select Committee, 2008b: Qu.427). On 28<sup>th</sup> January this figure increased again after Straw failed to mention to the JSC that there was another £258 million for capital receipts and in a written answer to Parliamentary questions in January 2008 he told the House that initial costs had not included land purchase costs, running costs or other associated costs (Home Affairs Select Committee, written answers, 21 January 2008). Thus, as costs had not been fully understood for a 'cost effective' prison building project, the evidence suggests that this was a preconceived idea without the support and evidence of research.

The Howard League of Penal Reform (2009:13) concluded that "despite all the criminological evidence which demonstrates the multiple failure of prison as an institution, the government has proceeded with the most extensive prison expansion programme in UK history". Thus, these developments evidence how the Labour administration was ignoring research findings which did not provide support for the rules and meaning of membership to which they were adhering.

Furthermore, another example of populism is the rebranding of community orders to community payback. This move was officially justified by the need to improve public confidence in the criminal justice system (Casey, 2008). Although this revolved around assumptions of restorative justice, the high visibility vests that offenders were expected to wear during their community payback evidences support for the deployment of public shaming as a form of punishment. At the end of 2008, Jack Straw announced that offenders taking part in community payback schemes should do so whilst wearing high visibility jackets in order to show the public that community sentences were not a soft option. Government documents evidence how this was purely to increase public confidence in the scheme rather than anything to do with more effective crime control techniques (HM Government, March 2010). This is

reinforced by analysis of secondary data of a JSC interview with David Hanson, who agreed that punishment in the community needed to be made more visible “in order to be able to have the debate with the public and the world at large about reform and rehabilitation” (Home Affairs Select Committee, 2010b: Qu. 574). This chimes closely with developments described by advocates of the punitive turn thesis and the return of shameful punishment (Pratt, 2000).

However, the punitive turn has little to say about the significant degree of competition and resistance towards these methods of punishment. The Telegraph reported how local councils were not enforcing the wearing of the visibility jackets. A survey by NAPO showed that 39 out of 52 charity and community groups hosting the schemes had stopped workers from wearing the jackets on site. The union described the move as “‘humiliating and demeaning’ and risked violence against those involved” whilst Human Rights groups described them as ‘medieval’ (Whitehead, 2008).

#### *ii. Sentencing Council*

Although Carter’s proposals for titan prisons were criticised as ‘populist’, his proposals for a Sentencing Commission demonstrate how there were attempts at creating buffers between sentencing legislation and political interference. Carter (2007:33) described the advantages of a new Sentencing Commission as “allow[ing] for improved planning and governance of policy decision and the process by which decisions are made would be far more transparent than at present”.

The Sentencing Council was the result of various attempts at improving the influence that the Sentencing Guidelines Council were having on sentencing practice. Carter’s suggestions of a Sentencing Commission to streamline the effects of the existing SAP and SGC was considered by the Sentencing Commission Working Group, under the chairmanship of Rt Hon Lord Justice Gage. They evaluated these ideas and produced a consultation in March 2009 which recommended that they were taken forward. An interview with a retired Home Office official, confirmed the purposes of the council;

*“The new council could be a buffer between the politics and judiciary and whilst politicians would still set maximum penalties and things like that the council would take a fairly robust approach to setting out what the tariffs should be with the possibility even of linking penal resources to sentencing levels. That was the idea that [Lord] Gage flirted with”* (Interview D).

Thus, the development of the Sentencing Council demonstrates the attempt at limiting political interference, which was thought to result in punitive outcomes. The Sentencing Council was created by the Coroners and Justice Act 2009. Believing that the existing framework was too loosely structured, and adherence to guidelines was not strictly enforced, the new Sentencing Council enforced the guidelines much more rigorously.

The Coroners and Justice Act 2009 implemented the Sentencing Council, which enforced the guidelines much more strongly in the sentencing process. Section 180 of the Coroners and Justice Act states that “courts must follow any sentencing guidelines which are relevant to the offender’s case”. Under the 2003 Act, sentencers must “have regard to” relevant guidelines and give reasons if a sentence imposed does not follow such guidelines. However, the 2009 Act stipulated that every court must *follow* any relevant sentencing guidelines “unless the court is satisfied that it would be contrary to the interests of justice to do so” (Coroners and Justice Act 2009, clause 111).

In conclusion, this Chapter demonstrates how Labour adopted a plethora of dispositions in order to respond to the prison crisis. Whilst there was a clear adherence to a punitive dispositional power amongst some members of Parliament, who advocated the use of prison for purposes of incapacitation and community penalties which shamed offenders, there was also adherence to reducing the level of punishment to a more proportionate level of punishment. This suggests that Labour were adopting strategies which would reduce the demand for prison without risking their political reputation of being ‘tough on crime’. There was also a change in priority towards the incapacitation of offenders in prison, rather than tackling criminogenic needs. Apart from the change in level of punishment, these developments corroborate the punitive turn thesis regarding the methods and objectives used in penalty. Although there was evidence of another, more reformist disposition being adhered to by lobbyist groups and the opposition parties, with which Straw also sympathised, his responsibilities as Justice Secretary determined that he adhered to the predominant, punitive disposition.

## **5.4 Powers of change**

The next section of this chapter demonstrates how the timing of the economic recession and the prison crises facilitated both punitive as well as cheaper, more progressive agendas. Analysis of the data suggests that there were significant ‘technologies of production’ and

‘technologies of discipline’ which facilitated a disruption of the political strategy identified in chapter 4.

### 5.4.1 Facilitative power

The timing of the economic recession and the prison crisis are believed to be significant in explaining the developments of Labour’s third term. The analysis shows how both crises were used to justify more prison places within larger prisons as well as an excuse to limit the amount of interventions for targeting criminogenic needs. The timing of these two crises are thought to be considerably important in the shift of penal policy to a more punitive approach. Without the IPP sentence generating such a high prison population, it would have been difficult to justify the need to begin such a significant prison building programme. Thus, the timing of these two contingencies empowered a punitive approach to crime control. However, it also empowered other methods of punishment which were not so resources intensive, such as punishment in the community and restorative justice.

#### *i. Economic recession*

The analysis found that fiscal budgets were becoming an increasing factor in Labour’s decision-making processes. In December 2009, an economic recession was made official. “Gross domestic product fell by 1.5% in the last three months of 2008 after a 0.6% drop in the previous quarter” (BBC, 2009). This marked a different time for the new government. Prior to this announcement, Labour had been relatively plentiful with their law and order budget. However, the government had to form policies within a new agenda of austerity. As monetary resources became scarce in the lead up to the recession, Labour began to be criticised for encouraging sentencers to base their judgements on the resources available rather than what the crime deserved. Although the Labour party would deny this in public, the then Prisons Minister David Hanson admitted in an interview with the JSC that resources were something that had to be taken into consideration. This was later supported by Straw as Justice Secretary. For the first time within the period of the study, the government admitted that the sentencing framework would be guided by the resources available at the time. Part of the role of the new Sentencing Commission was to find the balance between punishment and resources. As Straw announced in his speech after the publication of the Carter review:

*“Such a commission would have an ongoing role in monitoring the prison population and reporting on the impacts on the prison population and penal resources of all national policy proposals and system changes. I wish to emphasise that the proposal has nothing to do with linking individual sentences to the availability of correctional resources. The debate relates to the linking of resources to the overall sentencing framework”* (HC debate, 5<sup>th</sup> December 2007).

As Home Secretary, Blunkett (2006a:382) described how fiscal limits were a significant restraint on penal policy in the new millennium – “not a day went by when I didn't return to it in my mind” – and members of Parliament had expressed their concerns about the cost of implementing these types of sentences. These fiscal limitations might suggest that cheaper, more progressive provisions would be implemented in response to a tighter budget. However, it resulted in the scrapping of Blunkett's ‘custody plus’ and ‘intermittent sentencing’, which Blunkett's predecessor, John Reid announced as being too costly to implement in 2006.

Thus, the data evidence how fiscal constraints worked to subvert initial intentions of particular penal reforms. It could be assumed that fiscal constraints would result in the empowerment of cheaper but more progressive developments. However, in practice this was not that case. Although there was an emphasis on cheaper developments such as restorative practices, as described above they were used to employ more punitive techniques of public shaming via increasing the public visibility of punishment (section 5.3.3). Also, analysis evidenced how imprisonment, and the need to increase the prison capacity was a main priority. The need to protect the public was prioritised over reforming practices, demonstrating the acceptance of offenders being warehoused in larger prisons. This demonstrated the commitment that actors were making to a punitive disposition.

This is illustrated by requests for Carter (2007) to achieve a “better balance ... in terms of balancing value-for-money and the economies of scale that one can have from size”. The nature of the request was not how to employ other, cheaper techniques of crime control, but how to expand the prison system within the financial restraints. As mentioned above, the direction of the decision-making process of titan prisons had begun before Carter's review. The recession was used to justify this strategy. Parliamentary debates evidence how there was broad cross-party consensus that more prison places needed to be provided. However, larger prisons were empowered on the basis that they had better economies of scale. This was evidenced in an

interview with Straw by the JSC, where Straw acknowledged that smaller prisons may be “more pleasant places” where better regimes could be run, but that it was about minimising overhead costs. Smaller prisons were “too expensive” (Home Affairs Select Committee, 2010b: Qu.52).

This premise would also explain why interventions to tackle criminogenic needs took a back step in the third Labour administration. These interventions were resource intensive, as Lord Ramsbotham acknowledged in the Parliamentary debate on the prison population:

*“My Lords, one of the problems with overcrowding is that it involves a shortage not just of cell space—we are obviously pleased that there is now money to buy more—but of all the other services: the staffing, the education, the work programmes and so on. Can the noble and learned Lord tell us whether the Treasury has granted more money for all the extra services required to accompany the cells?”* (HL debate, 19<sup>th</sup> June 2007).

In an interview with the JSC, and which was reinforced by the Ministry of Justice report for the Committee, Hanson admitted that “we have not looked at implementing that for financial reasons because we have looked at how we can deal with spending in other areas” (Home Affairs Select Committee, 2008b: Qu.105). These schemes would have illustrated an adherence to the reintegration of offenders back into the community. However, as demonstrated above, priorities and resources were focused on imprisonment and containment.

However, the timing of the recession and prison crisis also empowered particular dispositions based on reform and restorative justice methods. Community penalties were less resource intensive. Methods of restorative justice, community sentences and closing prisons were consistently justified by savings in costs. For example, *Do Better Do Less* (Howard League for Penal Reform, 2009) used the demanding nature of the prison system on the government budget to justify the need for other methods of crime control to be employed. This was especially since Labour’s prison expansion had resulted in a five per cent annual rise between 1997 and 2005 on law and order spending. By 2007-8 the criminal justice system had received £22.7 billion, over a third more than it received ten years ago. The Howard League for Penal Reform argued that there were



*“clear parallels between the current UK financial crisis and the crisis now facing its penal policy and practice. The most significant of those parallels relates to excess.” ... “Localism speaks to moderation. It offers more possibilities of countering excess simply because of the scale of governance and the directly felt impact of initiatives. We have entered a period of increased pressure on public spending. Precarious global economic conditions combined with the crisis our penal system faces make demands for a smaller, more effective and cheaper system of punishment all the more imperative” (ibid, p.21-37).*

The data analysis suggests that, under these circumstances, restorative approaches and community penalties were empowered as dispositions and began to exert real influence in mainstream penal policy.

*ii. Political risk*

Labour’s issue of an increasingly overcrowded prison and implementing provisions such as the ECL created political vulnerability, which the Conservative Party took advantage of. The Party, led by Conservative MP Nick Herbert severely criticised Labour for not protecting the public sufficiently but instead, releasing dangerous offenders early as a way of reducing the prison population (HC debate, 28<sup>th</sup> November 2007). As evidenced by an extract from an interview between Annison (2015:152) and a penal reform group representative, “the Tories were watching them like hawks, waiting for weakness”. This created an element of political risk for the Labour Party, who was subsequently forced to make changes, but whilst creating a symbolic image of political strength. This was coupled with threats of a judicial review on Article 5(1) ECHR or the breaking down of the ‘lifer’ system (Annison, 2015).

*iii. Ministry of Justice*

During Labour’s final administration, the Ministry of Justice was implemented in 2007. This gave ministerial power and responsibility of crime control to a new position – the Secretary of State for Justice. This facilitated a change in crime control policy via an interaction with a change in the causal powers that it produced (discussed below). It was after John Reid was replaced with Lord Charles Falconer as the actor responsible for the crime control agenda that the ‘End of Custody Licence’ scheme was introduced, which illustrates a disruption to Labour’s agenda.

#### *iv. Local councils*

Facilitated by a lack of prison capacity and constraints on prison building programmes, another disposition which was more concerned with the reforming of offenders via a more restorative approach in the community began to emerge. Negotiations are exemplified by the developments of community payback schemes, which evidence a shift towards more restorative methods of punishment, but with the later addition of offenders wearing high visibility jackets for the benefit of public confidence. These methods were resisted due to local communities not adhering to these sets of rules and meaning of membership, and offenders were no longer obligated to wear them. Another example was the titan prisons, which demonstrate adherence to warehousing of offenders via containment in prisons which had been proven to be less effective in reforming offenders. Despite a disruption to the punitive disposition via the lack of planning permission by local councils, which again demonstrates their causal power within the circuit of power, larger than usual prisons were still built in 2014.

#### *V. Resignation of Home Secretary*

John Reid was appointed Home Secretary after Blunkett had resigned following public accusations of fast-tracking the renewal of a work permit of his ex-lovers' nanny. This 'technology of discipline' mirrors the process described in chapter 3 regarding disciplinary measures taken against Conservative Party members who had committed a variety of scandals during their time as Ministers. Blunkett's resignation reveals how certain 'standing conditions' of Parliamentary procedure creates opportunities for those accused of such scandals to be dismissed, or in the case of Blunkett, to resign his post. Blunkett's resignation facilitated the disruption of the agenda committed to in Labour's second administration. For example, as described above, after Blunkett's resignation, his successor announced the abolition of the 'custody plus' and 'custody minus' provisions that Blunkett has personally invented.

### **5.4.2 Causal power**

As described above, the development of the Ministry of Justice in 2007 created new standing conditions for causal powers to be enforced. Shortly after Reid was replaced with Lord Falconer as the actor with the potential to exercise constitutional-legal power, the 'End of Custody Licence' scheme was implemented. This was despite severe criticism from the Labour Party of the scheme and how it made the party vulnerable to political attack by their opposition.

This resistance demonstrates how Falconer exercised his causal power to implement the provision. Analysis of documents created by pressure groups evidence their considerable criticism of plans to create titan prisons. However, due to the structure and process within the legislative arena, these groups were lacking in the capacity to exercise causal power to effect any significant change.

Within the Labour Party concern was directed at the consequences of the IPP sentence on the overcrowded prison service, and how this would be tackled. On 26<sup>th</sup> June 2007 Gordon Brown became Prime Minister, who then appointed Jack Straw to replace Lord Falconer as Secretary of State for Justice. Straw describes how his first priority was to solve the issue of prison overcrowding (2012:503). However, there was little need to exercise his causal powers when attempting to resolve the situation. Straw has been described as fostering “good working relations” with civil servants and creating productive working relationships to amend the IPP sentence (Home Office official in Annison, 2015:146). “Ministerial decisiveness, coupled with intellectual freedom for officials, was very much appreciated” (ibid). This is reinforced by Straw’s memoirs, in which he describes the social relations with elite actors in the legislative field (2012:502-3).

Analysis of the data highlights how the IPP sentence was amended subsequent to Jack Straw being appointed as Secretary of State for Justice. “Falconer ... wouldn’t have [amended the sentence] because it was his own policy. So yes, simply on the facts Jack Straw’s arrival did allow us to do something” (Interview with Ministry of Justice civil servant, by Annison, 2015:153). This highlights how a change in policy was dependent on individuals with causal powers to enact change at the level of ‘decision’. However, there is little evidence to suggest that Straw needed to exercise such causal powers, due to the consensus within the legislative arena being that the IPP sentence needed to be changed.

## **5.5 Conclusion**

In conclusion, this chapter has described a change in Labour’s political strategy towards methods which are, partially, consistent with the punitive turn thesis. Exogenous events of an economic recession forced the Labour administration to prioritise their objectives and framed subsequent penal policies by disrupting Labour’s disposition. Plans for larger prisons illustrated a shift towards the incapacitation of offenders and a subtle disregard for tackling

criminogenic needs. Although the latter maintained some prevalence, there was evidence of a shift in priorities of warehousing offenders in order to protect the public. The data evidenced how creating enough prison places would be prioritised over dealing with criminogenic needs of offenders. This acceptance of warehousing offenders, illustrates elements of a punitive turn, as described by authors of the thesis. This reflects a punitive agenda in a similar way to Howard's 'prison works' agenda in Chapter 3. Concerns with avoiding political vulnerability empowered this punitive agenda, despite aversion to such methods by the Secretary of State for Justice and other key actors in the legislative arena. However, a new agenda of austerity empowered cheaper, more progressive methods of crime control. Analysis of the Criminal Justice and Immigration Act 2008 evidenced a shift away from the 'totality' principle, towards more proportionate levels of punishment and making 'punishment fit the crime'. Other developments during this time period included methods of restorative justice and diversionary tactics which illustrates the complexities and nuances of Labour's political strategy which cannot be accounted for by a punitive turn. There was also an attempt at buffering political interference with the sentencing process by the implementation of the Sentencing Council (via the Coroners and Justice Act 2009). Data surrounding this development provides evidence contrary to populist punitiveness and demonstrates a more rational approach to sentencing during this period.

This chapter concludes that the contradictory and complex developments in penalty are due to the co-existence of 'punitive' and 'just deserts' dispositions. Both were facilitated by the wider policy environment and measures of austerity, and a manipulation of Labour's agenda to adhere to these dispositions via a prioritisation of fiscal resources and the importance of 'protecting the public' as an expressive form of justice for the Labour Party. As demonstrated in the aforementioned empirical chapter, a 'punitive' disposition, like other dispositions, identified in this chapter were not inevitable due to their dependence on the political process.

## *Chapter 6*

### *Discussion*

#### **6.1 Introduction**

This thesis has assessed the key claims of the punitive turn thesis by exploring the changes and continuities of legislative developments in penal policy in England and Wales, between 1990 and 2010. A multiple-embedded case study has gathered empirical evidence on the political processes leading to actual developments in sentencing legislation, in order to support, dismiss or adapt claims of the punitive turn thesis. This time period was chosen on the basis that existing literature uses legislation developed during this time as evidence of a punitive turn; two strikes laws, mandatory minimum sentencing and an increase in the imprisonment rate. The punitive turn thesis is based on the premise that there has been a fundamental change in the nature and overall direction of penal policy. Explained by neoliberal political discourse and broad changes in the structural formation of society and its apparent functions, a new set of arrangements in responding to crime has included harsher levels of punishment and new objectives of punishment which no longer seek to reform the offender. New methods of punishment involve mass imprisonment and public shaming of offenders. These arrangements have been driven by a new rationality of populism and a view that the public was demanding harsher methods of punishment due to the lessening tolerance of crime.

As introduced in Section 1.4, this thesis argues that penal policy is an emergent outcome of processes of political competition, rather than an epiphenomenon of political rationalities or state functions. To understand this, it has been necessary to draw upon cognate developments in political analysis that understand this competition in terms of established agendas that actors seek to maintain and perhaps develop in response to rivals who, in turn, seek to reform or even transform these agendas. In this way the continuities as well as changes shaped by this competition can be better acknowledged and the over-homogenised imagery of the (singular) punitive turn better avoided. In doing this, the thesis has drawn upon distinctions between causal, dispositional and facilitative power (Clegg, 1989) and the concomitant concept of multi-centred governance (Edwards, 2016). Comparing the core features of the punitive turn with key changes and continuities in sentencing legislation in England and Wales between

1990 and 2010 provided a method of articulation of how punitiveness could be organised in 'real' terms and empirically identified in the data. In this chapter, these concepts are used to discuss findings from the empirical study of penal policy in England and Wales over the past three decades and their implications for the punitive turn thesis, its critics and the prospective research agenda on this key topic of contemporary criminology.

Traditional methods of political analysis emphasise *either* political agency or societal structure in addressing the concept of 'punitiveness' in Western penal systems. These methods have developed sophisticated macro level analyses of wider and deeper shifts in social, economic and cultural forces that have brought about a fundamental shift in penal policy. However, although countertendencies of punitiveness have been identified, there is little understanding of how each tendency dominates or recedes over time. This thesis has provided a more detailed empirical analysis of changes and continuities in English and Welsh penal policy than have proponents of the punitive turn, proposing how counter but co-evolving tendencies are able to exist in the policy environment. Inspired by liberal criminologists' approach to political analysis, a new theory of power is suggested as being conceptualised around a multi-centred governing arrangement within the political arena; how political power extends beyond the will of governments and distinguishes between legislature, executive and judiciary; a distinction between politics and administration and; decision-making processes leading to key legislative changes in the legislative arena (Downes & Morgan, 2007; Edwards & Hughes, 2012).

Initial analysis identified a significant level of political competition during the policymaking process. This prompted the utilisation of Stuart Clegg's *Circuits of Power* framework (1989) as a method for articulating the components of this political competition. His conceptualisation of different types of power provided a helpful way of exploring the policy process and how policy is an outcome of such processes within governing arrangements. In this way, punitiveness could be understood more concretely as co-existing with other responses to crime. Clegg's acknowledgement of the duality of structure and agency in relations of power helps the avoidance of reductionism in accounts of policy making either to the agency of particular actors or to the social structures they inhabit in the wider environment of penal policy. In Clegg's framework, power is viewed as a relational concept that emphasises the interaction of agency and structure (and the interaction of actors in a particular structural context) in explaining social change and continuity such as the outcomes of political competition in the public policy process. Consequently, this thesis investigates the claims of a punitive turn in the

penal policy process in a more concrete and less abstract way, to understand the interaction of structure and agency in penal policymaking in the particular historical context of England and Wales over the past three decades.

As it will be further clarified, a particularly important contribution of Clegg's framework to wider social scientific debate over the investigation of political power is the introduction of a third type of power in addition to the causal power of particular actors (as in the renowned formulation of an 'A' getting a 'B' to do something they otherwise wouldn't have) and the power inscribed into social structures (which help explain the resources that facilitate how 'A's' can get 'B's' to act, or indeed how 'B's' discipline themselves to act in certain ways). This third type is that of 'dispositional power' (the rules of meaning and membership that integrate actors, such as those involved in the policy process, into rival groups, committing them to certain beliefs which in turn enable and constrain them to act in certain ways – such as not completely contradicting their previously held commitments to punitive populism for risk of losing all credibility as a political actor).

A central claim about the contribution this thesis is making to the existing literature (see section 1.4) is that understanding change and continuity in penal policymaking in particular historical contexts requires a theory of political competition and this, in turn, is best understood through reference to the dispositional power relations that integrate rival groups into different concepts of risk and justice. Political competition over the maintenance, development, reform or transformation of penal policy agendas is organised in terms of these different concepts of risk and justice. The remainder of this chapter elaborates and justifies this claim. It will discuss how there were headline developments in sentencing legislation which are broadly consistent with the punitive turn thesis and how there was certainly evidence of a general shift towards more punitive policy decisions. However, the thesis argues that this is due to the 'ordered relationship' and interactions between the three types of causal, dispositional and facilitative power conceptualised by Clegg (1989) rather than an epiphenomenon of state functions or political rationalities. The critical implication of this insight is that penal populism needn't have worked out in the way it did in the context of England and Wales over the past three decades nor is there any inexorable teleology to its prospective fortunes.

After briefly summarising the 'headline' supporting evidence of the punitive turn thesis, the chapter will highlight how different dispositions on crime control (illustrated in table 1)

predominated and receded over time and how this is the result of the interaction between causal, dispositional and facilitative types of power in an ‘ordered relationship’ (Clegg, 1989). Structural relations of the legislative arena interact with causal power of key political players to manipulate the fixed ‘rules of meaning and membership’ of the dominant dispositional power to affect punitive agendas. This is within the ‘problem situation’ of exogenous events that facilitate the innovation of dispositional powers. In this way, ‘rival’ dispositions were used as a tool to augment punitive outcomes via developments in sentencing legislation during particular times.

## 6.2 The nature of dispositional powers

Clegg (1989) describes how dispositional powers adhere actors to a fixed set of ‘rules of meaning and membership’ of particular institutional ideas, such as ways of governing crime. This type of power enables actors to behave in particular ways and to develop political strategies in alignment with these rules in a way which prevents them to adhere to other, co-existing dispositions. As described in the findings chapters, there were five dispositional powers which, at certain points in time, dominated and receded across a national administration, either individually or alongside other dispositions, at particular points in time.

Dispositions	Rules of meaning and membership										
	Level of punishment			Objective			Method			Rationality	
	Excessive	Less	Proportionate	Suffer	Reform	Contain	Coercion (removal of civil liberties)	Compliance (maintain civil liberties)	Coercion and management	Populist	Expert
<b>Punitive</b>	X			X		X	X			X	
<b>Reform</b>		X			X			X			X
<b>Restorative</b>		X			X			X			X
<b>Risk</b>	X					X			X		X
<b>Just deserts</b>			X	X				X			X

*Table 1 – Diagnostic Tool of Sentencing Policy Dispositions*



## 6.2.1 Dispositional powers – Headline developments

This section will discuss the headline developments which illustrate the impact of punitive and rival dispositional powers. The first section summarises the key developments in sentencing legislation which evidences a punitive turn as described by its proponents (in Chapter 1). The second section describes other developments which evidenced the influence of the ‘rival’ dispositions.

### *i. ‘Punitive’ developments*

The thesis identified sentencing legislation which has been used as evidence for a punitive turn. The 1994, 1997, 1998 and 2003 Criminal Justice Acts included sentencing legislation which increased the quantitative level of punishment for similar crimes, such as the introduction of tougher mandatory minimum and indeterminate sentences. An increase in the qualitative intensification of punishment was identified via more austere prison regimes, and a considerable increase in prison capacity to meet the growing influx created plans for bigger prisons (section 3.3.1). New methods which evidence Pratt et al’s (2005) claims of more intense punishment in the community were identified in the form of new community orders (ASBOs, SSOs) and electronic monitoring (section 4.3.1). Proposed schemes for public humiliation via publicly accessible sex offender registers and high visibility vests to be worn during community payback provide evidence of punitive methods having emerged in England and Wales (section 5.3.3).

These new methods of punishment were matched with objectives of containment, warehousing and incapacitation, illustrating how the change in the objective of punishment was no longer to rehabilitate and reintegrate offenders. Instead, policy shifts such as Michael Howard’s ‘Prison Works’ agenda and David Blunkett’s proposals for tougher indeterminate sentences were justified by the need to protect the public. Although the latter agenda of Indeterminate Sentences for Public Protection (IPP) emphasised the rehabilitation of offenders, a severe lack of resources to implement such proposals creates doubt that this was ever a priority.

Lastly, rational and evidenced based policy was increasingly displaced by a new, more populist approach to crime control during the decision-making process of more ‘punitive’ legislation (the 1997 and 2003 Acts). Extracts from transcripts of interviews with those involved in the

IPP sentence (Chapter 4) had strikingly similar statements to those from a Home Office civil servant involved in the 1997 Act (Chapter 3). The data surrounding the construction of these new types of sentences strongly suggest that the rationale was based on symbolic effectiveness and to appease the public rather than on actual effectiveness of crime reduction. Thus, this direction of policymaking, which is highlighted during the creation of more punitive policies, is consistent with the claims of the punitive turn thesis.

*ii. Rival dispositional powers*

However, as the findings chapters illustrate, although there was a predominance of a punitive disposition, other developments in sentencing legislation were not consistent with the punitive turn and highlight the importance of the concept of the ‘co-evolution’ of rival dispositions of risk and justice. These developments included advances in diversionary tactics, such as restorative justice methods for young offenders (section 4.3.3); developments in community penalties in order to make them *sound* ‘tougher’ and therefore being used by the courts more (section 3.3.3); more proportionate, and relatively lenient, sentencing in individual cases by the judiciary via arguments based on ‘just deserts’ (section 3.3.1) and; an increase in the numbers of prisoners receiving education and treatment services during their custodial sentences (section 4.3.2). These developments co-evolved during the same Labour administrations that employed punitive legislation discussed above, thus demonstrating the competition confronting a punitive disposition within the legislative arena. These outcomes are evidence of the influence of such rival dispositions succeeding in the legislative arena and being part of the complicated political strategies adopted by creative political actors in the legislative field. This demonstrates the complexities of policy outcomes in England and Wales during the time studied, and which are inadequately captured by the generalist notion of a punitive turn.

## **6.2.2 Power as relational**

These complexities can be articulated and understood in light of conceptualising power as relational to resistance. As described in Chapter 2, Clegg’s premise of power is opposed to the Hobbesian image of the Leviathan. Promoting Machiavelli’s insight into power as the outcome of strategic relation conceptualised the nature of power and its relationship with resistance. Dispositions originate from resistance to the dominant disposition in the legislative arena and a democratic process which allows for political competition. Resistance is found in the political dilemmas of each dispositional power, which are created by the fixed nature of the ‘rules of

meaning and membership' which adhere actors to certain meanings of justice and the inherent contradictions in crime control dispositions. Given that dispositional powers are rule based, political dilemmas map out the limitations of these rules when claiming to govern crime (Edwards et al., 2017). It is these limitations which create resistance and competition. Thus, overcoming such resistance and competition highlights the importance of appreciating the politics of sentencing policy and how they result in certain policy outcomes.

### *Dilemmas*

Each disposition is based upon certain rules of how to approach crime control. Due to the volatile nature of the political context produced by a liberal democracy - process of legislation formation and contrasting dispositional rules which adhere actors to particular concepts of justice, analysis highlighted a significant level of resistance to and between the dispositions. What follows is a brief discussion of the dilemmas discovered during analysis and how forms of resistance resulted in the creation of innovative dispositions which produce certain policy outcomes.

These rules have moral implications which contradict, or undermine the objectives of other dispositions, as well as having instrumental limitations. For example, a punitive disposition (in the way described by proponents of the punitive turn) undermines a rational, effective approach of crime control and promotes one based on expressive and emotive styles of justice. A 'risk' approach may work in opposition to this but can subsequently be seen as undermining popular sentiments. Both dispositional powers can result in what Garland terms a 'criminology of the other', where methods of punishment are used for exclusionary purposes, which can result in an authoritarian approach to crime control and an encroachment on civil liberties (Simon, 2007). Furthermore, as demonstrated in the findings' chapters, both dispositions had instrumental implications of being highly resource intensive and costly. Chapter 5 highlighted the demonstrable impact of a punitive agenda requiring a high level of resources, including a large prison capacity to warehouse an increasing number of offenders who have been sentenced to prison for longer periods of time. Despite saving money from austere prison conditions, research suggesting that these types of conditions lead to higher recidivism rates and thus, more people in prison and subsequent cost.

In contrast, methods of restorative justice are cheaper due to needing less resource from the prison system and lower rates of recidivism suggest a less demanding cost over time. However, it has limitations regarding its appropriateness for more serious offences and dangerous offenders who need to be prevented from harming others. Due to political agendas emphasising the need for better crime control strategies and associations with the developing concept of ‘dangerousness’, restorative justice consistently had little to offer such agendas. Thus, a significant dilemma for restorative approaches to crime cannot deliver equal access to justice for the same kinds of victimisation (Edwards et al., 2017).

The premise of a ‘just deserts’ approach is a rational approach to punishment, which should be measured by the level of harm caused by the criminal act. Although it privileges the rights and responsibilities of the offender, its arbitrary nature is manifested at the level of implementation, when, as was shown with the difficulties of implementing the 1991 Act, there were difficulties in deciding what ‘just’ punishment was and for whom was it just? As demonstrated in this thesis, the arbitrariness of ‘just’ punishment may result in more punitive sentencing in the climate of penal expansion. Also, it lacks in any consequentialist value and may not provide an appropriate length of punishment for the rules of a ‘reform’ based agenda (Muncie, 2006). Again, despite the progressive nature of ‘reform’, which has similarities with, but has features which make it distinct from Garland’s penal welfarism, at the more manifest level of implementation it has high start-up costs which may not be appealing given the resources available.

It is the anticipation of such dilemmas that can unfold under certain scenarios which future research into politics and criminology need to consider in order to constructively criticise sentencing agendas. This thesis argues that an understanding of the interaction between causal, dispositional and facilitative powers can help to anticipate such dilemmas in particular scenarios.

### **6.3 The Politics of Punishment**

The main finding of this study was that a punitive policy outcome was the result of key players in the legislative field manipulating of the ‘rules of meaning and membership’ of rival dispositions towards a more punitive agenda. Key players were able to justify the use of more punitive sentencing legislation in light of such dilemmas described above and when certain

external events provided facilitative powers for innovation of the dominant disposition. Therefore, it was the relationship between the different levels of power and their corresponding types of power that allowed a punitive policy outcome to occur. This section will describe this ‘ordered relationship’ of the three levels of power and their corresponding types of power (Clegg, 1989). This is followed by how the relationship played out in practice via the manipulation of dispositional rules to achieve punitive policy outcomes.

### 6.3.1 The ‘ordered relationship’

As described above, dispositional power consists of fixed ‘rules of meaning and membership’ of ways of governing crime. This section will describe the relationship between this and other types of power as a means of building an explanation of change and continuity in penal policy making.

Type of power	Description
Dispositional power	Consisting of rules of meaning and membership which adheres members, whilst excluding from others. Dispositional becomes causal when resistance is met.
Causal power	Constitutional-legal powers set by organisation, dictating fiscal and other resources which can force ‘A’ to get ‘B’ to do something when ‘B’ resists.
Facilitative power	External events which can disrupt dominant disposition, causing innovation and empowering of other dispositions.

*Table 3 – Distinguishing Types of Power*

#### *i. Causal power*

Hay (2002) argues that there is an important relationship between actors and the social context in which they are acting, and that this is fundamental to political outcomes. The circuit of causal powers and standing conditions of the legislative arena conceptualise this relationship and provide a framework for how actors within the social context consider the institutional settings they find themselves in and the possibilities/limitations that the settings place upon them in advancing their causes. Causal power is exercised via certain standing conditions that are attached to the organisational position of ‘A’ and ‘B’ to the moment when ‘A’ gets ‘B’ to do

something that ‘B’ would otherwise resist. Therefore, dispositional and causal powers are connected via the standing conditions found within the legislative arena. Clegg (1989) differentiates between the capacity to *have* power and the capacity to *exercise* it. Without resistance, there is no need for power to be exercised. It is the social level of power that provides the conditions through which causal powers can be exercised. Once a dispositional power is formed and adhered to, causal power may be exercised when there is resistance to it – in this way, dispositional becomes causal when it is *exercised* and is identified in the policy outcome. It is the standing conditions of the legislative arena which provide actors with the tools to exercise their causal power, it is only within liberal democracies that these negotiations can take place; “where mandates to govern do not of themselves equip elected administrations with the financial, organisational and informational resources to translate their policy agendas into practice” (Edwards, et al., 2017:309).

It is important to emphasise that dispositional powers are not controlled by specific actors and their individual agency but are a product of collective agency within the policy process. This was evidenced by content analysis of the data when exploring the relationship between the episodic and social systems of power. A key theme of analysis was how the structural and procedural conditions – the standing conditions - of the legislative arena had an impact on policy outcomes. These were highlighted by key actors as being significant obstacles in progressing a Bill through Parliament, as intended by the original authors – normally the Home Secretary at the time.

As the “site of innovatory discussion and intervention of aspects of criminal justice”, key political players frequently expressed their frustrations with the process of getting a Bill through Parliament (Downes & Morgan, 1997:120). Memoirs of key players in the political arena frequently expressed their frustrations with the process of creating legislation and the different “organisations” and “offshoots” of and within the Home Office that they had to contend with (Major, 1999; Blunkett, 2006a:282). For example, in his autobiography, David Waddington referred to advocating the re-introduction of the death penalty during the time that he was Home Secretary, but that he was part of the minority and that chances of restoring capital punishment were “slight” (2012:185) (see section 3.4). Also, in an interview by the Justice Select Committee with the then Home Secretary, Jack Straw talked of how he would prefer to have less people in prison but that approach did not conform to the dominant political strategy of the time which was to ‘protect the public’ (see section 5.3.2). This demonstrates

how dispositional powers are not reducible to individual actors, even when they hold a politically powerful position such as Home Secretary. Instead, dispositional powers restrain individual actors into fixed meanings about how to govern the problem of crime, which are based on collective agencies of actors in the legislative arena.

Although there is room for acumen and slight adaptations to the rules of dispositional powers (discussed below), success in achieving this is dependent on facilitative powers on the systemic level. Without the disruptive nature of facilitative powers, social integration prevents individual political actors from altering a disposition without incurring some political damage such as the loss of support from members of the disposition that an actor might be trying to move between. This exemplifies the difference between having power and the capacity to exercise it. Even though the Home Secretary had ‘causal power’ – the capacity - they were not always able to exercise it effectively due to contradictions with the dominant dispositional power.

#### *ii. Facilitative power*

Whilst the nature of dispositional power generates conservatism and the avoidance of change, resulting in what DiMaggio & Powell (1983, *in* Edwards, 2016:252) call ‘institutional isomorphism’, events and conditions outside of the legislative arena, in the broader policy environment, have the power to disrupt or empower certain dispositional powers. This type of power can answer Garland’s (2013:476) call for developments in the study of penal policy as being “in the context of the problem environment in which penalty operates rather than as an independent policy domain”. This study has used Clegg’s systemic level of power to consider the ‘problem environment’ as being a set of external environmental contingencies. These include technological breakthroughs, political or economic crises, highly publicised criminal events and general incidents of considerable political controversy.

It is this type of power which avoids reductionism of a ‘Westminster-centric’ approach of political processes and events because analysis includes external events and conditions which reflect political, social and cultural contexts within which they are played out and how they are linked with the “criminological and political ideas that relevant actors implicitly or expressly mobilise and tussle over” (Loader & Sparks, 2004:11). Thus, the extent to which political actors could manipulate rules of the dominant dispositional power are not only dependent on

the standing conditions, and their institutional position in the legislative arena, but also on environmental contingencies that were external to Westminster. For example, section 3.5.1 and 4.4.1 highlights the effects of serious crimes, subsequent media attention and potential public scrutiny of the Government's crime control strategy. The murder of James Bulger in Chapter 3 as well as the murders of Sarah Payne, Jessica Chapman and Holly Wells in Chapter 4 had similar effects of successfully justifying tougher sentencing policies by the leading Conservative and Labour Governments at the time. Also, section 5.4.1 identified the economic recession of 2009 as being a significant restraint on the punitive agenda of the Labour Government, and which resulted in plans of larger, more austere prisons being postponed. The threats of political vulnerability and financial restraint posed by these external developments and the impact this had on forthcoming policy was recognised by the utilisation of a facilitative type of power and how exogenous conditions disrupt or empower certain dispositional powers.

### **6.3.2 Changes and continuities**

It is acknowledged that a shift towards punitive sentencing legislation occurred in England and Wales between 1990 and 2010 due to the increasing politicisation of penal policy and political parties attempting to 'out toughen' the opposition parties (Downes & Morgan, 1994; Downes 1999). Even so, understanding *how* this punitive policy agenda prevailed over rivals matters for developing the political analysis of crime and punishment in liberal democracies. As such, the thesis acknowledges the astuteness of political actors in mobilising disruptions in the policy environment to challenge the agendas of their rivals. Through this analytical approach it is possible to identify how Home Secretaries were able to re-work some of the provisions of legislation to suit their agenda when encountering the political dilemmas described above, whilst nonetheless being constrained by their commitments to particular concepts of risk and justice. The remainder of the chapter discusses the key changes and continuities arising from this analysis of dispositional power in contemporary penal policy in England and Wales.

#### *'Just deserts' to 'punitive' dispositional power*

Chapter 3 evidenced a significant shift in the dominant disposition from 'just deserts', (evidenced by the Criminal Justice Act 1991) to a 'punitive' disposition (evidenced by the Criminal Justice and Public Order Act 1994 and Crime (Sentences) Act 1997). Analysis of the policymaking process of each of these Acts evidenced a change in the 'level' of punishment, as well as 'objectives', 'methods' and 'rationalities' of the types of punishment being



implemented in policy outcomes. The use of dispositional power provided an empirical and observable shift in the decisions being made by key actors during this time, and how specific external events, including the murder of James Bulger, increasing crime rates and a political attack by the Labour party empowered a 'punitive' disposition in the legislative arena. Notwithstanding the 'watering down' effects of the 1997 Act by the House of Lords, the Chapter discussed how Michael Howard succeeded in implementing policy outcomes that resonate with claims of the punitive turn thesis. Tougher sentencing policies and austere prison regimes were introduced and there was evidence of a shift towards 'governing through crime' as issues that would have previously been considered under the aegis of social welfare, were to be dealt with by the criminal justice service (Simon, 2007).

#### *Continuation of punitive policy outcomes via 'risk'*

The net-widening effects of a shift from social welfare to criminal justice approaches intensified during New Labour's two terms. Chapters 4 and 5 discussed the developments of New Labour and their complex political strategy of triangulating crime control strategies in order to reduce the level of political competition faced within the legislative arena. This triangulation evidenced a continuation of penal policy outcomes of Howard's 'Prison Works' agenda, but via the manipulation of a new concept of 'risk' and accompanying objectives of 'reform'. A fresh focus on 'criminogenic needs' emerged, resulting in the belief that 'risk' was a dynamic and changeable characteristic of an individual. Despite the long-term effectiveness of such a strategy, New Labour satisfied immediate, apparent popular sentiment for harsher sentencing, favouring expressive styles of justice over instrumental effectiveness. In this way, although risk management provides a distinct framework of principles for punishment, its application during the Labour administration evidences a continuation of expressive, populist, punitive policy outcomes but which were augmented through a 'risk' disposition. Also, despite initial investment in methods to tackle 'criminogenic needs' of offenders during custody, the 'reform' disposition was subtly neglected by New Labour. The Chapter evidences how the co-evolving dispositions restricted New Labour's political strategy, but how key actors were able to manipulate penal policies which adhered to such dispositions, as well as meeting popular sentiment.

### *'Punitive' and 'just deserts' dispositions*

Labour's third term in office was disrupted by an economic recession in England and Wales in 2009. There was a shift towards more 'punitive' strategies which resonated with methods of incapacitation and plans to build larger prisons. Larger prisons were justified by the need to protect the public, and to reinforce Labour's sovereign strength, similar to Michael Howard's 'Prison Works' agenda and a 'punitive' disposition. Evidence of this disposition was identified by the use of community penalties as techniques of shaming offenders.

However, the highly expressive and symbolic methods of punishment co-existed with a resurgence in the proportionality principles of a 'just deserts' disposition. The IPP sentence was amended to restrict the use of the provision in court to more serious offences and attempts were made to buffer political interference via a new Sentencing Council implemented a year later. These changes reflect the co-existence of theoretically contrasting 'punitive' and 'just deserts' agenda, which was explained via causal and facilitative power. Wider environmental concerns of an economic recession, which constrained a 'punitive' disposition also empowered a 'just deserts' disposition as a tool to amend punitive policy outcomes and to accommodate for measures of austerity. In this way, changes to environmental contingencies resulted in a disruption of Labour's political strategy.

Consequently, the empirical chapters highlighted changes and continuities of dominant dispositional powers in the policymaking process. A 'punitive' disposition was evidenced, but was always resisting, negotiating with and co-existing with other dispositional powers. These chapters not only demonstrate the complexity of the policymaking process, which has not been considered by other methods of political analysis, it highlights the contingent nature of dispositions, due to the political dilemmas attached to them and how they are manipulated by key actors in the policy process within the wider policy domain.

## **6.4 Implications of this study**

The remainder of this chapter will discuss what these findings imply about punitiveness and how it can be conceptualised in future studies of penal policy making. This is inherently related to the methodological implications for the study of change and continuity in this policy area, particularly a more empirically grounded approach to policy process. Lastly, policy

implications are suggested which involve the anticipation of policy dilemmas and their prerequisites described above in constructively creating sentencing agendas.

#### **6.4.1 Theoretical and methodological implications**

The theoretical and methodological implications of this study are intertwined. The former can only be explained in light of the methodology used.

Chapter 1 reviewed the claims of the punitive turn thesis. Proponents of this thesis were discussed in light of their approach to explaining how a punitive turn has occurred in Western liberal democracies since the 1970s. Such explanations were grounded in either accounts of discourse and political rationalities of what the crime problem is and subsequent solutions to it, or structural accounts of a new state formation of a 'security state' which resulted in neoliberal features impacting on criminal justice. These accounts do not consider the political competition that produces change but also continuity in penal policy. They imply that punitiveness is inevitable and an immutable outcome from shifts in deep-seated social, political and economic forces. This study evidences the contingent nature of punitiveness. Rather than being an artefact of a security state or a consequence of a neoliberal political rationality, this study suggests that punitiveness is the result of a combination of structural relations and agentic opportunities within the political process and the context of political competition.

A means of conceptualising this political competition is in terms of different dispositions about risk and justice which bind the actors in this policy process into rival groups. This competition can, in turn, be empirically investigated, in the first instance, through the kinds of exchanges that occur in legislative arenas, such as the House of Commons and which are recorded in its minutes, Hansard. This verbatim record of competition in the legislative arena can, in turn, be complemented by reference to other empirical sources, such as the autobiographies of key actors in this arena (such as Home Secretaries) and qualitative interviews with key informants about, for example, what issues were brought to the arena in the first instance or, crucially, those that were 'mobilised off the agenda'. Even so, the principal focus of this thesis was on that political competition that could be directly observed in the legislative arena and what this tells us about the importance of dispositional power in enabling and constraining this competition.

This is a starting point in developing a theory of political competition in the penal policy process which could, in future, be further developed through more systematic qualitative interviewing of policy actors in the legislative arena but also in the wider policy environment. This was beyond the remit of this thesis and not a prerequisite of substantiating its core analytical claims about the existence and importance of political competition in explaining the formulation of penal policy. Even so, future research can further extend the scope of this political analysis to encompass the role of key actors in the policy environment such as pressure groups (including prisoners and victims rights advocates) and media correspondents. There is also an opportunity to extend this analysis of political competition beyond the legislative arena and into a study of the implementation and outcomes of penal policy: a study of penal policy ‘in action’.

Acknowledging the contingent nature of punitiveness moves away from the ‘criminologies of catastrophe’ by opening up possibilities for change (O’Malley, 2000). Rather than punitiveness being immutable, and therefore being unchangeable by intention, having a more in-depth understanding of such contingencies suggests that future change and continuity is dependent on particular moments in the legislative arena. Understanding the dilemmas of the different dispositions highlighted in this and future studies allows for more control over future legislation, rather than being pre-determined by a structural formation or reduced to political agendas set by individual agents. Conceptualising political power as Machiavellian strategic negotiation can be understood as being organised through dispositional power. This concept of power as the negotiated outcome of political competition implies that different agendas for risk and justice in penal policy making, and their concomitant ‘dispositions’, could be facilitated by shocks in the broader environment of this policy.

### *Structure and agency*

Margaret Archer’s concept of structure and agency, described in Chapter 2, illustrates how social reality can be understood by regarding structure and agency as separated by connected elements. The interplay between the structure of the legislative arena and the agency of political actors within it is explored via dispositional and causal types of power. Whilst dispositional power allows for the abstraction of social rules of meaning and membership which combines collective agency together, causal power explains how this agency is played out in practice via the actions of individual agents and the roles and constitutional-legal resources that they have

within the structural relations of Westminster and the legislative arena. In this way, structure provides the conditions for action rather than determined it. “Structures have a conditioning influence on the projects (Parliamentary Bills) that can be formed in a given social context (legislative arena)” ((added) Danermark et al., (2010:86). Subsequently, action transforms, or in this case, reproduces the structure that provided the conditions for action for the next generation of actors. In this way, a critical realist approach was adopted that allowed an emphasis on the interplay between structure and agency, rather than reducing one into the other or ignoring either completely. Avoiding the reductionist element of the literature described in Chapter 1, this study has suggested a method that could be used for future research by exploring continuity and change in crime control measures.

### *Historical analysis*

Archer’s central argument is that the interplay of structure and agency can only be understood over time. Based on the propositions that “social structure *precedes* in time the actions that lead to its reproduction” and “structural elaboration occurs *after* the actions that give rise to it”, an amount of time needs to have passed in order to understand the dynamics of the interplay. A case study of the past provides a framework of time in order to understand how the interplay has impacted on penal policy outcomes. Conducting historical analysis of a twenty-year time period allowed such interplay to be investigated, with reference to the structure and organisation of the legislative arena preceding and constraining action in the form of dispositions and how such action - in this case, continuity and change in penal policymaking - reproduced it. Avoiding ‘presentist’ approaches of applying present labels and their significance to past events, this thesis demonstrates the benefits of historical analysis and the need to understand the nature of social continuities and change in the phenomena in question, which explain the relevance of concerns and issues in the context of that time period. The interplay of structure and agency helps to understand how historical changes and continuities in sentencing legislation have developed into legislation of the present day, with an appreciation of the historical significance of concerns in crime control.

### *Political analysis in criminological studies*

Another implication of this study is the importance of political analysis in criminological studies. Chapter 1 described the emergence of political analysis in criminology and subsequent reluctance by more recent criminologists to include the political process in explanations for

methods of governance. With the different conceptions of what constitutes political analysis in contemporary criminological and penological research in mind, the specific contribution of this thesis is to advance a political analysis of the competition that generates penal policy in particular historical contexts rather than a political analysis with regards to this policy as an epiphenomenon of either political rationalities or state functions. This study evidences the need to bridge the gap between criminology and political analysis as a way of meeting Garland's (2013:475) demands for more detailed studies of 'proximate causes' in understanding change and continuity by addressing; the 'structure and operation of the penal state', which he refers to as "the governing institutions that direct and control the penal field" and; to appreciate penal policy in the context of the 'problem environment' rather than policy outcomes being independent of it. With the use of Clegg's framework, I argue that the former refers to the episodic system of causal powers and the power of agents within the institutional setting of the legislative arena and the various standing conditions that generate such agentic power. The latter is dealt with via the systemic circuit of facilitative powers and which avoids the reduction towards a 'Westminster-centric' model of analysis. The use of this type of power considers what Garland asks for in future research – "that policy should be located within the problem environment in which it operates" (2013:487).

Clegg's (1989) framework provides a systematic approach to the messy and complex systems within Westminster. Hidden in plain sight, these political processes have a significant and, until now, an overlooked part to play in policy outcomes. This new theory of politics emphasises the different levels of power at play, which evidences Clegg's (1989), and more recently Edwards (2016:256) claims of a multi-centred governance. Power as "strategic and relational rather than sovereign and proprietorial" opens up new avenues of political analysis at the level of 'decision-making' (and naturally integrated 'talk') and to provide a method to understand how dominant dispositional powers overcome resistance in other places and at other times.

#### **6.4.2 Policy implications**

As described above, a better grasp of the causal mechanisms of change and continuity opens up the possibility for changing that which is believed to be less effective regarding criminal justice. Acknowledging political dilemmas of different dispositions and how these effect policy outcomes can result in ultimately more effective policy agendas which can overcome such dilemmas. A better understanding of such dilemmas in a particular context can lead to intended

outcomes, rather than using ‘hindsight’ as a means of measurement. Instead, the anticipation of instrumental and moral dilemmas described above can result in a more constructive agenda for future sentencing legislation. Policymakers can learn from the intricacies of the decision-making process and how to develop more effective sentencing agendas and distinguish this effectiveness between symbolic and instrumental. This thesis suggests ways in which policymakers can critically assess agendas in the context of political competition and the dilemmas of dominant dispositional powers.

## 6.5 Conclusion

In conclusion, the core contribution of this thesis is a theory of political competition that generates penal policy in particular historical contexts, and the centrality of dispositional power to this theory in articulating how a tendency such as a ‘punitive turn’ can be empirically investigated. The use of dispositional powers allows for empirical observation of concepts of risk and justice, thus providing a starting point in explaining how countertendencies can co-evolve alongside one another, despite contrasting in the methods and objectives of punishment that each tendency advocates. Theoretically, a contribution of this thesis is in illustrating how punitiveness is not the inevitable and immutable outcome from shifts in deeper-seated social forces that proponents claim. Rather, the use of dispositional power and the interactions with facilitative and causal power suggest that punitiveness is contingent on procedures, structures and agencies of the policymaking process – the politics of punishment.

As introduced in section 1.4, this thesis argued that penal policy is an emergent outcome of processes of political competition, rather than an epiphenomenon of political rationalities or state functions. To understand this, it has been necessary to draw upon cognate developments in political analysis that understand this competition in terms of established agendas that actors seek to maintain and perhaps develop in response to rivals who, in turn, seek to reform or even transform these agendas. In this way, the continuities as well as changes shaped by this competition can be better acknowledged and the homogenised imagery of the singular punitive turn better avoided. In doing this, the thesis has drawn upon distinctions between causal, dispositional and facilitative power (Clegg, 1989) and the concomitant concept of multi-centred governance (Edwards, 2016) to develop a middle-range theory of political competition.

In the particular historical context of England and Wales, this thesis identified key moments of continuity and change in sentencing legislation which reflect dominance, competition and co-evolution of dispositions. A 'just deserts' disposition that was responsible for the Criminal Justice Act 1991 was quickly replaced with a 'punitive' disposition in the form of Michael Howard's 'Prison Works' agenda and the Crime (Sentences) Act 1997. Notwithstanding the resistance that this disposition came up against (section 3.8.1), this policy shift evidences the co-existence of 'just deserts' with a 'punitive' disposition in the legislative arena, thus indicating a significant change in penal policymaking during this time. Following onto the next administration, New Labour implemented a triangulation of crime control strategies, reflecting a disruption to the 'just deserts' disposition and a replacement of co-existing dispositions: 'punitive', 'restorative justice' and new concepts of 'risk'. The latter was used to augment a punitive agenda which was strategically different to Howard's raw punitiveness. Whilst 'restorative justice' remained in the margins, a continuing shift towards punitiveness was achieved. This agenda continued into the latter years of New Labour's administration, via the co-evolution of emerging concepts of 'risk' and 'reform', resulting in a significant rise in the prison population. Thus, the presence of these dispositions suggests that headline developments used to illustrate a 'punitive turn' in England and Wales (tougher sentencing legislation and a rise in the prison population) was due to the dominance of co-evolving 'risk' and 'reform' dispositions in this particular historical context – rules of meaning and membership which result in the same excessive outcomes as a punitive disposition, but are justified by a more rational approach based on new concepts of risk and justice.

The use of dispositional power enables the thesis, and future studies, to empirically investigate influential agendas in the policy process at a particular time. This theory of political competition provides a method of understanding change and continuity, with an appreciation of co-evolving agendas and how they bind key actors in this policy process into rival groups. Through exchanges that occur in legislative arenas, a verbatim record of competition can be directly observed. Causal and facilitative powers are useful in understanding how dispositions dominate and recede over time, providing a way of empirically investigating political competition in the policy process and wider policy environment. Limitations of this contribution as it currently stands include limiting an analysis of political competition to the policy process, with limited knowledge of the mobilisation of bias pre-empting some dispositions about risk and justice even getting into this arena. As a starting point in developing a theory of political competition, future research can further extend the scope of this political



analysis to encompass the role of other key actors, as well as into the study of the implementation and outcomes of penal policy: the study of penal policy 'in action'. In this way, limitations could be addressed and produce a cumulative knowledge about the political competition in creating penal policy.

## Chapter 7

### Conclusion

#### 7.1 Main findings

The punitive turn thesis has become a prominent phenomenon within criminological literature and the sociology of punishment. Observers have documented a trend of increasing levels of punishment in Western liberal democracies since the 1970s and the ‘decline of the rehabilitative ideal’ (Allen, 1978). Punishment has been associated with new meanings, which reflect an increase in the level of tolerance for the suffering of a deviant, and a decrease in tolerance for criminality and victimisation. Historical methods of punishment, which were characterised by transforming the offender via “productive, restrained and rational” techniques, have a new purpose and character in the modern era (Foucault, 1977 *in* Pratt, et al., 2005:xii). Punishment has become a wasteful and excessive phenomenon with little attempt at reforming the offender back into society. Rather, the purpose of punishment is to exclude the deviant from the rest of society via methods of public humiliation and containment in custody. The abandonment of long-standing limits to punishment are accompanied by a language of condemnation, an emphasis on expressive justice and emotive sentiments (Garland, 2001).

This multiple-embedded case study has attempted to contribute to the debate on the punitive turn thesis. The study has drawn on empirical evidence via an investigation into sentencing policy in England and Wales between 1990 and 2010, in order to either support, dismiss, or adapt the claims of the punitive turn thesis. A focus on the decision-making processes of sentencing legislation highlighted how there was a significant amount of competition and negotiation during the progress of the Bills in Parliament. Punitiveness, as described by advocates, was one of many different dispositions being adhered to, when sentencing legislation was being formulated.

With this in mind, Clegg’s *Circuits of Power* framework was adopted as a method of articulation in identifying the different ‘camps’ within the legislative arena. Clegg’s concept of a dispositional type of power allowed a sense of what punitiveness might look like in ‘real’ terms. This type of power is characterised by the rules of practice and meaning of membership,

which adheres key players to behaving in such a way, as well as excluding those who do not conform. The identification of other dispositional powers reinforced Clegg's conceptualisation of power being produced and reproduced within a circuit of multi-centred governing arrangements. Social change occurs when there is a change in the positioning of dispositional powers within the legislative arena. This is explained by Clegg's episodic and systemic types of power, which refer to the duality of structure and agency at the level of organisation. Episodic types of power explain the agency of individuals within governing arrangements, and how 'A' can make 'B' do something that 'B' otherwise wouldn't have done. Systemic types of power refer to the external contingencies which can disrupt or empower the rules of practice of a disposition, such as technological developments, national events and economic crises. Thus, in a circuit of power of multi-centred governing arrangements, questions included:

- Is the punitive turn 'real'?
- If it is a 'real' phenomenon, what are the conditions of its existence?
- What have been the counter, co-existing tendencies within England and Wales sentencing frameworks? To what extent and in what ways is there empirical evidence of countertendencies to 'punitiveness' within the political competition over penal policy?

Based on the claims made by the punitive turn thesis, open codes were created to identify an increase in the level of punishment, a change in the objective and method of punishment and a change in the rationality, or justification for punishment. These codes were developed into a diagnostic tool to help differentiate between the 'rules of meaning and membership' which integrate political actors into a disposition on penal policy. The 'rules of practice' which fix the 'meaning of membership' were deduced from a deconstruction of existing literature on the punitive turn thesis and which provided the structure to identify rival dispositions which were induced from analysis of the empirical data.

The empirical chapters were divided by main developments identified during data analysis. Chapter 3 discussed the developments of three criminal justice acts during the Conservative government led by John Major, between 1990 and 1997. The Criminal Justice Act 1991 illustrated the influence of a just deserts dispositional power. A sentencing framework was based on an increase in the level of punishment proportionate to the seriousness of the crime

committed. Deterrence was viewed by the framers of the 1991 Act as an ineffective method of reducing crime, and thus was not a justification of punishment. Prison was seen as a last resort for offenders who had committed a serious or dangerous crime and alternatives to custody were encouraged with the purpose of punishment not only of a retributive nature, but co-existing with reforming the offender by reintegrating them into society.

The utilisation of Clegg's 'powers of change' identified changes in the environmental contingency, shaped by significant criminal events and Conservative Party scandals. This enabled the Labour party to politically attack the Conservative government and to introduce their own law and order agenda of being 'tough on crime, tough on the causes of crime'.

The chapter continued with an analysis of subsequent acts of the Conservative leadership – Criminal Justice and Public Order Act (1994) and the Crime (Sentences) Act 1997. These Acts and the surrounding documentation provide evidence to show how the just deserts model of sentencing was disrupted and replaced with new rules of practice resonating with the punitive turn. The Acts introduced new crimes, extended sentences for existing crimes and re-positioned the prison into the centre of crime control discourse. Howard's 'prison works' agenda justified an increase in the quality and quantity of punishment by a new belief in the effectiveness of deterrence. The purpose of punishment had shifted from reforming the offender to containment, in order to protect the public.

However, the chapter concludes that these punitive provisions did not equate with an accomplished punitive state, due to the competition and negotiation faced by adherents to a just deserts dispositional power. Due to the complexities of the political process, which has not been considered by advocates of the punitive turn thesis, many of the punitive provisions were disregarded by sentencers.

Chapter 4 discussed the findings of the first two Labour governments, between 1997 and 2005. The units of analysis were the Crime and Disorder Act 1998 and the Criminal Justice Act 2003. Relevant provisions of the 1998 Act revealed a new political strategy adopted by Labour. A triangulation of different approaches to crime were identified, including punitive, reformative, risk based and restorative practices. These rules of practice continued into the second term, evidenced by the 2003 Act. Punitive policy outcomes were due to a hybrid of risk and reformative based rules of practice. Developments in the concept of risk as dynamic and

changeable were fused with Labour's attention to the social causes of crime. Longer sentences were justified on the basis of reforming the offender by targeting their 'criminogenic needs', which could be improved by rehabilitative interventions in custody. The chapter provides an explanation for the punitive policy outcomes of the Labour administrations, which highlights important nuances and complexities of penal policy formation and implementation. The difference between intentions and outcomes were revealed, as well as illustrating the slippery nature of punitiveness and the sweeping assumptions it has made about the use of custody.

Chapter 5 concludes the findings chapters with analysis of the last of the Labour governments, between 2005 and 2010. This chapter revealed another disruption to the dominant dispositional power, of the hybrid of risk and reformatory dispositions. Clegg's concept of facilitative powers illustrates the significance of the economic crisis at the time, which, during the same time as the consequences of the overuse in the IPP sentence was recognised. This facilitated cheaper methods of punishment, with more progressive rules of practice including restorative justice. However, this co-evolved with the development of larger prisons in order to resolve the problem of prison overcrowding. The constraints on fiscal resources disrupted the commitment to reforming the offender in custody due to its need for intensive resources.

## **7.2 Reflective comments**

Despite concerns of validity when conducting research on politics (see section 2.6), the data gathered generated a level of confidence in the findings. Political memoirs were an unexpectedly rich source of data and, due to the fact that they were written after the author had retired from the political field, there was less reason to question the reliability of the narratives being described. The triangulation between different sources of data gives the findings of the thesis a significant level of validity. Secondary interviews with key players consistently corroborated the narratives of Parliamentary debates, which was again reinforced by autobiographies and media articles describing political and penal developments at the time.

However, there were limitations of the thesis, provoking thought and potential questions for future research in order to complement this thesis.

### *Volume of secondary data*

An aim of this thesis was to develop a more in-depth understanding of changes and continuities in sentencing legislation, in order to corroborate or dismiss the main claim of the punitive turn thesis that there has been a change in penalty in England and Wales. The nature of this aim meant that the case study had to be on a significant length of time. However, the length of time chosen, and the amount of empirical evidence gathered, hindered the level of detail that the research could achieve. Achieving familiarity with the data was difficult due to the volume of data which was available and considered relevant. The amount of data surrounding the six flagship criminal justice acts was, at times, overwhelming and the length of time chosen for the case study meant that some potential findings could have been overlooked.

### *Lack of primary data*

Further limitations of the thesis are due to the methods used. For example, the original intention of the study had been to undertake a much larger number of primary interviews with key players of the administrations under investigation. However, due to the limited resources of a self-funded study, the time and cost of accessing and interviewing so many participants could not be accommodated. Some interviews were conducted at the beginning of the research period. However, it was realised that there was little information given that had not been gathered using other sources of data, for example autobiographies, published speeches and interviews. The value of the data collected was limited to how it could be triangulated with other sources of data. Although there were a few valuable pieces of information from one or two interviews, other interviews became obsolete due to the lack of new information collected. The time spent setting up and conducting interviews could have been spent more effectively on secondary sources including the analysis of Parliamentary debates. Due to the number of years included in the case study, there was a sheer amount of volume of data needed to conduct this study. The resources needed to conduct primary interviews were not worth the data collected on most occasions. Due to the volume of data needed, secondary data in the form of government documents, Parliamentary debates and particularly autobiographies of political players were easier to collect and were rich in information.

### *Other claims of the punitive turn thesis*

As described in section 1.2.1, there are many claims of the punitive turn thesis. Focussing on sentencing legislation placed limitations on what the research could investigate. For example, due to the nature of qualitative method, claims about the criminal justice system targeting the poor and disadvantaged could not be investigated (Wacquant, 2001). This could involve a focus around the 'emancipatory effect' of punishment which is embedded in the debate of a punitive turn.

Also, the thesis has a narrow focus of analysis of Parliamentary processes which have led to specific legislation. This thesis has not accounted for other dimensions of policy process such as policy 'talk or 'action' (Pollitt, 2001). However, this narrow focus is justified on the basis that it is a significant dimension in understanding the context in which policy is formulated. A focus on decision-making processes resulted in the empirical analysis of Parliamentary debates which, in turn, highlighted the underappreciated context of policy formulation as being underpinned by politics. The politics refers to the capturing of rival competition in an empirical way in terms of what was being contested and resisted politically and how policy overcame such competition and co-evolving dispositions. This cannot be achieved without investigating this dimension of politics. Therefore, a focus on decision-making processes allows the analysis of dispositional powers and how the context in which policy is formed results from political competition. An understanding of how these dispositional powers interact with the causal and facilitative powers can shed light on the mechanisms which disrupt and empower such dispositions in explaining change *and* continuity of penal policy outcomes.

### *Future research questions*

As with the nature of any research, this investigation raised more areas for investigation. Due to the analysis being based on the recent past, rather than the present, it would be interesting to use the same methodology on the current government. This would present an argument about how current governing arrangements can be explained by the punitive turn thesis and bring the research up to date.

Despite the limitations of the study pertaining to the length of time investigated, although this length of time is justified via the aims of continuity and change, the findings of this thesis could

be complemented by more in-depth studies of decision-making processes of particular Acts and their relevant sections.

Another research question which could complement this and other research into the political economies of nation states (such as Cavadino & Dignan, 2006; 2007; Lacey, 2008) would be a comparison of different political economies and how dispositional powers found within each legislative arena compares with the UK.

The focus of this thesis was on decision-making processes of sentencing legislation. Thus, there is a considerable amount of legislation not investigated which could account for a punitive turn, or otherwise, such as procedural, evidential and preventative aspects of crime control policy. Initial investigation into the rise in the prison population flagged a number of important reasons for the rise. Although sentencing legislation played a significant part, other reasons included the use of sentencing legislation in court and the attitude of sentencers. Thus, although this has been partly addressed at times during the thesis, a separate analysis of sentencing legislation at the level of 'action' would complement this study.

### **7.3 Implications of the study**

The implication of this study is how it demonstrates the need to reconnect the study of crime to the study of governance and, within this broader programme, to acknowledge and understand the central role of political competition in driving the social reaction to crime.

Rather than being subdued into the terms of the punitive turn argument, a critical perspective has shed light on the nuances and complexities of penal policy and the political context which results in certain policy outcomes. This thesis suggests that the political context can be empirically investigated via the interaction between different types of power which make up the 'circuit of power' (Clegg, 1989). These types of powers and their interaction encapsulate the context of the decision-making process, which has, thus far, been underappreciated by the broader, macro level approaches to understanding crime control strategies.

The interaction between the systemic, social and episodic types of powers highlights an inherent feature of the political context - resistance and competition. It is this resistance which can explain how 'volatile and contradictory' approaches to crime control can exist within the



same context of the legislative arena (O'Malley, 1999). Also, the interaction between the different types of power highlighted in this thesis can result in policy outcomes overcoming such competition and producing the legislation that was investigated during this study. By defining the dispositions which were found in the data, and which are already used by social scientists, they provide the means for diagnosing the complex nature of sentencing legislation, namely the consequence of political competition and negotiation which occur in governing arrangements.

Therefore, the role of political competition needs to be investigated more within studies of criminology. This thesis has suggested a methodological way in which this can be achieved, and which provides a more accurate understanding of how continuity and change of these social reactions can occur within the arena of legislative assemblies, such as Westminster. The thesis also accounts for extra-Parliamentary processes of pressure group politics and mass media constructions of crime problems and how environmental events external to the legislative arena can affect reactions at the level of decision-making processes. By appreciating the interaction between; organisational processes of the legislative arena, agentic powers of key actors, social powers which adhere key actors to fixed rules of practice of how to govern crime and exogenous events which can disrupt and facilitate such rules, this thesis provides a more grounded approach to understanding continuity and change.

As Garland (2013:484) observes, not all social and historical processes result in changes in penalty. Such changes are directly due to state action: legislative changes made to sentencing laws and actions of legal decision makers. These "proximate causes" are "causally determinate in ways that are obvious but that tend to be overlooked". This methodology has not only explored the 'proximate causes' of policy making, but it avoids the reductionism of a singular approach to either structure or agency. It avoids the reductionist explanations of policy decisions to the agency of key political players involved and the deterministic nature of state formations and their apparent functions. Rather, it highlights the interaction between structure and agency via the three circuits of powers discussed here. Chapter 6 discussed this interaction via the main themes of the findings chapters and how such interaction resulted in certain policy outcomes.

In this way, punitiveness is not beyond the political process. It is not inevitable or immutable as such authors of the punitive turn suggest but emerges from contextually shaped political

competition. Like other crime control approaches, it is contingent on certain mechanisms within the legislative arena as well as environmental contingencies. It is the relationship between 'proximate causes of' internal structures and external changes that need to be considered in future research.

Further research might explore these other empirical foci for studies of political competition over crime control, including other criminal justice agencies and institutions such as metropolitan policing agendas, sub-national arenas of urban security strategies, as well as comparative studies of national agendas and public safety regimes within the community. It can also contribute to existing literature on political economies and the institutional structures, features and processes which distinguish political economies from others. An understanding of institutional structures would be complemented by an investigation of the interaction between different types of powers involved in the decision-making process.

Thus, a more rigorous empirical study of political competition over crime control can advance criminological thought by providing a more accurate understanding of how continuity and change occurs within the context of political processes and legal institutions; how these interact with social and cultural values of crime control and how exogenous contingencies create the problem of crime. Criminological research needs to grapple with political analysis and have a more accurate understanding of the politics – resistance and competition – that contextualises continuity and change in penalty. This thesis provides a way of empirically and methodologically approaching this gap in criminology.

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Senior Research Assistant at the Centre for Criminology, University of Oxford – David Faulkner

Secretary of State for Justice - Jack Straw

Minister of State for Justice – David Hanson

President of Prison Governors' Association – Paul Tidball

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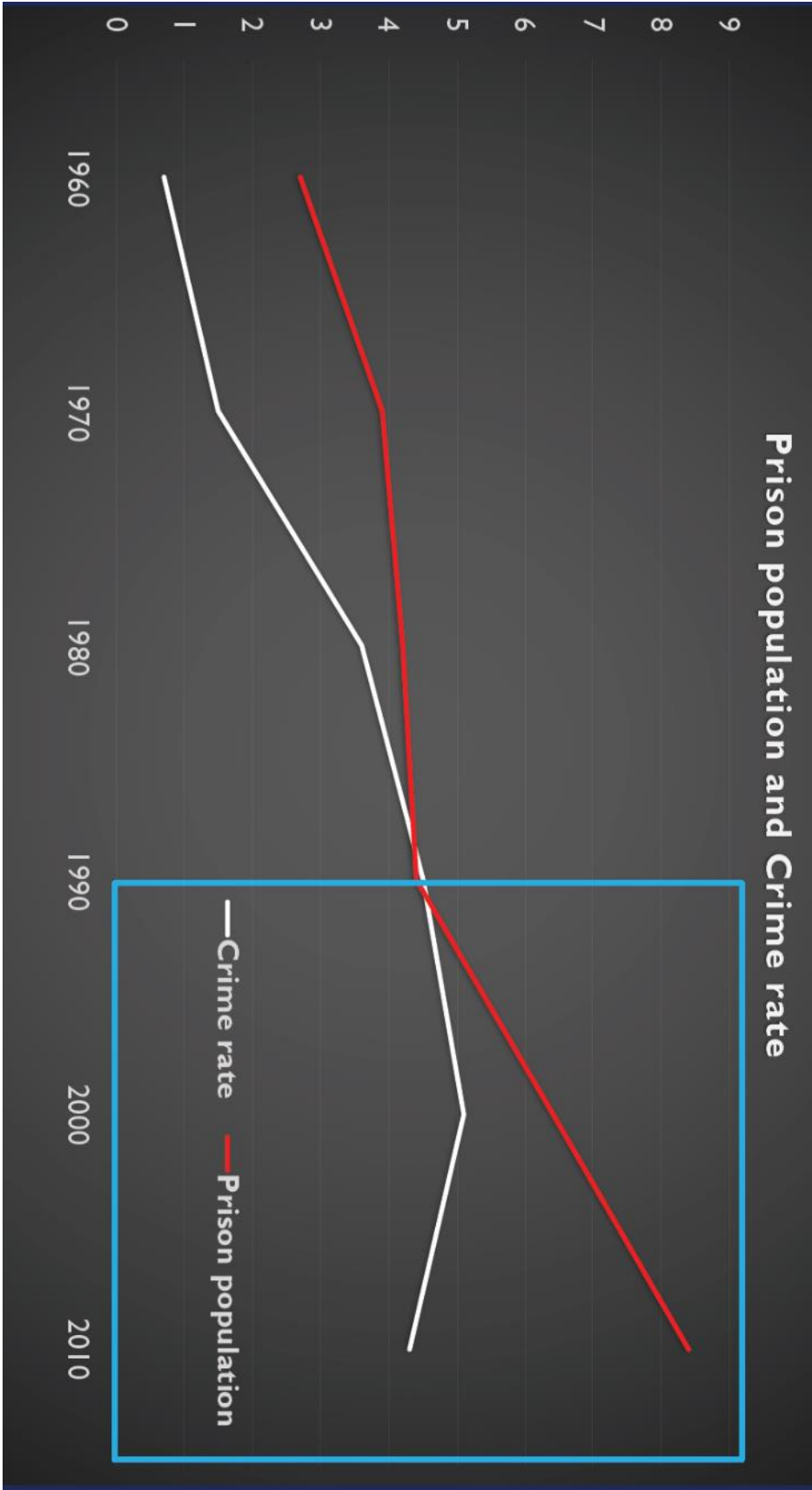
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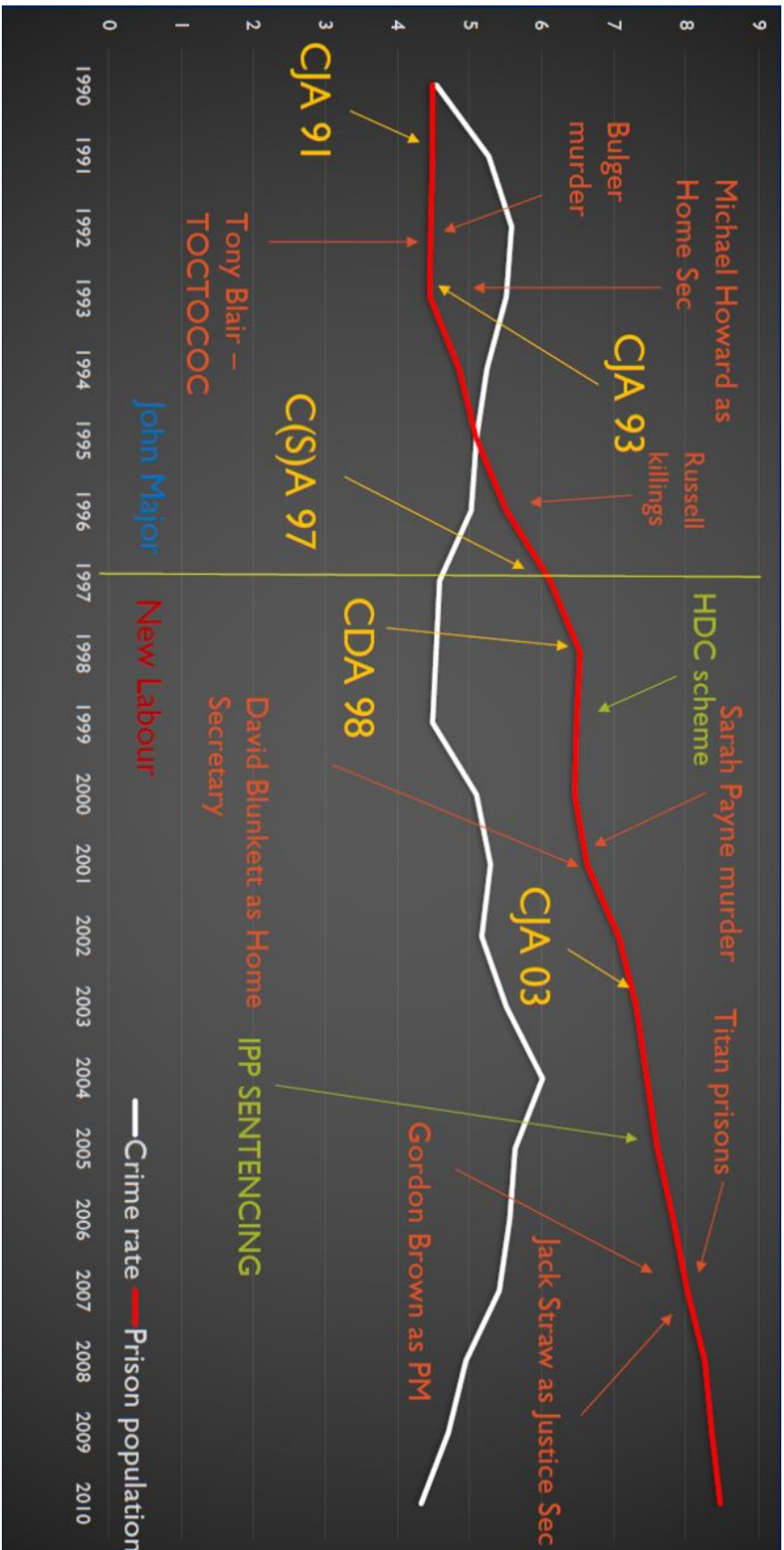
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Appendix I





## Appendix II

<b>CRIMINAL JUSTICE ACT 1991</b>			
<b>SECTION</b>	<b>CHANGES MADE</b>	<b>SCORE</b>	<b>EXPLANATION</b>
<b>PART I: POWERS OF COURTS TO DEAL WITH OFFENDERS</b>			
1.Restrictions on imposing custodial sentences	2)Subject to subsection (3) below, the court shall not pass a custodial sentence on the offender unless it is of the opinion—  (a)that the offence, or the combination of the offence and one other offence associated with it, was so serious that only such a sentence can be justified for the offence; or  (b)where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from him	1	Restricting the use of custody to be a last resort
2. Length of custodial sentences	(2) The custodial sentence shall be—  (a)for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with it; or	1	Just deserts. Restricting length of custody to what is commensurate with the seriousness of the crime
2. Length of custodial sentences	(b) where the offence is a violent or sexual offence, for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender	3	Not included under the just deserts framework due to the protection of the public justifying a longer sentence
6. Restrictions on imposing community sentences	Community sentences are not to be passed unless the crime, or crimes, are serious enough to warrant such a sentence. Aims of sentence are dictated by what the offender is in need of  New type of community sentence:  (4) In this Part “community order” means any of the following orders, namely—  (a) a probation order;	1	Community punishment is given if commensurate with the seriousness of the offence – just deserts  The type of order given is determined by other aims of

	<p>(b) a community service order;</p> <p>(c) a combination order;</p> <p>(d) a curfew order;</p> <p>(e) a supervision order; and</p> <p>(f) an attendance centre order.</p>		rehabilitation, reparation and reintegration - reform
<p><i>Financial Penalties</i></p> <p>17. Increase of certain maxima</p>	<p>(1) A new scale of the amount of fine that could be imposed was amended</p> <p>(2) Magistrates were given new powers to impose a larger fine, from £400 to £1000</p>	2	The maximum amount that someone could be charged for a fine was increased in order to make them a more suitable/appealing punishment.
<p>18. Fixing of certain fines by reference to units</p>	<p>(1) This section applies where a magistrates' court imposes a fine on an individual—</p> <p>(a) for a summary offence which is punishable by a fine not exceeding a level on the standard scale; or</p> <p>(b) for a statutory maximum offence, that is to say, an offence which is triable either way and which, on summary conviction, is punishable by a fine not exceeding the statutory maximum.</p> <p>(2) Subject to the following provisions of this section, the amount of the fine shall be the product of—</p> <p>(a) the number of units which is determined by the court to be commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with it; and</p> <p>(b) the value to be given to each of those units, that is to say, the amount which, at the same or any later time, is determined by the court in accordance with rules made by the Lord Chancellor to be the offender's disposable weekly income.</p>	2	Introducing a new system of unit fines where the amount imposed would reflect the seriousness of the offence. Amount payable would be determined by weekly income of the offender.

<p><i>Miscellaneous</i></p> <p>26. Alterations of certain penalties</p>	<p>(1) In section 7 of the [1968 c. 60.] Theft Act 1968 (theft), for the words “ten years” there shall be substituted the words “seven years”.</p> <p>(2) For subsections (3) and (4) of section 9 of that Act (burglary) there shall be substituted the following subsections—</p> <p>“(3) A person guilty of burglary shall on conviction on indictment be liable to imprisonment for a term not exceeding—</p> <p>(a) where the offence was committed in respect of a building or part of a building which is a dwelling, fourteen years;</p> <p>(b) in any other case, ten years.</p> <p>(4) References in subsections (1) and (2) above to a building, and the reference in subsection (3) above to a building which is a dwelling, shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is.</p>	<p>1</p>	<p>Reducing penalties for certain crimes.</p> <p>More symbolic than concrete as it was to reflect how judges were sentencing for these crimes</p>
<p><i>Supplemental</i></p> <p>29. Effect of previous convictions</p>	<p>(1) An offence shall not be regarded as more serious for the purposes of any provision of this Part by reason of any previous convictions of the offender or any failure of his to respond to previous sentences.</p> <p>(2) Where any aggravating factors of an offence are disclosed by the circumstances of other offences committed by the offender, nothing in this Part shall prevent the court from taking those factors into account for the purpose of forming an opinion as to the seriousness of the offence.</p>		



<b>CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994</b>			
<b>SECTION</b>	<b>CHANGES MADE</b>	<b>SCORE</b>	<b>EXPLANATION</b>
<b>PART I: YOUNG OFFENDERS</b>			
<i>Secure training orders</i> 1. Secure training orders	Imprisonment of children between 12 and 15 for no less than 6 months and no more than 2 years	5	A way of imprisoning young people
<i>Custodial sentences for young offenders</i> 17. Maximum length of detention for young offenders	(1) Section 1B of the [1982 c. 48.] Criminal Justice Act 1982 (maximum length of detention in young offender institution for offenders aged 15, 16 or 17 years) shall be amended as follows.  (2) In subsection (2)(b), for the words “12 months” there shall be substituted the words “24 months”.  (3) In subsection (4), for the words “12 months” there shall be substituted the words “24 months”.  (4) In subsection (5), for the words “12 months” in both places where they occur there shall be substituted the words “24 months”	4	Increasing the maximum length of custodial sentences from 12 months to 24 months.
<b>PART V: PUBLIC ORDER: COLLECTIVE TRESPASS OR NUISANCE ON LAND</b>			
<i>Powers to remove trespassers on land</i> 61	(1) If the senior police officer present at the scene reasonably believes that two or more persons are trespassing on land and are present there with the common purpose of residing there for any period, that reasonable steps have been taken by or on behalf of the occupier to ask them to leave and—  (a) that any of those persons has caused damage to the land or to property on the land or used threatening, abusive or insulting words	4	Creation of new laws of trespassing punishable by criminal sanctions.

	<p>or behaviour towards the occupier, a member of his family or an employee or agent of his, or</p> <p>(b) that those persons have between them six or more vehicles on the land,</p> <p>he may direct those persons, or any of them, to leave the land and to remove any vehicles or other property they have with them on the land.</p> <p>(4) If a person knowing that a direction under subsection (1) above has been given which applies to him—</p> <p>(a) fails to leave the land as soon as reasonably practicable, or</p> <p>(b) having left again enters the land as a trespasser within the period of three months beginning with the day on which the direction was given,</p> <p>he commits an offence and is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.</p>		
<p><i>Disruptive trespassers</i></p> <p>68. Offence of aggravated trespass</p>	<p>(1) A person commits the offence of aggravated trespass if he trespasses on land in the open air and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land in the open air, does there anything which is intended by him to have the effect—</p> <p>(a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity,</p>	<p>4</p>	<p>Increasing powers of police in relation to raves punishable by criminal sanction</p>

	<p>(b) of obstructing that activity, or</p> <p>(c) of disrupting that activity.</p> <p>(3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.</p>		
<b>PART XII: MISCELLANEOUS AND GENERAL</b>			
<p><i>Harassment, alarm or distress</i></p> <p>154. Offence of causing intentional harassment, alarm or distress</p>	<p>In Part I of the [1986 c. 64.] Public Order Act 1986 (offences relating to public order), after section 4, there shall be inserted the following section—</p> <p>“4A Intentional harassment, alarm or distress</p> <p>(1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he—</p> <p>(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or</p> <p>(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,</p> <p>thereby causing that or another person harassment, alarm or distress.</p> <p>(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the person who is harassed, alarmed or distressed is also inside that or another dwelling.</p>	5	<p>New offence of causing intentional harassment alarm or distress by using threatening, abusive language or behaviour. Punishable for up to 6 months. Inserted into 4(a) of the Public Order Act 1986.</p>

	<p>(3) It is a defence for the accused to prove—</p> <p>(a) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or</p> <p>(b) that his conduct was reasonable.</p> <p>(4) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.</p> <p>(5) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both.”.</p>		
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CRIME (SENTENCES) ACT 1997			
SECTION	CHANGES MADE	SCORE	EXPLANATION
<b>PART I: MANDATORY AND MINIMUM CUSTODIAL SENTENCES</b>			
2.Mandatory life for second serious offence	<p>(1)This section applies where—</p> <p>(a) a person is convicted of a serious offence committed after the commencement of this section;</p> <p>(2)The court shall impose a life sentence, that is to say—</p> <p>(a)where the person is 21 or over, a sentence of imprisonment for life;</p> <p>(b)where he is under 21, a sentence of custody for life under section 8(2) of the [1982 c. 48.] Criminal Justice Act 1982 (“the 1982 Act”),</p> <p>unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify its not doing so.</p>	5	Increasing length of punishment and certainty of imprisonment
3.Minimum of 7 years for third class A drug trafficking offence	<p>(1) This section applies where—</p> <p>(a) a person is convicted of a class A drug trafficking offence committed after the commencement of this section;</p> <p>(b)at the time when that offence was committed, he was 18 or over and had been convicted in any part of the United Kingdom of two other class A drug trafficking offences;</p> <p>(2)The court shall impose a custodial sentence for a term of at least seven years except where the court is of the opinion that there are specific circumstances which—</p> <p>(a)relate to any of the offences or to the offender; and</p> <p>(b)would make the prescribed custodial sentence unjust in all the circumstances.</p>		
4.Minimum of 3 years for third domestic burglary offence	<p>(1) This section applies where—</p>		

	<p>(a) a person is convicted of a domestic burglary committed after the commencement of this section;</p> <p>(b) at the time when that burglary was committed, he was 18 or over and had been convicted in England and Wales of two other domestic burglaries;</p> <p>(2) The court shall impose a custodial sentence for a term of at least three years except where the court is of the opinion that there are specific circumstances which—</p> <p>(a) relate to any of the offences or to the offender; and</p> <p>(b) would make the prescribed custodial sentence unjust in all the circumstances.</p>		
<b>PART II: EFFECT OF CUSTODIAL SENTENCING</b>			
<p><i>Chapter 1: Determinate Sentences</i></p> <p>8. Honesty in sentencing</p>	<p>(1) Subject to the following provisions of this Chapter, a prisoner shall be released when he has served his sentence.</p>	3	<p>More symbolic than effecting real changes as judges were instructed to take this into account when sentencing and give shorter sentences with regard to this provision</p>

CRIME AND DISORDER ACT 1998			
SECTION	CHANGES MADE	SCORE	EXPLANATION
<b>PART I: PREVENTION OF CRIME AND DISORDER</b>			
<i>Crime and Disorder: General</i> 1. Anti-social behaviour orders	(1) An application for an order under this section may be made by a relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged 10 or over, namely—  (a) that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and  (b) that such an order is necessary to protect persons in the local government area in which the harassment, alarm or distress was caused or was likely to be caused from further anti-social acts by him  Conditions of breach are punishable by up to five years and or a fine	3	Creating new criminal laws for what was previously deemed as a civil issue. Making it a criminal offence gave the power to impose a custodial sentence if conditions of order are breached.
2. Sex offender orders	(1) If it appears to a chief officer of police that the following conditions are fulfilled with respect to any person in his police area, namely—  (a) that the person is a sex offender; and  (b) that the person has acted, since the relevant date, in such a way as to give reasonable cause to believe that an order under this section is necessary to protect the public from serious harm from him,  Punishable by up to five years imprisonment and or a fine	5	Building on previous act (Sex Offender Act 1997) which makes breach of conditions punishable by custody
<i>Youth Crime and Disorder:</i> 8. Parenting orders	(1) This section applies where, in any court proceedings—  (a) a child safety order is made in respect of a child;  (b) an anti-social behaviour order or sex offender order is made in respect of a child or young person;	3	

	<p>(c) a child or young person is convicted of an offence; or</p> <p>(d) a person is convicted of failure to comply with school attendance order or failure to secure regular attendance at school of registered pupil</p> <p>(4) A parenting order is an order which requires the parent—</p> <p>(a) to comply, for a period not exceeding twelve months, with such requirements as are specified in the order; and</p> <p>(b) to attend, for a concurrent period not exceeding three months and not more than once in any week, such counselling or guidance sessions as may be specified in directions given by the responsible officer</p> <p>Punishable by a fine</p>		
<p><i>Youth crime and disorder</i></p> <p>11. Child safety orders</p>	<p>(1) Subject to subsection (2) below, if a magistrates' court, on the application of a local authority, is satisfied that one or more of the conditions specified in subsection (3) below are fulfilled with respect to a child under the age of 10, it may make an order (a "child safety order") which—</p> <p>(a) places the child, for a period (not exceeding the permitted maximum) specified in the order, under the supervision of the responsible officer; and</p> <p>(b) requires the child to comply with such requirements as are so specified.</p> <p>(2) A court shall not make a child safety order unless it has been notified by the Secretary of State that arrangements for implementing such orders are available in the area in which it appears that the child resides or will reside and the notice has not been withdrawn.</p> <p>(3) The conditions are—</p> <p>(a) that the child has committed an act which, if he had been aged 10 or over, would have constituted an offence;</p>	<p>3</p>	



	<p>(b) that a child safety order is necessary for the purpose of preventing the commission by the child of such an act as is mentioned in paragraph (a) above;</p> <p>(c) that the child has contravened a ban imposed by a curfew notice; and</p> <p>(d) that the child has acted in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself.</p> <p>(4) The maximum period permitted for the purposes of subsection (1)(a) above is three months or, where the court is satisfied that the circumstances of the case are exceptional, 12 months.</p>		
<b>PART II: CRIMINAL LAW</b>			
<p><i>Racially aggravated offences</i> 28-32 Racially aggravated offences</p>	<p>28. (1) An offence is racially aggravated for the purposes of sections 29 to 32 below if—</p> <p>(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a racial group; or</p> <p>(b) the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.</p> <p>(4) In this section “racial group” means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.</p> <p>29. (3) A person guilty of an offence falling within subsection (1)(c) above shall be liable—</p> <p>(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;</p> <p>(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.</p>	4	<p>Increasing length of punishment via aggravating circumstances of offence</p>

<p><i>Miscellaneous</i></p> <p>34. Abolition of doli incapax</p>	<p>New criminal age of responsibility from 12 to 10</p>	<p>5</p>	<p>Net-widening</p>
<p><b>PART FOUR: DEALING WITH OFFENDERS</b></p>			
<p><i>Sexual or Violent offenders</i></p> <p>58. Extended sentences for licence purposes</p>	<p>(1) This section applies where a court which proposes to impose a custodial sentence for a sexual or violent offence considers that the period (if any) for which the offender would, apart from this section, be subject to a licence would not be adequate for the purpose of preventing the commission by him of further offences and securing his rehabilitation.</p> <p>(2) Subject to subsections (3) to (5) below, the court may pass on the offender an extended sentence, that is to say, a custodial sentence the term of which is equal to the aggregate of—</p> <p>(a) the term of the custodial sentence that the court would have imposed if it had passed a custodial sentence otherwise than under this section (“the custodial term”); and</p> <p>(b) a further period (“the extension period”) for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose mentioned in subsection (1) above.</p> <p>(3) Where the offence is a violent offence, the court shall not pass an extended sentence the custodial term of which is less than four years.</p> <p>(4) The extension period shall not exceed—</p> <p>(a) ten years in the case of a sexual offence; and (b) five years in the case of a violent offence.</p>	<p>5</p>	<p>Giving courts the power to extend sentences for serious, violent and dangerous offences</p>
<p><i>Offenders dependent etc. on drugs</i></p> <p>61. Drug treatment and testing order</p>	<p>(2) Subject to the provisions of this section, the court by or before which the offender is convicted may make an order (a “drug treatment and testing order”) which—</p> <p>(a) has effect for a period specified in the order of not less than six months nor more than three years (“the treatment and testing period”); and (b) includes the requirements and provisions mentioned in section 62 below.</p> <p>(4) A drug treatment and testing order shall be a community order for the purposes of Part I of the 1991 Act; and the provisions of that Part, which include provisions with respect to restrictions on imposing, and procedural requirements for, community sentences (sections 6 and 7), shall apply accordingly.</p>	<p>1</p>	<p>Punishment for treatment purposes</p>

	<p>(5) The court shall not make a drug treatment and testing order in respect of the offender unless it is satisfied—</p> <p>(a) that he is dependent on or has a propensity to misuse drugs; and</p> <p>(b) that his dependency or propensity is such as requires and may be susceptible to treatment.</p>		
<p><i>Sentencing: general</i> 80-81. Sentencing Advisory panel</p>	<p>Creation of Sentencing Advisory Panel:</p> <p>(3) Where the Court decides to frame or revise such guidelines, the Court shall have regard to—</p> <p>(a) the need to promote consistency in sentencing;</p> <p>(b) the sentences imposed by courts in England and Wales for offences of the relevant category;</p> <p>(c) the cost of different sentences and their relative effectiveness in preventing re-offending;</p> <p>(d) the need to promote public confidence in the criminal justice system; and</p> <p>(e) the views communicated to the Court, in accordance with section 81(4)(b) below, by the Sentencing Advisory Panel.</p>	2	Aiming for more consistency in sentencing

<b>CRIMINAL JUSTICE ACT 2003</b>			
SECTION	CHANGES MADE	SCORE	EXPLANATION
<b>PART 11: EVIDENCE</b>			
<p><i>Chapter 1: Evidence of bad character</i></p> <p>98. Bad character</p>	<p>References in this Chapter to evidence of a person’s “bad character” are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which—</p> <p>(a) has to do with the alleged facts of the offence with which the defendant is charged, or</p> <p>(b) is evidence of misconduct in connection with the investigation or prosecution of that offence.</p>	4	<p>To improve chances of conviction as well as a longer sentence</p>
<b>PART 12: SENTENCING</b>			
<p><i>Chapter 1: General provisions about sentencing</i></p> <p>145. Increase in sentences for racial or religious aggravation</p>	<p>(1) This section applies where a court is considering the seriousness of an offence other than one under sections 29 to 32 of the Crime and Disorder Act 1998 (c. 37) (racially or religiously aggravated assaults, criminal damage, public order offences and harassment etc).</p> <p>(2) If the offence was racially or religiously aggravated, the court—</p> <p>(a) must treat that fact as an aggravating factor, and</p> <p>(b) must state in open court that the offence was so aggravated.</p> <p>(3) Section 28 of the Crime and Disorder Act 1998 (meaning of “racially or religiously aggravated”) applies for the purposes of this section as it applies for the purposes of sections 29 to 32 of that Act.</p>	4	
<p>146. Increase in sentences for aggravation related to disability or sexual orientation</p>	<p>(1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).</p> <p>(2) Those circumstances are—</p>		

	<p>(a)that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—</p> <p>(i)the sexual orientation (or presumed sexual orientation) of the victim, or</p> <p>(ii)a disability (or presumed disability) of the victim, or</p> <p>(b)that the offence is motivated (wholly or partly)—</p> <p>(i)by hostility towards persons who are of a particular sexual orientation, or</p> <p>(ii)by hostility towards persons who have a disability or a particular disability.</p>		
<p><i>Sentencing and allocation guidelines</i> 167. The Sentencing Guidelines Council</p>	<p>(1) There shall be a Sentencing Guidelines Council (in this Chapter referred to as the Council) consisting of—</p> <p>(a)the Lord Chief Justice, who is to be chairman of the Council,</p> <p>(b)seven members (in this section and section 168 referred to as “judicial members”) appointed by the Lord Chancellor after consultation with the Secretary of State and the Lord Chief Justice, and</p> <p>(c)four members (in this section and section 168 referred to as “non-judicial members”) appointed by the Secretary of State after consultation with the Lord Chancellor and the Lord Chief Justice.</p>	2	
<p><i>Chapter 3: Prison sentences of less than 12 months</i> 181. Prison sentences of less than 12 months</p>	<p>(1) Any power of a court to impose a sentence of imprisonment for a term of less than 12 months on an offender may be exercised only in accordance with the following provisions of this section unless the court makes an intermittent custody order (as defined by section 183).</p> <p>(2) The term of the sentence—</p> <p>(a)must be expressed in weeks,</p> <p>(b)must be at least 28 weeks,</p>	1	<p>New types of sentences where offenders could serve the custodial part of their sentence around employment/education.</p>

	<p>(c) must not be more than 51 weeks in respect of any one offence, and</p> <p>(d) must not exceed the maximum term permitted for the offence.</p>		
183. Intermittent custody	<p>(1) A court may, when passing a sentence of imprisonment for a term complying with subsection (4)—</p> <p>(a) specify the number of days that the offender must serve in prison under the sentence before being released on licence for the remainder of the term, and</p> <p>(b) by order—</p> <p>(i) specify periods during which the offender is to be released temporarily on licence before he has served that number of days in prison, and</p> <p>(ii) require any licence to be granted subject to conditions requiring the offender's compliance during the licence periods with one or more requirements falling within section 182(1) and specified in the order.</p>	1	
<p><i>Chapter 5: Dangerous offenders</i></p> <p>225. Life sentence of imprisonment for public protection for serious offences</p>	<p>(1) This section applies where—</p> <p>(a) a person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and</p> <p>(b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.</p> <p>(2) If—</p> <p>(a) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and</p> <p>(b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life,</p>	3	<p>A new way of dealing with offenders thought to be too dangerous to be released at a given point in time. Indeterminate nature of sentence was avoid releasing dangerous person. Sentence was to provide therapeutic and educational interventions in order to improve their risk rating.</p>

	the court must impose a sentence of imprisonment for life.		
<i>Chapter 6: Release on licence</i> 244. Duty to release prisoners	As soon as a fixed-term prisoner, other than a prisoner to whom section 247 applies (serving an extended sentence), has served the requisite custodial period of one half of their sentence, it is the duty of the Secretary of State to release him on licence under this section.  Does not apply to short term sentences of less than 12 months	2	Early release scheme to improve chances of rehabilitation on release. Working with better probationary tactics

**CRIMINAL JUSTICE AND IMMIGRATION ACT 2008**

SECTION	CHANGES MADE	SCORE	EXPLANATION
<b>PART TWO: SENTENCING</b>			
10. Effect of restriction on imposing community sentences	<p>In section 148 of the Criminal Justice Act 2003 (c. 44) (restrictions on imposing community sentences), after subsection (4) insert—</p> <p>“(5) The fact that by virtue of any provision of this section—</p> <p>(a) a community sentence may be passed in relation to an offence; or</p> <p>(b) particular restrictions on liberty may be imposed by a community order or youth rehabilitation order, does not require a court to pass such a sentence or to impose those restrictions.”</p>	2	Reducing the level of seriousness to encourage community sentences over imprisonment
11. Restriction on power to make a community order	<p>After section 150 of the Criminal Justice Act 2003 (community sentence not available where sentence fixed by law etc.) insert—</p> <p>“150A Community order available only for offences punishable with imprisonment or for persistent offenders previously fined</p> <p>(1) The power to make a community order is only exercisable in respect of an offence if—</p> <p>(a) the offence is punishable with imprisonment; or</p> <p>(b) in any other case, section 151(2) confers power to make such an order.</p>		
<i>Custodial sentences</i> Section 13 - 18	<p>Amendment made to 03 Act regarding IPP sentences. Imposing a “seriousness threshold” on both indeterminate and extended sentences for public protection. The effect of the amendments is that such sentences may only be imposed where the offender would be required to serve at least two years in custody or (in the case of offenders over 18) where the offender has a previous conviction for one of a specified list of very serious offences.</p>	2	Imposing stricter rules on the use of the IPP sentence



	<p>Removing the rebuttable presumption of risk (requirement for judges to conclude that the offender is dangerous) where there is a previous conviction for violent or sexual crime.</p> <p>Allowing courts greater discretion so that where all the conditions for an sentence of imprisonment for public protection are met (sexual/violent offence which carries penalty of 10 years or more; risk test; seriousness threshold passed) the court may impose a sentence of imprisonment for public protection, extended sentence or other sentence as it finds most appropriate in the case; where the conditions for an extended sentence but not a sentence of imprisonment for public protection are met (sexual/violent offence carrying penalty of less than 10 years; risk test; seriousness threshold passed) the court may impose an extended sentence or other sentence.</p> <p>Changing the structure of extended sentences so that offenders are automatically released on licence halfway through the custodial period, rather than release between this point and the end of the custodial term being at the Parole Board's discretion as previously.</p>		
<p><i>Custodial Sentences</i></p> <p>19. Indeterminate sentences: determination of tariffs</p>	<p>makes some changes to the method by which courts determine the tariff (that is, the minimum time that a person must spend in custody) when they are imposing a discretionary life sentence in a particularly serious case. The result, in such cases, is that courts are empowered to increase the period which will have to be served in prison before the offender becomes eligible for consideration for parole</p>	4	<p>giving courts the power to give longer custodial sentences</p>
<p><i>Release and recall of prisoners</i></p> <p>21-23</p>	<p>enable the sentencing court to direct that time spent on bail under an electronically monitored curfew should be credited against a custodial sentence in a similar way to the manner in which remands in custody are credited. A person will receive credit at the rate of a half a day for every day spent subject to a qualifying electronically monitored curfew (that is a curfew of 9 hours a day or more).</p>	2	<p>Result will be that time spent in custody on a custodial sentence will be less</p>
<p>25. Release on licence under Criminal Justice Act 2003 of prisoners serving extended sentences</p>	<p>automatic early release of prisoners serving extended (as opposed to life) sentences, instead of discretionary release by the Parole Board.</p>	2	<p>Increasing eligibility for early release</p>

<i>Bail</i> 51. Bail conditions: electronic monitoring	Schedule 11 makes provision in connection with the electronic monitoring of persons released on bail subject to conditions.	2	Amendments to Bail Act 1976 to allow for bail for those not deemed a risk

### *Appendix III*

<b>Criminal Justice Act 1991</b>	
<b>DEBATE</b>	<b>DATE</b>
HC debate	30.3.1988
HC debate	6.2.1990
HL debate	
HL debate	23.5.1990
HC 2 <sup>nd</sup> reading	20.11.1990
Standing Committee Stages	24 meetings between 29.11.1990 - 7.2.1991
HL debate	12.12.1990
HC debate	17.12.1990
HC debate	20.2.1991
HC debate	
HC debate	25.2.1991
HL 2 <sup>nd</sup> reading	12.3.1991
HL Committee stage	26.3.1991
Select Committee on Murder and Life Imprisonment (HL)	18.4.1991
HL debate Committee stages	18.4.1991 – 26.4.1991
HL 3 <sup>rd</sup> reading	4.6.1991
HC debate	25.6.1991
HL debate	3.7.1991
HC debate	16.7.1991

**Royal Assent – 21.7.1991**

<b>Criminal Justice and Public Order Act 1994</b>	
<b>Debate</b>	<b>Date</b>
HC 2 <sup>nd</sup> reading	11.1.1994
HC committee stages	94.2.21 94.3.28

	94.4.13
HL 2 <sup>nd</sup> reading	25.4.1994
HL committee stages	16.5.1994 23.5.1994
HL report	7.7.1994 5.7.1994
HL 3 <sup>rd</sup> reading	19.7.1994
HC debate	19/20.10.1994

**Royal Assent – 3.11.1994**

<b>Crime (Sentences) Act 1997</b>	
<b>Debate</b>	<b>Date</b>
Publishing white paper	3.4.1996
HL debate	23.5.1996
HC debate	19.6.1996
HC debate 2 <sup>nd</sup> reading	4.11.1996
Standing Committee stages	12.11 – 10.12.1996
HC debate	13.1.1997
HC debate	15.1.1997
HL 2 <sup>nd</sup> reading	27.1.1997
Committee stage	13.2.1997 18.2.1997 18.2.1997
HC debate	17.3.1997
HL debate	18.3.1997
HL 3 <sup>rd</sup> reading	19.3.1997
HC 3 <sup>rd</sup> reading	15.1.1998

**Royal Assent – 21.3.1997**

<b>Crime and Disorder Act 1998</b>	
<b>Debate</b>	<b>Date</b>
HC debate	27.11.1997
HL 2 <sup>nd</sup> reading	16.12.1997

HL Committee	3.2.1998 10.2.1998 12.2.1998 24.2.1998 3.3.98
Report	17.3.1998 19.3.1998
HL 3 <sup>rd</sup> reading	31.3.98
HC 2 <sup>nd</sup> reading	8.4.1998
Standing Committee stage	28.4.1998 - 11.6.1998
HC debate	21.7.1998
HL debate	22.7.1998

**Royal Assent – 31.7.1998**

<b>Criminal Justice Act 2003</b>	
<b>DEBATE</b>	<b>DATE</b>
HC debate	16.5.2000
HC 2 <sup>nd</sup> reading	4.12.2002
Standing Committee B	30.1.2003
HL 2 <sup>nd</sup> reading	16.6.2003
Committee stages	30.6 - 17.7.2003
HC debate	20.11.2003
Report	29.10 - 11.11.03
HL 3 <sup>rd</sup> reading	17.11.2003
HL debate	18.11.2003
HL debate	20.11.2003

**Royal Assent 20.11.2003**

<b>Criminal Justice and Immigration Act 2008</b>	
<b>Debate</b>	<b>Date</b>
HC 2 <sup>nd</sup> reading	8.10.2007
HC Committee stages	16 – 29.10.2007
HL Committee stages	5.2 – 12.3.2008
HL second reading	2.4.2008
HL 3 <sup>rd</sup> reading	30.4.2008
HC debate	6.5.2008
HL debate	7.5.2008
<b>Royal assent – 8.5.2008</b>	

# Appendix IV

## CONSENT FORM



**Title of Project: The Politics of Penal Policy**

Name of Researcher: Phillipa Thomas

Please tick box

1. I confirm that I have read and understand the information sheet dated May 2017 for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily.
2. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving any reason, without my legal rights being affected.
3. I understand that in giving my consent that the results of the study might be published in academic journals or reports.
4. I consent to the interview being audio recorded.
5. I agree to take part in the above study. Please contact me on Tel: .....

\_\_\_\_\_  
Name of Interviewee

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Researcher

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

When completed, 1 copy for interviewee signed by both parties; 1 copy for researcher site file;

Phillipa Thomas

I am a PhD student in criminology at Cardiff University investigating sentencing policy and practice in England and Wales between 1990 and 2010. My main concern is with the increasing prison population in England and Wales; a trend which began in the early 1990's. The aim of explaining this increase in the prison population is being attempted via a historical analysis of sentencing policy.



This study is situated in a broader debate within penality, that England and Wales have witnessed an increase in the severity of punishment, or what is also known as the 'punitive turn'. The project is attempting to test the claims made by the punitive turn thesis, or new punitiveness, in England and Wales. In light of the criticisms of the punitive turn concept not being supported with enough empirical evidence, the aim is to generate evidence of 'empirical particulars' in order to support, dismiss or adapt the claims made by the punitive turn theory.

The units of analysis are 'flagship' Acts of Parliament which have been understood as being instrumental in creating sentencing legislation - Criminal Justice Act 1991; Criminal Justice Act 1993; Criminal Justice and Public Order Act 1994; Crime (Sentences) Act 1997; Crime and Disorder Act 1998; Criminal Justice Act 2003.

My line of enquiry is surrounding the politics of sentencing policy and the decision-making process behind the implementation of several key Acts of Parliament. By following the passage of the bills of the aforementioned Acts, I am exploring why these Acts were implemented and what have been the key influences in their implementation. As well as investigating the content and outcomes of sentencing principles implemented during this time, the more prominent question under investigation is 'why' sentencing has followed certain pathways. This has required a focus on the 'political' within penal sanctions. I argue that the structure of society – the social, cultural and economical - has been fully examined in relation to its consequences on penality. However, reasons surrounding why England and Wales have witnessed certain trends in penality have not included decision making procedures and the people/influences involved in making those decisions.

In summary, the research questions are as follows:

- What were the sentencing trends in England and Wales between 1990 and 2010? Was an increase in punishment the dominant trend, or one of many co-evolving tendencies?
- What were the influences behind these trends and what was the decision-making process of sentencing procedures?
- To what extent can the punitive turn thesis be applied to England and Wales sentencing framework over the past three decades?