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CHAPTER 3

England and Wales 1900–1990: Welfare Advances and Retreats

The idea of the tariff for the offence or making the punishment fit the crime dies hard; but it must be uprooted if reformation rather than punishment is to be – as it should be for young offenders – the guiding principle.

Molony Committee 1927: 48

For most of the twentieth century England and Wales, in contrast to Russia, held to a remarkably steady course in its policies towards young law-breakers. From the beginning of the century until the 1980s one of the guiding principles remained the gradual abolition of custody for young people. Yet, as the century progressed, both the strategies employed and the thinking about young offenders began to change. By the 1980s welfare principles, as advanced by earlier generations of reformers and policy-makers, were under challenge, and disagreement over the use and value of custody had emerged as an issue. Protecting society became a priority. Punishment, it began to be argued, had a part to play. Yet, oddly enough, the custody figures declined steadily in the 1980s. In the 1990s the picture changes – both the policies and their impact on custody – and thereafter the figures begin to rise. Was this a result of lessons learnt over the previous half-century, or an ignoring of them, or was it a response to a quite different situation? In chapter 7 we attempt an answer. Here we look at the pre-history, both to assess the strategies, which, it was hoped, would gradually lead to the ending of custody, and to discover what influenced the making and implementation of policy.

First, a comment, with relevance to any comparative work. The choice of comparators influences the features that stand out. Reading the committee reports, politicians' statements and Acts of Parliament, I became aware that the Russian picture was shaping my view of English developments. I was looking at English experience from a 'Russian' perspective, discovering similarities and differences that I had not always expected and noting aspects of the way things were done in England that stood in sharp contrast

to Russia. Had I been looking at England and Wales against a background of, for example, developments in Germany or the United States, other aspects would surely have commanded attention.

Perhaps most striking are the shared assumptions, in the two countries, particularly in the inter-war years, of the causes of youth crime, and of the need to rehabilitate or re-educate the young offender. However, the English policy-making environment, with its input from a wide variety of actors – political, governmental, judicial and social (voluntary and professional) – emerges as very different. Policy-making moved slowly, open to public scrutiny, and often resulted in compromises. Some of the same issues – most notably the role of criminal justice agencies versus social welfare institutions, and the tension between welfare and punishment – rear their heads. Yet the implementation of policy, because of the variety of agencies or institutions involved, and competition between them, seems in England much less straightforward. Legislators may have intended one thing, outcomes were another. We noted this too in Russia, but in England and Wales the gap between legislative intention and the use of custody as a sanction by those who implemented the law is more noticeable, and widened as time went on.

In England, throughout the period, certain issues dominated debate and policy: the age of the juvenile, the role of magistrates vis-à-vis higher courts or local authorities, forms of institutional ‘care’ or detention, and the attempt to find alternatives to prison. But first, as background: three Acts, passed before the First World War, embodied principles that continued to exert a major influence on the treatment of young offenders throughout the period.

The 1907 Probation of Offenders’ Act allowed courts to suspend sentencing or discharge an offender under a probation order, which entailed supervision, for a specified period, by a volunteer ‘officer of the court’ or probation officer.

The 1908 Children Act, while retaining the age of criminal responsibility as 7 (together with the principle of *doli incapax* for ages from 7 to 14), introduced juvenile courts for those under the age of 16 (except on a charge of homicide). The juvenile court was a court of summary jurisdiction, but with a special juvenile magistrate. Crown courts dealt with serious offences, even for young children. No child under 14 was to be sent to prison, and 14- or 15-year-olds only with a special certificate justifying the decision. If an institutional response was required, the child should be sent to an industrial school or a reformatory.

For an older group (16–20-year-olds), who would come before adult courts, the Children Act and the Crime Prevention Act 1908 confirmed the use of Borstal training.¹

Reclaiming and re-educating the unfortunate

In 1925 the government, concerned that it was time to review the workings of the 1908 Act, set up the Molony Committee to ‘inquire into the treatment of young offenders and young people who, owing to bad associations or surroundings, require protection and training and to recommend any changes needed in law’. The committee reported in 1927. Reforming, rather than punishing the offender, the Committee noted, had become a key principle of penal policy and this was even more relevant in the case of the young offender ‘whose character is still plastic and the more readily molded by wise and liberal treatment’. Although, the Committee continued, the law draws a distinction between the neglected and the delinquent, ‘in many cases the tendency to commit offenses is only an outcome of the conditions of neglect, and there is little room for discrimination either in the character of the young person concerned or in the appropriate method of treatment’ (pp. 5–6).

While favouring the retention of juvenile courts as part of the criminal justice system, the Committee spelt out the qualities needed in a magistrate: ‘love of young people, sympathy with their interests and an imaginative insight into their difficulties’. The words ‘conviction’ and ‘sentence’, the Committee recommended, should disappear because they stigmatized young people. (A key concern at the time was that if a young person received a conviction it barred him from joining the army or starting a new life in the colonies. The point is still being made today: a conviction can end a young person’s chance of employment or, as happened in 2008, jeopardize acceptance by a university.)

Further, the Committee argued (p. 48):

It is not always recognized that many offences committed by lads and young women between 17 and 21 are equally due to bad surroundings or defective home training and that the remedy there is to be found not so much in the punishment for the offence as in the provision of the right sort of training for the offender ... the idea of the tariff for the offence or making the punishment fit the crime dies hard; but it must be uprooted

if reformation rather than punishment is to be – as it should be for young offenders – the guiding principle.

Reading the Report I find myself back in the familiar world of the Russian texts of the 1920s. At first this seems a little surprising. The committee, after all, was an upper-class and establishment group of individuals, who surely viewed revolutionary developments in Russia with abhorrence. But ideas or assumptions in a historical period, the *zeitgeist*, sometimes linked to particular generations, can transcend boundaries. This does not mean that there were no differences between the Russian penal reformers and their English counterparts or that their politicians behaved similarly. We shall look in more detail at both these issues in a moment. But certain ideas, which emerged in the late nineteenth century, continued to exert their hold on those seeking to find strategies to prevent juvenile crime and to minimize cruelty to children; more than once they prompted similar responses, although their advocates were unaware of each other. We note this in relation to England and Russia in the 1920s and again in the 1960s.

The Committee, and those who gave evidence to it, as did their counterparts in Russia, clearly believed strongly that the appalling conditions that many children experienced (poverty, squalor and abuse or neglect) led to crime: deprived children became depraved children. Such children should be seen as one category – children in need of care – and they could and should be ‘saved’ – though education, care, example and discipline. ‘Reclaiming the Young Offender’, the subtitle of Bailey’s study of the inter-war period, captures the ethos of the time. The task was to ‘reclaim’ the boy or girl, and provide them with their rightful place as a ‘healthy’ member of society. In an influential study, Cyril Burt, child psychologist, wrote of ‘the susceptible mind’ of the child:

The typical delinquent is a child with a dull, uneducated mind, struggling to control an emotional and impulsive temperament, both housed in a weak, afflicted body and living with a demoralized family in an impoverished home. (quoted by Bailey 1987: 14)

Yet, like their Russian colleagues, the English reformers did not romanticize the young offender nor underestimate the task. Society, family and the child all played a part. Imprisonment could not effect a cure. The Committee was

much impressed by the unanimity with which prison staff opposed custody for young people, and with their arguments that young people are ‘plastic and impressionable’, that the prison environment ‘contaminates’, it does not provide time or space for training, and it ‘loses its deterrent effect’ (p. 79). Supervision by probation officers, less and better institutional education, wider use of Borstal, and further reduction in custody for the age range 14–20 were all recommended by the Committee. Furthermore:

Any court which passes a sentence of imprisonment upon a person between 17–21 should be required to give a certificate to the effect that it is satisfied that the offender cannot properly be dealt with except by committal to prison. *We hope that before too long some alternative methods may be devised which will avoid altogether the use of prisons for persons under 21.* (Molony Committee 1927: 80, my emphasis – MM]

While both Russian and English reformers saw the child in need of care and protection and the young offender as one category – the child in need of help – they parted company over the issue of age, and this is still true today. It was not just that the age of criminal responsibility in England remained very low compared with Russia (7 in 1908, only raised to 10 in 1963, where it still stands) but that concern with the ‘juvenile’ in Russia ended at 18. The English were concerned with a much larger age-group – 7 to 20 – and tended to make dividing lines at 14, and again at 16 or 17, referring to ‘children’ and to ‘young people’. Although the Russian Criminal Code distinguishes between age (14 or 16) depending upon the seriousness of the crime, and although, at different times, over-18s have been allowed to remain in the juvenile colonies, the English approach for much of the last century was for younger children between 7 and 16 to come before juvenile courts, except in homicide cases when they went before an adult court; 16–20-year-olds came before adult courts, and there were special institutions (Borstals) to cater for them. Both the minimum and the maximum age of the youth category are important, as we shall see when looking at other countries.

However, as regards the need to re-educate the young offender, and the type of re-education, the approaches had much in common. The Children and Young Persons Act of 1933 (Article 44, 1), which remains on the statute book today, stipulated:

Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the young person, and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training.

The English continued to use industrial schools and reformatories for the younger children (under 16) until replacing them with approved schools (state and charitable) in 1933. By the 1920s, and throughout the rest of the inter-war years, Borstals became the key institution for 'reclaiming' 16–20-year-olds. Many English reformers had set up and worked in boys clubs. The Borstal experiment of 1902, a secure institution for boys aged between 16 and 21, based in the Borstal prison in Kent, provided training, education and sport in a highly disciplined environment, based on a house system, with house masters and codes of honour. With a minimum sentence of two years, a maximum of three, for those who would otherwise have been sent to prison, good behaviour could result in earlier parole. In 1932 the first 'open' Borstal was set up; by 1938, of the eight Borstals three were open. One closed Borstal remained for young women. It was one of the responsibilities of a Borstal to find employment and shelter for the young person leaving, and to follow up his or her progress. Not surprisingly, this was difficult at times of high unemployment but, it was claimed, recidivism remained relatively low among those released.

The ethos of the Borstals (albeit with its English frills of houses, masters and corporal punishment) had its Russian counterpart in the colonies, and in Makarenko's methods in the 1920s. The correctional-labour colonies for 14–17-year-olds, which came to dominate the scene from the mid-1930s, relied pretty crudely on labour as the corrective, and for those of their inmates serving long sentences, the next stage was to move on to an adult colony. In this respect the English Borstals were more similar to the secure special schools, introduced under Khrushchev and still in existence today. However, by the 1940s and 1950s the Borstal system had run into trouble: its expansion and use of unqualified staff made it a less and less effective tool for 'training' young people. In 1961 the age for entry into Borstal was dropped to 15, and it became easier to transfer Borstal inmates into the prison system. As with the Russian secure educational institutions, both of the earlier period and today, the Borstal 'experiment' bears witness to

the difficulty of educating within a secure institution, which so easily can become a place of punishment for vulnerable young people.

Six years elapsed before some of the Molony Committee's recommendations found a place in the Children and Young Persons Act of 1933. The jurisdiction of the juvenile courts was extended to include 16-year-olds. Remand homes, under the local authority, should cater for 14–16-year-olds committed for trial, and also for those given a one-month sentence, but 'unruly' younger children and 17–20-year-olds could still be held on remand in prison. Sentencing the 16–20-year-olds to Borstal, or to prison, was the prerogative of the higher courts.²

In 1938 and again in 1948 the government returned to the issue of custody for young offenders.³

Both Labour and Conservative parties produced reports on the treatment of young offenders, in agreement that crime by young people 'is mainly the outcome of conditions, social, economic, and to some extent hereditary, for which they themselves cannot be blamed. The blame ... rests largely upon society' (*Youth Astray*, Conservative Party report, 1946, quoted by Bailey 1987: 290). When presenting the bill to Parliament, Chuter Ede referred back to the 1927 report, and stated that one of the main aims of the bill was to effect an immediate reduction in the numbers of young people received into prison (that is, either on remand or sentenced) and to move towards the abolition of imprisonment for all sentenced by a magistrate's court.⁴

The 1948 Criminal Justice Act seemingly confirmed this. Prison should only be used for anyone between the ages of 15 and 21 if the (Crown) court believed no other method to be appropriate. Magistrates could still send offenders to approved schools, the favoured option, but there were to be new (tougher) detention centres under the Home Office, with a maximum stay of three months, for anyone between the age of 14 and 21, and magistrates were not given the right to send older children to Borstal (seen as a non-prison option) in lieu of these. This surely did signify a departure from the principle that training and education should be part of any 'sentence' or measure. Despite the wording 'detention centre', it is difficult not to see this as the first move to introducing a 'prison' for young people, a vain attempt to find an alternative.

The belief that society was responsible for producing its deprived and depraved children, that a deprived child could all too easily become a depraved child, and that attention to the *needs* of all these children should be of paramount concern, led many early reformers to advocate treating young offenders outside the criminal justice framework. The English reliance upon a juvenile court, operating as a summary court, dealing with young people as criminals, did not go unchallenged. There were those giving evidence to the Molony Committee who wanted the juvenile courts to drop the use of criminal proceedings, which, the Committee recognized ‘rests upon the proposition that to vindicate society and the law, the accused must be punished’ (1927: 18). However, the Committee came out in favour of continuing with the court as a ‘law’ court rather than giving it the role of a welfare tribunal as had the Americans or the Russians with their juvenile courts. It did, however, emphasize the need to improve the choice of magistrates, to have a panel of magistrates with the appropriate qualities, and to simplify the procedures, measures that the 1933 Act attempted to put in practice. Thereafter the English system has struggled to reconcile the demands of criminal justice and the priority of the child’s welfare, redrawing the roles of magistrate, probation officers, police, local authorities and social workers.

The magistrates, since 1933 nominated by their colleagues, had no legal training. During the period from 1908 to 1988 they were dealing with both criminal offences and civil cases requiring care and protection. Their powers were, however, limited. First, they dealt only with the age-group 7–16, and not with homicide cases. If they felt a case should warrant a Borstal sentence, they had to refer it on to a higher court. After 1948, with the introduction of detention centres, magistrates faced an unwelcome choice between the lengthy procedure of handing over the case to a higher court, which could impose Borstal, or sentencing the offender to a detention centre. Throughout the period the magistrates argued, unsuccessfully, for the right to sentence to Borstal.

How did the juvenile magistrates interpret their brief – to address the welfare of the child – during the period from 1920 to 1948? While the numbers they dealt with rose sharply from the late 1930s onwards, and the 16-year-olds were now included, sentencing policy did not change dramatically. Roughly a third of those convicted continued to receive ‘nominal penalties’ – dismissals or binding over; probation moved up to become the most favoured measure – from perhaps a quarter in 1920 to 40 per cent in 1948;

finer dropped to single figures in the 1920s and 1930s but were back at 14 per cent in 1948; whipping had fallen out of use by the late 1930s. Custodial measures (which includes sending to industrial schools, reformatories, then to approved schools, remand homes and prison) accounted throughout for about 10 per cent of sentences. By 1948 approved schools (of which there were 145 in 1946) were the favoured option for custody (Bailey 1987: 316).

As we see from the above figures, magistrates were anxious to make use of the services of probation officers. The Molony Committee favoured their further involvement with young people released from Borstal and reformatories. The 1948 Act reaffirmed that the role of the probation service, originally a charitable agency of volunteers, now under Home Office control, and with its own hostels, was to 'advise, assist and befriend' those issued with probation orders. Yet by this time others were entering the field. There always had been a large number of private or charitable approved schools (the inheritance of Victorian philanthropy), and local authorities too had set up schools, and remand homes. The 1948 Criminal Justice Act established attendance centres (under the police) and detention centres while in the same year the Children's Act established the profession of social workers, employed by local authorities.

Serious crimes, even by young children, fell under the brief of higher courts. The magistrates could not sentence to Borstal, nor could they take up any case involving a youngster over the age of 16. Hence, the system made a distinction: magistrates were to deal with children, and children whose offences were not grievous. 'Young people' (17–20) and children, who committed serious crimes and could understand what they had done, came before the adult courts.

1960s – the peak of welfarism

In retrospect it is remarkable that, despite the conviction that young people's crime has its roots in social deprivation, measures to reclaim and reform young offenders occupied the law-makers far more than strategies to alter the environment in which they lived. Only in the post-war period did government begin to address these issues. By the 1960s, the need for society to address the causes of delinquency was on the agenda. The Ingleby Committee (set up in 1956), which reported in 1960, again emphasized the link between delinquency and social deprivation. It advocated channelling more resources to poorer neighbourhoods; there were families, it reported,

that, for one reason or another, fell between the existing services and for which family advice centres should provide support.⁵ In an atmosphere of ‘decentralization, preventive intervention, decriminalization, and treatment’ (Pitts 1988: 7), and the election of a Labour government in 1964, this was followed in 1965 by a government White Paper, *The Child, the Family and the Young Offender*, which invited discussion ‘of possible measures to support the family, forestall and reduce delinquency, and revise the law and practice relating to young offenders in England and Wales’ (1965: 3).

Among the measures proposed were:

- raising the age of criminal responsibility to 16;
- replacing juvenile courts by family panels of social and psychiatric experts and social workers, to whom young people would be referred and who, in turn, would refer them on to specialized agencies;
- ensuring that no one under the age of 18 should enter an institution run by the prison service.

In Russia, in the reform atmosphere of the 1960s, the ‘welfare’ or ‘re-educating philosophy’ gained a new lease of life, and the commissions were reintroduced. They would take the youngest and less serious offenders out of the criminal justice system. In England and in Scotland the reformers, who included the government, moved in the same direction. Following the Kilbrandon Report, in 1968 Scotland introduced Children’s Hearings, panels of lay representatives of the local community, to hear all cases concerning under-16s, but in England and Wales the government, after initial enthusiasm, backed away.

Subsequent discussion and opposition persuaded the government to present a modified document, *Children in Trouble*, to Parliament in 1968, and this became the Children and Young Persons Act of 1969, often described as the most welfare-oriented piece of legislation passed by Parliament during the twentieth century.

Juvenile delinquency [it argued] has no single cause, manifestation or cure. Its origins are many, and the range of behaviour which it covers is equally wide. At some points it merges almost imperceptibly with behaviour which does not contravene the law. A child’s behaviour is influenced by genetic, emotional and intellectual factors, his maturity,

and his family, school, neighbourhood and wider social setting. It is probably a minority of children who grow up without ever misbehaving in ways which may be contrary to the law. Frequently such behaviour is no more than an incident in the pattern of a child's normal development. But sometimes it is a response to unsatisfactory family or social circumstances ... or a symptom of a deviant, damaged or abnormal personality. Early recognition and full assessment are particularly important in these more serious cases. Variety and flexibility in the measures that can be taken are equally important...

The authors recognized that, 'An important object of the criminal law is to protect society' against the consequences of delinquent behaviour, which range from 'minor nuisance to considerable and suffering for the community'

... but the community also recognizes the importance of caring for those who are too young to protect themselves. ... The aims of protecting society from juvenile delinquency, and of helping children in trouble to grow up into mature and law-abiding persons, are complementary and not contradictory.

The criminal law, in its application to juvenile offenders [it continued] has for many years recognized the welfare of the individual as an important criterion, and has made provision for special forms of treatment. (Points 6–8)

The 1969 Act incorporated criticisms made of the original 1965 White Paper. Raising the age of criminal responsibility to 16 or abolishing the juvenile courts were forgotten, although the Act did aim at ensuring that, 'as far as possible, juvenile offenders should be dealt with outside the courts with the agreement of their parents' (para. 11) and, in a significant change, laid down that an offence by a 10–13-year-old would not in itself be sufficient to bring him or her before the court; only if it could be established that the child was in need of care, protection or control would the offence be considered, and then only as part of care and protection (civil) proceedings.

The Act emphasized both 'diversion from courts and the provision of welfare in courts' (Gelsthorpe and Morris 1994: 965; Morgan and Newburn 2006). For 14–16-year-olds (except for a charge of homicide), referral to court should only be used in the last instance. Only if mandatory prior

consultation between police and local services had not produced an alternative, and the magistrate agreed, could a case come to court. The magistrate's range of options was limited: supervision of children under the age of 14 passed to the local authority (which was to provide community homes in lieu of approved schools); for 14–16-year-olds care orders and supervision should be used wherever possible. The local authority (social worker) working together with the probation service was to devise new types of Intermediate Treatment for this age group. Attendance centres and detention centres would be phased out, as would Borstal for under-17-year-olds. Penal custody for 14–16-year-olds would gradually disappear.

Yet the results of this most radical piece of legislation were far from those the drafters of the Act had envisioned. The reasons for this lie in the complexity of the relationships between magistrates, local authorities, the probation and prison service, in police practices and sentencing policy. Compared with the Russian, the English system resembles a battlefield of competing parties, at every level, whether that of policy-making or implementation. It is to this aspect we now turn.

Policy-making and implementation

All the major legislative changes (1933, 1948, 1969) were preceded by drawn-out inquiries, discussion, white papers and/or draft legislation, and compromises in the final stages. The period between the Molony Committee's report in 1927 and the Children and Young Persons Act was six years, and the passage of the 1969 Act was the result of a process begun more than ten years earlier with the setting up of the Ingleby Committee. This contrasts sharply with the Russian experience, where legislation moved much faster, with little public discussion or overt opposition and, as we saw, with direct intervention by the political leader, Stalin, in 1935. In Russia an alliance between reformers and the political leadership was critical, not, as in the UK, the marshalling of evidence and arguments against other interested parties (in the judiciary, police, penal service, the House of Commons and the House of Lords, or in the voluntary sector), or in finding allies among them. Rearguard action by the House of Lords could save whipping or stall the abolition of capital punishment. If the 1933 Act was a compromise, so too was the 1948 Criminal Justice Act. The magistrates, now with years of experience, could in the 1960s ward off the proposal to abolish juvenile courts. Interested parties, it was assumed, had a right to be consulted, and compromises were needed to get measures through parliament.

Another feature of the period was the seriousness and professionalism with which the committees collected evidence, assessed it and made their recommendations. The Molony Committee, which took two years to gather evidence and views from a wide range of professionals, experts, judges, prison staff and probation officers, produced a report that a home secretary, taking up office today, would do well to read. Not only are some the arguments advanced still relevant but the report stands as an example of the kind of investigation that a responsible government should commission (and expect) before embarking on changes in policy towards young offenders.

The government, and the wider political environment, of course mattered. Changes in government delayed the 1933 Act, the war delayed the 1948 Act (and it was important that a Labour government was in power), and it is difficult to imagine the 1969 Act without the influence of the social reformers around Harold Wilson (yet by 1974 they were strangely silent). Unfortunately, the Act's allowing for a gradual introduction of some of the new measures, and its vagueness over IT (Intermediate Treatment) allowed for caution, and for its emasculation. The incoming Conservative government under Edward Heath made no attempt to close the attendance and detention centres, nor to phase out Borstal. Magistrates retained the option of sentencing to detention or passing the cases on to a higher court for a Borstal sentence; the social workers had greater powers to determine the content of care orders and supervisory orders, but this, inadvertently, could lead to those who infringed the conditions coming back to court for detention. Mandatory consultation did not occur. Intermediate Treatment developed slowly.

Children in Trouble had referred to:

juvenile courts ... voluntary organizations ... the probation service [which] has played a pioneering role ... in developing the concepts of diagnosis and treatment ... the approved schools [which] have done much to develop the concept of social education ... juvenile liaison officer schemes in some areas [the police contribution to crime prevention] ... the children's departments of local authorities... (point 8)

and suggested that, in cooperation with each other, all had an important role to play. But, understandably, their views and their interests did not necessarily coincide, and this made implementation far from straightforward.

Results were very different from those the drafters of the Act had envisioned. Against all expectations, custodial sentencing rose. And this was during a period when crime was rising slowly, and the police were making increasing use of cautions or informal warnings to divert young people away from the courts. In 1970 the police were cautioning a third of known young offenders; by 1979 this had risen to a half. The number of boys aged 14–16 sentenced to custody rose from 3,200 in 1971 to 7,700 in 1981. Magistrates, it seems, were opting in favour of custody and against care orders (Gelsthorpe and Morris 1994; Allen 1991: 31; on custody vs care orders, Bottoms 2002: Table 15.4). Yet they continued to discharge, to award fines or community (supervisory) orders in much the same proportions as before. No one was satisfied. The Right argued that not enough was being done to reduce crime, the Left was dismayed that despite the talk of treatment, incarceration was increasing. Borstal was no longer reducing the pool of reoffenders. With the return of the Wilson government in 1974 one might have expected action, but other issues were deemed more important, and nothing was done.

The 1982 Criminal Justice Act, which we come to in a moment, bore the strong imprint of a Conservative government appealing to the nation as a ‘law and order government’. Yet it is striking that from turn of the century through until the 1980s, despite the differences within the political and policy-making elite, there was a broad consensus that punishing or locking up children was not the answer to juvenile crime, and that society had a responsibility to step in with education and support (albeit in institutions) for those whose parents or society was failing. *The Times*, a strongly establishment newspaper, suggested that the 1948 Act was the product of ‘a common stock of liberal thought to which men of all parties and of none have contributed’ (5 November 1947, quoted by Bailey 1987: 303), and even the 1982 Act contained elements that emphasized the use of custody as a measure of last resort.

1980s – short, sharp shocks

The Conservative government returned to power in 1979, with a bid to act as a law-and-order government. It favoured the detention centres as administrators of short, sharp shocks, and child care services were now described as part of ‘the national pattern of law-and-order services’ (Patrick Jenkins, Secretary of State for Social Services, quoted by Davies 1982: 34). The process of preparing and passing legislation was speeded up. By 1980

the Home Office had produced a White Paper, and by 1982 the Criminal Justice Act, which included provisions for young people, was on the statute book. The Home Office and the government continued to insist that the aim was to reduce custody for young people, but this had begun to sound like a piece of obligatory rhetoric, rather than a deeply held conviction.

Borstal was abolished, and replaced by Youth Custody Centres where 15–20-year-olds would serve determinate sentences (with a maximum of 12 months for under-17-year-olds). Magistrates could also send 15–20-year-olds to detention centres, for short, sharp sentences (a minimum of three weeks) under a tougher regime. However, Section 1(4) of the Act specified that a custodial sentence should only be passed if

- i) the offender appeared unable or unwilling to respond to non-custodial sentences;
- ii) a custodial sentence was necessary for the protection of the public;
- iii) the offence was so serious that a non-custodial sentence could not be justified.

This, it seems was the one concession the opponents of custody had wrung from the government. Both the Probation Service and the prison governors expected and feared an increase in custodial sentencing (Allen 1991: 36). There was little evidence, from the preceding period, that magistrates and social workers would work together to devise alternatives to custody.

However, and to the surprise of practitioners and specialists, the next decade saw the number of 14–16-year-olds sentenced to custody decline back to the level it had been at the beginning of the 1970s.⁶ While the fall in size of age cohort by nearly 20 per cent in the 1980s almost certainly contributed, it cannot be held responsible. The crime rate continued to rise, albeit slowly, until 1985 before moving down (Gelsthorpe and Morris 1994). Despite the government's 'tough on crime' rhetoric, none of the practitioners seemed anxious to pursue a more punitive agenda. The police continued to extend cautioning – up to 70 per cent in the cases of known boy offenders between the age of 14 and 16 (Bottoms 2002) and thus diverted cases from court. Social workers had become increasingly wary of interventions that might result in detention, and worked more closely with magistrates, police and probation officers to find measures to treat offending behaviour within the community. In this more cooperative environment, Section 1(4) and Section 2(2), which

required a Social Enquiry report before a custodial sentence be imposed, influenced court practice.

A major injection of funding in 1983 for the Department of Health and Social Services to support IT at last bore fruit in local projects, involving both government and voluntary bodies, and suggested to magistrates that alternative workable measures were available. Perhaps most important the magistrates, now with greater powers to sentence (Borstal had gone), felt more secure in their role as 'criminal justices'. But they disliked the government's insistence on tougher regimes in detention centres, when the evidence showed that this had no effect, and showed their disapproval by using other sanctions (Rutherford 1989; Allen 1991).

In 1988 the government introduced a Green Paper, which seemed to herald a change of direction, back to an earlier philosophy:

Most young offenders grow out of crime as they become more mature and responsible. They need encouragement and help to become law abiding. Even a short period of custody is quite likely to confirm them as criminals, particularly as they acquire new criminal skills from the more sophisticated offenders. They see themselves labeled as criminals and behave accordingly. (*Punishment, Custody and the Community*, paras. 2.17–2.19, quoted by Morgan and Newburn 2006: 1028)

David Faulkner, Head of the Home Office Crime Department (1982–90), suggested that 'the visible reduction of known juvenile offending' should be attributed to the use of alternatives to custody, and in 1990 a Home Office circular stated:

There is widespread agreement that the courts should only be used as a measure of last resort, particularly for juveniles and young adults; and that diversion from court by means of cautioning or other forms of action may reduce the likelihood of reoffending. These factors would support a policy within which cautioning is used for a wide range of offences and offenders. (Home Office Circular 59/1990, cited in NACRO 2005: 28)

Yet, at the same time, a line was being drawn between criminal and care cases. The 1989 Children Act abolished care orders in cases of offending behaviour. Family courts were to deal with cases of care and protection; the

juvenile courts (renamed Youth Courts in 1991, with their brief extended to include 17-year-olds) were to deal with criminal offences. Children had been reclassified into two separate categories: those in need of care, and offenders.

By the end of the 1980s, the industrial schools, reformatories, approved schools, remand homes and Borstals, which had dominated the landscape for most of the previous eighty years, had gone. The probation service had lost ground, the social workers had gained. The role of charitable, non-professional institutions had declined, although they were still there for children in need of care and protection. Perhaps IT could bring local authorities and the other players together, although it was not clear whether the projects were directed at youth at risk more generally or aimed at offering alternatives to custody (Davies 1982). Custody was now firmly back as part of the landscape in the form of Youth Custody Centres under the prison service, to which youngsters could be sent, on remand, or to serve sentences of up to 12 months.

What are the lessons that might be learnt from the history of youth policy in England and Wales?

First, that a concern with the damage done by and the ineffectiveness of prison can produce a faith in alternatives, which may set out to be different, but, when they fail, ‘prisons’ return. Why do they fail? Because attempts to reclaim or re-educate young offenders without tackling the (recognized) causes of offending – poverty, neglect, abuse – can only succeed in individual cases. The cards remain stacked against the child.

Second, a modified criminal justice system that demands that its magistrates make the welfare of the offender their priority, and abjure punishment, will find its officers struggling. A separate system of higher courts to deal with serious offences and those by older children reinforces the perception of children as belonging to one or other category: either in need or criminal.

More positively, there are lessons to be learnt from the way governments went about seeking expertise, opinions and recognizing interests. There is also evidence that those involved (magistrates and police) did not hold rigid views or attitudes on how best to respond to young offenders, and that law and order agencies can cooperate with social workers and voluntary agencies (even if with difficulty) to find solutions that work to young people’s advantage.

Rethinking penal policy: The wider context

By the 1980s the thinking about juvenile crime and responses to it had changed in more than one country, and not only in one direction. The welfare consensus was evaporating. Some countries (Scotland, as we saw, and Scandinavia) opted for decriminalization. In the United States, and in England, the opposite occurred.

While one of the assumptions underlying the welfare approach is that society, pursuing policies that produce poverty and social injustices, is largely responsible for creating its criminals, the neo-liberalism of the 1980s saw it differently. For Thatcher or Reagan the individual was responsible. If crime exists in a society in which opportunities are open to all, we cannot lay the blame on society. Whereas the welfare approach – taken to extremes – sees ‘crime’ as disappearing in a society of equals (remember the Communist Party programme?), neo-liberalism views crime as a normal part of society. The assumption is that individuals will seize opportunities, if offered to them, to better themselves or pursue their own interests. The aim then becomes one of lessening the opportunities for crime (more cameras, more police, no wearing of hoods), of isolating the offenders and setting up safe ‘gated’ communities. The focus moves away from trying to change those features in the environment that, it is thought, breed crime – poverty, unemployment, deprivation in a wealthy society – to one of safeguarding the existing environment. Crime, like unemployment, becomes a ‘fact of life’, part of a normal society, and the criminal justice system should deal with it.

In America concerns that welfarism was not working began to be voiced, insistently, against a background of rising crime rates in the 1970s. The professionals – police, judges, prison staff, welfare workers – were under attack for failing to counter crime. And sentencing was seen partly to blame. Now here children were not the target. Adults account for 80–90 per cent of convicted criminals in all our societies and, not surprisingly, it is the adult criminal who is the main focus of criminal justice. However, policy towards adults usually exerts a strong influence on youth justice. In theory the policies could be sharply different – retribution for adults, restorative justice for children – but in reality it rarely, if ever, works like that.⁷ Among the factors that influence responses towards unacceptable behaviour, age is only one, though it may play a greater role in some cultures or societies than in others, and even within one society this may change over time. We shall

come back to this when we compare Russian and English attitudes towards young offenders.

In the US, criticism of welfare and a new concern with ‘rights’, initially directed towards the treatment of adults, was to influence the treatment of young offenders. Lawyers had argued that sentencing the offender rather than the offence, the practice of indeterminate sentencing, and policies of parole undermined the individual’s right to fair and equal treatment for a particular offence. These arguments had particular relevance for children. The observance of the right to a fair trial and defence of the individual’s rights was questionable in a youth court. Youth courts tended to adopt less stringent procedures to safeguard the defendant’s legal rights; judges were expected to focus on the needs of the particular child, not his or her rights; a judge might dismiss the case against one individual, give another a suspended sentence for the same offence, and send a third to prison. Making parole dependent upon ‘good behaviour’ could result in one young person serving twice as long as another, and he or she had little chance of challenging parole board decisions. In other words, procedures that had been intended to focus on the well-being of the child could and, in some cases, were undermining the child’s rights. Hence, some argued, a young person would be better protected in an adult court, and given a fixed sentence for the offence, not made to serve until his or her behaviour was deemed to be satisfactory.

In themselves such claims correctly address injustices that a paternalistic system of youth courts and flexible sentencing can produce. But they had unfortunate consequences in an environment in which it was becoming popular to argue that the individual rather than society is responsible for crime. The arguments of lawyers arguing for ‘just deserts’ struck a chord with those anxious to reassert the values of individual responsibility. The idea of a juvenile court as a youth tribunal faded. Some of those arguing for tighter sentencing guidelines may have wished to see guidelines that laid down milder sentences. However, the opposite occurred. Tightening sentencing guidelines at a time when the list of crimes was extended, with some being reclassified as more serious, combined with new guidelines for transferring minors to adult courts, and imposing custody without parole, has had frightening consequences in a society where the age of criminal responsibility remains as young as 10 in some states. More have been sentenced to custody, and limiting the arbitrariness of parole decisions has led to less parole (Snyder and Sickmund 2006).

There is no evidence that these developments influenced the shift in English policy towards young offenders in England in the 1980s. It was rather that the English system had built in features that could embrace a more punitive approach, should the legislators favour one. This was not happening across Europe and, simultaneously, the 1980s witnessed a new emphasis on human rights and the adoption of international conventions or rules that relate to children, including those in trouble with the law.

The most important were the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) of 1985, followed by the Convention on the Rights of the Child (1989). The Beijing Rules do not specify the type of justice system appropriate for children (other than that it should be concerned with the well-being of the child, and measures should be proportionate to both the offender and the offence), but they emphasize the importance of observing the child's legal rights, on involving the community and applying the principle of restitution wherever possible; they state clearly that remand should only be used in extreme cases, as should detention (only in violent, or repeat cases), and that sentences should be short; alternatives to detention should be sought. Neither the death penalty nor corporal punishment is permissible.

The Convention on the Rights of the Child, adopted in 1989, reaffirmed several of these, some in stronger form. Article 37 states:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

and Article 40, clause 3(b) requires governments to strive to create laws, procedures and institutions, which should establish the minimum age of criminal responsibility, and 'whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected'.

Subsequent rulings or guidelines, while basing themselves on these general principles, elaborated different aspects. The Vienna Guidelines of 1997 advocated the setting up of juvenile courts, and emphasized the need to find alternative measures to deal with law-breakers to keep them out of the court system. The Tokyo Rules for the protection of juveniles deprived of

their liberty (1990) laid detailed guidelines for their protection and welfare while in detention.⁸ And detention is defined as:

11(b): The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.

Again the insistence upon its being seen as an exceptional measure is present:

2. Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases.

The role of the conventions in influencing policy is quite limited. Although states may sign them, and their performance is monitored, the UN Committee's reports are only of recommendatory character. They are not enforceable. The increased use of detention by some countries is witness to that. Conventions may help NGOs to back their criticism with reference to international standards, but governments know that no one is going to use sanctions against them for the way they treat their children, and that international bodies can do little. The 2002 report of the UN Committee, which criticized the UK's record, had no effect upon government policy in England and Wales (see chapter 6). Yet at least the Committee compels a government to provide extensive (public) documentation regarding the treatment of its children, and to respond to criticisms or recommendations.

The Council of Europe, with its Court of Human Rights, has more teeth: the court's rulings are obligatory for the member states involved. The UK joined the Council of Europe in 1949, ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) and accepted the Court's jurisdiction in the Human Rights Act of 1998. Russia joined the Council of Europe in 1996, and in 1998 ratified the Convention for the Protection of Human Rights and Fundamental Freedoms and subsequently the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The latter allows for a Committee to visit any place of detention, and to report. The requirements

that must be met for an individual case to be accepted for review by the Court are stringent, and so far no cases from Russia have involved children.⁹

Probably all that international conventions can do is to set out some basic minimum standards. In their present form those that relate to young offenders reflect the mixed message that, by the end of the twentieth century, had come to dominate the treatment of young offenders: 'welfarism' is accompanied by a new concern with legalism. While conventions reaffirm the central importance of the welfare of the child, at the same time they refer to the importance of 'proportionality' (the response as appropriate for the offence) and advocate the setting up of youth courts. This, it has been argued, reflects 'a fundamental ambivalence'. It is easy to say that the response should be proportionate to offender and offence, but how can the response be both? The statements in the Beijing Rules, Walgrave argues, are 'a pleasing rhetoric that hides the language of feasibility' (2004: 548).

UK politicians were little interested in the conventions. However, for Russian reformers, emerging out of their isolation in 1990, and for politicians who wished to join the international community, they were seen as important.