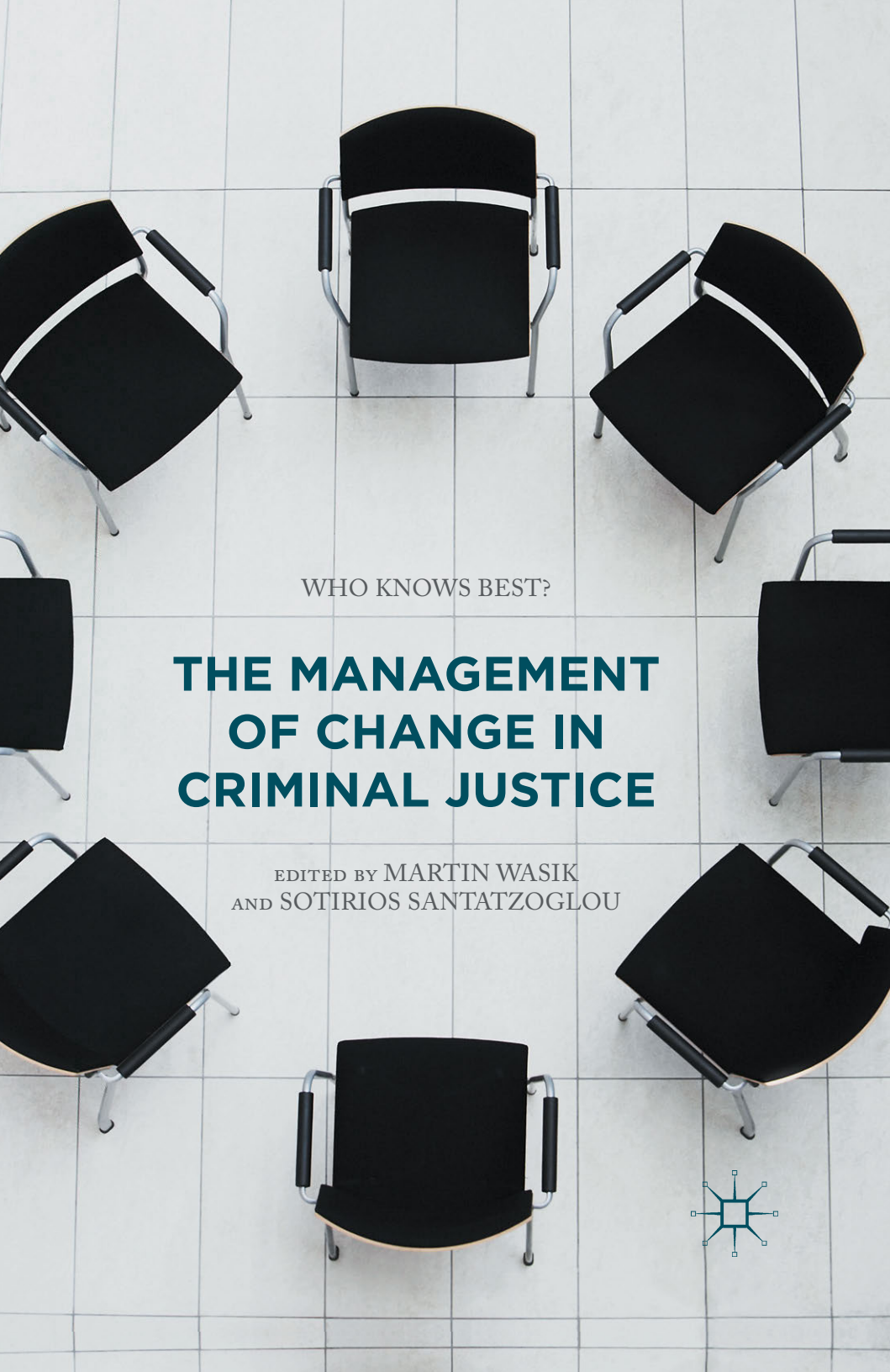

WHO KNOWS BEST?

THE MANAGEMENT OF CHANGE IN CRIMINAL JUSTICE

EDITED BY MARTIN WASIK
AND SOTIRIOS SANTATZOGLOU

The Management of Change in Criminal Justice

The Management of Change in Criminal Justice

Who Knows Best?

Edited by

Martin Wasik and Sotirios Santatzoglou
Emeritus Professor of Law at Keele University, UK

palgrave
macmillan

First published 2015 by
PALGRAVE MACMILLAN

Palgrave Macmillan in the UK is an imprint of Macmillan Publishers Limited, registered in England, company number 785998, of Houndmills, Basingstoke, Hampshire RG21 6XS.

Palgrave Macmillan in the US is a division of St Martin's Press LLC, 175 Fifth Avenue, New York, NY 10010.

Palgrave Macmillan is the global academic imprint of the above companies and has companies and representatives throughout the world.

Palgrave® and Macmillan® are registered trademarks in the United States, the United Kingdom, Europe and other countries.

ISBN 978-1-349-57650-0 ISBN 978-1-137-46249-7 (eBook)
DOI 10.1057/9781137462497

This book is printed on paper suitable for recycling and made from fully managed and sustained forest sources. Logging, pulping and manufacturing processes are expected to conform to the environmental regulations of the country of origin.

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication Data
The management of change in criminal justice : who knows best? / Martin Wasik, Keele University, UK, Sotirios Santatzoglou, Keele University, UK.
pages cm

1. Criminal justice, Administration of—Great Britain. I. Wasik, Martin. II. Santatzoglou, Sotirios, 1965–
HV9960.G7M36 2015
364.068′4—dc23 2015013135

Contents

Preface

The idea for this book emerged from various discussions between the two editors about the ways in which criminal justice policy emerges, takes shape and is implemented through the activities of practitioners on the ground. The purpose of the collection of essays is to explore a number of related themes within policy change in criminal justice. The subtitle 'Who Knows Best?' is meant to stimulate discussion about policy-making and its implementation (or not) through practice. How and why do particular criminal justice policies emerge from the political process and what are the contributions of politicians, civil servants, practitioners, researchers and others in the generation of those ideas? What is the relationship between the increasingly centralised formation of policy in Whitehall and its local implementation and delivery? To what extent is centralised policy interpreted and refined differently in local areas? Does diversity in implementation imply policy failure, or is it a sign of healthy activism among local practitioner groups? What importance does local justice have? When can the centre learn from local initiatives?

We invited contributors to write chapters on topics of particular interest to them, but to consider while doing so the aims, merits and limits of the 'top-down' approach to criminal justice policy-making and the involvement of policy-makers and practitioners in the management of change. The authors are well placed to offer a range of perspectives on these issues, whether through their own involvement as policy-makers, or practitioners, or campaigners or as academic researchers and writers. All approaches are represented here. Some of the essays reflect upon policy developments within particular historical periods (such as criminal justice policy under Thatcher, the implementation of community service orders in the 1970s and youth justice practitioner experiences in the 1980s), or in particular parts of the country (community justice in Scotland and youth justice in Wales) and some deal with contentious contemporary policy (such as 'transforming rehabilitation' and payment by results, multi-agency work on prolific offenders and proposed reforms to youth courts). Other essays reflect upon ongoing policy dilemmas, such as the impact of centralisation and managerialism on the magistrates' courts and the Crown Court, the continuing search for consistency and fairness in the administration of out-of-court disposals

and the use of anti-social behaviour orders against street sex workers. Yet others offer critiques of long-standing if not always consistent policies, such as those towards the 'troubled families' of young offenders and on 'community involvement' in the fight against crime. We are delighted to present a stimulating mix of chapters, some written by authors who are well-established experts in their field, and some who have the opportunity here to publish their doctoral research. Our thanks go to them all and to our publisher for their enthusiasm for the project and for their continuing support.

Finally, we must record our thanks to Max Rutherford, criminal justice programme manager at the Barrow Cadbury Trust, for kindly hosting a seminar for us in 2013 at which many of the contributors to this volume were able to discuss and exchange ideas and present early versions of their papers.

Contributors

Rob Allen
Co-Director, Justice and Prisons, UK

Rose Broad
Lecturer, Centre for Criminology and Criminal Justice, University of Manchester, UK

Mary Corcoran
Senior Lecturer in Criminology, Keele University, UK

David Faulkner
Former Home Office civil servant; Senior Research Fellow, Centre for Criminological Research, University of Oxford, UK

Stewart Field
Professor of Law, Cardiff Law School, UK

Penelope Gibbs
Director, Transform Justice, UK

John Harding
Former Chief Probation Officer, Inner London Probation Service, UK

Jessica Jacobson
Co-Director, Institute for Criminal Policy Research, Birkbeck, University of London, UK

Theresa Lynch
Teaching Fellow, School of Law, University of Birmingham, UK

Katrina Morrison
Lecturer, School of Life, Sport and Social Sciences, Edinburgh Napier University, UK

Peter Neyroud
Former Chief Constable, Thames Valley Police; Affiliated Lecturer, Institute of Criminology, University of Cambridge, UK

Sotirios Santatzoglou
Teaching Fellow, School of Law, Keele University, UK

Molly Slothower
Junior Fellow of the Cambridge Centre for EBP and Field Manager of the Birmingham Turning Point Project, UK

Roger Smith
Professor of Social Work, School of Applied Social Sciences, Durham University, UK

Jon Spencer
Senior Lecturer, Centre for Criminology and Criminal Justice, University of Manchester, UK

Chris Stanley
Former Magistrate and Trustee of the Michael Sieff Foundation, UK

Martin Wasik
Emeritus Professor of Criminal Justice, School of Law, Keele University, UK

Alexandra Wigzell
Research Fellow, Institute for Criminal Policy Research, Birkbeck University of London; Doctoral Student, Institute of Criminology, University of Cambridge, UK

Anne Worrall
Emerita Professor of Criminology, Keele University, UK

1

Who Knows Best? A Question About How Criminal Policy Change Takes Place

Sotirios Santatzoglou and Martin Wasik

Introduction

In defining the tasks of criminology, Sutherland pointed to an examination of 'the processes of making laws, of breaking laws, and of reacting toward the breaking of laws' (Sutherland et al., 1992, p. 3). This 'still hard-to-beat definition of the field' (Loader and Sparks, 2011, p. 13) shows that the question of crime, and the responses to it, also encompasses the issue of how policy and practice decisions about crime are made. The examination of the how question is significant, because the way that policy and practice decisions are made shapes the content of those decisions and, in turn, the scope and limits of criminal justice. The how question becomes particularly important when policy and legislative initiatives are of a strategic nature; namely, when they attempt to bring change or significant development in the operation and scope of criminal justice, in order to increase its efficiency, effectiveness and public legitimacy. Examination of the how question, therefore, is central to the study of the procedural legitimacy of strategic policy initiatives. The suspended sentence in English law is a simple but useful example. The Criminal Justice Act 1991, consistent with the government's general policy objective at that time of securing proportionality and 'desert' in sentencing, restricted the power to pass a suspended sentence to 'exceptional circumstances' only. This had an immediate and dramatic impact on practice, rendering the sentence effectively a dead letter from 1991 to 2003, when the policy was reversed and the legislative restriction was removed.

Notwithstanding the centrality of procedural legitimacy, a further point is that, in a number of cases, those initiatives may not be successfully implemented, or they may fail their strategic intentions. In the language of organisational theory, they are unsuccessful because they 'fail to yield [the] intended results' (Kiliko et al., 2012, p. 81). When legislative policy initiatives fail to produce their intended results, there may be an issue about the process which underpinned the formulation of the intended criminal justice change – in particular, how the questions for change were framed and whose initiatives and ideas became part of that process. An examination of these decision-making issues in criminal justice does not suggest that '[policy] ideas have a life of their own' (John, 2012, p. 142). Instead, it reveals both the forms of knowledge and the processes of knowing, which underpin policy perceptions of crime and the responses to it at a given historical time. In this way, the question of change in criminal justice becomes a question of cognitive management of the policy process, of knowing both the need for and the scope of change. In particular, it becomes a question about the policy-makers whose perceptions and concerns dominate the formation of change. It is also a question about the power of practitioners to implement (or not) policy change on the ground, to give it a shape which will faithfully reflect (or not) the policy intentions. These processes are worked out within, and by reference to, particular historical moments or periods. The suspended sentence again is an example. That sentence, introduced into English law in 1967 and re-branded several times since, was always intended by policy-makers to drive down the use of immediate imprisonment, but the sentence has persistently failed to deliver that result. In many cases, judges and magistrates use the suspended sentence as an alternative to a community order, rather than as an alternative to custody (Ashworth, 2010, p. 303). This is not a case of deliberate subversion by practitioners of policy intentions. It has much more to do with a degree of ambivalence in the underlying rationale of the sentence, and the way in which practitioners (here judges, magistrates and probation officers preparing pre-sentence reports) tend to focus on the sentencing options available to best fit the needs of each particular defendant, rather than considering an overall policy objective.

During the period when the essays for this book were being written, a major restructuring of the probation service had been put in train, based upon the coalition government's 'transforming rehabilitation' agenda (Ministry of Justice, 2013). One of the problems addressed by the reform has been long-standing concern over the ineffectiveness

of short prison sentences, not least the fact that these offenders have been released at or before the half-way point of their sentences with no supervision or support from the probation service (Johnston and Godfrey, 2013). The influential Halliday report in 2001 described this problem as 'one of the most important deficiencies' in the sentencing system (Halliday, 2001, p. 22). A policy initiative in the Criminal Justice Act 2003, to enable the probation service to provide such support (so-called 'custody plus'), has since been abandoned as too expensive. The transforming rehabilitation agenda tackles this same problem in a different way – by contracting with firms in the private sector to provide supervision of those released from short sentences on a payment by results basis (results being measured by change in expected reconviction rates of offenders). On the back of this development, however, the policy has been taken much further, with the majority of the community sentence supervisory functions of the probation service also being transferred to private contractors (Neilson, 2012). Broad and Spencer (this volume) discuss the policy framework which has apparently led to this dramatic (and in the views of many, unnecessary and regrettable) change. They argue that 'the transforming rehabilitation agenda . . . is a policy devised around . . . a neoliberal ideology that can be seen to have failed across a number of [other] policy areas'. It is certainly possible that the transforming rehabilitation agenda may fail to deliver the measurable beneficial outcomes which it claims to be able to achieve. The policy may also have unintended consequences in practice. One rationale for legislating to ensure that short sentence prisoners (those serving sentences of up to two years) receive a total period of 12 months under supervision/on licence following release is a policy initiative to restrict the use of such sentences. Defence practitioners will no doubt argue, once supervision requirements are in place, that short sentences are more onerous than before, and hence should be imposed less frequently. Judges and magistrates may, however, take the view that a short sentence followed by supervision and support is a much more attractive option than a short sentence with no supervision and support, so that such sentences may turn out to be used more often. As with the suspended sentence, this would not be a case of judges and magistrates deliberately thwarting a policy aim. Judges and magistrates focus on the case before them, identifying the best approach to be taken for each individual, rather than considering the overall policy objective, even if that were entirely clear. Policy, in terms of actuarial justice and public management is predominantly concerned with collectives and associated costs, rather than individuals.

Variations in practice as a policy problem

In his 1961 book *In Search of Criminology,* especially in the closing chapter 'Conditions for Achievement', Radzinowicz reminded criminologists that 'probation, the Borstal system, the juvenile courts and several other innovations . . . have evolved, on the whole, under the influence of growing social consciousness, of religious movements, and philanthropic stimulus, some from temporary measures, or just from straightforward common sense, supported by experience' (1961, pp. 178–179). Radzinowicz's observation captures the historical and organisational complexity of change and development in criminal justice. It provides a warning to criminologists of the limits of theoretical criminological knowledge, and asserts the importance of understanding the practice of criminal justice. Radzinowicz said that 'one of the best ways for criminologists to maintain an empirical and realistic attitude is to remain in close concert with those engaged in the administration of criminal justice' (1961, pp. 178–179). In this way, Radzinowicz placed the practitioners who implement criminal justice in practice as central to criminal justice development and as crucial to the development of criminological understanding. A range of subsequent studies have taken up Radzinowicz's advice and have addressed the role of practice in criminal justice development. These accounts have, however, differed widely.

Several of the key early research studies regarded the dynamics of practice as part of the problem which needed to be addressed. In 1962, in his book *Sentencing in Magistrates' Courts – A Study in Variations of Policy,* probably the first study in the country which employed fieldwork methods, Hood examined the question of 'equality of consideration' before the law; in particular 'that similar general considerations should be taken into account when a [sentencing] decision is made' (1962, p. 14). The study pointed to a serious problem of inconsistency in the way that justice was dispensed. He observed that 'frequently [sentencing] decisions are reached with the aid of "experience" ', but that magistrates 'have, in most cases, very little information on which to base their decisions' (Hood, 1962, p. 92). Hood concluded that 'there is evidence to suggest that their actions are, to some extent, related to the type of community on whose behalf they are acting, and to their personal views on what is the best way to deal with offenders' (Hood, 1962, p. 78). Hood's distrust of the judicial function in relation to sentencing practice can also been seen in the equally famous 1977 study by Baldwin and McConville, *Negotiated Justice: Pressures on Defendants to Plead Guilty*, which examined the circumstances in which defendants who asserted

their innocence might come under pressure from their lawyer, and the judge, to save the court's time by pleading guilty. The authors began by noting that 'if plea bargaining exists in England, it has certainly been well hidden from researchers'. On the other hand, 'a casual visit to the Birmingham Crown Court would rapidly dispel the misconception that plea bargaining scarcely exists in English courts . . . barristers, police officers and others refer to the "deals" that have been struck' (Baldwin and McConville, 1977, pp. 18, 24).

So concerned were the legal authorities by this research that serious efforts were made to suppress its publication. Other accounts expressed distrust and pessimism about the administration of justice and its future. In 1983 Morris's paper 'Legal representation in providing criminal justice for children', written in the wake of non-implementation of the progressive aims of the Children and Young Persons Act 1969, the author found that '[r]esearch on the English juvenile justice system indicates a system in confusion. Certainly, one cannot talk about *the system*' (1983, p. 131). In 1985, in the same pessimistic tone, Burney's book *Sentencing Young People – What Went Wrong with the Criminal Justice Act 1982?* was an empirical study of the effect of implementation of that act upon juvenile justice practice. Burney pointed with regret to '[t]he sheer variety of custom and practice [as] such a strong feature of our criminal justice system' making it 'almost inevitable that the absorption of statutory change will equally vary in style and consequences' (1985, p. vi). Morris and Burney's pessimism may have been premature, since by the end of the 1980s local juvenile justice practice had been transformed and had become much more in tune with the spirit of the 1982 act (Windlesham, 1993 Telford and Santatzoglou, 2012). It seems the transformation was, however, achieved through strategic local inter-agency developments, rather than by additional policy drivers from the centre.

The research studies mentioned above, and of course many others, have provided a wealth of information about the world of criminal justice practice. In general, they have regarded it as a mechanism for implementation, which has delivered (or failed to deliver) the intended policy change, rather than as a world with its own characteristics, which can be innovative, and which should be explored and understood. Those studies in general portrayed the decision-making of lower practice levels of justice as part of the problem, to be rectified through further top-down policy interventions, rather than as part of the solution in criminal justice development. One example is sentencing guidelines, especially in the magistrates' courts. Sentencing guidelines were developed to address the issue of unjustified disparity in outcome from

one magistrates' court to another, but it is often forgotten that guidelines were first developed and implemented locally by magistrates and justices' clerks in the 1980s. They did not have binding force until 2003, when sentencing guidelines for all courts were placed on a statutory footing. Sentencing 'consistency' is a difficult thing to measure statistically, given that consistency of approach is not the same thing as uniformity of outcome. According to Tarling (2006), part of the solution to the problem of magistrates' sentencing variations was for the Sentencing Guidelines Council 'to monitor the use [of guidelines] to ensure that they are being properly applied' (Tarling, 2006, p. 40). While the Sentencing Guidelines Council regularly published statistics showing local sentencing outcomes, it is very difficult to identify local 'best practice' in sentencing. This is because English guidelines (unlike US ones) are inherently flexible, recognising that facts can vary considerably within any given offence category, and according proper respect to local decision-makers to weigh those particular facts within a nationally agreed framework. The issue of disparity has to be addressed locally, through training, as well as by clear guidance from the centre. The internal dynamics of the practice world is as important in this context as any other, and magistrates need to feel that they have ownership of, or at least influence over, the guidelines which they use: guidelines should be generated 'with' rather than 'for' the courts. Writing in the context of differential fine levels in the magistrates' courts, Raine and Dunstan (2009) describe a rich picture of practice factors which influence the ways in which financial penalties are implemented locally – widely varying economic conditions, a sense of local justice, the need to preserve discretion, complexity in applying key terms in sentencing such as 'serious' and 'proportionate' and a 'lack of confidence in some courts about the reliability and general quality of information available to them' (2009, pp. 29–30).

In the different context of youth justice in Wales, Field (this volume) says that 'the very nature of negotiated local practice means that there is significant variation in youth justice cultures in both Wales and England'. Practitioners naturally focus on local justice rather than national policy. Justice is seen as being delivered by a local team, or in a local centre, rather than as part of a national structure or pattern. As one circuit judge has put it (Compston, 1994):

> The justification for local justice surely lies in this – that only by breaking justice down into manageable units can it work effectively, for the defendant, the victim and the community. It implies closeness to the community and responsibility to the community. Only by

> dealing with matters locally will any sense of mutual responsibility be restored.

Overall, though, the last 20 years has been a story of increasing centralism in criminal justice, with a steady loss of autonomy amongst key local agencies (the police, the courts and the probation service). Raine (2014, p. 408) has said that:

> centralisation needs to be understood in the context of wider public sector developments. The advent of new public management (NPM) gave primacy to issues of efficiency and parsimony in resource usage and promoted competition and the disciplines and styles of management associated with the private sector. Under New Labour this widened to encompass stronger concern for the modernisation of public services as a whole through stronger 'customer-centricity' and more 'joined-up' approaches across the sector. The centre [had a] strongly held conviction that 'top down' direction and unitary organisational form would be the best way to achieve greater efficiency.

Many of the essays in this volume touch upon this issue of central-local relations. For example, Gibbs laments the erosion of local influence at magistrates' courts level, despite those courts having been regarded traditionally as the epitome of local justice. In the 1980s there were 600 local magistrates' courts, each serving a petty sessional division. A series of administrative reforms has taken place since then, driven in the name of 'modernisation', resulting in the closure of two-thirds of those courts by 2010. There have been many different strands here, including the abolition of local magistrates' courts committees and their replacement by a national administrative structure for all courts, and the employment of more professional judges in place of lay magistrates. There has also been a significant reduction in workload as a result of increasing use of diversionary cautioning schemes. In this volume, Wasik examines the extent to which local justice endures amongst Crown Court judges despite the degree of central control emanating from nationally formulated guideline rules on criminal procedure. Both issues touch upon the important constraint of judicial independence in the context of managerial change. Despite all this centralisation, and probably as a reaction to the pervasive power of Westminster, over the same period there has been an important push towards the devolution of political power to Scotland and to Wales, and perhaps in due course to some of the English regions. In the context of criminal justice policy development

post devolution, two contributions to this volume, Morrison's chapter on community justice in Scotland and Field's chapter on youth justice in Wales, are especially illuminating. According to Henry, 'institutional spaces do matter, and have mattered, in framing and underpinning the ways in which crime, justice, security and safety have been imagined' (2012, p. 416). One example of the critical importance of an institutional space is provided by Morrison (this volume) where she explains the importance of the delivery of community justice in a devolved Scotland being located within local authority social service departments and underpinned by a social work ethos, rather than within a national probation service, as in England and Wales, which has been much more exposed to the political change imposed by Westminster.

Practice as a policy driver

In her 2009 paper 'Historicising Criminalisation', Lacey argued that an understanding of 'institutional conditions' is a 'preliminary to building normative theories', as on these conditions the 'realisations' of the normative vision of criminal law 'would depend' (2009, pp. 941–2). Lacey's account sets practice conduct, what she calls substantive 'in action' criminalisation, at the centre of theoretical development. Her account sets practice conduct as the basis of the criminal law and criminal justice principles. By contrast Ashworth, in his 2002 article 'Responsibilities, rights and restorative justice', championed the importance of principle (as opposed to practice) in the development of criminal justice. Ashworth pointed out that '[r]estorative justice is practice-led in most of its manifestations' (2002, p. 578), while at the same time expressing serious doubts about a practice-led theory of restorative justice. While '[t]he theory of restorative justice has to a large extent developed through practice', '[o]ne consequence of this is that there is no single theory' (2002, p. 578) and, in Ashworth's view, no coherence. The article as a whole demonstrates that restorative justice has grown through practice, but that there are limitations to practice leading development and change in policy beyond the local context. While this is true, restorative justice has been the subject of much academic research, which has fed into policy change, especially in youth justice. There is something of a chicken and egg problem here. The development of a coherent general theory of restorative justice needs to be underpinned by what is known about its practical operation and effect. A better formulation of theory ought to help in the practical applications of restorative justice,

but it may be that restorative justice has its greatest value when operationalised in local contexts, and it almost certainly functions differently in different institutional and community environments. 'One size fits all' does not apply to restorative justice. The detailed working out of the forms of restorative justice may be better left in local control, such as the neighbourhood youth offender panels in England, albeit subject to guidelines and aims set centrally (see, for example, Daly, 2003).

Rutherford's important book, *Criminal Justice and the Pursuit of Decency*, dealt with the role and impact of the values of key professionals in the administration of criminal justice. He argued in the book that ground level practice is the driver of change. In the chapter 'The Way Forward', Rutherford claimed that criminal justice practitioners 'are often the principal agents of change, being able to encourage, facilitate, or impede the reforms efforts of others . . . to a very considerable extent practitioners comprise the linchpin that determines the success or failure of any reform endeavour' (1994, p. 120). Rutherford's account clearly regarded practice as being instrumental and cognitively singular in furthering change and reform on the ground. As Patterson and Whittaker explain, 'it is to practice which we must look to understand the way in which the [law] is being operated' (1995, p. 261). Another example is Rock's 2004 policy study *Constructing Victims' Rights: The Home Office, New Labour and Victims* which describes the development of 'official discourse' into an acceptance of some form of victims' rights for England and Wales during the New Labour government. Shapland (2006, pp. 135, 136) suggested in a review of that book that in fact it was 'very unclear that there [had] been such an acceptance' of the enhanced role for victims within the world of practice, which had slowed and obscured the implementation of reform.

From an operational perspective, the move from the local to national, transforming local initiative into national policy, may be seen as something falling outside the sphere of practitioners. As one interviewee, a retired chief probation officer said to the first-named author: 'Practice can't drive. I mean – ground floor level practice can't drive policy changes unless it gets a champion.' Such a champion might be a minister, or a senior civil servant. Another interviewee, a retired chief probation officer, said: ' "practice dictating policy" – to a degree that's right', but 'what you also have to bear in mind is that policy, in the first instance, emanated from government'. This statement reflects the interplay between policy development at the centre and criminal justice practice on the ground. If local initiatives are to be transformed into national trends, 'you've always got to have a matching pair of ears and

eyes within the government, within the policy of the civil servants that sometimes it's kicked further into development by enthusiasm of the young ministers'. A striking example is provided by Harding (this volume), when he explains the crucial roles played by Home Office assistant secretary Michael Moriarty in facilitating and encouraging probation service practitioners to develop on-the-ground strategies to ensure the successful introduction of community service orders in the 1970s.

The cultural complexity of the practice world

At one time it was fashionable to debate whether criminal justice was best understood as a 'system' or a 'process'. As Pullinger (1985, p. 19) has said, it is characteristic of a system that it 'will possess channels of communication and control. [Its] effectiveness . . . will depend on the system's monitoring capacity, the efficiency of its information channels and the degree of control which can be exercised.' This account points to the character of criminal justice as a process rather than as a system. Indeed, as Rutherford explained, '[a]lthough it is sometimes held that criminal justice is (or should be) a "system" [however] regarding criminal justice as a system may distort reality by obscuring the divergent and competing purposes between and within agencies, the informal working arrangements, and the unanticipated consequences that frequently ensue' (1994, pp. 125–126). Rutherford refers to a more or less loose world of agencies and individuals who interact (or fail to interact) and through their influences produce expected or, sometimes, unexpected patterns of practice including innovation. Little in the way of central planning went into the English criminal justice process, and those who work within it bring quite different perspectives to bear and have very different concerns and priorities (Wasik et al., 1999). As Rock puts it nicely, 'independent interdependence is the force that binds criminal justice together' (Rock, 1990). An interviewee, a retired Home Office civil servant, stressed to the first-named author the cultural multiplicity of practice as affecting policy implementation, such as the very different working cultures of the probation service and the police. His experience was that the former tended to be:

> more independent, more intellectual, more willing to stop and argue . . . . that's what the probation service always likes to do, and the police will go away and do it. [The police] may do it after their own fashion, and not exactly as you would hope, but at least it would happen, and it would happen quite quickly, and broadly

> speaking it would be consistent across the country and it would look well-organized – [it would be] much more haphazard in the probation service.

Neyroud and Slothower (this volume) address the crucial role of the police in managing out-of-court disposals in England and Wales. Cautioning, in simple or mere elaborate forms, has been an important form of diversion from the more formal criminal justice process for a very long time. Successive governments have addressed the policy conflicts which underlie cautioning – to achieve the undoubted benefits of diversion, but to do so within a robust and principled system of decision-making. The police are the main decision-makers here. Individual officers exercise their discretion at a local level far removed from central policy-making, so that it has proved difficult to create a system of cautioning which is both effective and consistent. The authors review the background and then evaluate Operation Turning Point – the most recent, and perhaps the most comprehensive, attempt to deliver such a system. Their provisional conclusion is that guidance and training of the police is crucial, but not enough by itself to ensure consistent decision-making. What they refer to as 'bounded discretion' can, they believe, be achieved through the additional use of a computer-based decision support tool.

It becomes clear that the degree of systemic independence/interdependence of the criminal justice world can ensure the success or failure of policy reform. Patterson and Whittaker, in their study of implementation of criminal justice legislation in Scotland, say that:

> An understanding of . . . decision making . . . requires a recognition of the criminal justice system's institutional structure, and the ways in which the parts of that structure (police, prosecutors and courts) interact. This sets the form, and helps to shape the content, of the professional relationships which criminal justice practitioners develop in individual localities. This interaction produces a localised criminal justice culture, which sets the assumptions within which practitioners work to interpret the law in particular cases.
>
> (Patterson and Whittaker, 1994)

Halliday et al. demonstrated the importance of professional status as an element in practice interactions (in the particular case of pre-sentence report writing for courts by social workers) affecting interdependency and its outcomes (Halliday et al., 2009). The study also

makes clear the importance of power relations between professionals having different backgrounds, training and working assumptions of criminal justice. Critical here is inter-agency working amongst professionals. As Field (this volume) points out, 'different agencies (Crown Prosecution Service, magistracy, police and probation) rarely have hierarchical powers of direction and command as between each other, [so] much depends on inter-professional dynamics (often played out at a local level)'. Since the mid-1980s, multi-disciplinary co-operation has been an attractive objective for policy intervention. As Faulkner (this volume) explains, under the Thatcher government in the 1980s and early 1990s the perception from the centre 'was a lack of communication and co-operation between services and government departments, and what were later called "silos" – functions which were carried out in isolation from one another and without regard for the other interests involved'. Management information systems, performance indicators and targets were introduced and escalated under New Labour. Perceived lack of co-operation was addressed in different ways according to the policy cultures of the time: an 'invitation' for 'joined up' services in the 1980s, and top-down 'micro-management' of practice relations during the New Labour years. According to Rutherford, '[d]uring the 1980s it became more commonplace for practitioners to think in terms of the interdependence of criminal justice agencies' (1994, p. 125).

Telford and Santatzoglou (2013) have discussed the 'bottom up' development of inter-professional communication in youth justice practice during the 1980s. Arguably, within that particular field, negotiations and exchange of professional experiences strengthened the trust between practitioners from different traditions, and created a fertile ground for practice policy development (see further, Santatzoglou, this volume). In a 2001 interview, as an interviewee, a retired chief probation officer said:

> There'd been a sense, I think, in the '70s that you had to wait for government, as there is now, you know, with New Labour and everybody's waiting for the Youth Justice Board to do this or to do that: the top-down model. In the '80s [...] something happened that gave practitioners a sense that this was for them, they could make a difference. And they began to see it happen.

The account suggests the importance of the interface between a particular government's style of policy management and the engagement (or not) with criminal justice practice. Other studies have shown that the

flourishing of inter-professional discussion and co-operation can have a very positive effect on policy implementation (Henry, 2012). Such a process allows for the exchange of experiences, and the development of new ones, allowing practitioners to feel more in control of policy implementation and innovation, acting not just as agents, but the owners, of change. Inter-professional co-operation can function to ease any difficulties of differential power, as policy ownership becomes a shared endeavour. Ownership of change appears to be a critical issue in the practice world.

Politics, populism and the market

During the 1980s a liberal basis of criminal justice policy was retained, described by Rutherford as 'principled pragmatism' (Rutherford, 1996). Home secretaries Whitelaw and Hurd both had the ability to keep criminal policy clear from 'interference from Number 10' with perhaps the only exception being the 'dodgy period during the miners' strike' (retired Home Office civil servant, quoted in Loader, 2006, p. 576). The structure and the features of criminal policy-making continued mostly as before. As Faulkner and Burnett have put it: 'New ideas and new methods were being proposed and tested, but there was a sense of continuity with the past . . . The "old" public administration was still in the ascendant' (Faulkner and Burnett, 2012). Within the Home Office, the system of policy-making was descended from what Loader and Sparks (2011) have called 'mid-century liberalism'. They refer to the ongoing respect for criminal justice expertise, which was 'understood as incorporating various forms of practical wisdom and generalist intellect as well as specialist academic knowledge as such' (2011, p. 68). This expertise was accommodated within institutional forums such as Royal Commissions and advisory bodies, and also drawn from centres such as the Institute of Criminology at Cambridge, and the Home Office Research and Planning Unit. In those years the structure of policy-making was insulated through the existence of what Loader has called the 'platonic guardians': 'a governing elite equipped with "confidence, arrogance, authority, credibility" . . . and committed to producing and deploying expert knowledge' (Loader, 2006, p. 563). The system of the 'platonic guardians' reflected the existence of civil service power within the policy structure arising from its continuity and policy experience. The Thatcher government, and especially New Labour, however, were suspicious of the vested interests of experts and their warnings about the limited impact which government could expect to have on 'the crime problem', so that over time Royal Commissions and advisory bodies largely

fell into disuse. The government had its own policy agenda and 'just wanted to get on with things' (retired Home Office civil servant, quoted in Loader, 2006, p. 575).

By 1995 Rock was writing about a transformation in the process of policy-making, with far less political reliance on the knowledge and experience of civil servants and other 'experts', which was rejected in favour of penal populism and a general appeal to 'common sense'. Rock said that:

> The newest modes of policy making are themselves the fruits of a new politics of populism, moralism, and the market. Attempting to reform such matters as the organization of the police and prisons, the incarceration of young offenders, and the 'right to silence', a number of Home Office ministers appear recently to have been impelled by a strong sense of the political, by personal volition, a doughty common sense, and appeals to what are thought to be popular sentiment.
>
> (Rock, 1995, p. 2)

In this statement Rock summed up the forces of politicisation, which were to influence and restructure the criminal policy-making process to date. The transformation constituted a significant departure from a long-term established system. Indeed, one could talk of the post mid-1990s policy period as opposed to the one before, and especially as opposed to the 1980s. The two periods encompassed a very different degree of politicisation with respect to the management of criminal justice change which critically affected the utilisation of experience of criminal justice professional at various levels.

The appointment of Michael Howard as Conservative home secretary in 1993 was a significant turning point for criminal justice policy. In his 2009 book, *Punishment and Prisons: Power and the Carceral State,* which deals with the period 1990–1997, Sim devotes a particular sub-chapter to the heading 'The moment of Howard', thereby indicating the significance of that appointment with respect to the mid-1990s change of direction in criminal justice policy. In the wake of the murder of toddler James Bulger by two ten-year-old children Venables and Thompson, and in the context of the declining influence of the Major government, Howard's famous 'prison works' speech at the Conservative Party conference symbolised a sharp departure from the policy of limiting, and if possible reducing, the use of custody which had underpinned the Criminal Justice Act 1991 (Faulkner and Burnett, 2012). Howard rejected the long-standing policy of prison as a 'last resort' (Sim, 2009). His

appointment also marked a departure from the structure and values of an established process of criminal policy development.

Howard, who was the fifth home secretary in four years, regarded his appointment as *the* mechanism to overhaul the aims and function of a criminal justice system, which in 1993 was in a state of public and political turmoil. In 1993, under the title 'Public loses its faith in justice system', the *Times* reported that:

> A spokesman for Howard's department said yesterday that he was 'very concerned with any evidence that showed confidence in the criminal justice system may be declining'. Howard's priority was to implement measures that would 'most effectively restore full confidence in the system'.
>
> (Prescott and Kellner, 1993)

The message was that Howard's priority, as a reforming home secretary in touch with the common man and in tune with common sense, was radical policy change. In one way the message satisfied what Edelman has called the 'dramaturgical, illusionary dimension' of policy-making (Edelman, 1985). As Edelman has argued in his seminal book *The Symbolic Uses of Politics, '*[l]ike drama, [policy-making] is construed to be presented to a public' (1985, p. 210). Paraphrasing Edelman, the emergence of Howard as the active politician sold to the public his ability to manage what was portrayed in the media as a moment of crisis by promising immediate change, thereby answering the public's 'anxious search for direction' (1985, p. 190). However, Howard's 'moment' in criminal justice policy-making was much more than symbolic. His tenure as home secretary set in train a major shift in the structure and values of criminal policy-making. In his 1996 book, *Transforming Criminal Policy*, Rutherford voiced a prevalent concern of commentators at that time over the 'increasingly politicised nature of criminal policy', and the tendency of central government 'to seek greater influence, if not control, over the largely decentralised activities of criminal justice and crime prevention' (1996, p. 14).

Howard's politicisation of criminal policy was about greater control from the centre and it also concentrated power within a small group of ministers with similar ideological persuasions, keeping the civil service expert input at the periphery of this process. According to Crick, when Howard went to the Home Office, he 'felt he was entering a hostile territory' and Sim (2009) has written that, once in office, Howard 'surrounded himself with like-minded individuals', including

David Maclean, 'a vocal supporter of capital punishment who regarded criminals as "vermin" who should be driven from the streets'. Crick observed that during Howard's four-year term of office 'there were serious stirrings of revolt among Home Office civil servants' (2005). This rebalancing brought with it a marginalising of 'expert' opinion, including that of experienced civil servants, in favour of a more grass-roots penal populism. As Garland wrote in 2001:

> The old conventional wisdom was that elected officials ought best to avoid contentious pronouncements in an area where policy failure was highly probable. Until recently the details of corrections and crime control were frequently left to criminal justice professionals, and public opinion was viewed as an occasional brake on penal policy rather than a privileged source of policy-making initiatives. The relation between politicians, the public and professionals has been transformed, with major consequences for policy and practice.
>
> (2001, p. 145)

The following anecdotal story is concerned with the background to changes made to the practice of juvenile cautioning. An interviewee, a youth justice policy consultant with much experience of practice in the 1990s, said:

> There was a story that I was told when Michael Howard was Home Secretary, and cautioning was quite extensive. He saw it as a 'let off' really, 'nothing happened', so the fact that it *worked* was an irrelevancy. Howard went to some youngsters and said 'how many cautions have you had?' and they lied, basically, these two lads, and told him 'four' or something. 'What were they for?' 'Oh, one was for arson.' The Director of Social Services that was there, tried to intervene. [Howard] went straight on from there, this was a Friday afternoon, he went straight on to the Home Office on Monday morning, and we know this is right from the Home Office officials, and said 'we should tighten the whole caution thing'. The guidance that says you don't make more than two or three cautions was based on the evidence of those two lads, the arson, he set fire to a field of corn or something . . . He just wanted something to be able to say 'right!' So this is the problem when our legal system gets mixed up with politicians basically and public opinion.

Regardless of its accuracy, the story certainly reflects the new political taste for direct and immediate policy intervention, and it also probably

reflects the very negative feelings of contemporary policy participants (who disseminated the story). Howard's 'moment' was the start of a new era of political competition over which political party could claim greater 'toughness' on criminal justice issues. As Crick observes, 'those who were working in the Home Office in 1997 said that the best preparation for New Labour was working for Michael Howard' (2005, p. 284).

New Labour: Listening to 'ordinary people'

The impact of New Labour on the direction of criminal justice is usually condensed into Blair's 'tough on crime (and tough on the causes of crime)' slogan, which described New Labour's policy intention for an expansionist approach to criminal justice. The slogan was first heard in January 1993, during a radio interview and set the official stamp on New Labour's criminal policy agenda, pushing the party well into traditional Conservative 'law and order' territory. Blair made his political mark initially as shadow home secretary, and in that role was 'reluctant to attack' Howard for his pro-prison views, pointing out that 'a lot of Daily Mail readers would agree with him' (Crick, 2005). New Labour's highly interventionist approach was based on the political persuasion that the party must listen to 'ordinary people', in particular their preoccupation with persistent low-level anti-social behaviour and the public perception (accurate or not) that the criminal justice system was 'soft' and ineffective in dealing with offenders, especially juveniles. Once in government, Jack Straw confirmed that New Labour had broken 'with its past elitist inclinations, by listening to what ordinary people had to say about crime and anti-social behaviour' (Rutherford, 2000, p. 40). What now mattered in policy terms was the 'viewpoint of the man in the street, the man in the Clapham omnibus' who, back in the 1960s, was said by Lord Devlin to be the essential source of 'practical morality' and his 'viewpoint' the driving moral force in criminal justice (Devlin, 1965). Significantly, Devlin accepted that this ordinary man 'is not expected to reason about anything, and his judgment may be largely a matter of feeling' (1965, p. 15).

In 1995 Bottoms famously referred to politicians adopting a policy of 'populist punitiveness', by which he meant 'politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance' on crime (Bottoms, 1995). Sophisticated public attitude research conducted at the time showed (and has continued to show) that much of the public's disenchantment with the criminal justice process stemmed from florid and inaccurate newspaper reportage

and from widespread public ignorance of how the criminal justice process actually operates. Within the academic world the growth and effect of politicisation on criminal law and criminal justice were addressed. Ashworth, in the opening of his 2000 seminal article 'Is the criminal law a lost cause?', castigated the way in which government (first under Howard, then under New Labour) seemed to regard the creation of new criminal laws as the solution to all social problems:

> Politicians, pressure groups, journalists and others often express themselves as if the creation of a new criminal offence is the natural, or the only appropriate, response to a particular event or series of events giving rise to social concern. At the same time, criminal offences are tacked on to diverse statutes by various government departments, and then enacted (or, often, re-enacted) by Parliament without demur. There is little sense that the decision to introduce a new offence should only be made after certain conditions have been satisfied, little sense that making conduct criminal is a step of considerable social significance.

Eight years later, in *The Prisoners' Dilemma*, Lacey (2008) examined the politicisation of criminal justice policy-making in the context of the growth of the prison population, which had continued to rise year on year, had actually doubled in size between 1993 and 2008 and which has continued to increase inexorably ever since. Lacey referred to politicians' willingness to accept at face value the 'punitive attitudes' of the public, despite the 'ambivalence of public opinion on issues of prison growth and punishment'. Lacey put this down to politicians' fears of the electoral costs of returning to a more moderate criminal justice policy, but lamented that 'the malleability of "public opinion" makes it an unsound basis for policy development.' Allen (this volume) reflects upon the series of crises and switches in policy which have impacted upon the prison system in England and Wales during these changing political times. Against the background of a steadily escalating custodial population, there has been a pattern of policy initiative and failure – 'prisons themselves are notoriously resistant to change [and] at the macro level this partly reflects a tendency on the part of governments to neglect prisons unless something goes wrong'. There are just the same local variations in the institutional context as there are in other aspects of the criminal justice process. As Allen remarks, despite government intervention the running of prisons is largely in the hands of governors and staff in the individual prisons. Her Majesty's Inspectorate of Prisons

reports have shown great variation in performance both between seemingly similar establishments and within the same establishments over time – much seems to depend on the individual Governor.

New Labour's attention to (some would say obsession with) what the media was saying on a day-to-day basis meant that criminal justice policy statements and initiatives would come and go quickly in response to newspaper stories and short-term issues – what Cohen (1972) famously dubbed 'moral panics'. Shapland has referred to the 'influences on policy, particularly the growing importance of ministers and political demands . . . and the media-accentuated impact of individual events'. She refers to a climate where 'civil servants [have] to act and think fast in the storm of e-mails within and without the Office, rather than produce carefully considered responses' (Shapland, 2006, p. 137). In an interview conducted by the first-named author in 2001, a retired chief probation officer spoke of the rise of new advisers on criminal justice policy at that time:

> The Home Secretary now, for instance, has two political advisers on criminal justice matters. One of them, I think, is 24 years old and the other one is 26. Neither of them has a criminal justice background. What they are is very sharp political operators, very in-tune with the media mood, very much, very bright people really, able to look at a large body of evidence and decide what might be the best thing to persuade the Minister on. But I think most of us in the business feel they've got quite disproportionate influence.

New Labour latched on to (and legislated upon) public concerns about low-level anti-social behaviour. In a 2000 essay Rutherford addressed the 'origins and implications of New Labour's endeavour . . . to bring "sub-criminal conduct" within the ambit of the criminal justice process' through the development of the anti-social behaviour order (ASBO) (Rutherford, 2000, p. 33). The idea of the ASBO attracted much academic debate and criticism, but very little political opposition. Again, the political reality was an unwillingness to appear 'weak' by opposing populist measures aimed at addressing electorate concerns. According to Rutherford, 'there were no divisions on clauses relating to the [ASBO] at the Committee Stage, where the detailed work takes place . . . none of the amendments aimed at tightening the definition of anti-social behaviour were pressed to a vote . . . at no stage did anyone urge abandonment of the ASBO' (2000, p. 53). The order was implemented as part of New Labour's flagship legislation, the Crime and Disorder Act 1998. In the