The myth of punitiveness

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Abstract

There is a widespread claim in the criminological literature that the current period is characterized by a surge in punitiveness and that this 'punitive turn' is fuelled by a new populism. However, the key notions of 'punitiveness' and 'populism' remain largely undefined, with the result that much of the associated analysis is vague, while developments are often asserted rather than explained. Consequently, there is a tendency towards empiricism, on the one hand, and speculative idealism, on the other. It is not that one cannot find examples of punitiveness but since the deployment of punitive sanctions has historically been an endemic feature of the criminal justice system we are faced with question of 'what is new?' In this article it is argued that there has been a one-sided, exaggerated focus on punitiveness in recent times, which has detracted from the development of a progressive realist account of contemporary crime control.

Key Words

actuarialism • managerialism • populism • public opinion • punitiveness • toleration

Introduction

The subject area of criminology has been characterized historically by controversy and debate. However, over the past few years debate seems to have given way to a loose-knit consensus. One of the main points of consensus is the belief that we are witnessing a surge in punitiveness. In fact, the claim that recent crime control policy is dominated by punitive

mentalities seems to be overwhelmingly accepted by academic criminologists. There is a division between those who see this surge in punitiveness being driven from 'below' by an anxious and angry general public and those who see it as an essentially a 'top–down' process in which ambitious and manipulative politicians play on public fears and anxieties in order to get tough on crime and to increase their electoral support.

One of the initial contributors to this literature is Anthony Bottoms (1995) who in an article on sentencing policy and the philosophy of punishment outlines the notion of 'populist punitiveness', which he claims is one of the main components of sentencing and penal policy alongside concerns with human rights, community and forms of managerialism. Significantly, however, it is in relation to 'populist punitiveness' that this article and has been most frequently cited by criminologists.

David Garland (2001) has also incorporated the notions of punitiveness and populism into his account of the changing nature of crime control in contemporary society, seeing them as relatively autonomous but related processes. Garland argues that there is now a relatively populist current in penal politics such that the dominant voice of crime policy is no longer that of the expert or even practitioners but the long-suffering and ill-served public. Garland claims that we are witnessing a 'punitive turn', which is responsible for promoting:

> Harsher sentencing and increased use of imprisonment, 'three strikes' and mandatory minimum sentencing laws; 'truth in sentencing' and parole release restrictions; 'no frills' prison laws and 'austere prisons'; retribution in juveniles court and the imprisonment of children; the revival of chain gangs and corporal punishment; boot camps and supermax prisons; the multiplication of capital offences and executions; community notification laws and pedophile registers; zero tolerance policies and Anti-Social Behavior Orders. There is now a long list of measures that appear to signify a punitive turn in contemporary penalty.
>
> (Garland, 2001: 142)

In a variation on this theme, John Pratt (2002) claims that populist punitiveness is gaining ground and that a new axis of penal power has emerged under the auspices of a neo-liberal political programme; 'in which the indifference of the general public is increasingly giving way to intolerance and demands for still greater manifestations of repressive punishment' (2002: 182). Pratt sees the process more in terms of an anxious public placing increasing demands on a reticent state bureaucracy. Citing similar examples as those offered by Garland, Pratt sees the introduction of chain gangs, paedophile registers and new forms of stigmatization as disturbing examples of the introduction of more 'ostentatious and emotive' forms of punishment (Pratt, 2000).

Loïc Wacquant (2000), like Pratt, identifies neo-liberalism as a key factor in encouraging the development of a more punitive response but presents a

more top–down approach. For Wacquant the rise in punitiveness is exemplified by the development of mass incarceration in the USA and in the growing numbers of African Americans imprisoned. He argues that the expanding prison has little or nothing to do with crime rates but has come to replace the ghetto as an institution for containing and controlling lower class African Americans as the penal management of poverty comes to replace welfarism. The prison emerges as an institution of forced containment as a result of the crisis of the ghetto and as a device for caste control. Between the prison and the ghetto it is claimed there is 'a functional equivalency, structural homology and cultural fusion, spawning a carceral continuum that entraps a population of younger black men rejected by the deregulated wage-labor market' (Wacquant, 2001: 95).

Jonathan Simon (2001) offers a slightly different version of the punitiveness thesis. Like John Pratt, he is struck by the emergence of forms of punishment that appear increasingly severe, anachronistic or stigmatizing and which seem to signal either a new departure in the modality of punishment or alternatively represent a return to outdated and outmoded forms of punishment. The re-emergence of 'boot camps' with their emphasis on military discipline and strict regimes is presented as a prime example of such a reversion (Simon, 1999). Like Wacquant, he sees penal measures as being disproportionately directed at the poor and ethnic minority groups creating a 'revolving door' whereby members of these groups pass repeatedly through the prison during the course of their life with devastating consequences on individuals, families and neighbourhoods (Caplow and Simon, 1999).

Simon also identifies what he sees as an even more disturbing development in which some contemporary forms of punishment seem to go beyond simple retribution and claims to protect the public or reduce crime to involve forms of 'cruelty' where the objective is to take delight in the pain of others. Punishment, Simon argues, has become a kind of 'therapeutic theatre' in which the offender publicly expresses feelings of pain and moral shame. Although not claiming that these manifestations of cruelty represent a dominant feature of contemporary penalty, he sees these sentiments most prominently expressed in capital punishment, extremely long 'life-trashing' sentences such as California's 'three strikes' law and a variety of shaming and stigmatizing measures. Simon does, however, claim that 'governing through crime' is becoming a more pronounced feature of contemporary society and that the engagement in cruelty may become a new kind of entitlement distributed by government, as 'the criminal' becomes an increasingly legitimate target of public hostility (Caplow and Simon, 1999).

Even from this very selective and brief dip into a growing literature on punitiveness there are a number of issues that arise and which require examination. First, the definition of punitiveness and its relationship with other key concepts such as cruelty, vindictiveness and toleration. Second, the question of aetiology, involving some consideration of the conditions

associated with the emergence of punitiveness as well as the factors that are seen as shaping its development. Third, the relation between punitiveness and other dominant trends in penal policy such as managerialism, which are seen to involve different and even oppositional currents. Fourth, the role of populism in this process and its relation to politics, elites and the role of experts. Fifth, the notions of public opinion and public attitudes, which are often taken as key reference points for assessing changing levels of public punitiveness. Finally, there is a question of empirical investigation and the need to examine the degree to which this perceived rise in punitiveness squares with the available evidence.

The concept of punitiveness

Although the term 'punitiveness' is widely used in the literature, there is little attempt to define or deconstruct it. The consequence is that punitiveness remains a 'thin' and under-theorized concept. Its largely undifferentiated nature and the general vagueness surrounding it, however, has not been an impediment to its adoption. In fact, the general lack of specificity seems to have contributed to its widespread acceptance since it appears at first sight to have the capacity to 'explain' a whole range of penal developments.

One of the few attempts to provide a 'working definition' of the term 'punitive' is offered by Stanley Cohen (1994: 67–8). He stresses that punitiveness is characterized by coercion, formalism, moralism and the infliction of pain on individual legal subjects by a third party. Interestingly, his own vision of social control emphasizes the subtler, less visible and discreet mechanisms through which control is realized in contemporary society (Cohen, 1983, 1985). Cohen, like a number of other social control theorists offers a more Orwellian vision, which dwells less on overt strategies involving physical force or mental cruelty but on the development of more continuous and less perceptible forms of regulation.

Since punitive and emotive sanctions in their various forms are an enduring feature of penal policy the question that arises from Cohen's definition is 'what is new?' Do the range of sanctions identified by the various commentators as examples of a 'punitive turn' really signal a new departure or do they merely represent the phenomenal forms of an increasingly elaborate, and complex system of regulation? Cohen's definition also raises questions about the role of administrative controls as well as forms of monitoring and surveillance, but before we attempt to address some of these questions we need to return to the problem of definition. The notion of punitiveness is most commonly associated with retribution and vengeance. It is seen as essentially reactive rather than consequentialist. However, when retribution involves the use of the least restrictive sentence

or strict proportionality and where the aim is to limit the severity and duration of sanctions, it is not essentially an expression of punitiveness—whether or not it achieves its desired objectives. At the same time, sentencing strategies that are designed to protect the public through incapacitation or deter would-be offenders may involve greater levels of intervention, but such measures are not principally concerned with increasing the degree of punishment inflicted on individuals per se, although they may well involve greater numbers of people being subject to formal intervention. In a similar way the pursuit of rehabilitative strategies can lead to more prolonged and intensive forms of regulation. In the attempt to do more good it is always possible, as critics have repeatedly pointed out, to do more harm. Although it is often difficult to distinguish between these different rationalizations in practice, it is necessary to differentiate, as far as possible, between these different justifications for punishment, otherwise an increase in the range and intensity of formal interventions—whatever their underlying logic or objective—may be construed as an expression of punitiveness (O'Malley, 1999).

The term 'punitiveness' normally carries connotations of excess. That is, the pursuit of punishment over and above that which is necessary or appropriate. It is therefore more than handing out 'just deserts'. It involves the intensification of pain delivery, either by extending the duration or the severity of punishment above the norm. To put it another way, the notion of punitiveness suggests a disproportionate use of sanctions and consequently a deviation from the principle of proportionality. For this claim to be upheld, however, it would be necessary to demonstrate that sentences given for particular crimes or types of crime have increased, since without any knowledge of the severity of the relevant crimes and the offending histories of those involved, such claims have no basis. Indeed the separation of a detailed consideration of crime and victimization and its relation to punishment inevitably makes the sanctions imposed appear arbitrary.

This aspect of the definition also raises issues about changes in normative expectations and changing public sensibilities. If, for example, a particular type of activity such as domestic violence changes in public perceptions from being a 'private' matter to one deserving of formal legal sanctions, as long as the sanction directed towards offenders is widely seen as appropriate and not excessive, we cannot identify such a change as an example of punitiveness. Legal categories are, of course, changing continually as are processes of criminalization and decriminalization. There is also a gap between 'law in books' and 'law in action' and between the passing of legislation which is designed to be symbolic rather than practical. As we shall see later a number of the sanctions, which have emerged in recent years and which have been presented as examples of punitiveness, are largely symbolic. To claim an increase in punitiveness, it is necessary to distinguish between changing concepts of appropriateness and what constitutes disproportionate or excessive punishments. At the same time we

need to distinguish between those penalties, which have been introduced to protect specific groups and those that involve the intensification of existing sanctions.

In many versions of the 'punitiveness thesis' the use of custody is seen to be a critical indicator. It is the strategy of punitive segregation, particularly when linked to rising prison populations and increases in the lengths of prison sentences that the case for punitiveness is seen to have its most solid foundation. Within the logic of this position community-based sanctions are seen as essentially non-punitive since they represent 'alternatives' to custody. The critics of punitiveness often advocate the expansion of 'inclusive' community-based sanctions as a preferable option to incarceration. The fact that in both the UK and the USA the numbers of people sentenced to community-based 'alternatives' has increased at the same rate as incarceration over the past two decades—and in some cases faster— suggests that we have seen a simultaneous expansion of both 'punitive' and 'non-punitive' sanctions (Caplow and Simon, 1999). This is not to mention the rapid expansion of monitoring and surveillance strategies that are neither inclusive nor exclusive but rather provide a range of measures, which are generally seen as an alternative to punishment. We could also make reference to the forms of 'informal justice' that developed during the 1980s and which have been reinvented under the rubric of restorative justice (Matthews, 1988; Daly, 2002).

As a number of critics have pointed out, rather than informal or restorative justice constituting an intrinsically progressive or a non-punitive alternative to formal and segregative forms of control, they involve the creation of a greater plurality of the sites of adjudication, which ultimately serve to expand and enhance the existing system of crime control— although involving the erosion of rights and legal safeguards (Santos, 1987; Ashworth, 2003). In cases of 'net widening' or the formalization of previously informal sanctions the use of 'non-punitive' measures may, of course, involve the expression of more punitive responses.

It is noticeable how many commentators on social control play down the 'non-punitive' developments within penal policy. In the same way we tend to get very little critical commentary when the prison population stabilizes or decreases, as it did in the UK in the late 1980s and as it has done in other European countries over the past decade (Tonry, 2001). For similar reasons the crime drop which marks one of the most significant watersheds in the history of crime in living memory has received relatively little attention from either criminologists or the media (Blumstein and Wallman, 2000; Karmen, 2000). It is also the case that less than a decade ago in England and Wales some 20,000 people a year were being incarcerated for non-payment of fines with approximately one in five of those sent to prison each year being imprisoned for this offence. By the end of the 1990s the number had dropped to under 4000 as a result of concerted efforts to divert this group from custody. This major change in penal policy

has hardly been remarked on in contrast to the extensive literature on the rising prison population, and the development of 'tougher' sentencing policies. In line with the media, many academics feel that only bad news is worth reporting.

It is evident that in the discussions of changing penal policies there is some slippage between those sanctions that involve an increase in pain infliction and those that involve the emergence of 'emotive and ostentatious' punishments. In a number of accounts these penal developments blur into one another, such that increased use and length of prison sentences, the re-emergence of shaming and stigmatizing sanctions, vigilantism and capital punishment become seen as related developments and as part of a new 'configuration' of penal controls in which punitiveness and vindictiveness play a leading role. Punitiveness and the reappearance of certain emotive punishments are often seen as two sides of the same coin, but since punishment has historically had an emotive and expressive function it is not altogether clear what has changed in recent years.

Indeed, the division of sanctions into 'punitive' and 'non-punitive' is itself too simplistic and does little to account for the diversity and variability of penal developments. Neither is it adequate to locate the many available sanctions along a continuum of punitiveness. Thus rather than talk about penal sanctions as if they could be divided into two distinct types, we need a conceptual framework for mapping the increasingly complex and growing array of penal sanctions. To lump together boot camps, paedophile registers, public forms of shaming and stigmatization, imprisonment and the death penalty as examples of the development of a new 'field' of penal sanctions obscures the diverse, uneven and contradictory nature of penal processes (O'Malley, 1999).

We encounter similar problems with the term 'bifurcation'. Seeing the penal sphere as a twin track or bifurcated system with coercive and segregative controls on the one side and inclusive community-based controls on the other is too restrictive and loses a sense of the variability and the growing complexity of regulatory strategies. If it ever was the case that one could talk meaningfully of a twin track or bifurcated system, the development of intermediate sanctions as well as the integration of sanctions in the form of 'seamless sentences' or 'sentencing packages' is increasingly eroding the distinction between inclusive and exclusive and between community-based and custodial sanctions, while undermining the notion of 'alternatives' to custody (Bottoms, 1995).

In many respects the notion of toleration, which appears frequently in the literature, although also under-theorized, may be a more useful heuristic tool to address some of these questions. Toleration is a more dynamic, relational and less rigid term than punitiveness and carries within it an element of tension and ambiguity, while suggesting a sense of limit rather than outright condemnation of certain actions (Downes, 1988; Turner et al., 1997; Hancock and Matthews, 2001).

The aetiology of punitiveness

Although relatively little time and effort has been spent on identifying precisely what is meant by punitiveness in the literature, slightly more attention has been paid towards trying to identify the conditions of its emergence and development.

There are, needless to say, considerable variations in the types of history offered to account for the perceived surge in punitiveness. However, following Foucault it has become fashionable to produce 'histories of the present'. These genealogies are thought to avoid the problems of determination, structure and agency, essence and appearance as well as the vexed issue of causality. The processes that have been identified as playing a key role in the rise in punitiveness are: the decline of welfarism with its emphasis on needs and social inclusion; the demise of the rehabilitative ideal as the leading rationale for punishment and imprisonment; the 'disembedding' of social relations; the growth of 'ontological insecurity'; the fragmenting of communities; growing individualism; the emergence of new styles of managerialism as well as the advent of the 'risk society'. Each are seen individually or in combination to produce a (late modern) world characterized by a growing sense of insecurity and anxiety among different sections of the population. In this uncertain world, populist sentiments are seen to veer towards the more punitive end of the spectrum, resulting in a public and political shift to the right. In addition, the growth of the mass media is seen as critical in fuelling public sentiments and creating the conditions in which retribution and vengeance can more readily be expressed.

There is a certain logic and prima-facie appeal about this type of explanation. But the leap from changing social and structural conditions to assertions of increasing punitiveness, however, is too swift and too uncertain. It is not clear, for example, that all these processes are moving in the same direction or that changes in social relations involved are necessarily pushing towards an increase in the deployment of punitive or emotive punishments. The same conditions might equally be expected to create forms of withdrawal, fatalism or encourage a shift towards more administrative or managerialist strategies in which moral sentiments and the infliction of physical and mental pain are held to have a decreasing significance.

Loïc Wacquant (2001) attempts to explain the rise in punitiveness and the development of the growing racial disproportionality within a rapidly expanding prison and carceral system, as a function of a number of interconnecting factors including the decline of the Keynesian welfare state, the advent of post-Fordism, the rise of neo-liberalism and the failure of the ghetto to contain and control poor inner city African Americans. Consequently, he argues there has been a shift from the social to the penal treatment of poverty in the United States in which the prison has become a substitute apparatus designed to keep poor African Americans 'in their

place'. This structural functionalist account, however, fails to explain specifically why these penal measures come to the fore in the current period or why the prison should come to replace the ghetto as a prime site of control. On the first count there are a number of advanced western capitalist counties that have experienced a decline in welfare provision, a transition to post-Fordism and the rise of neo-liberalism, but have not experienced an increase in their prison populations. On the second count, to see the ghetto and the prison as functionally equivalent is to lose a sense of the specificity of place and of the social meaning and impact of different forms of social exclusion. There is evidence of a growing proportion of ethnic minorities in European prisons but there is no history of the type of hyperghettoization that has been a feature of the American urban landscape in past decades (Albrecht, 1997).

There can be no doubt that all these structural factors are in play to some degree but the point of analysis is to show the causal connections rather than just assert or imply them. What at first sight looks like a sophisticated historical and institutional analysis turns out on closer inspection to be a rather crude form of mechanical functionalism that is underpinned by what has been aptly described as a monochromatic politics (Anderson, 2002). In this highly conspiratorial account there is little consideration of agency or of the intra class and intra racial divisions that are to be found in deprived inner city areas.

David Garland (2001) is less sanguine about the possibility of 'reading off' changes in the nature of punitiveness from wider structural changes. In fact, although he presents an account of international developments in crime control he pays only passing attention to the substantial changes which have taken place in productive relations in most advanced western capitalist societies in recent years (Matthews, 2002). Instead, he argues, his aim is to identify the distinctive elements that are able to transform changing structural conditions into specific policy choices. A key factor in this process, he suggests, is the changing attitudes and experiences of the professional middle classes. Although different social groups have experienced 'ontological insecurity' over the past two or three decades, it is the educated middle classes and public sector professionals, he suggests, who were once the key supporters of penal welfarism, but who have recently led the drive towards increased punitiveness.

This is a novel but ultimately unconvincing explanation. Although there can be little doubt that the educated middle classes have been 'squeezed' economically in recent years and increasingly exposed to crime both directly and indirectly through the mass media, the evidence on the changing distribution of victimization, in the UK at least, indicates that it has become more concentrated and compounded among the poor and the vulnerable (Trickett et al., 1992; Hope, 2001). It is the poor, the disadvantaged and marginalized who have borne the brunt of increasing job insecurity, the breakdown of established communities and informal systems of control. Significantly, in relation to the claim that the educated middle

classes are becoming more punitive, Garland presents no real evidence of such a change. Although citing public opinion polls as indicating a general rise in punitiveness, he presents no substantive evidence of a shift in attitudes among the specific group who he claims are the leading force in this development.

If such a dramatic shift in the attitudes had occurred among the middle classes, one might have expected that it would have been translated into academic criminology. However, apart from very few American conservative criminologists the vast majority of professional criminologists advocate a version of reductionism or abolitionism and remain deeply wedded to some form of liberalism. Indeed, the overwhelming majority of criminologists are not advocating more severe sentences or greater use of incarceration. Instead, they see themselves as a corrective to the punitive public and manipulative politicians. It is the tabloid press and their impressionable readership together with unscrupulous politicians who are repeatedly blamed for the recent changes in penal policy—not the readers of the broadsheets.

Interestingly, social class features in a number of other accounts of the emergence of punitiveness, although with a very different emphasis. In contrast to Garland, for example, Bottoms claims that one of the distinguishing features of contemporary society is the relative decline of class as a social differentiator and a growing emphasis on 'citizens' and 'consumers', with notions of equality posed more frequently in relation to race and gender and interest group politics.

John Pratt's version of history, on the other hand, draws heavily on the work of Norbert Elias, which emphasizes the leading role of the upper classes in promoting the 'civilizing process'. However, in Pratt's analysis of current developments he talks of the erosion of class solidarities and tends to refer to the 'general public' and to 'public opinion' in shaping penal policy and generating punitive populism. Following an Eliasean path, Pratt's analysis involves a combination of evolutionism, elitism and historicism and most importantly it appears to have a limited explanatory purchase on recent development in crime control (van Krieken, 1989; Vaughan, 2000). The apparent rise in punitiveness is seen as something of a reversal of the 'logic of history' or a *decivilizing* process; while 'emotive and ostentatious' punishments as well as new forms of monitoring and surveillance do not sit very comfortably on this Eliasean trajectory (Pratt, 1998). Indicatively, Jonathan Simon (2001) expresses serious reservations about the explanatory value and relevance of Eliasean analysis, while David Garland (1990) who had previously expressed support for this approach seems in recent writings to find it much less convincing (Garland, 2001). Malcolm Feeley and Jonathan Simon (1992) see the class dimensions of recent control strategies in distinctly different terms than these other authors. For them, penal policy has being increasingly conditioned by a growing division between mainstream society and the 'underclass' and in risk society it is the marginalized and the disadvantaged who are seen as

increasingly the object of punitive penal sanctions. There is, however, widespread recognition among historians that the modern prison has since its inception in the 19th century been disproportionately concerned with the imprisonment of the 'lumpenproletariat', the 'dangerous classes', the poor and the feckless. Thus, the suggestion that under the influence of actuarialism imprisonment is directed mainly at the underclass does not appear to signal a significant change. At the same time, it is clear that the prison has historically been directed primarily towards certain social groups and specific individuals within them. Thus the claim that we are moving from a focus on individuals to groups is difficult to sustain as is the group/individual distinction itself in this context.

These various histories do not provide a consistent or convincing account of the emergence and development of punitiveness and as John Braithwaite (2003) has argued 'histories of the present' tend not to be interested in those branches of historical development that die before the present. Also in these 'stories' there is little discussion of the tensions, conflicts and struggles over policy implementation and development. This is particularly problematic, given the centrality of class in this literature. Consequently, history becomes one-dimensional, and although we are repeatedly told 'that it could have been different' it is difficult to see from the sources given how it could have been otherwise. There is a depressing sense of inevitability embedded in the analysis since all roads, as it were, lead to the punitive present. Thus what appears at first sight to be a liberal critique of existing policies and practices can turn rapidly into a conservative defence of the status quo. The vagueness which surrounds the concept of punitiveness is compounded by forms of historical explanation that fail to identify the specific mechanisms that might account for the 'punitive turn'.

It might also be expected that since many of these attempts to identify the historical conditions linked to punitiveness in 'late modernity' there would be some engagement and examination of the wider structural changes that have taken place in recent years associated with globalization, the restructuring of labour market and the advent of the 'information society'. Although some authors pay lip service to these developments, and make some reference to 'structural' change, the significance and impact of these changes is often inferred rather than explained.

Punitiveness, managerialism and risk

The introduction of new styles of managerialism over the last two decades and the role they have played in shaping the criminal justice system has been widely reported (Brownlee, 1998; McLaughlin et al., 2001). These forms of managerialism are seen as developing alongside punitiveness, although they are often seen as contrasting developments involving different and even oppositional dynamics. One of the modalities through which

this new form of managerialism is expressed is through actuarial justice based on risk analysis.

As Anthony Bottoms (1995) points out, there is a tension between claims that we are experiencing greater levels of cruelty and punitiveness with its emphasis on the intensification of morally charged and cruel forms of punishment, on the one hand, and the simultaneous claim that we are witnessing the ascendancy of actuarial justice which operates on a predominantly administrative basis, presenting itself as morally neutral, on the other. Thus the shift towards what Malcolm Feeley and Jonathan Simon (1992) call the 'new penology' with its emphasis on risk analysis involves, they argue, a significant shift not only in the language of penal policy but also in its objectives and practices. Thus:

> Government action against criminal activity even when mixed with traditional punitive functions, is increasingly subject to a different constitutional standard because instead of emphasising the goals of public justice, it emphasises the goals of risk management. It is preventive rather than responsive. It seeks not to punish but to exclude those with criminal proclivities.
>
> (Feeley and Simon, 1994: 185)

This passage argues that traditional concerns and conceptions of crime and punishment are giving way to strategies less concerned with individual reform than with the management of certain groups and particular populations. This involves the adoption of impersonal administrative measures, forms of systems analysis and utilitarian calculation. The aim, it is suggested, is neither to punish or rehabilitate but to manage. From this position there should be a relative decrease in levels of retribution and expressions of vengeance, cruelty and punitiveness, which should increasingly be replaced by more impersonal managerial strategies. But Feeley and Simon (1992) claim that despite the advent of the 'new penology' that punitiveness and cruelty are also becoming more prominent. Thus, at one moment the 'new penology' is seen to be in the ascendancy and replacing the 'old penology'; at another it is seen to be providing the conditions for its survival and expansion. Consequently, the terminology of the 'new penology' and 'old penology' appears inappropriate—particularly when this development is seen as involving a paradigm shift rather than serving as a contribution to an increasingly diverse range of sanctions (Feeley and Simon, 1994). Although there can be little doubt that forms of risk analysis are becoming more prevalent in the criminal justice system, the logic of actuarial justice does not adequately explain the perceived increase in punitiveness, nor the widespread interest in restorative justice, nor the growing emphasis on rehabilitation in its various forms, both inside and outside prisons (Zedner, 2002).

Feeley and Simon (1992) try to square this circle by claiming that: 'The actuarial logic of the new penology dictates an expansion of the continuum of control for more efficient risk management' (p. 457). This claim raises a

number of further questions. First, it would be an overstatement to suggest that risk analysis *dictates* an expansion of the control continuum, since such an expansion was well underway before risk analysis rose to any level of prominence. Second, it is also not clear why actuarial justice should 'require' such an enlarged cumbersome, expensive and often counter-productive system of crime control. Why would neo-liberal governments want to spend millions of dollars locking up minor offenders rather than just leave them to their own devices in deprived inner city areas? Why move them out of the ghetto into the prison?

Risk analysis in its various forms, however, is only one part of the penal matrix and has gained ground mainly because it connects with certain aspects of managerialism and because academic and political critiques have been muted (Jones, 1996; Clear and Cadora, 2001; Silver and Miller, 2002). The fact that this pseudo-scientific enterprise masks a thinly veiled moralism and subjectivism, while providing an extremely limited contribution to the enhancement of community safety, is coming to be recognized by policy makers but only belatedly by criminologists (Hudson, 2003).

Jonathan Simon (1993) was among the first to point out that a major contributor to the rise in the prison population in the USA in recent years has been the spread of managerialist practices involving the imprisonment of a significant number of parole violators. The fact that over 30 per cent of admissions to state and federal prisons in the USA are parole violators is extremely pertinent to explanations of the increase in the American prison population (Petersilia, 2003). The implication is that if it were not for the unanticipated consequences of adopting a more rigorous enforcement policy in relation to violations of parole or the breach of the community penalties, prison populations in the USA would be stabilizing or even decreasing (Blumstein and Wallman, 2000). It also suggests that a considerable proportion of the growth of prison population is an unanticipated result of more stringent management practices rather than a surge of punitiveness. These forms of managerialism are not necessarily risk based. They may have little or nothing to do with assessments of risk or actuarial justice and more to do with the pursuit of performance indicators and a more rigid commitment to the achievement of designated targets and objectives.

Other evidence of a significant level of transcarceration has been presented in a recent report from Human Rights Watch (2003) who found that state prisons in the United States are increasingly becoming a repository for the mentally ill, with three times more mentally ill people in prison than in mental hospitals. A further study by the Correctional Association of New York (2003) found that half of the inmates in solitary confinement were identified as seriously mentally ill, while a quarter in the highly disciplinary lockdown system were found to be on the mental health caseload. There is clear evidence of the prison system both failing to address the problems of these inmates and in many cases making them worse. In relation to the UK there is also no shortage of examples of prisons being used as repositories

for the containment of those for whom the necessary welfare or medical services are not available (Carlen, 1998; Birmingham, 1999). As disturbing as these findings are, they indicate that a significant factor contributing to the growth of the prison population is not just increased punitiveness towards offenders but rather the widespread use of the prison as a dumping ground for those for whom the state is unable or unwilling to provide suitable care and support.

The spread of managerialism can also be seen as standing in opposition to the focus on emotive punishments. The main shift in penal policy has not been so much towards expressive and emotive punishments, but the development of more administrative and impersonal styles of regulation. Post-welfarism has been seen as ushering in 'post-emotionalism' with a decreasing concern with the needs and mentalities of subjects and a focus on new forms of behaviourism, monitoring and surveillance together with a growing preoccupation with 'what works?' and a formal commitment to the pursuit of evidence-based policies (Tilley, 2001).

Populism, politics and elites

The concept of punitiveness and the notion of populism as presented in the recent criminological literature have two things in common—both are under-theorized and both carry negative connotations. Populism is seen to have come to the fore over the past two or three decades and to have gradually displaced the professional elites who previously took responsibility for the development of penal policy (Ryan, 1999; Garland, 2001).

Populism is seen to fuel the 'punitive turn' because the public harbours deep-seated punitive sentiments. These sentiments, it is argued, were once kept in check by a benign and enlightened group of experts. However, in recent years the general public have been able to express their views more openly and influence the development of penal policy. Vigilantism and public displays of hostility towards paedophiles, for example, are frequently taken as indicators of a deep-seated public punitiveness. This thinly veiled punitiveness, it is argued, is encouraged and fanned by the mass media who are looking for scapegoats and suitable enemies on which to direct their attention, stimulating public concern, thereby maximizing viewing figures and newspaper sales.

In these depictions there is little recognition of the various forms which populism can take and of its progressive as well as reactionary components. As Margaret Canovan (1999) has argued, populism is not an intrinsically 'backward' or pathological form of political mobilization. Rather, it should be seen as a shadow cast by democracy itself. Forms of populism that have supported progressive politics are played down and the public is perceived as a largely reactionary force harbouring resentments and animosities, while the relation between populism and new social movements and democratic politics is ignored (Arditti, 2003). Nor is there much discussion

of the ways in which populism has been mobilized to limit state oppression, promote equality and defend human rights. As in the cases of Stephen Lawrence and Rodney King, populist currents have played a critical role in confronting injustice.

However, recognizing the very different political directions which populism can take is not to overestimate the role populism has played in shaping penal policy. The general demands that members of the public may express from time to time are filtered, shaped and moderated before they are translated into penal policy. The complexities of policy formation are such that it would be naive to attribute its development to crude populism. Inasmuch as populism in its various forms plays a role, it tends to take the form of what has been described as 'ventriloquist' populism, which involves politicians speaking in the name of the people against sectional interests (Jessop, 1988).

The suggestion that there has been a decline in professional experts shaping and implementing penal policy is mistaken. There may be changes in the composition of elites and those who formulate penal policy, but this role remains largely in the hands of professionals and experts. Significantly, risk analysis has been developed by professional elites despite the fact that its language and practices do not resonate with the general public (Feeley and Simon, 1994).

It may be the case that old-style bureaucratic elites have been displaced to some extent by new forms of governance and new decision-making bodies. It is far from certain, however, that these new bodies are any more accountable or accessible than previous administrations. What is clear is that within a continually expanding criminal justice system we have seen a proliferation of all kinds of experts who are both able to influence policy making and mediate public demands. These include not only the established experts such as psychologists, sex therapists, drugs counsellors and educationalists, but specialists who are preoccupied with much wider considerations related to different aspects of lifestyle. Moreover, architects and designers, environmentalists, city planners and other professionals who previously had little interest in these matters, now play an increasingly central role. In addition, the proliferation of multi-agency partnerships means that a diverse range of agencies now have a stake in the development of crime control policy and practices. The fact that many of these experts wear jeans and trainers instead of suits and ties does not make them any less expert or any less influential (Cohen, 1994).

In political terms it is the rise of neo-liberalism and the drift towards the right of the political spectrum that is seen to explain the 'punitive turn'. Reagan, Thatcher and Bush are seen to be the prime movers in this process, followed closely by Clinton and Blair who in an effort not to be outdone by their political opponents express similar punitive sentiments. There is, of course, an element of truth in this proposition, but presenting all these political leaders and their parties as promoting different varieties of 'populist punitiveness' occludes more than it explains.

Despite all the 'get tough' rhetoric and the focus on 'law and order' during the Thatcherite 1980s, the number of people sent to prison annually at the end of the decade was less than in 1980. Moreover, the average daily prison population fell towards the end of the 1980s. During that decade two conservative Home Secretaries introduced early release schemes, which freed thousands of prisoners. It was also during the same period that we saw a remarkable reduction in juvenile decarceration, as the juvenile delinquent became a 'scarce resource' in the UK (Pratt, 1985; Graham, 1989). Like good monetarists the Thatcher government realized that the prison was 'an expensive way of making bad people worse'. At the same time they engaged in a major prison-building and refurbishment programme, which involved an overall improvement in the conditions in many prisons, and the virtual end of slopping out. The 1980s also witnessed the beginnings of a series of television programmes on life and conditions in prisons, which provided a new level of awareness and information about the previously closed world of imprisonment.

It was not until the early 1990s that the prison population in England and Wales began to take off. Although there was some continuity between the 'get tough' policies of the Conservative government and the incoming 'tough on crime' New Labour government, there can be little doubt that the crime control policies developed under New Labour express diminishing support for the use of incarceration. To represent current penal policy predominantly in terms of punitiveness involves a failure to appreciate the diversity and ambiguity of recent government policy (Crawford, 2001). There are mixed messages and competing imperatives emanating from official sources. At one moment there is talk of diversion and decarceration and at another the more rigorous enforcement of sanctions. For example, the Halliday Report embodies a number of apparently conflicting aims and argues simultaneously for the pursuit of uniformity and flexibility, rigidity and discretion while advocating both expediency and social justice (Home Office, 2001).

Even a cursory examination of recent government publications in England and Wales on sentencing and penal policy indicates the growing antipathy towards prison expansion and general recognition of the consequences of imprisonment on individuals, families and neighbourhoods. A central and recurring theme in recent official documents is the notion of social exclusion (see Young and Matthews, 2003). The influential report, for example, by the Social Exclusion Unit (2002) on 'Reducing Re-offending by Ex-prisoners' expresses the view that while imprisonment may be justified for serious, violent and persistent offenders, that for many of those currently imprisoned, incarceration serves to compound a history of exclusion.

A growing number of official reports published in the UK over the last few years could have been drafted by 1980s radical or critical criminologists—and some have. Recent proposals to limit the size of the prison population include the decarceration of offenders serving sentences

of less than 12 months, the expansion of early release programmes and the introduction of intermittent custody. There is a continued formal emphasis on using prison as a last resort when other sentencing options have been exhausted. The tone of these government publications on prisons and penal policy is generally defensive and at times apologetic. Imprisonment is not heralded as a positive option but as a necessary evil (Morris, 2004).

As Mick Ryan (1999) has suggested the nature of populism under New Labour is significantly different than the forms of populism that were established under Thatcherism. Under New Labour, individuals and communities are seen to have a duty to participate in crime reduction and contribute to the creation of safer communities. This emphasis on civility should not be dismissed as merely a 'responsibilizing strategy' but should rather be seen as an attempt to extend participatory democracy and to increase public involvement in policy making. Widening the level of active participation in policy making could encourage a greater degree of moderation into debates about crime control, not less (Johnstone, 2004).

A note on public opinion

The notion of public opinion is a central reference point in the punitiveness literature. However, as has often been pointed out there is always a danger that rather than report it, social scientists construct it (Osborne and Rose, 1999). Many of these studies fail to distinguish clearly between different aspects of 'public opinion' such as knowledge, attitudes and sensibilities, nor do they explain why people hold certain opinions and how strongly they adhere to them (Durham, 1993; Hancock, 2004).

Rather than demonstrate a drift towards punitiveness, surveys of public attitudes on sentencing and punishment have repeatedly shown that respondents support multiple sentencing goals. Expressions of retribution coexist alongside support for rehabilitation as well as other sentencing options. Citizens advocate a more balanced approach to crime, involving a mixture of punishment, rehabilitation and public protection (Cullen et al., 2002). Data collected by Russell and Morgan (2001) for the Home Office Sentencing Review found little evidence that the public want a tougher probation service. Instead, they want an effective service that reduces the likelihood that those on probation will re-offend. It was found that:

> The most common responses by members of the public to the open-ended question: 'What should sentencing achieve?' do not include the words 'punish', 'deterrence' or 'rehabilitation'. Terms generally taken to summarise the objectives of punishment. The most common responses are 'stop offending', 'reduce crime' or 'create a safer community' without any articulation as to how sentencing might achieve this outcome. People are generally not wedded to a particular philosophy of punishment; they just want something done which changes offenders' behaviour.
>
> (Morgan, 2002: 221)

John Doble (2002), a leading American researcher in this field, claims that because of the concentration on the punitive elements of public attitudes and a lack of appreciation of the diversity and variability of these views, 'public opinion was misread by pundits and political leaders' (p. 149). He cites evidence that the emphasis is shifting away from long prison sentences towards prevention and rehabilitation. Nevertheless, the mutual cross-referencing and largely uncritical commentary by numerous criminologists has helped to reify 'punitiveness' as a social fact. Unfortunately,

> Once constructed, social realities are difficult to deconstruct. In the United States the widely held view that the public is exclusively punitive potentially constrains the pursuit of progressive policy alternatives in many jurisdictions. Politicians and other policy makers woefully and persistently mis-perceive public views on crime control.
>
> (Cullen et al., 2002: 143)

For some commentators, such as Jonathan Simon, the drift towards more punitive and vindictive penal policies is seen as a reflection of a more basic change in public attitudes. However, there is another contrasting current that has gathered momentum in the UK in the post-war period, which involves a growing intolerance towards most forms of interpersonal violence. Thus domestic violence which was endemic but largely ignored until the 1970s, rape within marriage, racial attacks, child abuse, hate crimes, bullying as well as various forms of harassment and intimidation have increasingly become a cause of concern and the focus of intervention. There is also increasing opposition in the UK to parents disciplining their children by hitting or slapping them. In fact there has been something of a 'silent revolution' in social attitudes towards interpersonal violence over the past 20 or 30 years, but this history is still waiting to be written.

Assessing the empirical evidence

It is often suggested, or at least implied, that the rising prison population during the 1990s, especially in a period of declining crime rates, can be attributed to a surge in punitiveness, whether populist or not. Levels of imprisonment, however, can be influenced by a variety of factors including changing demographic profiles, differences in the distribution of crime and victimization, clear-up rates, conviction rates, the availability and use of non-custodial sanctions as well as by the deployment of early release mechanisms (Zimring and Hawkins, 1991). The influence of these factors would need to be assessed before any claims that the increase in the prison population is a function of punitiveness. Otherwise, such claims remain purely speculative and gravitate towards empiricism.

As for the various examples of punitiveness that have been repeatedly presented in the literature, the available empirical evidence suggests that either they are limited in space and time or alternatively they are more symbolic than real. If we look at the 'three strikes' laws, presumptive and

mandatory sentencing, for example, we find that their impact has been considerably less than expected. Despite all the publicity and predictions of spiralling prison populations in the USA, the 'three strikes' laws have had much less impact on courts, local jails and state prisons, with the exception of California than anticipated (Shichor and Sechrest, 1996). Their impact was largely symbolic and when implemented only tended to consolidate existing legislation (Austin et al., 1999).

There has been little interest in presumptive sentencing outside of the USA and although there has been some discussion in the UK no guidelines have been adopted. Similarly with mandatory minimum laws there are, even in the USA, broad exception clauses that enable judges to impose some other sentence (Tonry, 1999). Over the last few years, 25 states have abolished mandatory minimum sentencing laws, accelerated parole, increased prison 'good time' and diverted offenders into treatment (Greene, 2003). In England and Wales only eight burglars have been sentenced to the minimum three years under the provisions introduced by Jack Straw in 2000. Similarly, the minimum mandatory sentence of seven years for a third drug trafficking offence has only been used in England and Wales three times since its introduction (Travis, 2003). Thus it would seem that members of the judiciary simply do not implement sentencing policies they deem to be inappropriate.

While boot camps became increasingly popular in the USA during the 1990s, only one experimental institution for young people based on this model was introduced in Britain. This pilot project was set up in Colchester in 1996 by Michael Howard. It was, however, closed by the Labour government in 1998 even before it had been fully evaluated. Opposition to this experimental establishment not only came from politicians but from prison governors, prison reform groups and even the army. The formal reason given for the closure of the establishment was that it was too expensive and did little to reduce re-offending rates (Farrington et al., 2002).

While there has been much talk about 'austere' and 'no frills' prison regimes, it is the case that in the UK at least that prison conditions have generally improved over the past two decades particularly in relation to sanitation, diet and health provision. More treatment, recreational and educational programmes have been developed along with efforts to allow prisoners more time out of their cells in some prisons (HM Inspectorate of Prisons, 2003). Significantly, there have been a growing number of cases in recent years in which prison guards have been suspended or dismissed for brutal behaviour towards inmates in England and Wales and there has also been a growing concern with the victimization of prisoners (Dodd, 2001). It is possible that these reports reflect growing levels of prisoner abuse and violations of rights but it also suggests that there has been a change in official responses towards the treatment of prisoners and that claims of mistreatment and victimization are more likely to be taken seriously.

The old Victorian local prisons in the UK, however, remain bleak and often the most overcrowded institutions. However, despite these 'penal dustbins' even the most ardent critics of imprisonment in the UK have had grudgingly to acknowledge that there have been some significant improvements in prison conditions in recent years. In the 'new design' prisons the emphasis has been on reducing staff numbers, increasing surveillance and the development of automated functions. What most prisoners in these institutions find troubling is not so much the brutality of the guards but the long periods of time they are confined to their cells and lack of personal contact.

Much has been made of the campaigns that have been conducted and legislation that has been passed to address the issue of paedophiles. Continual reference is made to events at Paulsgrove in 2000. This 'moral panic' was, however, relatively short-lived, despite the concerted efforts of the tabloid press to perpetuate and heighten public concern. There has been relatively little discussion of this issue in the UK over the past few years and it seems to have slipped down the social and media agenda. In a similar way the often-cited reappearance of 'chain gangs' seems to have been limited to certain southern states of the USA and appears to be an idiosyncratic and short-lived policy.

The increased use of the death penalty in the USA is understandably seen as an indication of public punitiveness and sense of cruelty. However, there are indications that growing support for greater use of the death penalty in the USA during the 1990s is beginning to wane. New legislation has been put forward in a number of states, following growing concerns about wrongful convictions. The influential American Bar Association (ABA) adopted a resolution in 1997 setting out guidelines to minimize the risk of innocent people being executed and in 2000 the incoming president of the ABA issued fresh calls for a moratorium on executions. The American Psychiatric Assembly has also called for a moratorium and this initiative has gained support from church groups. Indicatively, the number of executions carried out in the United Sates has fallen sharply over the past 3 years from 98 in 1999 to 66 in 2001 (Hood, 2002; Lilly, 2002). In the UK, however, there is a different climate. Debates around the death penalty surfaced in the 1980s but never really looked like gaining sufficient support to justify its reintroduction. Over the past decade there has hardly been any serious reference to the possibility of bringing back the death penalty in the UK even following the much publicized Bulger case, the revelations regarding the activities of Harold Shipman, the most prolific serial killer in history or the Soham murders. What has been most remarkable is that despite a series of extremely brutal and high-profile murders just how tolerant the general public have been.

The introduction of 'zero tolerance' policing in the UK was also short-lived. As in the USA, the extent of its adoption and implementation was never clear (Stenson, 2000; Braithwaite, 2003). The term 'zero tolerance' is something of a misnomer and is more accurately described as 'selective

intolerance' since policing invariably involves selectivity and discretion. Where 'zero tolerance' policing has been introduced in the UK, it has resulted in a high level of complaints against the police and in one case the removal of the senior police officer most closely associated with this approach. In its place more community-based, problem-orientated policing and privatized forms of patrolling have gained prominence.

In the Republic of Ireland many of the changes, which are held to signal a dramatic transformation in crime control policy, have also not taken place. Reference to the death penalty has been deleted from the Irish constitution and there is no 'perpetual sense of crisis'. There never was a decline in the rehabilitative ideal, while retribution has not emerged as a generalized policy goal. Instead, it has developed a crime control policy, which as in many other countries is variable and volatile (O'Donnell and O'Sullivan, 2003).

Even a brief review of the empirical evidence that has been presented in the literature does not provide a convincing case to support the claim that punitiveness has played a central role in recent developments. The American evidence is stronger but punitiveness is much less pronounced than many criminologists suggest. There are clear indications of American exceptionalism, but various authors in their attempt to say something profound about 'late modernity' want to portray these developments as having international significance (Zimring, 2001; Young, 2003).

Conclusion

It is not difficult to find examples of the development and implementation of punitive strategies but there is a question determining the relative significance of such strategies in contemporary society. Since punitive and emotive strategies have historically been an endemic feature of crime control policies there is a need to explain what is new. It has been suggested that most of the examples of punitiveness that have been presented in the literature either represent more extreme and exceptional developments and that most are limited spatially or temporally. Punitiveness and related concepts are poorly theorized and the histories that are presented are selective and unconvincing, while critical connections tend to be assumed or asserted rather than explained.

There is a preoccupation with limited oppositions and polarities that fail to do justice to the diversity, contradictions, reversions and tensions in current crime control policy. In this twin-track, bifurcated and zero-sum world of punitive versus non-punitive, inclusion versus exclusion, populism versus elitism, 'new' versus 'old' penologies, 'civilizing' versus 'decivilizing processes', we are in danger of becoming lost in a series of false dichotomies.

Although there is a promise of something radical and new here, most of these accounts oscillate between liberal humanism and pessimism, and at a

certain point are in danger of dissolving into conservatism. There is no viable strategic or political programme that follows from these accounts. Rather, there is an overriding sense of fatalism and inevitability. Their ultimate limitation is not only that they present one-sided, exaggerated or mythical accounts of the development of crime control but that these various approaches do not provide us with the conceptual tools by which we could realistically address these issues.

The failure to disentangle both conceptually and empirically the constituent elements of 'punitiveness' has led a number of criminologists to see the recent expansion of the crime control industry as a function of the desire to 'get tough'. Rather than seeing the growing array of agencies and institutions with their different roles, discourses and specialisms, as part of an increasingly complex, opaque and expanding network of crime control, involving a diverse range of interventionist strategies. Consequently, there is a tendency to reduce these developments to an underlying punitiveness or populism, or both.

If the argument that the preoccupation with punitiveness is overplayed is valid, then we are left with the problem of explaining why so many criminologists and penal reformers have embraced this essentially voluntaristic and phenomenalist conception of penal development. It is not too difficult to see why penal reform groups find this type of explanation attractive, since it gives them the opportunity to present themselves as limiting the excesses of malevolent politicians on the one hand while educating a misinformed public on the other. Academic criminologists are also able to make similar claims while gaining the benefits that come from the belief that they occupy the moral high ground. However, the disproportionate focus on punitiveness may well reflect changing social sensibilities and a growing ambivalence towards the use of punitive sanctions— particularly segregative measures. Thus, rather than being in the ascendancy, punitive and emotive sanctions may in reality be becoming increasingly untenable.

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