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PUNITIVE CRIMINAL JUSTICE IN CONTEMPORARY SOCIETY

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ABSTRACT

This paper examines the influence of so-called popular punitivism on contemporary society. Concerted efforts by policy makers have, in recent times, promoted the use of punitive criminal justice methods and rhetoric to maintain a castigatory sentiment amongst the public. This has lead to the acceptance that crime and anti social behaviour are more effectively controlled by harsh and authoritarian measures. Central to this rise in punitive sentiment is the use of media and other agencies to legitimize and encourage a sensationalized fear of crime which owes more to imagery and emotive elements than criminological research.

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INTRODUCTION

Popular punitivism remains a contentious issue amongst criminologists, academics and other experts. It can be defined as the interplay in late modern society between the media, public opinion and politicians that generates a backdrop to the formulation and implementation of both criminal justice and penal policy.[1] Freiberg[2] suggests that popular punitivism allows politicians to effectively draw from and shape public opinion, which in turn enables power maintenance and vote buying. Garland[3] contends that popular punitiveness has progressed to become a deep seated aspect of modern culture that is embedded within the consciousness of the public, police and judiciary alike. Punishment (at least in an expressive sense) has once again become highly fashionable and is embraced warmly by the public who now are more angered and resentful. Fear of crime has effectively become a problem 'in and of itself' and the resultant government policies are designed more to allay such fear than reduce crime.[4] Essentially, a new political order has emerged that combines punitive policies and pragmatic risk management.[5]

A DISCUSSION OF POPULAR PUNITIVISM

Key contributors to the growth of popular punitivism are media-driven public insecurities about crime and criminals that are addressed through highly visible but effectively hollow governmental initiatives.[6] A recent example, 'Too Soft on Crime', appeared in the *Sunday Times*.[7] This article described Western Australia as an unsafe place in which to live and denounced the state government as being soft on crime following the publication of an extensive law and order survey. The study included the canvassing of issues such as the location of dangerous areas or 'hot spots', whether judges should be allowed to overrule jury verdicts, the exposure of paedophiles and the question of whether the affluent or media/sport stars receive more favourable treatment in court. Other law and order issues were canvassed including anti-hoon legislation, sex crimes and new proposals to allow prisoners to stay at home until prison beds are available. An additional article detailed an incident where a grandmother was threatened with a handgun in a road rage incident.

Mason[8] suggests that the media are a discursive and emblematical practice that attempts to regulate the way a subject can be discussed and examined. Effectively, the media legitimizes and naturalizes meaning by using language that imposes values upon the public. Since the 1980s there has been in evidence a shift away from bureaucratic and expert-driven penal policy toward one that is based more on emotions and symbolism. Unsurprisingly, politicians

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[1] T Thomas, 'When Public Protection becomes Punishment? The UK Use of Civil Measures to Contain the Sex Offender' (2004) 2 *European Journal of Criminal Policy and Research* 338.

[2] A Freiberg, 'Affective Versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice (2001) 3(2) *Punishment & Society* 270.

[3] D Garland, 'The Limits of Sovereign Power, Strategies of Crime Control in Contemporary Society' (1996) 36(4) *British Journal of Criminology* 460.

[4] D Garland, *Culture of Control: Crime and Social Order in Contemporary Society* (2001) 9.

[5] J Simon, 'Power, Authority and Criminal Law' in *Governing Through Crime* (2007) 23.

[6] P Mason, 'Lies, Distortion and What Doesn't Work: Monitoring Prison Stories in the British Media' (2006) 2(3) *Crime, Media, Culture* 252.

[7] *The Sunday Times* (Western Australia) September 9, 2007.

[8] Mason above n 6, 252-3.

are the recipients of considerable benefit from this construct of attitudes as penal effectiveness is sacrificed for political advantage.[9] Politicians have actively encouraged the increase in punitive sentiment amongst the population which can then conveniently be justified as an appropriate and explainable response to rising crime and bourgeoning prison populations.[10] By extension, research and analysis of criminal justice and penal initiatives become subordinate to the 'tabloid' interpretation. This construal diminishes the influence of criminological or expert sources allowing individual or high profile cases (often accompanied by dramatic imagery and prose) to take precedence, which encourages a more authoritarian approach to crime and offending. The dominant voice has effectively been transferred from the criminologist or expert to long-suffering citizens who live in fear and demand that strong measures of protection and punishment for wrongdoers are undertaken.[11]

There are many and varied types of punitive government initiatives and a number will be discussed in this paper. Examples of popular punitive practices include (along with colourful, media savvy titles such as 'tough on crime' and 'do the crime, do the time') increases in sentencing rates along with harsher penalties, zero tolerance policing, sex offender registers and intrusive security monitoring including closed circuit television. Mason[12] argues that British criminal justice policy will, for example, continue the punitive approach to prisons and uphold the 'prison works' position. Excessive incarceration will presumably continue to exist as a populist and cruel form of punishment. Indeed, prisons have perhaps achieved a hegemonic status that is resistant to material or ideological attack in the contemporary punitive society. This has been evident in many jurisdictions, such as Australia, England and America. Indeed, incarceration rates continue to accelerate despite an actual fall in crime rates, such as in America.[13] It must be said, however, that the situation has stabilized somewhat in the Australian jurisdiction after big rises in prison populations were experienced in the period following the mid 1990s. Sadly, Indigenous rates of incarceration in Australia show no such trend and continue to increase.[14] Maruna & King[15] argue that popular punitive practices such as the return of boot camps, chain gangs and capital punishment are evidence of public emotions of law enforcement being transferred into action. Other examples of punitive measures include 'no frills' prison, 'zero tolerance' policing, lengthy mandatory sentences, indefinite sentences, 'adult time for adult crime' sentences, various forms of capital punishment, the contentious 'three strikes and you're in' policies, 'truth in sentencing' and intrusive video surveillance amongst other exemplars.[16]

Another example of punitive practice is the abandonment of procedural safeguards that serve to protect people from abuse in the legal environment, such as the rights of suspects and prisoners.[17] Thomas[18] contends that in the United Kingdom, a sex offender register has been created based not on substantive evaluation or research but popular opinion expressed

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[9] S Maruna & S King, 'Public Opinion and Community Penalties' in A. Bottoms, S. Rex & G. Robinson (eds.) *Alternatives to Prison. Options for an Insecure Society* (2004) 84.

[10] Frieberg above n 2, 265.

[11] Thomas, above n 1, 338; Garland above n 4, 9, 10 & 13.

[12] Mason above n 6.

[13] Frieberg above n 2, 265.

[14] *Crime and Criminal Justice Statistics Indigenous Prisoners in Australian Crime. Facts and Figures 1* (2006) Australian Institute of Criminology *<http://www.aic.gov.au/publications/facts/2005/>*.

[15] Maruna & King above n 9, 84.

[16] Garland above n 4, 13.

[17] M Tonry, 'Symbol, Substance and Severity in Western Penal Policies' (2001) 34(4) *Punishment & Society* 529; Frieberg above n 2, 268; Garland above n 4, 12.

[18] Thomas above n 1, 339.

unsurprisingly through the media, including the publication of sex offender details which has led to mass demonstration, denunciation and vigilantism. The government responded with legislative amendments imposing more severe requirements on sex offenders. The so-called return of the victim and victim status has also become apparent in the prevailing punitive environment. That is, the interests and emotions of victims (including actual, familial and potential) both underpin the punitive approach and justify the penal welfare approach. In the past, victims existed for the most part as bit players in the criminal justice process. An apposite example is the careful use of symbolism for both victims and family members in the punitive model rather than portrayal as unfortunate citizens who have been harmed by crime. Essentially, the victim becomes a rather more representative character who has experienced collective rather than individual harm under the punitive model.[19]

Garland[20] also suggests that the 'law and order' stance of many governments effectively attempts to reinforce the state's power to govern by force and deny rights and conditions that would otherwise be acknowledged, including the right of silence for defendants and the exclusionary rule.[21] State powers and symbols are essentially manipulated and draw from public insecurities about rising crime and criminals. Examples include decisions to inflict harsh custodial punishment which serve to exaggerate sovereign might. Mason[22] contends that in the United Kingdom, the media actively constructs a penal discourse that normalises and more importantly strives to expand the notion that prisons are an effective solution to crime. An exemplar of the extent to which popular punitive policies are amplified by media occurred during October 2005 in the United Kingdom where prisoners were constantly portrayed as a social threat in print media and a large number of free to air terrestrial television programs flavoured with descriptions that highlighted violent offenders and offences, yet were unsurprisingly silent on penal issues such as prisoner rights. There was also extended emotional coverage of victims' family members. Extensive coverage of the proposed release of prisoners with electronic tags was also aired when the Home Office sought to extend the eligibility of prisoners for home detention. Moreover, the electronic media's version of events was combined with provocative print media reports on exaggerated release statistics and colourful stories of luxurious conditions in British prisons. This included much mileage being made of prisoners being provided with keys to their cells with the implication that freedom and choice is being provided to prisoners. Unsurprisingly, while overcrowding was mentioned it was deftly adapted to a financial aspect by the media who were quick to highlight the significant cost per night of placing prisoners into police cells when prison cells are unavailable.

In sympathy with these types of media-fuelled discourses is the long standing attack on the 'other'. That is, the relentless attack of those groups seen as disadvantaged or undesirable in society. The notion of the alien 'other' depicts criminals as members of treacherous groups of certain ethnic or racial groups. This criminology relies upon images, stereotypes and particularly anxieties, rather than research. The fabled 'folk devils' and 'moral panics' propounded by Cohen in early research are an essential ingredient of the so-called 'moral street sweeping' movement.[23] Tonry[24] argues that whilst ostensibly concerned with crime and criminals, popular punitivism is really a vehicle that allows people to direct their anger and

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[19] Garland above n 4, 11.
[20] Garland above n 3, 460-61.
[21] Garland above n 4, 12.
[22] Mason above n 6, 252-264.
[23] H Blagg, *Policing Issues for the 21st Century* (2007).
[24] Tonry above n 523.

post modern unhappiness and anxieties (resulting from significant social and economic change) toward scapegoats such as criminals, welfare recipients and immigrants along with other vulnerable targets. Typically, this group of people, for example, the African American and Hispanic population in the United States, reside in concentrated poverty areas of cities and are separated from the 'suburban locus' of mainstream social and economic existence. These groups are habitually viewed as a marginal population lacking hope, literacy and skills, and for all intents and purposes are seen as not just an underclass but a dangerous class. This, in the punitive analysis, is a group that is both high risk and in need of management for the protection of society. The rehabilitation of offenders can, however, only be realised where the larger community and specifically the middle and higher classes consider that the offender shares the 'same normative universe.' The whole notion of an underclass is one that essentially represents permanent marginality of a section of the population.[25] A particularly instructive example would be during the so called 'mugging crisis' in the 1970s in the United Kingdom, where the media unsurprisingly fuelled a panic targeted at immigrants.[26] The use of the American vernacular of mugging was also significant; while people had been assaulted in streets and public places for centuries, the use of new jargon added to the anxiety amongst the population. The promotion of criminality by popular punitive methods, argue Maruna et al,[27] allows ghettoization, prisonization, stigmatization and the social exclusion of the poor, and that offenders are nothing more than a 'stand in' or scapegoat population. Garland[28] suggests that punitive policies are grounded in characterising this type of offender as 'yobs', 'predators', career criminals or members of an underclass effectively representing an enemy.

As long ago as the 1970s, punitive sentiment began to gain momentum after an exceptionally long period of relative stability and penal welfarism dating from the 1890s that had utilised a common sense approach by generations of academics, policy makers and criminal justice practitioners. Effectively a system of 'decency and humanity' has morphed into one of 'insecurity, anger and resentment'.[29] Garland[30] contends that in Britain, for example, a significant shift toward a punitive approach to criminal justice policy has taken place. For his part, Garland[31] argues that crime is experienced as a prominent feature of contemporary life and a routine aspect of everyday consciousness with high crime rates a commonplace feature. Rather than addressing the causes of criminal behaviour as would be the case in a less oppressive welfare model, the punitive model focuses on the effects of crime toward victims, citizens and society. A visible change in the official discourse has occurred as expressive punishment has seemingly been legitimized and a language of punishment (reflecting public sentiment) is very much the norm. Indeed, as described by Garland,[32] the emotions and sentiment of the public have now be translated into action in ways that would have appeared highly optimistic decades ago. Maruna & King[33] and Simon[34] suggest that a narrowing of debate and a startling convergence amongst the major political parties has emerged that is grounded in the argument that uncompromising penal measures which maintain an approach

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[25] M Feeley & J Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and its Implications' (1992) 30(4) *Criminology* 467-468.
[26] Simon above n 5, 15.
[27] S Maruna, A Matravers & A King, 'Disowning Our Shadow: A Psychoanalytic Approach to Understanding Punitive Public Attitudes' (2004) 25 *Deviant Behaviour* 287.
[28] Garland above n 3, 461.
[29] L Zender, 'Dangers of Dystopias in Penal Theory' (2002) 22(2) *Oxford Journal of Legal Studies* 343.
[30] Garland above n 3, 447, Garland above n 4, 3 & 9.
[31] Garland above n 3, 446.
[32] Garland above n 4, 9-14.
[33] Maruna & King above n 9, 84.
[34] Simon above n 5, 23.

of harshness and zero tolerance will be rewarded with popularity amongst the electorate. In effect, a punitive discourse has resulted that has undone much of what was achieved in the preceding century when rehabilitation was openly pursued along with other support practices and ideologies such as parole, probation and juvenile justice strategies. Although still operative in modern criminal justice systems, these measures are subordinate to popular punitive measures that emphasise personal responsibility with nominal protection from economic harm. Rather, we are left with a criminal justice regime that all but promises protection against crime. We are seemingly now immersed in an environment of previously anachronistic measures such as public shaming of offenders and other draconian measures including the wearing of striped uniforms by American prison inmates and the highly visible chain gang method of inmate work practice. Garland[35] also propounds the notion that states cannot bear responsibility alone for crime prevention and control. This deflection policy also serves to encourage property owners, manufacturers, employers, retailers, school authorities, parents and individual citizens amongst many others to accept some form of responsibility for crime control by reducing criminal opportunities and increasing informal controls. This is, in a sense, a renegotiation of what is a state obligation from what is not.

Margaret Thatcher, the conservative British Prime Minister, initiated a punitive approach to criminal justice after the General Election of 1979 with law and order issues very much on the agenda. The Thatcher government initiated a series of sustained attacks on the perceived weakness of the previous criminal justice approach and introduced a sustained rhetoric of punitiveness characterised by retribution and deterrence and a near-unconditionally backed police service. The Thatcher (and later John Major) conservative administration argued vehemently that crime could not be 'explained away' by social conditions. It is instructive that the Home Secretary postulated that 'prison works'. Further developments occurred in the next decade following the heavily publicised murder of toddler James Bulger by two ten year old boys that ignited much debate regrading the electorally saleable 'prison works' approach. The 'new' Labour Party under Tony Blair (unlike previous labour administrations) was actively positioned as being tough on crime and causes of crime which continues to this day. The British Labour government has been described as both populist and punitive managerialist in nature. It is instructive that since Labour's return to office in the United Kingdom, over 1000 new offences were created up until early 2005. The Blair Labour Government showed incredible aptitude in reiterating toughness on crime through the medium of 'message' by focussing the public's attention in interviews, press conferences and seemingly endless public meetings. In one celebrated response to criticism from a tabloid newspaper, Blair reeled off manifold initiatives introduced by his administration including three strikes laws, tougher penalties for rapists and drug dealers and an end to repeat cautions and other diversionary measures for juvenile offenders. The contemporary war on terror rhetoric further cements these attitudes in modern society.[36]

In the American arena, tough on crime rhetoric has been prevalent since the mid 1960s and can be tracked through Richard Nixon's 'war on crime' through to Ronald Reagan's 'war on drugs' policies during the 1980s. Indeed, popular punitivist rhetoric is a well entrenched ingredient in the American political debate. Bill Clinton's election to the United States presidency was in no small part due to the Clinton administration's reading of a spectacular

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[35] Garland above n 3, 453-458.

[36] I Loader, 'Fall of the Platonic Guardians, Liberalism, Criminology and Political Responses to Crime in England and Wales' (2006) 46(4) *British Journal of Criminology* 574-578; H Croall 'Criminal Justice in Post-Devolutionary Scotland (2006) 26(3) *Critical Social Policy* 589; T Newburn & T Jones 'Symbolic Politics and Penal Populism: The Long Shadow of Willie Horton' (2005) 1(1) *Crime, Media, Culture* 84.

defeat of Democrat Michael Dukakis in the late 1980s. With a seemingly unassailable lead in opinion polls, Dukakis was comprehensively defeated by George Bush Snr essentially as the result of a negative advertising campaign proclaiming Dukakis as soft on crime. The vehicle used by the Bush media spin doctors was a recently furloughed African American murderer who was released from prison on weekends despite a life sentence. The support of Dukakis for the furlough program and his opposition to the death penalty was turned into much political mileage by the Bush camp. The campaign appealed to the racist element of the American public and insecurities regarding crimes committed by African Americans. This was well understood by Bill Clinton during his campaign in the early 1990s, including taking a stand supporting capital punishment. A punitive approach to crime had effectively become non-negotiable in contemporary American politics by this stage with its absence akin to political 'suicide'.[37]

An apposite example of the continued use of such strategies in the American arena was the symbolic use of a 'War on Crime' campaign by Rudolph Giuliani, who was formally a New York City Public Prosecutor but later emerged as a wily politician with an impressive repertoire of strategies to tackle both crimes on the 'streets' and also in the 'suites'. By directing law enforcement attacks on the fabled Wall Street stock traders he expertly tapped into public anxieties about the lawlessness of affluent financial traders and naturally indulged in generous media spin on. The symbolism of Guiliani's war on crime in the Wall Street investment houses, for example, was plain to see. His zero tolerance policing did in fact result in a reduction in the crime rates (and importantly homicide) in New York during the 1990s, although other forces may have been at least partially responsible for the stellar results. His efforts in significantly reducing organised crime through clever strategies won much support from the New York public who had grown tired of, if accustomed to, the heavy influence of organised crime in the city. His final achievement was, of course, the 'War on Terror' which allowed various punitive measures to be employed under the guise of protection of American interests and citizen safety in the new environment of international terrorism.[38]

A COUNTERPOINT TO THE POPULAR PUNITIVISM ARGUMENT

Political expediency based upon perceived public attitudes must, however, be examined in the popular punitiveness argument. Whilst political benefit and mileage linked to public fears and anxieties of crime and criminals as described above may be useful in explaining the decline in welfarism and a return to punitive, expressive penal policy, some of the assumptions that underpin popular punitivism appear less than straightforward.

Commentators such as Maruna & King[39] and Maruna et al[40] argue that the assumption that the public is *necessarily* punitive is ambitious, with research suggesting that a more appropriate view is that public opinion toward criminal justice is perhaps reasonably moderate rather than particularly punitive. Moreover, research has also shown that the public attitude is perhaps selectively punitive, as harsh punishment for serious offenders is certainly supported by the public yet rehabilitation also attracts followers. It would seem, therefore, that public opinion on criminal justice is in fact rather fluid. Unsurprisingly, there are also

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[37] Newburn & Jones, above n 36, 74-80.
[38] J Braithwaite 'What's Wrong with the Sociology of Punishment?' (2003) 7(1) *Theoretical Criminology* 20-23.
[39] Maruna & King above n 9, 87.
[40] Maruna et al above n 27, 278.

cross-cultural differences in punitive attitudes. Zedner,[41] for example, contends that the views of Garland and other commentators that welfarism with its more rehabilitative model of criminal justice was followed by a more punitive regime may not be the case, as many criminal justice practices have carried on much as before.

Moreover, Zedner[42] also remains unconvinced as to whether the collapse of welfarism or indeed its scale can be universally accepted. Nor could its collapse be portrayed as necessarily sudden. It is instructive that programs like probation and community service, which can both be considered as rehabilitative, have been used more, not less, frequently during the so-called punitive penal environment. Fines, for example, remained the most popular penal sanction even at the height of the welfare approach. Prisons have in fact continued to pursue rehabilitation. For example, in the United Kingdom, Rule 3 of the *Prison Rules 1999* states that 'the purpose of training and treatment of convicted prisoners shall be to encourage and assist them to lead a normal life', which exactly matches the 1964 version. Indeed, prison psychologists, probation officers, educational officers and resettlement officers continue to pursue this goal although it must be said that the political environment in which they operate is more punitive. Further, the approach by Garland and others suggesting that the criminal 'other' are deviant creatures or folk devils is also not without difficulty as, for example, class lines, race and gender differences are rarely mentioned, and nor are factors such as lifestyle, cultural background and religious identity. Issues such as these are entirely pertinent to the issue of underclass or of criminal others. It is instructive that when one examines the demographic issues many supposed concentrations of 'others' are more logically explained, although it must be said that Garland[43] does maintain that victimization tends to be a pocketed and concentrated phenomenon.

CONCLUSION

The widespread adherence to popular punitivism principles remains a concern in many countries. Logically, penal policy should embrace fundamental values of safety and freedom from fear and harm through the medium of deterrence from offending, incapacitation of offenders, rehabilitation of offenders, developmental or situational crime prevention, socialization and moral-educative effects. The difficulty, of course, is in the mix. Overzealous penal policy can lead to a state becoming unduly and unjustly intrusive on the liberty of citizens whilst too little security in a state will fail to satisfy core obligations. Popular punitivism, it would seem, reinforces the notion that political expediency remains a major determinant of penal policy.[44]

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[41] Zedner above n 29, 344.
[42] Zedner above n 29, 344 & 346.
[43] Garland above n 3, 446.
[44] Tonry, above n 17, 519, 530.

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