

Rethinking penal policy: towards a systems approach

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Introduction

Much attention in recent years has understandably focused on the rapid increase in the prison population on both sides of the Atlantic. The fact that the population imprisoned in the United States now exceeds 2 million has been widely referred to, while the prison population in England and Wales increased by 50 per cent between 1993 and 2000. There is also a growing sense among criminologists that the penal system is undergoing a significant transformation. Various explanations have been presented in the past to account for these developments, but few have been found to be convincing (see Matthews, 1999, chapter 6). In the recent period, however, an additional set of explanations have been put forward to explain these changes, and these accounts are gaining considerable ground as plausible explanations.

One main reason given for the remarkable rise in the prison population is the perceived growth in punitiveness among politicians and the general public (Garland, 2001; Simon, 2001). Much of this punitiveness, it has been argued, has been disproportionately directed towards certain racial groups (Mauer, 1999; Wacquant, 2001). A further, but not unrelated, explanation is that the penal system is becoming more polarized and has developed into a dual track or 'bifurcated' system, with the introduction of more austere 'super max' prisons on one hand and the proliferation of communitybased sanctions on the other (Cavadino and Dignan, 1992; Rose, 1999). It has also been suggested that the emergence of the 'new penology', with its focus on the control of aggregate populations - predominantly the underclass - through the use of different forms of risk assessment has widened the focus of penal intervention and stimulated the expansion of the penal system (Feeley and Simon, 1992, 1994). Finally, it has been argued that the development of a 'prison-industrial complex' has increased the scale of imprisonment, as investors and local communities have come to view prisons as sources of income' and profit, and have a vested interest in maintaining prisons as a site of investment and economic activity (Lapido, 2001; Parenti, 1999).

In the course of this paper it will be argued that while most of these accounts have a rational core, they do not individually or collectively provide a convincing explanation of recent developments in penal policy or fully account for the rise in the prison population. In some cases they provide partial or 'ideological' accounts, which confuse rhetoric with reality, contingent and generative

causes, or appearances with underlying processes. In contrast, it is suggested that there are other important, but largely neglected processes at work, which have been less conscious and less deliberate (and consequently more difficult to counter) than many of these accounts suggest.

The punitive turn?

Are we becoming a more punitive society? The answer on both sides of the Atlantic is generally affirmative. The adoption of mass incarceration and the widespread use of the death penalty across the United States, the reintroduction of boot camps, the adoption of 'three-strikes' legislation along with determinate, mandatory and so called 'honest' sentencing are all seen as indicative of a widespread surge in the level of punitiveness. Similarly, in the United Kingdom the rapid growth of the prison population since 1993, the increase in the average length of prison sentences, the 'naming and shaming' of paedophiles, and the spread of vigilantism are all seen as examples of increased punitiveness both within and outside of the criminal justice process. For many who accept that we are experiencing a rising tide of punitiveness the main issue is whether it is a function of changing public tolerance and sensibilities or is orchestrated by manipulative politicians and the media (Simon, 2001; Mauer, 2001).

The increase in punitiveness, however, is only one part of the story, and the exclusive focus on the introduction of tougher measures is in danger of losing sight of the greater diversity of penal sanctions that have emerged in recent years. In contrast, for example, to the increased severity in the sentences meted out to certain offenders there has been, in England and Wales at least, a decrease in the number (and by implication the proportion) of those sent to prison for offences such as burglary and theft. In contrast to the reintroduction of boot camps (which never really took off in the United Kingdom) there is a growing interest in the development of the more seemingly benign responses such as restorative justice (Daly, 2001). In contrast to the introduction of determinate and mandatory sentencing strategies we have seen the growth of mentoring and 'buddy' schemes designed to assist and befriend offenders, as well as witnessing the expansion of pre-court diversion schemes. Just as the penalties for violent crime have increased, so penalties against some 'non-victim' crimes have decreased. Along-

side the use of capital punishment and incarceration in the United States we see the massive growth in the number of community-based programmes organized around the monitoring, supervision and surveillance of offenders.

These changes, however, do not represent simply a shift along a continuum of punitiveness, moving from severity at one end to leniency at the other. Rather, there seems to have been a discernible shift in the character and purpose of official sanctions. This includes the development of what John Pratt (2001) has referred to as 'emotive and ostentatious' punishments, which involve new forms of humiliation and degradation as well as public displays of remorse. Examples of such punishments include the introduction of chain gangs in America as well as other measures that involve the performance of menial labour and the wearing of stigmatic clothing in public. The pre-capitalist nature of some of these sanctions has been referred to by some as 'the neo-feudalization of punishment' (Shearing, 2001).

Other commentators, such as Pat O'Malley (1999), suggest that contemporary penal policy and practice is characterized by an unusual degree of incoherence and volatility, which is a consequence of the formation of new political configurations rather than an expression of the limits of the sovereign state. Examples of these volatile tendencies in the United Kingdom include the demand at one moment for a crackdown on drugs and at another the virtual decriminalization of certain illegal drugs, while others still are recategorized in order to attract lower penalties. A few years ago there were calls for an expansion of the prison system, but more recently political leaders have called for its reduction. Other examples of rapid changes in the penal climate could be given, but the significant point is that these opposing and contradictory policy developments are often expressed by the same social and political groups over a relatively short period of time.

Despite the-development of this increasingly complex mosaic of sanctions there are signs of a change in objectives, with a slowing down in the growth of the American prison population as a result of a levelling-off in prison admissions (Blumstein and Beck, 1999). There is also evidence from different US states of a reduction in the use of mandatory minimum sentences and a greater use of non-custodial options for drug-related and other offences in an attempt to cut the prison population. Similarly, in England and Wales there has been a change of mood over the last year or two with a number of official pronouncements

expressing a desire to limit the use of prison (Butterfield, 2001; Home Office, 2001). It is often the case that politicians who talk tough adopt rather different policies when they examine the financial implications of planned interventions. It is salient to note that under the administration of the 'Iron Lady', Margaret Thatcher, that there were not only fewer people being sent to prison annually over the course of her administration, but she also oversaw two virtual amnesties, in which thousands of prisoners in England and Wales were released early.

The disproportionate focus on the rise of the prison population has diverted attention away from the equally rapid increase in community-based sanctions. Just as the prison population in the United States has increased threefold over the 1980s and 1990s, so community-based sanctions have also increased by the same amount over the same period, with the consequence that there are, at the time of writing, 3.8 million people on probation and 725,000 on parole (Bureau of Justice, 2001). The simultaneous expansion of both incarceration and community-based sanctions, it has been argued, has led to an increasingly bifurcated system, with the development of more intensive forms of custody on one side and expansion of a growing array of 'softer' non-custodial options on the other.

Beyond bifurcation

The term 'bifurcation' has come into common usage since its original formulation in the 1970s (Bottoms, 1979). Although the term has been used in a number of different ways since then, it has come to denote a 'twin-track' policy, which differentiates between minor or 'ordinary' offenders, who can be dealt with in inclusive, welfare-orientated or community-based facilities, and the serious or 'exceptional' offenders, who are the subjects of tougher measures, usually in the form of exclusionary forms of confinement. There has been a consensus for some time that this 'twin-track' approach is an entrenched feature of penal policy, in Britain at least, and that the gap between these two tracks is widening (Cavadino and Dignan, 1992; Rose, 1999; Sparks, 1996). Whatever viability these distinctions may have had in the 1970s, the depiction of the contemporary penal process as an essentially bifurcated system is both misleading and ideological, since it captures inaccurately the relations between the available penal responses, while perpetuating outmoded conceptions of the distribution of penal populations.

To some extent the promotion of the notion of bifurcation has been sustained through the examination of the distribution of offenders at one point in time, or at a series of specific points in time. The presentation of official statistics as a series of snapshots tends to reinforce the conception of the penal system as being highly differentiated and segmented. Viewed in this way, custodial and community-based responses are seen as 'alternatives', catering to different populations. However, if we examine the movement of offenders over a period of time we discover that there is a continual flow of individuals between these different sites such that a significant percentage who are currently in prison will be subject to community-based sanctions in the future, and vice versa. The belief in the reality of bifurcation inadvertently reinforces the official ideology that prisons are reserved for the serious and exceptional offenders, while community-based sanctions cater for minor offenders.

It is also the case that the divisions associated with the concept 'bifurcation' are based on an explicit or implicit assumption that custodial and exclusionary forms of punishment are concerned with the containment and disciplining of the body; while community-based sanctions are more concerned with the mind of the deviant, seen to be capable of reform. This ideological demarcation between different types of offenders, located in different facilities has also been sustained by a division between different professional groups; that is, between those who focus on the containment and control of the body and those who specialize in training, education and personal development (Cohen, 1985). These divisions, which may have some basis in the past, are not only being eroded, as rehabilitation programmes aimed at the mind and body proliferate in British prisons; while any aspirations to provide education, training or rehabilitation in community-based facilities are steadily diminishing. At the same time there has been a gradual blurring of the boundaries between custodial and community-based sanctions, as the latter have become more 'intensive' in order to gain credibility and secure 'clients'.

In many jurisdictions custodial and community-based sanctions are no longer seen as 'alternatives' but as complementary and mutually reinforcing options. Supervision, curfews, monitoring and the like are increasingly presented as a necessary complement to incarceration. This mixing of different forms of punishments has been developing for some time, and recent Home Office discussions on the introduction of so-called 'seamless sentencing' signifies a conscious

attempt to combine a number of different types of exclusionary and inclusionary sentences into a single package (Home Office, 2000).

The notion that community-based facilities are reserved predominantly for minor offenders has been undermined by the evidence of a doubling in the proportion of individuals on probation who have been convicted of a violent offence between 1990 and 2000; while those who were given a sentence of probation for burglary decreased by half between 1998 and 2000, dropping from 12 per cent to 6 per cent. (Home Office, 2002). As in the United States, the number of people given probation is increasing steadily, while the case-loads of probation officers, who are predominantly involved with low-key monitoring and surveillance practices, is rapidly rising.

In the United States the connections between different types of sanctions has become more apparent in recent years, particularly in relation to the use of parole as an early release strategy. This strategy was originally designed to return prisoners to the community under supervision, and thereby reduce prison overcrowding, while giving inmates an incentive to conform. However, recent research has found that approximately one third of those currently incarcerated in the United States are imprisoned for parole violations. In some states, such as California, the proportion of people incarcerated for parole violations reached an alarming 60 per cent in the 1990s (Petersilia, 1999). Of those admitted to prison as a consequence of parole violation some 40 per cent in 1997 were for violations of the technical conditions of parole, rather than for new crimes.

It appears to be the case that breaches and violations, which have been a frequent but an often neglected feature of certain communitybased programmes, are becoming less tolerated by officials (Worrall, 1997). As a result of better methods of detection, new styles of management, such as New Public Managerialism with its insistence on measurable outcomes, breaches are seen as less acceptable than previously was the case.

It is also important to note that one of the implications of the New Public Managerialism is that the pursuit of greater efficiency and the strict adherence to specified targets necessarily involves the development and enforcement of stricter sanctions. That is, the pursuit of greater cost-efficiency generates its own inherent punitiveness, such that managers, whose aim may understandably be to improve performance, become less tolerant of 'failure'. Thus, part of the shift towards greater punitiveness in the penal system, and elsewhere, is a consequence

not so much of an inherent desire to 'get tough' but a product of attempts to develop and enforce more stringent procedures.

Similar evidence of the ineffectiveness of current supervision and monitoring practices in England and Wales is also available. In a recent 'in house' review of the effectiveness of the transformed probation service, HM Inspectorate of Probation found that of 210 programmes being delivered most were 'poorly designed, variable in length, intensity and methods used, are applied indiscriminately and are misunderstood by the courts' (HM Inspectorate of Probation, 1998). Only 12 programmes were found to make any impact on reconviction, and only four were found to work in any effective way. The programmes that demonstrated any real effectiveness were those that spent a considerable amount of time with low-risk offenders, while the main factor which appeared to reduce re-offending was having a job to go to on release. Significantly, intensive probation was seen to have only a minimal effect on reducing the likelihood of re-offending.

Thus, rather than talk about bifurcation it is probably more appropriate to see these developments as examples of 'transcarceration'. That is, the high level of recidivism, which has become associated with these different sanctions, involves the circulation of individuals through different agencies and institutions over time. Also, in an increasing proportion of cases, individuals are not being returned directly to the 'community' but are instead being placed in the hands of different agencies or institutions (Lowman et al., 1987). This may involve the movement of individuals through a series of criminal justice as well as treatment agencies, some of which may be operated by the state while others are privately run. The cumulative long-term effect of moving among these different sites is rarely explored, and the combined personal, social and economic costs of this recycling process tend not to appear in the formal calculations of cost-effectiveness (Arrigo, 2001). What is therefore required is not a snapshot of the distribution of offenders, but rather the tracing of the movement of individuals through these regulatory agencies. In this way we are less likely to see custodial and community-based sanctions as two divergent courses. Rather, we may be better able to appreciate the collaborative and mutually reinforcing nature of these sanctions.

It is indeed arguable that one of the major trends in recent years has been the repeated attempt to reduce the prison population by diverting offenders into the growing network of non-custodial alternatives. We have seen a prolifera-

tion of measures, whose introduction has often been justified in terms of their promise to take pressure off the prison system. Over the past decade a number of so called 'intermediate' or 'smart' sentences have been developed, and their introduction has been rationalized precisely in these terms. These developments involve mainly the introduction of 'third level' sanctions which are neither inclusive nor exclusive, but which involve predominantly surveillance, monitoring and supervision. The growth of these 'third level' sanctions in itself would suggest that the penal system has become 'trifurcated' rather than 'bifurcated'.

Intermediate sentences

The 1990s have been described, with some justification, as the decade of intermediate sanctions (Clear and Byrne, 1992). The widespread adoption of different sentencing options, including intensive probation, house arrest, community service and shock incarceration, both in the United States and Britain, has significantly increased the number and range of sentencing options available. The growth of these options, however, has not been dependent on the production of research evidence demonstrating that they work, but has been largely a result of a belief among policy makers and practitioners that there is a need for a new set of sanctions to be located between prison and probation' (Morris and Tonry, 1990). That is, many policy makers have been receptive to the arguments that there are a considerable number of people who are sent to prison each year who do not need to be there, while existing forms of probation and other community-based sanctions have become increasingly seen as 'soft' options, which do not serve as credible alternatives to prison. In a period of steadily growing prison populations, mounting costs and widespread overcrowding, the possibility of dealing with offenders through ostensibly cheaper non-custodial options appears attractive.

Shortly after the introduction of intensive supervision programmes, preliminary studies claimed that they were more cost-effective, that they served to reduce the pressure on the prison population, and that they provided an effective crime-control mechanism through close supervision, while helping to reduce crime by reducing the level of recidivism. Despite these early claims of success it became increasingly evident over the decade that the majority of these claims were unfounded, and were based on erroneous assumptions and often a mis-

understanding of the relation between prison, existing 'alternatives' to custody and intermediate sanctions. For the most part, comparisons made between the cost-effectiveness of prison and intermediate sanctions were unrealistic, since the majority of those given intermediate sentences would not have been sent to prison, but would have been more likely to have been given probation or some other existing community-based option. Research measuring recidivism rates for different intermediate sanctions showed very little difference from existing sanctions. In one extremely frank and honest review, involving one of the original advocates of intermediate sanctions, it was admitted that:

Few such programs have diverted large numbers of offenders from prison, saved public monies or prison beds, or reduced recidivism rates. These findings recur in evaluations of community service, intensive supervision, house arrest, day reporting centers, and boot camps. The principal problems have been high rates of revocation and subsequent incarceration (often 40-50 per cent) and the assignment of less serious offenders than program developers contemplated.

(Tonry and Lynch, 1996, p. 99)

Thus, it would seem that rather than provide a series of options that reduce the pressure on the prison system, by virtue of more appropriate and cost-effective sanctions, the impact of these intermediate sentencing options has been to contribute inadvertently to the expansion of the prison system. Critics of intermediate sanctions have pointed to the net-widening effects that often accompany the introduction of new 'alternatives' to custody; but a more serious problem is the way in which the proliferation of sentencing options creates a larger self-referential or autopoietic system, which recycles individuals through a more closely linked network of agencies (Brans and Rossbach, 1997; Luhmann, 1995). It is also the case that the introduction of intermediate sanctions has increased the sites of decision-making. Thus, when Michael Tonry and Mary Lynch (1996) and others claim that the way to salvage intermediate sanctions is to structure judicial decision-making they forget that many of the decisions concerning the use of sanctions, such as probation and parole, are made by prison authorities and other non-judicial bodies. In fact, the major difficulty of introducing these vari-

ous sentencing options is that it is extremely difficult to control for whom, and to what purpose, they are used .

At the same time, each sentencing option tends to be justified not so much in terms of its merits but rather in terms of the 'failure' of other options. That is, rather than acting simply as alternatives to incarceration they act as alternatives to each other. These problems became apparent in the 'decarceration debate' in the 1970s and 1980s, but it would appear that the lessons have not been learned (Cohen, 1985; Matthews, 1989). As a result we have experienceB an expanding network of sanctions with ever finer gradations, making the transition from one to another ever easier. It is also the case that the response to the perceived failure of the existing array of sanctions is not to rationalize the number available but rather to develop additional sentencing options, which, it is hoped, will resolve the problem. 1

It should be noted, however, that the suggestion that so called intermediate sanctions sit 'between' prison and probation is inaccurate. While some measures, such as boot camps, represent an intensification, and arguably a distortion, of existing forms of incarceration, other intermediate sanctions are of a different order, and are neither properly inclusive nor exclusive, neither welfare-orientated nor strictly punitive. Instead, they are concerned with monitoring, surveillance and the regulation of behaviour. They involve what Stanley Cohen (1983) once referred to as the 'new behaviorism', concerned with monitoring offenders without either trying to reform, correct or rehabilitate them. These are essentially managerialist techniques, designed to restrict the freedom of movement of individuals. The failure of these monitoring and surveillance strategies to address the causes of crime or make an attempt to reform offenders has resulted in a growing scepticism about the value of intermediate sentences. One ofAhe leading commentaries on the subject, for example, concludes:

Although most intermediate sanction programs have been 'sold' to legislators and the public at large based on their surveillance and control components, it now appears that it is the treatment component of these programs that results in changes in the subsequent criminal behavior of offenders. Unless policy makers and program developers recognise this fact by providing resources for both offender control and treatment intermediate sanction programs will not be viewed as

examples of ‘smart’ sentencing; they will be viewed as simply further evidence that ‘nothing works’.

(Petersilia, Lurigio and Byrne, 1992, p. xiv)

The recognition of the limitations, and indeed the failure, of intermediate sanctions, however, does not always provide a disincentive to policy makers. Even among those who claim to operate within a pragmatic ‘What Works?’ perspective, the repeated failure, for example, of electronic monitoring programmes in England and Wales did not deter policy makers. Indeed, it seemed to make them try harder to ‘demonstrate’ the viability of this sentencing option. One of the most recent publications on electronic monitoring produced by the Home Office is aptly entitled ‘Making the Tag Fit’ (Mortimer et al., 1999). But the aim, it would seem, is not so much to adopt the tag because it fits the offender or the offence, but because it fits with current policy interests and priorities.

The problem, however, is no longer the costs and benefits of specific sentencing options but how they fit within the widening network of disposals, which now includes a complex mix of inclusive and exclusive monitoring and surveillance strategies, each pursuing different and competing objectives. Within this increasingly diverse penal system there is a growing tendency for individuals to be recycled through different types of programmes in the course of their life. A surprising proportion of those who will at some point spend some time behind bars will also be subject to other penal sanctions at other times. There has been a significant ‘blurring of the boundaries’ between prison and community-based sanctions, probably most evident in the fusing of the prison and probation services in England and Wales (Home Office, 1998). This fusing of agencies and institutions is seen to have been stimulated by the emergence of a ‘new penology’, involving new forms of discourse, policies and practices.

The new penology

It is claimed by Malcolm Feeley and Jonathan Simon (1992), in their much quoted article on the ‘new penology’, that the development of a growing network of sanctions and the expansion of the prison sector are, in part, functions of the emergence of actuarial justice. The authors claim that the ‘old penology’, with its

emphasis on the rehabilitation of individual offenders, is being superseded by forms of risk assessment aimed at the control of aggregate populations -particularly the underclass -which have ushered in a wide range of responses in order to more effectively distribute offenders according to risk (Feeley and Simon, 1994).

Although there can be little doubt that different forms of risk analysis are becoming a central feature of contemporary penal systems in different countries, the degree to which this development accounts for the proliferation and shaping of the current range of punishments is questionable. The two examples offered to support their argument are the shift towards incapacitation as the leading rationale for incarceration, by which prisons come to take on 'waste management function', and the spread of surveillance and monitoring techniques. The problem with the first example is that while the emphasis on incapacitation may have increased in the United States, penal policy in the United Kingdom has taken a different direction. Second, while there is no doubt a close 'fit' between surveillance and monitoring operations on the one hand and risk analysis on the other there is a question of aetiology and causality, since the drift towards surveillance has been encouraged not so much by a preoccupation with risk analysis but rather is a product of wider social and economic developments associated with the emergence of what has been referred to as 'surveillance society' or 'control society' (Boyne, 2000; Deleuze, 1995).

Whereas it may be the case that prison use in the United States is increasingly rationalized in terms of incapacitation there has been a very noticeable reaffirmation of both the principle and practice of rehabilitation in the United Kingdom in recent years. In England and Wales there has been a considerable expansion and regeneration of rehabilitative programmes, particularly in the form of drug treatment and testing, literacy programmes, violence-reduction courses, sexoffender and cognitive-skills programmes, not to mention different training schemes and job-creation programmes. What is significant about many of these programmes is that they are new, that they are often directed at the most difficult and 'dangerous' offenders, and that they are, in penal terms at least, relatively well funded. These programmes may receive a mixed bag of responses, based on different conceptions of rehabilitation and may be the object of dubious forms of evaluation (Matthews and Pitts, 1999). But it is important to note that rehabilitation in prisons is not being 'displaced', as Feeley and Simon suggest, neither are the programmes invariably tied to conceptions of risk. Educational and training

programmes, health and drug programmes are now widely available, as are a series of aftercare programmes designed to help ex-offenders back into work. At the same time the role and meaning of 'rehabilitation' itself is being redefined within the prison setting, and currently combines a number of individual and social objectives (Cullen and Gilbert, 1982; Palmer, 1992; Rotman, 1990).

Central to these objectives remains the notion of recidivism. Although an unreliable and ambiguous measure, recidivism remains the main yardstick by which penal interventions, both those linked to rehabilitation and to risk analysis, are measured (Maltz, 1984). At the same time there appears to be a widening gap between a growing body of penal 'experts' -particularly prison psychologists, who have no doubt greatly improved their professional standing through the promotion of risk analysis -and others, both inside and outside of the penal system, who continue to talk the language of individual treatment, needs, reform and adjustment (Miller, 2001; Simon and Feeley, 1995).

It is not too difficult to determine the basis for the resurgence of rehabilitation in its different guises. Despite its apparent 'failure', rehabilitation continues to draw support from the general public, who do not want offenders returning to their neighbourhoods any more of a burden or a threat than they were before entering prison. These neighbourhoods characteristically have more than their fair share of problems. Second, the principle of rehabilitation is gaining increasing support from politicians, who want to reassure the public. Third, many prisoners and their families have an interest in rehabilitation inasmuch as it helps them to deal with their own personal, social and economic problems.

Thus, what we are seeing is the expansion of both rehabilitative programmes and risk analysis, which are combining in new and unexpected forms (Robinson, 2002). The term 'risk' has been conceptualized in a number of different and contradictory ways. Consequently, these different conceptions of risk have been used to justify competing and conflicting penal strategies (Brown, 2000). This has resulted in the creation a new set of tensions in the penal system as objectives and interventionist strategies are becoming more unstable and contradictory. In many cases rehabilitation programmes are assessed in terms of need, while those selected for treatment or training programmes are selected on the basis of risk assessments. Consequently, at one moment interventions are couched in the language of individual justice, treatment and rehabilitation, and at another in terms of risk and probability.

In relation to surveillance and monitoring strategies, Feeley and Simon (1992) are unclear about the causal connection between these two developments. However, a review of the emergence of surveillance and monitoring strategies in the United Kingdom indicates that they were well established a decade or so before risk analysis became incorporated into penal discourse. The reduction of 'face-to-face' work with offenders and the growth of monitoring strategies tied to administrative and managerialist approaches -particularly for young offenders -began to take shape in the late 1970s and early 1980s (Lilly, 1992; Pratt, 1989). There may be an 'elective affinity' between surveillance and risk analysis, but it is perfectly possible to develop surveillance and monitoring strategies that do not have an explicit actuarial component. Moreover, it cannot be assumed that it is the emergence of actuarial justice that has stimulated the proliferation of non-custodial sanctions. Again, the beginnings of the expanding network of community-based sanctions was already well underway in the 1970s, resulting in the overall extension of the welfare-punishment continuum (Cohen, 1985; Austin and Krisberg, 1981).

The impression given in the 'new penology' thesis that risk analysis is coming to dominate penal discourses and practices, while rehabilitative strategies are disappearing does not therefore square with the evidence. As rehabilitation has been reaffirmed and redefined, critiques of risk analysis have begun to emerge, particularly in relation to its presumed objectivity and utility. Thus, rather than becoming a permanent and unassailable feature of contemporary penal systems it would appear that actuarial justice is increasingly becoming an object of criticism.

Within the criminal justice system there are competing ways of conducting risk analysis, and it has been suggested that the selection of variables, the choice of modelling techniques and the methods of calculation employed to identify and reduce risk are often unreliable. This unreliability is compounded by the inclusion of different forms of bias. As Peter Jones (1996) notes in his review of the risk-prediction literature:

Almost all criminological prediction studies use some form of official record of offending as the criterion variable, usually arrest, conviction or incarceration. This has significant theoretical implications, as one can never disentangle the extent to which official measures

confound actual criminal behavior with the labeling of criminality in the criminal justice system. Thus, if arrest is the criterion measure and police agencies are biased or selective in their arrest procedures -by race or social status, for example then the study will likely identify those factors associated with police selection procedures as 'predictors' of criminality.

(Jones, 1996, p. 45)

Thus, official measures may confuse the behaviour of the individual with the activities and interests of agencies, such that a circular and self-fulfilling logic comes into operation as a result of inadvertently introducing structural bias into predictions. In addition, and equally worrying, is that under a system of actuarial analysis, in which the aim is to determine the potential risk of an individual, as part of a particular group, an individual might be deemed to be a risk despite the fact that s/he has never committed a criminal act (Silver and Miller, 2002). In this way the group-based nature of prediction methods may conflict with popular notions of justice, while promoting the continued marginalization of populations already on the fringe of the economic and political mainstream (Hudson, 2001).

A growing concern among penologists is the obfuscation of the moral, social and political criteria involved in actuarial justice. The apparent neutrality and objectivity of risk analysis has been questioned, and 'risk' has been shown to be a highly malleable, gendered and racialized category (Hannah-Moffat, 1999). The application, or in some cases the non-application, of risk predictors in women's prisons is significant. According to the logic of actuarial analysis, women, who are not generally seen as dangerous, might be expected to be dispersed into community-based facilities rather than being imprisoned. However, in the United States the number of women in prison has increased threefold over the last decade, while in England and Wales it has doubled over the same period.

At the same time actuarial methods of prediction do not address the causes of criminal behaviour, and are therefore unlikely to be able to effectively change the conditions which encourage offending. Thus, practically and politically, they are a poor tool for reducing crime or protecting the public. Not surprisingly, there are growing concerns in official circles about the perceived ineffectiveness of risk-based analysis. For example, as the recent Joint Thematic Review by HM Inspectorates of Prison and Probation (2001) put it, 'unless something is done

to tackle the causes of offending behaviour, and the social and economic exclusion from which it springs, and to which it contributes, prisons will continue to have revolving doors, and the public in the long term will not be protected'. The same report pointed out that probation staff lacked confidence in the ability of the prison staff to undertake risk assessment and that despite the rhetoric many cases were not, in fact, prioritized according to risk and needs assessment at all. In fact, intervention was found to be conditioned mainly by the length of sentence which had been imposed. It is also the case that, as risk analysis combines with rehabilitative measures, the unreliability of risk analysis may compound the 'failure' of rehabilitative efforts.

Thus, if actuarial justice is contributing to the expansion of the penal system it appears that it might be by default. That is, it is associated with promotion of unreliable techniques, which do not address the causes of offending. Neither does it offer consistent and reliable a number of different products, ranging from denim jeans to stretch limousines. The productivity, however, is significantly lower than labour in the commercial sector, and therefore it is not generally profitable (see Matthews, 1999). Even with the low profit-levels involved, the prison departments endorse this work because it makes the prison look industrious, teaches some useful skills, and helps to keep prisoners occupied and under control.

Private companies are becoming more centrally involved in the design, construction and running of prisons. Half the private prisons in the United States are run by the Correctional Corporation of America, while the Wackenhut Corporation controls a quarter of the private market. Although there is no indication that these private prisons actually save taxpayers any money (Park, 2000), the drive towards the privatization of prisons is motivated by the belief that the market mechanism is the most effective and efficient way to allocate and prioritize resources. Privatization is also seen as a way of injecting 'modern' management practices into an ailing prison system and a strategy for breaking down traditional working practices. Ironically, in the United States prison workers have developed an active and well-organized union, and one of their main objectives is to limit the spread of privately run prisons.

At one level it does not really make a great deal of difference whether prisons are managed by private or public personnel. There are enough stories of the failings of both. But what is important about the gradual privatization of pris-

ons is that it generally involves a shift toward a more impersonal and automated system of control, in which staff levels are reduced to a minimum, in order to maximize profits. There is little intrinsic interest among these commercial organizations in providing constructive and beneficial programmes for inmates. Neither do private contractors have much interest in reducing recidivism. On the contrary, they are more likely to benefit from the recycling of prisoners.

Christian Parenti (1999), in his discussion of the prison-industrial complex, argues that its emergence cannot be reduced to 'interest group' politics, which reduces this development to the interests of a number of avaricious entrepreneurs. Rather, he claims that it is a function of the American class structure and the need to find suitable 'scapegoats' in order to absorb the surplus population. Capitalism, we are told, needs to manage the poor through forms of segregation, repression or containment. It is not clear from Parenti's analysis, however, why the capitalist class has resorted increasingly to incarceration to control the poor in recent years, and what exactly has changed measures to determine when offenders might be released from prison, and involves a tendency to err on the side of caution by keeping some prisoners incarcerated for longer than might be considered necessary. It is also the case, as suggested above, that the new forms of managerialism that have been introduced in recent years have encouraged more stringent enforcement of rules and procedures, such that breaches and 'violations,' both inside and outside the prison, are more stringently enforced, thus extending the period of detention.

Thus, although it is difficult to find the evidence to support the contention that the expansion of the penal system has been 'dictated' by the logic of actuarial analysis, it can be argued that risk analysis has contributed indirectly to the rise of the prison population in other ways. Consequently, there is a real danger of giving too much credit to risk analysis and seeing it as a prime motor of change rather than as one factor within a wider set of determinants.

An alternative explanation offered for the growth of incarceration has been the development of the 'prison-industrial complex,' which involves the growth of investment in the prison industry, the provision of employment associated with the building of new prisons and the growing emphasis on the use of prison labour.

The prison-industrial complex

Prisons have become a multi-billion dollar business in the United States. The annual expenditure in 1997 was in the region of \$32 billion (Hagan and Dinovitzer, 1999). As the industry has grown, a whole new body of financiers and contractors have moved into this potentially very lucrative business with the aim of making substantial profits. Many new prisons are being built in depressed areas where local industries have gone into decline and they provide a much needed source of employment. Local residents, who a decade or so ago were objecting to correctional facilities being built in their localities, are now vigorously lobbying for prisons to be built in their areas, since they are seen to offer an economic lifeline to local communities short of work. Areas in which prisons have been introduced have been regenerated, with a range of new jobs following in the wake of prison construction. In some rural areas the prison has become the main local employer, while the emergence of employment opportunities has tended to push up land values (Parenti, 1999; Wray, 2000).

Within the prison itself there has been a growing emphasis on employment, and a range of firms now hire out prison labour to make to make this necessary. Parenti's account, in essence, is too 'top-down' and does not explain why so many of the poor and working class endorse, indeed demand, effective 'law and order' policies, unless one is to assume that they are extremely gullible and are duped into agreement by manipulative politicians. Nor does Parenti "address the question posed by Rusche and Kirchheimer (1968) and Michel Foucault (1980) as to why there continues to be a need for such a disciplinary mechanism in an advanced capitalist 'surveillance' society (Bottoms, 1983; Jancovic, 1977).

In a series of articles on the development of imprisonment in the United States, Loic Wacquant (2001, 2002) has argued that the drive towards mass incarceration is not propelled by the emergence of a prison-industrial complex so much as the development of a carceral continuum, which ensnares predominantly young Black men who are rejected by the deregulated labour market. The increasing proportion of young African Americans in prison is a consequence, he argues, of the growing obsolescence of the ghetto as a device for controlling this economically marginalized population, with the result that young Black men move continually between the ghetto and the prison. There is therefore, he suggests, a 'functional equivalence, a structural homology and a cultural fusion' be-

tween the prison and the ghetto, such that the prison is becoming more like the ghetto while the ghetto is coming to increasingly resemble the prison. As welfare provision has decreased so the caste system in the United States is shored up by means of a new form of governmentality, which relies increasingly on the prison to secure control:

The emerging government of poverty wedding the ‘invisible hand’ of the deregulated labor market to the ‘iron fist’ of the intrusive and omnipresent punitive apparatus is anchored not by a ‘prisonindustrial complex’ as the political opponents of the policy of mass incarceration maintain, but by a carceral-assistential complex which carries out its mission to surveille, train and neutralize the populations recalcitrant or superfluous to the new economic and racial regime according to a gendered division of labor, the men being handled by its penal wing while (their) women and children are managed by a revamped welfare-workfare system designed to buttress casual employment.

(Wacquant, 2001, p. 97)

For Wacquant it is not primarily a question of class but one of race, and although he mentions Hispanics in passing, it is young Black males that form the focus of his argument. His suggestion that the ghetto is coming to resemble the prison is based on the observation that ghetto areas have high levels of surveillance and police intervention, and are subject to severe spatial segregation. While all these examples are no doubt accurate, the types of controls he refers to are to be found in most high-crime areas, and the spread of surveillance and spatial control is now city-wide (Davis, 1998). In fact, the residential areas which are coming more to resemble the prison are the gated communities of the wealthy. With their high wire fences, barred windows and bolted doors, extensive surveillance and security guards patrolling the perimeter, carefully scrutinizing everybody who goes in and out, they have produced new forms of segregation and confinement. The question that arises is why does the (White) establishment want to spend the time, money and effort processing and recycling so many young Black males through the criminal justice system? From a neo-liberal vantage point it would presumably be cheaper and easier to reduce intervention to a minimum, and

to leave ghetto residents to deal with their own problems, while spending their money protecting themselves.

Much is made about the numbers of African Americans who have been incarcerated for drug-related offences. Much less attention is paid to the increasing imprisonment of young Blacks for crimes of violence. In both cases, however, the victims (both direct and indirect) are predominantly Black, and there is a significant demand in many Black communities to deal with the problem of drugs, particularly crackcocaine, and to reduce the level of victimization. Wacquant, like Parenti, makes no reference to the concerns about crime in Black neighbourhoods, and consequently provides an overly conspiratorial and functionalist account. In cases where the race of the offender is known, approximately three out of four violent crimes are intraracial, while the fact that rates of Black victimization decreased by approximately 60 per cent between 1993 and 1998 might lead some critics to conclude that the extraordinary rate of Black incarceration might have had some impact on the crime rate in some inner-city areas, albeit at a price (Rennison, 2001). It is also not surprising that the prison culture has increasingly come to resemble the inner-city ghetto, as the proportion of Blacks and Hispanics going to prison continues to increase. Although the vast majority of the literature on race and imprisonment, from both ends of the political spectrum, focuses overwhelmingly on the plight of African Americans, it is interesting to note that while the number of Black inmates in the United States increased by 261 per cent between 1980 and 1996, the number of Hispanic inmates increased by a staggering 554 per cent over the same period.²

In England and Wales the level of racial disproportionality is roughly similar to the United States with African Caribbecms making up approximately 13 per cent of the prison population and just under 2 per cent of the general population (Home Office, 1999). While there has been a series of anti-drug campaigns in the United Kingdom their scale and impact have not been anything like the 'War against Drugs' in the United States. Neither do African Caribbeans in the United Kingdom live in the type of ghettos found in the United States although they do tend to live in poorer inner-city areas. Other European countries are also experiencing a disproportionate number of ethnic minorities in their prisons (Tomasevski, 1994), but this development could not be explained in the terms suggested by Waquant. This indicates that there may be other processes which would need to be included in a comprehensive and convincing account of the

growing racial disproportionality in prisons in different countries (Sampson and Lauritsen, 1997).

Overall, however, the major problem with both Waquant and Parenti's analyses is that they present a largely unmediated account of the relation between the community and the prison, which they see as an essentially two-way process of incarceration/decarceration and prison/community. It has been suggested above that it might be more illuminating to study the movement of different social classes and ethnic groups through the penal system over time, and to identify if there are any significant class or race differences that might help to explain the changing penal population. That is, we might ask whether the routes through the penal system are significantly different for different social groups, such that differentials at the point of arrest are exacerbated and compounded once offenders enter the system.

On reflection, it would seem that the development of the prison as a site of investment, employment and manufacture has not been the primary driving force for the expansion of prisons or the penal system. Rather, these influences have served to consolidate an already expanded penal system. Once consolidated in this way, however, it becomes much more difficult to dismantle the penal apparatus and to counter these established interests. It is also the case that, as the balance in the penal system tilts towards different forms of privatization, there is little intrinsic interest in addressing the needs and problems of offenders or reducing the level of re-offending.

Conclusion

This review of recent developments in penal policy makes no claims to be comprehensive. Instead, it offers a series of observations and critical reflections on some selected themes. The aim has been to question some of the taken-for-granted assumptions about the changing nature of penal policy in contemporary society. Evidence from both the United Kingdom and the United States has been considered in an attempt to identify trends and recurring issues. There is always a danger, however, in pursuing a comparative analysis that focuses on similarities but ignores differences (Young, 2003). In many respects, of course, the United States and United Kingdom are worlds apart in terms of crime and crime control,

but where similar trends and issues are discernable, some commentary would seem to be in order.

The picture that emerges from this cursory investigation is at odds with a number of current accounts of developments in penal policy, and this is partly because a number of widely shared assumptions, on which much of the literature on the sociology of punishment is based, has been found to be in need of some qualification and revision. The picture presented here, although incomplete, indicates a general shift in the nature of penal policy towards a more diverse, volatile and conflicting set of strategies, which, while being uncertain in their effects, have resulted in the construction of a more elaborate and integrated system. Some old strategies are losing credibility while others are being reaffirmed and redefined. There is, in this period of transition, a lack of clear direction and coherence, but a multiplicity of agencies and institutions now involved in the penal system are producing a self-sustaining network of sanctions, through which a growing number of offenders will be recycled over a period of time.

It has been argued that there is a need to examine in detail the movement of individuals and groups through the various agencies and institutions which make up the penal system. In some cases the analysis also needs to be extended to other regulatory sites, both public and private, outside of the criminal justice system. An examination of the flow of offenders through the system provides a very different picture of their distribution, and the operation of the penal process, than is gleaned from headcounts or from a series of snapshots. The more integrated network of sanctions that now operates on both sides of the Atlantic increasingly involves forms of risk analysis, which target groups rather than individuals, include different forms of rehabilitation; a growing range of intermediate sanctions, as well as an expanded prison system. Much of this development has not been consciously achieved. It is not part of a grand plan or the product of a conspiracy. Rather, it is largely the outcome of unintended consequences of conflicting actions, many of which, paradoxically, were designed to reduce the intensity and scale of the penal system.

Through an examination of these changes it has been argued that the notion that the penal system is becoming increasingly bifurcated or polarized is untenable. This is not so much because intermediate sentences have created a new set of sanctions, which sit 'between prison and probation', since many of these sanctions operate on a different plane, but because of the development of more

‘seamless’ forms of sentencing on one hand, and the continual flow of offenders through custodial and non-custodial agencies and institutions on the other.

At the same time there are a number of issues which cause concern and need to be addressed. Most prominent among these is the increased reliance on forms of risk analysis in the penal sphere. Despite its claims to objectivity, risk analysis is an unreliable tool and provides an inconsistent and largely ineffective way of identifying, filtering and judging offenders. Its thinly disguised subjectivism serves neither to address the reasons for offending, nor does it make much contribution to protecting the public. Not surprisingly, there has been a reaffirmation of rehabilitative strategies in recent years, but since the deployment and evaluation of rehabilitative strategies are often conducted in terms of risk, there is considerable uncertainty about their effectiveness. It is clear, however, that risk analysis is not displacing individualized notions of justice and reform among prison staff, policy makers and the general public, and that, instead, a new hybrid discourse is currently in circulation producing an uneasy mix of policies and objectives.

The recycling of offenders through different agencies and institutions over time has become a feature of what is now described as the prison-industrial complex, as has been observed, whereby prisons have become big business, attracting private investors, while serving as major local employers. Many of these private investors and contractors are not particularly interested in individual reform or developing rehabilitation programmes. On the contrary, their drive for expansion and for greater profits is largely dependent on developing low-cost, ‘no frills’ prisons, which rely on increasingly automated and impersonal systems of control.

Breaking the circle requires a form of systems-analysis that can examine the flow of offenders through the penal system, and which can identify the ways that the existing network of sanctions facilitates the process of transcarceration, while deconstructing what has become an increasingly self-referential or autopoietic penal system. 3

Notes

1. In a recent Home Office publication *Making Punishment Work* (2001) the authors, for example recommend the introduction of ‘intermittent custody’,

which would allow the offender to spend some time out of prison, and ‘suspended sentence plus’, which would combine a suspended sentence of imprisonment with a community sentence, so that the suspended sentence could be activated if the offender failed to comply with the conditions of the non-custodial sentence. These sentencing policies might conceivably be justifiable in themselves, but there is little consideration in the document of how they might fit into the existing array of sanctions.

2. American criminologists have problems in classifying Hispanics, since it seems that Hispanics are an ‘ethnic group’ (defined by country of origin and language) while Blacks are a ‘race’ (defined by skin colour). Also, even liberal and radical criminologists tend to work with crude Black/White distinctions, such that rather than deconstruct the notion of race and show it to be a socially constructed and ideological category, they, for the most part, equate race with skin colour, thereby racializing the analysis (see Matthews, 1999 pp. 208-35).
3. Feeley and Simon (1992) suggest that there is an affinity between risk analysis and systems theory. However, the type of systems approach advocated here draws on the work of writers like Luhmann (1995) rather than the crude forms of managerialism that see the world in terms of inputs and outputs.

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