PUNITIVE CRIMINAL JUSTICE AND POLICY IN CONTEMPORARY SOCIETY

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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 and attacks on social deviants known as the 'other' 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. The question of whether this political and media manipulation of criminal policy has resulted in a more punitive society is not without difficulty however. Despite this punitive political and media driven focus a number of important factors need to be addressed in order to better understand punitivism in contemporary society.

I 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.[2] Freiberg[3] suggests that popular punitivism allows politicians to effectively draw from and shape public opinion, which in turn enables power maintenance and vote buying. Garland[4] 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

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[2] 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.
[3] A Freiberg, 'Affective Versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice' (2001) 3(2) *Punishment & Society* 265, 270.
[4] D Garland, 'The Limits of Sovereign Power, Strategies of Crime Control in Contemporary Society' (1996) 36(4) *British Journal of Criminology* 445, 460.

policies are designed more to allay such fear than reduce crime.[5] Essentially, a new political order has emerged that combines punitive policies and pragmatic risk management.[6] In contemporary society various oppressive law and order type measures are routinely introduced in tune with relentless attacks on the 'other' based more on imagery and less on expert driven policy in order to satiate political ideals and in turn act as explainable responses to increases in crime rates and prison populations. Yet, the question of whether the public has, as a result of this castigatory political and media focus, accepted such a punitive sentiment is not without difficulty as a number of important factors need to be canvassed in order to better understand the prevailing environment. Limitations in research, historical explanation, and manifold cross cultural and emotive factors have all contributed to a less than clear understanding of the impact of popular punitivism in contemporary society. This paper will outline the nature, impact and growth of punitive policies initiated by states and also examines various factors that bring into question the notion that contemporary society is necessarily punitive.

II   POPULAR PUNITIVISM AND CRIMINALISING THE 'OTHER'

A   *The Media and 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.[7] A recent example, 'Too Soft on Crime', appeared in the *Sunday Times*.[8] 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 locales 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. This ensemble of unsavoury and newsworthy issues typifies the focus of contemporary media agencies on law and order issues in Australia. By highlighting anti-social behaviour and lawlessness the media effectively establishes a springboard from which political forces can authenticate carefully crafted and opportunistic policy. The effect of the media in tandem with punitive political regimes will now be discussed.

Mason[9] suggests that the media are a discursive and emblematic 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

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

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

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

[8]   N Cox, 'Too Soft on Crime', *The Sunday Times* (Western Australia) 9 September 2007, 8.

[9]   Mason, above n 7, 252-3.

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 are the recipients of considerable benefit from this construct of attitudes as penal effectiveness is sacrificed for political advantage.[10] 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.[11] 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.[12]

B   *Popular Punitivism in Practice*

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[13] 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.[14] 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.[15] Maruna & King[16] 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

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[10]   S Maruna and S King, 'Public Opinion and Community Penalties' in A Bottoms, S Rex and G
       Robinson (eds), *Alternatives to Prison. Options for an Insecure Society* (2004) 83, 84.
[11]   Frieberg, above n 3, 265.
[12]   Thomas, above n 2, 338; Garland, *Culture of Control: Crime and Social Order in Contemporary
       Society*, above n 5, 6, 9, 10, 13.
[13]   Mason, above n 7.
[14]   Frieberg, above n 3, 265.
[15]   Australian Institute of Criminology, *Crime and Criminal Justice Statistics Indigenous Prisoners in
       Australian Crime. Facts and Figures 1* (2006)
       <http://www.aic.gov.au/en/publications/current%20series/facts/1-
       20/2006/6%20corrections.aspx#prisons> at 2 September 2009.
[16]   Maruna and King, above n 10, 84.

in' policies, 'truth in sentencing' and intrusive video surveillance amongst other exemplars.[17]

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.[18] Thomas[19] contends that in the United Kingdom, a sex offender register has been created based not on substantive evaluation or research but popular opinion expressed 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.[20]

Garland[21] 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.[22] 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[23] 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

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[17] Garland, *Culture of Control: Crime and Social Order in Contemporary Society*, above n 5, 13.

[18] M Tonry, 'Symbol, Substance and Severity in Western Penal Policies' (2001) 34(4) *Punishment & Society* 529; Frieberg, above n 3, 268; ibid 12.

[19] Thomas, above n 2, 339.

[20] Garland, *Culture of Control: Crime and Social Order in Contemporary Society*, above n 5, 11.

[21] Garland, 'The Limits of Sovereign Power, Strategies of Crime Control in Contemporary Society', above n 4, 460-1.

[22] Garland, *Culture of Control: Crime and Social Order in Contemporary Society*, above n 5, 12.

[23] Mason, above n 7, 252-64.

highlight the significant cost per night of placing prisoners into police cells when prison
cells are unavailable.

C   *Criminalisation of the 'Other'*

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 background. 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.[24] Tonry[25] argues that
whilst ostensibly concerned with crime and criminals, popular punitivism is really a
vehicle that allows people to direct their anger and 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.[26] 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.[27] 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
Matravers and King,[28] allows ghettoization, prisonization, stigmatization as well as the
social exclusion of the poor, and suggests that offenders are nothing more than a 'stand
in' or scapegoat population. Garland[29] 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.

D   *The Growth in Popular Punitivism*

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

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[24] H Blagg, *Policing Issues for the 21st Century* (UWA, 2007).

[25] Tonry, above n 18, 523.

[26] M Feeley and J Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and its
       Implications' (1992) 30(4) *Criminology*, 449, 467-8.

[27] Simon, above n 6, 15.

[28] S Maruna, A Matravers and A King, 'Disowning Our Shadow: A Psychoanalytic Approach to
       Understanding Punitive Public Attitudes' (2004) 25 *Deviant Behaviour* 277, 287.

[29] Garland, 'The Limits of Sovereign Power, Strategies of Crime Control in Contemporary Society',
       above n 4, 461.

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'.[30] Garland[31] contends that in Britain, for example, a significant shift toward a punitive approach to criminal justice policy has taken place. For his part, Garland[32] 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,[33] the emotions and sentiment of the public have now be translated into action in ways that would have appeared highly optimistic decades ago. Maruna and King[34] and Simon[35] 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 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[36] 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

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[30]   L Zender, 'Dangers of Dystopias in Penal Theory' (2002) 22(2) *Oxford Journal of Legal Studies* 341, 343.

[31]   Garland, 'The Limits of Sovereign Power, Strategies of Crime Control in Contemporary Society', above n 4, 447; Garland, *Culture of Control: Crime and Social Order in Contemporary Society*, above n 5, 3, 9.

[32]   Garland, 'The Limits of Sovereign Power, Strategies of Crime Control in Contemporary Society', above n 4, 446.

[33]   Garland, *Culture of Control: Crime and Social Order in Contemporary Society*, above n 5, 9-14.

[34]   Maruna and King, above n 10, 84.

[35]   Simon, above n 6, 23.

[36]   Garland, 'The Limits of Sovereign Power, Strategies of Crime Control in Contemporary Society', above n 4, 453-8.

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. Mackenzie, for example, suggests that policies such as New
Labour's effectively establish moral and normative reference points for governance.
That is, the media and the politically driven focus on others (who traditionally represent
the social other/irritant) validate punitive state action that is in turn premised on
misunderstanding and disingenuity. The contemporary war on terror rhetoric further
cements these attitudes in modern society.[37] Essentially, this moral authoritarianism
communicates, and appeals, to the populace in language they can now understand.[38]

In the American arena, tough on crime rhetoric has been prevalent since Richard
Nixon's 'war on crime' in the mid-1960s 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 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

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[37]   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*,561, 574-8; H Croall, 'Criminal
       Justice in Post-Devolutionary Scotland' (2006) 26(3) *Critical Social Policy* 589; T Newburn and T
       Jones, 'Symbolic Politics and Penal Populism: The Long Shadow of Willie Horton' (2005) 1(1)
       Crime, Media, Culture 72, 84.
[38]   S Mackenzie, 'Second-Chance Punitivism and the Contractual Governance of Crime and Incivility;
       New Labour, Old Hobbes' (2008) 35(2) *Journal of Law and Society* 214.

become non-negotiable in contemporary American politics by this stage, with its absence akin to political 'suicide'.[39]

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 formerly 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. 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 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.[40]

III   A COUNTERPOINT TO THE POPULAR PUNITIVISM ARGUMENT

A   *Is the Public Necessarily Punitive?*

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 fuelled by a fervent media 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 and King[41] and Maruna et al[42] suggest that an assumption that the public is necessarily or innately punitive (which has some support in evolutionary psychological research) and would have every bank robber, paedophile, rapist, drug trafficker and the like executed rather than 'accommodated' in soft prisons is short of the mark. Further, to assume that that the public is intrinsically punitive in attitude can lead to either avoidance or casual explanation of the assumption. Research suggests 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. Public attitudes toward capital punishment are an apposite example as many adherents would support the death penalty even if proof existed that it did not in fact deter crime, yet opponents would remain unmoved even if capital punishment were

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[39]   Newburn and Jones, above n 37, 74.

[40]   J Braithwaite, 'What's Wrong with the Sociology of Punishment?' (2003) 7(1) *Theoretical Criminology* 5, 20.

[41]   Maruna and King, above n 10, 87.

[42]   Maruna, Matravers and King, above n 28, 278.

found to be a deterrent of crime.[43] It would seem, therefore, that public opinion on criminal justice is in fact rather fluid.

An important factor in this fluidity is the nature of research regarding public attitudes and perceptions of punitiveness. That is, the very nature of punitiveness is less than well understood and there appears to be little in the way of a general consensual definition of the concept which has resulted in unclear meaningful empirical analysis. As an example, there seems little consensus on whether punitiveness is a trait of personality or a view premised in an understanding or lack of understanding of crime control. Whilst the understanding of punitive sentiment can be enriched through different perspectives and theories on public opinion and views, the lack of clarity in both definitional aspects and interpretation of research data has unquestionably been detrimental to research to date.[44] Often, for example, punitiveness is simply measured by responses to the question of what goals should be in place for corrections, with those who favour retribution over rehabilitation necessarily included in the punitive camp, yet other salient drivers such as deterrence (which can be seen as non-retributive) may also explain the support of strict punishment. Further, other measures of public beliefs such as polling are fraught with limitations as many surveys ask specific questions with little in the way of flexibility available to respondents. This can often illustrate public opinion as being consistent, yet logically would rarely be so.[45] Indeed, as suggested by Frieberg,[46] at any given time or in any era, be it rehabilitative or punitive in context, there are significant members of the public who are advocates of rehabilitation, remorse and repatriation. Also, despite the best efforts of politicians to amplify and shape public opinion by engaging in pro-punitive rhetoric in pursuit of popularity or power maintenance by accessing and manipulating the media, success in shaping public opinion may not be guaranteed. Mention should also be made of the fact that when actually provided with details of criminal acts and offender details rather than just statistics for example, survey respondents are actually more inclined to be lenient in attitude and supportive of more rehabilitative, non-punitive sanctions.[47]

B   *Salient Cultural Issues in Popular Punitivism and the Criminal 'Other'*

Unsurprisingly, there are also cross-cultural differences in punitive attitudes. Scandinavian countries for example are more sympathetic toward moralistic, humane or restorative attitudes toward punishment that link offences to moral culpability and are more receptive to modest penalties. Equally, continental European countries seem more conversant with social welfare values than do their counterparts in the United States and the United Kingdom for example where offenders are in the main vigorously processed in a retributive punitive way via the criminal justice system. It is also instructive that European countries are more receptive to community service and non-custodial penalties and far less enthusiastic toward both incarceration and longer sentence duration than those in the United States and United Kingdom jurisdictions. Moreover, many significant jurisdictions paint a different picture when it comes to penal policy. Canada and the Netherlands have continued a less punitive approach to criminal justice as has Germany where a wholesale reduction in prison occupation occurred over a long

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43   Maruna and King, above n 10, 88.
44   E Brown, 'The Dog That Did Not Bark' (2006) 8(3) *Punishment and Society* 287, 305-7.
45   Maruna and King, above n 10, 88-9.
46   Frieberg, above n 3, 270.
47   Ibid.

period from the 1960's and even in the post unification era fear of crime in the former East German jurisdiction remained low. Moreover, incarceration levels have remained at least stable in many north European countries and Japan[48] although it must be said that in very recent years levels have increased in Japan in tune with a more punitive sentiment amongst the public toward offenders.[49] As Zedner[50] alludes to, there seems a fundamental difference between American and European penal policy. That is, a winner and loser approach to criminal justice in the former versus a more inclusive, humane attitude in Europe. Crucially, it would seem that European countries historically are more comfortable with the notion that expert rather than public opinion should shape penal policy. Moreover, a history of more complex social welfare systems in Europe compared to America have arguably fostered value systems where crime is recognised as being linked to more complex social issues than is perhaps recognised by American politicians.[51] There are also marked differences in attitude within populations, such as in the United Kingdom for example, where males, readers of tabloid newspapers, the less educated and the elderly are the most vociferous in their support of punitive measures.[52] Suffice to say, cultural differences can be linked to attitudes toward offending and moral culpability yet, as described by Tonry, those in the United States or United Kingdom for example subscribe to different moralistic values such as in circumstances where offenders are also victims of crime. In these jurisdictions, offenders are made to suffer when offenders, yet conversely are ineligible for state attention when they themselves are victims because often criminal others and social irritants are amongst the most victimised members of society.[53] Logically, this also has much to do with demographic circumstances such as concentrations of ethnic groupings and employment issues as well as other factors such as large concentrations of African Americans or Hispanics in the United States or those from the Asian sub continent in the United Kingdom.

Similarly, the approach by Garland and others suggesting that the criminal 'other' are deviant creatures or folk devils is 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 also edifying to discover that many supposed concentrations of 'others' are more logically explained, although it must be said that Garland[54] does maintain that high risk victimization tends to be a pocketed and concentrated phenomenon uneven in social distribution and coincides with many settlements of ethnic minorities.

C   *The Ostensible Collapse of Welfarism and Rehabilitation*

Zedner,[55] 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

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[48]   Zedner, above n 30, 345.

[49]   K Hamia and T Ellis, 'Crime and Criminal Justice in Modern Japan: Frome Reintegrative Shaming to Poular Punitivism' (2006) 34 *International Journal of the Sociology of Law*, 157, 157-8, 174.

[50]   Zedner, above n 30, 354.

[51]   Tonry, above n 18, 530.

[52]   Maruna and King, above n 10, 89.

[53]   Tonry, above n 18, 530.

[54]   Garland, 'The Limits of Sovereign Power, Strategies of Crime Control in Contemporary Society', above n 4, 446.

[55]   Zedner, above n 30, 344.

before. Welfarism was, argues Zedner, the dominant penal practice but not to the extent that it represented a singular penal practice as the criminal law has historically been based on fundamentals like responsibility and culpability. To overly focus, therefore, on previous era welfarism to some extent ignores the retributive elements that have always been a feature of the criminal justice system. This focus could in part explain the so called revival of retributivism in recent times. Moreover, Zedner[56] 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. Garland, it would seem, focused too heavily on writings of radical young academics that were vociferous in their condemnation of penal welfarism whereas in fact these negative findings were far from unequivocal. It is also instructive that programs like probation and community service, which can both be considered as rehabilitative, have been used more, not less, frequently during the post rehabilitative era. 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, it is instructive that 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', 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.

D   *Popular Punitivism and Emotiveness*

The emotive elements in a punitive sentiment cannot be underplayed if we are to question whether or not the public is necessarily punitive. Karsdedt[57] suggests that emotions are an inescapable constant within the criminal justice system and by extension the community. Victims for example garner sympathy and compassion (as do offenders on occasion), offences evoke moral outrage and disgust while offenders can feel shame and remorse. For its part, the law has accommodated these emotions for example by packaging certain behaviour into hate or race crimes or classifying defences through emotive language such as crimes of passion in addition to defined restrictions such as under evidence rules that bar evidence which may sway jury members. Suffice to say, courts and other legal institutions are encumbered with the obligation to deal with intense emotions and emotional conflicts. A global 're-emotionalisation' of crime, suggests Karsdedt,[58] has taken place in recent years and has had a binary effect on criminal justice and penal policies. This has occurred through the emotionalisation of public discourse concerning crime and policy in addition to increasing the type of criminal sanctions based on, or at least appealing to, emotions.

The Restorative Justice movement has been fundamental in evoking emotions by elevating victims to a prominent position in the criminal justice system and establishing a connect between stakeholders in a crime such as victims, offenders and statutory agencies who combine to deal with the aftermath of an offence and implications that may follow. This moral indignation of societies is fed by the media who engage with the public by emphasising compassion with victims and disgust toward offenders and crimes committed. As a consequence, criminal justice policies are increasingly grounded in fear and anger of crime by politicians who seek to address these emotions

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[56]   Zedner, above n 30, 344-6.
[57]   S Karsdedt, 'Emotions and Criminal Justice' (2002) 6(3) *Theoretical Criminology* 299, 300.
[58]   Ibid 301-3.

and in fact return them back to the public. Yet, for all this emotiveness, the increased profile of the Restorative Justice movement has at least the potential to revive rehabilitative measures against this background of contemporary punitiveness by emphasising the importance of personal responsibility of offenders and potential readmission into society. Effectively, this reconciliation between offender and victim is not entirely removed from the rehabiliatative era's emphasis on psycho-social intervention of the offender and could perhaps be considered a resurrection of the rehabilitative paradigm for a new era. At the very least it acts as a rival to punitive practices.[59]

The importance of emotive elements in analysing public punitiveness, therefore, cannot be underestimated. Maruna et al for example suggest that forgiveness and vengeance can better be understood by analysing a society's emotive reactions to both crime and punishment. As a corollary, this examination can have important implications for the criminal justice system particularly in the all important area of reform. To ignore such powerful indicators such as public punitiveness would be a false economy for those attempting to introduce real change to penal practices.[60] The question, then, of whether the public is necessarily punitive is problematic to say the least. Public opinion on crime and punishment is vague at best and analysis of so called trends and attitudes are hamstrung by major shortcomings such as the difficulty in isolating what exactly is the public opinion and, even more so, could there be such a thing as a single public consensus?[61]

IV   CONCLUSION

The widespread adherence to popular punitive principles remains a concern in many countries and indeed even countries traditionally associated with a non punitive sentiment have in recent years adopted a more punitive public attitude. A salient example is Japan which has traditionally enjoyed a low crime rate yet has in recent years adopted a much higher media focus on crime whilst the public have increased in their fear of crime in tune with a more punitive attitude toward offenders. These developments have coincided with increased emphasis on victims rights.[62] 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. The emotive elements outlined above provide a conundrum for policy makers. While some would argue that restitutory and rehabilitative sanctions cannot match retributory, punitive responses, at least from a position of emotionally expressive and solidarity enhancing responses to crime and criminal activity that citizens' can recognise and identify with, there must be a place for compassion, sympathy and hope in criminal policy. Further, why must there be only individual responsibility, shame and guilt in criminal policy when forgiveness and redemption can be extremely powerful

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[59]   Zedner, above n 30, 355-6.
[60]   Maruna, Matravers and King, above n 28, 278-9.
[61]   Maruna and King, above n 10, 89.
[62]   Hamai and Ellis, above n 49, 174.

tools in criminal policy?[63] The important role of politicians is pivotal here as the more progressive parliamentarians could inject and encourage feelings of pride and hope into public emotions that engender security and well being whilst the media could promote crime prevention and rehabilitation strategies. The public, it would seem, clearly want something to be done to combat crime and criminal activity, which doesn't necessarily have to be expressed by punishment or other punitive sanctions and it is entirely possible that when presented with alternatives to punitive criminal control policies the public can not only recognise the value of rehabilitative and other restorative programmes in crime control but also the benefits as compared with punitive options.[64]

While popular punitivism may reinforce the notion that political expediency is a major determinant of penal policy[65] the crucial question of whether the public is necessarily punitive remains unanswered. Widespread devotion to such an assumption by stakeholders like politicians may not, it would seem, represent the panacea.

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[63]   Frieberg, above n 3, 270.
[64]   Ibid 270-1.
[65]   Tonry, above n 18, 519, 530.