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PENALTY AND THE PENAL STATE*

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The sociology of punishment has developed a rich understanding of the social and historical forces that have transformed American penalty during the last 40 years. But whereas these social forces are not unique to the United States, their penal impact there has been disproportionately large, relative to comparable nations. To address this issue, I suggest that future research should attend more closely to the structure and operation of the penal state. I begin by distinguishing penalty (the penal field) from the penal state (the governing institutions that direct and control the penal field). I then present a preliminary conceptualization of “the penal state” and discuss the relationship between the penal state and the American state more generally.

It is a singular honor to receive the American Society of Criminology’s Edwin H. Sutherland Award, particularly as someone who is not originally from the United States and who is still in many ways a very British criminologist. I am grateful to the Sutherland Award Committee, to ASC President Rob Sampson, and the ASC’s membership for honoring my work in this way.

My research (and that of my many colleagues) is devoted to the sociological study of punishment and penal control: to the field that is usually known as the “sociology of punishment” or “punishment and society.” The significance of this work has grown during the last three decades, as

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real-world developments have moved the penal system ever closer to the forefront of social and political life. And punishment and society research has, over the same period, made considerable intellectual progress, becoming more systematic in its methods, more consistent in its use of data, more theory driven in its research, and increasingly historical and comparative in conception. But instead of celebrating what we have achieved thus far, I want to use this lecture as an occasion to look forward and consider how the next phase of research and scholarship might best advance. For all its recent progress, the sociology of punishment remains a relatively young specialism with much work still to do. My intention here is to identify some lines of inquiry that are ripe for development in the hope that this may encourage others to enter the field and take up these challenges.

Punishment and society scholarship addresses a wide range of theoretical, empirical, and policy issues and is decidedly international and interdisciplinary in character.¹ But in recent years, and for a great many scholars, the effort to explain the extent, intensity, and distinctive nature of penalty in contemporary America has been at the top of the research agenda. It is this topic—contemporary American penalty—I want to consider here.² I will proceed to propose three shifts of emphasis in our research priorities that can be summarized as follows: In seeking to explain penalty, we should 1) attend more closely to the structure and operation of the penal state, 2) view penal policy in the context of the problem environment in which penalty operates rather than as an independent policy domain, and 3) develop more in-depth comparative studies focused on a few jurisdictions selected for their theoretical relevance.

AMERICAN PENALITY

The headline aspects of America's penal system are by now well known, even to nonspecialists, but let me mention five of its most distinctive characteristics.

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1. For a sampling, see *Punishment & Society: The International Journal of Penology* and the recent *SAGE Handbook of Punishment and Society* (Simon and Sparks, 2012).
 2. "Penalty" has come to be the standard term used to refer to the subject matter of the sociology of punishment. It refers to the whole of the penal complex, including its laws, sanctions, institutions, and practices and its discourses, symbols, rituals, and performances. As a generic term it usefully avoids the connotations of terms such as "penal system" (which tend to stress institutional practices but not their representations, and to imply a systematicity that often is absent) or else "punishment" (which suggests that the phenomenon in question is primarily "retributive" or "punitive" in character, thereby misrepresenting penal measures that are oriented to other goals such as control, correction, compensation, etc.). See Garland (1985: x).

First, there is the persistence of capital punishment in the United States at a time when all the other liberal democracies in the Western world have abandoned its use. The contrast between America and other Western nations was most marked between 1976 and 1998 when total abolition became standard elsewhere, whereas in the United States, capital statutes proliferated, the penalty's constitutionality was affirmed, and executions became more frequent. Between 2000 and 2013, U.S. death sentences and executions have declined from more than 300 sentences and close to 100 executions per year to fewer than 100 sentences and 50 executions. In the same period, the number of death penalty states has gone from 38 to 33. But the fact that America retains capital punishment at all is strikingly at odds with the abolitionism of most comparable nations.

In a criminal justice system that prosecutes tens of millions of offenders each year, capital punishment now directly affects a vanishingly small number of offenders. And its persistence is more indicative of contingent developments in constitutional law and in racial and regional politics than of any functional utility as a nationwide mode of penal control. But for scholars who specialize in the study of capital punishment, and for many nonspecialists who follow current affairs, the retention of the death penalty is the most distinctive feature of American penalty today.

Second, during the last 40 years, America has developed a rate of imprisonment that is greatly in excess of prior American rates, much higher than that of comparable nations, and probably the highest of any nation in world history. The total number of inmates in custody on the average day is approximately 2.3 million prisoners, with 1,504,000 in state or federal prisons and 736,000 in city and county jails. Expressed as a per-capita rate of the general population, this is a national rate of 720 per 100,000. Such a rate is more than six times as great as the Canadian equivalent (114 per 100,000) and anywhere from five to ten times as high as that of individual western European nations (which range from 60 per 100,000 in Finland to 150 per 100,000 in England and Wales). The American rate today is more than four times as high as it was in 1970.³

A third feature is the racial cast of America's prisons and jails—a phenomenon that echoes the racial disparities long affecting the administration of capital punishment. In America today, 42 percent of prisoners are Black, 15 percent are Hispanic, 40 percent are White, and 3 percent are classified as "other." This ethnic mixture is markedly different from that which prevailed for much of the twentieth century: Prior to the 1960s, African Americans accounted for between 20 and 30 percent of state and federal

3. See <http://www.sentencingproject.org/map/map.cfm>, International Centre for Prison Studies (2007), World Prison Brief: http://www.prisonstudies.org/info/worldbrief/wp_b_stats.php?area=europe&category=wb_poprate.

prisoners, and they formed a still smaller percentage in the nineteenth century. The proportion of Black prisoners shows a sharp increase only after 1975. The major cause of this demographic shift in the prison population seems to have been the “war on drugs,” although more severe penalties for violent crime and for recidivism also played a role.⁴

With respect to violent crime, imprisonment rates roughly mirror the racial patterns of criminal involvement and approximately 50 percent of state prisoners are serving sentences for violent offenses. But with respect to drug crime sentencing—which accounts for about 20 percent of state prison populations and about 50 percent of federal prisoners—African Americans are imprisoned at a rate eight times as high as Whites, despite evidence that both groups engage in drug offending at approximately the same rates. The war on drugs is not the sole cause of “mass imprisonment,” but it is a major cause of its racial disparities.⁵

Fourth, America’s extensive use of incarceration is paralleled by its use of probation and parole: The first is a supervisory sentence imposed as an alternative to custody; the second is a form of penal supervision for inmates granted conditional early release from state prison. As of 2011, 4.8 million people were serving sentences of penal supervision, with 3.9 million on probation and 853,000 on parole. Counting these offenders together with those in custody, the “correctional population” of the United States on any given day is approximately 7 million persons, or 1 in every 32 adults. And whereas in other nations, and in earlier periods of American history, probation and parole aimed to promote rehabilitation and resettlement (or “reentry” as it is now known), in America today they are oriented toward policing and risk management. Violation of parole license has become a major basis for imprisonment, with states such as California attributing most inmates received into custody to this source.⁶

The final feature of American penalty I would mention has to do with the disqualifications and disabilities that follow on a felony conviction. In all

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4. See Mauer (2006) and Garland (2010). Data on prisoners before 1990 bundle White and Hispanic prisoners together. Only after that date do we have separate data for the three demographic categories.
 5. See Stuntz (2011), Forman (2012), Alexander (2010), Western (2006), and Mauer (2006). Mass imprisonment is defined as “a rate of imprisonment that is markedly above the historical and comparative norm for societies of this type” and that “ceases to be the incarceration of individual offenders and becomes the systematic imprisonment of whole groups of the population” (Garland, 2001a: 1). Demographers estimate that more than 60 percent of Black males without a high-school diploma will be incarcerated at some point in their lifetime. Imprisonment is thus a normal life-course event for that group (Western, 2006).
 6. See <http://www.sentencingproject.org/map/map.cfm>; Simon (1990), Feeley and Simon (1992), and Grattet et al. (2009).

societies, the stigma of criminal convictions and sentences of imprisonment creates difficulties for ex-offenders when they try to secure employment, find housing, form relationships, or resettle in the outside world. But in the United States, these *de facto* social consequences of conviction are exacerbated by a set of *de jure* legal consequences that extend and intensify the sanction in multiple ways. Disfranchisement, either temporary or permanent; disqualification from public office and jury service; ineligibility for federal housing benefits, education benefits, and welfare assistance; liability to court costs and prison fees; exclusion from various licensed occupations; banishment from specified urban areas; and where the offender is a noncitizen, deportation—all of these are concomitants of a criminal conviction for millions of individuals (Alexander, 2010; Beckett and Herbert, 2011; Forman, 2012; Harris, Evans, and Beckett, 2010; Manza and Uggen, 2006; Wildeman, 2013). What Jacobs (2006) termed the “negative *c.v.*” of an American criminal record seems to be more public, more permanent, and more consequential than it is in other nations, with the result that potential employers, landlords, and others are legally permitted to discriminate against an individual on the basis of his or her prior convictions, or on the basis of prior arrests, even when these were for minor offenses or offenses that occurred many years previously.

Each of these patterns of penal practice is controversial, and an extensive normative literature considers whether they are cost-effective, politically legitimate, or constitutionally valid. But they also raise explanatory questions for the sociology of punishment, and it is these that I want to consider here. First, the problem of historical and comparative explanation: Why did American penalty expand so rapidly, and why is it so far out of line with comparable nations? Second, a question about the relationship between types of punishment and types of society: As a historical matter, societies that have imposed punishment on a massive scale have generally been illiberal, undemocratic societies governed by absolutist or authoritarian states. And theorists as different as Montesquieu (1762), Durkheim (1983[1902]), and Foucault (1977) have made general claims to the effect that harsh punishments, extensively deployed, are characteristic of absolutism and its sovereign powers, not of liberal or democratic nations. Against this background, America’s distinctive combination of liberal democracy and penal intensity seems anomalous and poses an explanatory problem of some importance.⁷

7. Recall that de Tocqueville, whose diagnosis of American democracy pointed to the “tyranny of the majority” as its chief pathology, also described America’s new penitentiaries as an example of the most complete despotism: “While society in the United States gives the example of the most extended liberty, the prisons of

EXPLAINING AMERICAN PENAL CHANGE

The expansion and intensification of American penalty after 1973 has generated an extensive scholarly literature that seeks to describe and explain this remarkable historical development.⁸ Despite differing emphases, the historical narratives presented by these accounts overlap at many points, with each pointing to some or all of the following: a rightward shift in the American electorate, a backlash against civil rights, rising public concern about street crime and disorder, the fusion of crime and race issues forged by the Republican Party's southern strategy, the rise of "law-and-order" politics, and the mobilization of cross-party support for tough-on-crime measures. But notwithstanding this narrative convergence, the interpretative frames and historical explanations offered by these accounts emphasize different causal processes, with the result that explaining America's prison boom has become a central point of contention in the sociology of punishment. Consider the following accounts, each of which has been influential and each of which stresses a different causal process.⁹

My own book, *The Culture of Control* (Garland, 2001b), argued that transformations in social ecology brought about by economic growth, social emancipation, and consumer capitalism in the postwar decades led to the emergence of "high-crime societies" in the United States and to a lesser extent elsewhere. It traces how, from the mid-1970s onward, a series of cultural and political adaptations to new social risks produced a reactionary "culture of control" with consequences for social and penal policy as well as for the conduct of everyday life. The decline of penal-welfarism, the rise of penal populism, the shift to a more risk-averse criminal justice, the expansion of private security, and the emergence of mass imprisonment were all concomitants of this cultural transformation.

Simon (2007) described how law-and-order politics became an attractive option for elected officials, and especially for state governors, in an era when New Deal or Great Society-type benefits could no longer be distributed to constituents in return for political support. Simon argued that the newfound appeal of a "war-on-crime" and victim-centered politics has prompted vote-seeking politicians to use crime control and its associated rhetoric and techniques as a template for governance in areas as diverse as

the same country offer the spectacle of the most complete despotism" (Beaumont, de Tocqueville, and Lieber, 1979: 79). For a discussion, see Boesche (1980).

8. See Wildeman (2013) for a critical bibliography. See also Beckett (1999), Ruth and Reitz (2006), and Flamm (2007).
9. I select these four because they neatly juxtapose distinct causal processes—grounded in culture, politics, economics, and race. There are other studies that are equally important or influential.

education, housing, workplace relations, and family policy. American penal-ity, on this account, is the outcome of a political strategy of “governing through crime.”¹⁰

Wacquant (2009b) argued that prison growth is a functional accompaniment of the neoliberal economic policies that have dominated U.S. politics since the 1970s. According to this account, America’s prison system expanded to contain a surplus population (largely composed of minority youth) thrown out of work by free-market policies and deprived of social support by the roll back of the Keynesian welfare state. In this socioeconomic context, the threat of imprisonment operates, alongside meager, disciplinary “workfare” benefits, as a disincentive that presses individuals to accept otherwise unattractive, low-wage work. Like the Poor Law and the workhouse before it, today’s system of imprisonment operates as a “less-eligible” adjunct to the labor market.¹¹

Finally, Alexander (2010) argued that mass incarceration, together with the disfranchisements and disqualifications imposed on felons, amounts to a new racial caste system that consigns poor Black men to a second-class citizenship, barring them from employment, housing, and government benefits as well as ensuring that masses of them will cycle in and out of prison. Alexander argued that this system—“the New Jim Crow”—emerged in the wake of the civil rights movement as a means of restoring Blacks to a subordinate social status. Because race controls were outlawed by the civil rights reforms of the 1960s and are expressly prohibited in today’s “colorblind” political culture, the New Jim Crow is premised not on race but on criminality. But contemporary law enforcement and, above all, the “war on drugs” are, Alexander insisted, thoroughly *racialized*, operating in ways that target poor, minority youth and ensuring that mass incarceration and its disabilities exclude millions of African Americans from participation in American democracy.

As interpretations of America’s contemporary penal landscape, each of these accounts has power and plausibility. And their disagreements over the causes of penal change certainly have theoretical (and perhaps political) significance, particularly their contrasting views of the importance of changing rates of crime, violence, and victimization. But, considered from the point of view of the field as a whole, their competing claims seem complementary rather than mutually exclusive, and their *inter se* differences

10. See Gottschalk (2006) for a different political process account.

11. Western (2006) and De Georgi (2006) also offered versions of this argument. The principle of “less eligibility,” which originated in England’s 1834 Poor Law Amendment Act, states that the situation of the able-bodied recipient of poor relief “on the whole shall not be made really or apparently as eligible as the independent labourer of the lowest class.”

more a matter of emphasis than of kind. No doubt theorists will continue to debate about the causal priorities and the relative impact of these different processes. But with these multiple accounts available, analyzing this specific history no longer seems such a pressing question for further research.

I make this suggestion because American penalty also prompts *comparative* questions that have not been adequately addressed. We want to know why U.S. penal expansion occurred but also why it was so much greater than in comparable nations. Unfortunately, the literature on American prison growth has little to offer us in this respect; the leading accounts are primarily historical in nature and chiefly focused on the United States.¹²

Once we begin to think about recent American penal history in comparative terms, significant gaps in our explanatory accounts become apparent. An examination of social and penal developments in non-American jurisdictions makes it clear that many of the social forces identified as causes of American penal change also have been operative in other nations but without producing the scale and intensity of penal expansion that occurred in the United States. A rightward shift in politics, the discrediting of the welfare state, a backlash against 1960s permissiveness, law-and-order politics, penal populism, free-market policies, precarious employment, welfare reform, racial (and anti-immigrant) hostilities, and a strengthening of social and penal controls—all of these have been present elsewhere. And in many instances, these developments have been associated with tougher penal policies and increased rates of imprisonment. But whereas other nations have experienced social developments that paralleled those of the United States and moved toward harsher penal policies, few exhibited anything like the fourfold increase displayed by America's prison rates. And all of them continue to impose imprisonment at a fraction of the rate that operates in the United States.¹³

The type of social processes associated with America's prison growth are not uniquely American. Similar forces have been present in other nations over approximately the same time period but have not produced the same scale or intensity of penal effect that we observe in the United States. And even if we were to hypothesize that these forces operate much more powerfully in the United States than elsewhere—a claim that is by no means

12. Garland (2001b) explored American developments alongside parallel developments in Britain, and Wacquant (2009a) made reference to the penal impact of neoliberal policies in other nations. But neither of these accounts—nor those of Simon (2007) and Alexander (2010)—are properly comparative in scope or method.

13. See Hamai (2008), Pratt et al. (2005), Wacquant (2009a), Downes and van Swaaningen (2007), and Webster and Doob (2007). On racialized processes of law enforcement and punishment in other nations, see Wacquant (2009a) and Rudin (2008).

obvious—it seems unlikely that such comparative intensity could explain a penal effect that is five to ten times greater in the United States than in other nations.

We can infer, therefore, that in the United States as compared with other nations, similar social forces produce similar penal outcomes but at a very different scale and intensity.¹⁴ And if this is the case, then we should focus more on the specific processes that “translate” social causes into penal effects, examining how these transmission processes operate in different jurisdictions, whether as barrier, modifier, or multiplier. My suggestion is that we should shift our attention—for the time being—away from the broad range of social forces that exert pressure for penal change and instead concentrate more narrowly on the institutional processes that directly produce specific penal outcomes. We should, in short, focus on the state.

BACKGROUND AND PROXIMATE CAUSES

When one thinks comparatively about U.S. penalty, it is not the social and political developments of recent American history that are so very distinctive but their remarkable translation into penal law and practice—a process that occurs in and through state institutions. Consequently, instead of concentrating primarily on social causes, as the literature has done up until now, we should focus on state structures and processes and seek to analyze the American state in comparative perspective.¹⁵

The value of a state-focused comparative research agenda is reinforced by two other considerations. The first is recent research that asks why capital punishment persists in the United States when it has been abolished in comparable Western nations. This research is comparative as well as historical and state-by-state variation over time within the United States proves to be as revealing as historical comparisons between the United States and other nations. In *Peculiar Institution* (Garland, 2010), I argued that the explanation for America’s continued use of capital punishment lies, above

14. Garland (2001b) traced the development in the United States and the United Kingdom of similar social and political forces, as well as similar shifts in penal policy and practice, but noted that these penal effects were of very different scales and intensity.

15. Again, I build here on an existing body of work by other authors. For example, Lacey (2010: 102) wrote that the literature’s “focus on structural forces . . . directs attention away from variations in the institutional framework through which these forces are mediated in different countries.” See also Whitman (2003) and Nelken (2010b). For earlier work that focuses on state processes, see Savelsberg (1994, 1999), Barker (2009), Gottschalk (2006), Novak (2008), McLennan (2001, 2008), Wacquant (2009b), and Young (1986).

all, in the distinctive character of the American state and the radically local, popular majoritarian control of the power to punish. What I am now proposing is a similarly state-centered, comparative inquiry into the distinctive characteristics of American penalty more generally.

The second consideration has to do with a sociological bias that has shaped our causal analyses. Until now, the punishment and society literature has concentrated on what one might term “deep” or background causation: the kinds of cultural, political, and economic processes that I discussed previously. But this is only half the story. We should recognize that the *proximate* causes of changing patterns of punishment lie not in *social* processes but in *state and legal* processes: chiefly in legislative changes made to sentencing law and in the actions of legal decision makers such as prosecutors, sentencing judges, corrections departments, and parole boards pursuant to these legal changes.¹⁶

In accounting for expanded prison populations and increased rates of imprisonment, the most immediate causes are specific forms of state action: the definition of the policy problem as one that requires increased punishment and decreased sentencing discretion, the enactment of mandatory sentences and increased drug offense penalties, three-strikes laws, changes in eligibility for parole, sentencing guidelines, truth-in-sentencing legislation, the imprisonment of parole violators, and the tougher plea agreements obtained by prosecutors whose powers have been enhanced by the increased severity of sentencing law.¹⁷ These state processes are causally determinate in ways that are obvious but that tend to be overlooked in the concern to identify the “prime movers” behind mass incarceration. The post-1970s revolution in sentencing law has led to more offenders being sent to jail and prison, for longer sentences, with fewer reductions in time served for good behavior, and to a greater likelihood of being reimprisoned for parole violation (Tonry, 1998).

The precise nature of these legal enactments is crucial because small variations in enacted laws or their enforcement may produce large variations in penal outcomes. “Three strikes” laws have been passed in dozens of states as well as in the federal criminal code, but the California legislation, with its distinctive specification of the offenses that will trigger a sentence enhancement—together with the practice of local prosecutors in charging under this law—resulted in thousands of enhanced sentences and large

16. Political scientists, such as Marie Gottschalk (2006), and legal scholars, such as Nelken (2009) and Stuntz (2011), have been more attentive to these processes.

17. See Blumstein and Beck (1999). On non-U.S. jurisdictions, see Nelken (2009), who noted that imprisonment rates in Italy and France are reduced by state grants of amnesties and collective pardons, which are administrative acts that often have little popular support.

increases in the California prison population (Zimring, Hawkins, and Kamin, 2001). Similar laws in other states, with slightly different provisions and different patterns of enforcement, resulted in many fewer such sentences and much smaller prison population increases. Explaining why California's prison population is larger than that of other states is, thus, in the first instance, a matter of accounting for legislative and enforcement differences, rather than of identifying the social factors that push for mandatory penalties and severe sentencing. The value of attending to state processes is thus indicated by macrolevel comparative work on the death penalty as well as by more microlevel comparisons of sentencing law.

WHAT TO COMPARE AND WHY?

Viewing American penalty in comparative perspective is less straightforward than one might expect. There is, of course, a lack of reliably comparable data because governmental agencies produce statistical information for their own purposes, and international comparison is rarely a matter of official concern. But more fundamentally, there are unsettled questions concerning precisely what should be compared and why.

Most comparative work proceeds by contrasting America's rates of incarceration to those of other nations on a per capita basis.¹⁸ We state that the U.S. imprisonment rate is more than 720 per 100,000, and we go on to observe that this American rate is approximately seven times as high as the European average and six times as high as that of Canada. These data are slightly misleading. America is a federated system, composed of 50 state jurisdictions and a federal jurisdiction. So when we say that the U.S. incarceration rate is seven times the current European average, we skate over sizeable variations within the United States and somewhat smaller ones in Europe. The fact is that some states such as Maine (264 per 100,000) run at about twice the European level, whereas others such as Louisiana (1,569 per 100,000) are more than ten times as high.¹⁹

As anyone who knows this literature will attest, comparative discussions are often motivated by normative concerns. Comparing the extent to which

18. Rates of incarceration are calculated by viewing average daily prison population—or sometimes the prison population on a specific day—in relation to the nation's population as a whole. Average daily prison population is a measure that combines stocks and flows—numbers received into custody and the average length of their prison term. Comparisons can be made on either or both indices. The United States is high on both measures—more people are sentenced to custody, and on average, they serve longer sentences. See Frost (2008) for a discussion of state-level differences within the United States.

19. See <http://www.sentencingproject.org/map/map.cfm#map>.

nations incarcerate their citizens is typically not a neutral inquiry about differential preferences for imprisonment but instead a basis for critical claims about the relative “punitiveness” or “repressiveness” of the nations in question.²⁰ Many commentators assume that if American jurisdictions impose imprisonment at a higher rate than non-American ones, then it follows that American rates are too high and that American justice is excessively harsh. In the American case, that may be the proper inference and the one we will be left with after further study. But it is possible to imagine situations in which a higher rate of imprisonment is not a sign of greater “punitiveness” but of some other factor or process—such as a higher volume of prosecuted crime—so we should not beg this question.

Punishments and sentences of imprisonment are not distributed across the general population on a random basis: They are imposed on convicted offenders as punishment for crime. But despite this obvious truth—and the efforts of several scholars to remind us of it—comparativists have not yet figured out how to think about rates of imprisonment (whether in America or elsewhere) in relation to the rates and patterns of crime and violence that are being sanctioned by prison sentences.²¹

How should we think about this relationship? One response that is surprisingly widespread in the critical literature is that there is no relation. Patterns of punishment and rates of imprisonment are wholly determined by social and political processes and bear no relation to rates and kinds of crime. This is, I believe, a mistake. But it is a mistake prompted by considerations that are embedded in the field’s theoretical assumptions. One axiom of the sociological literature is that punishment and penal measures are, to a considerable degree, independent of crime. Punishment, it has been pointed out, is a social process with social causes and social effects and not—or “not merely”—a reaction to crime. (The sociological insight here is that neither individual crimes nor aggregate crime rates determine the nature or extent of penal measures. It is not “crime” that dictates penal laws, penal sentences, and penal policies but the ways in which crime is socially perceived and problematized and the political and administrative decisions to which these perceptions give rise.)

This basic premise is now so thoroughly taken for granted that it is sometimes rendered in exaggerated versions. One occasionally reads that

20. See Cavadino and Dignan (2006a: 4–5). For a critical discussion, see Nelken (2009). Whitman (2003) offered a more nuanced, multidimensional concept of “harshness.”

21. For efforts to view imprisonment rates in relation to crime rates, see Pease (1994), Lynch and Pridemore (2011), Van Dyk (2007), Nelken (2009), Lacey (2008), Langan (2005), Tonry (2007), Frost (2008), and Kury and Ferdinand (2008).

punishment and penal policy are “unrelated to” or “utterly disconnected” from crime and crime rates.²² But this is an overstatement that transforms sociological insight into untenable hyperbole. The phenomenon in question is, after all, the punishment of criminal offenses and offenders, and the latter (offenses and offenders) always operate in some relation to the former (punishment), and always exert some pressure on its character and extent. Crime rates may increase steeply without producing corresponding changes in penal practice, as they did in the United States between 1965 and 1973. Imprisonment rates may increase despite the fact that crime rates are falling, as occurred during the 1990s and 2000s. But a time lag between changes in one and changes in the other does not mean that the two are unrelated. As I argued in *The Culture of Control* (2001b), it makes little sense to analyze late twentieth-century American penal policy without bearing in mind the extraordinary levels of violent crime and disorder that characterized parts of the United States in the 1960s and 1970s, and the social, cultural, and political consequences that flowed from this in the American context.

Penal processes develop in a complex relation to crime processes, and one does not directly or immediately determine the other. “Crime problems” are subject to competing definitions and are sometimes proxies for other issues; penal “solutions” are contested both pragmatically and ideologically; and punishments may be selected for symbolic rather than for instrumental effect. But there is generally *some* relationship, however mediated and indirect. So when we compare rates of imprisonment across jurisdictions, or across time, any inferences we draw about repressiveness or punitiveness should be modified by consideration of the patterns, trends, and rates of crime to which these penal measures are a response.

We can state this as a more general theoretical proposition: Whenever we evaluate a social policy—whether a penal policy or some other kind—that policy should be located within the problem environment in which it operates. Consider an example drawn from social welfare policy. Comparisons might show that nation A spends a larger proportion of its gross domestic product (GDP) on social expenditures than do nations B, C, and D. We might take this differential as an indication that nation A has a generous and well-developed welfare state, with all the associated normative implications. But if we discover that these high levels of social expenditure result from nation A’s extraordinarily high unemployment levels, which produce higher-than-average numbers of benefit claims and a lower-than-average GDP, we would draw a very different inference. Similarly, if we discover

22. For the most emphatic version of “the crime-punishment disconnect,” see Wacquant (2009a) and (2009b).

that individual benefit payments in nation A are lower than the average elsewhere, or that eligibility conditions are stricter, then we would once again draw different conclusions.

Looking at rates of imprisonment in isolation is similarly misleading: We should, instead, view them in their proper social problem/social policy context. But this, in turn, raises a more basic theoretical question, namely: In which social policy context should imprisonment (and punishment more generally) be considered? Or perhaps better, in which field of social problems and which strategy of social governance does criminal punishment function?

If we examine the sociological and historical literature, we find several possible answers to this question: 1) Imprisonment is an element of punishment policy, responding to public and/or political demand for punishment—demands that are distinct from rates and patterns of crime; 2) imprisonment is part of crime control policy, responding to crime rates and fear of crime; 3) imprisonment is part of a social control policy, responding not just to crime but to more general threats of social disorder, especially in periods of high unemployment, economic disruption, or political instability; and 4) imprisonment is an element of the security state, used to incarcerate political dissidents and enemies.

The first of these frames—penal policy as an independent policy choice—is, as I argued previously, unpersuasive because penal policy is generally conditioned by authoritative perceptions of the crime problem. There is no evidence that the fourth frame currently operates in the United States, the Guantanamo detainees notwithstanding, although it would clearly be an appropriate basis for studying imprisonment and judicial execution in the Soviet Union or Nazi Germany. The third of these frames—penal policy as a mode of governing the poor—has been shown to be an appropriate description in certain contexts (Garland, 1985; Wacquant, 2009b). The second frame, where imprisonment is a policy response to perceived crime control problems, is generally applicable, whatever the relevance of broader considerations of social control. But whichever contextual frame we select, each one raises difficult questions about the causal processes that shape policy: questions of the kind indicated above when I discussed the relation of crime and punishment.²³ How then to proceed?

The contextual frame in which a specific penal policy exists cannot be known in advance of detailed historical and sociological analysis. That

23. Conceiving of penal policy as an independent policy choice radically simplifies the issues, suggesting that penal policy is shaped entirely by the political preferences of law makers and their allies. If one's primary concern is to assign blame, then this is an appealing way of thinking. Normative judgments become more complicated if penal policy is also shaped by problem-solving efforts.

penalty's policy context and social function varies from place to place and time to time is an established finding in the sociology of punishment and is demonstrated clearly, for example, in the changing role of capital punishment (Garland, 2010). Before settling on an analytical frame, therefore, one needs a sense of how penal power is deployed in the specific jurisdictions under study. This complicates the problem of comparison and necessitates a more grounded, contextualized method of framing comparative questions. And it points, I believe, to the value of in-depth, qualitative and quantitative comparisons between carefully selected jurisdictions.

That a nation imposes high rates of incarceration relative to other nations certainly tells us *something* about that nation. But what exactly does it tell us? That it processes more offenders? That more of its offenders are guilty of serious crimes? That it sends offenders to custody when other nations use noncustodial penalties? That it imposes long terms of imprisonment where other nations impose shorter terms? That it chooses not to moderate prison terms by remission and parole? That it relies more on punishment than on prevention? That it adopts repressive means to maintain social order where other nations rely on nonpenal methods such as job creation, education, or welfare provision?²⁴ That it regards the poor (especially workless minority males) as a dangerous class to be managed rather than as citizens who are entitled to support and respect? Most of these questions can only be answered by means of careful, qualitative and quantitative comparisons, most likely using in-depth analyses of a few comparable jurisdictions or perhaps of the same jurisdiction at different points in time.

PENAL COMPARISONS

I have argued for the value of viewing American penalty in comparative perspective. I want now to stress the need for small-*n* comparative studies that are in-depth, qualitative and quantitative analyses, focused on penal state processes—a form of analysis that is still surprisingly rare despite the pioneering example of David Downes's *Contrasts in Tolerance* (1988). The earliest comparative studies in this field were primarily data-gathering exercises, collating and systematizing cross-national data to generate “league tables” of descriptive statistics (ranked by per capita rates of imprisonment or rates of execution) or to develop typologies classifying nations in penological terms. These international tables subsequently formed the databases for correlation studies of varying levels of sophistication, exploring the extent to which penalty co-varies with social indicators such as levels of unemployment, inequality, education, political rights, religion, welfare spending,

24. Nelken (2010a) discussed these questions.

and so on (Aebi and Stadnic, 2007; Cavadino and Dignan, 2006a, 2006b; Greenberg and West, 2008; Lappi-Seppala, 2011; Sutton, 2000, 2004; Walm-sley, 2009).

These large-*n* correlation analyses were our first cuts into the dense thickets of causation. Positively, they provided empirical support for causal claims that had previously rested on logic and impressionistic observation. So, for example, Beckett and Western (2001) found that U.S. state-level data revealed that welfare provision and imprisonment rates are negatively correlated, a finding that Downes and Hansen (2006) replicated in a study of 18 nations. Similarly, Sutton (2004) showed that in affluent Western democracies, moderation in punishment is associated with high levels of union strength, low levels of political partisanship, economic growth, and corporatist labor market institutions. Negatively, such studies challenged assumptions that had previously been widely shared, such as the assumed correlation between unemployment rates and imprisonment rates (Sutton, 2000).

These large comparative studies provide important information, allowing broad causal claims to be tested and supplying empirical parameters for more detailed inquiry. But for all their utility in these respects, such studies also have definite limits and should be viewed as one comparative tool among others rather than the central plank of a comparative research agenda. So, for example, our most sophisticated correlation studies of the death penalty find that death penalty abolition is positively associated with the presence of political rights and civil rights (Greenberg and West, 2008). That finding is no doubt a robust one, independently reinforced by historical studies, logical inference, and common sense. But it is a finding that makes America's retention of the death penalty more puzzling rather than less, because, according to these predictive factors, the United States clearly should be in the abolitionist camp.

Much of the problem lies in the necessarily inexact ways in which each of 190 or more nations is reduced to a few dozen variables: a process that inevitably means that each "factor" masks a great deal of internal variation. So although we know that small differences in the institutionalization of democratic principles can have large penological implications (Barker, 2009; Garland, 2010), it is difficult to capture these subtleties while keeping large-scale studies manageable. In these circumstances, we should encourage more detailed, in-depth comparisons focused not on large numbers of nations but instead on a few comparable jurisdictions selected for their relevance to issues of theoretical importance.²⁵

25. See Evans, Rueschemeyer, and Skocpol (1985: 348) for a discussion of the methodological issues, and see Barker (2009) or Lipset (1997) for examples of this kind of study.

Large-*n* correlation studies have a further limitation that is their tendency to isolate and examine individual “factors” and quantifiable “variables” rather than study processes, event sequences, and the choice-point contingencies that shape institutional outcomes. Such studies provide us with important information about co-variation or the clustering of factors and, in the more sophisticated studies, about interaction effects. But they generally provide no coherent model of the ongoing processes whereby factors interact to produce their effects, and they tell us little about the choices and contingencies at work therein. Their findings usefully point us to recurring associations and patterns, but we need more in-depth studies to identify the various ways in which different institutional structures connect to different action orientations and the penal outcomes that result.

Some authors have recently responded to this problem and have sought to improve the theoretical power of comparative analysis by borrowing analytical models from other disciplines and using them to study penal differences. Cavadino and Dignan (2006a, 2006b) borrowed from the comparative social policy literature to argue that nations with “neoliberal,” “conservative corporatist,” “social democratic corporatist,” and “oriental corporatist” welfare regimes exhibit different rates of imprisonment, with “declining levels of punishment as we progress through this list.” Similarly, Nicola Lacey (2008) drew on the “varieties of capitalism” literature to suggest that nations with “coordinated market economies” tend to punish less than those that have “liberal market economies.”

Both of these studies pointed to general processes, incentives, and institutional dispositions that might explain the association between a type of political economy and a type of penalty. Both suggested that societies that have developed “corporatist” institutions and practices lean toward incorporation and inclusion, whereas a “laissez-faire” approach tends to tolerate exclusion. They argued that these institutionalized dispositions affect penal practice as well as economic and social policy.²⁶ (One might also suppose that strong social networks and welfare institutions function as positive

26. “Co-ordinated systems [such as Germany or Sweden] which favour long-term relationships—through investment in education and training, generous welfare benefits, long-term employment relationships—have been able to resist the powerfully excluding and stigmatizing aspects of punishment. By contrast, liberal market systems oriented to flexibility and mobility [such as the US, the UK, Australia and New Zealand] have turned inexorably to punishment as a means of managing a population consistently excluded from the post-Fordist economy” (Lacey, 2008: 109). In a later paper, Lacey and Soskice (2013: 1) developed an argument focused more on political institutions: “Our core argument is that the decentralized American political system, which accords a distinctive degree of autonomy to localities, and which governs a distinctively wide range of decisions about education, zoning, and criminal justice through local electoral politics, produces a polarizing dynamic

social control mechanisms, making negative penal control less necessary and providing external supports for policies of rehabilitation and reintegration.)

But even these more sophisticated studies leave us with something of a black box when it comes to demonstrating how penal laws and policies are shaped and how penal decisions are made. They point to structural biases and institutional dispositions but not to empirical processes and actors' choices. At the end of the analysis, we still need to learn more about how social forces are translated into penal outcomes, not least because nations that are classed together in the same "variety of capitalism" or "welfare regime" category sometimes exhibit very different levels of punishment.²⁷ My suggestion is that, to supplement and extend these studies, we should pursue the kind of fine-grained inquiry that David Downes presented in his 1988 study of penal policy in the Netherlands and in England and Wales.

Downes (1988) began with two theoretically relevant research questions grounded in some striking empirical observations. Between 1945 and 1975, Holland and England both experienced steadily rising crime rates. But although English imprisonment rates increased along with crime rates, more than doubling between 1945 and 1985 (despite governmental attempts to curtail custodial sentencing), the Dutch imprisonment rates more than halved in the same period. How, Downes asked, might one explain this variance? And how, when repeated government efforts had failed to limit prison use in England, could the Dutch be so effective in controlling the flow of offenders into custody?

Downes's investigation revealed that the two criminal justice systems differed markedly in the extent to which they were "systems" capable of being managed. In England and Wales, sentencing patterns were not the result of a policy in any strict sense because the government lacked the means to control or even coordinate penal decision making at key points of the process. English rates of imprisonment were, instead, the unprogrammed outcome of sentencing decisions made by thousands of magistrates and judges whose claim to judicial independence put them beyond the direct control of government ministers. In the Netherlands, by contrast, system management was enabled by a structure of closely collaborative relations between senior judges, prosecutors, and Ministry of Justice officials, relations that allowed

in which it is impossible to garner stable political support for integrative, let alone redistributive policies."

27. Cavadino and Dignan (2006a: 30) noted that among the countries they classify as "neoliberal," imprisonment rates vary from 701 per 100,000 in the United States and 402 in South Africa to 141 for England and Wales and 115 for Australia.

these actors collectively to regulate the throughput of cases and ensure that prisons did not become crowded.²⁸

What about the different penal responses to rising crime? How could the Dutch respond to more crime by imprisoning less? And why would they choose to do so? Having controlled for crime rates, clear-up rates, and rates of prosecutorial waiver, Downes identified sentence variables as the most important causes of the differential rates of imprisonment. Where the average English prison sentence was 173 days, the Dutch average was 83. Whereas 8.5 percent of criminal convictions resulted in custody in the Netherlands, the equivalent figure in England was 14.0 percent. The problem to be explained was as follows: How could Dutch prosecutors and judges implement this strikingly lenient sentencing policy in a context of rising crime? And why did they choose to do so?

Downes argued that the solution to these puzzles lay not in Dutch culture or public sentiment but in the specific characteristics of Dutch criminal justice and its relation to the political system. The key features that he identified were a style of coalition politics that left criminal justice to the professionals, a highly developed network of social service and welfare agencies, the specific culture of the judiciary, the influence of rehabilitative ideas, and an influential Dutch criminology (“the Utrecht school”) that was highly critical of imprisonment as a response to crime. Of these, the most important element was the professional ideology of prosecutors and judges and its negative view of imprisonment: an orientation shaped by their law school education, by their ongoing connections to criminological experts, and by the historical memory of internment under the Nazis. As Downes put it, the key explanatory variables were those “closely connected with the actual accomplishment of sentencing by the prosecutors and judges themselves,” above all, their “judicial training and socialization” (1988: 101).

Although Downes did not cast his analysis in my terms, it should be clear from this summary that his 1988 study focused precisely on the institutions and processes of *the penal state* in the sense that I intend it. Let me turn now to a discussion of that concept.

CONCEPTUALIZING THE PENAL STATE

Recall the rationale for a state-based comparative analysis of American penalty. Cultural currents, political movements, and criminological

28. A “call-up system” that admitted offenders to prison only when a place came available was one of the devices used to maintain a government commitment to one-person-per-cell imprisonment without building new prisons.

developments—any and all of these shape penal practice only to the extent that they are translated into law and backed by administrative force. Penal practice is always a deployment of state power, and social forces that seek to affect penalty succeed in doing so only to the extent that they engage the state, its institutions, and its actors. Social currents may ebb and flow, but they have no penal consequence unless and until they enlist state actors and influence state action. It follows that the character of the penal state and the processes whereby it responds to social forces, translating (or not translating) political pressures into specific penal outcomes, are always the proximate causes of penal action and penal change.

The structure of the state, its powers and capacities, its autonomy or its openness to popular pressures, its internal divisions and restraints, and the interests and incentives of legal actors are all, in this sense, determinative. In what remains of this address, I will suggest how we might think about the penal state—or rather about penal *states*—since these vary between jurisdictions and change over time. What this entails is a comparative sociology of the *state* in general, which is already the subject of a rich social science literature, and the development of a concept of the *penal state* in particular, which we sociologists of punishment will have to work out for ourselves.

Modern states—within which penal states are embedded—are large, complex, differentiated entities, and if our concern is with penal matters, then some elements will generally be more relevant than others. The state's military power, its position vis-à-vis other states, its economic power, and its finance and trade policies—these aspects of state are unlikely to be directly relevant to penal policy.²⁹ Similarly, although areas of state policy such as policing, education, welfare, and employment may have an important bearing on penal policy or on penal policy's efficacy, these policies are generated and directed by distinct state agencies and affect penal policy from the outside.³⁰ To grasp the key processes that determine penalty, we need to focus

29. However, international and regional relations are becoming more relevant to national penal policy. The European Union and the Council of Europe have made the abolition of capital punishment a condition of membership and international agreements such as the European Convention on Human Rights have penal policy implications. See Loader and Sparks (2013). As a “superpower,” the United States is probably less subject to such forces than other nations.

30. The police are state actors who, among other things, deploy penal power: They make arrests, facilitate prosecutions, issue tickets, and impose fines. In these respects, the police form an element of the penal state. However, like other state institutions (the legislature, the administration, the judiciary) and other state agencies (education, housing, social work) the police also exercise important nonpenal functions and also operate outside of the penal state.

on those aspects of the state that enact penal law, shape penal policy, and direct penal practice—on what I will term the *penal state*.

Before developing this concept, let me make two distinctions that will clarify what I have in mind. The literature on U.S. punishment already makes reference to the “carceral state,” “the punitive state,” “the prison state,” and occasionally the “penal state.” But most of these usages invoke the term in a gestural, rhetorical way, invoking the “state” as a radical-sounding, critical way of talking about America’s prisons or its penal system.³¹ In my use, the term “penal state” is not a critical term: It is used in a neutral, nonevaluative sense to describe the agencies and authorities who make binding penal rules and direct their implementation. All developed nations have “penal states,” whether their penal policies are lenient or draconian. And no state “is” a penal state—penalty is only ever one state sector among many and, rarely, a dominant one.

Nor is my use of the concept intended to refer to the whole penal system and its apparatus of prisons, jails, correctional staff, and so on. The “penal state” refers instead to the leadership elites that direct and control the use of that apparatus and its personnel. Here I am distinguishing between the exercise of penal power and the apparatus through which that power is exercised. “Penal state” refers to the penal leadership and its authority, not to the penal infrastructure that this leadership directs.³² Penalty (the penal field) ought thus to be distinguished from the penal state (the governing institutions that direct and control the penal field).

I define “penal state” as those aspects of the state that determine penal law and direct the deployment of the power to punish.³³ The penal state

31. For Gottschalk (2006: 6), the “carceral state” (a term she used interchangeably with the “penal state”) is “defined by reliance on mass imprisonment and degrading punishment and its fierce attachment to the death penalty.” In other words, she used the phrase “carceral state” to describe what I would call American penalty in its current form. McLennan (2001), who described the rise of “a new penal state,” used the term in a manner similar to Gottschalk. Useem and Piehl (2008) questioned whether the “the prison state” should be viewed as a form of big government but conclude that an effective penal apparatus is not a violation of conservative small government principles. Wacquant’s (2009b) discussion of the state as a bureaucratic field is closer to the conception I develop here. See also Holleman et al. (2009).

32. To focus on these leadership groups is not to deny that penal managers and front-line staff also exercise power. Police officers, prison guards, and assistant district attorneys are, like “street level bureaucrats,” able to exercise discretion and choice in how they deploy their powers. Rather, I wish to attend to the locus of general policy-making decisions that rests with the leadership rather than with the rank and file.

33. Here “the state” may refer to the nation-state or, where penal powers are devolved as they are in the United States, to the local state.

thus includes the state legislature, executive and judiciary acting in their penal capacity (enacting penal laws, authorizing penal budgets, or adjudicating penal issues), together with the leadership of penal agencies who shape penal policy and direct its day-to-day implementation (police commissioners, chief prosecutors, judicial elites, justice department chiefs, correctional commissioners, prison wardens, probation service directors, state parole board members, etc.). To refer to the “penal state” is to refer to the structures and institutions of the larger state insofar as these affect the power to punish and to the leadership elites of the institutions of criminal justice that are charged with directing and deploying that power.

A focus on the variable characteristics of the penal state will serve as a useful basis for comparative research, particularly if the research is the kind of detailed, in-depth inquiry described previously. To this end, I would propose that future research on the penal state pursue three lines of inquiry:

1. What are the institutional and operative features of the penal state, and how do these vary?
2. What can studies of the penal state and the power to punish teach us about the American state more generally?
3. To what extent does the specific nature of the American penal state explain the distinctive character of contemporary American penalty?

I offer the following preliminary observations about each of these three questions in the hope of inviting comment and opening up discussion.

DIMENSIONS OF THE PENAL STATE

By specifying the nature of penal states and the key variables of which they are composed, we can ask whether durable differences between states explain differences in penal outcomes.³⁴ To the extent that state variation does matter, a model of the penal state will enable us to make focused, controlled comparisons. To formulate a useful ideal type, we need to specify penal states along a series of dimensions.³⁵ The most important dimensions for our purposes are as follows: 1) state autonomy, 2) internal autonomy, 3) control of the power to punish, 4) modes of penal power, and 5) power resources and capacities.

34. State structures—including penal state structures—are subject to change over time. But they are generally more durable than social movements and political currents: They have a “historical persistence and continuity” (Skocpol, 1985) and offer a relatively stable basis for comparison between jurisdictions.

35. The ideal type presented here is merely a first approximation. A study of the historical literature on penal change would supply much material for a more informed analysis.

STATE AUTONOMY

“State autonomy” refers to the autonomy of the state vis-à-vis civil society. To foreground the penal state is not to neglect the social roots of penal law and penal practice. Democratic states are rooted in civil society, and they respond to interest groups and public opinion via multiple pathways, the most important being the process of legislation. (Absolutist and authoritarian states may deploy the power to punish in ways that are unresponsive to public opinion, but no democratic state can, so any measure of “autonomy” is always within a framework of democratic accountability.) But to what extent do these social forces dictate the state’s conduct and to what extent are state actors autonomous of them? Is state penal policy determined from the outside by interest group demands, public opinion polls, media headlines, and voter ballot initiatives? Or is it shaped by state officials acting in accordance with their own interests and ideologies? Between these two possibilities lies the variable of state autonomy.³⁶

Penal power is power deployed by state actors. But it is not necessarily directed to their own ends or deployed in accordance with the preferences of the state bureaucracy, its officials, or their expert advisers. A larger degree of autonomy permits state officials to act against the preferences of popular opinion and electoral majorities. A smaller degree makes it more likely that penal policy will be dictated by opinion polls and media headlines. When penologists talk of “populist” political processes, of civil servants who are protected from the public pressure, of reform groups that have direct access to government, and of institutions that are “responsive” or “insulated,” they are pointing to variations in these dimensions of the penal state.

Some degree of autonomy is a property of each of the state’s institutions and agencies. The legislature exercises a greater or lesser degree of autonomy (from civil society and its social groups) when it enacts penal law and sentencing statutes. The executive is more or less autonomous in administrative and funding decisions affecting penal practice. Criminal justice decision makers, such as prosecutors, sentencers, corrections officials, and parole boards, may be more or less autonomous depending on whether they are open to direct public pressure or protected from it.

State structures and institutions are articulated with social and cultural forces in specific ways and by means of definite processes. Differences across states in the form of this articulation and consequent variations in

36. Discussing the comparative autonomy of the German and French states as a cause of their relatively lenient justice, Whitman (2003: 13–4) defined “autonomous” as meaning “steered by bureaucracies that are relatively immune to the vagaries of public opinion.”

state autonomy are important in explaining the impact of social forces on penal outcomes.

INTERNAL AUTONOMY

Internal autonomy is the autonomy of the penal state vis-à-vis the other state agencies and institutions. It is a measure of the extent to which penal state activities and interventions are controlled and directed from within, i.e., by the penal state's own leadership. It describes the extent to which penal state elites shape penal law, formulate penal policy, and pursue penal projects in accordance with their own values and commitments. Does the legislature consult penal state leaders before formulating laws? Are there legislative drafting conventions that give power to penal experts? Are there penal standing committees or advisory bodies that shape legislation? Do powerful commissions shape sentencing reforms? Or does the legislature simply enact laws in response to the preferences of electoral majorities and impose them on penal state officials?

Internal autonomy is determined by the penal state's place within the larger state structure of which it forms a part. This structural place will, for example, shape the relation of penal agencies to the state governor, the city mayor, or the national legislature. Are the leaders of penal state agencies political appointees who serve at the pleasure of an elected official? Are they, themselves, elected officials or are they tenured career civil servants? Are penal state elites accorded deference and autonomy within their own sphere? Do they play a role in the formulation of penal legislation and the goals of penal policy? Is the penal state more or less autonomous of, or more or less determined by, majoritarian politics and election results?³⁷

In some of America's western and southern states, departments of corrections have at times been "patronage-ridden fiefdoms" that operated in highly politicized, personalistic fashion, exercising little autonomy (Gottschalk, 2012). In other states, at other times, correctional agencies have been rationalized bureaucracies run by trained professionals, operating at an arm's length from electoral politics (Jacobs, 1977). The extent to which these penal agencies are autonomous of the political process has consequences for policy formulation and decision making. Historically, penal administrators have sought to enhance their own power and prestige by professionalizing their staff, developing research-based expertise, improving penal conditions, and stressing the positive aspects of punishment such

37. Nelken (2009: 301) provided an example: "The main resistance in Italy to the latest efforts by politicians to encourage the mass criminalization of illegal immigrants comes from a uniquely strong corps of self-governing and independent judges and prosecutors."

as reform, correction, training, and reintegration (Garland, 1990). Although there is no essential link between an autonomous penal elite and a “positive” penalty, the occupational interests of this group tend to press against harshly retributive punishment and a low-skilled “turn-key” role for penal staff.

The relationship of penal state agencies to other state agencies is consequential. For example, different policing strategies can have large effects on the flow of offenders into the penal process, and there is evidence suggesting that policing and punishing are inversely correlated, so that better resourced and more effective police results in less crime and less punishment (Tierney, 2013). There is also the question of whether penal officials govern in accordance with ideologies and policies of their own, or have their decisions shaped by actors elsewhere in the state. (So Wacquant, 2009b, for example, suggested a penal state with little autonomy when he discussed a “neoliberal penalty” shaped by the Treasury’s free-market commitments.)

One important element in this regard is the presence or absence of human rights treaties. Where nations have signed on to treaties, conventions, or regional group memberships that impose human rights standards on punishment (e.g., the United Nations’ standard minimum prison rules or the European Convention’s ban on unreviewable life sentences), these rules will constrain penal policy in various respects, setting minimum standards and enabling inmates to make rights claims. But from the point of view of penal elites, these “restrictions” tend to enhance their power and autonomy vis-à-vis legislators and the political process because penal officials can resist populist political pressure for harsher prison conditions by insisting on the need to comply with obligatory human rights standards.

We would expect a high degree of covariance between “state autonomy” and “internal autonomy.” If the legislature lacks autonomy and is relatively responsive to electoral pressure, then penal state agencies will tend to be weakly autonomous. Where the state is more shielded from popular opinion and media pressures, there will be more room for autonomous penal policy development.

CONTROL OF THE POWER TO PUNISH

Modern states are internally differentiated, with power being distributed across multiple agencies and between multiple groups all of which compete for control. States are divided vertically between national and local governments and divided horizontally between and within branches of government and between and within state institutions and agencies. Different nations allocate the power to punish differently, sometimes locating control at the national level and sometimes delegating it to subnational authorities such as local states or local counties. Although power is usually distributed

across the several agencies and decision makers that constitute the penal process (police; prosecutors; trial and appellate courts; prison, probation, and parole agencies; justice departments; etc.), the balance of power within that process may vary across jurisdictions and over time.

It matters where control of the power to punish is located, and it matters who controls its deployment (Savelsberg, 1999). Control may be retained by the legislature. It may be possessed by powerful prosecutors. It may be exercised by judges or juries. It may be delegated to penal administrators. It may be shared with commercial entities or private-sector partnerships. It may be reviewed by appellate judges or even taken over by court-appointed monitors. Each of these allocations has consequences for how penal power is deployed and the purposes to which it is put. With regard to the modern death penalty, national control has been associated with elite-driven abolition, whereas local control has tended toward populist retention.³⁸

The balance of power between penal agencies has, over the long term, undergone important changes with consequences for the exercise of control. During the late nineteenth and early twentieth centuries, discretionary decision-making power was increasingly allocated to penal experts and administrators who were permitted to shape custodial regimes, classify and allocate inmates, design treatment programs, and grant parole and early release. (Foucault [1977] called this “the declaration of carceral independence.”) From the 1980s onward, correctional officials lost much of their power (and prosecutors saw their power enhanced) when the U.S. Congress and state legislatures enacted mandatory sentencing laws, abolished parole, and curtailed prison programming (Garland, 2001b).

MODES OF PENAL POWER

Penal states have different kinds of power at their disposal and varying capacities to deploy them. The last two variable dimensions that I would highlight refer to the qualitative and quantitative aspects of power. First, the qualitative dimension:

Penal power takes different forms and may be oriented toward different ends. The power to kill, the power to incarcerate, the power to supervise, the power to levy fines, the power to transform individual conduct, and the power to transform families or communities are distinct forms, and they

38. Miller (2010), Scheingold (1992), and Stuntz (2011) offer evidence that in the United States, local control can produce more pragmatic crime policy, whereas federal legislation is more often gestural and heavily politicized. This may be the case: But as a comparative matter, one ought not to equate the national government in a strongly centralized, unified polity with the federal government in a federated, decentralized union.

each may be deployed as means to different ends. For purposes of comparison, one wants to know which modes of exercising power are deployed by a particular penal state and in what proportion.

As Foucault (1977) observed, modes of power are always also modes of power-knowledge. How penal authorities rationalize their actions, how they conceptualize the challenges they face, how they problematize the fields in which they operate and the objects of their actions, and how they define the proper ends and means of penal practice—these are all ideational aspects of power that ought to be taken into consideration.

Penal technology is also relevant. Penal power may use coercive means such as confinement, exclusion, or even execution to impose retributive suffering or exclude dangerous individuals. It may rely on surveillance and disciplinary techniques to render penal subjects docile. Or it may use educational and welfare techniques to promote training and reintegration.

All modern states use both negative (i.e., incapacitating) and positive (i.e., capacity-building) penal power, but the balance between them varies. We want to know the extent to which a penal state relies on positive modes such as penal-welfare, restorative justice, reentry and resettlement, or rehabilitation. How much of its activity is geared to positive ends of social enhancement? To what extent does the penal system coordinate with other agencies such as social work, schools, and health care, or engage families, landlords, and employers? To what extent does it resort to negative means such as segregation, confinement, and close control?³⁹

POWER RESOURCES AND CAPACITIES

If the “modes of power” dimension refers to *qualitative* aspects of penal state power traced along a positive-negative continuum, then capacity refers to *quantitative* aspects, measured as high or low. When I talk of “penal state capacity,” I do not mean simply “prison capacity”: i.e., the number of inmates that can be accommodated by the existing penal institutions, although the size of the penal estate is certainly part of what is involved. I mean, more generally, the power potential of the state, its access to resources, the means at its disposal, and its capacity for taking effective action.

Many elements contribute to a penal state’s capacity. Legal powers, budgetary resources, professional expertise, rational organization, system coordination, detailed statistics, trained personnel, and institutional

39. The balance between policing and punishment is an important consideration. American states that spend more on policing generally spend less on punishment, and vice versa (see Tierney, 2013).

infrastructure are the most obvious. To what extent is the penal state bureaucratized and professionalized? Are correctional budgets tightly constrained, or is there scope for discretionary spending? Does the penal state have its own policy instruments, such as criminological research units, prison actuaries, cost–benefit analysts, bureaus of statistics, program evaluation teams, and so on?

Public trust and legitimacy are important too, as is the position of penal agencies in the status hierarchy of government. The standing of penal elites and their capacity to command public trust and political credibility will determine the extent to which they are entrusted with discretionary powers. External conditions such as employment and housing opportunities are crucial resources enabling positive penal action to be effective, although these may not be fully within state control.⁴⁰

The qualitative and quantitative aspects of penal power condition one another. Negative forms of power are relatively simple and require little know-how or coordination. If secure confinement and deprivation are the goals, then these require little more than a disciplined staff and a secure enclosure. By contrast, positive powers are more complex, requiring expertise and know-how, as well as coordination with, and support from, wider social networks such as education, housing, welfare, and employment.⁴¹ A state may have a large capacity for exercising negative power and a small capacity for positive power, or vice versa.

The character of the penal state does not by itself explain penal patterns and outcomes. But differences in the character of penal states may explain why different nations—or different states within federated nations—respond differently to common challenges and common social developments. Neoliberal and neoconservative politics, consumer capitalism and late modern risks, economic growth and recession, immigration and ethnic tensions, crime rate increases, and sensational crimes all affect multiple nations, often simultaneously. But the penal “response” that they provoke varies and varies in patterned, nonrandom ways. My working hypothesis would be that this patterning is explained by differences between penal states. A conceptual model of the penal state may therefore provide a theoretical basis for comparative and historical research.

40. See Simon (1990) on how the decline of employment for unskilled workers undermined the operation of traditional parole practices.

41. cf. Foucault’s contrast between “sovereign power” (the power of the sword), “disciplinary power” (the training of bodies), and “pastoral power” (a power that involves care and control, exercised at the level of the individual as well as at the level of the population).”

THE PENAL STATE AND THE STRONG STATE

The growth of penality and the growing reach of the penal state are new facts that will need to be integrated into our theories of the U.S. state, new facts that will, in all likelihood, prompt us to revise our existing understandings. So far, only two thinkers have addressed this question of state theory—political scientist Marie Gottschalk and legal historian William Novak. And both of them make the same argument: namely, that the growing power of the American penal state disproves the long-established conventional wisdom about the United States being a “weak” state.⁴² The notion that the U.S. state is “weak” has long been entertained—not in military or foreign affairs but with respect to domestic policy and the power of the state to impose its will on social and economic affairs. (The Obama administration’s difficulty in enacting and implementing the Affordable Health Care Act, despite a Democratic majority in Congress, would be a case in point.) These dimensions of the U.S. state are said to be “weak” not in absolute terms but as compared with the domestic power exercised by more centralized, rationalized states elsewhere.⁴³

Gottschalk and Novak claimed that the growth of American penality is a sure sign that America now has a strong domestic state, capable of projecting its power and enacting its will. Thus, Gottschalk (2006: 19) wrote that “[t]he extent of the carceral state is breathtaking and defies any characterization of the United States as a weak state.” She continued, the “emergence and consolidation of the U.S. carceral state was a major milestone in American political development that arguably rivals in significance the expansion and contraction of the welfare state in the postwar period” and that this

42. For a discussion of the weak state/strong state distinction, see Evans, Rueschemeyer, and Skocpol (1985: 351): “Weberian-minded comparativists started labeling states, especially modern national states, ‘stronger’ or ‘weaker’ according to how closely they approximated the ideal type of centralized and fully rationalized Weberian bureaucracy, supposedly able to work its will efficiently and without effective social opposition. Eighteenth century Prussia, for example, had a strong state according to this perspective, whereas the United States has always had a weak state.”

43. Whitman (2003) invoked the comparative weakness of the American state—and the comparative strength of the French and Germany states—in his explanation of differences in their penal policies. Douglas Hay’s classic analysis on the eighteenth-century English death penalty (Hay, 1975) makes a “weak state” argument for the English emphasis on penal control. Many scholars—myself included—now think it a mistake to talk of states as being “strong” or “weak” in the aggregate. Evans, Rueschemeyer, and Skocpol (1985: 355) wrote: “[I]t is no longer helpful to assume a single dimension of ‘state strength’ that conflates different features of state organization and resources or, worse, confounds the matter of state autonomy with issues of the capacities a state has for performing certain kinds of task.” See also Baldwin (2005).

development “challenges the common understanding of the U.S. state as weak. Over the past three decades, the US state has developed awesome powers and an extensive apparatus to monitor, incarcerate, and execute its citizens that is unprecedented in modern US history and among other Western countries” (p. 236). Similarly, Novak (2008: 759) observed that “[o]ne can hardly explain . . . the role of prison or the death penalty . . . by continued reference to a weak state tradition” and later, he talks of “a vast carceral network that continues to grow” concluding that “[t]his extraordinary distribution of officialdom is certainly not the product of a weak state” (p. 766).⁴⁴

For these writers, mass imprisonment and a hypertrophic penalty are evidence that the American state is not now and perhaps never has been a “weak state” and should not be understood in these terms. But the rejection of the “weak state” description is not just a question of nomenclature. That the American nation-state is made weak by its divided, devolved structure, by multiple veto points that obstruct state action, and by the comparative strength of private interests is the basis of the standard theory of American welfare state development and of much else besides.⁴⁵ If the facts of penal expansion have this theoretical consequence, then they are significant indeed.

But the revisionist claims made by Gottschalk and Novak are, I believe, based on a misleading simplification: one that fails to distinguish between modes of power and that erroneously treats the expansion of the penal apparatus as an index of state power and capacity more generally.

The American state—to follow, for a moment, these writers in aggregating what are actually 50 different penal states and a federal penal state—has demonstrated that it has the power to segregate, to supervise, and to stigmatize millions of individuals. It even retains the power to kill several dozen offenders every year. But what kinds of powers are these? And how should we think of them as elements of the governmental repertoire of a modern state? Those of us working in the sociology of punishment have not yet thought these issues through, but it seems to me that, for the most part, America’s penal power is chiefly directed to producing stigmatized, excluded individuals and, because it is so massive in its reach, to producing stigmatized, excluded groups and disorganized communities. It does not, for the most part, produce outcomes such as social stability or integration, or even law-abiding citizenship.

Extensive punishment, with a correctional population of 7 million, may be a means to suppress crime rates, although the extent of its effectiveness

44. Scheingate (2009: 4) echoed Gottschalk: “[T]he astounding scale of mass incarceration in this country belies any notion of a ‘weak’ state.”

45. See also Skocpol (1992) and Amenta (1998).

is contested and likely limited.⁴⁶ But whatever its impact on crime control, mass incarceration also generates detrimental social and economic effects—stratification, marginalization, social exclusion, family breakup, community disorganization, and the destruction of human and social capital—not associated with more positive, nonpenal methods of social ordering and crime control (Henrichson and Delaney, 2012; Muller and Wildeman, 2012; Wakefield and Uggen, 2010; Western, 2006).

It seems unlikely, then, that the large-scale use of negative penal power is the mark of a strong state or of a well-governed society. So what does it say about a state that has developed a massive capacity to incarcerate and supervise offenders? It seems unlikely that a modern government would prefer this mode of governing if others were equally available.⁴⁷ In fact, it seems more plausible to suggest that the extensive use of carceral power is a compensatory mechanism, providing a back-up penal control where more positive and more productive modes of social control are unavailable. State capacities tend to be uneven across domains, and the existence of such unevenness may explain why a state chooses one course of action rather than another. In confronting challenges (such as the challenge of crime), states may have definite limits, preferences, capacities, and recipes for possible action, all of which reflect an underlying structure (Evans, Rueschemeyer, and Skocpol, 1985).

If that is the case, then the extensive use of negative penal power may be an indication of deficiencies in the American state's governmental capacities—particularly its capacity for more positive, social modes of governing—rather than of newfound strengths.⁴⁸

46. It is true that the run-up in U.S. imprisonment coincided in time with a falling off in crime rates. But there are many other explanations for crime rate reductions, such as more effective policing, the spread of routine avoidance behavior, improved crime prevention, and so on (Garland, 2001b). Moreover, states—such as New York—have reduced crime rates while reducing imprisonment rates. The massive increase in the imprisonment of drug offenders has had little impact on rates of illegal drug use. Drug crime is not one of the index crimes that compose the Uniform Crime Reports (UCR) data, and drug arrests have not declined in parallel with violent and property crime. See <http://bjs.ojp.usdoj.gov/content/pub/pdf/aus8009.pdf>.

47. Here, of course, political processes and governmental capacities interact. It may be that popular electoral pressures make penal strategies more “available” than nonpenal ones and limit the extent to which nonpenal infrastructures of social control get developed.

48. My argument here is not a defense of the standard “weak state” thesis but instead a challenge to the emerging notion of a strong state premised on the massive deployment of penal power. As I have insisted in this address, state power must be viewed as multidimensional.

LIBERAL DEMOCRACY AND THE AMERICAN PENAL STATE

Recall the anomaly I mentioned previously: America is certainly a liberal democratic nation, but its massive use of penal power seems more characteristic of an authoritarian regime. Whereas America's penal institutions are not "despotic," operating, by and large, in accordance with the rule of law, they are deeply "illiberal" in other respects.⁴⁹ How might we make sense of this?

Building on the arguments I made in *Peculiar Institution* (2010), my analysis would be as follows: America is a liberal democracy, but "liberalism" and "democracy" are different traditions, involving different political principles and practices, each of which has distinct implications for the power to punish. As a political tradition, liberalism has many strands, including religious tolerance, a horror of cruelty, opposition to fixed hierarchies, support for market freedoms, and an intellectual attitude that values doubt, open-mindedness, and intellectual exchange (Gray, 1992; Grimes, 1956; Holmes, 1995). It also has evolved over time, coming eventually to embrace democratic ideals and to reconstitute itself as modern democratic liberalism (Starr, 2007). But at the core of classic liberalism are two essential commitments: 1) a conception of social order that values individual freedom and autonomy and 2) a commitment to limiting governmental power by means of the rule of law and the separation of powers. Liberal institutions—the practical embodiment of those principles—aim to restrain the coercive power of the state and uphold the rights and freedoms of individuals and so are generally opposed to harsh or excessive punishment.

Democratic institutions have a more equivocal relation to penalty. Democracy's central commitment is not to equality, or to civil liberties, or even to limited government, but to a form of rule in which "the people" govern themselves. And this commitment has given rise to many different kinds of democratic government: direct, participatory, representative,

49. The concepts of "despotic" and "infrastructural" power are widely used in political sociology. Mann (1984: 188) defined "despotic" power as "the range of actions which the [state] elite is empowered to undertake without routine, institutionalized negotiation with civil society groups." (Or, as he put it, the ability of the Red Queen to shout "off with his head" and have her whim gratified without further ado.) "Infrastructural power" is "the capacity of the state to actually penetrate civil society, and to implement logistically political decisions throughout the realm" (p. 189). In liberal democracies, penal power is regulated by law and the "despotic" form of power usually has limited application in legislative and sentencing processes. The power that is exercised *within* prisons, however, may be more or less despotic, depending on the availability of due process and legal remedies for inmates. Harcourt (2010) talked about legal despotism in connection with U.S. mass imprisonment, but in doing so, he stretched the meaning of "despotism" beyond its standard usage.

parliamentary, local, plebiscitary, and so on. Each of these forms sets up a different balance between popular will—usually as expressed by a majority of voters—and other political values, such as equality, minority protections, individual freedoms, or human rights. Where popular will is relatively unconstrained by such considerations, democracy may press in favor of harsh punishment rather than against it. To the extent that popular majorities are empowered, there is nothing incompatible between full democracy and full-on punishment.

Liberal institutions tend to constrain state punishment in the name of limited government and the rights of individuals. Democratic institutions punish in accordance with majority preferences, whatever these may be. What we call “liberal democracy” is a merger of (specific kinds of) liberal institutions and (specific kinds of) democratic institutions, and each nation, each polity, exhibits a different mixture. The U.S. polity contains important liberal elements—notably, the Bill of Rights and the review powers of the Supreme Court. But the dominant institutions in the United States are popular democratic ones, and the balance of power now leans heavily toward electoral majorities—and the corporate and financial interests that influence them—not to the nation’s counter-majoritarian liberal institutions.

Since the 1970s, American voters have undoubtedly been driven by punitive anger, racial animus, and fear of crime to demand harsher sentences. And American politicians have been only too willing to respond. But I would insist that American penalty cannot be fully explained by an especially punitive culture, nor by especially hostile racial divisions, nor even by especially high rates of crime and violence. Other nations, including the United States before the 1970s, have exhibited these characteristics without building such an extensive penal infrastructure or imposing such harsh punishments. The explanation, it seems to me, lies in America’s distinctive instantiation of liberal democracy and in the distinctive institutions that characterize the American state.

America’s radically local, popular majoritarian democracy allocates primary control over criminal law and criminal justice to local (state and county) rather than to national (federal) political processes. Moreover, its democratically accountable criminal justice processes, with elected county prosecutors and elected state judges, work to politicize criminal justice processes and connect them directly to local majority sentiment. The general effect is to limit the autonomy of the local penal state and increase its responsiveness to majoritarian pressure. To the extent that racial divisions are a characteristic of local political processes, or where fear of crime heightens the demand for “public protection,” these pressures will militate against the liberty interests of offenders and inmates. What is more, with the declining power of liberalism and liberal elites from the 1970s onward, the punishment of crime has become a “pathological” form of democratic politics with

all the organized interests concentrated on one side of the issue, all pressing for more punishment rather than for less (Stuntz, 2011).

In these circumstances, the chief constraints on punitive electoral majorities (other than fiscal constraints, which are relatively weak in this context and which have been repeatedly overcome) are counter-majoritarian liberal forces. But in the post-Warren Court period, these forces have greatly diminished as the power of penal experts and professionals has diminished, criminal justice has become increasingly politicized, and liberal criticism of over-imprisonment has been muted (Alexander, 2010; Garland, 2001b). Contemporary American penalty is in large part testimony to the recurring reluctance of America's liberal institutions, above all the courts, to temper the mood of "the people" and their political representatives when it comes to punishing offenders and "protecting the public."⁵⁰ U.S. courts have, in the last 30 years, made relatively little effort to uphold the liberty interests of offenders in the face of an increasingly severe penal system. The few protections that have been established have been chiefly procedural rather than substantive in nature and have focused largely on capital punishment cases to the detriment of those sentenced to imprisonment (Stuntz, 2011). In the face of popular political forces pressing for greater punishment and public protection, the result is that popular legislation has made penal sentences increasingly frequent and severe, and prison conditions increasingly crowded and austere, without provoking much in the way of effective liberal counterbalance.⁵¹

PENALTY, WELFARE AND THE AMERICAN STATE

Let me conclude by offering a larger theoretical observation. The distinctive state characteristics I have identified here with a view to explaining American penalty are the same characteristics that others have used to explain American welfare. In nations where strong and extensive welfare states have developed, welfare laws, institutions, and policies are typically generated by the national government and imposed throughout the territory, overcoming private-sector interests and taxpayer resistance. In the United States, these routes to welfare policy enactment are obstructed by the federated and devolved structure of the polity, by multiple veto points, by taxpayer reluctance to fund transfer payments, and by powerfully

50. See Michael Ignatieff's (2012) observation about popular preferences in the post-2001 "war on terror" is equally applicable to the "war on crime" of the 1980s and 1990s: "Majoritarian pressures to 'do what it takes to make us safe' have supported every attack on civil liberties" (p. 31).

51. *Brown v. Plata* (2011) is a recent and notable exception.

organized private interests. Clearly, a welfare state apparatus of Social Security, Medicare, and the rest has nevertheless emerged, but in comparative terms, and with regard to welfare, the structure of the American state and its relation to civil society work to inhibit expansion. Moreover, because welfare institutions often depend on extensive infrastructure and coordination between actors, they are difficult to develop in the face of interest group opposition.

In regard to punishment, the effects of the same American state structures are just the opposite. Control of penal power is primarily local, not national. It emerges from the bottom up, not from the top down. Compared with welfare state “entitlements,” penal policy is relatively inexpensive. Because punishment has long been regarded as a prerogative of state authority not private power, market actors do not compete with and inhibit state action but encourage and enable it. Not only are there few veto points standing between policy formation and actual implementation, but also there are no powerfully organized interest groups opposing the expansion and intensification of punishment. Moreover, the comparatively simple nature of negative penal power makes it relatively easy to roll out. The American state’s multiplier effect on punishment is generated by the same structures and institutional arrangements that produce a minimizing effect on welfare.⁵² This structural homology would, I suggest, repay further investigation.

A final word of clarification: Nothing I have said in this address is intended to deny that social and cultural forces play a major role in shaping penalty or to inhibit research on these processes. Nor do I wish to discourage the promising work now being done on the relation between structures of political economy and systems of punishment. My concern has been to encourage more attention to the variable structure of state institutions and to the state and legal processes that translate social and economic pressures into specific penal outcomes. It should go without saying—but I will say it anyway—that an integrated state-and-society approach is the theoretical ideal toward which the field should aim.

52. Wacquant (2009b) observed this inverse relationship, as did Beckett and Western (2001). But they attributed it to “neoliberal” (or “neoconservative”) political and social movements. My suggestion is that the hypertrophy of one and the atrophy of the other are facilitated by a specific state structure. For studies of the interactions of punishment and welfare, see Garland (1985, 2001b), Beckett and Western (2001), Downes and Hansen (2006), Wacquant (2009b), Lacey (2008), and Lacey and Soskice (2013).

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