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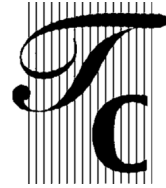
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For penal moderation

Notes towards a public philosophy of punishment

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Abstract

The 2008 financial crash, and the lessons it teaches us about the costs of unregulated excess, offers an opportunity to think anew about, and seek to temper, the enthusiasm for excessive punishment that has swept across several western societies in recent years. Taking this as my point of departure, I make the case in this article for a public philosophy of punishment that can speak to the times we now inhabit—what I call penal moderation. I begin by describing the value and role of a *public* philosophy of punishment and setting out the constitutive elements of penal moderation as a candidate for such a philosophy. These elements are restraint, parsimony and dignity. I then indicate how penal moderation might be put to work as an intervention in contemporary cultures and practices of punishment—by naming excess, drawing lessons from ‘moderate’ times and places, emphasizing that punishment is a social and political choice, and reconfiguring the relation between penal practice and ‘public’ opinion. I conclude by assessing two contrasting—if not mutually exclusive—styles of penal moderation that I term moderation-by-stealth and moderation-as-politics. My claim is that while the former offers a route to short-term reform, the latter is ultimately more consistent with penal moderation’s aspiration to serve as a public philosophy.

Key Words

moderation • penal culture • penal politics • public philosophy • sociology of punishment

Banking on punishment

The 2008 'credit crunch' has revealed the costs of a lightly regulated global financial system. It is now apparent that during years of economic growth—at which time they were worshipped and celebrated—investment bankers took decisions for short-term gain in disregard of the adverse affects of their actions upon others and the long-term costs of their reckless behaviour. In the wake of the global governmental intervention that was required to avert financial meltdown, it appears that the Thatcher–Reagan inspired era of neo-liberal excess is exhausted and that we may, just possibly, stand at the dawn of a new age of regulated responsibility. This much is now familiar. But can we not apply this analysis to other domains of public life and in particular to penal policy? Is reckless excess not also an accurate description of how in recent decades successive US and British governments have responded to crime and used punishment: for short-term political advantage, with scant attention to the collateral consequences of, say, mass imprisonment, in careless disregard of the long-term effects of their policies. Might this therefore, by extension, be an opportune moment to take stock of where three decades of neo-liberal penalty has left us; to reflect on the trajectory, temper and impact of excessive punishment, to contemplate a different course? Might this, in short, be a time for moderation?

Something approximating this thought has recently been taking shape within the sociology of punishment. For some time now analysts of punishment have been drawn—like bystanders to a car crash—to what has become known, perhaps a little complacently, as the 'punitive turn'. Article after article, and book after book, has sought to document and explain the rise and consequences of the penal state in the USA and UK—as registered by such indicators as record levels of imprisonment, the decline of rehabilitation, the return of expressive, ostentatious punishment, crackdowns on sex offenders, the flurry of anti-crime legislation and the generally shrill tone of political and popular debate about crime.¹ It is, however, possible today to detect signs of a change of mood and emphasis. Michael Tonry's (2007a) recent collection on comparative penal politics has reminded us that in global terms the UK, New Zealand and (especially) the USA are punitive outliers, and that many democratic societies retain less harsh and excessive penal systems. John Pratt has turned his attention to examining the key properties and conditions of existence of penal mildness in Scandinavia (Pratt, 2008a, 2008b), while Nicola Lacey (2008) has set out to explain the socio-economic and political conditions that give rise not only to penal harshness in the USA and UK, but to penal moderation across many western European societies. Moderation is, it seems, in vogue, either as a *characteristic* of certain penal systems and practices from which those (of us) living in outlier societies might learn, or as an *aspiration* that enlightened, liberal analysts of penalty share (Tonry, 2007b: 6) and which enable them to make common cause with penal reformers.

This turn to moderation is to be welcomed. Yet the idea itself remains, whether as fact or yearning, somewhat gestured at, and its meaning and

value either taken-for-granted or under-specified. I therefore want in this article to develop the idea of penal moderation and, in so doing, promote its virtues as a candidate for what one might call a public philosophy of punishment. The article is organized as follows. I begin by describing the value and role of a public philosophy of punishment and setting out the constitutive elements of penal moderation as a candidate for such a philosophy. These elements are restraint, parsimony and dignity. I then indicate how penal moderation might be put to work as an intervention in contemporary cultures and practices of punishment—by naming excess, drawing lessons from ‘moderate’ times and places, emphasizing that punishment is a social and political choice, and reconfiguring the relation between penal practice and ‘public’ opinion. I conclude by assessing two contrasting—if not mutually exclusive—styles of penal moderation that I term moderation-by-stealth and moderation-as-politics. My claim is that while the former offers a route to short-term reform, the latter is ultimately more consistent with penal moderation’s aspiration to serve as a public philosophy.²

What is penal moderation?

English penal policy stands today in something of a mess, the English penal system in what seems like a permanent state of crisis. There have been signs lately of official acknowledgement of this; yet the British government has no tenable strategy for addressing the problems that are, in many ways, of its own careless making. Its response to a prison population standing (as of 26 February 2010) at 83,925, and a system buckling under the strain, is technocratic fix. In recent times, the Ministry of Justice has proposed a Sentencing Commission that may bring use into line with capacity; is building five new large prisons to cope with rising demand, and urges sentencers to use alternatives to short spells of imprisonment. It then hopes that the topic can be kept below the media radar screen.

The current penal crisis, and the apparently limited room for manoeuvre of political actors who claim they wish to tackle it, is testament to the fact that the English penal system lacks a coherent public philosophy—a story about why and whom, and how and how much, ‘we’ punish that connects with, and re-articulates, sentiments that have some purchase within English society. A public philosophy seeks to foster debate about the choices ‘we’ make in response to crime (in terms of representations of offenders, public discourse about justice, justifications for punishment etc.); to clarify what is at stake when a society decides to punish, and to highlight what our choices say about who ‘we’ individually and collectively are, or aspire to become. It strives to bring reflexive coherence to a realm of public life that ‘has proved the most resistant to the effect of reasoned deliberation about the nature of the good society and the good polity’ (Pettit, 2001: 427). However, it does so in recognition of Pettit’s (2001: 449) claim that in a climate in which crime and punishment have become emotionally charged topics of

public discourse and political action, 'the main positions in penal philosophy are condemned to irrelevance'. There are few better examples of Pettit's point than s. 142 of the Criminal Justice Act 2003. This lists punishment, crime reduction, public protection and reparation as the approved purposes of sentencing without the slightest hint that these aims may clash, point sentencers in different directions or require prioritizing.

A public philosophy of punishment *starts* from where citizens recognizably are, not from where one might like them to be—partly for reasons of political prudence and partly out of recognition that democratic penal systems must remain minimally credible to those in whose name its practices are conducted. But it need and must not end there—to do so would be to become a captive of prevailing sentiment and orthodoxy. Rather, the task of a public philosophy of punishment is to provoke and unsettle, to excavate suppressed or half-buried meanings, to propose alternative interpretations of current sensibilities and practices, to raise questions that a public culture has forgotten how to ask and signal their importance (see, further, Tully, 2008: ch. 1). Given the condition, cost and manifest failings of its prisons today, English society pressingly requires a philosophy that offers a convincing rationale for radically reducing the harshness and scale of the present penal system—and for that milder and smaller system. Penal moderation is, I want to suggest, the best available candidate we have for such a task.

In respect of this claim, two prefatory points are in order. First, my concern in this article is with ways of seeing, and thinking and talking about, punishment, and with trying to find public vocabularies that can disrupt the penal enthusiasms that currently prevail in England and Wales. This is, of course, not the only means of countering a dominant penal imaginary, nor one that necessarily brings immediate rewards. Indeed, penal reform often happens through quietly changing governmental or judicial practices in ways that bypass public discourse and justification. My point is simply that interventions that seek to unsettle and re-make dominant sensibilities towards punishment need to form at least *one* strand of any viable politics of changing penal cultures. Second, the foregoing remarks about public philosophy intimate that its engagements are typically local even if they make claims and mobilize ideals that transcend the contexts in which it intervenes. Jonathan Simon (personal communication) has pointed out to me in this regard that penal moderation is 'very English' and unlikely to have great cultural purchase in, say, the USA. This is part of the point, as we shall see. But if penal moderation does not travel well it nonetheless stands as one (local) answer to a question which has a wider import. The challenge is to think about the (different) narratives of penal minimalism and de-escalation that are best able to have purchase in particular political cultures (Simon, this issue).

In the English case, penal moderation enters a field of struggle that is already structured by particular ways of seeing, and thinking about, punishment. That field has in recent years been dominated by a mass-mediated public narrative that has coupled punitivism and public protection—the

demand that the State inflict harm on criminal wrongdoers in return for the harm they have inflicted on their victims, and keep the ‘law-abiding’ safe from dangerous criminal others. These are the cultural tropes that have animated rising levels of incarceration since in the mid-1990s.³ This has been supplemented, and in some cases countered, by variants of what Braithwaite and Pettit (1989) call ‘preventionism’—the idea the penal system should be a force for making good, for repairing the damage done, for turning round offenders lives, for reducing the risks of re-offending. Penal moderation offers an alternative to both these competing narratives, one that resists the excesses and pathologies of the former, while tempering the misplaced enthusiasm sometimes found among proponents of the latter.

The idea of penal moderation operates, first and foremost, in and upon public culture where it seeks to inculcate a sense of *restraint* in how English society talks about and delivers punishment. In so doing, it connects with, and builds upon, the moral ambivalence that many citizens feel towards punishing—an ambivalence that rarely registers in current political debate, but which has become a stock finding of research into public attitudes to punishment (Roberts and Hough, 2005; King, 2008). This research finds that punishment is capable of evoking anger, resentment and a passionate desire to inflict harm on the criminal wrongdoer, or to have the State do so on our behalf—often for reasons that have relatively little to do with people’s direct experience of crime and more to do with a faltering sense of secure belonging or their general worldview (Tyler and Boeckmann, 1997; Farrall et al., 2009). But punishment also calls forth feelings of shame, regret and forgiveness, invoking responses that view prison as futile and seek repair and reconciliation (King and Maruna, 2009). Penal moderation works with and upon these conflicting emotional states. It seeks, in particular, to bring this often silenced ambivalence to the surface of public discussion and find ways of institutionalizing it.

Punishment—for a penal moderate—is an occasion for, and source of, sorrow and regret: it does and should make us feel *uncomfortable* (Braithwaite and Pettit, 1989: 6). Punishment, such feelings remind us, is the organized infliction of pain by the State upon an individual in response to that individual’s criminal wrong-doing. It is an act whose exercise should thereby be restrained—in a double sense. As a matter of law and practice, one must subject penal practices to clear limits and controls, and robust forms of accountability. As a dimension of public culture, its exercise calls for the cultivation of an attitude of care and caution with respect to whether, why and whom, and how and how much, societies punish. This of course, is hardly a novel or startling claim, though it has become today a controversial one. The idea of restraint is built into the very idea of a criminal justice system in a liberal democracy; such systems are constituted to control not only transgressors but what their victims and others may do in response. The tension hereby created is that this system of organized restraint on the punitive passions needs also to remain minimally credible in the eyes of those it seeks to regulate.

In this respect, the word moderation has itself been chosen with deliberate care—in two senses. It has, in the first place, several advantages over—or at least avoids several limitations of—other possible ways of framing and advancing the project of minimalism in criminal justice—something of some import in an emotionally charged policy field where words matter. These alternatives include abolition (which remains difficult to bring within the horizon of any realistic utopia, at least for male wrongdoers); leniency (which, in a hostile and febrile climate, is a red-rag-to-a-bull); reductionism (a rather clumsy academic term, which also carries the implication that penal reduction will remain the goal irrespective of prevailing conditions), and toleration (which mis-describes what citizens are being enjoined to do, which is not put up with criminal harm but to imagine and construct non-penal responses to it).⁴ But moderation has, second and more broadly, been selected as a cultural referent which seeks to connect with and engage that dimension of national self-understanding that depicts England as tolerant, forgiving, decent and pragmatic—a land, as the saying goes, of sweet moderation. This is, of course, a mythic, ideological construction. But by appealing to it—in a spirit of immanent critique—one calls upon its adherents to dwell upon the question of why their cherished commitments are routinely violated when it comes to their society's response to law-breakers (see, for example, Loader, 2009b).

Penal moderation alerts us, second, to the scale and limits of the penal system. It begins from the view that punishment is a 'tragic' institution (Garland, 1990: 80); a simultaneously necessary and futile practice that is destined to disappoint because the levers that conduce individuals to conform lie pretty much beyond the penal system's control. It recalls and works with the well-documented fact that the prison is a perennially failing social apparatus about which it is wise never to be sanguine, or to invest much hope. The watchword is thus *parsimony*. A penal moderate might usefully draw here on several—often, in other respects, competing—resources. Parsimony is a key idea within modern retributivist theory (Morris, 1974; von Hirsch and Ashworth, 2005; Lippke, 2009). But one also finds in Braithwaite and Pettit's (1989) republican theory a defence of parsimony as the 'master presumption' of a criminal justice system that contributes to relations of non-domination.⁵ Since criminal justice interventions do 'immediate and unquestionable damage to someone's dominion' for promised benefits that are always 'distant and probabilistic in character', the onus of proof, Braithwaite and Pettit argue, should lie with those justifying such interventions, not those seeking to remove or reduce them. 'The presumption' they say, 'ought to be in favour of less rather than more criminal justice activity' (1989: 87).

Penal moderation focuses and re-focuses public attention on the question and benefits of a minimum necessary penal system. In the present economic climate, the case for parsimony can be pressed with a Treasury-mindset. Penal moderation reminds us that prisons are a scarce and expensive public resource that need to be used sparingly and with due regard to their cost.

At a moment when citizens are focused on restraint and the price of things, there may today be more leverage for this case than existed during times of economic plenty, a point I return to below. But the concern with parsimony needs, more fundamentally, to emphasize and give practical effect to the sociological truism that there is no penal solution to questions of crime and disorder—and that thinking about how to create secure societies needs to focus on wider institutions and mechanisms of economic inclusion, moral education, social regulation and dispute resolution. This is a lesson that English society has tended to disregard in recent decades.

In these respects, penal moderation is a public philosophy focused on the limits rather than the purposes of punishment. This is something about which it is worth being explicit. Penal moderation departs from, or at least stands prior to, the standard menu of perspectives in the philosophy of punishment which, arguably, are carelessly indifferent to the scale of punishment (incapacitation); have few resources for preventing penal expansion (deterrence); run the risk of encouraging punishment on the grounds that it benefits offenders (rehabilitation); or have restraining purposes whose benign intentions can be, and over recent decades have been, captured by the forces of penal aggravation (just deserts). In the face of these dangers—of the risk of setting goals of punishment that are ‘voracious and consuming’ (Braithwaite and Pettit, 1989: 46)—the penal moderate insists that, whatever one thinks punishment is for, one uses it as sparingly as possible.

Penal moderation aims, then, to cultivate in public life more responsible speech about punishment, and seeks to minimize resort to penal measures in general and to prisons in particular. In so far as social and political ideas about crime, punishment and social order permeate prisons and other penal institutions and shape the texture of daily life within them (Liebling, 2005: 462), the first two elements of penal moderation may have indirect effects on the practices, as well as the scale, of punishment. But penal moderation also requires a third element which enables us to address directly penal practice and prison regimes and conditions. The key—moderating—idea here is that the penal system treats with human *dignity* all those whom are brought under its care and control. One can apply this notion to criminal justice institutions generally and propose it as the basic organizing principle governing the treatment of all those—victims, witnesses, suspects—whose lives are embroiled in, and risk being (further) damaged by—the criminal justice process. But one also needs to apply it to those to whom such dignity is least likely to be extended—convicted offenders. For a penal moderate, law-breakers are and remain both humans and citizens, and must be treated as such (Duff, this issue). In this way, a public philosophy of penal moderation can inform and reinforce the notion that guarantees of basic human rights can and should apply within penal settings. It also emphasizes the importance of instilling and sustaining notions of harm reduction—a culture of moderation—within the working practices of penal institutions and the occupational outlooks of those who work inside them. Penal moderation reminds us that penal institutions are constituted by a range of coercive

practices which necessarily rob those brought under their control of dignity. But it further reminds us that these necessary humiliations can be mitigated by making sparing use of penal forms of social control and by handling asymmetries of power inside penal institutions in ways to seek to foster and sustain civic virtues (Liebling, 2005).

Taken together these three elements—restraint, parsimony and dignity—may appear to add up to a negative philosophy, or be viewed by some as a counsel of despair. Penal moderation, even a sympathetic sceptic may say, cannot speak to a public imagination suffused with support for harsh penal responses to crime. So too, it must stumble before a political establishment wedded to presenting itself as ‘tough on crime’. The attendant concern is that penal moderation fixes attention on the damage caused by, and limits of, the penal system in ways that offer little to those victimized by, or anxious about, crime and which disregard the good intentions of criminal justice professionals and the positive programmes that the penal system does in fact deliver.

We should be clear that it is nothing of the sort. To be sure, penal moderation sets out to disturb and transform the received terms of political debate about punishment—to make prison less central to how people think and feel about crime and its control, and to loosen attachment to the notion that there exists a penal solution to crime problems. But given the dead ends of penal policy in England, the ongoing expansion of the prison estate and the ill-temper that pervades public responses to crime, moderation is a vital and *positive* message to inject into societal debate. This is so because radically reducing the resort to prison, and society’s expectations of it, is a precondition for maximizing the good that the penal system can accomplish (through education, training, work, behaviour management and drug treatment programmes) as well as for thinking more imaginatively about—and creating—alternative forms of justice and dispute resolution. It is also so because tempering the zeal of advocates with a dose of moderate scepticism about what *any* criminal justice response to crime is likely to achieve may help to harness the virtues, while minimizing the attendant vices and escalating propensities, of such emergent progressive ideas as restorative justice, problem-solving courts and justice reinvestment.

Making penal moderation work

I turn now to the work that penal moderation has to do in a penal climate that remains in greater part inimical to its organizing principles and overall take on the place of punishment in social life. How, in other words, can one connect penal moderation with the present trajectories, and possible futures, of English penal policy? Four main tasks present themselves in this regard—naming penal excess; learning from ‘moderate’ times and places; emphasizing that punishment is a social and political choice; and reconfiguring the relation of penal politics and practice to ‘public’ opinion. I shall deal briefly with each in turn.

The idea of moderation provides, first, a critical lens through which to re-interpret the present and focus analysis of contemporary penal policy and its pathologies. The starting point here is to note that the antonym of moderation is not simply expansion in some quantitative sense, but the more qualitative notion of excess. This idea, it seems to me, offers a persuasive means of capturing the main contours that English penal policy has followed since the mid-1990s and the manner in which it has erred (Loader, 2009a). It draws attention to the way in which government has materially and symbolically behaved as if crime were *the* rather than a social problem during a period in which volume crime levels have been falling. It serves to highlight the hyperactivity that has marked the governance of crime and punishment. This has resulted in an incessant flow of new initiatives, policy proclamations, statements of intent, tsars, task forces, agencies and targets for government ministries and criminal justice bureaucracies; as well as in an unprecedented flurry of criminal justice legislation and the creation of over 3000 new criminal offences. It enables us to make sense of the hostile impatience that government has often displayed towards things that stand in the way of speedy, decisive executive action against criminal threats (e.g. human rights), or those who can be and have been depicted as out-of-touch with the legitimate anxieties and demands, and the sturdy common sense, of the 'law-abiding majority' (e.g. civil servants, criminal justice professionals, lawyers, penal reformers). And it enables us to re-name the resort that English society has made to imprisonment in recent years as a *binge*; a frenetic feasting during times of economic plenty on what is best interpreted as a myopic but crowd-pleasing 'solution' to the crime question—one whose legacy is a society that is altogether too comfortable with, even keen on, banishing thousands of—typically young, poorly educated, mentally troubled and drug- and alcohol-dependent—men and women to institutions of penal coercion (Social Exclusion Unit, 2002).

Against this backdrop, the penal moderate's second task is to remind her co-citizens that it didn't have to, and doesn't have to, be this way. This can be done by placing recent English experience in a comparative context, by pointing to the ways in which England and Wales resides today with the punitive outliers among liberal democratic states, and by these means unsettling the received naturalness of imprisonment rates and the obviousness of the carceral response to crime. That task can be advanced in part by means of internal historical comparison. One might, in the English case, seek to bring to public consciousness some relatively recent but now politically forgotten episodes of English penal history such as the practitioner-led movement to reduce custody for juveniles in the 1980s and the coalition of officials, practitioners and criminologists who formulated a new approach to reducing prison use in the period from 1987 to 1993. Further back, one may also seek to learn more about—and from—the period of decarceration that extended from 1908 to 1939 (causing the closure of some 20 prisons) and with minor fluctuations back to the formation of a national prison system in 1877 (Hobhouse and Brockway, 1923).⁶

But penal severity's obviousness can also be challenged by highlighting and seeking to learn from the variation in penal practice that is to be found across western states, and the persistence of societies that have managed to create or sustain relatively mild penal systems. Several cases in point spring to mind. Though it has made other moves towards the penal regulation of the poor in recent years, it nonetheless remains the case that imprisonment rates in France have remained stable over the last decade. More tellingly, Canada has cut prison numbers by 11 per cent since 1997 with policies in marked and conscious contrast to those pursued in neighbouring USA, while maintaining a fall in crime levels comparable to that found in the USA (Zimring, 2007: ch. 5). Finland has in recent years radically cut its prison population and actively strives to keep the scale and temper of punishment within 'Scandinavian' norms. Norway has long sustained a relatively benign penal culture, as has Germany.⁷

Bringing these cases to public notice is today an important moderating task. But that political project not only draws and depends upon recent work in comparative penology, as we shall see. It also calls for the further development of a research agenda in the history and sociology of punishment whose flourishing has, arguably, been hampered by the field's recent fixation with the advent of the carceral state. This agenda seeks to extend and deepen understanding of the meanings of, and conditions of possibility for, moderate penalty. In pursuance of it a number of observations may usefully be made. It is vital that this activity is not reduced to a crude zoological exercise of putting societies, or spans of historical time, into boxes marked 'excessive' and 'moderate'. One also needs to develop indices of moderation that transcend what has become the field's default measure of severity/mildness—imprisonment rates; something that happens partly because of the accessibility of relevant comparative data. Some recent work has begun to do precisely this, including Cavadino and Dignan's (2006) text on comparative penal systems; Tonry's (2007b: 14) review of the determinants of penal policies and much of Loïc Wacquant's (2009) work on neo-liberal penalty, which is careful to attend to the broader patchwork of police and penal regulation. There may be some value here in using the elements of restraint, parsimony and dignity as a basis for extending such empirical investigation and analysis. It is equally important to remain aware that such enquiry should be oriented to empirical approximations of moderation; moderation's critical value is likely to be maximized if it is understood as a regulative ideal rather than an entity to be found, and when its academic and other practitioners assume a reflexive rather than complacent attitude towards its meanings and possibilities (cf. Tonry, 2007b: 6). Finally, one must attend closely and sensitively to the historical and social embeddedness, and to the local meanings, of what may be, or may be mistaken by observers as, moderate penalty; something that the best comparative work knows well (Melossi, 2001; Sparks, 2001; Nelken, 2009) and which alerts us to the difficulties of translation and the dangers of simple-minded lesson-drawing.

Such a project does not, of course begin afresh and much has been learned in recent years about the socio-economic, political and cultural prerequisites of relatively mild penal systems. That work appears to suggest that such systems are more likely to be encountered in societies with a broader commitment to egalitarianism and generous welfare support; with consensual rather than winner-takes-all political systems; that retain the levers of penal policy in the hands of (trusted) bureaucrats and professionals not elected politicians, and where the mass media are relatively inattentive to crime and punishment. Reading this body of work one is struck by its tendency, noted by David Nelken (2009), to lapse into a penological version of Albert Cohen's evil-causes-evil (or, on this case, good-causes-good) fallacy: the idea that moderate punishment flows from other benign or progressive properties of social relations and political systems.⁸ But one is also put in mind of a point that James Q. Wilson (1985: ch. 3) once made about criminological theory: that it directs, in this case, the penal reformer's attention to those features of a society that are most difficult to change; that are not easily transposed to neo-liberal political cultures where the genie of crowd-pleasing, excessive punishment has been unleashed from the bottle, and which, in any event, ought to be defended on grounds other than that they conduce to mild punishment.

There is, however, a possible exception to this, one that brings us to the penal moderate's third primary task. The exception is that those societies which have effected reductions in the use of prison and/or sustained relatively mild penal systems have done so through acts of political will. In cultivating the requisite will, the task of penal moderation is to expose the fallacies of the doxa which treats penal trends as a reflection of crime rates; to remind one's co-citizens that patterns of punishment are radically under-determined by patterns of criminal activity and that there is much else and more 'going on' when a society decides whether, how and how much to punish. By breaking with the naturalness of punishment, and the obviousness of its current severe forms, one can make clearer how, in England and Wales as in the USA, the neo-liberal political project has *opted* for penal over social regulation. As Loïc Wacquant (2009) has argued, the 'freeing' of markets, and eclipse of state-organized social solidarity, produces in those societies generalized economic precariousness and insecurity with dual effects. It gives rise to a 'martial discourse' that reduces 'security' and the State's role in fostering it, 'to the sole issue of physical or criminal insecurity', while conjuring up new 'castaway categories' from whom the 'law-abiding' have to be—and demand to be—protected (Wacquant, 2009: 4). And it relocates the task of regulating the poor from 'the "Left hand" of the state ... represented by labor law, education, health, social assistance, and public housing' to the "'Right hand" ... of police, justice, and correctional administrations' (2009: 6).

Conversely, one can claim that those societies which retain smaller penal systems and relatively benign penal climates do so because they have opted to regulate their crime and related social problems otherwise and acted

accordingly—often in ways that draw on feelings of national pride/shame about how that society punishes and an attendant sense of where it wishes to be located on the world's penological map. Finland reduced its prison population in part because its political elite wanted to break with the country's Russian past and be, and be seen as, 'Scandinavian'. It thus had to punish accordingly. Germany sustains a relatively mild penal climate in the shadow of its dark past; Canada takes pride in being distinct from the USA in criminal justice matters; and post-devolution Scotland is staking out a new penal identity by imagining and realigning itself with (mild) Sweden rather than (punitive) England (see Armstrong and McNeil, 2009). In the light of this, perhaps the most obvious—and usable—lesson that one might draw from recent work on comparative penology is that the political art of penal moderation lies in emphasizing these aspects of social and political choice and knowing how to tap into, and work with and upon, the feelings of national shame/pride that punishment can provoke.

This possibility segues into the final way in which penal moderation may be put to work in a hostile climate—one concerning the interplay between penal politics and practice and 'public' opinion. The turn to incarceration and associated forms of penal severity over the last decade has issued from a government that assumed for itself the role of consumer champion, giving voice and effect to whatever calls for punishment and claims to greater security pressed themselves most forcefully upon it. On this view, the task of government becomes that of ensuring that public opinion (or at least its reading of what constitutes 'public' opinion) has its demands affirmed and sated; it is no part of the legitimate responsibility of political actors to reason with such opinion, to put another view, point out discomforting facts, or intractable dilemmas, or value trade-offs, or the limits of what police and punishment can do to produce secure societies. In the face of these tendencies the penal moderate's job is to point out that this stance rests on a misreading of what is known about public sentiment towards crime and punishment. There are those whose daily lives are blighted by crime or whose worldview makes them angry and vocal enthusiasts for 'tough' punishment—they are not always the same people. There are also those—no doubt a smaller group—who express a moral commitment to using punishment sparingly and to positive effect (King and Maruna, 2009). But there is also evidence—from recent analysis of the British Crime Survey, for example—that the majority of people have little experience of crime, rarely think about it from one day to the next and, when prompted to do so, express ambivalent feelings about the proper response to it (Farrall et al., 2009). When given actual cases to ponder most people tend to sentence much like the real sentencers that they hold, when asked about them in general terms, to be 'soft'. They view prison as futile and back the idea of offenders repairing the damage they have caused (for a review of the evidence, see Roberts and Hough, 2005). Penal moderation's work here lies in recovering and giving practical effect to these ambivalent postures towards punishment; postures that fall silent or are silenced in a mediated public culture suffused with simple and consoling anti-crime scripts, postures that

consumerist politics either wilfully overlooks or dare not attend to for fear of the political fall-out.

Two styles of moderation

In breaking with a politics of crime and punishment which treats government as an uncritical cipher of consumer will, two broad repertoires of moderating intervention present themselves. They are by no means mutually exclusive, but they nonetheless offer alternative ways of thinking about, and advancing the project of, moderate penalty. I shall term them moderation-by-stealth and moderation-as-politics.

The former proceeds by avoiding engagement with citizens whose visions of punishment may not fully overlap with those of the penal moderate. Instead, it strives to make incremental gains using strategies, and through institutions, that either disregard public sentiment, address the citizenry in a circumscribed manner, or set out to neutralize public opinion as a significant determining force in the field of punishment. In an inhospitable climate, the temptation to go on in this manner may be strong indeed, and it often seems and is the most obvious route to short-term gains. Moderation-by-stealth nonetheless evinces several shortcomings, both at the level of political principle and as a penal reform manoeuvre. Let us consider the attractions and pitfalls of three of the forms that it may take.

The first one may be termed 'decoy rhetoric'. On this view, the British government's unceasingly tough rhetoric and the attendant spree of new powers and orders is seen as coinciding with—and making political room for—a series of preventative measures (such as 'Sure Start' and drug treatment programmes) that work unheralded under the media radar screen. Doob and Sprott (2006) make a cognate case about recent youth justice reforms in Canada which, they argue, managed to cut the use of formal youth justice for young offenders under the cloak of some symbolically tough messages about youth crime. To the extent that this strategy is consciously deployed, its logic is to assuage public anxiety and anger at the level of rhetoric, thereby creating space and cover for the administrative delivery of more moderate policy and workable outcomes. The bear-traps are all too apparent, however. Those delivering such outcomes on the ground stand at constant risk of scandalous exposure and if so exposed practitioners and policy-makers are left with no convincing tale to tell, or at least not one that does not contradict the Government's or system's stated goals.

The second form one might call 'playing the Treasury card'. The claim here is that prisons are an expensive public resource that for *fiscal* reasons our society now needs to use more sparingly. The appeal of this strategy is that, among a citizenry judged to be hostile to the broader aims and ideals of the penal moderate, it 'speaks a language people understand' and to which they may be receptive. But only 'may'. Success depends on citizens coming to the conversation as taxpayers rather than, say, as fearful victims, or potential victims, or as individuals and social movements in solidarity with victims.

If the latter turns out to be the case, the public may simply retort that this is a price that can and must be paid, or else demand that the necessary cost savings are made by making prisons more austere or cutting back on educational or drug treatment programmes. They may even be persuaded that government investment in prisons is a (Keynesian) route out of recession. Once such retorts are brought into play, the moderate with the Treasury card has no place she can easily turn without risking bad faith.

The third form of moderation-by-stealth I term 'cultivating indifference'. The starting point here is that engaging citizens in deliberation about punishment is likely to have not moderating but aggravating effects, heating up the penal climate still further. This indeed is what recent experience in California and New Zealand appears to have shown (Zimring et al., 2001; Pratt and Clark, 2005). The problem, on this view, is not what citizens think and say about punishment, but *that* they think and talk so much about punishment; such that it has become a pervasive feature of political culture and everyday life (Simon, 2007). Given this, one should stop trying to encompass crime and punishment within a broader democratic project and instead find ways of insulating government officials and penal bureaucrats from the heat of public opinion and outrage (Pettit, 2001; Zimring and Johnson, 2006; Lacey, 2008: ch. 4). One way of achieving this is to scale back the level and intensity of governmental and public discourse about crime, so as to encourage citizens to think, and worry, about other things. By so doing, one can create the space for penal bureaucrats and experts to wield their moderating influence.⁹

The virtue of this position is to remind us that in a secure democratic society crime and punishment would be background issues, not topics that citizens endlessly fret over and talk about. This last mode of moderation-by-stealth nonetheless has difficulties—of political prudence and principle—that speak directly to the overall limits of stealth as means of advancing the project of moderate penalty within hostile political cultures. The prudential risk is that fostering public silence will leave the status quo unchallenged in the place where it currently sits (Currie, 2009). At best stealth strategies leave unaddressed and unabated the emotions that animate demands for penal severity and provide a reservoir of support for rulers committed to penal solutions to the crime problem. At worst, they aggravate the frustrations of citizens who feel shut out from processes which they think affect their lives and about which they may care deeply, or who are (justifiably) irritated by social and political actors who are judged to be pressing their case by means of elite conspiracy or sleight of hand. In terms of political principle, stealth moderation in each of the forms described fails to give sufficient recognition to the fact that crime control and penal systems in democratic societies must remain minimally credible to those in whose name their practices are conducted, and to the virtuous circles of legitimacy and effectiveness that such credibility can generate (Loader and Walker, 2007: ch. 8).

Given this, the promise of what one may call moderation-as-politics—the form of moderation that is most fully consistent with its status as a public philosophy—lies precisely in the fact that it does not treat prevailing ‘public’ opinion as a ticking bomb that needs to be avoided or else carefully diffused. Instead, pursuing moderation as politics means making one’s case across the now diverse settings of public will-formation (even and perhaps especially those where one expects a hostile reception); fostering dialogue with citizens, and seeking to challenge and move (rather than take-as-given) prevailing understandings of the meanings and place of punishment in our collective life. It means, in short, engaging with, rather than neutralizing or cooling down, the passions that crime and punishment provokes (see, further, Loader and Sparks, 2010: ch. 5). To be sure, this approach brings forth certain risks (of the further aggravation that stealth moderates fear) and it is not one that may necessarily deliver short-term wins. But moderation-as-politics carries a wider ambition and promise—one which seeks to find ways of anchoring moderation in public institutions *and* culture, rather than treating moderate penalty as an always precarious and fragile accomplishment of elites. In part, this requires one to recover and put to use those moderating resources to be found in prevailing structures of thought and feeling. In the English case, this means a politics that exposes citizens of a society that purports to be tolerant, forgiving and pragmatic to the penal system that has been so thoughtlessly swollen in their name; urges them to take full stock of the economic and social consequences of these penal priorities, and to consider alternatives that can be reconciled with that society’s dominant self-understandings. But as a public philosophy, penal moderation has an internal rather than instrumental relation to a more deliberative politics of crime and its regulation. It thus, in the end, enjoins us to counter the ‘malady of infinite aspirations’ (Durkheim, 1961: 40) that attend unregulated demands for order and punishment by imagining and constructing better democratic institutions.

Notes

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1. Examples include, among many, Garland (2001), Whitman (2003), Gottschalk (2006), Useem and Piehl (2008) and Wacquant (2009) for the USA; Tonry (2005) and Newburn (2007) for England & Wales.
2. This article attempts to lay some foundations for a sociological and normative project whose overarching ambition is to recover and re-articulate the virtues of criminal justice minimalism (while recognizing and specifying the things that criminal law and justice can bring to the construction of a good society—Duff, this issue), and examine its conditions of possibility in an age when the culture and practices of punishment have tended in the direction of excess (Loader, 2009a). But it also emerges from, and is in part an extension of, my involvement in the *Commission on English Prisons Today*, which was established by the Howard League for Penal Reform in 2007 and reported in 2009. Its report, along with details of its remit, membership and working papers, can be found at www.prisoncommission.org.uk.
3. Prison numbers in England & Wales have risen by 60 per cent since 1995, and are projected to increase to over 100,000 by 2014.
4. I am grateful to David Downes for his assistance in helping me to formulate these distinctions.
5. Briefly and crudely put, the republican ideal of non-domination refers to social and political conditions under which each enjoys freedom from arbitrary interference by their co-citizens and by the State.
6. In the US context that comparative task can be advanced along a dimension that focuses on inter-state variation. For an analysis and explanation of US imprisonment conducted in these terms see Barker (2009).
7. For details and analysis see Roche (2007) on France; Webster and Doob (2007) on Canada; Lappi-Seppälä (2007) and Pratt (2008a, 2008b) on Scandinavia; and Tonry (2004) on Germany.
8. Nelken's (2009) work on Italy as a 'non-punitive' society seeks to complicate what he thinks is an overly flattened and rosy picture. He demonstrates, for example, that Italy's relatively low imprisonment rates (a good) are a product in part of the sheer number of years it takes for a criminal trial in Italy to be concluded (a bad). His broader interpretative point is that the analysis of non-punitiveness, or moderation, has to attend to the question of whether the supposedly non-punitive outcomes are generated by actors who understand themselves to be acting in such ways. Nelken's work also registers the crucial importance of attending to the relationship between penal and non-penal modes of social regulation.
9. For evidence that indifference towards punishment coincides with non-punitive views, see King (2008).

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