



Volatile and contradictory punishment

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Abstract

Criminologists have recognized that contemporary penal policy and practice are characterized by an unusual degree of incoherence and volatility. Garland (1996) sees this as evidence of the limits of the sovereign state, Simon (1995) as a sign of the postmodern disintegration of modern penalty, while others explain it in terms of the emergence of advanced liberalism and neo-liberal politics. This article argues that such incoherence is better understood in terms of the contradictory elements of New Right politics. The nature of this political alliance extends the repertory of penalty simultaneously in 'nostalgic' (neo-conservative) and 'innovative' (neo-liberal) directions, resulting in considerable incoherence. At the same time, the conservative orientation to state authoritarian strategies and the neo-liberal leaning toward market and private sector governance, could account for the volatility. This brings into question some of the accounts based on more fundamental social transformations.

Key Words

crime • government • justice • neo-conservative • neo-liberal • punishment

Symptoms of chaos?

There is currently a bewildering array of developments occurring in penal policy and practice, many of which appear mutually incoherent or contra-

dictory. Disciplinary obedience versus enterprising autonomy, incapacitation and warehousing versus correctional reform, punishment and stigmatization versus reintegration, formal criminalization versus informal victim/offender settlements—these inconsistent and sometimes contradictory couples may all be used to describe elements that make up the diversity and incoherence of contemporary penal policy and practice. But while diversity of sanctioning has been a characteristic of penal modernism for some time, even a brief survey of developments suggests a state of penological inconsistency that probably has few precedents in the history of modern criminal justice. This situation is all the more problematic not only because in most jurisdictions several inconsistent penological regimes or forms are in place, but also because in some jurisdictions virtually all may be available as options (Alder and Wundersitz, 1994; Lambert and Mason, 1996). Without attempting even a cursory review of the complete range of sanctions currently deployed, the following broad categorizations provide some idea of the diversity and incoherence of contemporary penal regimes.

Discipline

In a recent report to the Ontario Solicitor General and Minister for Correctional Services (Carr and Ecker, 1996), a Task Force recommended the introduction of a program of strict discipline for young offenders that ‘must teach social control, self discipline, respect for authority and a work ethic.’ The program was:

to involve highly structured 16 hour days and stress strict discipline, work programs, and the development of life skills and social skills. Both staff and participants will be in uniform. The emphasis will be on a behaviour modification program which continually monitors the progressions of participants.

(Carr and Ecker, 1996: 16)

Such strict, hierarchical and authoritarian disciplinary, behaviorist programs have become quite widespread, operating in 30 states in the USA, in several Canadian provinces, in Britain and in Australia. More extreme versions involve military drill and the trappings of the army induction programs; rigorous routines; manual labour; and summary punishment for infractions. It is a model that echoes penal regimens recognizable in Foucault’s *Discipline and Punish* (1977), in which inculcating instinctive habits of obedience appear to be the aim of intervention.

Punishment

Whether in the guise of just deserts, deterrence or retribution, punitive intervention has been reinstated in mainstream penalty after years of being regarded as an obstacle to reform under ‘enlightened’ welfare sanctions

(Garland, 1985). In the case of stringent punitive prison regimes the justification frequently is that welfare and correctional models muddled the factors that potential criminals must include in their pre-offense decision making, and 'sent the wrong message' to the community. While superficially aligned with discipline of the boot camp style, such penal discourses usually have little or no sympathy with, or faith in, the rehabilitative aim of strict disciplinary programs. Most frequently, they reflect concern that rehabilitative (and especially 'welfare') sanctions provide skilling benefits not available to the law abiding, rather than dealing out punishment. In addition, punitive sanctions reflect the concerns of those who rail against sentences determined by reformist timetables rather than by the seriousness of the offense, and seek 'truth in sentencing' (Brown, 1990).

Enterprise

Both strict disciplinary and punitive approaches seem to hark back to the 19th century, with its emphasis on self-denying virtues of conformity, 'moral character' and obedience. As such, they contrast markedly with recent developments aimed at creating 'enterprising prisoners' (Pratt, 1996; Garland, 1997). Such schemes, as Garland suggests, partake of a much more positive discipline in which prisoners are 'trained for freedom.' They:

enlist the prisoner as an agent in his own rehabilitation, and as an entrepreneur of his own personal development . . . [prisoners] take part in the government of their own confinement. They are permitted to choose their preferred options from within the available range of developmental activities.

(Garland, 1996: 462)

Such schemes regard the prisoners as being given an opportunity to make an enterprise of their lives and seek to enlist rather than coerce. They seek to create subjects who are innovative and enterprising rather than obedient and conforming, and self-fulfilling rather than self-denying—characteristics that do not sit well with the assumptions underlying the disciplinary model of the boot camp. More generally, such programs display a positive vision for reform that has little use for the negative dynamic of punitive penalties, and the denial of possibilities for self-guided rehabilitation (Garland, 1997).

Incapacitation

The 'warehousing' of prisoners and the close surveillance of offenders serving community correctional sentences has become a prominent feature of contemporary criminal justice. Despite certain superficial similarities and sometimes overlaps with other regimes mentioned, the incapacitation approach itself has neither a rehabilitative nor a punitive logic. Determination of the length of sentence is actuarial—as in 'three strikes and you're

out'—fixed by the risk profile of the offender and linked to merely preventative concerns (Feeley and Simon, 1994). Like punitive penalties, it is justified partly on the basis that 'nothing [reformatory] works' and that rehabilitative programs have been an expensive failure (Cohen, 1985). Such schemes are also predicated on the assumption that the citizenry deserves protection, and they are supported by sophisticated claims that it is cheaper to warehouse prisoners than to leave them at large (Zedlewski, 1985).

Restitution

Alongside the reinstatement of retribution and its state-centred, moral-collectivist imageries, other developments have been disconnecting offending and the state. For example, recent developments in Australia and in Britain have moved to prevent courts imposing fines where it is possible to hand down a restitution order (Parliament of Victoria, 1993). In place of collective morality driving retribution, and a process that centres the state as symbolic victim, individual victims and offenders privately negotiate restitution. As one British opponent complained, 'a compensation order may cancel out the unfair treatment of the victim by the offender; but that is all. It cannot cancel out, since it does not address, the public aspect of the offender's conduct' (Miers, 1990).

Reintegration

In place of the ceremonial justice of exclusion and stigmatization, reintegrative sanctioning seeks to work through informal procedures to restore the individual to the collectivity (Mugford and Braithwaite, 1994). It thus seeks to distinguish itself from most existing sanctions, for example by explicitly condemning the 'counterproductive' stigmatization essential to retribution, the 'nihilism' of incapacitation, and the rehabilitative 'failure' of welfare sanctions (e.g. Braithwaite, 1989). While frequently identified with restitution, the tensions between reintegration and restitution are often significant. This is most clear in the above-mentioned Australian example, where restitution is focused on the victim in a 'privatized' form of justice. In such instances, the penal process, while clearly restitutive, may be no more reintegrative than, say, a defamation action.

Explaining volatile and contradictory punishment

The emergence, survival or renewed vigor of each of these developing trends has been explained in a number of ways. Postmodern nostalgia (Simon, 1995), neo-liberal politics (Pratt, 1996), socially structured moral outrage (Garland, 1990), racialized deindustrialization (Simon, 1994), the crisis of welfare state technologies and penal modernism (Garland, 1995), the failure of welfare sanctions (National Crime Prevention Institute,

1986), the cost-effectiveness of new penal technologies (Zedlewski, 1985), the triumph of behaviorism (Cohen, 1985), the emergence of effective actuarial techniques (Feeley and Simon, 1994) and so on ad infinitum. It is instructive briefly to review a few of these accounts.

For Jonathan Simon the development of boot camps 'evidences an endgame of penal modernity':

Along with other recent developments, including the death penalty and the rebirth of curfew laws and community policing, the boot camp is an exercise in what some scholars have called 'willful nostalgia', a sensibility that is a crucial marker of postmodernization in a variety of social fields.

(1995: 26)

It is nostalgic, Simon argues, because it has no reference to anything functionally meaningful in contemporary society. Such boot camps no longer exist in the military, and the type of modernist temporal order with which they mesh—for example the structured time of Fordist industrial production—has ceased to exist in the world of those (mostly young, black and unemployed) for which the schemes cater. In Simon's view this disjunction is symptomatic of the decadence of late modernity: the sanctions hark back to a lost industrial and modernist past, and have no functional connection with the present.

In many other readings, however, the emergence of boot camps appears as part of a broader resort to negative discipline and an associated move away from anything smacking of welfare reformism. Perhaps not surprisingly, this development is frequently attributed to the success of neo-liberal politics—with particular reference to the political rejection of welfarism in general and to the emphasis on individual responsibility for the consequences of actions (Cohen, 1985; Brown, 1990; O'Malley, 1994). Other commentators take seriously the claims promoted by New Right political discourses concerning the failure of reformism, and argue that such failure has led to the necessity to develop new forms of penal and crime preventative regime (e.g. National Crime Prevention Institute, 1986; Geason and Wilson, 1989). For Simon (1995), this is yet another aspect or expression of the willful nostalgia of postmodernity—especially where punitive and just deserts tendencies are linked to the return of sanctions such as the death penalty and chain gangs.

Despite their association of punishment, neo-liberal pressures are also seen to be behind the model of the 'enterprising prisoner' (e.g. Pratt, 1996; Garland, 1997). The enterprising and autonomous subject envisaged in prison regimes is seen to reflect the positive side of neo-liberal techniques of governance in which:

enterprise provides a rationale for structuring of the lives of individual citizens. Individuals are to become, as it were, entrepreneurs of themselves, shaping their own lives through the choices they make among the forms of life available to them . . . The political subject is now . . . an individual

whose citizenship is to be manifested through the free exercise of personal choice among a variety of marketed options.

(Rose, 1989: 226)

The movement toward penal incapacitation, too, has been explained in terms of the rise of neo-liberalism, especially with reference to the focus on economic accountability and efficiency (O'Malley, 1994). However, incapacitation has also been linked to a variety of other developments associated with 'the risk society' thesis. For some, the focus is on the role of imprisonment in reducing the risks to the proper enjoyment of commodities (Pratt, 1995, 1996). More generally, Feeley and Simon (1992, 1994) see incapacitation as part of a much broader and more or less apolitical 'logic' of risk management in which actuarial techniques and actuarial justice are displacing technologies of individualized discipline. Still another interpretation suggests that incapacitation is a response to two related changes. The first of these is a post-industrial destruction of the modernist work regimes and the temporality to which correctional prison regimes were tied. The second is a political response to the emergence of new 'dangerous classes' of the permanently unemployable, for whom correction is regarded as pointless (Simon, 1994).

Restitution, and its sometimes allied and sometimes inconsistent partner, reintegration, have likewise been linked with a number of shifts in contemporary social order. Braithwaite (1993), for example, suggests that reintegrative sanctions may be connected with a late modern shift toward shame rather than guilt. This transformation in foundational social values in turn is being brought about (*inter alia*) by such developments as globalization and the communications-led collapsing of time-space distantiation. The increasing salience of restitution also is seen as consistent with neo-liberal manoeuvres to responsabilize individuals and to take the state out of as much social life as possible—while also and ironically increasing effective police control through the associated erosion of due process (White, 1994). Cohen (1985) regards the same processes as reflecting pressures to bring the institutions of civil society back into social control, for example through making families responsible for the consequences of their children's offenses.

Perhaps the key limitation of such explanations is that because each relates to a particular sanction they do not confront, and thus do not account for, the sheer diversity and incoherence of these developments. However, three broader theses have been tendered which offer to make sense of this overarching problem, some of which clearly can be detected in the various particular accounts above:

- that incoherence and volatility reflect the limits of the sovereign state (Garland, 1996);
- that such volatility reflects the disintegration of modernity and its displacement by postmodernity (Simon, 1994, 1995);
- that all of these apparently incoherent sanctions can be united under a

common umbrella of neo-liberal political rationality (O'Malley, 1994; Pratt, 1996).

Each of these theses will now be considered in more detail.

The limits of the sovereign state

Garland has suggested that the inability of state policy interventions to reduce high crime rates has generated a governmental predicament which is manifested in a 'recurring ambivalence' toward criminal justice and its penalties (Garland, 1996). In the wake of the demonstrable emptiness of aggrandized sovereign state claims to provide security, governments now wish to deny primary responsibility for crime control. Yet they recognize that the political consequences of such a move are potentially disastrous. The result is the 'volatile and contradictory character of recent crime control policy.' Crime is alternately characterized by governments as part of normality properly governable through everyday life and increased private sector responsibility, and as a product of personal and social monstrosity requiring punitive state intervention. For Garland (1996: 462), 'while this contradiction is sometimes rationalized as a "policy of bifurcation", its real roots lie in the political ambivalence which results from a state confronted by its own limitations.'

One of the most valuable aspects of Garland's thesis is the recognition that penal policy is not necessarily a rational and consistent whole, and is responsive to dilemmas, failures of political will, and conflicts of political interest. Despite its *apparent* obviousness, this is an important observation in the context of contemporary penology that still seeks grand patterns and overarching unities. However, the account confronts several major difficulties.

First, Garland's attention is drawn to the tensions between only two more or less polar responses of the state to its dilemma: a politics of denial of responsibility for the problem, and a politics of punishment as evidence of the state's commitment and strength. These, in their turn, are linked with two contradictory and alternative criminologies—respectively 'of the self' and 'of the other.' It is difficult to deny that Garland has located a central contradiction in current crime control, and insightfully linked these to dilemmas of contemporary state governance. But this oscillation is only one dimension or feature of the much broader pattern of incoherence discussed earlier, clearly involving concerns other than those raised by the 'Exhaustion' thesis. Punitive penalty is not the only alternative to devolution, although the contrast between these two responses may be among the most marked within the spectrum of inconsistent penalties. Garland's account, in some respects, achieves its effect by ignoring an array of other responses to crime which indicate quite diverse agendas and assessments of the fate of state-based crime control. This suggests that the volatility of policy and the contradictory range of responses are two distinct, if linked, phenomena.

Second, devolution to the private sector is not limited to criminal justice, but is part of a much broader and more thoroughgoing critique of the state and of state-based governance. It is hard to find a sector of government in which critique accompanied by devolution has not been a major characteristic over the past two decades (Crook et al., 1992; Clarke, 1992). In this move, led by neo-liberalism, it is urged that, as far as possible, many things—crime control being only one—should be taken away from government and moved to the private (including market) sector where they will be dealt with effectively (Peters, 1987; Osborne and Gaebler, 1993). If instability surrounding the state's monopoly of crime control is merely a sideshow in a far bigger restructuring of governance, then Garland's thesis in its present form cannot account for this, nor reflect this.

Postmodern penalty

An alternative view of the volatile and contradictory nature of contemporary penalty is proposed by Simon (1995). For Simon the situation we confront is not simply one in which governments cannot cope with crime. Rather, it is one in which the conditions that underlie the entire panoply of modernist penal philosophy and practice are being disrupted and destroyed. We have noted already his arguments about boot camps, chain gangs and postmodern nostalgia, and the view that incapacitation reflects the breakup of modernist temporal order. But Simon moves further along this line to suggest that there may be two more unsettling processes occurring. The first is that we should not expect that penalty will assume the same central place in postmodernity that it has done over the past three centuries. Rather, criminal justice institutions and processes may be sidelined: '(n)ew forms of regulating undesirable behaviours or populations are likely to come from other settings, like theme parks . . . , shopping centres, and campuses' (Simon, 1995: 46). The second is that the willful nostalgia associated with decaying modernity is likely to have manifestations which reach well beyond the boot camp:

we should expect a great deal of movement around the model. We should not be surprised to see a *vast range of modern penal cliches run through this adaptive screen in a very short time*. We should also expect that the penal system will develop several other, similarly nostalgic formations. The curfew laws that have recently regained popularity are an example. The death penalty is another. These artifacts will not replace the institutions of modern punishment. What they will do is provide, through nostalgia, an infusion of meaningfulness for practices that can no longer find sustenance in real external referents.

(Simon, 1995: 47, emphasis added)

These are highly original arguments. However, while this account could explain both the decentering of governance of crime and the apparent chaos of contemporary penal practices, the model does not account for

innovative developments, such as 'enterprising prisoners' and restitution, that have little connection with nostalgia. Further, if developments are written off as nostalgic simply because they have historical precursors, this may lead to misleading oversimplifications. For example, the emergence of 'community' police is used by Simon as an example of nostalgia—which he views as harking back to the apocryphal vision of a past communal solidarity. In support of Simon's thesis we can certainly point to critics who argue 'nostalgically' that current policing practices have become 'distorted.' Such proponents seek to return to the 'traditional' model of Peel's 19th-century police by stripping away the excess load police are alleged to have taken on, and returning much of this to 'the community' (e.g. Alderson, 1984). However, other reformers envisage an *innovative* 'partnership' between a modern professionalized police and a more active, autonomous and skilful 'community' to which they are linked by quasi-market and quasi-contractual ties. Such police partnerships are quite distinct from Peel's police model which they superficially resemble (O'Malley and Palmer, 1996; O'Malley, 1997). There is little in this new 'empowered' and switched-on community model that could be thought of as nostalgic. As well, such initiatives, whether with respect to law and order or to almost any area of governance, see themselves as revolutionary adaptations to new social conditions, and as breaking out of the straitjacket of the past (e.g. Peters, 1987).

Simon clearly is aware of the general issue in these points for, as he also argues (1995), the 'postmodern' is only a grid that we can place over many and varied changes. It may be invaluable for allowing us to think our way beyond the limits of what exists, but it is pitched at such a broad and long-term historical level that it can neither be supported by nor explain contemporary tendencies in punishment. Rather, he suggests we need to develop richer middle-range accounts of penal strategies and practices before we can adequately diagnose the fate of modern punishment. The promise of such middle-range theory may be being realized in some of the work that seeks to interpret diverse penal strategies and practices as a feature of contemporary neo-liberal politics.

Neo-liberal penalty

Several accounts argue that the ascendance of neo-liberalism explains virtually all of the developments outlined at the beginning of this article (O'Malley, 1992, 1994; Pratt, 1996). Neo-liberalism is said to provide such an inclusive governmental discourse because it integrates a series of central concerns, which may be summarized as follows:

- an attack on state-centred governance, expounding a view that the interventionist state has crippled economic dynamism by overregulation, by diverting potentially profitable activities into non-profit state agencies and by requiring a significant drain of capital to finance its own costs of operation;

- an assault on welfarism which is seen as generating a culture of dependency rather than activity and independence, and as destroying individual freedom and responsibility by inserting technocratic governance into all walks of private life;
- the advocacy of the market as a model for most social order (including most surviving 'state' operations), advocacy of the enterprise as a model for organizational and individual activity, and idealization of the entrepreneur as the model for preferred individual self-governance;
- an emphasis on cost-effective, pragmatic, results-based government, coupled with accountability at all levels, and especially a desire to make government accountable for expenditure and productivity;
- the reaffirmation of individual responsibility and of the responsibility of families and communities;
- an affirmation of freedom of choice, including choice in relation to consumption as a market-provided reward for success.

Reference to these central principles of 'neo-liberalism' is held to explain all of the criminal justice developments outlined earlier. Thus, *restitution* reflects the ethic of individual responsibility, envisages the victim as the customer of justice, promotes quasi-contractual market-like relations, and takes the state out of governance (e.g. White, 1994). *Reintegration* is linked to the neo-liberal reaffirmation not only of individual responsibility, but of the family and community—and in so doing it also expresses in law the faith of neo-liberals in the institutions of 'private society' over those of government (Cohen, 1985). *Incapacitation* is seen to reflect the urge for accountability, as it prioritizes victims as the customers of criminal justice, withdraws welfare practices from penal policy, and renders justice more cost-effective (O'Malley, 1994; Pratt, 1996). The schemes that seek to create 'enterprising prisoners', put into practice the neo-liberal affirmation of the entrepreneurial spirit, wedded with the emphasis on individual responsibility (Garland, 1996, 1997). *Punitive and just deserts penalties* remove the welfare orientation of the previous penal regimes and bring to the fore the responsabilization of individuals, while at the same time reducing correctional costs (O'Malley, 1994). The *strict discipline* programs likewise center individual responsibility, while at the same time promoting values of self-reliance and application consistent with neo-liberal images of the active citizen (Simon, 1995). Further, it has been argued that the neo-liberal stress on the small state and the privileging of the market, as well as on cost-effectiveness, can account for the shedding of many crime control functions to the 'more effective' private sector and the community.

If neo-liberal models provide *prima facie* accounts for many of the diverse policies and practices, they nevertheless confront several problems. First and foremost, they tend not to confront the contradictory nature of the diverse formulations and practices of penal policy that are presented as consistent with this rationality. For example, can the same political ration-

ality be deployed to explain the rise of boot camps *and* the incapacitation and warehousing of prisoners *and* reintegration *and* prisoner enterprise schemes? True, as noted, there is the emphasis on pragmatism and experimentation/innovation, and this could be used to explain variability in penal practice and policy. Yet, surely, the blind obedience and self-denial of the boot camp regimes are at odds with the model of the enterprising prisoner and of 'enhanced autonomy'. Likewise, is not punitive criminal stigmatization at odds with reintegration? How can all of these be neo-liberal? Without an adequate account of this inconsistency within neo-liberalism, arguably we are no further advanced in explaining the original problem of the volatile and the contradictory nature of contemporary penalty.

One solution may be to adopt the insight provided by Garland, and accept that political rationalities are not consistent. We can certainly point toward Thatcher's (1993) quite explicit fostering of 'enterprise culture' and her simultaneous promotion of the 'Victorian virtues' and institutions. Confronted by conflicting demands at different times and in different situations, and focusing more on pragmatism than consistency, we could believe that neo-liberals selectively mobilize different themes in the neo-liberal repertoire as the situation demands. Even an elementary familiarity with party politics and governmental vagaries would give considerable plausibility to such an account. But two questions arise which need closer attention. The first concerns the adequacy of our account of neo-liberalism. Are we certain that because some political element or particular program appears, for example in 'Thatcherism', it is therefore neo-liberal? The second question concerns what explanatory work is being performed by 'neo-liberalism' in this account. How far does the neo-liberal thesis usefully explain contemporary sanctioning when all the explanatory work is simply transported to the next level—concerned with the differential mobilization of particular 'neo-liberal' themes?

'Neo-conservatism' and the New Right

Perhaps because of the background influence of Foucauldian theoretical work on many of those writing about neo-liberalism and crime control, there has been a tendency to regard most changes prominent in conservative politics as reflecting a single political rationality. Silenced in much—if not all—of this literature is the role and place of *neo-conservatism* as a specific political rationality. I would suggest that what has passed for neo-liberalism may better be understood in terms of the well-worn notion of the New Right. Broadly speaking the New Right consists of two distinct and in some ways competing trends of thought: a neo-conservative *social authoritarian* strand, and a neo-liberal *free market* strand (Gamble, 1986, 1988; Levitas, 1986; Hayes, 1994). The resulting alliance, although usually referred to as neo-liberal in current criminology, is in practice far less coherent than a single political rationality.

To begin with, neo-conservatism is probably the source of much of the emphasis on order and discipline that is attributed to neo-liberalism in recent criminology. For neo-conservatives, discipline is essential for the social good—and the concept of the social here has very specific organic overtones that do not sit well with neo-liberals' radical individualism. Allegiance and loyalty, and membership of traditional collectivities such as the family and the nation, are paramount. Obligations, whether to the family, the community, or the nation, are in a sense *given* in the nature of social beings, rather than contractually, rationally, or voluntarily chosen by individuals on the basis of self-interest. Consequently, the freedom and enhanced autonomy that is central to neo-liberalism:

cannot occupy a central place in conservative thinking . . . Freedom is comprehensible as a social goal only when subordinate to something else, to an organisation or arrangement which defines the individual aim. Hence, to aim for freedom is at the same time to aim at the constant which is its precondition.

(Scruton, 1984: 41)

For neo-conservatives, the state, in particular in its role as the preserver of order and the governor of the nation, is the privileged symbol of political rule, and allegiance to the state has little or nothing to do with a liberal social contract (Scruton, 1984). This strong assertion of state *sovereignty* in turn privileges both law and order as crucial, more so than the market and the individual. Thus for neo-conservatives 'the law may not only control contract and crime, but may also regulate family relationships, personal morality and so on. And the state must possess severe and ultimate sanction and may utilise retributive punishment and social controls' (Hayes, 1994: 122). In all of this it is not difficult to detect the source of those elements of penal policy that appear somewhat incongruous with the 'switched on' capitalism of neo-liberalism and enterprise culture. Neo-conservatism would promote and find appeal in 19th century boot camp technologies of negative discipline and unthinking obedience and in retributive punishments (even—as in Roger Scruton's (1984) and Ernest van den Haag's (1975) cases—the death penalty).

This account is somewhat one-sided, because it reveals little that would bind neo-conservatism in a political alliance with free-market, radically individualistic neo-liberals. The key, perhaps, is to be found in their common aggressive support for a capitalist economy. True, neo-conservatism could not give such unfettered play to the market forces and consumer sovereignty crucial to neo-liberalism, and in this is another source of tension (Gamble, 1988). The writings of Daniel Bell (1976) in the United States—and particularly his belief that consumerism has undermined the bourgeois virtues and rationality—provide a clear enough illustration of this.

The bourgeois world-view—rationalistic, matter of fact, pragmatic—had by the nineteenth century come to dominate not only the techno-economic

structure but also the culture, especially the religious order and the educational system which instilled 'appropriate' motivation in the child. It reigned triumphant everywhere . . . (but) the last hundred years have witnessed an effort by anti-bourgeois culture to achieve autonomy from the social structure . . . In both doctrine and lifestyle, the anti-bourgeois won out. This triumph meant that in the culture, antinomianism and anti-institutionalism ruled . . . few opposed the idea of boundless experiment, of unfettered freedom, of unconstrained sensibility, of impulse being superior to order, of the imagination being immune to merely rational criticism. The traditional bourgeois order of life—its rationalism and sobriety now has few defenders in the culture.

(Bell, 1976: 53)¹

However, it is also the free market that is the site in which the neo-conservative virtues of a kind of social Darwinism are held to be demonstrated and delivered. In the words of the British conservative Peregrine Worsthorne (1988: 14), 'the battlefield and the economic jungle . . . [are] the proving place of character.' There is also in neo-conservatism a hostility to welfarism that would give common cause with the neo-liberals, for welfare interventions tend toward the elimination of inequalities that for conservatism are the essential index and mechanism of Darwinian social selection (Levitas, 1986).

If these are the key points of articulation between neo-conservative social authoritarianism and free-market neo-liberalism, the implication of the above is nevertheless that some of what has been attributed to neo-liberalism may rather have its foundations in neo-conservatism. What *is* core to neo-liberalism is the privileging of the market and individualism, which are regarded as the optimum technologies for social order (Gamble, 1986). Neo-liberalism, especially in the formulations of Milton Friedman, F.A. Hayek and the Chicago School of Economics, imagines virtually all institutions, including law and penalty, as optimally effected in terms of market efficiency and rationality. Likewise, it is neo-liberalism that centers the generalization of entrepreneurial imageries and techniques (together with allied discourses such as new managerialism). As the neo-liberal Nell puts it:

adventure, imagination and boldness in the taking of risks—these are the central elements in the make-up of the entrepreneur, the true creator of the world in which we live . . . The things of the world are built by entrepreneurs essentially out of their own vision and energy, the natural resources are discovered and mobilised by them.

(quoted by Hayes, 1994)

Accordingly, like neo-conservatism, neo-liberalism is hostile to welfarism and to the equalizing tendencies of state interventionism. But in contrast to neo-conservatism, the incentives provided by the commodified pleasures delivered by the market become an essential element—and this too is one of the things that also distinguishes neo-liberalism from Bell's nostalgic world

of the 'Protestant Ethic.' Consequently 'freedom' has a different meaning and place for neo-liberals than for neo-conservatives. For neo-liberalism it is founded in the contractual imagery of the market; the principal form of free relationships is voluntary and driven by self-interest; the emphasis becomes increasingly on *freedom of choice*, extending to libertarianism on the 'radical' wing of neo-liberalism.² Thus, collectivism for neo-liberals has a very low profile, and is promoted to the extent that it works through an implied contractualism—that is for (mutual) self-benefit. The valorization of the 'community', for example, is not intended to conjure up the imagery of the collective greater good and traditional solidarity that is core to neo-conservative imageries, so much as an association of like-minded individuals whose unity will survive as long as it proves effective (O'Malley and Palmer, 1996).

In this light, political discourses such as 'Thatcherism' or 'Reaganism' emerge as specific political programs and platforms, formed out of two quite diverse but overlapping strands of 'New Right' political rationality. For the purposes of criminological analysis, what is important about this familiar political observation is that penal policies over the past two decades have been formed by regimes that amalgamate and combine rather contradictory governing rationalities. Unity between them is possible, as we have seen, because of certain shared values and assumptions. Probably the most crucial is the focus on the market as the optimum deliverer of goods and of valued qualities of the subjects of governance. Another, as noted, is a shared hostility to regimes of the welfare-interventionist state. However, these and many other points of overlap nevertheless disguise quite distinct and often contradictory positions. 'Community', as noted, would appear to mean contractualism to free-market neo-liberals, but for neo-conservatives it represents a collectivity greater than the individual, demanding loyalty. For neo-conservatives the market is by no means an unmixed blessing, for while they stress the work ethic and the economic play of 'natural selection,' they tend to regard with a more jaundiced eye unfettered consumerism and freedom of choice (Hayes, 1994). This does not imply any necessary instability in the alliance. Not only did long-lived regimes such as Thatcher's manage such tensions, but organic intellectuals, such as F.A. Hayek have incorporated almost polar opposite elements from each rationality into a rationalized whole. In Hayek's (1988) case, amalgamating free-market individualism with an emphasis on the need for traditional institutions and values was seen not only as possible but even necessary in order to provide social cohesion.

What we are likely to find in such regimes is thus not necessarily instability of tenure, but a degree of potential for internal contradiction that will not always be obvious to the participants, and a certain volatility and inconsistency in the face of governmental problems that straddle more tense sites in the alliances. One of these, as seen earlier, is likely to involve matters touching on the sovereignty of the state, and in this perhaps we see one of the sources of the oscillation noted by Garland. Another is likely to

be the response to indiscipline and to moral and social variability. The diversity and incoherence in relation to penal regimes and techniques, and the oscillation between imageries of the strong state and of devolution to the public sector, may now be understood in a more substantively political light.

New Right penalty

The second of the two major questions posed earlier concerned the general explanatory value of neo-liberalism. In the original thesis, the sheer scope of its inclusiveness meant that too much additional explanatory work was required to account for the mobilization of specific programs within its compass. An important part of a response that can now be offered is to note that the spread of responses attributed to neo-liberalism is significantly reduced. For example, while there must be little room for doubt in attributing the enterprising prisoner model and the 'civil' negotiation of restitution to neo-liberal influences, retributive punishment and disciplinary obedience appear to belong within a neo-conservative politics.

As this suggests, the alliance of these two rationalities explains the rather bi-polar pattern of development that is extending the diversity or range of sanctions. On the one hand is the resurrection or revitalization of formerly discredited but venerable penalties and penal orientations (retribution, strict discipline, death penalties, and chain gangs). This is effected through the resurgence of neo-conservatism, the favored policies of which not surprisingly are the sanctions identified by Simon as representing a post-modern nostalgia. The suggestion here, however, is that while nostalgia may indeed be at work, what is manifest is not a nostalgia born of post-modernism, but the explicitly modernist nostalgia of neo-conservatives. This neo-conservative nostalgia matches punishment and penal discipline with support for a unified moral order under the governance of state paternalism. On the other hand is the addition to the penological repertory of quite radical and innovatory initiatives, which are largely associated with neo-liberalism—as suggested already, most notably the model of self-governing, enterprising and 'active' prisoners. Thus within a New Right penalty the repertory or range of available sanctions is expanded in contradictory directions, namely, the innovative and the nostalgic. Meanwhile, in the center an amalgam of persisting welfare, disciplinary and regulatory sanctions either is left more or less intact, or represents a field where there is considerable overlap between the allied rationalities: as, for example, with the deployment of incarceration as a deterrent.

This bi-polar perspective on the penalty of the New Right can also explain, in terms of a rather more ordinary politics, the volatility in sanctioning policies that Garland accounts for in terms of the limits of the

sovereign state. At the one pole, the policy oscillation that favors the state taking command and clamping down on crime can be identified with neo-conservatism. Conversely, the policy moment that swings toward devolving responsibility to the community, or even moving out of intervention altogether, is largely an outgrowth of neo-liberal rationalities. Thus, neo-conservatives have long called for a 'remoralization' of society as a means of fighting crime, and regard the role of the state and of law as crucial in this respect (e.g. Marsland, 1991). It will be remembered that Ernest van den Haag (1975) called for the introduction of the death penalty for drug pushers not simply in order to get tough on crime, but primarily on the grounds that 'the law can be used to attain ends other than justice'—most importantly the reassertion of state authority in the wake of its 'loss of nerve' (1975: 213). At the other, neo-liberal extreme, proponents such as Milton Friedman (Friedman and Friedman, 1984), Becker and Landes (1974), and in Australia the Centre for Independent Studies (Buchanan and Hartley, 1992) have proposed withdrawing state involvement through criminal justice from many areas of 'victimless crimes'—on the grounds that it is no business of the law to enforce a particular code of moral conduct. Rather, the role of law is understood to be the much more limited one of governing actions that interfere with the freedom of others. Coupled with this, as we have seen, the innovators among neo-liberals urge the decentering of governance over crime, as far as possible, in an effort to establish the autonomy of citizens and improve the efficiency of services (Osborne and Gaebler, 1993: 51). In such an alliance, oscillations between state bellicosity and devolution, of the sort observed by Garland, seem a perfectly intelligible outcome.

Sorting out the pressures from neo-liberal and neo-conservative poles, of course, is not often as black and white in practice. Both neo-liberals (e.g. Zedlewski, 1985) and neo-conservatives (Wilson, 1975) have supported expanding imprisonment, but from within the heartland of their discourses: Zedlewski on the grounds of cost-effectiveness, Wilson on the grounds of punishing 'wickedness.' As well, protagonists of the New Right frequently embody contradictory positions reflecting both 'wings' of the alliance (see Thatcher, 1993), or themselves shift ground—the example of van den Haag's conversion from a supporter of the death penalty in the war on drugs to an advocate of free-market self-regulation and state withdrawal being the most striking (Tame, 1991). For this reason the oscillation noted by Garland quite possibly cannot be reduced to the ascendance of particular fractions of the New Right, but may reflect all manner of political contingencies facing a fairly heterogeneous alliance of political rationalities. The price of a better explanation of the volatile and contradictory nature of current penalty, ironically, may be a recognition that we are no more able to predict policy directions than is Garland. What we have reached here are perhaps what Hindess (1984) regards as the limits of explanatory sociology, rather than the limits of the sovereign state.

From the New Right to the New Laborism?

These are not normal times in politics, nor is the alliance of neo-liberalism and neo-conservatism a routine alliance. We should recognize that the formation of the New Right is linked directly with the shift away from governance through the 'social' technologies of welfarism—social engineering, social work, social welfare, social security, and so on. Social 'welfare and interventionist' government has been assaulted, transformed, and sometimes dismantled by this alliance. Increasingly, governance is mobilized in terms of individuals, communities, markets, and families, and we may be entering an era witnessing the 'death of the social' (Rose, 1996). This shift, whatever its origins, is now no longer to be associated exclusively, or even perhaps primarily, with governments of the 'New Right'. The former Keating Labor government in Australia, for example, embraced many neo-liberal technologies both generally and in the governance of crime, while retaining a social democratic platform. It was this Labor regime that oversaw the introduction of market (or market-like) techniques, and related 'neo-liberal' mechanisms, into almost every area of life from the funding of tertiary education to the provision of unemployment relief (Dean and Hindess, 1998). Correspondingly, in criminal justice there was also a move toward rendering offenders more individually responsible for their offenses, and thus subject to punishment rather than correction. This regime supported the shedding of state criminal justice functions—from privatization of prisons to rendering the citizenry more responsible for the governance of crime control via crime control committees and community justice initiatives (O'Malley and Palmer, 1996). In this Labor period too, programs rendering offenders personally responsible to victims and thus available for restitution and reintegration were established both federally and provincially (Sandon, 1991a, 1991b; Federal Justice Office, 1992). The era of 'Rogernomics' in New Zealand saw parallel developments under Labor regimes, while the penal politics of Blair's Labour government in Britain do not seem radically at odds with what has gone before. In such neo-liberal/Labor amalgams, similar room for diversity and incoherence may be detected as has been characteristic of the New Right.

Such an apparently unlikely alliance between neo-liberalism and Laborism—perhaps better seen as the deployment of neo-liberal techniques and frameworks by Labor regimes—may not be so surprising. As Rose points out (1996), criticisms of welfare-interventionist strategies came from the Left as much as the Right, and some commentators on the Left are already advocating the adoption of some of the techniques of neo-liberals (Burchell, 1993). Certainly we can detect 'Leftist' arguments supporting market-based techniques in the crime control field. For example Brogden and Shearing (1995) have explored market techniques as a progressive approach to governing security in post-Apartheid South Africa. The present article is not the place to explore the implications of Brogden and Shearing's

unsettling of the certainties of politics (see O'Malley, 1996). Rather, the point to be made is that we are in an era during which old political certainties—of what is Left and what Right—are being destabilized. In an environment in which neo-liberal techniques of government are grafted onto other rationalities, the prognosis, I suggest, is for a prolonged period of inconsistency and volatility in penalty. Even so, I suggest that this has more to do with changing paradigms of government, than with anything as catastrophic as the emergence of postmodernity or, perhaps, reaching the limits of the sovereign state.

Notes

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1. Compare this with James Q. Wilson's brand of criminological conservatism:

The demise of Victorian morality, the inability of the state to recreate that morality, and the growth in personal freedom and social prosperity, have combined to produce an individualistic ethos that both encourages crime and shapes the kinds of policies we are prepared to use to combat it.

(1983: 46)

2. A concise illustration of the difference between conservative and neo-liberal views is provided by Judith Brett. Looking back at one of the high water marks of conservative eloquence—Sir Robert Menzies' speech to the 'forgotten people' of middle-class Australia—Brett notes that in those days the primary association of the word 'individual' was *independence*. This is no longer the case:

Today it is *freedom*, most generally understood as freedom of choice in everything ranging from the colour of a new stove to sexuality. In [Menzies' speech] . . . the word 'freedom' appears only once: 'The greatest element in a strong people is a fierce independence of spirit. This is the only *real* freedom, and it has as its corollary a brave acceptance of unclouded individual responsibility'. The words 'choice' and 'liberty' do not appear at all. By contrast the words 'frugal'/'frugality' appear five times, 'thrift'/'thrifty', three, and 'save'/'savings' eight. For Menzies' Liberals the word 'individual' took its primary meaning from Protestantism and its ethic of hard work, personal responsibility, thrift and community service.

(1993: 1)

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