

*Understanding Punishment: Beyond "Aims and Objectives ..."**

Let me begin with a speculative aside. I think it is likely to have been the case that until the late 1970s, the study of punishment at tertiary level will have been confined to law faculties. There was no "sociology of punishment" to speak of; and within the law faculties "punishment" was likely to be tacked on to the end of criminal law courses. Here, as in the case of my own education, we would have been taught "the aims and objectives of punishment". What should punishment do, we were taught; should it deter, rehabilitate, make retribution, perhaps — which of these is the best way to proceed, which is the most "rational" response to make to offenders? Such an analysis, if that is the correct word to use here, are in themselves made possible by a belief that "experts" could put the penal system on some kind of planned, rational, well-ordered basis. And, of course, such attempts to present a view of the penal world as it ought to be prevent all kinds of other questions being asked about this world as it is: questions about the reasons for penal change, about the shape and form penalty takes at particular times are never asked. Equally, the issue of "rationality" is simply taken for granted rather than recognised as itself a product of post-Enlightenment thought, expressed initially in the work of reformers such as John Howard and then securing a crucial strategic place in the subsequent study of punishment, as we see today in the work, for example, of Nigel Walker.¹

To what extent, though, has the 1990s punishment curriculum changed? I think it is still the case that comparatively few sociology departments will offer sociology of punishment courses — despite all the other sociologies of sport, leisure, ageing, gender and so on that have mushroomed since the 1970s. Within legal studies, it is interesting that one of the most widely used criminal law textbooks in England — Smith and Hogan,² now in its seventh edition — deals with "Crime and Punishment" in one chapter, and introduces the subject in the following way: "when a sentence is to be imposed, the first decision to be made should be as to the object to be achieved by it".³ In effect, the study of punishment is still reduced to one that is simply concerned with what sentencing practice should be.

Nonetheless, it is clear that there have also been some very important changes in the study of punishment over this period. This has been because of the huge impact of the work of Foucault⁴ and Cohen.⁵ Equally, the changing political context of the post 1970s period is likely to have made such matters as the link between fiscal crisis and decarceration visible to even the most narrow of positivists. As such, penological analysis has been

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1 Walker, N, *Sentencing in a Rational Society* (1969); Walker, N, *Punishment, Danger and Stigma* (1980).

2 Smith, J and Hogan, B, *Criminal Law* (1992).

3 Id at 4. I am indebted to Associate Professor Mark Findlay of the Law School, University of Sydney for drawing my attention to this point.

4 Foucault, M, *Discipline and Punish* (1977).

5 Cohen, S, "The Punitive City" (1979) 4 *Contemporary Crises* 339–60. Cohen, S, *Visions of Social Control* (1985).

broadened out to include such matters as critical historical analysis and such themes as class control and power and domination. Even now, though, the net widening aspects of modern penal reform — perhaps one of the most well-known aspects of the Foucault/Cohen literature can still be reduced to yet another common sense problem within the penal system, to be remedied by greater efficiency, more rationality, planning and so on. In effect, the concept has been divorced from the epistemological roots which produced it, whereby it is seen as a feature of the changing nature of modern penalty: the shift from institutional to community based forms of social control,⁶ implemented by criminal justice planners, experts and the like. In other words, the relationship between social theory and the institution of punishment is still at a very uncertain stage.

However, the foregoing remarks have been by way of prelude to the main theme of this paper: a critical exegesis of David Garland's *Punishment and Modern Society*.⁷ They are meant to serve as an introduction to it, since this book, above all others, would seem to have the potential to remedy what still amounts to a lack of connection between theory and punishment. To me, at least, this is essential if we are to understand what might lie behind, be responsible for, the form, shape, function and role of punishment in modern society. Garland achieves this by providing his own critical exegesis of the work of a range of social theorists in masterly and well written form: the only critical point I would raise in this respect is that perhaps a concern for academic rigour can lead him to be over-critical in places. Perhaps, for example, a little more credit could have been given to the originality of the pioneering work of Rusche and Kirchheimer,⁸ irrespective of some of the shortcomings which are obvious to us today. Original ideas are precious commodities, even if they necessitate some knocking into shape from subsequent commentators. Be that as it may, the differing social theories that are set out in *Punishment and Modern Society* can be seen to explain various dimensions of modern punishment in the following ways (although here I can only briefly summarise their most important themes).

Durkheim and the necessity for punishment

Durkheim's work is important for our understanding of punishment because of the way in which he recognised that "passion" lies at the heart of punishment. The sense of outrage that is provoked by those actions that are in breach of the *conscience collective* helps to promote a sense of social solidarity — as is regularly experienced when the activities of particular groups of criminals (such as child molesters, rapists, and, increasingly, those involved in corporate and white collar crime) come to light. Their punishment thus provides an outlet for individual psychic emotion *and* collective social morality. In this way punishment has an importance as a communicative force. It gives assurances to individual citizens and, of course, helps to define, clarify and establish moral boundaries: a good example of this being the growing desire to have "tougher" punishments for corporate criminals in the aftermath of the 1987 stockmarket crash and the way in which this brought some of their activities to light.

In this way there is a political necessity to punishment. It maintains control and authority — and at the same time it helps to satisfy the sense of outrage, the "punitive passions" of

6 See particularly Cohen (1979), *ibid.*

7 Garland, D, *Punishment and Modern Society* (1990).

8 Rusche, G and Kirchheimer, O, *Punishment and Social Structure* (1939).

individual citizens. In effect, Durkheim, like few other theorists, recognises the “deeply held sentiments regarding crime and punishment [which] undoubtedly exist throughout the population”,⁹ as public opinion surveys regularly reveal, and which demands and provides support for legal punishment.

Marxism and the political economy of punishment

As is well known, Marx himself had very little to say about punishment. This section of the book therefore deals mainly with the secondary literature that has been influenced by Marxist concepts and which has sought to apply these to our understanding of punishment. As such, the way in which punishment can act as a form of class control rather than a form of mere crime control is recognised; as is the way in which specific penal methods are determined by wider social forces than the apparent central objective of crime control. Hence the particular suitability of the prison as a sanction to fit the interests of industrial capitalism: “capitalist economic relations gave rise to the idea of man as the possessor of labour power and of liberty, both of which could be calibrated and measured in terms of time, and it was thus capitalism which gave rise to modern imprisonment, which is premised upon precisely this mentality”.¹⁰

At the same time, prison regimes conformed to one of the central features of 19th century political economy: *the less eligibility principle*, which dictated that those dependent on the State in some way or another must experience worse conditions than those who had no such dependency. Indeed, the principle still has an important influence on penalty today: punishment must go some way towards disadvantaging those who break the law. If they are sent to prison they must endure worse conditions than those of free people. To ensure commitment to the social order from the lower classes and other disadvantaged groups, crime must not be seen to pay. Hence the periodic outrage over the provision of Christmas dinners for prisoners, their access to colour television and so on.

Foucault and the technologies of power

Foucault illustrates how modern punishment — particularly imprisonment — actually works. In the micro-detail of *Discipline and Punish*¹¹ we come to understand the development in modern society of strategies of surveillance, classification and disciplinary training. Their purpose is to transform criminals from anti-heroes into “docile bodies”. In this way it is intended that those who prey on society will become useful subjects, able to make a positive contribution to the functioning of society, rather than acting as a drain on its resources.

That this does not happen in practice and that the prisons have been known to be expensive failures for well over a century now does not mean that governments blindly follow a penal policy that is “irrational”. For Foucault, the prison’s failure is the hallmark of its success. It serves the function of reproducing a set of fairly minor criminals that become the scapegoat for the rest of society’s crime problems, while the “crimes of the powerful” go largely unnoticed and unpunished. In this sense, *there is* a rationality to punishment which this implicit function confirms. As Garland indicates, there are actually a number of problems with the po-

9 Garland, above n7 at 62.

10 Id at 115.

11 Above n4.

sition that Foucault takes on this matter. Nonetheless, what Foucault has achieved *inter alia* is to raise the question of the role and permanence of the prison in modern society. How we might now answer it should go beyond the technical suggestions that are made for its improvement and the radical dreams that countenance its abolition.

The influence of Max Weber

Foucault's emphasis on rationality ensures that his work overlaps with that of Weber, as it does with regard to their depiction of the "iron cage" which both see as constraining the subjects of modern Western societies.¹² Although Weber has received little by way of direct attribution in the sociology of punishment, the reason for this, Garland explains, is that "[his] sociological concepts, and particularly his account of modernity, have become taken-for-granted elements within modern social thought, to the extent that most accounts of modern institutions speak a Weberian language without feeling the need to acknowledge it as such".¹³

For Weber, the drive towards modernity was accompanied in the last century by the rationalisation of *inter alia* the forces of punishment. This can be seen in the development of Justice Department bureaucracies; the professionalisation of penal staff; the attempts to put penal policy on a planned basis, rather than leaving it to the whim of "charismatic individuals"; the curtailment of the sentencing powers of the judiciary to prevent its excesses and to bring this body more into line with the policy objectives of the executive; and the current computer-based attempts to monitor and systematise sentencing patterns.

Yet the system refuses to work to order. In the New Zealand context¹⁴ the professionalisation of prison staff towards the end of the 19th century did not lead to prison officers becoming penological "experts". Instead, they simply recognised the power that they now had as a corporate body and began to block prison initiatives which they saw as inimical to their own interests. Furthermore, governments clearly have a vested interest in making punishment more effective, efficient and purposeful. They are likely to favour the provision of work and education programs in the hope that these can bring about the reform of individual criminals. However, their movements towards a more ostensibly rational penal realm are constrained by the desire of the public to have criminals disadvantaged through punishment. For Garland, this dichotomy is a feature of "the contrasting visions at work in contemporary criminal justice: the passionate, morally toned desire to punish and the administrative, rationalistic, normalising concern to manage".¹⁵

Norbert Elias, punishment and culture

Most students of the sociology of punishment will be familiar with the range of theoretical perspectives so far presented. However, both the reference to Elias and the implications of his work in this context are likely to be quite new. Nonetheless, Garland makes use of Elias' seminal work *The Civilizing Process*¹⁶ to draw our attention to the relationship between

12 Smart, B, *Foucault, Marxism and Critique* (1983).

13 Garland, above n7 at 177. Garland (at 178) adds that Weber's influence is most evident in "the vast literature which deals with the courts, the police, and the prisons, from an organizational point of view, discussing the peculiar dynamics and goal displacements which bureaucratization has introduced into the criminal justice sphere ...".

14 See Pratt, J, *Punishment in a Perfect Society* (1992).

15 Above n7 at 180.

16 1982 (first published 1939).

punishment and culture; that is, the way in which contemporary “mentalities” (ie “ways of thinking”) and “sensibilities” help to determine the form that punishment takes. It is thus not constituted solely by reference to economic imperatives, nor does it exist simply to control the poor. Recognition of this link between punishment and culture is, I think, a major breakthrough in our understanding of punishment, although to date little work has been undertaken in this area.¹⁷ For this reason, I propose to spend more time on my review of this section of the book than the others.

Elias’ work is important since it traces the historical development of human sensibilities (the first volume of his *magnum opus* is appropriately titled *The History of Manners*)¹⁸ from the medieval period through to modern society itself. He shows how human behaviour has gradually changed during this period as a result of the diffusion of manners and etiquette (initially found amongst the aristocratic elite), the refinement of sensibilities, and the growth of distaste at the sufferings of others (animals included). In effect, “[this] civilizing process in culture involves a tightening and a differentiation of the controls imposed by society upon individuals, a refinement of conduct, and an increased level of psychological inhibition as the standards of proper conduct become ever more demanding”.¹⁹ One of the consequences of this for life in modern society has been “*the privatisation of disturbing events*”. That is, “sex, violence, bodily functions, illness, suffering and death gradually become a source of embarrassment and distaste and are more and more removed to various private domains”.²⁰ People in modern societies are now moved by the sight of what appear to be visions from a distant past, such as starving Ethiopian families or abandoned children in Romanian “orphanages” precisely because these sights so contradict the *weltanschauung* of these societies today.

Just so with punishment, although we have to look to the work of Spierenburg,²¹ writing in the Elias tradition, rather than Elias himself to see the impact of this developing sensitivity and the civilising process on changes to the punishment of criminals. Spierenburg argues that, in the period from the 12th to the 19th century there was a gradual reduction to the point of virtual disappearance of punishments inflicted on the body. During this time we move from the public display of rotting corpses (usually after a public and hideous execution) to solitary confinement in the prison cell. At this point, I would not so much offer a criticism of this line of thinking, but a question that gives the opportunity for further clarification. Can we take still further the disappearance of the punishment process during the course of the 19th century — through examination of the trends which have since occurred in prison architecture and location.²² In this way, it becomes possible to explain what has hitherto been one of the least remarked aspects of modern penality: the removal of the penal institution from its pivotal role at the epicentre of the 19th century city. Is it not likely to be the case that, where we do find such establishments, these areas will have become ghetto territories, derelict and run-down and long since by-passed by the wealth and technology of modern development? Indeed, the very names of the penal

17 Cultural influences on punishment are seen most clearly in Spierenburg, P, *The Spectacle of Suffering* (1984). They are hinted at in Downes, D, *Contrasts in Tolerance* (1988). In my own work (see Pratt, above n14) I have attempted to illustrate the importance of cultural influences on the history of punishment in New Zealand.

18 1978 (first published 1939).

19 Garland, above n7 at 217–8.

20 Id at 222.

21 Above n17.

22 See Evans, R, *The Fabrication of Virtue* (1982), Pratt above n14, and Pratt, J, “This is not a Prison: Foucault, the Panopticon and Pentonville” (1993) *Social and Legal Studies* (in press).

institutions they contain sometimes have a Dickensian ring to them that gives away their age. British prisons provide excellent examples of this: “Strangeways” in Manchester, or “Wormwood Scrubs” in London. Other than this, prisons that remain in central city areas may be converted into tourist attractions, as with “Old Melbourne Gaol”. Just a few minutes walk away from the latest shopping mega-complexes, the gaol, which was completed in 1864, is now a National Trust building and is open to visitors. As if reminding us that such a scene belongs to the past and not to the present, the brochure that can be purchased on entry tells us that “today the Melbourne Gaol appears gloomy, sinister and depressing. Visitors looking at it in its present condition try to imagine the poor starved ill-treated wretches who were once incarcerated in its cold dark cells ...”.

To me, these trends have profound implications for the nature and understanding of “punishment today”. They are likely to mean that governments will be greatly restricted in attempting to reduce prison populations by, say, the introduction of “half-way houses”. Public sensibilities still dictate that criminals be hidden away in prisons rather than placed in the midst of local communities. And they illustrate the nonsense of the argument that I have heard put forward by one or two liberals that governments deliberately keep prisons secret places; if only the public knew more about them, it would be much more supportive of decarceration strategies. In fact, the reverse is true. In a way that continues this “privatisation of disturbing events”, the public wants prisons to be closed off and secret places. It does not want its conscience disturbed by what goes on there, so long as this does not also involve the infliction of “barbaric” punishments on the body, or any evidence of utter helplessness and abandonment, leading only to a cruel and undeserved end, as in the contemporary examples above. For the most part, prison leads to the remorseless decay of the human spirit and not such extremes of physical suffering: which, today, helps to make it an acceptable sanction.

Governments do have a vested interest in trying to make the public aware of the futility of prison (if only because of the money-saving potential of this). That they fail to do so means that referrals continue, overcrowding worsens and Justice Departments become even more secretive about the dehumanising and degrading apparatus they preside over, because of the embarrassment that this causes them.

At the same time these sensibilities constrain punishment in other ways. Perhaps punishment would be at its most effective if it did actually resemble the “carceral archipelago” in the manner of Foucault’s depiction. Yet the all-pervasive system of surveillance, not to say disciplinary training, that this would necessitate (if governments could afford it which is another matter) would surely exceed the limits of what is thought to be ethically permissible in modern western societies. Strategies for the control and regulation of deviant populations are expected to be discrete and confined to particular locations rather than all-pervasive.

Here, then, I have tried to capture and raise for further discussion what I see as an important trend in modern penality — which Garland suggests, but does not perhaps explore in full. But as an alternative line of questioning that stems from this, we might want to consider why we find the celebration of particular aspects of punishment — the death penalty to be precise — in that most western of western societies, most modern of modern societies, the United States. What is it about the cultural values of that country that make this possible? Notwithstanding a rather cursory examination of the politics of punishment there, Garland is strangely silent on this point.²³

23 Above n7 at 245–6.

Punishment and Colonisation

The relationship between punishment and culture would also seem to open up another long neglected area of analysis: the impact of colonisation on the development of punishment systems in former colonies such as Australia, Canada and New Zealand. At one level, as I have tried to illustrate elsewhere,²⁴ emigrants from Britain to New Zealand in the 19th century (and beyond) tended to regard their new country as a “Britain of the South Pacific”. They went about deliberately replicating a range of British institutions and modes of administration, including the punishment system. Criminals were thus transported from New Zealand to Tasmania, as well as from Britain, between 1840 and 1853. After the abolition of this sanction, penal servitude, as in Britain, was introduced and so on.

However, the formal commitment to British penal policy that the nature of colonisation in New Zealand engendered meant that the country became locked into a system that it had neither the need for nor the resources to build. The latter factor itself led to a range of *de facto* and pragmatic initiatives, irrespective of formal policy objectives. At the same time, as the system (inevitably) failed to measure up to these objectives that had been set for it, its history became one of continuous and inevitable failure. Furthermore, the commitment to British and Western cultural identity meant that any vestiges of Maori culture and institutions were simply not permissible because they would have threatened that sense of identity. Thus the very suggestion today that there should be any recognition of the indigenous justice system of New Zealand usually brings with it the most outright rejection. This is because punishment helps to confer a sense of identity — predominantly with Britain and the West, the roots of which go back to the beginning of European settlement itself. Mention of Maori punishment practices poses a challenge to the hegemony of European culture and thought.

Thus, while conferring a particular identity, punishment also defines as ‘illegitimate’ alternative ways of imposing punishment which, as in indigenous cultures, do not include the prison, so much has this institution become a part of the *weltanschauung* of modern Western society. Yet the dynamics of colonialism are simply ignored in the book, making it appear rather Anglo-centric. It is aimed at English speaking audiences — yet many of those countries will have had a colonial history: something in the realm of punishment (in this context) was there before the British arrived. The subsequent histories of denial, exclusion and suppression that colonialism brought with it are simply ignored here. And yet the dynamic of colonialism itself needs recognition and explication: modern Western punishment has an existence in some countries that has been made possible only because of the silencing of other ways of punishing.

The phenomenology of punishment

Notwithstanding this critical absence, Garland provides us with a picture of modern penal policy as ultimately torn between “the passionate morally toned desire to punish and the administrative, rationalistic, normalising concern to manage”.²⁵ I think this picture is a good one — to a point. It presents us with the penal system torn between Durkheimian and Weberian influences — a kind of ongoing dilemma which helps to explain both the

24 See Pratt, above n14.

25 Above n7 at 183–4.

failure and limits of penal reform. And yet I have certain reservations about this picture. It means, for example, that prison life is stylized in the following way: "prison officials, in so far as they are being professional, tend to suspend moral judgement and treat prisoners in purely neutral terms".²⁶ Maybe this is true of many prison governors — I doubt if it is true of the work and views of all prison officers. Indeed, it is as if Garland's picture and the book itself misses another dimension — what we might call the phenomenology of the punishment experience. Here, I have in mind the various literatures on how, for example, probation officers go about "making sense" of their job — the way judgements are made between good and bad families, the selectivity of information in report writing and so on;²⁷ or the way in which prison officers can subvert penal policy and indeed resort to violence and intimidation;²⁸ or the way in which prison biographies can show the resistance of prisoners to penal power.²⁹ Such literatures add an important dimension to that image of penal policy noted above — indeed, they help to clarify it for us in important ways. As such, this would seem to be another important absence from the book.

However, I do not wish to exaggerate my critique. Overall, I think Garland's work constitutes a remarkable and outstanding achievement. What it offers us is the opportunity to take the study of punishment out of that very narrow and restricting focus that it has been subjected to in much of academia — to take it beyond studies of its aims and objectives, studies of what punishment ought to be and instead to look at its significance and reality; to explain the form it takes rather than just taking this for granted. This means that we have to bring social theory to the study of punishment. In this sense, the book is likely to be just as important to the study of punishment as, say, *The New Criminology*³⁰ was to the study of crime: and hopefully it will have the same impact.

John Pratt

Department of Criminology, Victoria University of Wellington

26 Id at 183.

27 Cicourel, A, *The Social Organization of Juvenile Justice* (1968) remains the classic text in my opinion.

28 See, for example, Scraton, P, Sim, J and Cashmore, E, *Prisons Under Protest* (1991).

29 For example Boyle, J, *A Sense of Freedom* (1978).

30 Taylor, I, Walton, P and Young, J, *The New Criminology* (1973).