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# Historicizing Contrasts in Tolerance

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David Downes' *Contrasts in Tolerance*<sup>1</sup> is rightly regarded as a landmark in criminal justice scholarship. While its comparative analysis of post-war penal policy in England and Wales and The Netherlands set new standards for macro-level studies of the political economy in which criminal justice systems are embedded, its substantive theses about the conditions under which reductive policies can be politically feasible and practically effective had implications for penal policy well beyond the countries which it examined. Today, in the context of rapidly rising imprisonment rates and a depressing sense of their political inevitability, Downes' insights are yet more relevant—and his message more poignant—to British criminologists. The relevance becomes yet more apparent when we look across the Atlantic to the United States, an avowedly civilized society which nonetheless seems to be able to tolerate—indeed positively to demand—a penal system of staggering scale, cost, and inhumanity. Even in the Netherlands, the conditions which sustained the relatively tolerant penal culture which Downes, charted appear to have been eroded.

Urgent questions therefore occupy the agenda of contemporary comparative criminal justice scholarship. Are we

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<sup>1</sup> David Downes, *Contrasts in Tolerance* (Oxford: Clarendon Press, 1988).

witnessing, as Garland might be taken to suggest, a general move towards a 'culture of control',<sup>2</sup> in which a combination of repressive and managerial criminal justice strategies are becoming increasingly salient to governments' ability to present themselves as effective and, where relevant, electable? If so, can this be explained in terms of the globalization of the world economy, accompanying changes in demographic, employment, and family structure<sup>3</sup> and a consequent diminution in nation states' power to control their increasingly interdependent economies, leading to a greater resort to criminal justice policy as a tool of social governance? Additionally or alternatively, is globalization having an impact in terms of increased communication across national systems, with consequently greater co-ordination of policy and transfer of ideas across space? Or do national differences remain key to explaining the dynamics of criminal justice policy?<sup>4</sup> Such questions can only be approached in terms of comparative method. Yet, seventeen years on, *Contrasts in Tolerance* stands not only as a landmark but also as a somewhat lonely beacon in the terrain of comparative macro-level studies of criminal justice.<sup>5</sup> As Michael

<sup>2</sup> David Garland, *The Culture of Control*, (New York: Oxford University Press, 2001); see also David Garland (ed.), *Mass Imprisonment in the United States: Social Causes and Consequences* (London, Sage, 2001); Jock Young, *The Exclusive Society* (London: Sage, 1999).

<sup>3</sup> See in more detail Garland, *The Culture of Control* (n. 2 above), ch. 4.

<sup>4</sup> For thoughtful analysis of these questions, see Tim Newburn and Richard Sparks (eds.), *Criminal Justice and Political Cultures* (Cullompton: Willan Publishing, 2004). Many of the essays in this collection are trained on questions of policy transfer in relatively specific areas rather than on the macro-questions to which I am directing attention in this essay. Several, however, make important points about comparative methods more generally: see in particular Newburn and Sparks, 'Criminal justice and Political Cultures' pp. 1–13; Dario Melossi, 'The Cultural Embeddedness of Social Control', pp. 80–103; John Muncie, 'Globalisation and Multi-modal Governance' pp. 152–77. See also David Nelken, 'Comparing Criminal Justice', in Mike Maguire, Rod Morgan and Robert Reiner (eds.), *The Oxford Handbook of Criminology* (3rd edn, Oxford: Oxford University Press, 2002) p. 175.

<sup>5</sup> For other relatively lonely beacons, see Mirjan Damaska, *The Faces of Justice and State Authority* (New Haven: Yale University Press, 1986); Andrew Rutherford, *Prisons and the Process of Justice* (London: Heinemann 1984); Paul Chevigny, 'The Populism of Fear: Politics of Crime in the Americas' (2003) *5 Punishment and Society* 77.

Tonry noted in 2001,<sup>6</sup> notwithstanding the existence of a great deal of empirical evidence and of a general acknowledgement of the need for sustained comparative research, the field remains patchily, even sparsely, populated. In the first chapter of his book, Downes offered a thoughtful analysis of the reasons underlying the dearth of comparative research. Some of them had to do with the relative isolation of criminology as a discipline and, in genres effecting a rapprochement with mainstream sociology, its association with methods such as interactionism which trained their focus on the details of local knowledge in particular spheres.<sup>7</sup> Others related to the dynamics of the contemporary academy and the costs of producing in-depth, large-scale comparative studies—particularly those with a qualitative as well as a quantitative dimension.<sup>8</sup> Unfortunately, both in Britain and elsewhere, these dynamics have become yet more powerful in the intervening years, with the pressure to publish on a regular basis acting as a serious disincentive to scholars wishing to undertake large-scale, long-term of projects of the kind necessary for serious comparative research.

In explaining the paucity of sustained comparative research, one might also cite the influence of a certain scepticism, in both postmodern scholarship and mainstream sociology, about the appropriateness of ‘grand’ theory in social research: a tendency to celebrate particularity and contingency and to castigate macro-theoretical perspectives, from Marxism through to methodologically individualistic rational choice theory, for producing obfuscating generalizations. In a classic instance of the baby being jettisoned along with the bathwater, these trends of theoretical scepticism have contributed to the relative dearth of just the sorts of mid-range, speculative comparative studies which might help us to explain the dynamics of contemporary criminal justice policy and to relocate criminal justice scholarship within the overall domain of political economy where, as Downes rightly argued in 1988, it belongs. Even Garland’s

<sup>6</sup> Michael Tonry, ‘Symbol, Substance and Severity in Western Penal Policies’, 3 (2001) *Punishment and Society* 517–36 at 530–1.

<sup>7</sup> *Contrasts in Tolerance* (n. 1 above), pp. 4–5.

<sup>8</sup> The limits of linguistic competence, too, have an impact, not least in the bias towards British/American/Australian comparisons in the literature in English.

influential contribution,<sup>9</sup> though refreshingly free from any inhibition about launching large-scale hypotheses, shares in the prevailing non-comparative scholarly culture, and in doing so risks elevating an explanatory framework largely informed by the specificities of the US situation to the status of a general theory of penal dynamics in the modern world.<sup>10</sup> Properly understood, we must regard Garland's thesis as a provocation to comparative research—indeed as a powerful starting point for such research—rather than as a completed project in itself.

While speculative, macro-level comparative criminal justice scholarship remains relatively rare, there has, however, been an explosion of interest and publishing in another, related field: that of long-range historical studies of the development of criminal justice systems in a number of modern societies. At first sight, this is surprising: after all, one might have thought that, given its time-consuming nature, the institutional imperatives just discussed might have inhibited historical as much as comparative work. In fact, however, historical criminal justice studies are flourishing. This is perhaps to be explained by the somewhat more tractable nature of historical data as an object of research: working in archives is laborious but, particularly from the nineteenth century on, sources are predictably available and may not pose the sort of geographical and linguistic challenge that confronts the scholar keen to address two or more systems. Probably more important is the secure establishment of history as a discipline: indeed, the historical work on criminal justice has come as much from historians as from legal scholars and sociologists.<sup>11</sup> Another factor has almost certainly been the influence of Michel Foucault's work, and in particular of his

<sup>9</sup> *The Culture of Control* (n. 2 above); cf. Young's *The Exclusive Society* (n. 2 above), a book which is more sensitive to comparative dynamics.

<sup>10</sup> See Lucia Zedner, 'Dangers of Dystopia' (2002) *Oxford Journal of Legal Studies* 341–66; see also James Q. Whitman, *Harsh Justice* (Oxford: Oxford University Press, 2003) pp. 203–5.

<sup>11</sup> See for example John Beattie, *Crime and the Courts in England 1660–1800* (Princeton: Princeton University Press, 1986); *Policing and Punishment in London, 1660–1800* (Oxford: Oxford University Press, 2001); Martin Wiener, *Reconstructing the Criminal* (Cambridge: Cambridge University Press, 1991); *Men of Blood* (Oxford: Oxford University Press 2004); Peter King, *Crime, Justice and Discretion in England 1740–1820*

meditation on the emergence of the carceral system in *Discipline and Punish*.<sup>12</sup> This is somewhat ironic, given that Foucault was associated with poststructuralist theory, was himself a critic of 'grand' theories purporting to offer general 'Truths', and was, as Whitman has argued, curiously blind to the comparative dimensions of his thesis about a movement from punishment of the body to punishment of the soul.<sup>13</sup> Yet Foucault's blend of historical detail with bold, even sweeping hypotheses lent confidence, energy, and intellectual excitement to the project of analysing the history of social institutions, and arguably had its effect even on those most critical of his method and approach.<sup>14</sup> He produced a distinctive blend of history and social theory which has without doubt both invigorated the discipline and liberated it to some extent from the tendency to become embedded in detail to the point where it is difficult to discern the wood constituted by the trees: a tendency which it shares, of course, with some genres of comparative scholarship.<sup>15</sup>

In this essay, I want to examine two recent contributions to this flourishing debate about the history of criminal justice in modern societies so as to develop some ideas about how it can contribute to the structured, macro-level understanding which comparative studies also promise. Focusing on

(Oxford: Oxford University Press, 2000); though, as we shall see, legal scholars like John Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003); Markus Dirk Dubber, *The Police Power* (New York: Columbia University Press, 2005); Lindsay Farmer, *Criminal Law, Tradition and Legal Order* (Cambridge: Cambridge University Press, 1997); and James Q. Whitman, *Harsh Justice* (Oxford: Oxford University Press, 2003), and sociologists such as David Garland, *Punishment and Welfare* (Aldershot: Gower, 1985) have also made a substantial contribution.

<sup>12</sup> Transl. A. Sheridan, (Harmondsworth: Penguin, 1977).

<sup>13</sup> *Harsh Justice* (n. 10 above), p. 5.

<sup>14</sup> See for example Whitman's swingeing critique: *Harsh Justice* (n. 10 above), p. 98ff. Whitman castigates Foucault both for his lack of comparative perspective and for his deployment of an obfuscatingly overbroad concept of 'modernity'.

<sup>15</sup> For a thoughtful discussion of the pitfalls of comparative research and a plea for an adequately theorized comparative law, see Pierre Legrand, 'How to compare now' (1996) 16 *Legal Studies* 232; 'Comparative Legal Studies and Commitment to Theory' (1995) 58 *Modern Law Review* 262; and Lucia Zedner, 'In Pursuit of the Vernacular: Comparing Law and Order Discourse in Britain and Germany' (1995) 4 *Social and Legal Studies* 517–35.

James Q. Whitman's *Harsh Justice* and Markus Dirk Dubber's *The Police Power*, I shall suggest that historical studies can usefully complement comparative research, can put questions on the agenda of comparative studies, and can fulfil some of the same explanatory and policy-relevant functions as comparative scholarship. When able to avoid getting too preoccupied by the fly's eye perspective invited by so much exotic detail, and when bold enough to work with large-scale hypotheses at the level of social theory, both comparativists and historians, I shall suggest, can provide an illuminating perspective—that of territorial or temporal distance—on the 'local knowledge' garnered by most criminal justice research, in just the way exemplified by Downes' classic study.

### ***Harsh Justice: Socio-political Roots of Contrasts in Tolerance?***

A work rich in scholarly detail and wide in analytical sweep, the main question and explanatory thesis of James Q. Whitman's *Harsh Justice* may nevertheless be simply stated. At the start of the twenty-first century, the United States stands not only as the world's one super-power but also as a country with a long democratic tradition, and one which prides itself on its robust constitutional culture and respect for civil rights. Yet its criminal justice system is of the sort which we should expect to find not in one of the world's great democracies but rather in one of the countries whose repressive regimes the United States so loudly decries (if unevenly acts against) in its foreign policy. In quantitative and in qualitative terms, punishment in the United States amounts to harsh justice indeed. Both the record and ever-rising prison population and the uneven distribution of the burdens of the system are striking, with the proportion of young black males now incarcerated inviting functional comparison with the institution of slavery.<sup>16</sup> Moreover, the conditions of life in many

<sup>16</sup> See Whitman, *Harsh Justice* (n. 10 above), p. 3, ch. 2; Garland, *The Culture of Control* (n. 2 above), chs. 5 and 6, pp. 208–9; Jerome Bruner, 'Do Not Pass Go' (review of Garland) (2003) 50 *New York Review of Books* 29 September; Marcellus Andrews, 'Punishment, Markets, and the American Model: an Essay on a New American Dilemma' in Seán McConville (ed.), *The Use of Punishment* (Collompton: Willan Publishing, 2003) pp. 116–48.

US prisons are staggeringly harsh: overcrowding is widespread, rape and other forms of violence endemic, and constructive prison regimes rare.<sup>17</sup> A glimpse of the usually closed world of prison life, and of the inhumanity with which the United States regards it as appropriate to treat even unconvicted carceral inmates, was recently to be had on the world's television screens with the transmission of images of detainees—shackled, bound, shuffling—at the Guantánamo Camp Delta in Cuba.

How, Whitman asks, has the United States, with its image of itself so strongly bound up with the notion of progress, civilization, and humanity, ended up with one of the world's harshest and most degrading criminal justice systems? The answer, he suggests, is to be found in social history, and in particular in a comparison between the long-range development of the criminal justice systems in European countries such as France and Germany and in the United States. To paint with very broad brush-strokes, his explanation is as follows: before the great movements of Enlightenment-inspired reform in the eighteenth and early nineteenth centuries, the criminal justice systems of the continent of Europe, like other social institutions, were inherently status-based. The bulk of punishment being carried out against those of low social status, and being orientated to their further degradation within an intensely hierarchical social structure, many punishments—think for example of the range of corporal punishments which formed the core of the penal repertoire—were vividly, and deliberately, humiliating. Moreover, there was a clear and elaborate set of distinctions between high- and low-status penalties. By today's standards, of course, punishments for those of higher social status were also brutal. The key point, however, is that there was a distinction, and that punishment was regarded as an essentially, and justifiably, degrading phenomenon.

But with the decisive turn against the bloody *ancien regime* associated with modernization, codification, and the political culture of the Rechtsstaat, there was a decisive turn away from these degrading forms of punishment, as there also was from

<sup>17</sup> For an eloquent—and horrifying—literary depiction of life in a US jail, see Tom Wolfe, *A Man in Full* (Jonathon Cape: London, 1998).

practices such as torture. Indeed, aiming for dignity in punishment and rejecting the old practices of degradation became one of the self-conscious marks of the new civilization. The trajectory, therefore, was a gradual levelling up: a generalization of the high-status, more respectful and humane forms of punishment. Through many twists and turns of history, the association of degradation in punishment with an older, uncivilized model of society now decisively rejected, gave birth to and sustained, in both France and Germany, a relatively mild penal system. As Liora Lazarus has shown in relation to Germany, it also generated a penal system which is regarded as strongly accountable to the courts for reaching constitutionally and otherwise appropriate standards of respect and treatment: the *Rechtsstaat* implies that state coercion must have constitutional justification.<sup>18</sup>

In the United States, by contrast, there was never a revolutionary moment in which a key part of the self-conception of the new order was a rejection of an older, indigenous, status-based society with its implication of appropriate degradation in punishment. This was for the simple reason that no such historical experience existed to be rejected. There was, of course, the institution of slavery. But this lasted well into the late modern period, and indeed cast its own shadow on the development of US penal practice.<sup>19</sup> In the early context of a society of settlers distributed across a huge space, we might further suggest that the imperatives of social order favoured severity in punishment and, moreover, punishment orientated primarily to the exclusion of the deviant rather than to social reintegration. This is not, of course, to argue that this path is an inevitable one for newly founded societies located in a large and perhaps hostile terrain. As John Braithwaite has argued, the Australian experience was

<sup>18</sup> For an excellent description and analysis of these features of the contemporary German prison system, see Liora Lazarus, *Contrasting Prisoners' Rights* (Oxford: Oxford University Press, 2004). In what follows, I shall concentrate on Germany rather than France as a comparison point, both because of my greater familiarity with the German system, and because it seems arguable that the French system has developed along significantly different lines, having to do with the distinctive quality of the highly centralized French state.

<sup>19</sup> See Whitman, *Harsh Justice* (n. 10 above), pp. 11, 173–7, 198–9; for a further analysis of the cultural and historical roots of American punitiveness, see Dario Melossi, 'The Cultural Embeddedness of Social Control' (n. 4 above).

different, with the experience of mutual dependence fostering a culture of 'mateship' which, along with economic imperatives in a very sparsely populated country, favoured—at least for the settlers—inclusionary over exclusionary dynamics in mechanisms of social control.<sup>20</sup> In America, by contrast, the specific conditions—notably the existence of a substantial, formally excluded population of slaves, in stark contrast to the Australian trajectory of gradual socio-political inclusion of convicts from a relatively early stage—favoured the development of a harsh, exclusionary, and degrading penal system.

For Whitman, however, it is the absence of a rejected local history of pre-modern, status-based hierarchy which implies the absence of what in Europe was a crucial dynamic in shaping the move towards a humane and legally accountable penal system. Though defining itself in opposition to the hierarchical societies of Europe and strongly attached to status-egalitarianism, the new America opted gradually for a levelling down of punishment, generalizing low- rather than high-status penalties. The difference between the two families of systems is vividly symbolized in the generalization of beheading and of hanging as the modes of execution in the criminal justice systems of Europe and of Britain and the United States, respectively.

This is not the place for a full analysis or critique of Whitman's thesis. But certainly, if we add in the British case,<sup>21</sup> questions may be raised about the weight which he places on what we may call the 'degradation hypothesis'. In Britain, after all, there was if not a decisive revolutionary moment at least a substantial rejection, towards the end of the eighteenth century, of the harsher features of the 'bloody code', with the gradual reforms from then through the early nineteenth century oriented

<sup>20</sup> Braithwaite, 'Crime in a Convict Republic' (2001) 64 *Modern Law Review* 11.

<sup>21</sup> It should be made clear that Whitman does not purport to offer a general theory of penal harshness and in particular does not make any claim to explain the British case, which arguably lies outside the four corners of his explanatory hypothesis because, unlike France, Germany, and the United States, it did not experience any form of political revolution in the eighteenth or nineteenth centuries. It seems fair, however, to understand him as making a general argument that traditions of social hierarchy have an impact on practices of punishment, and to this extent to evaluate his thesis in relation to other systems.

to goals not dissimilar from those of the French or German systems. While formal codification of criminal law was never achieved (except in relation to Britain's colonies . . .), the overt violence of corporal penalties and, eventually, of public hanging was gradually rejected, while the large and unaccountable discretion inherent in the *ancien regime*, along with the harshness of its penalties and the wide scope for royal prerogatives of pardon and mercy, were gradually rationalized in a system orientated more firmly to predictability, certainty, formal justice, and the rule of law. Though certainly not motivated primarily by an ideal of respect for persons, even the austere prison systems of the early Victorian era were informed by an essentially humane view of prisoners as capable of reshaping their characters within a penal environment appropriately calibrated towards repentance and reform.<sup>22</sup> Doubtless this had to do both with the political movement towards a more democratic governmental structure, and with broad cultural changes in mentality and sensibility which, in Britain as in the rest of Europe, decisively affected factors such as the attitude to violence.<sup>23</sup>

Yet, despite these analogies between British and continental political history, Britain's criminal justice system today appears to be far less sensitive than, say, that of Germany to the need to ensure humanity in punishment. Indeed, in terms of indices like imprisonment rates, conditions of imprisonment, legal redress available to prisoners, and salience of criminal justice policy to politics, one might say that the British system looks more like its American than its German cousin, or at least constitutes a hybrid case. This implies that the degradation hypothesis is not the only explanatory factor which is needed to produce an adequate

<sup>22</sup> See Martin Wiener, *Reconstructing the Criminal* (Cambridge: Cambridge University Press, 1991). Such humanitarian instincts also shaped reform debates in early nineteenth-century America, with the British prison regimes themselves influenced by the American example: see Michael Ignatieff, *A Just Measure of Pain* (Harmondsworth: Penguin, 1989); Norval Morris and David J. Rothman, *The Oxford History of the Prison* (New York: Oxford University Press, 1998).

<sup>23</sup> See Norbert Elias, *The Civilising Process*, vols. I and II (Oxford: Blackwell Publishing 1978, 1982; first published 1939); V. A. C. Gatrell, *The Hanging Tree* (Oxford: Oxford University Press, 1994); Martin Wiener, *Men of Blood* (Cambridge: Cambridge University Press, 2004).

account of contrasts in penal severity across modern systems at relatively similar levels of economic development.

The degradation thesis is not, however, the only explanatory factor in Whitman's account. Alongside it sits an argument about the distinction between 'weak' and 'strong' states. As Whitman notes, Durkheim's prediction that the development of modernity and in particular the contractualization of social relations towards a 'horizontal' social culture would lead to mildness in punishment is decisively disproved by the American case.<sup>24</sup> Rather, curiously, Americans' attachment to status egalitarianism and their general suspicion of state power appear to have conduced to harshness in punishment. The German recognition of the strong state's legitimate right to proscribe a wide range of forms of conduct is balanced by an accompanying recognition of the state's right to exercise its prerogative of mercy. In the United States, by contrast, any generalized prerogative of clemency *de haut en bas* would be unthinkable: it is entirely inconsistent with the status egalitarian and minimal state mentality. It is significant for this aspect of Whitman's argument that the nineteenth century reforms in Britain and America, but not in Europe, involved a rejection of the prerogative of mercy other than in exceptional cases.<sup>25</sup> The rationale for criminal punishment, therefore, resides not in any sovereign power of the state, but rather in the inherent evil of crime—an attitude which itself conduces to a levelling up of harshness.

Whitman's dual thesis can, I would argue, shed light on some of the contrasts between England and the Netherlands identified and analysed by Downes. For he gives us an insight of the first importance. This is that contemporary differences between the penal systems of relatively similar societies may have long historical roots: roots which, in the light of institutional path-dependence, help to explain the persistence of contrasts even amid an increasingly globalized and intensely economically interdependent world. There is no particular reason to think,

<sup>24</sup> *Harsh Justice* (n. 10 above), pp. 194–9.

<sup>25</sup> In the United States, as in the United Kingdom, certain powers of clemency have survived, but they tend to be regarded with suspicion. A recent example would be Bill Clinton's use of the presidential pardon on leaving office, which attracted a great deal of criticism.

*pace* many criminal justice scholars,<sup>26</sup> that globalization, communication or interdependence imply policy convergence. I do, however, want to suggest that Whitman's argument requires some supplementation. Specifically, I want to suggest that the degradation thesis and a modified version of the strong/weak state thesis are most illuminating when located within a more differentiated comparison rooted in an analysis of political economy—a field in which comparative studies are flourishing.

In *Contrasts in Tolerance*, Downes was rightly cautious about making sweeping claims for the power of an intangible 'culture of tolerance' in the Netherlands, while acknowledging that a tolerant and inclusionary attitude to the treatment of crime among powerful elites had been an important factor in sustaining moderation in penal policy.<sup>27</sup> The Dutch political elite's support for moderation and humanity was, in Downes' view, itself sustained by the complex socio-economic structure of 'pillarization', in which complementary 'columns' 'of denominationalism . . . guaranteed social order to a high degree on the basis of informal social controls'.<sup>28</sup> The Netherlands' structurally pillarized society exhibited a high degree of group-based stratification: yet it was premised on a generalized norm of incorporation and mutual respect which implied the tolerant, parsimonious and civilized penal system, as well as the tight degree of multi-agency co-ordination and state steering through the prosecution process, which Downes charted. With the gradual breakdown of pillarization, the dynamics which sustained parsimony in the scale and scope of punishment began to be eroded: as the power of informal social controls fell, so the demand for formal controls rose. But, crucially, Downes saw no sign that the demand for an increase in formal social controls was accompanied by any erosion of the other dimension of tolerance: that is, the belief that the quality of punishment

<sup>26</sup> See, for example, Michael Tonry, 'Symbol, Substance and Severity in Western Penal Policies' (n. 6 above), pp. 527–31; Tim Newburn and Richard Sparks, 'Criminal Justice and Political Cultures' (n. 4 above).

<sup>27</sup> On the dangers of confounding variables and explanatory concepts in invoking ideas such as 'culture' see David Nelken, 'Disclosing/Invoking Legal Culture' (1995) 4 *Social and Legal Studies* 435–52; see also Nelken (ed.), *Comparing Legal Cultures* (Aldershot: Dartmouth, 1997).

<sup>28</sup> *Contrasts in Tolerance* (n. 1 above), p. 192.

should be humane, respectful and consistent with its subjects' status as members of the polity. While in Britain, the analogous pressures to expand the scale of punishment had led inexorably to an increase in inhumanity via overcrowded prisons which became dumping grounds for the socially excluded, in Downes' analysis, the Dutch demand for expansion in punishment had issued in a number of well-co-ordinated attempts to pre-empt any such outcome through decisive policy measures.<sup>29</sup>

What explains the difference? Here a blend of Whitman's degradation hypothesis and of Downes' interpretation may usefully be combined with the insights of recent political-economic analysis of comparative institutional advantage. In the Netherlands, the political economy depended on the stable integration of all social groups, albeit via a pillarized social structure: it amounted, in short, to what has been termed by Hall and Soskice a 'co-ordinated market economy'.<sup>30</sup> Such an economy, which functions in terms primarily of long-term relationships and stable structures of investment, not least in education and training, and which incorporates a wide range of social groups and institutions into a highly co-ordinated governmental structure, has strong reason to opt for a relatively inclusionary criminal justice system. It is a system which is premised on incorporation, and hence on the need to reintegrate offenders into society and economy.<sup>31</sup> Such a system is structurally less likely to opt for degradation in punishment. Britain, by contrast, falls into Hall and Soskice's model of a 'liberal market economy'. Such economies—of which the purest form, significantly for any argument about criminal justice, is the United States—are typically more individualistic in structure, less interventionist in regulatory stance and depend far less strongly on the sorts of co-ordinating institutions which are needed to sustain long-term economic and social relations. In these economies, flexibility and innovation,

<sup>29</sup> *ibid.*, pp. 201–6.

<sup>30</sup> Peter A. Hall and David Soskice 'An Introduction to the Varieties of Capitalism' in Hall and Soskice (eds.), *Varieties of Capitalism* (Oxford: Oxford University Press, 2003) pp. 1–68.

<sup>31</sup> For an analysis of the impact of these dynamics on German criminal justice, see Nicola Lacey and Lucia Zedner, 'Discourses of Community in Criminal Justice' (1995) 22 *Journal of Law and Society* 93–113.

rather than stability and investment, form the backbone of comparative institutional advantage. It follows that, particularly under conditions of surplus unskilled labour, the costs of a harsh, exclusionary, criminal justice system are less than they would be in a co-ordinated market economy.

My suggestion is that the liberal/co-ordinated market economy distinction may be a more powerful analytical tool than the (undoubtedly overlapping) weak/strong state distinction. This is for two reasons. First, the strong/weak dichotomy may be misleading if applied beyond the rather specific context within which Whitman deploys it. For example, in terms of one of Whitman's key criteria of 'strength'—relative autonomy in policy-making and implementation—both the United Kingdom and, though to a lesser extent the United States,<sup>32</sup> are in some respects strong states. This is because, under certain electoral contingencies (and particularly in the simpler parliamentary structure of the United Kingdom with its strong form of party discipline), the dominance of the executive is such as to allow it to push through its policies in the face of both popular and other-party opposition. Second, the liberal/co-ordinated market economy distinction has an analytic reach into a wider range of interrelated political and economic institutions which characterize particular national systems and which have their impact on criminal justice policy.

Putting these two points together, we could take just one hypothesis which would be susceptible of—and worthwhile—testing within this model. There is an association between co-ordinated market economies and proportionally representative electoral systems and between liberal market economies and first-past-the-post, winner-takes-all systems—a difference which may itself feed into the relative 'strength' of different kinds of political economy under varying external conditions.<sup>33</sup> To put it crudely, the 'strength' (in the sense of policy-making autonomy) of co-ordinated market economies is rather regularly constrained by the need to negotiate with groups incorporated in the governmental process. But this consensus-building dynamic

<sup>32</sup> Its particular structure makes the United States a 'strong' state in relation to foreign but not domestic policy.

<sup>33</sup> See Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in 36 Countries* (New Haven: Yale University Press, 1999).

may make them 'stronger' in the sense of less heteronymous in the light of swings of popular opinion. While clear winners of first-past-the-post elections in liberal market economies may feel relatively unconstrained by popular opinion early on in their terms, their unmediated accountability at the ballot box will make them highly sensitive to public opinion as elections loom. What is more, their increasing dependence on the approval of a large number of 'floating' median voters, sufficiently affluent to regard crime as a threat to their wellbeing, may feed into the political salience of criminal justice.<sup>34</sup> Under the sorts of economic and cultural conditions charted by Garland, therefore, it may be that there is a further association between the politicization of criminal justice and the impact of penal populism in liberal market economies such as the United States, with decisive implications for the harshness of punishment.

In Britain, notwithstanding a political history that might lead us to expect Whitman's degradation hypothesis to have some explanatory power, the dynamics of a liberal market economy have progressively eroded the anti-degradation sensibility. We can see, one might argue, the force of the anti-degradation sensibility at work in the early nineteenth century penal reform movements, as in the penal welfare movement of the late nineteenth and early twentieth centuries; in the borstal system, in the development of probation, and in much else besides.<sup>35</sup> (It is significant—and unsettling to Whitman's degradation thesis—that we can also identify American analogues to these instances of humanitarian penal reformism.) But the influence of the dynamics of a liberal market economy have increased markedly over the past twenty-five years, as many of the attitudes and

<sup>34</sup> Cf. Chevigny, 'The Populism of Fear' (n. 5 above); Bert Useem, Raymond V. Liedka and Anne Morrison Piehl, 'Popular Support for the Prison Build-up' (2003) 5 *Punishment and Society* 5; Mick Ryan, *Penal Policy and Political Culture in England and Wales* (Winchester: Waterside Press, 2003); J. Pratt, D. Brown, M. Brown, S. Hallsworth and W. Morrison (eds.), *The New Punitiveness* (Cullompton: Willan, 2005).

<sup>35</sup> See David Garland, *Punishment and Welfare* (n. 11 above); Michael Ignatieff, *A Just Measure of Pain* (New York: Pantheon Books, 1978). As Whitman also acknowledges, the differences between the United States and the French and German systems have become much starker since the collapse of the welfarist rehabilitative consensus in the early 1970s: see *Harsh Justice* (n. 10 above), p. 193.

values which sustained the post-war welfare state settlement have come to be eroded by a more aggressively market-orientated culture.<sup>36</sup> This political culture is itself premised in part on the imperative of high performance amid increasing global economic competition, with the collapse of Fordist production regimes and the availability of cheap manufactured goods from countries like Singapore, South Korea and, more recently, China and India. The inevitable upshot is structural economic insecurity for low-skilled workers in advanced liberal market economies.<sup>37</sup> In a short-term economic culture, the bottom third of the work force risks become a socially as well as economically excluded group.<sup>38</sup>

It is therefore no surprise that during this period we have seen not only a large increase in the absolute and relative size of the harsher end of the British and American criminal justice systems, but also a weakening of political sensibilities in favour of human rights and decent conditions for prisoners. There comes a point, we might suggest, at which both the absolute situation of the disadvantaged and disparities of wealth between rich and poor—disparities which are markedly greater in liberal than in co-ordinated market economies—become so acute as to amount in themselves to a form of status distinction.<sup>39</sup> And this in turn dissolves Whitman's apparent paradox about the co-existence of degrading punishment with (formal) status egalitarianism in the contemporary United States. In the face of political-economic imperatives, the anti-degradation mentality is relatively weak. Whitman's degradation and strong state hypotheses, in short, need to be articulated with a theory of the structure of political economy: the power of anti-degradation sentiments is itself a function of their resonance and consistency with broader dynamics of socio-economic organization.

<sup>36</sup> See Robert Reiner, 'Beyond Risk: A Lament for Social Democratic Criminology', ch. 2 above.

<sup>37</sup> On the sociological implications of this economic transformation, see Richard Sennett, *The Corrosion of Character* (New York: Norton, 1998).

<sup>38</sup> See C. Hale, 'Economic Marginalisation and Social Exclusion', in C. Hale, K. Hayward, A. Wahidin and E. Wincup (eds.), *Criminology* (Oxford: Oxford University Press, 2005).

<sup>39</sup> On the criminological significance of relative deprivation, see Robert Reiner, 'Beyond Risk', ch. 2 above.

### ***The Police Power: Tracing Patriarchal Power in Modern Penal Mechanisms***

In Downes' characterization of the relatively tolerant nature of Dutch penality, as in Lazarus' analysis of the relatively humane contemporary German prison system, one important explanatory factor is the way in which penal practices sit within a broader legal framework which ensures the accountability of penal power to public and even constitutional standards. On the face of it, the existence of such a framework in a modern liberal democracy is hardly surprising. In such societies, with the exception of wartime or other emergency situations, penal power is the most coercive state apparatus, and it is taken as given that it calls for justification. Against a backcloth of respect for civil rights and formally equal membership of the polity, the infliction of criminal punishment has to be justified, one would assume, in terms of arguments which respect the interests of all.

Two main families of justification have dominated the field since the late eighteenth century. First there are deontological theories which emphasize the justice of punishment in terms of factors such as desert, often fleshed out in terms of the capacity of punishment to restore a moral equilibrium which has been upset by criminal conduct.<sup>40</sup> On the basis of some form of social contract generating reciprocal obligations of forbearance and respect, an offender may be seen as having taken an unfair advantage *vis-à-vis* fellow citizens: proportionate punishment is called for to wipe out the unfair advantage and to restore the normal relations of justice between citizens. On the basis of a robust requirement that offenders be proven to be truly responsible for their offences, such a theory claims to respect their autonomy and individual rights: indeed, on some versions of this theory, the offender is seen as having in some sense willed his or her own punishment.<sup>41</sup>

The second family of penal justifications is consequentialist.<sup>42</sup>

<sup>40</sup> Michael S. Moore, *Placing Blame* (Oxford: Clarendon Press, 1997).

<sup>41</sup> For a thoughtful critique of this genre of theory, see Stephen Paul Brown, 'Punishment and the Restoration of Rights' (2001) 3 *Punishment and Society* 485–500.

<sup>42</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789), ed. H. L. A. Hart and J. H. Burns (London: Methuen, 1982).

These theories argue that punishment, though *prima facie* an evil, may be justified by its contribution to the good of all in society through effects such as deterrence, incapacitation, rehabilitation, reparation, satisfaction of victims' grievances, prevention of resort to private vengeance, and even moral education. Consequentialist theories, too, claim to respect the autonomy of individuals in that each person's welfare is taken equally seriously. As is well known, however, the distributive implications of pure consequentialist theories are problematic from the point of view of a moral position strongly committed to the independent importance of justice, rights, or individual autonomy. They would justify, for example, the framing of an innocent person or a grossly disproportionate punishment wherever this would maximize overall social benefits. For this reason, pure consequentialism is relatively rarely defended today, and most penal philosophers—like designers of penal policy—seek to draw on the insights of both families of justification, blending an appreciation of the importance of framing punishment so as to pursue social benefits while constraining its distribution in terms of individual rights and autonomy through a general requirement of responsibility and/or in terms of an overarching political theory such as republicanism.<sup>43</sup>

The recognition that punishment must be justified might therefore be thought to lie at the heart of the self-conception of a liberal-democratic modern society. Yet, as the contrasts unearthed by Downes suggest, the urgency with which this need for justification is felt varies markedly across systems. The tolerance of and, indeed, positive public support for 'harsh justice' in the United States undoubtedly discloses a weaker popular disposition to question the state's exercise of its power to punish than is suggested by the nature of the Dutch public debate in the

<sup>43</sup> See for example H. L. A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968); John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1990); R. A. Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001); Nicola Lacey, *State Punishment* (London: Routledge, 1988); Andrew von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993).

mid-1980s about how to reform the criminal justice system in the light of newly emerging crime problems associated with drugs,<sup>44</sup> or by the elaborate system of German prisoners' rights described by Lazarus.<sup>45</sup> Yet, as Whitman acknowledges, this is on the face of it paradoxical, given the American disposition to be suspicious of state power. Nonetheless, given the increasing salience of criminal justice to electoral politics, and the force of electoral discipline on democratic governments,<sup>46</sup> it seems obvious that these contrasts in popular attitudes to punishment constitute an important explanatory variable in any attempt to understand the differences between contemporary penal systems in relatively similar societies.

In *The Police Power*, Markus Dubber advances an historical thesis which may be of relevance to our understanding of these differences. Like Whitman's, Dubber's argument plays out over a very large historical and spatial canvass, but has an essentially simple structure. Looking back even as far as the city states of classical Greece, Dubber argues, we can discern two markedly different forms of public power: political power and police power. Political power is that through which a society of equals governs itself. It is, in effect, a form of self-government; it takes place through law and is constrained by the demands of justice, formal equality, and so on. Police power, by contrast, derives from the power of the head of a family to govern the resources—animate and inanimate—within his household. It is hierarchical and essentially patriarchal power, discretionary and vaguely defined in its essence, a power of management over persons and things themselves not invested with rights or autonomy. Instrumental and preventative in temper, the police power is orientated to goals such as peace, welfare, efficient use of resources, and security.<sup>47</sup> This is not to say that police power is unconstrained: the patriarch is under an obligation to govern his household so as to maximize its welfare; hence feckless or malicious exercises of police power will be regarded as

<sup>44</sup> See *Contrasts in Tolerance* (n. 1 above), chs. 5 and 7.

<sup>45</sup> *Contrasting Prisoners' Rights* (n. 18 above).

<sup>46</sup> As I argued in the previous section, this discipline may be more stringent in the winner-takes-all electoral systems typical of liberal market economies.

<sup>47</sup> *The Police Power* (n. 11 above), ch. 5.

illegitimate.<sup>48</sup> But the nature of these constraints of fitness and prudence are markedly different from the criteria of legitimacy governing the exercise of genuinely political power.

Dubber traces the distinction between political and police power through the centuries and through a wide range of influential legal and philosophical tracts from Aristotle through to Locke, Rousseau, Blackstone, and Smith.<sup>49</sup> In England, the emergence of an increasingly powerful monarch, and the expanding reach of the King's Peace, gradually overlaid the police power of landowners with the overarching police power of the monarch. Within this emerging structure, the monarch constituted, as it were, the macro-householder in relation to whom all subjects, including the landowning micro-householders, were regarded as resources to be managed efficiently (and as beneficiaries of the monarch's paternalist obligations). The police power of the monarch lay alongside the political and legal structures which treat persons as formally equal—notably jury trials. Looking far back into the history of early modern England, provisions such as the Statute of Labourers, anti-vagrancy and gaming laws were, Dubber suggests, quintessentially manifestations of the police power rather than of self-government through law. While exquisite status distinctions marked the system at every level, even the main law of serious crimes—the law of felony—found its origins in outlawry, was rooted in the notion of a breach of the feudal nexus, existed primarily to protect the Lords (just as Treason existed to protect the monarch) and was trained primarily on those of low status—the non-householders.<sup>50</sup> Where restitutive or reparative measures were ineffective, the primary resort of the criminal process was explicitly degrading, typically physical, punishment. Such punishments were designed to enact on the subject's body the degradation which, notwithstanding trial by jury, his or her offence implied, without thereby permanently unfitting him for productive labour (hence the prevalence of whipping). Criminal justice and punishment were, on this view, primarily a

<sup>48</sup> *The Police Power* (n. 11 above), p. 42 ff and ch. 8.

<sup>49</sup> *The Police Power* (n. 11 above), Part I.

<sup>50</sup> *The Police Power* (n. 11 above), pp. 14–16, 19.

hierarchical means of managing a population and not an expression of self-governance within a community of equals.

There was always, therefore, an ambiguity about the status of criminal justice, which lay on the muddy border between political/legal and police power. With the gradual emergence of modern sensibilities and a vestigially democratic structure of government, the place of the police power, and its relationship with legal/constitutional/political power, became yet harder to rationalize within an overarching political theory. Imported—ironically but enthusiastically—to America by the Founding Fathers, the police power, Dubber argues, flourishes to this day in the United States. Yet it has never been settled within a constitutional or other legal framework which could generate the sorts of accountability consistent with the overall attitude to public power in a liberal-democratic polity. It would generally be taken as obvious that criminal justice power is legal power: the subjects of modern criminal law have in most systems a panoply of procedural rights, and criminal justice systems are increasingly subject to the overarching regulation of bills of rights enshrined in national constitutions or supra-national legal instruments such as the European Convention on Human Rights. But, Dubber argues, if we look at the substance of criminal law—what may be criminalized and how—we see, even in a country with as robust a constitutional culture as the United States, something approaching a vacuum in terms of accepted constraints. While the power to punish may be weakly constrained by standards such as the prohibition on cruel and unusual punishments, the power to criminalize remains all but unconstrained. This, he suggests, discloses strong traces of the police mentality which characterized much of the early, pre-modern criminal justice system, particularly that trained on the governance of the lower status members of society.

Despite some discussion of the origins of the concept of police in French thought and of the continental development of a ‘police science’ in the eighteenth century,<sup>51</sup> Dubber unfortunately does not pursue any sustained comparative analysis. But his argument may certainly be put to comparative use. For the purposes of explaining contemporary differences in attitudes to

<sup>51</sup> *The Police Power* (n. 11 above), ch. 4.

the proper constraints on penal power, the key point in his story comes with the emergence of modern democratic sentiments and political structures. This is a point at which, as we have seen, the tension between law and police becomes much harder to manage than within the older, comfortably status-based societies which preceded the modern era. My suggestion is that there may be an important difference here between modern societies. On the one hand we have societies such as those of continental Europe, whose modern constitutional settlement made explicit the distinction between police and law. These settlements aimed to domesticate the police power within a new political framework, while explicitly differentiating it from legal power. On the other hand, we have societies such as Britain and the United States, which absorbed the police power, unacknowledged, within the new legal power. In these societies, as Dubber suggests has been the case in the United States, the police power infuses the self-governing, autonomy-respecting aspects of criminal law with a managerial mentality in which the ends always justify the means. It is worth examining this distinction in some detail.

As Dubber notes, in many countries—including both Germany and the United States—the debate about whether the police power is an aspect of legal power or whether it is a separate branch of government continued right up to the twentieth century, with marked differences of opinion as to the implications of locating the police power within the criminal justice system.<sup>52</sup> In the United States, for example, Roscoe Pound was inclined to regard the police power's consequentialist orientation as appropriate to the tasks of rational modern governance. By contrast, jurists like Sayre regarded it as having a dangerous capacity to subvert the procedural safeguards and autonomy-respecting constraints of a truly legal order. In effect, Dubber suggests, the views of Pound have won the day: the police power flourishes at both state and federal levels, albeit rationalized in different ways.<sup>53</sup> At the federal level, it is disguised as an exercise of the right to regulate commerce; at the state level, the constitutional appropriateness of police power is acknowledged, yet the state courts have been slow to develop the sort of theory of

<sup>52</sup> *The Police Power* (n. 11 above), ch. 7.

<sup>53</sup> *The Police Power* (n. 11 above), ch. 6.

substantive due process which might effectively constrain its definition and exercise.<sup>54</sup>

In both Britain and the America, probably the most obvious manifestation of the police power is the existence of widespread regulatory offences in areas such as driving, health and safety, licensing, low-grade public disorder. These *mala prohibita*—many of them attracting strict liability<sup>55</sup>—are often regarded by criminal law scholars as an embarrassing exception to the normal principles governing the law of *mala in se* or ‘real crime’. They exist to promote the social welfare, and since their conviction does not imply the sort of stigma or the severe penalties attached to ‘real crimes’ such as murder or theft, the absence of a robust responsibility requirement and suspension of the procedural safeguards which purportedly characterize the criminal justice system are tolerated. Examine any treatise on criminal law, however, and you will find little about these numerous regulatory offences. Nor will a standard treatise give much space to troubling ‘exceptions’ to the ‘normal’ principles of criminal procedure such as anti-social behaviour orders,<sup>56</sup> which deploy a formally civil process to invoke a substantively criminalizing power. These absences reflect the difficulty of reconciling regulatory mechanisms with the predominant conception of criminal law as a quasi-moral normative system concerned with wrong-doing and culpability.<sup>57</sup> British and American criminal law therefore encompasses two markedly different sorts of

<sup>54</sup> Dubber himself begins to develop such a theory: see *The Police Power* (n. 11 above), ch. 9.

<sup>55</sup> i.e. liability without proof of fault in the sense of responsibility conditions such as intention, recklessness, negligence or knowledge.

<sup>56</sup> Crime and Disorder Act 1998; [www.crimereduction.gov.uk/asbos5.htm](http://www.crimereduction.gov.uk/asbos5.htm); see Tim Newburn, ‘Young People, Crime and Youth Justice’, in Mike Maguire, Rod Morgan and Robert Reiner (eds.), *The Oxford Handbook of Criminology* (Oxford: Oxford University Press) pp. 531–78 at pp. 563–4; and Ken Pease, ‘Crime Reduction’, in Maguire *et al.* pp. 947–79 at pp. 969–70.

<sup>57</sup> For further analysis and discussion, see Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law* (3rd edn, Cambridge: Cambridge University Press, 2003) and Nicola Lacey, ‘In Search of the Responsible Subject: History, Philosophy and Criminal Law Theory’ (2001) 64 *Modern Law Review* 350–71. And for a recent, explicit, example of the marginalization of regulatory offences, see Victor Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005) p. 16.

regulatory systems. But because this is rarely acknowledged, there has been little effort either to rationalize the quasi-moral and the morally neutral, instrumental forms of social regulation or—more importantly—to develop a proper account of the limits of the state’s regulatory power.

On the continent of Europe, however, this location of regulatory offences within the framework of criminal law ‘proper’ would be regarded as most unsatisfactory. Rather than sweeping the old police power within the modern framework of criminal justice, the modern governmental settlements of European codification of the early nineteenth century were inclined to separate out this form of social regulation within a discrete framework, leaving regulatory offences as a more visible and autonomous manifestation of state power. As Whitman puts it:

The strength of the bureaucratized European state also helps explain another crucial aspect of mildness in French and German punishment: the capacity of French and German law to define some forbidden acts as something less awful than ‘crimes’—as mere *contraventions* or *Ordnungswidrigkeiten*. When European jurists define these species of forbidden conduct, they are able to make use of terms which would trouble Americans. The justification for punishing *Ordnungswidrigkeiten*, according to standard texts, lies in the pure sovereign prerogative of the state . . . .

This, Whitman argues, has decisive implications for the severity of punishment:

[I]t is important to recognize what Europeans gain by pursuing this form of analysis. Because they are able to defer to state power, they are able to treat some offenses as merely forbidden, rather than as evil:—as *mala prohibita* rather than *mala in se*. The contrast with the United States is strong: our liberal, anti-statist tradition leads us to conclude that nothing may be forbidden by the state unless it is *evil* . . .<sup>58</sup>

And it is this association of crime with evil which has come to feed so intractably into other, political-economic dynamics favouring penal severity.

Doubtless we should not exaggerate the significance of this difference between the European and the British and American

<sup>58</sup> *Harsh Justice* (n. 10 above), p. 201 (both quotations).

systems. After all, explicitly administrative or regulatory power may be abused just as readily as criminal justice power. But there is nonetheless something important about the way in which the continental systems declined to sweep the old police power under the carpet of the modern criminal justice system: a recognition of the need for regulation in the name of social welfare, but equally a recognition that this is a different project from criminal justice and state punishment, calling for separate scrutiny and a different kind of justification. My suggestion is that this recognition of the distinctiveness of criminal justice and penal power may also be associated with a more robust attitude to the need for the state to justify its penal power, and for that penal power to be held to legal account, in countries like Germany and the Netherlands as compared with Britain and the United States. When combined with the political economy analysis sketched in the last section, this comparative legal framework may help us to understand the persisting differences between the German or Dutch and the British or American systems—as well as illuminating the dynamics which may be putting those long-standing differences under pressure.<sup>59</sup>

## Conclusion

Further contributions to the genre of comparative scholarship exemplified by David Downes' *Contrasts in Tolerance*,

<sup>59</sup> In this context it is interesting to note the outcome of the German elections (September 2005), in which the Christian Democrats were widely predicted to gain a substantial victory. In the event, their neo-liberal agenda of economic reform—which would, had it been thoroughly pursued, have attempted to move Germany away from the co-ordinated towards the liberal market economy structure—appears to have deprived them of decisive electoral success, with the German electorate resisting transition to flexible labour markets and the dismantling of social protections characteristic of the post-war political settlement. (Some of the same dynamics appear to have influenced the French electorate's negative assessment of the European Constitution.) If my analysis in this paper is correct, this electoral outcome has been a positive thing from the point of view of the survival of a relatively tolerant German criminal justice policy—at least in relation to those successfully incorporated into the economy.

How much success a Christian Democratic majority government would have had in dismantling the institutional features which sustain Germany's

I have argued, are urgently required. In purely intellectual terms, the challenge of understanding the relationship between criminalization and broader features of the cultural, political, and economic environment remains one of the most fascinating—and incompletely met—in the social sciences. More pragmatically, in an increasingly interdependent world, and one in which both technologies of communication and supra-state political structures militate to the transmission of policy initiatives across space, the task of understanding the conditions under which particular policies are likely to be effective is compelling indeed. Only comparative research located within a broader understanding of how particular political economies function has any hope of generating a robust answer to this question. I have further argued, however, that comparative research may need an historical dimension; and that recent research on the development of criminal justice systems over long periods of time may produce important insights for the comparativist.

It follows that the legitimacy of criminology or criminal justice studies as autonomous disciplines must be questioned. Since criminal justice systems—the articulation of offences, their interpretation, and application through a range of social practices, and the imposition of punishment—are embedded in broader cultural, political, and economic institutional structures, it makes little sense to study them in isolation. A future of dialogue and co-operation between criminologists, historians, political scientists, sociologists, psychologists, and others therefore promises more illumination than a future of splendid isolation for the criminal justice scholar. This may be obvious, but it is perhaps worth stating in a context in which public funding is rather readily available for short-term research into pressing ‘crime problems’, but less readily available for

co-ordinated market economy is debatable. What seems clear, however, is that it is easier to dismantle such institutions than to construct them. To this extent, I would suggest that ‘globalization’—primarily in the sense of economic exchange and interdependence—is likely to favour liberal over co-ordinated market economic structures. I therefore—regretfully—share Robert Reiner’s pessimistic prognosis for the future of social-democratic criminal justice policy (‘Beyond Risk’, ch. 2, above).

long-term, collaborative projects exploring broader and less immediately policy-relevant hypotheses.<sup>60</sup>

In this essay, I have simply pointed to a small number of hypotheses, generated by historical research, which would be susceptible of careful comparative investigation. The broad hypotheses of theoretically inclined contemporary criminologists provide a further provocation to, and starting point for, comparative and historical research. But without such research, their hypotheses cannot be tested in a meaningful way. This insight, as much as his substantive account of the differences between Dutch and English post-war penal policy, is a lasting, and significant, contribution of David Downes' *Contrasts in Tolerance* to criminal justice scholarship.

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<sup>60</sup> See Lucia Zedner, 'Useful Knowledge? Debating the Role of Criminology in Post-War Britain', in Lucia Zedner and Andrew Ashworth (eds.), *The Criminological Foundations of Penal Policy: Essays in Honour of Roger Hood* (Oxford: Clarendon Press, 2003).

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