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**Criminal Justice and Democratic Systems:
Inclusionary and Exclusionary Dynamics
in the Institutional Structure of Late Modern Societies**

by

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Abstract

It is generally agreed that the humanity, fairness and effectiveness with which a government manages its criminal justice system is a key index of the state of a democracy. But the constraints on realization of democratic values and aspirations in criminal justice are markedly variable. In the last two decades, in the wake of both increases in recorded crime and a cluster of cultural and economic changes, criminal justice policy in both Britain and the U.S. has become increasingly

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politicized: both the scale and intensity of criminalization, and the salience of criminal justice policy as an index of governments' competence, have developed in new and, to many commentators, worrying ways. These developments have been variously characterized as the birth of a "culture of control" and a tendency to "govern through crime"; as a turn towards the "exclusive society"; and in terms of the emergence of a managerial model which focuses on the risks to security presented by particular groups. In the U.S., we witness in particular the inexorable, and strikingly racially patterned, rise of the prison population, amid a ratcheting up of penal severity which seems unstoppable in the face of popular anxiety about crime. In the context of globalization, the general, and depressing, conclusion seems to be that, notwithstanding significant national differences, contemporary democracies are constrained to tread the same path of penal populism, albeit that their progress along it is variously advanced. A significant scaling down of levels of punishment and criminalization is regarded as politically impossible, the optimism of penal welfarism a thing, decisively, of the past.

This paper sets the nature and genesis of criminal justice policy in Britain and America within a comparative perspective, in order to make the case for thinking that, far from being invariable or inevitable, the rise of penal populism does not characterize all "late modern" democracies. Rather, certain features of social, political and economic organization favor or inhibit the maintenance of penal tolerance and humanity in punishment. I argue that, just as it is wrong to suppose that crime can be tackled in terms of criminal justice policy alone, it is equally erroneous to think that criminal justice policy is an autonomous area of governance. Rather, the possibilities and constraints under which governments develop and implement criminal justice policies are a function of not only perceived crime problems but also a cluster of institutional factors relating to political and economic systems. Notwithstanding a degree of convergence, so-called "globalization" has left many of the key differences among advanced democracies intact, and these may help to explain the striking differences in crime levels, penal severity and the capacity for penal tolerance in otherwise relatively similar societies. Only by understanding the institutional preconditions for a tolerant criminal justice system, I argue, can we think clearly about the possible options for reform within any one system.

The state of criminal justice - the scope and content of criminal law, the performance of criminal justice officials, public attitudes to crime, and the extent and intensity of the penal system - is often used as a broad index of how "civilized," "progressive," or indeed "truly democratic" a country is. A classic expression of this idea is that of Winston Churchill, who commented nearly a century ago that: "[T]he mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm, dispassionate recognition of the rights of the accused, and even of the convicted criminal, a constant heart-searching by all charged with the duty of punishment... these are the symbols which measure the stored-up strength of a nation and sign and proof of the living virtue in it" (1910). In a development which has been particularly marked since the emergence of a rhetorically powerful framework of international human rights, data about criminal justice systems are standardly used to draw presumptive conclusions of democratic legitimacy or illegitimacy. And, notwithstanding that "the mood and temper of the public" in many countries is, in relation to crime and punishment, anything but "calm and dispassionate," politicians today remain foremost among those willing to exploit the power of appeals to democracy and human rights in criticizing criminal justice policies. As I drafted an earlier version of this paper, British Lord Chancellor Lord Falconer, for example, was reported as describing Guantánamo Bay as a "shocking affront to the principles of democracy," and as arguing that "[d]emocracies can only survive where judges have the power to protect the rights of the individual."¹ Human rights organizations like Amnesty International and Liberty, as well as many journalists and other commentators, have also drawn broad conclusions about the state of American, British or other democracies from the condition of their criminal justice systems.² Key instances are recent commentaries on the huge expansion of the prison population in the U.S.A.³ and on the development of more extensive anti-terror laws in the UK.⁴

Of course, the contested meaning of the term "democracy" makes it all too easy for debates about the purported democratic credentials (or lack thereof) of a criminal justice system to become empty polemics, with the adjective "democratic" signifying (as it has unfortunately come to do in some recent foreign policy rhetoric) an undifferentiated term of approval rather than a conception providing normative benchmarks against which social practices may be assessed. This perhaps helps to explain why it has been politicians and pressure groups, rather than theorists of criminal justice, who have tended to frame the normative debate about criminal justice in terms of "democracy."⁵ With

¹See <http://www.guardian.co.uk/Guantanamo/story/> (September 13, 2006).

²For a recent contribution which also sets out from Churchill's comment, see Shami Chakrabarti, "Reflections on the Zahid Mubarek Case," *Community Care* (July 2006). As in the case of Guantánamo, such critique also embraces the subsumption of matters arguably the proper object of criminal justice within less procedurally robust arrangements.

³David Garland, *The Culture of Control* (Oxford University Press, 2001); James Q. Whitman, *Harsh Justice* (Oxford University Press, 2003).

⁴Conor Gearty, *Can Human Rights Survive?* (Cambridge University Press, 2006).

⁵See for example David Held, *Models of Democracy* (London: Polity Press, 1987); Carole Pateman, *Participation and Democratic Theory* (Cambridge University Press, 1970); Anne Phillips, *Democracy and Difference* (Cambridge: Polity Press, 1993) and *Engendering Democracy* (Cambridge: Polity Press, 1991). We should pause to note that, though it does not always appear as a qualifier to the

a few honorable exceptions,⁶ the burgeoning literature in normative criminal law and penal theory has been curiously impoverished in terms of explicit discussion of the relationship between criminal justice and democracy, rarely moving beyond relatively general discussion of the issues most strongly indicated by a wide range of versions of liberalism: the desirability of guaranteeing the rule of law and principle of legality, the presumption of innocence, the accountability of criminal justice officials and policymakers, respect for individual rights and freedoms, the avoidance of inhumane punishments within a legal or, perhaps preferably, constitutional or even international framework.⁷ As soon as discussion moves beyond these relatively abstract formulations, disagreement invariably ensues. There is, it seems, a consensus that there are indeed criteria for what counts as a criminal justice system which is genuinely “in keeping with a modern constitutional democracy”⁸ yet only a limited consensus about what those criteria might be.

In this paper, I am not going to engage in any general analysis of these normative issues. Rather, I want to focus on just one matter which, on almost any plausible view, seems central to the democratic aspirations of a criminal justice system. This is its capacity to respond effectively and even-handedly to the harms and rights violations represented by criminal conduct without resorting to measures which in effect negate the democratic membership and entitlements of offenders.⁹ Normatively, in other words, we might expect liberal-democratic criminal justice to aspire to be reintegrative and inclu-

term “democracy” or “democratic,” the recent literature in English is dominated by versions of, broadly speaking, liberalism. Here I would include analyses like that of Antony Duff which move some way in the direction of communitarianism, as well as the republican theory of John Braithwaite and Philip Pettit; John Braithwaite and Philip Pettit, *Not Just Deserts* (Oxford University Press, 1990); Antony Duff, *Trials and Punishments* (Cambridge University Press, 1986); *Punishment, Communication and Community* (Oxford University Press, 2001); Nicola Lacey, *State Punishment* (London: Routledge, 1988).

⁶For example Pablo de Greiff, ed., *Democracy and Punishment* Special Issue, *Buffalo Criminal Law Review* 5 (2002) : 321-600.

⁷To avoid becoming embroiled in a lengthy preface which would subvert my main purposes, I will set out from a broad definition of democracy as a set of values relating to ideal governance structures that are informed by a concern with the following matters (albeit in varying configurations): representation of, and responsiveness to, the will of citizens; direct or indirect participation of citizens in decision making; accountability of officials for proper conduct and effective delivery of policies in the public interest; adherence to the rule of law and respect for human rights. This broad conception implies the relevance of the evaluative benchmark of democratic values to non-state mechanisms of delivering social control. The significance of practices such as private security in corporate or community hands, mediation and restorative justice alongside state-delivered criminal justice now place these institutions at the core of any normative project concerned with the democratic credentials of social governance (see for example Les Johnston and Clifford Shearing, *Governing Security* [London: Routledge, 2003]). My main focus in this paper is on the state criminal justice system, but many of the issues which I raise would be equally relevant to the non-state diaspora of social control.

⁸Michael Cavadino and James Dignan, *Penal Systems: A Comparative Approach* (London: Sage, 2006), p.98.

⁹I use this formulation rather than the more elegant “citizenship” because I take it that a liberal-democratic framework would accord essentially the same entitlements to citizens and non-citizens in the criminal justice context.

sionary rather than stigmatizing and exclusionary. And here we encounter one of the most troubling empirical paradoxes of contemporary democratic criminal justice. For the fact is that, in many countries, criminal justice policy has been driven in an exclusionary direction with – perhaps even because of – popular, and hence literally democratic, support.

This mismatch between the apparent ideals of democratic criminal justice and the political dynamics of criminal justice in some societies raises a broader set of questions which I want to take as my general theme: what are the institutional preconditions for the realization of values such as penal moderation or inclusionary practices in criminal justice? Clearly, there is a connection between ideals and the development of institutions suitable to their delivery. But the linkage is far from straightforward: the long history of idealistic institutional reform is after all, littered with unintended consequences. This makes it especially regrettable that this second, institutional question has proved to be of relatively little interest to political philosophers (though there are of course some honorable exceptions, notably Jeremy Bentham).¹⁰ It is true, of course, that mid-level questions about the ideal or, at least, more democratic design of criminal law and penal institutions have been central to the concerns of criminal justice scholars and criminologists. Think, for example, of the extensive literature on sentencing reform, published in many countries from the late 1970s on, which advocated institutions like sentencing commissions as more reliable and accountable deliverers than courts and legislatures of even-handed sentencing practice consistent with neo-classical penal ideals;¹¹ of prescriptions for policing reform;¹² or of debates about creating institutions of restorative justice.¹³ These relatively concrete questions have increasingly found their way into the normative literature, and with them has come a more explicit confrontation with the tricky question of the relationship between ideal theory and the distinctly non-ideal conditions in which we have to try to realise our ideals.¹⁴

But is such a concern with the design of criminal justice practices adequate to a full understanding of the institutional preconditions of a humane and moderate criminal justice system? My argument is that our analysis of institutional preconditions needs to move to a higher level of generality, beyond criminal justice institutions themselves. The reason for this is very simple. Criminal justice is no more autonomous institutionally and practically than it is discrete theoretically: just as the ideals which motivate our normative theories of criminal justice are drawn from broad democratic, political and moral theories, so the actors and institutions which enable and constrain the pursuit of our cri-

¹⁰Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, eds., *The Trial on Trial I: Truth and Due Process ; II: Judgment and Calling to Account* (Oxford: Hart Publishing, 2004 and 2005, respectively); Braithwaite and Pettit, 1990, op. cit., note 5; Philip Pettit, 'Is Criminal Justice Feasible?' in de Greiff, ed., 2002, op. cit., note 6, pp. 427-50.

¹¹Andrew von Hirsch, *Doing Justice* (New York: Hill and Wang, 1976); Michael Tonry *Sentencing Matters* (New York: Oxford University Press, 1996).

¹²See for example Trevor Jones, Tim Newburn and David J. Smith, "Policing and the Idea of Democracy," *British Journal of Criminology* 36 (1996): 182-98.

¹³John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989); *Responsive Regulation* (Oxford University Press, 2002).

¹⁴See in particular Duff, 1986, op. cit., note 6.

minal justice ideals operate within a broad socioeconomic and political context which in turn shapes their capacities. Without a sense of this broader context, our normative projects are liable to misfire. As Philip Pettit has put it, there is a risk that "... the main positions in penal philosophy are condemned to irrelevance under current institutional arrangements."¹⁵ I agree with Pettit that "[t]hose who defend those positions have a responsibility to consider whether their ideals can be made politically feasible."¹⁶ But I want to argue that our conception of the conditions of political feasibility needs to be drawn more broadly than has so far tended to be the case.

Responsiveness and inclusion: competing ideals under prevailing conditions?

In the rest of the paper, I want to consider how we might work to a better understanding of the broad question of the conditions under which political systems are able to combine, in their penal policy, a respect for democratic responsiveness and social inclusion: or, to put it the other way round, the conditions under which governments are likely to construct – in the name of democracy – a system in which the impact of criminalization and imprisonment is patterned along lines of socio-economic advantage or group membership in such a way as to feed strongly into the dynamics of social exclusion of certain social groups.

This question illustrates an apparent tension in the comfortable assumption underlying much normative literature: the assumption that there is necessarily a positive correlation between the instantiation of liberal democracy and a humane criminal justice system. From this optimistic, liberal-rationalist perspective, one of the most perplexing issues of contemporary criminal justice policy in many countries is the frequent clash between a popular demand for extensive and punitive criminalization and the inclusionary precepts of ideal theory. It is worth noting that these inclusionary precepts are backed up by criminological research on the effectiveness of punishment.¹⁷ Even within "official" (i.e., administrative, government-sponsored) criminology, it is next to a conventional wisdom, for example, that increased imprisonment rates make at best – to put it mildly – only a modest contribution to reducing crime, particularly when judged in the light of their very substantial economic and human costs.¹⁸ One recent commentator has gone so far as to argue that "criminal justice policy is largely irrelevant as a means of reducing crime."¹⁹ This would suggest that high rates of imprisonment offend against

¹⁵Pettit, 2002, op. cit., note 14: 449.

¹⁶Ibid., 449-50.

¹⁷See for example Jock Young, *The Exclusive Society* (London: Sage, 1999) Chapter 5; Robert Reiner, *Law and Order: An Honest Citizen's Guide to Crime and Control* (Oxford: Polity Press, 2007) Chapter 5; A. Doob and C. Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis," *Crime and Justice* 30 Michael Tonry, ed. (Chicago: University of Chicago Press, 2003).

¹⁸Home Office, *Making Punishments Work* (London: Home Office) para 1.66 (estimating that the prison population would have to rise by 15 percent to achieve a reduction of 1 percent in crime); W. Spelman, "Jobs or jails? The crime drop in Texas," *Journal of Policy Analysis and Management* 24 (2005): 133-65; "The Limited Importance of Prison Expansion," in A. Blumstein and J. Wallman, eds., *The Crime Drop in America* (Cambridge University Press, 2000); B. Western, *Punishment and Inequality in America* (New York: Russell Sage, 2006).

¹⁹Richard Garside, "Right for the Wrong Reasons," (London: Crime and Society Foundation, 2006).

the value of autonomy and liberal principles of parsimony in punishment. Yet, in some countries at certain times – the UK and the U.S. are, unfortunately, contemporary examples - this frequently rediscovered insight goes hand in hand with high levels of popular support for expansion of the prison system. This support is often, of course, framed in terms of the moral currency of desert. But no dispassionate observer could fail to be struck by the cultural and temporal variability of judgments of what is deserved, and this should give pause to anyone concerned about the sorts of limits to state punishment to which liberals are committed. What broad socio-economic and political conditions structure such waxing and waning of popular conceptions of desert? And how do different institutional structures affect the way in which such popular conceptions feed into the development and implementation of policy? It seems unlikely that we could devise an effective liberal case for decarceration without understanding factors such as these.

One of the most basic tenets of democracy is the need for accountability – and hence, ideally, responsiveness – of governments to the views and experiences of the electorate. But the degree to which these views and experiences are regarded as appropriately subject to mediation by expertise, distance, the constraints of an entrenched set of rights, and a host of other factors, varies within different versions of both democratic theory and democratic system. While accountability and responsiveness are, in different guises, constants in democratic theory, they are in potential conflict with other values such as the aspiration to foster an inclusionary criminal justice policy. And this conflict may be accentuated by the particular institutional constraints under which different sorts of democratic governments operate. If we are to explore the potential conflicts prompted by the link between the democratic value of responsiveness and the electoral disciplines presented by a popular demand for penal severity, we need to interpret the question about the “political feasibility” of criminal justice broadly. This means asking questions not only about, say, the sort of sentencing institution best adapted to delivering just and parsimonious punishments, but also about the sorts of democratic institutions most likely to produce stable support for that kind of sentencing institution.

Crime, Economy and Society in “Late Modern” Western Countries: Continental Inclusion and Anglo-Saxon Exclusion?

Within the last decade, there has been a significant increase in criminal justice scholarship that tries to get to grips with what we might call the big socio-economic picture within which criminal justice policy has developed in western democracies. Two outstanding examples are David Garland’s *The Culture of Control* and Jock Young’s *The Exclusive Society*.²⁰ Both accounts chart the marked loss of faith, from the 1970s on, in many western democracies, of the optimistic, reformist “penal modernism” or “penal welfarism” which dominated criminal justice policy for most of the twentieth century. In the context – particularly in the years after the Second World War – of the development of welfare states, of economic growth, and of very high levels employment, it was possible in many countries to construct and sustain a criminal justice policy which was, in Young’s terms, inclusive. Though the most serious offenders were incarcerated (or worse...), the emphasis for the vast majority of offenders was on rehabilitation and reintegration. This equilibrium was facilitated by moderate rates of actual crime and by the

²⁰Oxford University Press, 2001; London: Sage, 1999.

fact that, in a strongly socially and spatially stratified world, the (much smaller than today) middle classes were relatively insulated from the effects of crime. In this context, crime was not a strongly politicized issue: there was a reasonably high degree of faith in – indeed deference towards – the expertise of criminal justice professionals and the competence of politicians.

With the global economic changes which began in the 1970s – recession, the contraction or even collapse of manufacturing industries, the growth of unemployment and the creation of a large sector of people either long-term unemployed or employed in insecure forms of work – the consensus which had sustained penal modernism began to erode. This was, significantly, accompanied by significant rises in recorded crime across Western countries (it is much to the credit of both Garland and Young that they incorporate crime rates – all too often the unmentioned “elephant in the room” in progressive criminology – into their analyses).²¹ As crime – the experience of criminal victimization, and of managing the risk and fear of it – became a normal feature of everyday life for the economically secure, crime became an increasingly politicized issue.

Garland suggests that these broad economic and cultural changes prompted, at least in the United States, a general move towards a “culture of control,”²² in which a combination of repressive and managerial criminal justice strategies have become increasingly salient to governments’ ability to present themselves as effective and electable. The upshot has been the development of a strangely bifurcated criminal justice policy. On the one hand, we have what Garland calls “the criminology of the other”: a powerful “outrage dynamic,” within which governments feeling constrained to “act out” more and more hysterically in response to the most serious crimes.²³ On the other hand, there has developed a “criminology of everyday life”: a much quieter “normalization”

²¹In England and Wales, for example, the total recorded crime rate in 1995 was 11.5 times that in 1955, while the rate of violent offenses was almost twenty times higher: Young, *The Exclusive Society*, op. cit., p. 64. On the political significance of crime rates, see also Robert Reiner, “Beyond Risk: A Lament for Social Democratic Criminology,” in Tim Newburn and Paul Rock, eds., *The Politics of Crime Control* (Oxford: Clarendon Press, 2006) and, in greater empirical detail, his *Law and Order*, op. cit., Chapter 3. Reiner gives a useful summary of the persuasive evidence of the association between unemployment and, yet more strongly, inequality and rates of crime, with the political and economic arrangements which lead to higher crime.

²²David Garland, *The Culture of Control*, op. cit., note 23; see also David Garland, ed., *Mass Imprisonment in the United States: Social causes and consequences* (London: Sage, 2001); Jock Young, *The Exclusive Society*, op. cit. For a further, detailed analysis of crime trends in the UK, see Tim Newburn, “‘Tough on Crime’: Penal Policy in England and Wales,” in Michael Tonry and A. Doob, eds., *Crime and Justice* 36 (forthcoming: University of Chicago Press 2007).

²³MacDonagh’s conception of the conditions conducive to the production of an outrage dynamic, the relevance of which to criminal justice has been identified by Philip Pettit, resonates with the environment within which criminal justice policy is formulated in what Garland calls “late modern” societies. “First, ... the society in question is literate or at least has access to channels of communication whereby exposure of an evil can be broadcast. Second.. the society embraces values such that people will generally be outraged by the evil in question... and third.. the society is democratically organized in such a way that politicians are going to be required, on pain of electoral sanction, to respond in a more or less persuasive way to the outrage”; Pettit, 2002, op. cit., note 14 at pp. 432-3.

and actuarial management of less serious crime.²⁴ How can this be explained? Garland offers us a theory grounded in the globalization of the world economy and accompanying changes in patterns of employment,²⁵ leading to a diminution in nation states' power to control their increasingly interdependent economies. Combined with shifts in demography and family structure, and reinforced by anxiety about crime as a significant dimension of risk to be managed in an increasingly unpredictable and culturally disembedded world, these dynamics have led to a greater resort to criminal justice policy as a tool of social governance.

Garland's influential contribution²⁶ has the great merit of offering large-scale hypotheses about the conditions which have brought about the "culture of control" which seems so decisively to constrain the development of criminal justice policy in some countries. Yet, in terms of marshalling our socio-economic and institutional analysis in the service of our ideals, his argument seems a counsel of despair. If the dynamics of penal populism are a structural feature of "late modern" society, all avenues for institutional reform designed to counter the culture of control seem blocked. There is however strong reason to resist such a dystopian conclusion, at least in this monolithic form. For, as Lucia Zedner pointed out in an astute review, in his frequent slippage between analysis of data based primarily on the U.S. (and, to a lesser extent, British) experience, and references to "late modern societies," Garland risks elevating an explanatory framework largely informed by the specificities of the U.S. situation to the status of a general theory of penal dynamics in the late modern world.²⁷ As Young is more careful to point out²⁸ – on the basis of an analysis focusing on many of the same socio-economic changes, including significant, and proportionately comparable, rises in recorded crime – there are in fact striking differences in the extent to which even countries fitting most closely Garland's explanatory model have responded in terms of a severe penal populism.

Even as between Britain and the U.S., both of which fit Garland's pattern relatively closely, the differences in terms of the overall scale of both recorded crime and punishment are striking. Countries like Denmark, Sweden, Germany or Canada fit Garland's analysis yet less accurately.²⁹ To take just one illustrative comparison, the incar-

²⁴See Malcolm Feeley and Jonathan Simon, "The New Penology," *Criminology* 39 (1992): 449-74; Jonathan Simon, *Governing Through Crime* (2006).

²⁵See in more detail Garland, *The Culture of Control*, op. cit., note 23, Chapter 4.

²⁶*The Culture of Control*, op. cit., note 23.

²⁷See Lucia Zedner, "Dangers of Dystopia," *Oxford Journal of Legal Studies* (2002); see also James Q. Whitman, *Harsh Justice* (Oxford University Press, 2003) pp. 203-5.

²⁸Acknowledging the need to take note of "the demands of specificity and [to] contrast... the material and cultural situations in Western Europe and the United States," Young further observes: "No doubt such contrast is over-schematic, for the differences within Western Europe are immense; but the constant tendency to generalize from the United States to Europe, without acknowledging the profound cultural differences, has to be resisted"; *The Exclusive Society*, op. cit., note 23, p.27.

²⁹See for example Michael Tonry, "Why Aren't German Penal Policies Harsher and Imprisonment Rates Higher" *German Law Journal* 5,10 (2004); Tonry gives strong evidence that rises in penalty are not caused by rising crime; see particularly Figure 1. For further evidence that trends in penalty are not directly related to trends in crime, see Tim Newburn, "'Tough on Crime': Penal Policy in England and Wales," op. cit., pp.9ff, 27.

ceration rate across the developed world last year ranged from 62 per 100,000 of the population (in Japan) to 737 in the U.S.A., with the UK, at a rate of 148, enjoying the dubious distinction of having the highest incarceration rate in the EU. Sweden (at 82) and Germany (at 94) still enjoy markedly lower levels,³⁰ notwithstanding recent rises in the imprisonment rate in most countries (a trend to which Canada is an honorable exception, having reduced its imprisonment rate from 131 in 1994-95 to 107 in 2006.) Yet these countries have also experienced most of the factors to which Garland accords explanatory priority: the shocks of a global recession in the context of an increasingly internationalized economy and strong competition from emerging economies like China, South Korea and India; changes in levels of social deference premised on increasing relative social equality, education and prosperity in the postwar era; changes in family and demographic structure; the influence of mass communications and of a market economy which fosters a society based on a culture of individual consumption. Not all “late modern” democracies have reacted by plumping for a neo-liberal politics, “rolling back the state” and cutting public spending on welfare provision. And many countries have managed to sustain a relatively moderate, inclusionary criminal justice system through the period in which the British and American systems have, albeit at different speeds and to different degrees, been moving towards a criminal justice system which fosters Young’s “exclusive society.” Are there, therefore, any lessons which can be learned from comparative research on the differences between the criminal justice systems of democratic societies at relatively similar levels of economic development?

“Harsh Justice”: socio-cultural origins of inclusion and exclusion?

In pursuing this question, we confront the unfortunate fact that macro-level comparative research on criminal justice is relatively thin on the ground.³¹ A few scholars have, however, been willing to make the considerable investment required to engage in this kind of work, and it is therefore worth reviewing some of their conclusions.³² A

³⁰Comparisons of rates of recorded crime in different countries are notoriously problematic, but homicide rates are generally agreed to be broadly comparable, and it is therefore worth noting the yet starker international contrasts here. Average homicide rates between 1999-2001 ranged from 55.86 per 100,000 of the population in South Africa to 1.02 in Denmark, with a number of transitional societies (Russia, 22.05; Lithuania, 10.62) exceeding the U.S. rate (5.56), itself more than three times that of the UK (1.61) (Barclay and Tavares, *op. cit.*, Table 1.1). As Young notes, there is however no direct correlation in trends in recorded crime and severity of penal response: *The Exclusive Society*, *op. cit.*, note 23, p. 144-5; indeed, the decline in recorded crime in many western countries between 1993 and 1995 was not associated with any general mitigation of the scale of punishment: *ibid.*, p. 122, pp.142-5: see also the tables provided by Garland, *The Culture of Control*, *op. cit.*, note 23, pp.208-9. See also the tables at the end of this paper.

³¹See Nicola Lacey, “Historicizing Contrasts in Tolerance,” in Tim Newburn and Paul Rock, eds., *The Politics of Crime Control* (Oxford University Press, 2006).

³²No survey of the field would be complete without reference to Freda Adler’s *Nations Not Obsessed with Crime* (Littleton CO: Fred B. Rothman & Co., 1988). On the basis of OECD crime figures, Adler selected ten contrasting societies marked by their relatively low crime levels and moderate criminal justice policies. Though her quantitative analysis of a range of socio-economic indicators revealed virtually no shared features of these societies, she concluded, on the basis of her qualitative analysis, that they were marked both by unusually high levels of popular participation in criminal justice policymaking and delivery, and – yet more strongly – by highly developed infor-

helpful starting point is James Q. Whitman's *Harsh Justice*. Whitman's analysis sets out from what we might call the "democratic paradox" of contemporary U.S. criminal justice. The U.S.A. stands not only as the world's one superpower 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, in significant respects, 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 U.S.A. so loudly decries (if unevenly acts against) in its foreign policy. In quantitative and in qualitative terms, punishment in the U.S.A. amounts to harsh and exclusionary 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.³³ Moreover the conditions of life in many U.S. prisons are staggeringly harsh: overcrowding is widespread, rape and other forms of violence endemic, and constructive prison regimes rare.³⁴ On almost any plausible version of democratic theory, the U.S. criminal justice system exhibits some catastrophic flaws: in terms of respect for human rights, in terms of effective use of resources in the public interest, in terms of consolidating structural social exclusion of certain sectors of the population – notably young black men.

How, Whitman asks, has the U.S., with its image of itself so strongly bound up with the notion of progress, civilization, 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 a comparison between the long-range development of the criminal justice systems in European countries such as France and Germany and in the U.S.A., and of the differing sensibilities which shaped their paths to modern democracy. To paint with very broad brushstrokes, 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 oriented to their further degradation within an intensely hierarchi-

mal institutions of social control. While these conclusions are plausible and consistent with other criminological studies, including those on which I shall concentrate, I would argue that Adler's study has some methodological features which should make us cautious about relying too strongly on her findings – and in particular on the negative findings of her quantitative analysis. In particular, her method of comparing starkly different societies (not all of them democratic) seems less well designed to elicit the sorts of institutional insights I am interested in than is an in-depth comparison of relatively similar societies exhibiting markedly different levels of obsession with crime, such as that of Whitman (see below).

³³See Whitman, *Harsh Justice*, op. cit., note 29, p. 3, Chapter 2; Garland, *The Culture of Control*, op. cit., note 23, Chapters 5 and 6, pp. 208-9; Jerome Bruner, "Do Not Pass Go" (review of Garland), *New York Review of Books* 50 (Sept. 29, 2003); 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. 116-148.

³⁴For an eloquent – and horrifying – literary depiction of life in a U.S. jail, see Tom Wolfe, *A Man in Full* (Farrar, Strauss and Giroux, 1998). A glimpse of the usually closed world of prison life, and of the inhumanity with which the U.S. 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.

cal, non-democratic 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 turn against the bloody *ancien régime* 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 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 and its emerging democratic sensibility. 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 that 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.³⁵

In the U.S.A., 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 U.S. penal practice.³⁶ In the early context of a society of settlers distributed across a huge space, we might further suggest that the imperatives of social order favored severity in punishment and moreover punishment oriented primarily to 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 different, with the experience of mutual dependence fostering a culture of “mateship” which, along with economic imperatives in a very sparsely populated country, favored – at least for the settlers... – inclusionary over exclusionary

³⁵For an excellent description and analysis of these features of the contemporary German prison system, see Lazarus's *Contrasting Prisoners' Rights* (Oxford University Press, 2004).

³⁶See Whitman, *Harsh Justice*, op. cit., note 29, 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,” in Tim Newburn and Richard Sparks, eds., *Criminal Justice and Political Cultures* (Collompton, Willan Publishing 2004), pp. 80-103; on the “cultural” slant of Whitman's analysis, and the specific relevance of the history of slavery in the U.S., see the exchange between Garland and Whitman, “Capital Punishment and American Culture,” “Response to Garland,” *Punishment and Society* 7 (2005) : 347 and 389, respectively.

dynamics in mechanisms of social control.³⁷ 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 – favored the development of a harsh, exclusionary and degrading penal system.

For Whitman, however, it is the absence of a rejected local history of premodern 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 U.S. respectively.

From cultural to political and economic analysis: institutional variables bearing on the capacity to deliver inclusionary criminal justice policies in different forms of democracy

This is not the place for a full analysis or critique of Whitman's thesis. But certainly, if we add in the British case,³⁸ questions may be raised about the weight 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 to goals not dissimilar to 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 régime," along with the harshness of its penalties and the wide scope for royal prerogatives of pardon and mercy, were gradually rationalized in a system oriented 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.³⁹ This

³⁷"Crime in a Convict Republic," *Modern Law Review* 64 (2001): 11.

³⁸Whitman 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 U.S.A., 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.

³⁹See Martin Wiener, *Reconstructing the Criminal* (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*

was a system in which offenders' incipient status as citizens rather than mere subjects was already discernible, and it was informed by a desire to reclaim offenders for inclusion in mainstream society – a desire that would gradually come to dominate modern penal policy in most developed countries right up to the 1970s. This dynamic 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.⁴⁰

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 needed to produce an adequate account of contrasts in penal severity across modern systems at relatively similar levels of economic development. Indeed, it suggests that we need to look beyond cultural explanatory factors such as the sensibility to degradation.

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.⁴¹ 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 U.S., 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.⁴² 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.

The weak-strong state distinction adds a valuable dimension to Whitman's analysis in that it points us towards differences in institutional structure as potentially im-

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).

⁴⁰See Norbert Elias, *The Civilizing Process*, Volumes I and II (Oxford: Blackwell Publishing, 1978, 1982; first published 1939); V.A.C. Gatrell, *The Hanging Tree* (Oxford University Press, 1994); Martin Wiener, *Men of Blood* (Cambridge University Press, 2004).

⁴¹*Harsh Justice*, op. cit., note 29, pp. 194-9.

⁴²In the U.S., as in the UK, 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.

portant explanatory variables. But the distinction is not, in my view, entirely satisfactory. For example, in terms of one of Whitman's key criteria of "strength" – relative autonomy in policymaking and implementation – the UK, even if not the U.S.,⁴³ is in many respects a strong state. This is because, under certain electoral contingencies, given the simple parliamentary structure of the UK 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. In explaining institutional constraints on criminal justice policy, it might have been more productive to focus on specific variables such as the distribution of veto points or complex decision-making structures within particular political contexts.⁴⁴ But Whitman's insight that contemporary differences among the penal systems of relatively similar societies may have long historical roots is of the first importance. For historical differences (in the light of institutional path-dependence) may help to explain the persistence of contrasts even amid an increasingly globalized and intensely economically interdependent world. There is no particular reason to think, *pace* many criminal justice scholars,⁴⁵ that globalization, communication or interdependence imply policy convergence. I therefore want to suggest that Whitman's degradation thesis would be *yet* more illuminating if it was located within a *more* differentiated institutional comparison rooted in an analysis of political economy – a field in which comparative studies are flourishing, and in which criminal justice scholars are showing a renewed interest.

In another of the relatively rare examples of sustained comparative research which sets criminal justice in its broader political-institutional and economic context, David Downes offered an analysis of the relatively tolerant penal culture which characterized the Netherlands in the 1970s and 1980s, at a time when increases in both recorded crime and penal severity were already marking the British criminal justice system.⁴⁶ 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.⁴⁷ The Dutch political elite's support for moderation and humanity was, in Downes's 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."⁴⁸ The Netherlands' structurally pillarized society exhibited a high degree of group-based stratification: yet it was premised on a generalized norm of incorpo-

⁴³Its particular structure makes the U.S. a relatively "strong" state in relation to foreign but not domestic policy.

⁴⁴Such as the impact of a multi-jurisdiction structure on criminal justice reform in the U.S.: see David Garland, "American Culture and Capital Punishment," *op. cit.*, note 37, p.362.

⁴⁵See for example Michael Tonry, "Symbol, Substance and Severity in Western Penal Policies," *Punishment and Society* 3 (2001): 517-36 at pp. 527-31; Tim Newburn and Richard Sparks, eds., *Criminal Justice and Political Cultures*, *op. cit.*, note 37.

⁴⁶David Downes, *Contrasts in Tolerance* (Oxford University Press, 1988).

⁴⁷On the dangers of confounding variables and explanatory concepts in invoking ideas such as 'culture,' see David Nelken, "Disclosing/Invoking Legal Culture," *Social and Legal Studies* 4 (1995): 435-52; see also Nelken, ed., *Comparing Legal Cultures* (Aldershot: Dartmouth, 1997).

⁴⁸*Contrasts in Tolerance*, *op. cit.*, note 47, p. 192.

ration and mutual respect which implied the tolerant, parsimonious and civilized penal system, as well as the tight degree of multi-agency coordination and state steering through the prosecution process, which Downes charted. With the gradual breakdown of pillarization, the dynamics that sustained parsimony in the scale and scope of punishment began to erode: as the power of informal social controls fell, so the demand for formal controls rose.⁴⁹ 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: i.e., the belief that the quality of punishment 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's analysis, the Dutch demand for expansion in punishment had issued in a number of well-coordinated attempts to preempt any such outcome through decisive policy measures.⁵⁰

What explains the difference? In trying to answer this question, I am fortunate to be able to draw on an impressive recent contribution to the relatively sparsely populated field of systematic comparative studies of criminal justice: Michael Cavadino's and James Dignan's *Penal Systems: A Comparative Approach*. In this book, Cavadino and Dignan present systematic data from twelve countries on criminal justice variables such as imprisonment rates, youth justice arrangements and privatization policies.⁵¹ They set this information in the context of a broader typology of the political economy and social culture of each of the twelve countries. They group the twelve countries into four fami-

⁴⁹At the time of his original research, 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: i.e., the belief that the quality of punishment 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's analysis, the Dutch demand for expansion in punishment had issued in a number of well-coordinated attempts to preempt any such outcome through decisive policy measures: *Ibid.*, pp. 201-6. Sadly, his recent work suggests that, with increasing political pressure, humanity as well as moderation in Dutch punishment are now under serious threat: see David Downes, "Visions of Penal Control in the Netherlands," and Downes and René van Swaaningen, "The Road to Dystopia? Changes in the Penal Climate of the Netherlands," both forthcoming in Michael Tonry and A. Doob, ed., *Crime and Justice* 36 (forthcoming: University of Chicago Press, 2007).

⁵⁰*Ibid.*, pp. 201-6.

⁵¹While the use of imprisonment rates as a tool of comparative penology has, as Cavadino and Dignan note (*Penal Systems: A Comparative Approach*, op. cit., pp. 4-10), limitations, they remain an indispensable starting point in any attempt to construct an index of penal harshness. Eoin O'Sullivan and Ian O'Donnell have recently shown, however, that – at least in the case of the Republic of Ireland – if diversion from technically non-criminal modes of incarceration such as asylums and Magdalen Homes is taken into account, the apparent rise in penalty represented by imprisonment data is turned on its head, since the overall level of coercive confinement over the last half century has in fact declined: "Coercive Confinement in the Republic of Ireland: The Waning of a Culture of Control," *Punishment and Society* 9 (2007): 27-48. While Ireland seems likely to be a particularly striking case of this phenomenon, and while a shift towards overtly penal mechanisms of confinement is itself significant, there is a real need for empirical investigation of this issue in other countries.

lies of political economy – neo-liberal (the U.S.A., South Africa, England and Wales, Australia, New Zealand), conservative-corporatist (Germany, France, Italy, the Netherlands), social-democratic (Sweden and Finland) and oriental-corporatist (Japan) – characterized in terms of broad criteria such as form of economic and welfare-state organization, extent of income and status differentials, degree of social inclusivity, political orientation, degree of individualism.⁵² Extrapolating from their criminal justice data, and applying what they call a “radical pluralist analysis,” they demonstrate – as shown in Figure 1 – striking family resemblances along the lines of the typology, with neo-liberal political economies exhibiting the highest imprisonment rates, the lowest age of criminal responsibility, and the least cautious approach to prison privatization; and with conservative-corporatist, then social-democratic, and finally oriental-corporatist countries placed on a descending scale towards moderation in penal policy.

In one paper, I am not in a position to do justice to the richness of Cavadino’s and Dignan’s individual country surveys, though I shall refer to them from time to time. Rather, I want to build on their analysis. For, persuasive though their findings are, and much though I agree with their argument that “we need to understand both commonalities and discontinuities between countries, and the reasons for them, if we are to make sense of penalty...,”⁵³ their account rests largely at the level of establishing correlations rather than explaining its mechanisms. In common with other work manifesting a very welcome revival of interest in political economy among criminologists – notably Robert Reiner’s *Law and Order: An Honest Citizen’s Guide to Crime and Control*⁵⁴ – much of the elaborated causal argument – is focused on what we might call the cultural sociology of political economy: on issues such as burgeoning feelings of insecurity in the neo-liberal countries, the role of the mass media, anomie attendant on the experience of relative deprivation and so on. Like Reiner, Garland and Young, Cavadino and Dignan most certainly demonstrate these cultural factors to be of importance. But, other than in relation to the welfare state (on which more below), they do not develop a systematic view of the linkages between the political-economic variables which might underpin these countries’ systematically different criminal justice policies (and indeed which would justify thinking of them as related types). As Cavadino and Dignan themselves conclude, with

⁵²The overall picture is developed in Chapter 1 of *Penal Systems: A Comparative Approach*, op. cit., and is usefully summarized on the table on p. 33; see also M. Tonry and D. Farrington, eds., *Crime and Punishment in Western Countries 1980-1999* (University of Chicago Press, 2005); Michael Tonry and A. Doob, eds., *Crime and Justice* 36 (forthcoming: University of Chicago Press, 2007).

⁵³Cavadino and Dignan op. cit., p. 3.

⁵⁴Oxford: Polity Press (forthcoming 2007); the same point could be made about both Young and Garland, op. cit. Even Newburn (Tim Newburn, “Tough on Crime’: Penal Policy in England and Wales,” op. cit., pp. 34,36), while emphasizing the need to develop an account rooted in an understanding of political-economic structures, frames this in terms of the “cultural conditions” and “socio-cultural circumstances” underpinning the various political dynamics conducing to harshness. Michael Tonry (“Why Aren’t German Penal Policies Harsher and Imprisonment Rates Higher,” op. cit.) uses a framework which also gives emphasis not only to institutional variables such as meaningful separation of powers and political insulation of practices and processes, but also to cultural factors such as sensibility cycles, taste for moralism and, in relation to Canada, francophone culture and American oppositionalism. I agree that all of these are indeed striking variables; my point is simply that we need to try to understand the deeper structural and cultural conditions which give rise to them.

refreshing honesty: “Some patterns give rise to puzzles. One which continues to trouble us is this. We think we have demonstrated that the position of a country within our typology of political economies has an important effect on the punishment level of that country. But why, exactly?”⁵⁵ They go on to note that an argument entirely at the level of differing “penal cultures” is unsatisfactory because there is no consistent correlation between public attitudes and political economy such as exists between political economy and level of punishment: Japan, for example, scores high on assessments of punitive public attitudes, but low on actual punitiveness, while exactly the opposite is the case in New Zealand.⁵⁶ Yet without some sense of the *reasons* why some forms of political economy appear systematically to favor more moderate penal policies, we are not in a good position to begin to address the other question with which Cavadino and Dignan conclude their book: that of “whether penalty is fated to become harsher and harsher – as it has been doing in most of the countries surveyed – or whether there are any lessons to be learnt from our studies which indicate how an ever more punitive future could be avoided, or might simply fail to come to pass.”⁵⁷

I want to argue that we can make some progress toward answering these questions by reading Cavadino’s and Dignan’s striking findings in the light of recent political-economic analysis of comparative institutional advantage. In the Netherlands at the time of Downes’s study, 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 political scientists Peter Hall and David Soskice as a “co-ordinated market economy.”⁵⁸ 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 coordinated governmental structure, has strong reason to opt for a relatively inclusionary criminal justice system. It is a system premised on incorporation, and hence on the need to reintegrate offenders into society and economy.⁵⁹ Such a system is, we might hypothesize, structurally less likely to opt for degradation or exclusionary stigmatization in punishment. Britain, by contrast, falls into Hall’s 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 U.S.A. – are typically more individualistic in structure, are less interventionist in regulatory stance, and depend far less strongly on the sorts of co-

⁵⁵Cavadino and Dignan, *op. cit.*, p. 339.

⁵⁶*Ibid.*, pp. 30-31; see also Tim Newburn, “‘Tough on Crime’: Penal Policy in England and Wales,” *op. cit.*, p. 30, also sounds a note of caution about overplaying the role of public opinion and of the idea that it is media-driven, citing U.S. research by Beckett and Sasson which found that it was politicians’ emphasis on crime that drove media reporting rather than the other way round (Katherine Beckett and Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (Thousand Oaks CA: Sage, 2004 [2nd edition]). Once again, the interesting question is whether both media and political focus on crime are driven by other variables.

⁵⁷*Ibid.*, p.340.

⁵⁸Peter A. Hall and David Soskice, “An Introduction to the Varieties of Capitalism,” in Hall and Soskice, eds., *Varieties of Capitalism* (Oxford University Press, 2003), pp. 1-68.

⁵⁹For an analysis of the impact of these dynamics on German criminal justice, see Nicola Lacey and Lucia Zedner, “Discourses of Community in Criminal Justice,” *Journal of Law and Society* (1995): 93-113.

ordinating institutions which are needed to sustain long-term economic and social relations. In these economies, flexibility and innovation, rather than stability and investment, form the backbone of comparative institutional advantage. It follows that, particularly under conditions of surplus unskilled labor (conditions which liberal market economies are also more likely to produce), the costs of a harsh, exclusionary criminal justice system are less than they would be in a coordinated market economy.

My suggestion is that the liberal/coordinated market economy distinction – which, significantly, maps neatly onto Cavadino’s and Dignan’s fourfold typology – may be a powerful tool in building an understanding of the inclusionary and exclusionary dynamics of different criminal justice systems. For the distinction has an analytic reach into a wide range of interrelated political and economic institutions which characterize particular national systems and which have their impact on criminal justice policy. A full analysis is well beyond the scope of this paper, but it is possible here to suggest a number of more or less complex hypotheses which would be susceptible of – and worth – testing within this model. These various factors are closely intertwined, and hence difficult to separate in an analytically satisfactory way (see Figures 4 and 5, pp. 34-35, for a visual map of the linkages). But the following schematic account may give some idea of the sorts of issues that an analysis of comparative political economy would put on the agenda of scholars interested in the relationship between criminal justice and different varieties of democratic system:

1) Political Systems: electoral arrangements and the bureaucracy

The recognition that punishment must be justified might be thought to lie at the heart of the self-conception of a liberal-democratic modern society. Yet, as the contrasts unearthed in the comparative literature suggest, the urgency with which this need for justification is felt varies markedly across democratic systems. The tolerance of and indeed public support for “harsh justice” in the U.S.A. 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 mid-1980s about how to reform the criminal justice system in the light of newly emerging crime problems associated with drugs.⁶⁰ 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, 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. How directly they are reflected in the electoral system, and hence exert discipline on governing parties, is therefore likely to be an important factor in explaining the institutional capacity of different systems to sustain moderate criminal justice policies.

In this context, it is interesting that there is, empirically, an association between coordinated market economies and proportionally representative (PR) electoral systems, and between liberal market economies and first-past-the-post, winner-take-all systems –

⁶⁰Or by the elaborate system of German prisoners’ rights described by Lazarus, *Contrasting Prisoners’ Rights*, op. cit., note 36.

a difference which may itself feed into the relative “strength” of different kinds of political economy under varying external conditions.⁶¹ To put it crudely, the “strength” (in the sense of policymaking autonomy) of coordinated market economies is rather regularly constrained by the need to negotiate with groups incorporated in the governmental process. In this sense, we might say that coordinated market economies with PR systems are both more genuinely representative and more oriented to effective participation in and contribution to policymaking – at least for groups integrated within subsisting socio-political structures – than are liberal market economies whose electorate gets a one-shot say in policymaking at election time. But this consensus-building dynamic may make the coordinated market economies “stronger” in the sense of less heteronomous in the light of swings of popular opinion. While decisive 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, as party affiliations among the electorate weaken, governments’ increasing dependence on the approval of a large number of “floating” median voters, sufficiently affluent to regard crime as a threat to their well-being, may feed into the political salience of criminal justice.⁶² Under the sorts of economic and cultural conditions charted by Garland, and in the light of Young’s argument about the salience of increasing relative deprivation to both the scale and the perceived seriousness of crime problems, therefore, it may be that there is a stronger association between the politicization of criminal justice and the impact of penal populism in liberal market economies such as the U.S., with decisive implications for the harshness of punishment.

It is also worth noting a further difference between the political systems to be found in liberal and coordinated market economies, itself correlated with the PR/majoritarian distinction. In most coordinated market economies, deference to the expertise of the professional bureaucracy – i.e., the civil service, often including not only policy advisers, penal system officials and prosecutors but also judges – tends to be high. Bureaucrats in these countries are not expected to be politically neutral. Rather, their political affiliations are known: they shape their career paths according to the government of the day, but do not imply any block on career progression. Their social status has remained generally high, and their expertise respected. This is in part because the coalition politics typical of PR systems implies a less polarized political environment in which governments feel less need to retain total control of policymaking. By contrast, particularly in recent years, the tendency in majoritarian systems has been for governments to

⁶¹See Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in 36 Countries* (New Haven: Yale University Press, 1999). In his analysis of the survival of capital punishment in the U.S., David Garland has also pointed to the relevance of institutional dynamics of particular political systems, and in particular to the power of floating “median” voters and the difficulty of building an effective abolitionist strategy in a multi-jurisdictional polity: Garland, “Capital Punishment and American Culture,” *op. cit.*, note 37, pp. 360, 362.

⁶²Cf. Paul Chevigny, “The Populism of Fear: Politics of Crime in the Americas,” *Punishment and Society* 5 (2003): 77; Bert Useem, Raymond V. Liedka and Anne Morrison Piehl, “Popular Support for the Prison Build-up,” *Punishment and Society* 5 (2003): 5; Mick Ryan, *Penal Policy and Political Culture in England and Wales* (Winchester: Waterside, 2003); J. Pratt, D. Brown, M. Brown, S. Halls-worth and W. Morrison, eds., *The New Punitiveness* (Cullompton: Willan, 2005).

prefer to work with their own politically appointed advisers, and to ignore the advice of technically neutral civil servants wherever this is judged to interfere with the chances of electoral success or political expediency. In Britain, this has been particularly marked during the last thirty years, with power increasingly concentrated in Downing Street and the political wing of the Treasury: in the U.S., too, politicians and political appointees, rather than bureaucrats, have responsibility for most important fields of policymaking. Despite some controversy about this politicization of the bureaucracy, the implications for a dilution of the status of the professional civil service are clear. And they have been particularly striking in the field of criminal justice. Professional civil servants who assert their independent judgment in opposition to what ministers see as politically expedient have been dealt with in increasingly peremptory – even personally abusive – terms.⁶³

This feeds into a dynamic in which politicians' decisions become ever less insulated from the flow of perceived public opinion – a factor which, as Michael Tonry has argued, has been a crucial driver of penal harshness in several countries.⁶⁴ The difficulty here for politicians, however, is that – as one influential journalist recently put it – “Those who live by tabloid headlines must be ready to perish by them.”⁶⁵ Once a professional bureaucracy is undermined, one of the main tools for depoliticizing criminal justice is removed. And analogy with economic policy is instructive here. The current British Labour administration managed to effect some political insulation of the setting of interest rates by creating a Monetary Policy Committee located in the Bank of England, and is forming a similar strategy in relation to planning policy. No such solution is possible in the field of criminal justice, where the role of experts – and notably of those within the public service – has been steadily undermined by politicians quick to seek electoral advantage by deriding expert opinion wherever it conflicts with what they take to be popular sentiment. While I have taken these examples from the UK, Cavadino's and Dignan's book identifies the strength of a professional bureaucracy, along with deference to expertise, as two conditions key to the maintenance of moderate criminal justice policies in several of the corporatist and social democratic countries.⁶⁶

⁶³In an infamous incident in the early 1990s, Michael Howard, then Home Secretary, deliberately breached convention by naming civil servant David Faulkner, architect of the moderate Criminal Justice Act 1991, deriding his views in a radio interview; more recently, Rod Morgan, an experienced criminal justice scholar and professional, was rewarded for his independent-mindedness and professionalism by the decision not to renew his term as Head of the Youth Justice Board.

⁶⁴“Why Aren't German Penal Policies Harsher and Imprisonment Rates Higher,” *op. cit.*; see also Tonry's *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy* (Cullompton: Willan 2004).

⁶⁵Philip Stephens, “Crime, Punishment and Poetic Justice,” *Financial Times*, January 30, 2007, p. 15. The comment was in relation to the Home Secretary John Reid.

⁶⁶See Cavadino and Dignan, *op. cit.*, pp. 102, 105 (Germany); 122-3 (the Netherlands, where they argue that decline of faith in the professional bureaucracy was a key element in the rise of managerialism and penal severity); 132 (France) 35-6, 151-2, 164 (Finland and Sweden); 180-3 (Japan). Conversely they note (p. 55), in relation to the U.S., that the weakness of professional authority and the personalized rather than bureaucratic character of American public life has fed into the politicization of criminal justice. Similarly, David Downes has noted in his work on the Netherlands the importance of bureaucratic authority to the establishment and maintenance of moder-

To sum up: in liberal market economies with majoritarian electoral systems, particularly under conditions of relatively low trust in politicians, relatively low deference to the expertise of criminal justice professionals, and a weakening of the ideological divide between political parties as they become increasingly focused on the median voter and correspondingly less able to make commitments to a stable party base, the unmediated responsiveness of politics to popular opinion in the adversarial context of the two-party system makes it harder for governments to resist a ratcheting up of penal severity. As Newburn has shown in relation to the British case, these dynamics become particularly strong where both parties take up a law and order agenda.⁶⁷ In PR systems, where negotiation and consensus are central, and where incorporated groups can have greater confidence that their interests will be effectively represented in the bargaining process which characterizes coalition politics, the dynamics of penal populism may be easier to resist. And in PR systems, due to the discipline of coalition politics, in which bargains have to be struck before elections, voters can be more confident about what policy slate they are voting for – a striking difference from majoritarian systems, where a party with a comfortable majority is more or less unconstrained by its own manifesto once elected. (In criminal justice, a vivid example is that of the current Labour government’s spectacular turnaround on prison privatization: having fought the 1997 General Election on a platform of principled opposition to privatization, it was announced within a month of the election that all new prisons in England and Wales would be privately run.⁶⁸)

2) The structure of the economy: production regimes, labour markets, education and training, disparities of wealth

In countries like 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.⁶⁹ (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 last thirty years, as many of the attitudes and values that sustained the postwar welfare state settlement have come to be eroded by a more aggressively market-oriented culture.⁷⁰ This political culture is itself

ate policies, and the association of its decline with the turn to harshness: *Contrasts in Tolerance* and “Visions of Penal Control in the Netherlands,” op. cit.

⁶⁷Tim Newburn, “‘Tough on Crime’: Penal Policy in England and Wales,” op. cit., p.30ff.

⁶⁸Cavadino and Dignan, op. cit., p. 315.

⁶⁹See David Garland, *Punishment and Welfare* (Aldershot: Gower, 1985); Michael Ignatieff, *A Just Measure of Pain* (New York: Pantheon Books, 1978). As Whitman also acknowledges, the differences between the U.S. 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*, op. cit., note 29, p. 193.

⁷⁰See Robert Reiner, “Beyond Risk: A Lament for Social Democratic Criminology,” op. cit., note 24.

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.⁷¹ In a short-term economic culture, the bottom third of the work force risks become a socially as well as economically excluded group.⁷²

In the coordinated market economies, by contrast, a longer-term economic culture appears to have survived the impact of increased international competition and the collapse of Fordism. Within the political economy of comparative advantage, this is seen as a function of several interlocking factors: the nature of the economic activities in which these countries have concentrated their efforts; the close incorporation of employers as well as unions in the management of the economy; and the implications of each of these factors for the structure of education and training. Unlike the increasingly flexibilized and service-oriented economies of the liberal market economies, many coordinated market economies excel in producing high quality goods which depend on relatively technical and industry-specific, non-transferable skills. In this context, employers have strong reason to invest in education, training and apprenticeship systems. They also, crucially, have strong reason to use their considerable bargaining power with government to press for generous welfare provision for workers who are temporarily unemployed but whose skills remain necessary to the economy.⁷³ With the higher levels of investment in education and training typical of these economies, which also demonstrate lower disparities of wealth and higher literacy rates,⁷⁴ the costs of pursuing socially exclusionary policies in areas such as criminal justice are relatively high.

In the liberal market economies, increasing relative deprivation consequent on flexibilization of labor markets and growing disparities of both income and skills (see Figures 6, 7 and 8) pose, as Young has argued,⁷⁵ a huge challenge for inclusionary criminal

⁷¹On the sociological implications of this economic transformation, see Richard Sennett, *The Corrosion of Character* (New York: Norton, 1998).

⁷²See C. Hale, "Economic Marginalisation and Social Exclusion," in C. Hale, K. Hayward, A. Wahidin and E. Wincup, eds., *Criminology* (Oxford University Press, 2005): on the institutionalization of a "40:30:30" society of structural social exclusion, see also Will Hutton, *The State We're In* (London: Jonathan Cape, 1995).

⁷³In this context they also have a concern to maintain the incentives for new generations of workers to make the considerable investment necessary to acquire these skills.

⁷⁴See Torben Iversen and David Soskice, "Distribution and Redistribution: The Shadow of the Nineteenth Century" (typescript, Harvard University Department of Government, 2007) – a paper which also explores the roots of varieties of capitalism into the distinctive structures of political and economic organization in the nineteenth century.

⁷⁵*The Exclusive Society*, op. cit., note 23; see in particular chapters 1, 2 and 7; on the criminological significance of relative deprivation, see also Robert Reiner, "Beyond Risk," op. cit., note 24, and *Law and Order*, op. cit., Chapter 3. Reiner points out that increasing inequality appears to correlate not only with penal harshness but also with patterns of victimization which reinforce social exclusion: see Danny Dorling, "Prime Suspect: Murder in Britain," in P. Hillyard, C. Pantazis, S. Tombs and D. Gordon, eds., *Beyond Criminology* (London: Pluto, 2004), on the impact of recent

justice policies, particularly in a world in which mass communications and increased levels of education imply the cultural inclusion of the relatively deprived within the individualistic values of a consumer society from which they are economically excluded. This undoubtedly exacerbates what seems to be one of the most difficult challenges for a democracy to meet in sustaining a moderate criminal justice policy: the difficulty, as Richard Sennett has put it, of “showing mutual respect across the boundaries of inequality.”⁷⁶ 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 favor 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 coordinated market economies – become so acute as to amount in themselves to a form of status distinction – the very feature which Whitman argues to have fostered the “degradation dynamic” in early modern criminal justice systems.⁷⁷ In this context it is interesting to note the further empirical fact that PR-based coordinated market democracies are significantly more likely both to elect left-of-center governments and to display lower disparities between the best and worst off.⁷⁸ In the face of political-economic imperatives leading to ever-increasing disparities of wealth and de facto status distinctions in the liberal, Anglo-Saxon economies, the anti-degradation mentality is relatively weak. Whitman’s degradation hypothesis, in short, needs 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. Features of both political and economic organization which conduce to lower disparities of wealth seem likely, in short, to make it easier for governments to pursue inclusionary criminal justice policies.

British social policy on the number of socially excluded young men who become victims of homicide.

⁷⁶Richard Sennett, *Respect in a World of Inequality* (New York: W.W. Norton, 2003), p. 23.

⁷⁷Note that this argument in turn dissolves Whitman’s apparent paradox about the coexistence of degrading punishment with (formal) status egalitarianism in the contemporary U.S.A.

⁷⁸See Torben Iversen and David Soskice, “Electoral Institutions and the Politics of Coalitions: Why Some Democracies Redistribute More Than Others,” *American Political Science Review* 100 (2006): 165-181. The authors’ suggested explanation for this finding is complex, but hinges on the need within PR systems for multiple political parties to form coalitions, and hence to be able to commit to governing partners – and hence to the electorate – about policies to be pursued during a given term of office. Within such a structure, it is also the case that interests represented within smaller parties forming coalitions have a greater chance of finding a political footing, while the volatile force represented by the power of the median voter, who “floats” between the two parties characteristic of majoritarian systems, is correspondingly less, being mediated by credible commitments made during the bargaining process. In such a system, where coalition partners can hold each other, during government, to pre-election bargains, centrist parties holding the balance of power will tend to have more to gain from aligning themselves with left- than with right-wing parties: the middle classes they represent have an interest in maintaining good levels of public services, and the minority centrist party will be able to bargain with the left-of-center party to prevent it from moving too far left during its term of office.

3) *The welfare state*

Another key difference between capitalist democracies in the “late modern” era has been their development of policies across the whole range of institutions associated with the postwar welfare state.⁷⁹ Here again, to paint with very broad brush strokes, political economies at relatively similar levels of development, characterized by broadly liberal-democratic political structures, have taken markedly different paths. While countries like Britain and the U.S. have adopted neo-liberal policies committed to “rolling back the state” and curtailing public expenditure,⁸⁰ the Scandinavian, “social-democratic” countries have maintained their welfare states more or less intact, with European, “continental” countries like Germany adopting a pattern closer, in terms of generosity of provision and scope of coverage, to their Scandinavian than to their British neighbors.

Among variables in political-economic structure, the welfare state is the institutional feature that has received most sustained attention from comparative penologists. Cavadino and Dignan, for example, give significant emphasis to the universal coverage provided by the social-democratic welfare states of Scandinavia, drawing attention to the distinction between them and the more selective, stratified welfare states of corporatist countries. It is, of course, highly plausible that the impact of relatively generous welfare provision on the reduction of both absolute and relative poverty would have a knock-on effect on crime. Less obviously, there is also evidence that it is associated with levels of penalty. David Downes and Kirstine Hansen have recently shown, on the basis of a study covering eighteen countries, that countries spending a higher proportion of their GDP on welfare have lower imprisonment rates – a relationship which has grown stronger over the last fifteen years.⁸¹ But the precise causal mechanism is not so clear. Is it, once again, a cultural argument: that the generous and inclusionary instincts represented in welfare-state policies are likely to be reflected in criminal justice policy? Beck-

⁷⁹Gösta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Cambridge: Polity Press, 1990); *Welfare States in Transition* (London: Sage, 1996): the “liberal,” “social-democratic” and “continental” typology is drawn from Andersen. The main differences between social-democratic and continental systems under his scheme are the tendency of the former to fund welfare provision from general taxation rather than payroll taxes; the size of the public sector; and the low scale of involvement of private bodies in providing public services.

⁸⁰For discussion of this development in Britain, and of its implications for criminal justice, see Paddy Hillyard and Steve Tombs, “Towards a political economy of harm: states, corporations and the production of inequality,” in Paddy Hillyard, Christina Pantazis, Steve Tombs and Dave Gordon, eds., *Beyond Criminology: Taking Harm Seriously* (London: Pluto Press, 2005), pp. 30-54.

⁸¹David Downes and Kirstine Hansen, “Welfare and Punishment in Comparative Perspective,” in S. Armstrong and L. McAra, eds. *Perspectives on Punishment* (Oxford University Press, 2006). Downes and Hansen note that recent increases in welfare spending in the UK have, however, coincided with significant growth in the prison population. They suggest that this may be due to the much-remarked failure of a sufficient proportion of these resources to find their way into the delivery of education, medical and other caring activities as opposed to their restructuring and management. An alternative hypothesis would be that this reflects the increasing “bifurcation” of social policy, with sustained welfare provision for those whom there is an interest in reintegrating (as in “welfare to work”), and the removal of benefits from those who will not, or cannot be, incorporated into the economy.

ett and Western have argued,⁸² on the basis of a study of U.S. states with findings similar to that of Downes and Hansen, that welfare regimes vary according to their commitment to including or excluding marginal groups: the more inclusive systems exhibit both higher welfare spending and lower imprisonment rates. But are there other factors that predispose countries or regions towards inclusivity or exclusivity in both penal and welfare arrangements?

It would be nice to be able to attribute the persistence of decent welfare provision and penal moderation to generous and humane sensibilities. But it seems likely that both the distinctive structures of welfare states and penal moderation are articulated with broader political and economic dynamics. In other words, there are political-economic reasons which explain why it is possible – indeed sensible – for some countries to maintain generous and expensive welfare provision even in the face of increasing competition from countries that are not investing public resources in this way. A range of explanations has focused on precisely such an articulation of the welfare state to the structure of the economy, and I canvassed some of them in my discussion of production regimes. Within a liberal market economy in a flexible and increasingly services-based economy, governments have chosen to maximize incentives to rejoin the labor market, a strategy that has had sufficient plausibility with a critical mass of the electorate because of the high degree of transferable skills within the work force. Within the labor markets of countries with less flexibility, where long-term investment in less transferable skills (as in the social-democratic and continental systems), or an extensive public sector providing employment for women and services for dual-career families (as in the social-democratic systems of Scandinavia), are still key to comparative advantage, it makes sense to give relatively generous support to workers who experience periods of unemployment rather than encouraging them to retrain or to find work in new sectors of the economy. *Pace* Margaret Thatcher (and, in part, Tony Blair), generosity of welfare provision and relatively secure employment relations appear, under certain combined conditions, to be just as good a basis for economic success and stability as relentless flexibilization and welfare cuts. For, though there has been some recent reduction of welfare benefits in several of the European corporatist countries,⁸³ the remaining differences are significant and seem unlikely to be eroded in the near future.

4) Institutional capacity to integrate “outsiders”

Another key feature of the late modern world, as analyzed by criminologists like Garland and Young, is the increasing mobility of the social world from the late 1960s on. This mobility has a number of dimensions: in a wealth-valuing culture and flexible economy, with relatively high levels of education, there is more mobility between social classes; in a globalizing economy characterized by transnational political structures like

⁸²K. Beckett and B. Western, “Governing social marginality,” in D. Garland, ed., *Mass Imprisonment: Social Causes and Consequences* (London: Sage, 2001), pp. 35-50.

⁸³N. Gilbert, *The Transformation of the Welfare State: The Silent Surrender of Public Responsibility* (Oxford University Press, 2002). Downes’s and Hansen’s figures for 1998 reveal the scale of the difference, with the proportion of GDP spent on welfare ranging from 31 percent in Sweden to less than half that level – 14.6 percent – in the U.S. Again, the figures arrange themselves on CME/LME lines, with the exception of Japan, which has a level of welfare spending similar to that of the U.S.

the EU, marked also by relatively cheap international travel and mass communications, there is more geographical mobility. These developments have added new layers of complexity to what might be seen as one of the central challenges for any democratic system of criminal justice: that of “reintegrating” offenders into society and economy.

This is far too complex an issue to be susceptible of even a preliminary analysis in this paper. But it is interesting to note – and a corrective to what might be seen as the temptation to think that the coordinated market economies of Europe and Scandinavia are necessarily better placed to sustain democratically acceptable levels of penal moderation than their liberal-market Anglo-Saxon counterparts – that the structure of this problem may be significantly different in the two sorts of system. While the laissez-faire and individualistic culture typical of liberal market economies may well make it relatively easy to integrate geographical or “cultural” “outsiders” like recent immigrants wherever they find access to the labor market, the more intensively group- and skills-based system of the coordinated market economies may well pose significant challenges in terms of integrating newcomers into the representative and decision-making structures that have helped to sustain a relatively moderate criminal justice policy with relatively high institutional capacity for reintegration. Coordinated market economies are, in short, good places to be incorporated insiders, but hard systems to enter from the outside. In this respect I remember that, during research on community-based criminal justice policies in Germany which Lucia Zedner and I conducted over a decade ago, we were already struck by the strong association of crime with the image of the “Auslander” – an image which was in marked contrast to the (admittedly no more attractive) class, age and race-based stereotypes informing British criminal justice debate of the time.⁸⁴ In a relatively closed and highly coordinated system, it makes sense for the government to support citizens who temporarily fall on hard times – and it is hence relatively easy to garner political support for such policies. But the impact of a large inflow of unincorporated “outsiders,” for example through the sort of economic migration which has featured particularly strongly in continental Europe and some parts of Scandinavia since the dismantling of the Iron Curtain, may cause particular strain, significantly undermining the institutional capacity to sustain inclusionary social policies across the board – with worrying implications for criminal justice.

This argument might help to explain the relatively high proportion of foreign prisoners in social democratic and, particularly, corporatist countries.⁸⁵ But might it also help to explain the worrying recent trends towards greater penal severity in countries like Sweden, Denmark, Finland and – most spectacularly of all – the Netherlands? It would be depressing to think that these quintessentially tolerant – though, until the events of 1989, relatively homogenous – societies may be being pushed in a less tolerant direction by the challenge of diversity. But Beckett’s and Western’s argument about the relationship between inclusionary welfare provisions and moderation in punishment

⁸⁴Nicola Lacey and Lucia Zedner, “Discourses of Community in Criminal Justice,” *Journal of Law and Society* (1994): op. cit., note 52; “Community in German Criminal Justice: A Significant Absence,” *Social and Legal Studies* 7 (1998).

⁸⁵See Figure 1 below; see also Council of Europe, “SPACE 1 Annual Penal Statistics 2005 (by Marcelo F. Aebi and Natalia Stadnic), Table 3 (International Centre for Prison Studies, World Prison Brief, 2006).

may perhaps help us towards an explanation, while providing a ray of hope for the future. Their further finding of a positive relationship between levels of imprisonment, the proportion of black and ethnic minority groups, levels of poverty and Republican representation led them to argue that welfare and penal policy tend to be closely tied mainly at times “when efforts are made to alter prevailing approaches to social marginality.”⁸⁶ Much more research would be needed to establish precisely what is happening in the social democratic countries to prompt the recent rise in penalty, let alone whether it is likely to be sustained. But it seems relevant that in at least some of these countries – like the Netherlands, where Downes and van Swaaningen have recently reported that no less than 57 percent of the prison population was born outside the country⁸⁷ – fears about the sustainability of established welfare and social structures in the face of large-scale immigration have fed into the popularity – and in some cases the election – of right-wing governments committed to policies akin to the U.S. Republican “efforts to alter prevailing approaches to social marginality.”⁸⁸

5) Embedding of criminal justice policy within a constitutional structure: the relationship between “police power” and “government by law”

In *The Police Power*, Markus Dubber advances a historical thesis which may be of further relevance to our understanding of the differences in the institutional capacity of liberal democracies to sustain relatively moderate criminal justice policies under late modern conditions. Like Whitman’s, Dubber’s argument plays out over a very large historical and spatial canvas, 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 preventive in temper, the police power is oriented to goals such as peace, welfare, efficient use of resources and security.⁸⁹ 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 illegitimate.⁹⁰ 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.

⁸⁶K. Beckett and B. Western, “Governing social marginality,” *op. cit.*, p 46.

⁸⁷“The Road to Dystopia?” *op. cit.*, Figure 6.

⁸⁸See Cavadino and Dignan, *op. cit.*, pp. 47-8, 106-7, 121, 137-8, 146, 166, 307, 314; David Downes, “Visions of Penal Control in the Netherlands,” and Downes and René van Swaaningen, “The Road to Dystopia? Changes in the Penal Climate of the Netherlands,” *op. cit.*

⁸⁹*The Police Power* (New York: Columbia University Press, 2005), Chapter 5.

⁹⁰*Ibid.*, *op. cit.*, note 68, pp. 42 ff. and Chapter 8.

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.⁹¹ 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. 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.⁹² 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 offense implied, without thereby permanently unfitting him for productive labor (hence the prevalence of whipping). Criminal justice and punishment were, in this view, primarily a hierarchical means of managing a population and not an expression of self-governance within a community of equals.

With the gradual emergence of modern sensibilities and a vestigially democratic structure of government, this ambiguity about the status of criminal justice, lying on the muddy border between political/legal and police power, became more troubling. 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 the United States by the Founding Fathers, the police power, Dubber argues, flourishes to this day in the U.S.A. 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 U.S.A., 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

⁹¹Ibid., Part I.

⁹²Ibid., pp. 14-16, 19.

power to criminalize remains all but unconstrained. This, he suggests, discloses strong traces of the police mentality which characterized much of the early, premodern 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,⁹³ Dubber 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 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, status-based societies that preceded the modern era. My suggestion is that there may be another important difference here among modern democracies. 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 U.S.A., which absorbed the police power, unacknowledged, within the new legal power.⁹⁴ In these societies, 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.

In both Britain and the U.S.A., probably the most obvious manifestation of the police power is the existence of widespread regulatory offenses in areas such as driving, health and safety, licensing, low-grade public disorder. These *mala prohibita* – many of them attracting strict liability⁹⁵ – 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

⁹³Ibid., Chapter 4.

⁹⁴As Dubber notes, in many countries – including both Germany and the U.S.A. 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 (*The Police Power*, Chapter 7). In the U.S., 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 (ibid., Chapter 6). 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 substantive due process which might effectively constrain its definition and exercise. Dubber himself begins to develop such a theory (ibid., Chapter 9).

⁹⁵I.e., liability without proof of fault in the sense of responsibility conditions such as intention, recklessness, negligence or knowledge.

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 offenses. Nor will a standard treatise give much space to troubling “exceptions” to the “normal” principles of criminal procedure such as anti-social behavior orders,⁹⁶ 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.⁹⁷ British and American criminal law therefore encompasses two markedly different sorts of 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 offenses 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 offenses as a more visible and autonomous manifestation of state power. As Whitman puts it: “[T]he 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*...”⁹⁸ And it is this association of crime with evil which has come to feed so intractably into other, political-economic dynamics favoring penal severity.

⁹⁶Crime and Disorder Act 1998; www.crimereduction.gov.uk/asbos5.htm; see Tim Newburn, “Young People, Crime and Youth Justice,” in Mike Maguire, Rod Morgan and Robert Reiner, ed., *The Oxford Handbook of Criminology*, third edition (Oxford University Press, 2002), pp. 531-578 at pp. 563-4; and Ken Pease, “Crime Reduction,” in Maguire et al., pp. 947-979, at pp. 969-70.

⁹⁷For further analysis and discussion, see Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law*, third edition (Cambridge University Press, 2003) and Nicola Lacey, “In Search of the Responsible Subject: History, Philosophy and Criminal Law Theory,” *Modern Law Review* 64 (2001): 350-371. And for a recent, explicit, example of the marginalization of regulatory offenses, see Victor Tadros, *Criminal Responsibility* (Oxford University Press, 2005), p. 16.

⁹⁸*Harsh Justice*, op. cit., note 29 p. 201 (both quotations).

Doubtless we should not exaggerate the significance of this difference between the European and the British and American 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 postwar Germany and the Netherlands as compared with Britain and the United States.⁹⁹ When combined with the political economy analysis sketched earlier section, this comparative legal framework may help us to understand the persisting differences between the German, Swedish, Dutch and the British or U.S. systems – as well as illuminating the dynamics which may be putting those longstanding differences under pressure.¹⁰⁰

Conclusion

It would take a yet longer analysis and a much larger body of evidence, embracing a wider range of institutional variables, to accomplish anything like a full analysis of the questions raised in this paper. I trust, however, that I have succeeded in establishing an essentially simple point: It is of little use to have a clear program of institutional criminal justice reform, embedded within a coherent theory of liberal democracy, if prevailing features of political and economic structure or culture make it impossible to garner the electoral and political support or to build the institutional capacity necessary to enact, implement and sustain that program. Recent research on, and informed debate about, criminal justice gives us reason to believe that there are significant political con-

⁹⁹Cf. Lazarus's account of legal protections for prisoners in Germany: *Contrasting Prisoners' Rights*, op. cit., note 36.

¹⁰⁰In this context it is interesting to note the outcome of last year's (September 2005) German elections, in which the Christian Democrats were widely predicted to gain a substantial victory. In the event, their neo-liberal agenda of economic reform – which, had it been thoroughly pursued, would have attempted to move Germany away from the coordinated towards the liberal market economy structure – appears to have deprived them of decisive electoral success, with the German electorate (and indeed some parts of the CDU) resisting transition to flexible labor markets and the dismantling of social protections characteristic of the postwar 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 that sustain Germany's coordinated 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 favor liberal over coordinated market economic structures. I therefore – regretfully – share Robert Reiner's pessimistic prognosis for the future of social-democratic criminal justice policy (“Beyond Risk,” op. cit., note 24).

straints on the development and implementation of the sort of criminal justice systems which would be indicated by a commitment to liberal-democratic values. Further, as I have attempted to show, a comparative analysis suggests that there are key national differences in the capacity of broadly liberal democratic systems to deliver the sorts of criminal justice policies to which we would expect them to be committed; systems that respect human rights and the dignity of persons, observe the rule of law, and deliver an effective response to crime without demonizing and excluding certain sectors of the population.

Some sorts of liberal-democratic system may be more capable, in short, of delivering what normative theorists think of as liberal criminal justice policies than others. This may sound like a recipe for dystopia or – at best – for a “second best” approach to criminal justice policymaking. But even if our analysis suggests that the room for maneuver may be slight, it seems important to try to grasp – at an institutional level – why it should be that some kinds of liberal democracy have turned out to be so much better at sustaining moderate, relatively tolerant and humane criminal justice systems than have others. Neither the UK nor the U.S. is going to adopt a PR system, or restore a generous welfare system, any more than they are about to empty their prisons and rediscover penal welfarism. Countries like Germany, whose economies and societies flourish on the basis of a highly coordinated system of group integration – the other face of which is an intractable exclusion of outsiders and long-term unincorporated groups – are not going to become flexible economies overnight. Along these, and many other institutional variables that have not been mentioned in this paper, their available criminal justice strategies will be accordingly enabled and constrained. Policy improvements are possible, and there is some scope for international learning and policy transfer; but the appropriateness of reforms is always contingent on the specific dynamics of the local environment.

Policy transfer has not, in any case, been the object of my comparative argument. Rather, I want to suggest that an adequate theoretical analysis of the potential for improvement of criminal justice systems in terms of their compliance with democratic ideals must be informed by a grasp of their institutional conditions of existence; and that these conditions of existence include not merely the shape of criminal justice policies and practices but also the broad political and economic structures of a given society. Structure is not determination: so even though I cannot, unfortunately, share Radzinowicz’s view that “[P]enal history amply demonstrates that unjust levels of punishment in democratic societies break down sooner or later,” let me end on a more optimistic note.¹⁰¹ The recent reduction of the prison population in this country shows that committed politicians in liberal market economies can on occasion buck the trend to severity. Even British Conservative Home Secretaries – Winston Churchill notable among them – sometimes manage to effect a reduction in the prison population. Recent data on emerging political anxieties about the costs of criminal justice in some U.S. states may give us hope that sufficiently determined politicians there too may before long be in a position

¹⁰¹Sir Leon Radzinowicz, *Adventures in Criminology* (London: Routledge, 1999), p. 435, cited in Tim Newburn, “‘Tough on Crime’: Penal Policy in England and Wales,” *op. cit.*, p.41.

to work effectively towards at least a modest reversal of the trend to harshness.¹⁰² To realize criminal justice may not be “feasible”:¹⁰³ but the realization of less criminal injustice, and of a criminal justice system matching more closely liberal-democratic aspirations, is a worthy goal. It is, however, one towards which we can only make progress on the basis of a combined sense of our normative objectives and of the varying institutional environments in which we must pursue them.

¹⁰²See Sara Steen and Rachel Bandy, “When the policy becomes the problem,” *Punishment and Society* 9 (2007): 5-26.

¹⁰³See Philip Pettit, “Is Criminal Justice Feasible?” *op. cit.*, note 14.

Figure 1: Political Economy, Imprisonment and Homicide

	Imprisonment Rate 2002-03	Imprisonment Rate 2006	Homicide Rate	% Foreign Prisoners
Neo-Liberal Countries (liberal market economies)				
U.S.A.	701	737	5.56	6.4
South Africa	402	336	55.86	3.3
New Zealand	155	186	2.5	9.3
England and Wales	141	148	1.6	13.6
Australia	115	125	1.87	19.5
Conservative corporatist countries (coordinated market economies)				
Italy	100	104	1.5	33.2
Germany	98	94	1.15	28.2
Netherlands	100	128	1.51	31.7
France	93	85	1.71	21.4
Social democracies (coordinated market economies)				
Sweden	73	82	1.1	26.2
Finland	70	75	2.86	8.0
Denmark	58	77	1.02	18.2
Norway	58	66	.95	17.2
Oriental corporatist (coordinated market economy)				
Japan	53	62	1.05	7.9

Sources: Adapted from Cavadino and Dignan (2005), Barclay and Tavares (2003), International Centre for Prison Studies (2007), Hall and Soskice (2001).

Figure 2: Recent Trends in Canadian Imprisonment

	Prison Population	Imprisonment Rate
2006	34 096	107
2000-01	35 235	123
1997-98	37 401	126
1994-95	38 516	131
1991-92	35 235	123

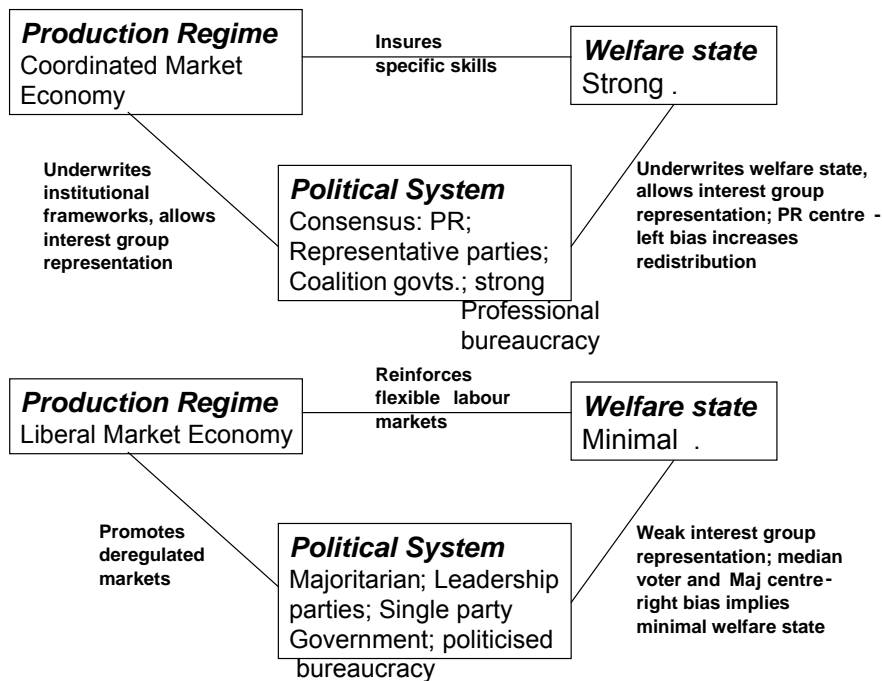
Source: International Centre for Prison Studies (2007).

Figure 3: Imprisonment Rate Trends in the U.S., UK, Germany, Sweden and The Netherlands

	1986	1997-98	2006
U.S.	313	645	737
UK	93	125	148
Germany	88	90	94
Sweden	56	59	82
Netherlands	34	87	128

Source: Adapted from Cavadino and Dignan (2006), p. 45; International Centre for Prison Studies (2007).

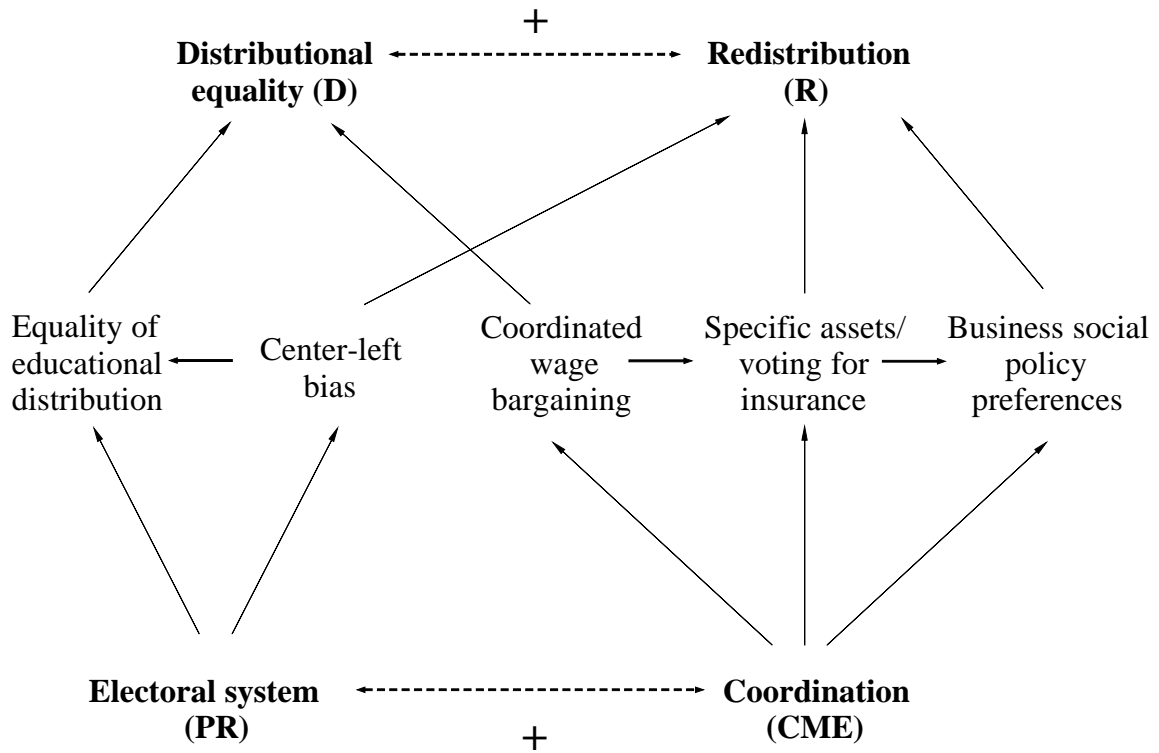
Figure 4: Diagram summarizing main institutional linkages in different varieties of political system



(with thanks to David Soskice)

Figure 5: A Sketch of the Causal Relationships Between Institutional Variables

Source: Figures 5 6, 7 and 8, are taken from Torben Iversen and David Soskice, "Distribution and Redistribution: The Shadow of the Nineteenth Century," typescript on file with the authors. I am grateful for their permission to reproduce these diagrams.



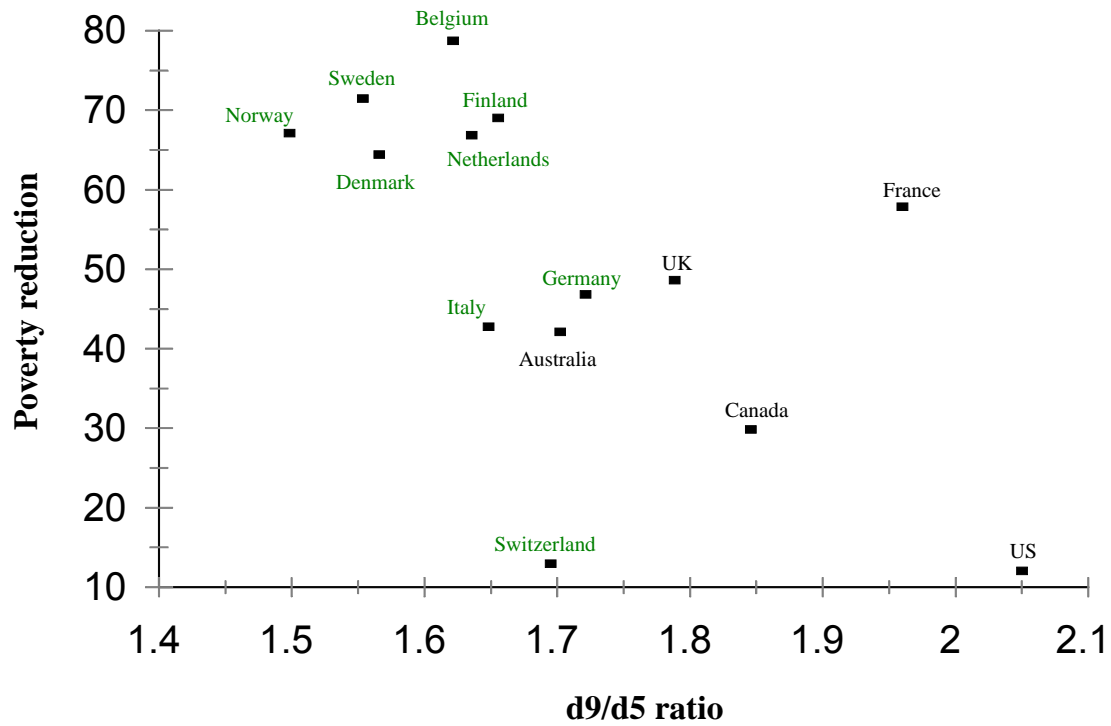


Figure 6: Inequality and Redistribution (ca. 1970-1995)

Notes: Poverty reduction is the percentage reduction of the poverty rate (the percentage with income below 50 percent of the median) from before to after taxes and transfers. The d9/d5 ratio is the earnings of a worker in the top decile of the earnings distribution relative to the earnings of a worker with a median income.

Source: Luxembourg Income Study and OECD.

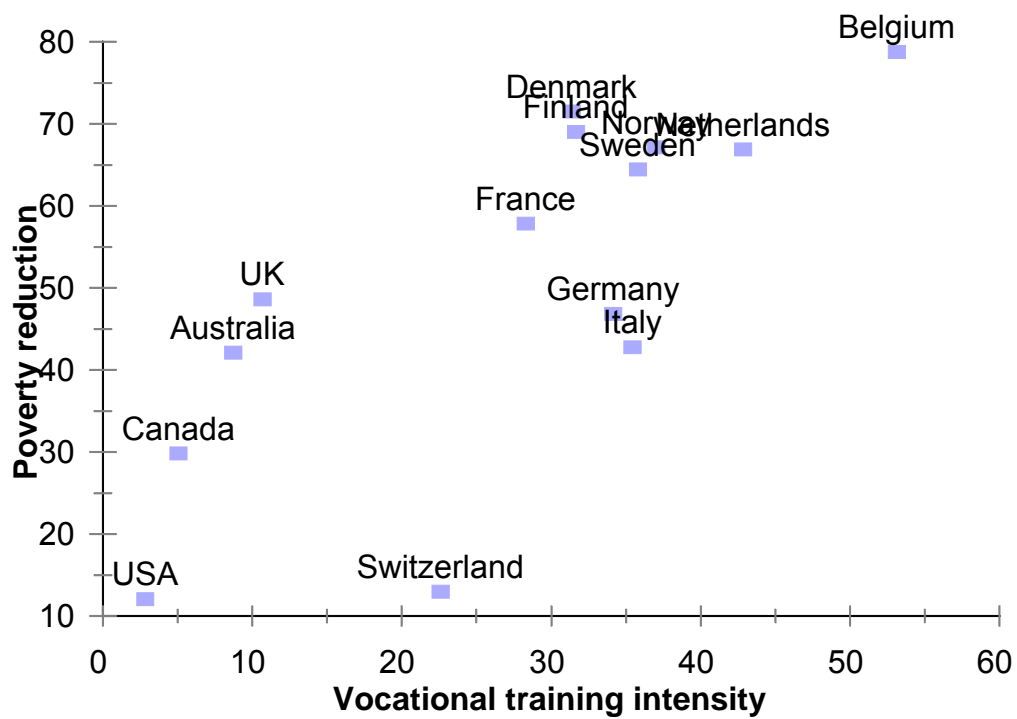


Figure 7. Vocational Training and Redistribution

Notes: Poverty reduction is defined the same way as in Figure 1. Vocational training intensity is the share of an age cohort in either secondary or post-secondary (ISCED5) vocational training. Source: UNESCO (1999).

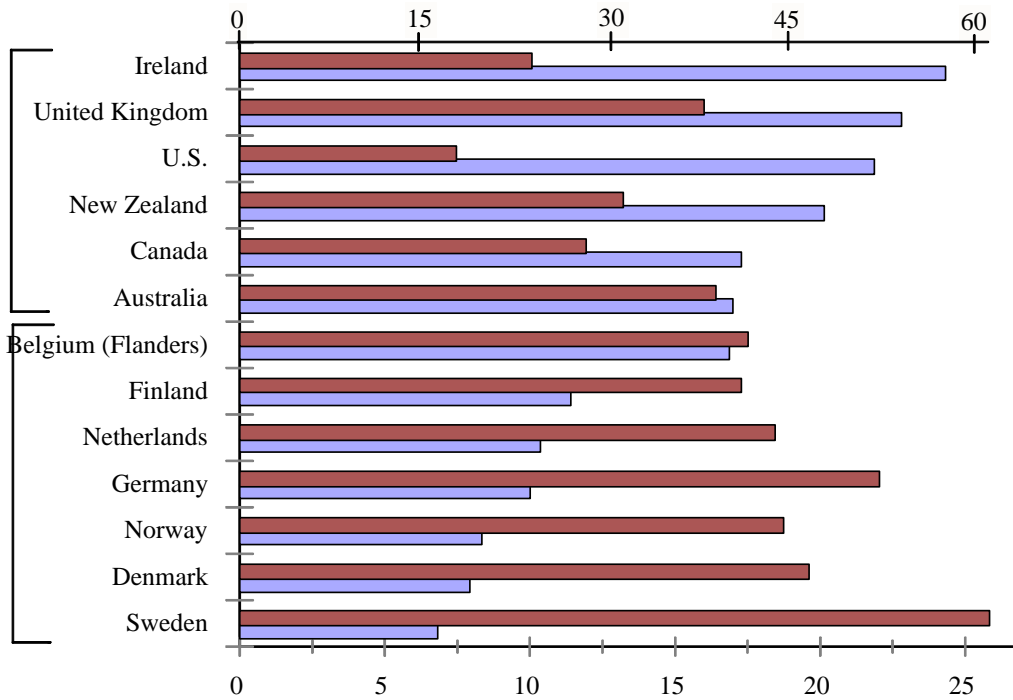


Figure 8. The percentage of adults with poor literacy scores (bottom scale), and the percentage of adults with low education and high scores (top scale). 13 OECD countries, 1994-98.

Notes: The top bars (using top scale) show the percentage of adults who have not completed an upper secondary education but have high scores on document literacy. The bottom bars (using bottom scale) show the percentage of adults taking the test who get the lowest score, averaged across three test categories.