Countering catastrophic criminology : Reform, punishment and the modern liberal compromise

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Countering catastrophic criminology

Reform, punishment and the modern liberal compromise

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Abstract

This article argues that accounts that envisage rupture in penality tend to overplay the coherence of 'modern' punishment and underplay the inconsistency of current developments. It suggests that this problem stems in large part from a failure to appreciate the 'braided' nature of modern liberal punishment, which is always about both punishment and reform. Part of the 'secret' to this is found in David Garland's earlier work in which the 'welfare sanction' appears as a compromise between modernist scientific expertise and liberal legalism and individualism. Normative regulation coupled with punishment in this bargain. As a result, even during the heyday of the welfare sanction and at rehabilitation's height, punitive and deterrent penalties remained important. Similarly, there is substantial evidence that increasingly widespread approaches such as restorative justice, therapeutic justice and risk-need models carry a newly revised correctionalism into the present. Rather than conceive recent changes as indicative of a watershed in penal rationality and practice, this article suggests that it is more important to think about the ways in which neo-liberal assaults on the modernist side of this equation have transformed its character.

Key Words

liberalism • modernism • neo-liberalism • punishment • reform

I am skeptical of approaches of this 'epochal' sort. I prefer to examine changes at a more modest level, not in terms of cultural shifts but as empirically identifiable differences in ways of thinking and acting. It is not a question of claiming that the older ways have been erased or consigned to history, but of identifying something new taking shape within and alongside the old arrangement, something different threatening or promising to be born. (Rose, 1999: 173)

INTRODUCTION

The 'volatile and contradictory' (O'Malley, 1999) character of crime policy is often juxtaposed against the perceived cohesiveness of 'modern' punishment to explain the penal present as a moment of fundamental transformation. O'Malley (2000a) has referred to this type of approach as 'catastrophic'. Though he critiqued several versions of this thesis five years ago (O'Malley, 2000a),[1] many others have cropped up since then. They argue that we are in the midst of a significant break in penal rationality, and a consequent watershed in our techniques for governing crime. The nature of the rupture – how it is described and how it is said to have changed things – usually depends upon each author's particular distinction between the past and the present, yet they each propose that we have reached the end of some era or epoch. In 1986, Colin Gordon referred to this type of historical vision as 'semiology of catastrophe' (1986: 78), and he included among his examples Hayek's *Road to serfdom*, Adorno and Horkheimer's *Dialectic of enlightenment*, and Polanyi's *Great transformation*. Gordon argued that these histories of the present stem from a distinct style of genealogical investigation that reflects upon the pre-cursors to some current catastrophe. Perhaps the most compelling genealogical form, they generate 'a new forensic edge in the interrogation of the past' (Gordon, 1986: 77). This is because the outcome, the 'catastrophe' as it were, is already known to us, and we can then try to understand more about historical trajectories in light of this. On the other hand, Gordon suggests, the approach lends itself to 'a harsher judgment on [. . .] present, undiagnosed trends and propensities' (1986: 77–8); to favoring exemplars of rupture over those which indicate continuity.

This is not, however, the sole or even the dominant style of genealogical investigation:

> Alongside it and sometimes overlapping with it is the different and more classical mode . . . which might instead be called a permanent pragmatics of survival, oriented to the longer-term identification of historic trends which may be irreversible in character and may impose inescapable costs and intrinsic, though finite risks. (Gordon, 1986: 78)

The difference, as Gordon sees it, is not so much in political partisanship but in 'ideological tonality' (1986: 78): where one approach prophetically warns that a certain course may lead or has led to catastrophe – the *end* of one thing or another – the other addresses the hazards as well as the necessities of the present. The latter approach, of which Foucault and the Frankfurt school are Gordon's examples, spotlights instead the *beginning* of a reformulation of the present. At one level, the distinction is between reading the present as an end or as a beginning, and as we will see, this has important theoretical and practical consequences.

This article will argue that catastrophic approaches in criminology tend to overplay the coherence of 'modern' punishment. There is frequently an assumption in these criminologies that the 'era of rehabilitation' was unified in the sense that punitiveness was eclipsed by more reformative tendencies. Certainly at times correction and reform have held center stage, though punishment was never fully displaced – and as we will see, the reverse is true also. Furthermore, in centering rupture, catastrophic approaches also tend to downplay or ignore counter-currents to present punitiveness. I will argue here that punishment and reform have always braided together in modern liberal penality, and that they continue to do so. While some catastrophic approaches have aptly described several of the recent changes to the punitive side of the story, they have in

general failed to consider innovative penal projects that re-invent modernist correction and reform.

NEW CRIMINOLOGIES OF CATASTROPHE

In defending a postmodern interpretation of criminal justice, Simon Hallsworth (2002) has argued that economic shifts and changing social relations have undermined the (social) conditions that were necessary to sustain correctional projects. This has happened, he argues, because of a 'crisis' in 'penal modernity'. In response, a new 'economy of excess' is said to have overshadowed criminal justice which re-legitimates pain delivery, ushers in (increasingly) visceral sentencing and abandons the productive investment in offenders. These developments he argues, are not modern, and cannot be linked with modern principles of punishment because they question and find wanting the positivistic ideals of rehabilitation. According to Hallsworth, just as the arrival of a 'restricted' modern economy revamped the excessive feudal order, so too has a new 'global economy of excess' now unmade penal modernity. By this token, new criminal justice practices are incommensurate with modernity and fundamentally seek to destabilize and replace its normative foundations.

In contrast to other postmodern accounts, Hallsworth argues that it is not necessary to propose the complete disappearance of modernity in order to confirm these changes (2002: 147–8). Yet he clearly identifies a rupturing of 'modern punishment':

> Against the dominant penal trend expressed throughout the late 19th and 20th century that sought to invest productively upon offenders in ways guaranteed to reclaim them as useful, productive subjects, this trend has now been reversed [. . .] This shift has been accompanied by a profound reconceptualization of the individual penal subject, as someone to whom pain can be legitimately delivered, and whose reform is no longer considered necessary, possible or desirable [. . .] nothing is done to help reform the incarcerated because such systems no longer recognize that anything can or ought to be done to them. (2002: 158)

> Cumulatively, these shifts have provoked a crisis in penality. (2002: 148)

The response to this crisis involves the 'resurrection of penal values that are incompatible with and profoundly antagonistic to those of penal modernity' (2002: 156). Yet they are only inconsistent with 'modern' punishment if we take the latter as primarily or wholly about the productive investment in offenders, and assume that visceral sanctions and punitive orthodoxies were not at play. To the contrary, it is doubtful that there was ever a complete de-legitimation of pain delivery and punitiveness in 'modern' prisons. As Barry Vaughan (2000) has commented, it may be rather that overt physical brutality was transposed and transformed into more embedded psychological and emotional punishment.

In *The culture of control* (2001), David Garland likewise argues that the present 'crime control complex' is drastically different than anything we have seen before:

> Recent developments in crime control and criminal justice are so puzzling because they appear to involve a sudden and startling reversal of the settled historical pattern [. . .] The modernizing processes that, until recently, seemed so well established in this realm [. . .] now look as if they have been thrown into reverse. (Garland, 2001: 3)

Twentieth-century 'penal modernism' is described by Garland as the combination of underlying specialist institutions such as the police, the courts and prisons, juxtaposed with a modernist superstructure organized around the unifying ethos of 'correctionalism' (which includes generally, rehabilitation, individualized treatment, indeterminate or flexible sentences and criminological research). This superstructure, he argues, was supported by systematic arrangements such as probation, parole, juvenile courts, treatment programmes and so on, and more broadly by social welfare agencies themselves. The resulting organizational mix is said to have created a hybrid 'penal welfare' structure, which combined the liberal legalism of due process and proportionate punishment with a correctional commitment to rehabilitation, welfare and specialist (criminological) expertise. This nexus mobilized what he calls the 'welfare sanction' (see also Garland, 1981), and a breadth of consensus was reached about the ends that criminal justice was to pursue and the means required to do so. A common 'credo' and consensus emerged that crime control must be a specialist, professional task of law enforcement, oriented to the post hoc pursuit and processing of individual offenders (Garland, 2001: 34). Here 'rehabilitation' was not just one element among others, but the 'organizing principle, the intellectual framework and value system that bound together the whole structure and made sense of it for practitioners' (Garland, 2001: 35).

By contrast, this unified arrangement has supposedly now been transformed into a 'late modern' pre-occupation with economic freedoms and social control – the precise opposite concerns. Garland posits that 'In the course of a few years, the orthodoxies of rehabilitative faith collapsed in virtually all of the developed countries' (2001: 54). And he continues: 'Late modernity and the new politics to which it gave rise changed how organizations thought about crime and punishment, justice and control, just as it changed the terrain on which these organizations operated' (2001: 103). This new terrain is said to have ushered in control and containment. New strategies include:

> the reintroduction of chain gangs, 'three-strikes' and mandatory minimum sentencing laws; 'truth in sentencing' and parole release restrictions; 'no frills' prison laws and 'austere prisons'; retribution in juveniles court and the imprisonment of children; the revival of chain gangs and corporal punishments; boot camps and supermax prisons; the multiplication of capital offences and executions; community notification laws and pedophile registers; zero tolerance policies and Anti-Social Behaviour Orders. (2001: 142)

Crime he suggests, has taken on an entirely new significance as an indicator of inadequate controls, rather than an indicator of need, whose solution lies in the development of more controls. Garland's vision of a catastrophic rupture in 'penal modernity' presses him into overplaying the coherence and consistency of that 'era', and into underestimating the inconsistency of current developments, which as we will see, are not *all* about control.

Barry Vaughan's (2000) account, on the other hand, suggests that 'modern punishment' was less coherent than accounts like those of Garland and Hallsworth make it seem. For Vaughan, punishment was 'always' about both reform and punishment. Arguing that citizenship can serve as an important indicator of punishment, he shows how the development of distinct components of citizenship (egalitarianism, social trust, mutual dependency and so on) correlate to significant changes in punishment. Beginning with the birth of the prison and the conditions that surrounded it, Vaughan

argues that modern punishment can be defined by the enumeration of normalization, correction and/or segregation (2000: 24). The category of the criminal was, he argues, one of incomplete citizenship where punishment was partly an attempt to encourage offenders to regulate themselves and change their behavior: 'it is against those who have fallen below the standards which are expected of all citizens but is also used to mould them into citizens' (2000: 24, citing Bailey, 1987). But at the same time, it served as a deterrent and retributive mechanism. Modern punishment for Vaughan was both a punitive deterrent as well as a device for character-transformation (2000: 26). Penal authorities, he argues, could never establish regimes which would be exclusively reformatory – the symbolic role of punishment implied that suffering had to be seen to be imposed so they could not be seen as being too 'indulgent' (2000: 33). *All* modern punishment thus involved elements of both punitiveness and reform (2000: 26–7): 'reform and deterrence were always linked and [. . .] to portray punishment as composed of one or the other fails to do justice to the complexity of penal practice' (2000: 32).

In contrast to this duality of more modern punishment, however, Vaughan suggests that not only has there been a recent increase in the incarcerative side of punishment, but that the nature of punishment is becoming more exacting. It is no longer being used in a 'modern' way to reintegrate, reform and to discipline 'conditional' citizens, but instead to simply disable or exclude those who are thought to be 'non-citizens'. Since the 1970s, he argues, citizenship has been undergoing a significant transformation, which relates to the failure of the 'nation-state' to secure participation within society, and the correlative development of supra-national citizenship. As states become more integrated through political institutions above the level of the nation-state: 'Traditional ideas of citizenship are challenged by such developments and currently punishment is being deployed to shore up citizenship through the exclusion of marginalized members and immigrants' (2000: 36). This for Vaughan runs completely counter to the reform/punishment character of 'modern' punishment:

> Punishment is now being used not upon those who are thought to be conditional citizens with a view to reintegration but against those who are thought to be non-citizens to disable or exclude them. Punishment in the modern era has always been ambivalent but it is losing whatever sense of inclusiveness it has as the exclusiveness of citizenship becomes more evident. (2000: 36)

There seems then a clear tendency to interpret criminal justice and penality as having undergone a 'catastrophic' transformation. As the argument goes, things are now and will be in the future completely different from the previous era, organized as it was around scientific reform and correction. While these accounts vary greatly in detail, and in what they propose causes this rupture, they are alike in that they now see the governance of crime as control oriented, exclusionary and incacerative. However a number of critics have suggested that this over-exaggerates the degree of change and the consistency of emerging patterns (e.g. O'Malley, 2000a; Loader and Sparks, 2004; Brown, 2005).

MOVING BEYOND CATASTROPHE

O'Malley (1999) has described penal policy as exhibiting 'volatile and contradictory' characteristics, recognizing that both correctional *and* punitive currents are at work.

Rose (2000) has suggested that risk 'sorts' populations into low- and high-risk streams that are subjected respectively to inclusive *and* exclusionary practices. More closely aligned with the position adopted in this paper, Loader and Sparks (2004) have argued that neither the past nor the present exhibits the consistency attributed it by catastrophic criminologies:

> Aside from setting up some rather unhelpful binary oppositions [. . .], such histories of the present run the risk of doing violence to the past, of underplaying its tensions and conflicts, of inadvertently re/producing one-dimensional – implicitly rose-tinted – accounts of both the history of the politics of penal modernism, and the reasons for its (apparent) demise. (2004: 14–15)

For example it is questionable whether even during the heyday of the 'welfare sanction' things were as organized and coherent as some accounts suggest. Other writers have questioned the extent to which rehabilitation – and welfare governance itself (O'Malley, 2004a) – dominated mid-century practices as often as proposed.

For example, even at welfare's 'height', the fine remained the most frequently used penal sanction (Zedner, 2002: 344–5; see also Bottoms, 1983). And in prisons, correctional programmes always were and still are backed up by very real and immediate punitive and carceral sanctions for non-compliance or misbehavior, just as some criminal sanctions remained primarily retributive. Modern liberal penality, even where in large part reformative and corrective, always included some element of deterrence and retribution. As Vaughan remarks,

> It is a failing of those influenced by Elias (Franke, 1995) and Foucault (Garland, 1985) that they believe that the excessive brutality which seemed to characterize earlier punishments had no place in the prison system and were gradually eradicated from modern forms of punishment. (2000: 27)

Rather the explicit brutality in prisons throughout the 'modern' era was consistent, not occasional (Vaughan, 2000: 27), and regimes of solitary confinement, physical and psychological punishments for transgression of rules and intense humiliation and degradation, have always been elements of modern penal regimes. In other words, not only does the identification of change in catastrophic accounts seem too extreme – ignoring strong correctional and inclusive counter-currents today, and strong repressive currents in the era of the welfare sanction – but the modernist and liberal criminal justice in which we are still embedded has a characteristically 'braided' nature where correctional and repressive streams (regional differences aside) are always present and always strong.

Part of the 'secret' to this is provided by David Garland's earlier account (1981, 1985) of the emergence of the 'welfare sanction', and more recently by Barry Vaughan (2000). Emerging in part from criticisms in the 1800s that the Victorian penal system was less a remedy for social misbehavior and more a cause of it, the welfare sanction concerned itself with normative regulation, supervision and administrative segregation, as well as punishment (Garland, 1981: 40). In this account, the welfare sanction emerged as a compromise between 'modernist' social expertise based upon the scientific reform of offenders, and classical liberal concerns that offenders would no longer be held responsible for wrongdoing. The classical liberal orthodoxy of individualism, legalism and

social laissez-faire was thus rewritten to include non-legal (human) knowledges and disciplines:

> These knowledges and the techniques they proposed, though highly diverse and contradictory *inter se*, nonetheless were united by a general programme of intervention based not on a legal philosophy but upon a positive knowledge of (human) objects and the techniques which would transform them. (Garland, 1981: 38)

The durability of this penal-welfare compromise lay precisely in the fact that it combined so successfully punitive and reform impulses, liberal legalism and modernist scientific knowledge and expertise (see also, Garland, 2001: 35).[2]

As Barry Vaughan more recently points out, all modern punishment always entails elements of both punitiveness and reform (2000: 26–7). Where Garland (1985) goes on to break punishment down into two types (correction and segregation), implying that one is either the subject of reform practices or a recipient of exclusionary deterrence, Vaughan aptly highlights the 'ambivalence of punishment' (2000: 27). Part of this is his suggestion that the 'modernization' of punishment and the prison system did not eradicate violence, but merely transposed it, transforming overt violence into psychological and emotional humiliation, which is no less punitive. As such, the normative and disciplinary practices of the 'modernized' penal system were embedded as much in punishment as in correction and reform, and penality was a reflection of this recipe. While Vaughan chalks up the persistence of punitiveness to being a legitimating device for reinforcing the notion that offenders were not complete citizens (Vaughan, 2000: 28), alternatively we might say that the persistence of punishment alongside more scientific and expert-driven interventions is due to the continued braiding of modernist and liberal rationalities. In this way, the doctrines of punishment, responsibility, deterrence and so on, are melded to those of correction, reform and the application of 'human' knowledges and sciences.

Following this broader genealogy it seems clear that the arrival of a neo-liberal political rationality has led to an assault on the modernist elements of the equation, and a revalorization of liberal individualism and responsibility. Yet, as this article suggests, it would be a mistake to imagine that this represents a complete watershed. As others have argued (e.g. Meyer and O'Malley, 2005) it is not at all the case that 'modern' welfare institutions have disappeared, or even been significantly dismantled. Rather – as with unemployment – the old rehabilitative apparatuses have been the site of new techniques and new practices. For example, it seems true, as King (1999) has argued, that developments such as 'workfare' are coercive and 'illiberal', but it is also the case that these practices continue to braid together such repressive elements with more reintegrative efforts at retraining and reform (see Walters, 2000, 2001). In this process, reformative techniques have been subject to much innovation, bringing them in line with a new focus on individual responsibility, setting up new relations of expertise that downplay 'dependency', and so on – but 'expert' intervention with a view to changing subjects has not disappeared.

As the second part of the article will propose, something similar has occurred in the domain of punishment and corrections. Certainly the modernist theme of reform and correction has been under assault. But following the onslaught of 'nothing works' in the 1970s, a counter-tide of 'what works' has been flowing. Even should we agree

that programs and reform initiatives such as abolitionism, decriminalization and de-institutionalism have had little impact upon government thinking and policy (e.g. Garland, 2001), other programs have had more sustained and in some cases increasingly relevant play in criminal justice and penality. In these cases, correctional and reformative tendencies have been revalorized and revitalized. Rather than the period since about the 1980s having witnessed the demise of a correctional ethos, the following examples will demonstrate how we have been witness to their re-invention.

Restorative justice

Restorative justice has gathered increasing attention over the past two decades (see, for example, Olson and Dzur, 2004 and the *British Journal of Criminology* special issue, 'Practice, performance and prospects for restorative justice' (2002, 42(3))). As Daly has shown, in the past 10 years, over 60 edited collections or book-length treatments of it have been published in English. In her opinion, 'no other justice practice has commanded so much scholarly attention in such a short period of time' (Daly, 2004: 500). The concept of restorative justice has captivated not only academics and scholars, but researchers, policy makers, activists and advocates, and governments (see, for example, Daly, 2004). Important questions are still debated, for example, whether or not it should be an informal or a formal mechanism (compare Pavlich, 2002 and Olson and Dzur, 2004), whether it is the polar opposite to retributive forms of justice (compare Braithwaite and Mugford, 1994 and Daly, 2002), and the extent to which 'professionals' and 'experts' should be involved in its projects (see, generally, Johnstone, 2002). Yet despite these continued debates, and the diverse range of projects usually associated with it (e.g. victim offender reconciliation programs, sentencing circles and family group conferences), restorative justice proponents tend to agree upon the following core elements:

(a) an emphasis on the role of victims in the justice process;
(b) the involvement of all the parties concerned with the criminal event (including the victim, the offender, supporters of each and the wider community); and
(c) a central focus on 'solving' crime 'problems' by restoring balance among all affected parties, and successfully reintegrating victims and offenders back into their communities.

It seeks to extend the logic of informal mediation and arbitration beyond the settlement of business disputes and into the realm of individual conflicts (Braithwaite, 2003: 13–14). A primary concern is to reduce state control of the criminal justice process. Many would say the approach is based upon a critique of more 'formal' mechanisms, and by extension, of dominant criminological theories that see the state as the only legitimate arbiter of criminal justice (Olson and Dzur, 2004: 142).

Though it is now widely supported by various governments and politicians, most restorative experiments were started by criminal justice professionals, voluntary workers and allied reformers working within the existing (rehabilitative) system (Johnstone, 2002: 2). This grew from dissatisfaction with 'formal' procedures, but also with rehabilitative projects that centered on the state, its experts and state-supported and directed correctional systems. Restorative projects respond to these problematizations

by ridding criminal processes of 'experts' and by locating the authority and responsibility to solve crime problems within the communities that are affected by them. This is intended to move the crime 'problem' and 'solution' into community forums where the autonomy and embeddedness of local authorities is said to reside. The autonomy of state experts in governing crime posed problems for accountability to local interests. As a solution, restorative forums allow local interested parties to have a more central stake in matters pertaining to crime and delinquency within their communities. This broadens the corrective gaze to include parties other than the offender, and to encompass the entire community including the victim. The offence is thus shifted from a wrong committed against the state, to be corrected by state experts focusing on the rehabilitation of individual offenders, to a wrong committed against the proper balance of a 'community'. It is to be the community that mediates, sanctions and supports the correction of crime problems. In re-centering the victim in this process, restorative justice attempts to avoid rehabilitation's identified problem of focusing overly on the offender to the detriment of victims.

Yet despite these significant changes, there is a considerable thread of correction and reform embedded in restorative justice. It seems safe to say that rather than rupturing modern penality, these differences take restorative justice beyond rehabilitation's identified problems while maintaining and modifying several of its underlying principles. Some of these continuities become evident as we draw out the similarities between the two programs. For example, both restorative justice and rehabilitation share an action plan to address the *underlying causes* of offending behavior and to *prevent* re-offending (see also, Johnstone, 2002: 4). They both perceive crime as caused in part by (social) factors beyond an individual's control, and attempt to address those factors through reform (broad social programming in the case of rehabilitation, and more 'targeted' reconciliatory and reparative programs in restorative justice forums). Further, both concern themselves with aiding and changing offenders in some way, and they both focus on 'correcting' the crime problem rather than simply containing or controlling it. This demonstrates an implicit belief that crime is a 'problem' that has a solution and is solvable. As Lucia Zedner (2002: 356) has noted, restorative justice operates as a powerful rival to punitive orthodoxies, and may even signify a rebirth of rehabilitation. Restorative justice, in this sense, has quite a bit more in common with rehabilitation than it may at first appear, which in part may rebut the proposition that it is just another new weapon for crime control (though this may at times be its *effect*).[3] Along with the significant political capital that restorative justice is beginning to have – which stems in part from its promise to 'do' something about crime – it satisfies current (neo-liberal) demands by centering individual responsibility, keeping experts out of the justice process and involving the community in corrections (see O'Malley, 2000b; Zedner, 2002). But at the same time as it responds to criticisms of state-centered (welfare) rehabilitation, restorative justice projects re-articulate the modernist portion of the recipe in important and perhaps unrealized ways. It may quite rightly be seen as a re-invention of correctionalism rather than a significant departure from it.

Such projects have already acquired significant leverage in many western countries (see, generally, Braithwaite, 1993, 1999; Braithwaite and Mugford, 1994; Pavlich, 1996, 2002; Crawford and Newburn, 2002; Daly, 2002; Johnstone, 2002; Olson and Dzur, 2004). In 1999, the United Nations Economic and Social Council passed a resolution

endorsing its principles (United Nations, 1999) and inculcating them into various international resolutions. Related projects numbered over 1000 in 16 different countries in 2001 (Umbreit, 2001: xlv). Examples include 'reintegrative shaming'[4] ceremonies in New Zealand and Australia, which are even being used in white-collar crime cases (Braithwaite and Mugford, 1994: 152), and the proliferation of the 'Wagga' model throughout Australia and elsewhere, introduced in the UK in the early 1990s (Johnstone, 2002: 4). In New Zealand since 1988, the rate of institutionalization of youth offenders has dropped by more than half and perhaps by as much as 75 percent, and most cases that proceed beyond the formal laying of charges end up being diverted into some form of restorative conference (Braithwaite and Mugford, 1994: 162). In the UK, Adam Crawford and Tim Newburn (2002) have noted that both the Crime and Disorder Act 1998 and the Youth Justice and Criminal Evidence Act 1999, both pieces of national legislation, are grounded in the principles underlying the concept of restorative justice (see also, Home Office, 1997; Zedner, 2002: 356).[5] In Canada, La Prairie has likewise documented a shift away from 'punitiveness and punishment' towards 'reconciliation, healing, repair, atonement, and reintegration' (1999: 147). More specifically, there are now more than 100 'restorative projects' across Canada so labeled by the Department of Justice and Correctional Services. The RCMP, Canada's national police force, now champions 'Community Justice Forums' (CJFs), which center on restorative principles[6] and the Gladue Courts in Toronto now solely handle Aboriginal offenders through a culturally sensitive judicial process that stresses restoration and repair.

In the United States, however, restorative justice is often regarded as less prominent than elsewhere. Richard Ericson (2005: 666) for example, notes that in the USA a more exclusionary style dominates, whereas other countries including Britain, France, Australia and Canada, prefer a more inclusionary and restorative approach. The US Department of Justice did sponsor several conferences on restorative justice in the later 1990s, and at present, all 50 states have restorative programs in some stage of development (Olson and Dzur, 2004). Unfortunately this does not indicate the (likely varying) level of state commitment to restorative justice,[7] and as Daly has remarked, 'legislation establishing and funding restorative justice initiatives, of the sort that exists in Australia and New Zealand, and to a lesser degree, in England and Wales [. . .] is absent in the USA' (2004: 502). Nevertheless, in all 50 states restorative justice is now a penal option, though a poorly funded and supported one in many cases. Yet we might say that as is the case with most criminal justice innovations, where some jurisdictions have taken more to restorative justice, others have seen different developments – which may be no less correctional.

Therapeutic justice

Therapeutic jurisprudence has been described as the study of the role of the law as a therapeutic agent (Wexler, 2000). This is based upon the premise that the law can and does function as a therapeutic agent and that legal procedures constitute social forces that often produce therapeutic or antitherapeutic consequences (Winick, 1977). Emerging originally out of mental health law, over the past decade the therapeutic approach has moved out of primarily academic and scholarly discussions and into mainstream court practices, particularly in the United States. David Wexler, one of its

founders, has described the model as an umbrella under which can be located a number of areas that would not otherwise seem related:

> how the criminal justice system might traumatize victims of sexual battery, how workers' compensation laws might create the moral hazard of prolonging work-related injury, how a fault-based (rather than a no-fault) tort compensation scheme might enhance recovery from personal injury, and how the current law of contracts might operate to reinforce the low self-esteem of disadvantaged contracting parties. (Wexler, 1999: 696)

The movement of therapeutic jurisprudence from concept into practice has most fully occurred in the therapeutic application of the law by judges and attorneys, though it shows promise of emerging in other realms, and according to some, may eventually come to embrace most if not all legal areas (see Wexler, 1999). The recent popularity of therapeutic jurisprudence is generally regarded as due to the acceptance by many judges and attorneys that they 'actually inevitably play a role as a social worker' (Wexler, 1999: 699).

Following from this, 'therapeutic justice' has come to refer primarily to judicial approaches that address criminal behavior as a problem requiring non-traditional sanctions and/or social services in addition to traditional measures. Proponents of therapeutic justice generally agree that crime is most aptly conceived as a manifestation of an offender's 'illness' in body or character, and that the focus of the justice process should therefore be on rehabilitation, healing and teaching accountability, rather than punitive incarceration. As US supporter Judge Marcus argues, offenders should be offered 'treatment instead of incarceration' because their violations primarily stem from 'low self-esteem' (quoted in Nolan, 1998: 87). Despite different practical manifestations, the therapeutic justice model has several core themes that include a reliance on a combination of authorities in treating offenders (e.g. a psychologist, a social worker, a judge, etc.), the 'treatment' of offenders as individual cases and the correction of 'pathologies', 'routines', 'habits' and 'behaviors'. All of this involves enhancing skills and ties to communities in order to facilitate reintegration post-treatment.

An example of the therapeutic approach in practice may be found in various types of 'problem-solving courts'. While there is no clearly articulated philosophy which unites all problem-solving courts, they are designed to address 'root causes or underlying problems, not just symptoms, behind repeated court appearances or convictions' (Rothman and Dunlop, 2006: 2). This is accomplished by focusing on achieving better results for victims, litigants, defendants and communities in court, forging new responses to chronic social, human and legal problems that have proven resistant to conventional solutions, broadening the focus of legal proceedings to change the future behavior of litigants and ensure the future well-being of communities and an attempt to fix 'broken systems', making the courts and its partners more accountable and responsive to their 'clients' (Berman and Feinblatt, 2001: 126). These courts can include among others, drunk-driving courts, domestic violence courts, family courts, wellness courts, mental health courts, drug treatment courts (DTCs) and community courts (see, for example, Berman and Feinblatt, 2001; Butts, 2001; Kaye, 2004; Bakht, 2006). Over the past 10 years or so, therapeutic justice has increasingly manifested itself in drug treatment courts. Now a powerful movement in the United States, which is beginning to be mirrored elsewhere (such as Canada and in Britain) these courts are specially

designed to deal with drug offenses by deploying therapeutic concepts and practices. Though drug courts emerged independently of the therapeutic model, the two are now increasingly merged, and it is coming to be generally accepted among drug court practitioners, judges and lawyers, as well as other criminal justice professionals, that 'working therapeutically is an appropriate, effective, and productive way for the justice system to function' (Hora, 2002: 1469).

'Drug treatment courts are now mainstream and can no longer be seen as "boutique" courts staffed by renegade judges' (Hora, 2002: 1469). They have caught the attention of state as well as federal governments: in 1994 US President Bill Clinton announced a plan to spend $13.2 billion on the 'drug problem' – up from $1 billion the previous year – most of which was earmarked for 'treatment' (Nolan, 1998: 80). This plan was intended to cut 'demand' rather than 'supply' by 'treatment and education', since the traditional ways of dealing with drug offenders had all but been discredited (see also, Fischer, 2003: 228). Due to this level of commitment, therapeutic justice as exemplified in therapeutic drug courts is most fully developed in the United States, though it is emergent in countries such as Canada, in the UK and in Australia (see, respectively, La Prairie et al., 2002; Bean, 2002; Makkai, 2002). Part of the reason for the rapid expansion of this approach is the larger theoretical proposition that the therapeutic alternative will alleviate the harshness of highly impersonal, bureaucratic systems, while reducing the cost of criminal justice and getting drug offenders out of the crime cycle; in other words, it 'works'.

The first drug court was initiated in Florida in 1989, and at present more than 600 drug treatment courts have been established across the USA (Nolan, 2003). In Colorado, the State University now has a drug court on its campus, and the therapeutic model has also spread to drunk driving courts,[8] family courts and 'wayward father' courts (Walsh, 2001). Canada now has two experimental drug treatment courts in Toronto and Vancouver, and is finalizing plans for several more. Australia is well along with drug courts in five states (New South Wales, Queensland, South Australia, Western Australia and Victoria), and is developing proposals for a national association or federal body, which would facilitate the emergence and assessment of further drug courts (Indermaur and Roberts, 2003). Ireland has recently been experimenting with a pilot drug court which the Court Services Board now plans to expand (Farrell, 2002), and Scotland is also on the map now having made observations of drug courts in California, and begun contemplating their utility within its own country (Walker, 2001). Moreover, the Dade County court and other courts have recently expanded or considered expanding the therapeutic courts to deal with non-drug charges as well, such as domestic violence, burglary and prostitution cases (Nolan, 1998: 87). The courts have also begun to expand their criteria from only first-time offenders to drug offenders with any number of prior arrests, which would seem to counter any claim that they are used for only a small proportion of first-time offenders.[9]

The courts promise to 'expertly' fix offenders by using the traditional mechanism of the courts, and adding other programs such as AA, in- and out-patient therapy and parole. Many use a '12-step recovery program' since when engaged,

> the client must not only make amends to those he has hurt, but also assume responsibility for the health of other addicts. Personal healing and community healing are accomplished, and

> the participant learns to integrate recovery values into his or her life – not to practice them briefly to escape trouble and to manipulate others. (Hora and Schma, 1998: 12)

These disciplinary and rehabilitative practices promote a court therapy climate in which recovery and the solution of drug and crime problems is considered both possible and immanent. Traditional rehabilitative programming is augmented by moving away from 'social experts' and towards the 'psy' disciplines (e.g. psychology, psychotherapy, psychiatry) and developing a correlative concern with 'pathologies' and 'diseases' (rather than the 'social' causes of crime).[10] The explanatory models mobilized in the courts have shifted their focus away from deficiencies related to poverty, social class and so on, toward 'individual' differences, pathologies and illnesses. Individually tailored therapeutic programs are designed to address offenders' individual problems, as opposed to the broad discipline and welfare-based reform programs that were characteristic of traditional rehabilitation.

Despite marked differences between rehabilitation and therapeutic drug courts, however, some have characterized therapeutic jurisprudence as the ascendance of the 'rehabilitative ideal' over traditional law rooted in retributive principles: drug treatment courts, and therapeutic justice more broadly, claim to 'rehabilitate rather than punish' (see Fischer, 2003). Though the courts respond to some core problematizations of 'modern' rehabilitation, continuities between the two emerge from careful scrutiny. First, both therapeutic justice, as exemplified in the therapeutic drug treatment courts, and traditional rehabilitation focus on the *underlying causes* of offending behavior and concern themselves with preventing future re-offending. They also both operate on the premise that crime is caused by factors beyond the control of the individual. These factors are then corrected by approaching offenders as individuals who require treatment and [re]programming in order to be reintegrated into society. Both use experts in this process (rehabilitation's 'social' experts, and drug treatment courts' 'psy-' experts), and both rehabilitation and therapeutic justice claim a collaborative goal of 'fixing' something, rather than simply containing or controlling it, implying that the crime problem is 'solvable'. Synonymous with rehabilitation's focus on expert discourses of correction,

> One of the things therapeutic jurisprudence tries to do is to look carefully at promising literature from psychology, psychiatry, clinical behavioral sciences, criminology and social work to see whether those insights can be incorporated or brought into the legal system. (Wexler, 2000: 129)

Proponents have continuously suggested that 'there are certain kinds of rehabilitative programs and packages, particularly the cognitive/behavioral variety, that look rather promising' (Wexler, 2000: 129). While therapeutic courts already offer programs such as 'reasoning and rehabilitation', practitioners argue that these types of programs can and should be made widely available in other correctional and community settings: 'a more subtle way of thinking about this in therapeutic jurisprudence terms, however, is to ask how reasoning and rehabilitation can be made part of the legal process itself' (Wexler, 2000: 133).

All of this is not meant to suggest that therapeutic justice and rehabilitation are perfectly synonymous, only that they are connected in important and perhaps unrealized ways. In a very practical sense, therapeutic justice has flourished by augmenting

rehabilitation while maintaining a focus on expert correction and reform. A focus on 'root causes' and 'therapeutic treatment' re-emphasizes modernist elements of 'scientific' correction and reform, while the introduction of 'new' experts (psychiatrists, psychologists and so on), targeted treatment programs based on individual profiles, the combination of therapeutic measures with punitive sanctions for failure to comply, the supposed reduction in the cost of criminal justice processes, prison sentencing and court procedures, as well as the valorization of individual responsibility for treatment programs, satisfies neo-liberal demands for efficiency, reductions in dependency and a move away from 'social' (welfare) solutions. It should not, however, be assumed that therapeutic justice is a positive development and does not (and will not) potentially involve the enhanced control and punishment of offenders (see, for example, Nolan, 1998: ch. 8; Fischer, 2003: 242), or that drug treatment courts are a viable solution to the drug problem. Nor should the political attractiveness of the therapeutic model be ignored.[11] However, what these similarities do suggest is that therapeutic justice, exemplified most notably in therapeutic drug courts, while an important departure from rehabilitation, re-articulates correction and reform to fit with new neo-liberal pressures.

Risk/need approaches

What many often refer to when describing risk and punishment is 'actuarial justice', a concept developed by Malcolm Feeley and Jonathon Simon in two seminal articles written in the early 1990s (1992, 1994). They argued that risk was coming to replace rehabilitation as the dominant paradigm – the 'new penology' – and that this was evidenced by a shift away from individually tailored rehabilitative measures to the risk-based management of groups of offenders.[12] Yet actuarial justice does not exhaust the use of risk in penality. For example, 'risk/need' programs – the identification of 'criminogenic needs' and the subsequent re-programming of those needs (see Hannah-Moffat, 1999, 2005; Moore and Hannah-Moffat, 2005) – and 'drug harm minimization' – the identification of risks in drug users and the drawing of those users into treatment programs (see O'Malley, 2000c, 2004b, 2005) – are *inclusive* strategies which mobilize risk in an acutely different way than 'actuarial' schemes for avoiding danger.

Current risk/need models are referred to as 'third generation', and emerged in the early 1990s in response to criticisms of first- and second-generation risk assessment tools. Focusing overly on a 'static' subject, the previous tools for risk assessment were problematized in large part by the professionals who used them. It came to be generally accepted among practitioners that life circumstances, routines, behaviors and so on, change quite often throughout the course of incarceration. As a result, the new conception of risk/need, and the tools developed alongside it, bring together information about an offender's history to develop flexible and 'dynamic' treatment plans (Hannah-Moffat, 2005: 33, quoting Andrews and Bonta, 2002). Risk is here mobilized as a way of determining an offender's criminogenic needs, and targeting correctional programs toward them.

Examples seem most evident in Canada, however accounts of what is happening in the UK suggest that combined notions of risk/need are perhaps equally salient there (Aubrey and Hough, 1997; Kemshall, 1998; Hannah-Moffat, 2005: 36). In Britain, the OASyS is used by the HM Prison Service to categorize risk/need in offenders, and a recent Home Office study suggested that new standardized risk and need assessment

programs will be piloted in all probation services and in the Prison Service in the near future (Maung and Hammond, 2000). Similarly national trends are evident in the USA and Australia (Texas Criminal Justice Policy Council, 1995; Cumberland and Boyle, 1997; Winters and Hayes, 2001). The Youth Level of Service/Case Management Inventory (YLS/CMI), another example of a risk/needs tool, is used widely in the USA, Canada and the United Kingdom (Hannah-Moffat, 2005: 36). Such programs have begun to address the needs of even the most serious offenders: 'those serving sentences of ten years or longer, have become the focus of *increasing* attention, being regarded as "a unique group requiring special approaches to the provision of programmes and services"' (Meyer and O'Malley, 2005: 207, citing Correctional Services Canada, emphasis added).

Partly in response to what has been called a 'political and humanistic' commitment on the part of many correctional jurisdictions to 'do something' to aid in rehabilitation and reintegration (Hannah-Moffat, 2005: 34), risk/need schemes have flourished.

> Many of these bureaucrats who were responsible for implementing the government's rhetorical changes [toward risk] and translating them into practices were the same people who had participated in the changes towards rehabilitation in the 1970's. As such, many of these individuals continued to have a strong commitment to the idea of rehabilitation and worked hard to implement changes which would both satisfy the government's rhetorical needs while maintaining, on the level of practice, a system committed to working with and changing individual prisoners. (Moore and Hannah-Moffat, 2005: 89)

This suggests a number of things. First, in order to respond to neo-liberal attacks on the modernist aspects of penality and on welfare governance more generally, practitioners within the criminal justice system can and do meld new demands with existing propensities and practices. In many cases what are still primarily welfare-oriented institutions and professions have had to alter their rhetorical strategies to fit with the expectations of emergent neo-liberal regimes; in particular they have had to learn to operate using the language of risk (Ericson, 2005). As we know, welfare professionals have not been discredited across the board, nor did widespread layoffs accompany neo-liberal assaults in most countries. Second, and following from this, the specific projects which emerge from this combination of (neo-liberal) institutional direction and the correctional and reform oriented work of (modernist) experts and professionals within the system, may foster a different relationship between liberalism and modernism. What this entails in many cases is a transformation in correctional and rehabilitative principles and practices, rather than their complete displacement. In the case of risk/need, designed primarily by embedded professionals such as those working within prisons and penitentiaries as well as by academics, emergent projects mobilize risk as one specific technique in the repertoire of primarily correctional rationalities, deployed so because the language and practice of risk articulates smoothly with new political and administrative demands (such as efficiency and cost-effectiveness), while at the same time being malleable to diverse organizational logics. Risk here becomes 'inclusive' as it is bound to the intent of (modernist) correctional programs (as opposed to the exclusive intent of actuarial justice). In this new discourse of risk/need, 'need is explicitly linked to "rehabilitation"' (Hannah-Moffat, 2005: 34); risk factors *are* rehabilitative targets.

As Dawn Moore and Kelly Hannah-Moffat have argued, these types of initiatives aimed at 'changing' prisoners 'are consistent with the age-old goals of rehabilitation and reform of prisoners', though 'the practices through which these transformations are meant to take place are different' (2005: 85; see also O'Malley, 2005). In particular, risk/need modifies the traditional rehabilitative agenda by carefully articulating differences between 'criminogenic' and 'non-criminogenic' needs. This entails a distinction between needs which are 'dynamic' attributes of an offender that when changed will result in reduction of the possibility of recidivism, and non-criminogenic needs which are also changeable, but which are not necessarily associated with the probability of recidivism (and thus receive low priority). This latter category will include such things as poverty, health, social relationships, etc., while criminogenic needs include such things as parenting skills, a place to live, the need to stop taking drugs and so on. 'The inclusion of *need* in risk assessment redirects intervention efforts and links risk management strategies to rehabilitative strategies informed by a particular psychological and normative theory of offending' (Hannah-Moffat, 2005: 39, emphasis in original). In this way, 'traditional' rehabilitation, criticized for being wasteful and inefficient, is redirected, or 'targeted' (see also Valverde and Mopas, 2004) to offenders based upon their individual needs/risks. What were formerly characteristics of an offender *population* are now identified as *individual* needs.[13]

As Hannah-Moffat has suggested, the link to the 'what works' agenda is obvious:

> The identification of dynamic risk/need factors signifies an opportunity to change or transform the offender into a prudent responsible subject. Risk/need models legitimate newly defined targeted custom-made treatment models and garner managerial and fiscal support for a 'new rehabilitationism'. (2005: 40)

These new 'targeted' interventions aim to reduce recidivism by combining appropriate treatment with techniques of risk assessment, however the rationale is quite different from welfare discourses which offered more global and widespread interventions: they 'reframe social problems as individual problems' (Hannah-Moffat, 2005: 43). In tandem, the responsibilities of 'the state' change. For traditional rehabilitation, the state and its experts were responsible for success or failure. With risk/need approaches, the offender is responsibilized for their offending *and* their own treatment program. The perceived 'efficiency' of this method responds to wider criticisms of welfare governance by proposing to lower the costs of an overburdened criminal justice system, targeting programs to specific offenders and their individual needs reducing 'waste and inefficiency', and making the offender responsible for their own treatment and rehabilitation. As Correctional Services Canada has put it:

> [Risk/needs is] a comprehensive and integrated assessment process wherein an offender's *risk* (factors which led the offender into criminal behaviour and the criminal record) and *needs* (areas in the offender's life/lifestyle, which, if changed, can reduce the risk of re-offending) are identified at the beginning of the sentence, so that programming and treatment are appropriately focused. (quoted in Hannah-Moffat, 2005: 35, emphases in original)

This is seen as the most 'efficient' approach as universal access for all prisoners to all programs is no longer feasible.[14] Treatment may include however, many of the programs

with which rehabilitation has been associated, such as cognitive skills training, substance abuse programs, living skills aids, abuse and trauma programs and employment and education services among others, and of course, experts remain central.

DISCUSSION

If the welfare sanction was a compromise between classical liberals and modernists, the arrival of neo-liberals on the scene has led to an attack on the modernist elements of this equation. But it would be mistaken to assume that the latter has or will disappear. Rather it has been reshaped to fit with existing pressures and demands, for example by adopting the language and practice of risk, and targeting its programs toward individuals rather than populations. Modernist scientific expertise and 'human' knowledges in many cases remain key to criminal justice and penality, as we have seen with the three projects sketched out. It seems true that some new developments are primarily controlling and repressive, but these elements continue to braid together with more reintegrative efforts at correction and reform. In this process, reform-oriented techniques are the subject of quite a bit of innovation to bring them in line with a new focus on individual responsibility, setting up new relations of expertise that downplay 'dependency', demands for efficiency and so on. Yet 'expert' intervention with a view to changing offenders has not disappeared. In fact,

> Within a continually expanding criminal justice system we have seen a proliferation of all kinds of experts who are both able to influence policy making and mediate public demands. These include not only the established experts such as psychologists, sex therapists, drugs counselors and educationalists, but specialists who are preoccupied with much wider considerations related to different aspects of lifestyle. Moreover, architects and designers, environmentalists, city planners and other professionals who previously had little interest in these matters, now play an increasingly central role. (Matthews, 2005: 189)

What we have seen with restorative justice, therapeutic justice and risk/need models seems to support Matthews' claim. Experts and professionals operating within criminal justice institutions and professions have helped shape the nature and focus of new and innovative projects, and continue to play important roles in interventionist strategies. It may even be worth investigating whether the introduction of new experts into criminal justice can help explain some of its apparent inconsistency. Along with new experts, the proliferation of 'partnerships' among agencies and private and public institutions also means that an increasingly diverse set of institutions and agencies now have a keen interest in crime policy. These experts and practitioners bring new ideas, new knowleges and new techniques to the governance of crime. As we saw with therapeutic justice, for example, drug treatment courts in particular bring forth the 'psy' disciplines (psychiatry, psychology and so on) to combine these disciplinary approaches with the 'social work' of judges and lawyers, and the 'political' demands for solutions to overburdened courts.

The purpose of this article has been, rather than to provide yet another explanatory account of the present, to suggest – ironically perhaps considering the complexity of the individual accounts – that things are more complicated than some would seem to suggest. The point has been to caution approaches that see the current state of affairs

as completely new, and as catastrophically different from 'modern' rehabilitation. Rather, punishment and reform can be seen as always braiding together variously in modern liberal penality. Marked punitiveness during rehabilitation's heyday, as well as the recent emergence of important (transformed) correctional projects demonstrates this characteristic braiding. Even if there seems to be an overall expansion of punitiveness and a retraction of correctionalism in some jurisdictions,[15] it is important not to confuse jurisdictional trends with global (or western) ones, or to ignore counter-currents to what is (mis)perceived as an unstoppable wave of control. While it may be accurate to suggest that certain jurisdictions are not *primarily* correctional at any given moment, it would be an oversight to suggest that they are *not at all* about correction.

An alternative approach is to try and engage in exactly the type of analysis which this article has attempted, to pull out the continuities as well as the discontinuities implicit in a number of new and innovative approaches to crime and punishment; approaches which are neglected by catastrophic theories precisely because they are similar to what are considered more 'modern' – and displaced – forms of punishment. As Brown notes,

> Inasmuch as some [. . .] accounts tend to be a little sweeping and generalized, are weighted towards US exceptionalism, gloss over local, regional and national differences, focus on the discursive and the cultural, and tend toward what O'Malley calls 'criminologies of catastrophe' (2000: 164) and Zedner 'a dystopic future' (2002: 364), it may be a useful exercise to engage in a more detailed and specific, empirically based assessment in relation to [. . .] penal practice. (2005: 28)

Rather than throwbacks to a previous era, newly corrective penal projects are showing themselves to be important developments that are gathering increasing support from politicians, practitioners, academics and the public – they cannot be ignored.

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Notes

1 Those he assessed included the 'postmodern' thesis, the 'risk society' and 'actuarial justice' accounts, and 'neo-liberal' explanations. These theories are catastrophic, he argued, in that they propose 'a more or less complete transformation in criminal justice and penality' as a result of broader changes in the organizing principles of society and/or government (2000a: 153). To contrast, he demonstrated the vitality of the 'modern' in contemporary punishment *contra* postmodern theses (see also Simon, 1995: 28), the marginal influence that actuarial strategies have had in practice *contra* actuarial justice accounts (see also Kemshall and Maguire, 2001), and how 'the social' has been transformed in the present, *contra* the 'death of the social' thesis (see also Stenson and Watt, 1999).

One of O'Malley's criticisms was that catastrophic approaches tend towards characterizing penal history as the succession of distinct and unified periods. For example, what was once regarded as 'modern penality' is now seen as 'postmodern penality' (e.g. Simon, 1995), or what was once a system of 'correctionalism' is now seen as one of 'control' (e.g. Garland, 2001). This type of periodization will tend to neglect three very important things: (1) the struggles inherent in the transition between such periods; (2) the messiness of their boundaries (see also, Loader and Sparks, 2004: 15); and (3) the continuities between and among them – all significant problems. To this we might add that such accounts tend to valorize the past in the face of present 'catastrophe'. For example, where once we took critical aim at the 'welfare sanction' and social government more broadly, this now tends to be favored in light of our dark present and murky future. From another angle, catastrophic accounts tend to focus on wide structural forces, which are said to bring about rupture. This tends to neglect the local and embedded politics of the criminal justice system itself, its institutions, professions and agencies. The unfortunate result is a style of grand theorization that marginalizes new projects, which emerge primarily from *within* criminal justice institutions and professions.

2 This historic compromise, of course, represented a particular inscription of a much broader tension that was to appear throughout the 'welfare state' era, even in such archetypical documents as Beveridge's blueprint for post-war social security (see O'Malley, 2004a: ch. 2).

3 At the same time, it should also be acknowledged that the process and outcome of individual restorative projects should not be ignored: it is quite likely that many of these projects will (and do; see Pavlich, 1996 for example) have controlling and punitive tendencies. Roche notes that 'for all its promise of promoting healing and harmony, RJ can deliver a justice as cruel and vengeful as any' (2003: 1).

4 For John Braithwaite and many of his followers, restorative justice is synonymous with 'reintegrative shaming' because they both share an emphasis on the reintegration of offenders, a victim focus and the use of shame in some form through mediation and reconciliation, to repair harms (see, for example, Braithwaite, 1993). Both also focus on the 'alteration of perspectives' and 'the generation of social support' (Braithwaite and Mugford, 1994: 139) through actively involving offenders, victims and the community in the reintegration process, and result in similar sanctions, for example a combination of private compensation to victims and community work, signifying both the private and public harm. Moreover, both projects have the dual effect of involving communities in the decision-making process.

5 The entire reform package of which the newer Act is a part stresses a shift in the values of the criminal justice system away from exclusionary punitive justice 'and towards an inclusionary restorative justice capable of recognizing the social contexts in which crime occurs and should be dealt with' (Crawford and Newburn, 2002: 476, quoting Muncie, 2000). This broader shift is perhaps most centrally characterized by the introduction of 'referral orders' as part of the Youth Justice and Criminal Evidence Act 1999 (Crawford and Newburn, 2002). These orders divert criminal justice cases away from the formal system and into restorative projects such as family conferencing. Between 2000 and 2002 they were introduced into 11 areas across England and Wales (Crawford and Newburn, 2002: 479).

6 http://www.rcmp.ca/ccaps/restjust_e.htm

7 As Daly (2004) notes, while there are many programs of restorative justice in the USA, they typically have small budgets, and tend to make extensive use of volunteers (citing Weitekamp and Kerner, 2002). State variation is also significant; while some states have small and ad hoc restorative activities, others have more established programs.

8 See also, National Drug Court Institute (1999).

9 It is also important to note that therapeutic treatment in US prisons has continued largely unabated over the past three decades. From the late 1960s until the 1990s, the number of state penitentiary inmates enrolled in some form of drug treatment therapy skyrocketed from 1544 to 218,534 (Nolan, 1998: 113). Even if we take into consideration the rapid growth in the number of prison inmates during this period, the total percentage involved in some form of treatment has still increased dramatically (Nolan, 1998: 114). Moreover, 'in 1990, a census found that more than 42 percent of state prison inmates were involved in some form of counseling, be it for drug dependency, alcohol dependency, psychological/psychiatric conditions, life skills, parenting, or employment' (Nolan, 1998: 115). Recent reports indicate that these types of treatment programs will continue.

10 This seems to mimic an overall expansion in behavioral psychology and cognitive behavioral programs in prisons (see, for example, O'Malley, 2000a; Young, 2002).

11 Fischer (2003: 242) has argued that Canadian drug treatment courts are part of a 'political' process of proposing to 'do' something innovative about crime, which serves to mask the protection and reinforcement of traditional practices and institutional structures of punishment. This argument is well taken, however Fischer deals only with the two drug courts in Canada, not the emerging therapeutic justice model, which proposes, in its own narrative at least, the principles outlined here.

12 While their argument is often taken as suggesting there is or will be a wholesale adoption of actuarialism across the board (as is implicated in Feeley and Simon, 1992), it should be noted that later on, Feeley and Simon suggest that actuarial justice is a model for governing specifically defined categories of individuals (such as the 'underclass') that have been created in part by 'postmodern' conditions (see Feeley and Simon, 1994).

13 It bears noting that projects such as those associated with Crime Prevention through Social Development (CPSD) now target health, poverty, housing and so on, under the discourse of 'prevention' by addressing 'social' and 'root' causes. What was once on the agenda of the prison is in many cases now located under the public discourse of 'crime prevention' and located in other government discourses and departments.

14 It should be noted that where rehabilitation centered and attempted to act upon offenders' impoverished histories, past traumas and experiences of marginalization, the new focus is on changing individual 'dynamic' factors (Moore and Hannah-Moffat, 2005: 94). Moore and Hannah-Moffat suggest that this is because factors related to history, trauma, economic background and so on, are now accepted as irreversible, though this perhaps misses another central development. In many cases 'social' factors have been re-organized under the banner of 'prevention', becoming elements that need to be addressed pre-, rather than post-, crime. For example,

'crime prevention through social development' (see, for example, Public Safety and Emergency Preparedness Canada, 2005) targets social and environmental factors – as well as elements related to specific risk groups' lifestyles – through preventive social programming: 'social causes' are re-organized within 'preventative' projects rather than 'corrective' ones.

15 The expansion of punitiveness is most evident in the United States where welfare governance never took as strong a hold as it did elsewhere. Yet even so, as we have seen with therapeutic justice and the drug courts, correctionalism and reform are not completely displaced. On the other hand, Ireland remains committed to rehabilitation, and discourse and practice there have changed little over the past decade.

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