

Punishment, legitimate policies and values: Penal moderation, dignity and human rights

Sonja Snacken

Vrije Universiteit Brussel, Belgium

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Abstract

Twenty years ago, we described how changing prison populations in western countries result from a complex interaction between criminality, external (demography, economy), internal (criminal justice policies) and intermediate factors (public opinion, politics and media). While the outcome of these interactions is contingent, we advocated a reductionist penal policy in order to curb penal inflation. Subsequent macro-sociological analyses and comparative penological studies raised important questions though concerning the possibilities for political action to influence levels of punitiveness. This article looks again into the scope for political decision making in fostering penal moderation in western countries. By elaborating on a relational concept of ‘legitimacy’ of policies, we argue that moderate penal policies can politically be legitimized through appeal to dignity and human rights as fundamental values.

Keywords

dignity, human rights, legitimacy, punishment, values

Introduction

With many western countries facing increasing prison populations in the 1980s, we, with other scholars, started to look for possible explanations. Based on an overview of the international literature, we concluded in the 1990s that – contrary to the popular view of a direct link between crime rates and prison rates – changing prison populations result from a complex interaction between criminality, external (demography, economy), internal (criminal justice policies) and intermediate factors

Corresponding author:

Sonja Snacken, Department of Criminology, Research Group Crime and Society, Research line Penalty and Society, Vrije Universiteit Brussel, Belgium.

Email: ssnacken@vub.ac.be

(public opinion, politics and media) (Beyens et al., 1993; Snacken et al., 1995). Penal inflation and prison overcrowding are hence not a fate to be suffered passively, but (we argued) at least partly the result of policy. Following Rutherford's (1984) analysis of available policy choices, we advocated a reductionist penal policy in order to curb penal inflation.

However, increased attention to similarly large macro-sociological and cultural developments in late-modern societies also raised questions about the possibilities for political action to curb such inflation (Garland, 2001, 2004). This led to a boom in comparative studies aimed at trying to understand similarities *and* differences in levels of punitiveness. The concept of punitiveness itself was enlarged, encompassing not only imprisonment rates but also more qualitative criteria relating to the treatment of offenders and prisoners. Discussions about 'reductionist' policies were consequently replaced by the larger concept of 'penal moderation' (Loader, 2010).

Now, 20 years later, we revisit our initial analysis by, first, evaluating its continued validity in light of subsequent research. Second, we consider again the scope for political decision making in fostering penal moderation in western countries. Third, by elaborating on the relational concept of legitimacy of policies as developed by Beetham (1991) and Bottoms and Tankebe (2012), we argue that moderate penal policies can politically be legitimized through appeal to dignity and human rights as fundamental values.

Mechanisms of changing prison populations: The importance of penal policy

Figure 1 provides a visual overview of the complex interactions between several factors influencing changing prison populations.

Twenty years later, while the model still seems valid, each of its mechanisms has since been further developed and several new phenomena must be introduced. First, I summarize our earlier findings in light of more recent studies, with special emphasis on the importance of penal policy.

External factors: Demography and economy – and policy. . .

In the early 1990s, prison population prognoses in the Netherlands, Germany, the UK, Australia and the USA were offered based on demographic changes in western societies (Blumstein, 1987; Hesener and Jehle, 1987; Home Office, 1993; MacKenzie et al., 1988; Projectgroep Structuurplan, 1989). The baby boom after the Second World War, followed by a baby bust, was supposed to influence prison populations through the well-established correlation between *age* and *criminality* (Farrington, 1986; Loeber and Farrington, 2014). The influence of age structure on prison populations proved much more elusive though, as overriding criminal policies or practices strengthened or weakened its effect (Düinkel, 1989; Graham, 1990; Zimring and Hawkins, 1991). This became even clearer over the last 20 years, as the introduction of longer prison sentences, restrictions on parole, whole life

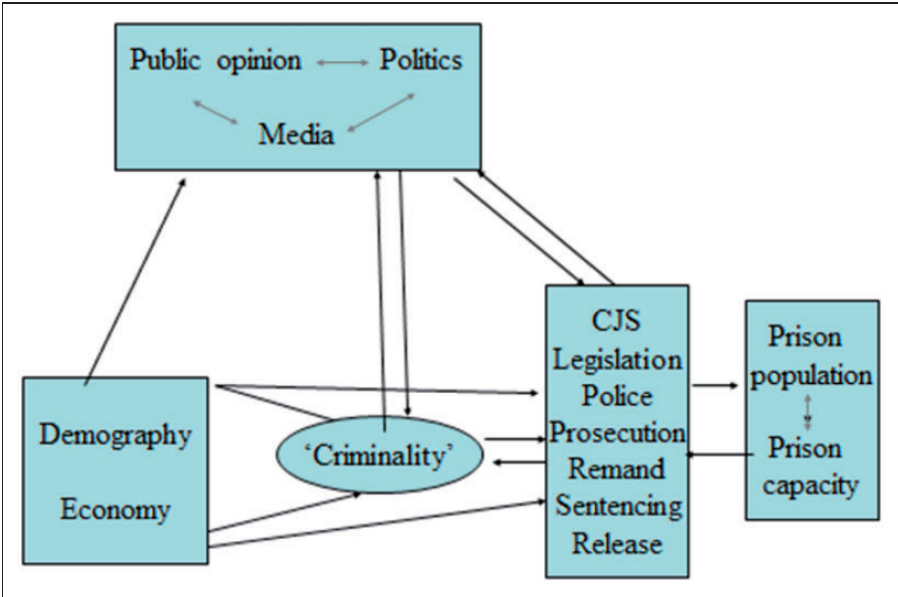


Figure 1. Mechanisms of changing prison populations.
Source: Beyens et al. (1993); Snacken et al. (1995).

sentences and more severe punishment for sexual offences increased the presence of elderly prisoners in many western prison populations (Aebi and Delgrande, 2014: 3, 66; American Civil Liberties Union, 2012; Crawley, 2007).

Migration and *ethnicity* were also seen as possibly influencing criminality through different fertility patterns among immigrant and ethnic minority groups, resulting in an overrepresentation of ‘crime-prone’ age groups in these populations. However, the overrepresentation of ethnic minorities in many western prison populations has also been linked to the selectivity of the criminal justice system. The combination of ethnicity and socio-economic vulnerability increases the perception of ‘dangerousness’ and hence the risk of being subjected to remand custody and a prison sentence after conviction (Chiricos and Bales, 1991; De Pauw, 2000, 2010; Laffargue and Godefroid, 1989; Melossi, 1989; Vanhamme and Beyens, 2007; Vanneste, 2003).

‘*Crimmigration*’, the conversion of criminal law towards increasingly restrictive immigration policies (Stumpf, 2006), has further fostered the detention and overrepresentation of foreigners and immigrants in western prisons (for Europe, see Melossi, 2013; Wacquant, 2006; across continents see Guia et al., 2013). Periods of economic and social uncertainty are known to generate a more repressive ‘moral climate’ in societies, resulting in less tolerance of different marginalized groups among the public and penal actors and more demands for harsher punishment (Melossi, 1989; Vanneste, 2001). Higher prison rates therefore are the consequence of a set of political decisions and micro-decisions from penal actors, influenced by dominant perceptions of public sensibilities and public opinion.

Criminality – and policy

Crime rates and prison rates develop relatively independently from each other, even when controlling for the seriousness of crimes (Cavadino and Dignan, 2006; Lappi-Seppälä, 2011, 2012a; Snacken et al., 1995; Zimring and Hawkins, 1991). ‘Criminality’ is defined by legislation and processed by penal actors. It should be part of the analysis of punishment, but its influence on prison populations will always be mediated through the criminal justice system and its policies. Alcohol or drug abuse and sex offences illustrate this point. Finland reduced its prison population by one-quarter when it redefined the pervasive alcohol problem as a health issue rather than a penal issue in 1969 (Törnudd, 1993). The ‘war on crack cocaine’, initiated by the Anti-Drug Abuse Act of 1986, contributed to US mass incarceration by sending a disproportionate number of African Americans to prison as compared to whites (Duster, 1997; Garland, 2013; Mauer, 2009). Similarly, the definition of sexually deviant behaviour as an either medical or a penal problem results in varying proportions of sex offenders incarcerated in western prisons (Tubex, 2006).

Internal factors: The criminal justice system – and policies

The prison system constitutes the end of the criminal justice system process and is influenced by policies and decision making at all levels: legislation; policing; prosecution; remand custody; sentencing; and release from prison. National penal policies condition the size and characteristics of prison populations – through legislation, the application of custodial and non-custodial sanctions and measures, the length of imprisonments and the possibilities for early release. Rutherford (1984) described three types of criminal policies influencing prison populations: *reductionist*; *expansionist*; and *stand still* policies. The impressive decarceration in Finland since the 1960s (Lappi-Seppälä, 2012b, 2012c; Törnudd, 1993, 1996) has since corroborated his analysis of reductionist policies. Many European countries introduced new forms of non-custodial sanctions at the lower level of the penal range (Durnescu, 2013) while enhancing punitive measures at the upper range, thus illustrating Bottoms’s (1977) description of a *bifurcation policy*. However, the quadrupling of the prison population in the USA through mass (or hyper-) incarceration was the object of differing explanations, with some authors focusing on broader socio-economic and cultural changes (e.g. Garland, 2001), while others stressed the role of a specific political project (e.g. Wacquant, 2009). I come back to this after the next section.

Intermediate factors: Public opinion, politics and the media

As shown in Figure 1, penal policies are themselves influenced by the interaction between public opinion, political choices and the media with structural changes in society and criminality.

Public opinion and demographical/economic changes. As already mentioned, periods of economic deterioration seem to reduce public tolerance of all kinds of 'deviant' groups, including unemployed people, immigrants and drug addicts (Melossi, 1989). This has been further corroborated by the 1999 European Values Study, which describes solidarity as a typical European value, but found that this solidarity is higher with elderly, sick, disabled and unemployed people ('potential we') than with immigrants ('them'). This has been termed welfare chauvinism, a feeling often stimulated by right-wing political parties (Banting, 2000; Coffé et al., 2005; Ivaldi, 2012).

Public opinion, media and criminality. Criminality enjoys great public interest and the public image of crime is influenced by the selective media focus on serious crime and crimes committed by ethnic minorities (Brillon et al., 1989; Doob and Roberts, 1988; Roberts, 1992; Roberts and Doob, 1990). Fear of crime and penal populism may then become an important motor for harsher penal policies (Kury, 2008; Roberts and Hough, 2002; Roberts et al., 2002).

Public opinion and the criminal justice system. This relation has been described as multiple ignorance (Doob and Roberts, 1988). The public generally thinks judges are too lenient but underestimates the severity of punishments imposed on offenders; the gap between desired and imposed sentences is much smaller than assumed and attitudes change when more and more accurate information is offered (Roberts and Hough, 2002; Verfaillie, 2012). Judges generally assume the public wants harsh sentences, but public support for non-custodial sanctions is stronger than assumed, especially for measures including some sort of restitution towards either the victim or society at large (Beyens, 2000; Doob and Roberts, 1988; Van Dijk et al., 1990).

Public opinion, political choices and the criminal justice system. Countries facing increasing prison rates often experience increasingly repressive political rhetoric, leading to more punitive policies and practice. Examples are found in the USA with its 'war on drugs' (Tonry, 1994) and in several European countries where crime and insecurity, sometimes coupled with immigration, came to the political foreground in the 1990s (see France, England and Wales, the Netherlands, Belgium) (Snacken, 2007; Snacken et al., 1995). But politics are also important in countries where prison rates decreased. See Finland, for example, where the decisive shift towards a reductionist policy was initiated by Inkeri Attila, Minister of Justice and professor of criminology, and made possible by a Finnish political culture leaving important political decisions to experts and top-ranking civil servants, not to so-called public opinion (Tornudd, 1993).

Conclusion. In summary, our earlier analysis (Snacken et al., 1995) emphasized the complexity of the interactions between different factors (external, internal and intermediate) that ought to be taken into account when trying to understand changes or differences in penal trends within and between countries. Macro-level

shifts in social contexts were taken into account in our model, but they were studied through their impact on the intermediate factors (politics, media, public opinion) and on (meso- or micro-level) decision making within the criminal justice system. While recognizing that this made the outcome highly contingent (see Zimring and Hawkins, 1991), we also stressed the importance of penal policies in determining changes in prison populations and the range of available policy choices, advocating a reductionist penal policy as described by Rutherford (1984).

We discuss in the next section how the range of available possibilities for policy making would, however, become an object of controversy.

From policies to macro-social explanations to comparative penology: 'Splendours and miseries' of political decision making¹

Macro-social explanations and politics

At the turn of the 21st century, macro-social explanations for changing penal practices in contemporary western punishment and crime control, offered by scholars such as David Garland and Loïc Wacquant, became highly influential. The 'punitive turn' since the 1970s was explained in terms of broad and deep contextual transformations, such as the characteristics of late-modern societies, socio-economic globalization and the spread of neo-liberal policies in western societies. This raised important debates concerning the ability of politicians to influence penal trends.

Garland's (2001) *The Culture of Control* describes how since the 1970s the characteristics of late-modern societies led not only to high crime rates in the USA and the UK, but also to profound cultural adaptations. The 'normality' of high crime rates illustrates the limitations of the state's criminal justice agencies to control crime. Public attitudes adapted to this new reality with a preventative response (a culture of safety and precaution) and a punitive response (demands for the penal segregation of offenders). The loss of primary control over crime and insecurity led state authorities to foster private security preventative partnerships, to emphasize the state's power to punish and to resort to expressive forms of 'acting out' in response to the public's anger and outrage. In the USA and the UK, this also changed political culture, with the 'New Right' defending a combination of market liberalism (preventive turn) and moral conservatism (punitive turn). 'Official criminology' followed and legitimized these developments by emphasizing the routine, 'normal' character of much crime ('criminology of self') and the need for (situational) crime prevention methods to stem it, while demonizing other criminals, such as 'sexual predators' ('criminology of the other'), thereby justifying their harsh punishment and incapacitation.

How much leeway does this account leave for agency and political choices? Garland's emphasis on structural and cultural transformations was criticized for creating a bleak or dystopian outlook (Zedner, 2002), a criminology of catastrophe

(O'Malley, 2000) in which politics seem epiphenomenal (Loader and Sparks, 2004: 15–16). Garland (2001: 76) stressed that policy responses in the USA and UK were the result of political and cultural choices that were by no means inevitable, but equally emphasized that political choices will always be conditioned by institutional structures, social forces and cultural values: political actors 'are the final movers rather than the prime ones' (Garland, 2004: 181). He acknowledged though that the crime control field is a 'place of ongoing conflict and contestation', with outcomes being 'a contingent product of conflicts, calculations and struggles' (Garland, 2004: 167). Thinking about future possibilities hence requires including 'counterdoxic' struggles and the power and prestige that sustain them (Garland, 2004: 168). This is also true for criminological narratives (Young, 2002). Critical criminology, for instance, still retains a certain cultural capital and prestige and such 'displaced discourses' continue to exert pressure on policy and public opinion (Garland, 2004: 168). I will come back to this when discussing human rights as both an important cultural value *and* political and criminological narrative.

Within our mechanisms described in Figure 1, Garland emphasizes the influence of criminality on the intermediate factors of public opinion and politics, with the former dominating the latter. In contrast, the hyperincarceration of vulnerable (ethnic) groups in the USA and Europe is explained by Wacquant (2006, 2009) through state action – an explicit political project aiming at replacing 'welfare' with 'workfare' and 'prisonfare', resulting in a 'penal state'. The penal state in the post-Fordist USA is described as a response to the implosion of the black ghetto in the 1960s, left to crumble onto itself as middle-class blacks left to live in adjacent satellite districts, and the joint withdrawal of the wage-labour market and the welfare state. The right to welfare was replaced by an obligation of 'workfare', imposing insecure, flexible, underpaid jobs. 'Workfare' and 'prisonfare' are the two faces of state action aimed at controlling those at the bottom of the class and race hierarchy through restrictions, coercion, deterrence and stigma (Wacquant, 2008a). In Europe, too, 'castaway categories', such as unemployed youth and the homeless, drug addicts and postcolonial immigrants without documents, have become the living and threatening incarnation of the generalized social insecurity and anxiety resulting from the erosion of Fordist, stable and homogenous wage-work. The new 'martial' discourse of politicians and the media on delinquency fixates these feelings onto the narrow issue of criminal insecurity (Wacquant, 2008b: 12). Social welfare retraction and penal expansion are hence seen as 'the engines and core constituents of a *political project*, namely neoliberal governance, and must be viewed as two parts of a whole' (Lynch, 2011: 238, emphasis in original). Simon's *Governing through Crime* (2007) equally stresses that the US 'war-on-crime' is a political strategy, a new model of governance offering political leaders an attractive alternative in an era when socio-economic benefits could no longer be reliably distributed. Similar analyses were offered in some Continental European countries (e.g. Van Campenhoudt, 1999).

Within our intermediate factors, Wacquant hence emphasizes political decision-makers as the key actors in the punitive turn, albeit supported by public sentiments

and (commercialized) media. Can we infer that other, non-punitive choices are possible? Following Bourdieu, Wacquant describes the state as a bureaucratic field, a 'splintered space of forces vying over the definition and distribution of public goods', in which the treatment of urban marginality has shifted from the feminine 'Left hand' of the state (welfare) to the masculine 'Right hand' of punishment (Wacquant, 2009: 289–290). Attempts to influence penal policies in the USA through moral exhortation about race and incarceration on grounds of civic inclusiveness are seen by him as a political cul de sac, as the USA has developed a virulent culture of demonization of convicts. But he does advocate political strategies stressing the extravagant financial costs associated with continued hyperincarceration and the destabilization of lower-class families and neighbourhoods, and reviving alternative strategies that prioritize social and medical treatments over penal nostrums (Wacquant, 2008a).

Comparative penology and politics

Other scholars reacted to this type of analysis by emphasizing the continued differences in punishment levels and trends in western countries, despite similar socio-economic and cultural developments, and looked instead for risk and protective factors (Tonry, 2001, 2007). Variations in prison rates were found to correlate with differences in political economy and welfare provision (Beckett and Western, 2001; Cavadino and Dignan, 2006; Downes and Hansen, 2006; Lacey, 2008; Lappi-Seppälä, 2007, 2011; Pratt, 2008, 2011), the balance between crime control and human rights for offenders and victims (Kurki, 2001; Morgan, 2001; Snacken, 2006, 2007, 2010; Tonry, 2001; Whitman, 2003), political culture and structure (majoritarian versus consensual democracies), media culture and structure (Green, 2007, 2008; Lappi-Seppälä, 2007; Tonry, 2007), and judicial structure and independence (Lappi-Seppälä, 2012a; Tonry, 2007) (see also Snacken and Dumortier, 2012).

At the same time, comparative penological research broadened its scope from comparing quantitative imprisonment rates to the more general concept of 'punitivity' (Kury, 2008; Kury and Ferdinand, 2008) or 'punitiveness' (Pratt et al., 2005), including more qualitative approaches to the treatment of offenders, prison conditions and so on. Examples of 'penal moderation' (Loader, 2010) were contrasted with the belief in a general 'punitive turn' or 'new punitiveness' (Pratt et al., 2005). Quantitative and qualitative aspects of penal moderation were at the centre of Pratt's work on the 'Scandinavian exceptionalism' (Pratt, 2008; Pratt and Eriksson, 2011, 2012, 2013) and reactions to it (Barker, 2013; Ugelvik and Dullum, 2012), and on some scholars' analyses of the impact of European human rights on penal and prison policies (Cavadino and Dignan, 2006; Girling, 2006; Snacken, 2006; Van Zyl Smit and Snacken, 2009; Whitman, 2003). The focus on mass incarceration broadened to include mass supervision in the community (McNeill and Beyens, 2013) and to the abolition or retention of the death penalty in Europe and the USA (Garland, 2010; Girling, 2006; Snacken, 2006).

Where do these studies lead us with regard to political possibilities to choose for moderate penal policies? Loader (2010: 359, emphasis in original) concluded that, although ‘the socio-economic, political and cultural prerequisites of relatively mild penal systems’ seem to point to ‘those features of a society that are most difficult to change’, it is also clear that:

those societies which have effected reductions in the use of prison and/or sustained relatively mild penal systems have done so through acts of political will... [I]n England and Wales as in the USA, the neo-liberal political project has *opted* for penal over social regulation.

Under which conditions can moderate penal policies then be developed? Garland (2013) stresses the importance of characteristics of the penal state as ‘proximate causes’ in understanding different reactions to similar macro-sociological trends (‘deep or background causation’). Contrary to Wacquant, he does not use the concept of ‘the penal state’ as a critical evaluation of punitive developments, but as a ‘neutral, nonevaluative’ description of the ‘agencies and authorities who make binding penal rules and direct their implementation’ (Garland, 2013: 495). He distinguishes five key dimensions of ‘penal states’, which could form the basis of future comparative research: state autonomy; internal autonomy; control of the power to punish; modes of penal power; and power resources and capacities. The first two dimensions seem at the heart of the discussion concerning the possibilities for politicians to influence penal trends. State autonomy refers to the autonomy of state officials vis-a-vis civil society, interest groups and public opinion. Internal autonomy is a measure of the extent to which penal state activities and interventions are controlled and directed by the penal state’s own leadership. He expects a high degree of covariance between state autonomy and internal autonomy, with more room for autonomous penal policy development where the state is more shielded from popular opinion and media pressures (Garland, 2013: 499).

Should we infer from this that penal moderation is only possible in societies combining state autonomy and internal autonomy, that is, where penal elites disregard public opinion altogether? Loader (2010) offers another valuable distinction in penal decision making: between ‘moderation-by-stealth’ and ‘moderation-as-politics’. Moderation-by-stealth avoids engaging publicly with thorny questions over punishment and does little to change public discourse and understanding of punishment. Moderation-as-politics is explicitly committed to public debate, seeks to understand as well as to influence ‘hearts and minds’ before turning to policy. He argues that ‘while the former offers a route to short-term reform, the latter is ultimately more consistent with penal moderation’s aspiration to serve as a public philosophy’ (Loader, 2010: 349). In societies or periods where crime and punishment are important social issues, stealth strategies do not address the public emotions that animate demands for penal severity. This raises questions concerning the legitimacy and credibility of such practices in the eyes of those in whose name they are conducted (Loader, 2010: 362). In contrast, moderation-as-politics seeks

to challenge prevailing understandings of the meanings and place of punishment and engages with the passions that crime and punishment provokes (Loader, 2010: 363).

Conclusion

Over the last 15 years, our intermediate factors of public opinion, politics and media have come to the fore in analyses of levels of punitiveness in western countries. The field of crime control and penal policy making is described as a complex or a bureaucratic field, characterized by struggles between different forces and narratives. Comparative penological analyses emphasize the variations in political responses in different countries to similar macro-sociological forces and trends. In line with our earlier analysis, penal moderation still seems to be the result of political choices made from a range of options. In democratic societies, bound by democratic accountability, such options seem only viable in the long term if they engage with the passions that crime and punishment provoke ('moderation-as-politics'). This brings us to the core question of the legitimacy of such penal policies in democratic societies.

Legitimacy of moderate penal policies, values and human rights

The legitimacy of moderation-as-politics requires engaging with the passions that crime and punishment provoke in the public. The *relational* character of legitimacy has long been recognized, as exemplified by Weber's influential sociological analysis. Other scholars such as Beetham (1991) in political philosophy and Bottoms and Tankebe (2012) in criminology have further investigated and developed this relational approach to legitimacy, emphasizing the importance of shared values between power-holders and their audience. We apply these findings to the values inherent to penal moderation and argue that moderate penal policies can politically be legitimized through appeal to dignity and human rights as shared fundamental values.

Legitimacy of policies and (shared) values

'Legitimacy' is a multidimensional concept, used very differently in different disciplines. In his influential book on political philosophy, *The Legitimation of Power*, David Beetham (1991) refers to three main interpretations of the concept by three groups of professionals: (1) constitutional lawyers, who refer to legal and constitutional validity; (2) moral and political philosophers, who question whether the exercise of power is justifiable from a moral point of view (universalizing claim); and (3) social scientists, who look into the empirical consequences of discussions of legitimacy within a particular social context. As far as the latter is concerned, Beetham is very critical of the influence that Max Weber's definition of legitimate

power – ‘belief in its rightfulness by relevant social actors’ (Weber, 1922/1968: 213) – has had on the social sciences, as it seems to reduce legitimacy to a mere description, without any objective reference or moral content. Weber’s definition misrepresents the relationship between beliefs and legitimacy: ‘a given power relationship is not legitimate because people believe in its legitimacy, but because it can be justified in terms of their beliefs’; the emphasis should be on ‘the degree of congruence, or lack of it, between a given system of power and the beliefs, values and expectations that provide its justification’ (Beetham, 1991: 11). He hence distinguishes different levels of legitimacy: (1) the legal/constitutional validity of the acquisition and exercise of power; (2) the justifiability of the rules governing a power relationship in terms of the beliefs and values current in a given society; (3) the evidence of consent derived from actions by subordinates expressive of it.

What does this mean for values and the legitimacy of penal policies? Bottoms and Tankebe (2012) further elaborate on both Weber’s and Beetham’s thinking through a dialogic approach to legitimacy in criminal justice, distinguishing audience legitimacy from power-holder legitimacy: legitimacy is seen as the ‘recognition of the right to govern’ within a structured bilateral (or multilateral) relationship; if successfully established it ‘simultaneously justifies the actions of both the power-holder and the obedient subject’ (Bottoms and Tankebe, 2012: 125). Beetham’s three dimensions of legitimacy – legal/constitutional validity, shared beliefs and core values, and consent – are seen as constitutive of audience legitimacy. Power-holder legitimacy includes not only the formal legality of their positions, powers and manners in which they exercise their powers, but also the cultivation of ‘their self-legitimacy with reference to the beliefs shared by them and their audience’ (Bottoms and Tankebe, 2012: 151).

Shared beliefs and values (and legality) are hence at the centre where the two forms of legitimacy meet. Values are defined here as ‘those moral beliefs to which people [appeal] for the ultimate rationales of action’ (Bottoms and Tankebe, 2012: 141, citing Spates, 1983: 28). Bottoms and Tankebe distinguish between general core values and specific criminal justice values. Core values relate ‘to essential values and basic institutions, which are the object of a consensus that lies beyond discussion and [have] a type of validity that is foundational’ (Bottoms and Tankebe, 2012: 141, citing Coicaud, 2002: 16). Shared values have negative as well as positive effects: they set limits within which legitimate power may be exercised, but also furnish rules and resources for those who govern, within which they can realize certain societal objectives (Bottoms and Tankebe, 2012: 142). The concept of shared values is in itself complex though: globalized societies such as ours may result in different groups holding very different core values, and laws do not necessarily mirror the generally held values in that society. This may require ‘skillful negotiation’ by power-holders in order to foster the legitimacy of a particular policy (Bottoms and Tankebe, 2012: 144).

Michael Walzer's (1994) distinction between 'thick and thin moralities' is seen as helpful in this respect: while a 'thick' moral argument is particularist and culturally embedded, referring to 'a way of talking among ourselves, here at home, about the thickness of our own history and culture', 'thin' moralities are universalist and refer to 'a way of talking to people abroad, across different cultures, about the thinner life [different groups] have in common' (Bottoms and Tankebe, 2012: 143; Walzer, 1994: x). But he also believes that 'there are the makings of a thin and universalist morality inside every thick and particularist morality' (Walzer, 1994: xi). This could then mean that, within the dialogic process that legitimation requires, part of the skill of power-holders in an increasingly globalized world will be to identify that shared thin morality, and to negotiate its acceptance by communities who may espouse different thick moralities (Bottoms and Tankebe, 2012: 143).

How do we apply this to penal policies and penal moderation? Let us look more closely at Walzer's arguments.

Thick and thin moralities, justice, values and rights

Walzer (1994: 1–2) illustrates his concepts with the example of the signs with 'Truth' and 'Justice', carried by Czech demonstrators on TV in 1989. They were easily recognized and everybody acknowledged the values they were defending, because everybody has some sense of what tyranny is and why it is wrong ('thin morality'). But if pressed 'they would have described a just society in different ways; they would have urged different rationales for reward and punishment' ('thick morality').

The idea of justice is hence a good example of both a thick and a thin morality. It seems to appear in all human societies and is translated in institutions and practices. Thinking and talking about justice in a society is linked to the particular historical and cultural context, to thinking and talking about other parcels of that society ('thick morality'). But at the same time, some aspects will be immediately accessible to people who do not know anything about the other parcels. They will see something that they recognize, and the sum of these recognitions is thin or minimal morality (Walzer, 1994: 4–5).

Morality develops from thick to thin, not the other way round: 'Morality is thick from the beginning, culturally integrated, fully resonant, and it reveals itself thinly only on special occasions, when moral language is turned to specific purposes' (Walzer, 1994: 3). That does not mean that thin moralities are substantively or emotionally more minor than thick moralities, quite on the contrary:

this is morality close to the bone. There isn't much that is more important than 'truth' and 'justice,' minimally understood. The minimal demands that we make on one another are, when denied, repeated with passionate insistence. In moral discourse, thinness and intensity go together, whereas with thickness comes qualification, compromise, complexity, and disagreement. (Walzer, 1994: 5)

The dualism of thick and thin moralities is linked to the essence of any human society: universal because it is *human*, particular because it is a *society*. Societies are necessarily particular, because they have members and memories; humanity, by contrast, has members but no memory, no history and no culture, no shared understanding of social goods (Walzer, 1994: 7). It is possible, nonetheless, to give some substantial account of the moral minimum, as long as we understand that it is necessarily expressive of our own thick morality:

we can pick out from among our values and commitments those that make it possible for us to march vicariously with the people in Prague. We can make a list of similar occasions. . . and catalogue our responses and try to figure out what the occasions and the responses have in common. Perhaps the end product of this effort will be a set of standards to which all societies can be held – negative injunctions, most likely, rules against murder, deceit, torture, oppression, and tyranny. Among ourselves, late twentieth-century Americans or Europeans, these standards will probably be expressed in the language of *rights*, which is the language of our own moral maximalism. (Walzer, 1994: 9, emphasis added)

According to Walzer, feelings of justice as thin morality will thus probably be translated in the USA and Europe into a language of *rights*, as expression of our thick morality. He then goes on to apply his concepts to distributive justice and to international politics.

But marching symbolically with protesters in Prague is quite different from accepting penal moderation or granting rights to unpopular groups such as offenders and prisoners. So the question remains: how do we apply this to penal policies?

Legitimacy of penal policies, values, dignity and human rights

Let's go back to Bottoms and Tankebe's dialogical approach to legitimacy and criminal justice, and their distinction between audience and power-holder legitimacy.

Audience legitimacy. Within audience legitimacy, Bottoms and Tankebe (2012: 144–147) describe procedural justice and effectiveness as fairly universal 'specific' values of criminal justice systems. Research has demonstrated the empirical importance of *procedural justice* in a variety of penal settings (police, courts, prisons, . . .) and across nation-states and ethnicities (for the USA, see Tyler 2012; for Europe see Hough et al., 2013). It encompasses two different values though, with different emotional connotations. 'Quality of decision-making' refers to basic principles of natural justice (independence, consistency, being listened to, . . .). 'Quality of treatment' is more personal and refers to respect for the subject as a human being, his or her dignity, privacy, respect for his or her moments of weakness and so on (Bottoms and Tankebe, 2012: 145; Tyler, 2012: 329). Being treated as a human

being, with respect for our dignity, rights and weaknesses, hence seems an important aspect of how we want to be treated by the criminal justice system.

Effectiveness is another fairly universal specific value of criminal justice systems. This is more than just a utilitarian concept when related to legitimacy, as it refers to the ability to satisfy the ends which justify penal power. Effectiveness and legitimacy are hence interdependent and organically interactive (Bottoms and Tankebe, 2012: 147).

Power-holder legitimacy. Power-holder legitimacy was already at the centre of Weber's concept of legitimacy (Weber, 2009, cited by Bottoms and Tankebe, 2012: 151). Within the dialogic approach to legitimacy, it can have two different meanings, depending on whether we look at it from the point of view of the audience or the power-holder. In the first sense, it could be understood as 'justifying, in the eyes of those without power, both the authority of the power-holder and the obedience of the citizen'. In the second sense, it refers to the self-belief that rulers have in their moral right to govern – a self-belief that then underpins the[ir] claims to legitimacy' (Bottoms and Tankebe, 2012: 150). Power-holder legitimacy is a necessary precondition for successful audience legitimation: power-holders have to reflect critically on their own power if they want to anticipate and understand possible opposition by the audience. For Weber and Beetham (1991) alike, the legal/constitutional validity of the acquisition and exercise of power is a fundamental aspect of power-holder legitimacy. For Beetham (1991) and Bottoms and Tankebe (2012: 151), power-holders must also cultivate their self-legitimacy with reference to the beliefs shared by them and their audience. Power-holder legitimacy can hence be defined through a combination of Weber's formal legality and Beetham's shared beliefs and values: the 'cultivation of self-confidence in the moral rightness of power-holders' authority, within a framework of both official laws and regulations, and societal normative expectations' (Beetham and Tankebe, 2012: 154).

Conclusion. We could conclude from this that penal moderation-as-politics is possible within a dialogic approach to legitimacy if it is based on active engagement with general core or specific criminal justice values that are shared by power-holders and their audiences. This is illustrated, for instance, by the Finnish experience with decarceration. Originally designed by 'penal elites', it was successful because those elites engaged with professionals, the media and the public at large, emphasizing the importance that its crime policies become more 'Scandinavian' by lowering disproportionately high prison rates, without losing any effectiveness (similar crime rates). The main values invoked here were hence the Scandinavian identity (shared core value in Scandinavian thick morality) and the continued effectiveness of crime control (shared specific criminal justice value).

At the European level, forms of penal moderation such as the abolition of the death penalty and more 'humane' treatment of prisoners have been advocated by appealing to the protection of the inviolable dignity and human rights of all human beings, including offenders and prisoners, as a core 'European' value. How can this

appeal be understood within Walzer's description of 'justice' as both a thick and a thin morality? Are dignity and human rights part of a universal thin morality that power-holders can invoke to justify moderate penal policies? And could this relate to the finding that procedural justice and quality of treatment are important values when people are themselves confronted by the criminal justice system?

I now turn to contradictory accounts concerning dignity and human rights as fundamental values in western societies and their impact on different levels of punitiveness.

Dignity and human rights: Core values, elite action or a 'dignity gap' between Europe and the USA?

'Dignity gap' between Europe and the USA?

Whitman (2003) links the widening divide in harshness over the last 30 years between the USA and 'Europe' (as exemplified by Germany and France) to long-term, deeply historical differences in attitudes towards status, degradation and dignity. Going back as far as the 18th century, 'European' attitudes are seen as a reaction against the social stratification and discrimination of the *Ancien Régime*, resulting in an upward egalitarianism where the previously privileged treatment of aristocratic prisoners must be extended to all citizens. The emphasis on dignity and against degradation in punishment is further reinforced by Europeans' more recent experience of Fascist penal philosophy, the development of strong states and the influence of decisions by the European Court of Human Rights and national courts. In contrast, most Americans never identified with the African slaves and their experiences of degradation. American egalitarianism is described as downward egalitarianism, and a fundamental distrust of state power hinders the development of a state-founded bureaucracy of punishment independent of public opinion.

This 'dignity gap' between US and European cultures became the object of lively debates and dissensus. Other scholars emphasized that penal welfarism in the USA up until the 1970s also recognized the dignity of the offender (Garland, 2005) and that prisoners' rights were better protected by the US federal courts in the 1960s and 1970s than by their European counterparts (Kurki, 2001; Morgan, 2001; Snacken, 2006). Differences in penal harshness, and US retention of the death penalty more particularly, should rather be explained by cultural changes and political and legal struggles over the last 30 years in the USA: the interaction between the choice of federal litigation as a specific form of abolitionist action, the specific features of US polity (constitutional law, separation of powers, local nature of criminal law jurisdiction) and specific cultural circumstances (the 'crime complex' of the 1970s, the backlash against the Supreme Court's 'elitist' liberal activism in the *Furman* case in 1972 (*Furman v Georgia* 408 US 238), the conservative reaction against civil rights gains, the 'urban decay' of the 1960s) (Garland, 2005: 358). The abolition of the death penalty in Europe is seen as the

result of political elites, who controlled the national legislature, having the legal capacity and political opportunity to outlaw a practice despite popular support for it, 'relying upon bipartisan support from social elites and governmental officials that enabled them to disregard majority public sentiment' (Garland, 2005: 362).

Human rights as core value or elite action?

The abolition of the death penalty in Europe is described here as an illustration of moderation-by-stealth: elite action by political and social elites avoiding public debate altogether. More generally, the potential impact of human rights on punishment is seen as an illustration of such 'internal autonomy' in penal states, that is, 'the extent to which penal state elites shape penal law and policy, and pursue penal projects in accordance with their own values and commitments':

human rights treaties ... or regional group memberships that impose human rights standards on punishment ... will constrain penal policy in various respects ... But from the point of view of penal elites, these 'restrictions' tend to enhance their power and autonomy vis-a-vis legislators and the political process because penal officials can resist populist political pressure for harsher prison conditions by insisting on the need to comply with obligatory human rights standards. (Garland, 2013: 499)

Others have emphasized on the contrary that the abolition of the death penalty is 'one of the last bastions of criminal justice where governments lead by example', a 'salient' feature of European politics, domestic and foreign, and an important symbolic part of the construction of the 'elusive and fragile European identity' as 'a penal community of sentiment' (Girling, 2006: 72). This analysis seems much more in line with Loader's moderation-by-politics, that is, engaging with rather than avoiding public sentiment.

Are dignity and human rights elitist or core values? Outside penality, socio-legal scholars have described human rights as 'one of the great ideologies of the age [which] ... have become so embedded in a global consciousness as to be able to influence the conduct of international and national affairs' (Galligan and Sandler, 2004: 23). Human rights as global consciousness reminds us very much of Walzer's concept of thin morality. This seems corroborated by the European Union Standard Eurobarometer 74 (autumn 2010), where the three most important personal values of respondents (out of a given list) were human rights (47 per cent), peace (44 per cent) and respect for human life (41 per cent), followed by democracy (29 per cent), individual freedom (23 per cent) and the rule of law (22 per cent). The three values which best represent 'Europe' (here the European Union) were democracy (38 per cent), human rights (38 per cent) and peace (35 per cent), followed by the rule of law (25 per cent). Religion, by contrast, scores lowest on both, with 6 per cent and 3 per cent respectively.²

Punishment, human rights, values and emotions

Of course these responses concerning human rights refer to generally held values, not their application to penalty, which still supposes ‘engaging with, rather than neutralizing or cooling down, the passions that crime and punishment provokes’ (Loader, 2010: 363). Even if human rights and dignity are core values in ‘European’ society or part of a universal thin morality, they often will conflict with other values and emotions related to penalty: the expression of censure, moral indignation, solidarity with victims, concerns for personal and community safety, fear of the ‘Other’ and so on (Boutellier, 2004; Pratt, 2002). The range of options available to penal power-holders is hence influenced by which (balance of) values they invoke to legitimize policy choices.

In Europe, the prohibition of the death penalty, torture and inhuman or degrading punishment is absolute, as such actions are considered contrary to human dignity *in se*. In 1981 in France, presidential candidate François Mitterand went to the elections with an explicit promise to abolish the death penalty, building on a decade of media reporting describing the French death penalty as an aberration in Voltaire and Hugo’s country (Devienne, 2010) and on public emotions following Gilles Perrault’s (1980) *Le pull-over rouge* about the likely miscarriage of justice in Christian Ranucci’s execution in 1976. In contrast, in the USA, the Supreme Court’s finding in *Roper v. Simmons* (1 March 2005; 543 US 551), that the death penalty for juveniles under 18 is unconstitutional, is not based on human rights concerns but on its lack of effectiveness, as the recognition of juveniles’ diminished culpability renders the two penological justifications for the death penalty – retribution and the deterrence of capital crimes by prospective offenders – inadequate. But Illinois Governor George H Ryan used the same argument as French President Mitterand concerning the risk of errors to order a moratorium on executions in the state in 2000, followed by the abolition of the death penalty by his successor in 2011.

Death penalty abolition has been found to be positively associated with the presence of political and civil rights (Greenberg and West, 2008). But the USA has consistently argued that the death penalty is not a human rights issue and that it is legitimate as long as public opinion and state legislations continue to support it (Hood and Hoyle, 2008). Europe, in contrast, emphasizes that it is a human rights issue, and should therefore not be left to the ‘whims of a volatile public opinion’ (Conseil de l’Europe, 2001: 12–13). Should ‘political and civil rights’, which can be taken away from undeserving or non-citizens, be distinguished from ‘human rights’, which are innate in all human beings? European exclusionary politics of crimmigration towards non-citizens indicate that we should not appease ourselves too much with such distinctions.

The findings mentioned earlier concerning the importance of procedural justice may perhaps help us to understand the differences between Europe and the USA. The quality of treatment by criminal justice actors, with respect for our dignity, rights and weaknesses, is apparently an important shared value of respondents on

both sites of the Atlantic. This would suggest that dignity and human rights are indeed part of a thin morality of justice found in both places – at least as we see it *for ourselves*. In Europe, this has gradually been extended, especially over the last 20 years, to offenders and prisoners. This extension was supported by a strong human rights ideology (Girling, 2006), but also by the continued legitimacy of critical criminological accounts of crime and punishment, emphasizing the crimes of the powerful (Cohen, 2000), the risks of police brutality (Young, 2002) and the inherent risks of inhuman and degrading treatment in any form of detention (Van Zyl Smit and Snacken, 2009). This was not only supported by ‘penal elites’, but also by elected politicians, who contributed for example to the creation of a European Committee for the Prevention of Torture and Inhuman or Degrading Punishment or Treatment in 1989, which regularly inspects all places of detention.

A similar reflection could be made with regard to the specific penal value of effectiveness. Within the shared beliefs between power-holders and the audience, ‘evidence-based penal policies’ through risk assessments and cognitive behaviour treatment programmes were developed in many European countries to reinforce the effectiveness and credibility of the penal system (Snacken et al., 2013).

In the USA, by contrast, the ‘war on crime’ has led to a ‘virulent culture of demonization of convicts’ (Wacquant, 2008a) and to punitive laws and measures (Three strikes, Megan’s law,...) that favour expressive over effective alternatives and ‘suggests a complete disregard for the rights or humanity of those being sanctioned’ (Garland, 2001: 133). These political choices were further legitimized by the ‘criminologies of everyday life’, and especially the ‘criminology of the other’ (Garland, 2001: 130).

The thin morality of justice is turned into policies through thick moralities that are the object of struggles and competing narratives. Within the complex bureaucratic field of crime control, power-holders thus have the discretion to choose between different, often contradictory aims, beliefs and values inherent in punishment. They can – and do – select particular (political, moral, ethical, criminological) narratives to support their choices.

That is not to say that European politicians do not resort to expressive or punitive measures aimed at retribution or incapacitation. The increased use of preventive detention in several European countries testifies to this trend (Snacken et al., 2013). Moreover, the pendulum could now be moving in the USA. Simon (2012) describes a recent ‘dignity tsunami’ in US Constitutional law and the US Supreme Court, creating new prospects for ‘a dignity-based reform of the penal state’. This second wave of dignity concerns is part of a process which began in the USA after the Second World War but ended in the 1970s, when dignity in the US courts went into a period of hibernation (Henry, 2011) for 40 years. Henry’s empirical study of Supreme Court opinions invoking dignity shows that the Court’s reliance on dignity is increasing. In contrast to its past usage, dignity is now as likely to be invoked by more conservative as by more liberal Justices on the Court. Henry points out that ‘dignity’ is not one concept but refers instead to five different typologies: dignity as institutional status; equality; liberty;

personal integrity; and collective virtue. According to Simon (2012), Henry's dignity as personal integrity offers the most exciting foundation for a renewed constitutional attack on the USA's penal state. Conversely, the use in recent cases of dignity as collective virtue emphasizes that violations of dignity as personal integrity demand that the community permitting such violations be censured as indecent, inhuman or uncivilized.

In a different vein, the renewed emphasis in the USA on prisoner re-entry and the cautious penal optimism in the reform potential of offenders, exemplified by the Second Chance Act of 2007, illustrate how US penal policy-makers appeal to US Evangelical Protestant fundamental values to convince their public of the possible redeemability of prisoners (Green, 2013). While religion scores low in the European Union Standard Eurobarometer (see earlier), the USA shows much higher levels of religiosity, with 65 per cent of respondents claiming religion is an important part of their life (see Gallup Religiosity Survey 2009).³ Tapping into religious values may hence be a much more effective penal strategy in the USA than in Europe.

Are the changes in the Supreme Court's case law and the renewed religious emphasis on prisoner re-entry and redemption illustrations of a timid 'de-demonization' and 're-humanization' of prisoners? Will the 'dignity gap' between Europe and the USA slowly decrease by a new willingness to apply a universal 'thin morality' of dignity and humanity to offenders and prisoners?

I have argued elsewhere that this thinking is in line with the required legal-constitutional validity of penal policies in a democratic *Rechtsstaat* (Snacken, 2010, 2013), an important aspect of Beetham's concept of legitimacy. In Bottoms and Tankebe's dialogic approach to legitimacy, these values can also be seen as providing power-holders who opt for penal moderation the 'self-confidence in the moral rightness' of their authority. This can then lead to 'skilful negotiation' with the audience based on dignity and human rights as general core values, and on procedural justice ('we also want to be treated with respect') and effectiveness ('human rights do not lead to less effective penal systems') as specific penal values.

Conclusion

Twenty years after our first analysis of changing imprisonment rates in western countries, our conclusion concerning the complex interactions between external, internal and intermediate factors (Figure 1) still seems valid. Each of these clusters of factors has been further developed, leading to ever more complex interactions and analyses. But penal policies and the choices made among them are still part of the picture. Punishment is highly symbolic and expressive (Garland, 1990), but at the same time 'volatile and contradictory' (O'Malley, 1999), involving many different emotions and values. In our western democracies, based on political and public accountability, penal policies by-stealth have a high risk of failure (Loader, 2010). Penal policies will only be legitimate if penal power-holders engage with the audience on the basis of core values (Beetham, 1991; Bottoms and Tankebe, 2012). Moderate, inclusionary penal policies can succeed by appealing to human rights

and dignity as inviolable core values. Punitive, exclusionary policies will succeed by appealing to the fear and loathing of the 'Other'. Within the complex interactions between 'deep' and 'proximate causes' of penal changes (Garland, 2013), penal power-holders have an inescapable responsibility to determine whether we treat offenders as we want to be treated ourselves.

Notes

1. Paraphrase of Honoré de Balzac's *Splendeurs et misères des courtisanes* (1838–1847).
2. I come back to this point when discussing the Second Chance Act in the USA.
3. See Gallup Religiosity Survey (2009), available at: <http://www.gallup.com/poll/142727/religiosity-highest-world-poorest-nations.aspx> (accessed 23 March 2015).

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Sonja Snacken is Professor of Criminology, Penology and Sociology of Law at the Vrije Universiteit Brussel, Belgium. Her research focuses on penalty in Europe, with special emphasis on the integration of an empirical social scientist approach with human rights concerns.