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Punishment and conditional citizenship

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Abstract

This article enquires whether modern practices of punishment are undergoing a transformation by investigating the effect that the development of citizenship has had upon modern punishment. Citizenship requires that people expand their horizons of recognition and treat people, who had previously been disregarded, as equals. This is one of the primary cultural influences upon punishment and explains why modern punishment has always partly been an inclusionary project. The effect of citizenship is ambivalent as punishment is designed not only to incorporate offenders but also to underline their 'conditional' status as citizens, hence the persistence of brutal treatment. This article traces the influence of citizenship, through the emergence of civil, political and social rights, upon punishment from the late 18th century to the present day. It argues that the 'inclusionary' aspect of punishment is waning as the conditions of citizenship are becoming ever more stringent.

Key Words

citizenship • conditional citizen • deterrence • less-eligibility • punishment • reform

It is not surprising that record levels of incarceration in many countries and a hardening of rhetoric vis-a-vis community sentences leaves many wondering whether modern practices of penal punishment are being fundamentally transformed. It is not just a matter of an increase in numbers being incarcerated (see Home Office, 1998) but also the nature of punishment that is becoming more exacting. The only way to answer this query is to examine what it is that is distinctive about modern punishment that may be in the process of a transformation.

To this end I will enquire into the origins of modern punishment in England and Wales and argue that what distinguished it was an attempt to incorporate offenders rather than exclude them through execution or transportation to the colonies.¹ This novel form of punishment arose as the idea of citizenship within a national territory emerged towards the end of the 18th century. Citizenship could only emerge if there was increasing identification among a people, a sympathy towards each other and it was

this bond between people that provided the necessary cultural conditions for modern punishment to emerge. Punishment was to be exercised upon those with whom the middle classes felt a tentative link, not complete but conditional citizens. I will argue that with the enunciation of distinct components of citizenship significant changes in punishment occurred so that citizenship can serve as a useful index for assessing whether punishment is undergoing fundamental changes.² It is generally acknowledged that citizenship is undergoing changes at the end of the 20th century and I will examine what effects these changes are having on modern practices of punishment.

THE DISTINCTIVENESS OF MODERN PUNISHMENT

It is not difficult to state when modern punishment originated; it is generally agreed to have begun with the 'birth of the prison' in the late 18th century when prisons began to be used as punishment per se to achieve a transformation of the offender. Before that they were a means of holding the individual offender until he or she was transported or a debt was paid off. It is more difficult to say what is distinctive about this modern form of punishment. Michel Foucault famously said (1979) that the prison was a means of achieving a more effective punishment at less cost through a process of continuous discipline which would encourage the offender to be compliant. This process of supervision and what Foucault calls 'normalization', encouraging offenders to abide by a certain type of behaviour, is held to be what is distinctive about modern punishment.

A sympathetic critic such as David Garland (1985) contends that 'the development of specific practices of normalisation, classification, categorisation and discrimination between criminal types simply did not occur in Britain until after 1895' (1985: 32). Instead of positing certain practices as intrinsic to punishment, Garland carries out the commendable task of enquiring after the conditions under which reformatory practices of punishment emerged. He locates this change as being due to the fact that the political franchise was, at the turn of the 19th century, being extended to the 'mass of the male working class' for the first time. The emergence of a political citizenship required a more rigorous regulation of the working class, 'more contingent upon behaviour and character'. This is why a whole series of institutions sprang up which would identify those prospective citizens who seemed to be unable to fulfil the demands of citizenship. Once these people were identified, they were 'subjected to a work of normalisation [e.g. probation], correction [e.g. Borstal] or segregation [e.g. prison]' (1985: 249). These so-called deviants had a choice:

either they become responsible, conforming subjects, whose regularity, political stability and industrious performance deems them capable of entering into institutions of representative democracy; or they are supervised and segregated from the normal social realm in a manner that minimises (and individualises) any 'damage' they can do. (1985: 249)

Perhaps the most interesting account is that Garland explicitly connects punishment with the emergence of a particular kind of citizenship, the political. It is this linkage which provides a way of avoiding some of the oft-noted problems with previous analyses of punishment and a means of assessing whether punishment is undergoing a fundamental change. I will argue that citizenship is constituted by a change in the regard people have for each other, evidenced by the emergence of social trust and

egalitarianism. Punishment shares in these cultural conditions as they direct who is worthy of punishment and of what kind and the more extended citizenship becomes the more punishment moves in the direction of reform.

It is only recently that culture has been readmitted to punishment; Garland admits that his approach replaces the analysis 'of cultural forces by an analysis of ideological forces', viewing punishment 'from the point of view of its implications for class domination and the control of the poor' (1991: 129). The problem with such an approach was highlighted by Ignatieff (1983) who pointed out that any explanation which ignored the cultural determinants of punishment would be at a loss to explain why such faith was placed in one option rather than another. In times of social crisis, why do elites choose to reform offenders rather than imposing physically severe punishments? Only an approach that recognizes the cultural basis of punishment will be able to explain why it assumes a particular form at any one time. The next section will show that citizenship has a cultural basis and why this results in punishment being an inherently ambivalent practice.

The emergence of citizenship

As students of citizenship are well aware, T.H. Marshall (1977) went beyond defining citizenship as simply a matter of membership of a community but instead divided it up into three distinct elements: civil, political and social rights. The first category refers to those rights necessary for individual freedom, the second refers to the right to participate politically as a member of the electorate and the last refers to the right to a full and healthy life as defined by a society at any one time. He located the emergence of each of these elements in the 18th, 19th and 20th centuries respectively. These do not follow on from one another in an evolutionary fashion as some have taken Marshall to be saying (Giddens, 1982) but may arise as a result of struggle. Despite the commentators who disagree with Marshall's interpretation most accept his chronology of citizenship, at least in the case of Britain.

There are, however, a number of weaknesses in Marshall's account. By interpreting citizenship as solely a matter between state and individual groups, we may end up with 'a juridical definition of citizenship as merely a collection of rights and obligations' (Turner, 1993: 2). This may obscure the cultural basis upon which citizenship must rest, although it should be said that Marshall recognized that 'citizenship requires . . . a direct sense of community membership based on loyalty to a civilisation which is a common possession' (1977: 101), the problem being that he too readily assumes that there is such a common civilization which is unstintingly shared by everyone (Hindess in Turner, 1993: 30-3). Rights will only be granted and recognized if one possesses a certain status which is held to be legitimate (Barbalet, 1988: 16) so that citizenship first rests upon people exemplifying certain common standards of behaviour upon whom rights will then be bestowed. Turner (1993: 2) is perhaps correct to define citizenship as 'that set of practices which define a person as a competent member of society, and which as a consequence shape the flow of resources to persons and social groups'. Citizenship is then a dynamic, contingent affair that may be granted or rescinded, depending upon the public estimation of one's behaviour.

Consequently citizenship is neither a fixed nor an all-or-nothing state; if citizenship is defined as the sum of obligations owed by the state to the citizens, there may be a

tendency to divide society up into two groups, 'the first of whom enjoy full citizenship, and the second of which for reasons of status or condition are debarred from it'. Rather 'there are several groups that may better be viewed as part in, and part out, of citizenship' (Bulmer and Rees, 1996: 275). This may entail that if some people are identified as 'partial citizens', the community may take it upon itself to adjust the individual's behaviour so that 'they may be relied on to regulate themselves' (Hindess in Turner, 1993: 32). The category of the criminal might be said to be one such incomplete citizen and punishment is partly an attempt to encourage offenders to regulate themselves. Punishment is used against those who have fallen below the standards which are expected of all citizens but is also used to mould them into citizens (Bailey, 1987) – hence punishment is not only a deterrent but is also deployed as a device for character-transformation. It is used on those who are conditional citizens, people who may be moulded into full citizens but who are, at present, failing to display the requisite qualities expected of citizens. This is one of the great animating impulses behind modern punishment, the desire to convert people into proper citizens rather than excluding them, as with transportation, or making a spectacle of them, as with capital punishment.³ Yet for punishment to be meaningful, it must entail that some rights or privileges are forgone; the process of inclusion cannot be total. The ambivalence of prisoners' position is both a blessing and a curse: the acceptance that prisoners can often rely on 'common-law rights concerning negligence, the duty of care, or the rules of natural justice' (Vagg, 1994: 170) but the lack of clarity as to which specific rights prisoners enjoy means that there is still a large degree of administrative discretion.

The relationship between punishment and citizenship is then conditional in two senses: the first is that one's claim to citizenship is granted only if one abides by an accepted standard of behaviour and punishment may be imposed if one does not live up to this standard; second, while undergoing this punishment, one is no longer a full citizen yet neither is one completely rejected. Instead, one occupies the purgatory of being a 'conditional citizen'.

Garland's analysis implicitly recognizes that citizenship is a dynamic affair arising out of social struggle yet his analysis is lacking in two respects. The first is that he makes reference only to one element of citizenship – the political – whereas it has been accepted traditionally that it is composed of three, although it is increasingly being questioned if this typology adequately encompasses recent societal changes (see Roche, 1995). Yet if punishment prior to 1895 was partly as a result of civil citizenship and this was neither dissolved nor incorporated into political citizenship, how did this affect punishment? The graduated nature of citizenship means that reform is only gradually admitted into the practice of punishment and reaches further back than the beginning of the 20th century. Second, there is insufficient recognition in Garland's account that citizenship may be partial. Punishment is broken down into two types, correction (which includes what he calls normalization) and segregation – those who can be transformed into acceptable citizens and those who will never be capable of so doing. His analysis seems to suggest that one is either a subject of reformatory practices, eventually able to be admitted into society or else a recipient of deterrence who must be excluded from the mainstream of society. Yet this ignores the conditionality of citizenship and how all punishment comprises both elements of punitiveness and

reform. I now wish to turn to Elias's theory of a civilizing process to see if it can explain the ambivalence of punishment.

Norbert Elias (1982) argued that as societies become more differentiated and their members more dependent upon each other, the behaviour of people becomes more calculable and restrained and people begin to identify more with each other. It is not only those who are most deeply enmeshed in the tightening bonds of what Elias calls webs of interdependency – typically the commercial middle class – who are affected by this cultural shift, for the very people who 'tighten-up' their own behaviour also try to modify the more spontaneous behaviour of others. Calls to move away from punishments involving the infliction of public physical pain were part of a strategy of distinction on the part of some of the middle classes who argued that such punishment degraded themselves and brutalized others.

However, stressing sympathy may mislead as it can overemphasize the effect of reformatory efforts within prisons and underestimate the deliberate severity of these regimes. 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, even though both theorists would interpret this change very differently. McGowen, for example, writes that 'the prison did not indulge in an excessive violence whose only object was pain' (1986: 327). It is true that the early prisons in England and Wales were marked by efforts to reduce deliberately inflicted violence; one of the earliest attempts to devise a penal regime, the silent system which demanded associated labouring in silence, foundered because it was thought that it was impossible for inmates to be continually silent without recourse to the whip. It might be said that a reduction in overt violence sees an increase in psychological humiliation, a stripping away of the prisoner's sense of self-worth which Goffman called the 'mortification of the self'. Vagg (1994: 68) employs the useful French term infantilization to describe how the inmate is treated as a child so that he or she must request permission for virtually everything and ask for it correctly. Not only is this a means of control but it is also a reminder to the inmate that he or she is encompassed in a process of domination. I would hesitate to call these examples of 'symbolic violence' only because they are very real in their effects but they do remind the prisoner of the physical coercion implicit within the penal system.

However, a cursory reading of penal history would demonstrate that physical brutality within prisons was explicit and was not just an occasional occurrence. How do we explain the persistence of brutality within the prison, brutality that was not just incidental but intrinsic to its structure? Some would see the persistence of violence as a result of a sub-culture among penal staff which, encouraged by public ambivalence towards prisoners, treats them with callousness. But violence subsists at a far deeper level within the structure of penal confinement and is an ever-present possibility in many encounters. There is no refuge, no retreat 'back-stage' to a more secure private life. As one prisoner described it recently, one of the 'very worst things about being in prison is that you can't have a shit or a shower without worrying who is in the next cubicle and who is coming in next' (quoted in King and McDermott, 1995: 139 [who found that 46.3 percent of their respondents perceived that either other prisoners or staff were a threat to their personal safety]).

It is ironic that a reading deriving from Elias would see the establishment of prisons as representing a pivotal point in the civilizing process as it marks a point where the use of public violence is openly castigated. The establishment of prisons in the late 18th century signifies that the unpredictably violent conditions of the Middle Ages were being left behind. The medieval conditions that Elias believed encouraged a frail self-control among all members of society, as few could be trusted, were being replicated within the prisons so that it could be said that violence was not eradicated but merely transposed.

Both aspects of violence, the psychological and physical, serve as legitimating devices to reinforce the idea that offenders are not complete citizens since they do not seem to observe the requisite standards.⁴ There is a reciprocal relationship between citizenship and punishment: the cultural conditions of citizenship directs how people will be punished and punishment reinforces notions about whom is thought worthy of citizenship.

In the following sections I wish to substantiate my claim that citizenship has had a great influence upon punishment by showing how the emergence of three distinct components of citizenship within Britain led to the reform of practices of punishment. I will also highlight the persistent ambivalence of punishment due to the conditional nature of citizenship.

CIVIL CITIZENSHIP AND PUNISHMENT

If it is agreed that the civil component of citizenship emerged in the 18th century, then this could only have occurred if there was an underlying cultural shift in individuals' estimation of each other – Kalberg (in Turner, 1993) states that the emergence of social trust and egalitarianism are essential foundations for modern citizenship. Marshall noted that one of the civil rights was the right to justice which is the right to 'defend and assert all one's rights on terms of equality with others and by due process of law' (1977: 74). For such a right to take hold would mean that people already began to identify with each other in some way. This is not to say that it was a reciprocal affair; in fact, the middle class showed a much greater affinity for the so-called lower orders than vice versa. If the cultural element of citizenship is apparent from the 18th century, and we accept that the extension of citizenship has an important influence on punishment then we should expect punishment to undergo a modification.

The 18th century has been recognized as a time of great ferment, not least because of the incipient industrialization of Britain. However, alongside this structural transformation, there was also a cultural shift in manners and etiquette so that 'politeness was a logical consequence of commerce' (Langford, 1992: 4). The commercial classes also tried to encourage etiquette among others; these people were those typically classed as the lower orders and for the middle-class reformers 'they were the perpetual challenge of the age. The story of politeness and commerce as it developed in the mid-18th century is not least an account of the way in which the polite and commercial class dealt with its inferiors' (1992: 6); we might add that this theme is not confined to commerce. The development of the prison, as an alternative to capital punishment, is the story of how the burgeoning middle class tried to impose their own standards of behaviour upon those who were thought to be worthy of inclusion within society but not yet able to take their place voluntarily.

There were two strands to the calls for changes in the system of punishment: the first was a realization that the ordinary populace were vital to the well-being of the nation for 'as citizens we must be mutually dependent' (Dagge, 1772: 261). A punishment, such as transportation or capital punishment, which deprived society of some of its members was seen to be both a 'public injury and a private loss' (Dawes, 1782: 33). It was a public injury because the unity of society was beginning to be predicated upon the inclusion of all its members so that to withdraw one was to bring discordance to the 'entire whole' (1782: 33);⁵ it was viewed as a private loss because such punishment did nothing to try to refine human nature but allowed criminals to persist in their 'dissoluteness of manners' (Hanway, 1776: 64). Implicit within this was a higher estimation of the value of the individual member of society and a belief that those who could regulate their own behaviour were 'bound by every social tie, to drag them out, who are carried down the stream of iniquity' (Hanway, 1781: 103).

Punishment was less and less about making an example of an offender to reassert an already existing consensus and more about including subjects upon whom society's grip had never taken hold. No longer were people to be punished in a way which relied solely upon physical suffering as its vehicle of communication; the individuals to be punished were increasingly thought to be the primary recipients of the message of punishment and were being increasingly valued.

Hence there was a change in the very metaphor of punishment: before the offender had been conceived of as a putrid limb and society as the body of which it was simply a part. If the limb was left unattended then the infection that lay within it would spread and infect the rest of the body; the remedy was to sacrifice the limb to save the body, what Thomas Alcock called a 'seasonable amputation'. This metaphor was questioned by the very people who championed for penal reform. Society could not function by continually cutting off the 'flower of the people' (Hanway, 1781: 18) any more than a body could adequately function after the loss of a limb.

The second strand was a growing repugnance at open displays of violence, whether inflicted by citizen or state. Middle-class revulsion at excessive punishment was part of a strategy of distinction, a way of disassociating themselves from both aristocracy and the masses and asserting the particular superiority of their own manners and attitudes. To insist upon open suffering was to assign oneself to the uncouth class, those who did not know any better. The cultural programme of reform was a subtle exercise of power, a way of imposing their own *Weltanschauung* upon others. Thus the expressive and instrumental are inseparable within a cultural programme of penal reform.

The best way to characterize the feelings of these humanitarians is through the emotion of sympathy, a sentiment which 'provided a program for transforming threatening encounters with other people into the reassuring discovery of a common humanity' (McGowen, 1986: 314). Sentiments such as sympathy would provide the cultural underpinning for a common citizenship and would provide the impetus for reformatory efforts dedicated to adjusting the individual offender. The differences in temperament and behaviour, exhibited by criminals, which were a danger to the community at large would be ironed out by the prison: a corollary of this sentiment of sympathy was that the prison reformers 'regarded the peculiar otherness of the criminal as a mute condition to be overcome' (1986: 329). What sympathy would try to do was bind people into society, not through coercion, but through the inculcation of manners;

it 'created a web that tied you to others, while binding them to you, even as everyone seemed knit together in something greater than the individual' (1986: 322), what Elias would call a web of interdependency. What is notable about the sentiment of sympathy is that it evoked a concern for those who were indifferent to such pleas, in short it 'presumed a relationship that it also confessed did not exist' (1986: 314). It was a common criticism of capital punishment that it merely exacerbated the differences between the 'refined' and 'common' people by stirring up their passions through the spectacle of the execution. Capital punishment was incapable of producing in its audience the kind of self-regulating agents that the commercial middle class was becoming as it enticed the most impulsive behaviour. Another method had to be found 'to restrain moral actions which prove absolutely adverse to man's happiness' and so it was deemed that 'application should be made to their minds' (Dawes, 1782: 5). This appeal could only be accomplished by isolating the individual offender and so pointed towards institutional confinement. The prison was an institution which would try 'to save life and serve life; its goal was to take hardened offenders and by softening them render them good neighbours and citizens' (McGowen, 1986: 326). The programme offered in prisons was designed to awaken feelings of remorse and shame over their past conduct as they realized the injury they inflicted on others with whom they were joined.

If we are to date modern punishment with the birth of the prison then this is connected with an expansion in the scope of sympathy, that people who previously would have been disregarded were now thought worthy of attention and aid. This enlargement of mutual regard lays the basis for the emergence of citizenship in its civil element that led to calls for both the standardization of and proportionality in punishment. Marshall believed that one of the consequences of civil citizenship was that one's rights were defended through 'due process of law' which, if carried through, would reduce arbitrariness and discretion in both sentencing and punishment.⁶ Yet why did this mutual regard not ensure that brutality within prisons was eradicated?

There are a number of reasons why punishment operates with a severity that is incompatible with reform. The first is that, as Elias noted, those who are in the vanguard of the civilizing process are usually the ascending classes, those who are trying to distinguish themselves both from those regarded as their inferiors and those who had been hitherto regarded as their betters, the aristocracy. Desire for reform of punishment was spread unevenly throughout society and was regarded by many as an unnecessary indulgence; members of the aristocracy thought that many criminals were not worth preserving.

Second, one of the great criticisms of the death penalty was that it provoked the wrong kind of reaction, that for many in the audience it was no more than spectacle or entertainment. Thus the high purpose which the elites within society had intended had been distorted by the reaction of the crowd and cast into doubt the elites' own reasons for preserving capital punishment. It was being associated with the basest of feelings and emotions, in short it had become an embarrassment. By 'privatizing' punishment, shielding it from public view within an enclosed area, the respectable classes were freed from this embarrassment since they could now persuade themselves that it was being carried out for the loftiest of motives and was no longer associated with personal feelings. Hence, civilization did not necessarily mean the suppression of violence but its transfer away from a public space and into institutional confines.

A third and more profound reason for the ambiguity of punishment lies in the enunciation of citizenship. What impelled reform was a feeling of affinity with offenders but what necessitated reform was a belief that offenders were different, hardened and more callous than those who proposed reform. Penal reformers could never wholly identify with them and so those that had been found guilty of criminal offences could never be regarded as complete citizens while they were undergoing punishment. Consequently, they could never enjoy the privileges accorded to those who had abided by the law, which provided the minimum standard for civilized behaviour. This conviction was pronounced through the doctrine of 'less eligibility' which stated that the conditions which prisoners enjoy must be of a lower standard than that enjoyed by the least well-off in society who are not undergoing punishment. There were prudential reasons why 'less-eligibility' was promulgated so fervently, namely the fear that if conditions inside the prison were superior to those on the outside – the first state prison Millbank was labelled a 'fattening house' for convicts – punishment would no longer be a deterrent; but perhaps, more importantly 'less-eligibility' helped to maintain a distinction between those who were deserving of citizenship and those who were not.

Consequently even while reform was being emphasized with Britain's prisons, ways were being sought to 'torment' the prisoners, as Bentham put it. Bentham's utilitarian logic could not perceive the necessity of insisting on suffering which produced no obvious benefits as he remained blind to punishment's symbolic importance. Jonas Hanway rightly recognized that 'how to compel, and at the same time reform, is the question' (1776: 97) and the answer was that punitive labour was to be the 'inevitable concomitant of improving prison conditions' even though there was a 'fundamental conflict between the attempt to provide particularly odious labour for felons and a desire to encourage reformation' (De Lacy, 1986: 104). The fundamental conflict arose because of the ambiguous nature of the criminal, neither absolute outsider nor a full citizen but a conditional one.

This delicate balance between reform and deterrence was maintained until the mid-19th century when it was thought that too many privileges had been granted to prisoners. Transportation had ended in the 1850s and to relieve pressure of numbers, convicts were released early on a ticket-of-leave scheme. They were easy scapegoats for the London garrotting panic of 1863 and public concern crystallized in the findings of two committees which called for a more punitive regime. The Chairman of the Directorate of Convict Prisons, Edmund Du Cane, believed that it was impossible to influence criminals through reform as they were 'in a certain sense mentally deficient' (1885: 2). Conditions in prison were not meant to elevate prisoners, to encourage them to change but to instil a sense of dread within them. Rewards for long-term prisoners were reduced and prison labour was designed to be 'incessant, often arduous and painfully harassing' (Griffiths, 1904: 174–5) with the result that many long-term prisoners were said to have been 'rendered permanently bedridden invalids' (quoted in Radzinowicz and Hood, 1986: 504). These procedures were a more extreme version of the 'torments' that had arisen in prisons in the first part of the century. However, just as I have shown that reform always needed to be counter-balanced by a degree of deliberately inflicted suffering, deterrence was not given *carte blanche*.

In an almost mirror image of the complaints made earlier in the century concerning the supposedly unwarranted attention given to reform, protests were made about the

undue attention being given to deterrence to the detriment of reform. Visiting committees fulminated about the lack of a reformatory influence and the insistence on strict discipline to the exclusion of all else: 'discipline is very good: but we want more than that. What is the good of sending a man to prison unless it is to reform him?' (quoted in McConville, 1995: 273). What this indicates is that reform and deterrence were always linked and that to portray punishment as composed of one or the other fails to do justice to the complexity of penal practice. The question that I will raise of Garland's account is whether a policy of 'bifurcation' is viable, whether it is possible to divide up those who have the potential to be reformed and those who are irredeemable and treat them accordingly. Or is it the case that the demand for punitiveness will spread across all categories of prisoners?

Foucault's analysis can be faulted not simply for presuming that modern penal practice has always been concerned with a 'mechanics of training', diagnosing the individual offender's faults and devising programmes to correct them, which Garland acknowledges, but also for presuming that modern punishment is no longer concerned with inflicting pain upon the body and seeing this as an archaic, inefficient practice. It may be inefficient in the transformation of the offender but it can serve to draw a distinction between those who are supposedly civilized and those who are not. It seems paradoxical to say that brutal punishment exists to underline the civilization of those who are calling for it but not if we remember that the civilizing process owed a great deal to fear of the masses. Reform was all well and good but if the masses were refractory and their minds unheeding of admonition then their bodies would be punished; that such punishment was necessary said nothing about the 'character of respectable society except that it possessed the strength to protect itself' (McGowen, 1994: 278).

The political basis of punishment

If punishment is linked with the rise of citizenship, then it is not surprising that the emergence of political citizenship had some effect upon punishment. Garland (1985) believes that punishment becomes less obviously punitive to sink further into the social body, in Foucault's phrase, 'not to punish less but to punish better'. If the working class were to be incorporated into society through the extension of the vote, then their behaviour would have to be policed more intensively.

The effect of political citizenship upon punishment was similar to that of civil citizenship in that it led to concerns about the deleterious effects of punishment, that it was too severe and exacerbated the problem of criminality, precisely the arguments made against capital punishment a little over a century earlier. The penal regime seemed to have been too successful in that the numbers being received into prison were declining, a background against which those who were unamenable to the succours of deterrence stood out all the more vividly. Frustration at the futility of applying physically punitive punishment to these intractable cases was increasingly being voiced. The difference between the first and second wave of civilizing punishment was that although the first was born out of fear of the masses, the second issued more from a sense of well-being and security (Wiener, 1990). If we interpret punishment as partly constituted by people's sensibilities, then it can be argued that the post-1895 penal reforms were motivated not simply by issues of control but also the belief that criminality tarnished the nation: 'the retention of a compact mass of habitual criminals

in our midst is a growing stain on our civilisation' (Gladstone, 1895: 1). If the working class were to be incorporated then it would have to abide by the standards of a civilization which was to be shaped into a common possession and penal practice was a means of achieving this.

One of the oft-noted characteristics of penal practice at the turn of the 20th century was its supposed individualization: that the discrediting of uniform penal regime led to discipline, inspired by criminological findings, directed by the particular circumstances of each offender. There are a number of problems with this analysis: first, it ignores how an individualized punishment, inspired by political citizenship, combined with an earlier kind of punishment, inspired by civil citizenship, which stressed uniformity of punishment, of treating no offender with special favour or discrimination. The two are in flagrant contradiction and if we accept that the earlier form of punishment was not simply displaced but was 'overlaid' (Cohen, 1985) by the later practice, then what effect did this have? Many penal historians (Forsythe, 1990; Bailey, 1997) acknowledge that classical principles of justice remained strong especially among the judiciary – who strangely never really figure in Garland's work – so that many of the more treatment-oriented models of punishment such as preventive detention camps for habitual criminals and reformatories for inebriates were failures (Bailey, 1997: 302–4).

One of the reasons why the treatment model of punishment never permeated penal institutions was that its incorporation meant not only a departure from the principles of classical justice but it also meant tipping the balance against deterrence. This would have diminished the role of punishment as a dramatic illustration of the inferior role of the criminal. The prisons, which Foucault saw as the locus of individualized punishment, were not drastically affected: it is difficult to discern in the convict prisons any strikingly different mode of managing, categorizing or classifying them according to the requirements of eugenic or any other criminological theory (Forsythe, 1991: 73).

The more specialized institutions fared no better: the preventive detention camp suffered not only because it demanded a double sentence – three years' penal servitude and then an indeterminate sentence – and so fell into disrepute with judges but also because the prison commission was unsure what conditions should pertain within the camps. Prisoners, after two years, were allowed relaxations of a literary and social character but the authorities were unwilling to publicize this lest it provoke criticism – less-eligibility rearing its head again. Similarly the conditions and administration of Borstals was attacked on the grounds that they were only one step removed from those of a convict prison (Bailey, 1997: 303). The penal authorities found it impossible to establish regimes which would be exclusively reformatory (and this includes the rehabilitative model) or based on deterrence. The symbolic role of punishment meant that suffering had to be seen to be imposed otherwise it would be impossible to distinguish between prisoner and pauper but its part in building citizens meant that it was vulnerable to the criticism of being too indulgent.⁷

SOCIAL CITIZENSHIP, PUNISHMENT AND BEYOND

Although there were many proposed adjustments prior to the Second World War, it is generally accepted that the next great wave of change within the penal system took place after the war, with the rise of the welfare state following the end of the Second World War. How then did social citizenship affect punishment? Crucially, social citizenship

obliged the state to provide for a standard of living which allowed any individual citizen 'to live the life of a civilised being according to the standards prevailing in the society' (Marshall, 1977: 78). This had a profound effect upon punishment: it entailed a redoubling of efforts to reintegrate the criminal within society; this was facilitated by the adjustment to the notion of less-eligibility which underpinned much of the severity of the penal system. If the general standard of living were to be lifted, this would allow for a relaxation of the severity of punishment since the demarcation line between prisoner and pauper would no longer have to be drawn at such a low level.

Can we say that finally with the advent of social citizenship, there emerges a form of punishment which accords with the kind of punishment which Foucault envisaged as coinciding with the birth of the prison? Certainly, the document *Penal practice in a changing society* (Home Office, 1959) spoke of a search for 'more precise methods of classification' which was based 'more on a study of the personalities of offenders' which would hopefully 'reduce recidivism by more effective personal training' (paras. 51 and 58). There were still limitations to the kind of treatment that could be provided: first, although 'less-eligibility' had been weakened it had not been dispelled completely. The Salmon Committee proposed that the training that juveniles undertook in Borstals be considered as part of an apprenticeship but the trade unions rubbished the idea, citing the principle of 'less-eligibility' as support and asked why offenders should be assisted before law-abiding citizens. Second, there was the conflict adverted to earlier between the punishment entailed by the civil and the political and social, namely the incompatibility between proportionate punishment and the indeterminate sentencing implied by the welfare model of punishment. It was this incompatibility which led to such vociferous criticism of the welfare approach especially as regards juveniles.⁸ If there is any period in British penal history which can be said to tally with a Foucauldian reading, it is the short period after the war from the 1950s to 1970s, and even then there are obstructions.

The demise of the welfare approach is usually dated from the mid-1970s with the dissemination of Martinson's 'Nothing works' article (1974) which encapsulated misgivings that many held about the welfare model of punishment. Thus the failure of the treatment model is located internally within the system of punishment; yet this would be to ignore wider societal changes which were making the welfare approach untenable and which previously had underpinned punishment.⁹ From the 1970s on, the British state encountered limits, mainly in the failure to achieve full employment and eradicate poverty, in what it could achieve by way of social redress, what it could deliver to its putative citizens through the medium of social rights (Roche, 1992). How did these limits affect the administration of punishment?

There are some who believe that this crisis of the welfare state entails a more punitive approach for perhaps two reasons: the first is that the persistence of poverty will mean that punishment will have to abide by the notion of 'less-eligibility', to distinguish between prisoner and pauper (Sparks, 1996). The second is that the failure of the welfare state will induce a sense of crisis amongst the elites of society and so 'projects for toughening punishments are part and parcel of a more general climate of social disciplining linked to critical situations' (Melossi, 1993: 264).

The 'whip', however, is not immediately brandished in every crisis situation. If we look back to the last century when the Gladstone Committee called for a fundamental

reorientation in punishment, the situation was similar. This is how Garland described a section of the then working class:¹⁰

excluded by laws and property, marginalised by the labour market and political forces, this class stood outside respectable Victorian society, devoid of social attachment and the constraint it entails. It stood on the very margins of the system of production, in turn exploited or excluded. But this marginality carried with it the menace of the unpredictable and the unattached. The destitution of this class was also its danger. (1985: 40)

As Garland made clear, attempting to integrate this class made sense as they were caught up in one of the greatest webs of interdependency – mass employment. Reintegration of offenders is a viable option only ‘if the larger community from which offenders come is viewed as sharing a common normative universe with the communities of the middle class – especially those values and expectations derived from the labour market’ (Feely and Simon, 1992: 468). What distinguishes these two end-of-century crises are the changes in the labour market: not just the so-called post-Fordist era of mass production but also a more fragile sense of security brought about by unstable employment.¹¹

Social rights were meant to deliver security. They have often been conceived as a guarantee of material security but this overlooks that the state, in promising to deliver such rights, also attempts to secure a ‘general reduction of risk and insecurity’ (Marshall, 1977: 113). Citizens expect that the state will not only deliver a ‘general enrichment of the concrete substance of civilised life’ (1977: 113) but will also preclude their lives from being disrupted by any perceived threats.

The problem with such guarantees is that there is no discernible means by which to measure the attainment of such security but the state, if it is to retain the confidence of its citizens, must try to reassure them that they are safe in its hands. While it has become increasingly obvious to all citizens that the state cannot procure a general material enrichment, the state feels increasingly compelled to adopt a punitive stance in order to dilute a feeling of a ‘more general insecurity – deriving from tenuous employment and fragile social relations’ (Garland, 1996: 460). Thus the state’s current punitive stance is a peculiarly modern phenomenon in that it is a response, despite its archaic vestiges, to its failings to make good the promise of social rights. This response only further dissolves the ‘direct sense of community membership’ (Marshall, 1977: 101) that has already been corroded by economic changes.

CONCLUSION

One of the reasons why I have analysed such an extended period is that it allowed me to argue that each of the last three centuries has witnessed a prolonged transformation of the penal realm. The late 18th century, exemplified by the ‘birth of the prison’, did represent a fundamental break with previous practices of punishment; the changes at the end of the 19th century, exemplified by the Gladstone Committee’s calls for reform and deterrence to be ‘primary and concurrent’ objects of penal policy, although bolstered by the development of criminology, represented only a partial break with the past. Many of the changes which are thought to have occurred in the first few decades of this century only occurred after the Second World War with the establishment of the welfare state.

It has been the main argument of this article that these changes tally with the development of citizenship and since the 1970s citizenship has been undergoing a transformation. These relate to the failure of the nation-state to secure participation within society for all those who reside within its boundaries and the emergence of the question of supra-national citizenship as states have become more integrated through the development of political institutions above the level of nation-states, facilitating the movement of people. 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. If we look at the use of custody in England and Wales in 1997, there was an increase in the use of custody of 19 percent for female prisoners,¹² 16 percent for young male offenders. Furthermore, 85 percent of non-criminal prisoners were held under the 1971 Immigration Act (Home Office, 1998).

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.

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NOTES

The views expressed in this article are those of the author and do not necessarily represent the positions of the Irish Penal Reform Trust.

- 1 One reviewer has queried my assertion that pre-modern punishments were not inclusive pointing to the widespread use of compensation. It is important not to idealize compensation as 'social status determined the severity of punishment' (Gorringer, 1996: 89); second, punishment was construed as satisfaction, to repair a rent in a divinely established order so that the material consequences of the offence were addressed, not the culpability of the offender. Punishment was not a means for the offender to achieve civil status in society (see note 3) but to return to the (inequitable) status quo.
- 2 Sparks (1996: 81) notes that we must distinguish between short-term changes which are a result of 'the press of immediate conjectural circumstances and contingencies' and those developments which are 'on a long wave of historical development'. Garland (1995) has questioned whether punishment is undergoing such a dramatic change; he makes the valid point that supposed ruptures can be traced to earlier projects and 'to assert the coming of postmodernity in the penal realm is to rely upon spurious contrasts and pseudohistorical periodizations' (1995: 199). One of the reasons why the postmodern account has been accepted is that it rests upon a 'very simplified account of how things used to be' (1995: 199).
- 3 Ekirch (1987: 151-2) makes clear that 'neither population [slaves and convicts] enjoyed any claim to "virtue" ... Without virtue, men could never hope to achieve

full civil status within society.' This indicates how the perception of offenders had to be transformed before the prison could be accepted as an appropriate institution of punishment.

- 4 Mathieson talks about a symbolic function of imprisonment which stigmatizes those who are imprisoned as black and 'against this background the rest of us, on the outside, may define ourselves as all the whiter' (1990: 138). I would differ slightly in that this assumes that those on the outside are already formed as a coherent group whereas I would argue punishment helps to constitute a consensual people.
- 5 Hanway (1781) calculated this loss in monetary terms and estimated that the gain to the community would be £200 p.a. if offenders were not transported or hanged.
- 6 Buxton argued that it was the 'chief boast and glory of Great Britain, that equal justice is administered to all' yet he lamented that this could never be the case while imprisonment varied according 'to the geographical situation of the place where it is committed' (1818: 7).
- 7 Revisionist historians of punishment might admit that custodial institutions did not embody individualized principles of punishment but it was the plethora of non-custodial penalties that extended the field of discipline. The assumption is that these measures exercised 'normalized' discipline but is this the case? Certainly the growth of probation and pre-sentence reports might be said to embody Foucauldian tendencies but there are countervailing tendencies (Bottoms, 1983).

I might be accused of looking at punishment in a stereotypical fashion, equating it with imprisonment when the great majority of cases are disposed of by non-custodial means. However, it is now being recognized that punitiveness spreads across the breadth of penalties including those at the 'shallow' end. Also, if we are interpreting punishment as a cultural practice, it cannot be denied that it is the prison which dominates the public's thinking.

- 8 *The report of the committee on children and young persons*, Cmnd. 1191, noted that there were 'bitter complaints that a child has been sent away from home because he has committed some particular offence which in itself was not so serious' (para. 66).
- 9 Simon comments that 'crises in penalty do not arise primarily from the internal problems of punishing offenders but from transformations in social and political structures' (1993: 5).
- 10 Simon (1993) notes the similarities between current perceptions of a so-called 'dangerous class' and at the end of the last century.
- 11 Lea (1997) offers a more instrumental analysis than mine but the effects are similar.
- 12 The issue of gender and citizenship has come under much scrutiny in recent years. One of the challenges to traditional notions of citizenship is the charge that they do not register the concerns of women: is punishment now being used more intensively against some women as they attempt to break away from constricted roles?

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