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RECONCEPTUALIZING PENALITY

Towards a Multidimensional Measure of Punitiveness

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Despite the proliferation of work on the 'punitive turn', issues concerning its definition and measurement remain largely under-examined in the mainstream literature. This article seeks to refocus attention on the best ways in which to measure punitiveness and to argue that a more accurate characterization of what we mean by the concept forms an important part of advancing our understanding in this area. To illustrate this point, punitiveness in three countries is measured according to a unidimensional measure, a broader test proposed by Tonry and a fully multidimensional test. It is contended that the very different results produced by these tests suggest the need for greater social-scientific attention to the measurement of the punitiveness concept itself.

Keywords: state punitiveness, punishment, measurement

Introduction

For a number of decades now, criminologists have been in conversation about the future of punishment. The search for general explanations for the rise in punitiveness (or what Young (2003: 99) has termed criminology's 'new problematic') began in earnest in the early 1990s. 'In a strikingly provocative and influential statement' (Sparks 2000: 131), American criminologists Feeley and Simon (1992; 1994) argued that a 'new penology' is in ascendance which does not concern itself with the punishment, deterrence or rehabilitation of individuals but rather with the identification and management of unruly groups. Accounts which followed focused on different aspects of the so-called 'punitive turn' and the factors propelling it. To name but a few: Bottoms (1995: 40) put forward the concept of 'populist punitiveness' as 'the notion of politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance'; Pratt (1996; 2002) invoked Elias as a theoretical framework on which to advance claims about the 'decivilizing' of punishment; while Garland (2001), together with Simon (2007), detected a crisis at the level of the state. Certainly, the publication of Garland's influential *Culture of Control* (2001) acted as a major stimulus for discussion to the degree that the 'punitive turn', its extent and significance, now represents one of the major debates within the sociology of punishment today (Lacey 2008; Loader 2010; Downes 2011; Nelken 2011; Snacken and Dumortier 2012).

Despite the quantity of ink spilled on the 'punitive obsession' (Coleman and Sim 2005), issues concerning its definition and measurement remain largely under-examined in the mainstream literature to date (Matthews 2005). Indeed, analytic attention to the core components of the concept (Gordon 1989; Whitman 2003; Tonry 2007;

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Kutateladze 2009) appears in inverse proportion to its preponderance in the criminological literature (Feeley and Simon 1992; 1994; Bottoms 1995; Garland 2001; Wacquant 2002; 2005; 2009; Frost 2005; 2008; Pratt *et al.* 2005; Pratt 2007; Simon 2007; Lacey 2008). In light of the dearth of analytical work on this issue, this article seeks to refocus attention on the best ways in which to measure punitiveness. In the first part, a survey of the relevant literature is undertaken with a particular emphasis on those (relatively sporadic) attempts to empirically investigate the multidimensional nature of the concept. The principal argument advanced is that a multidimensional test (MDT), incorporating a large number of variables across several sectors of the criminal justice system, is superior to tests with fewer variables which focus on a few selected points along the system. To illustrate the point, in the second part of the article punitiveness is assessed in three jurisdictions (Ireland, Scotland and New Zealand) over a 30-year period from 1976 to 2006 according to a unidimensional measure (imprisonment rates), a broader test proposed by Tonry (2007) and a fully multidimensional test. It is contended that the fact that the three countries examined change rankings depending on the test employed suggests the need for greater social-scientific attention to the measurement of the punitiveness concept itself. The article closes with a discussion of the importance of accurate measurement of the phenomenon and the potential application of the MDT to a larger sample group.

Deconstructing Punitiveness

There is an important lack of conceptual clarity in the literature around punitiveness and this has led to widely inconsistent operationalization. For this reason, it is worth spending some time on the meaning of the concept itself before proceeding to discuss how it is most commonly measured. The term has been used to refer both to individual/public attitudes towards punishment (see, e.g. Kury 2008; Kury and Ferdinand 2008) and state punitiveness and it should be noted first of all that it is exclusively state or systemic punitiveness which forms the subject of this article. A second issue is the scope of the inquiry, which may legitimately be extended beyond the realm of the criminal justice system and in some cases arguably *should* be in order to gain a rich understanding of the harshness of states or communities at given points in their history (see, e.g. O'Sullivan and O'Donnell (2007) on 'coercive confinement' in the Republic of Ireland). While convincing arguments may be made for a broader approach, the inexhaustibility of the subject of social control necessitates some selectivity. In the instant case, the compromise struck was a focus on the 'objects' of the criminal justice system only.

The third, and main, difficulty, however, relates to conceptualizing a phenomenon as multifaceted and complex as punitiveness as it operates in the 'real' world. Although this is an issue which has long preoccupied social scientists, namely the extent to which research can uncover 'the truth' (see, e.g. Cain and Finch 1981), the problem is more acute when it comes to a concept as protean as punitiveness. It is important that data are not treated as objective phenomena which unproblematically reflect the 'real' world but rather as remote proxies for the 'true' punitiveness of the criminal justice system. The point is put well by Pease (1994) in relation to punitiveness at the point of sentencing. If, he argues, punitiveness refers at base to the calibration of the diminished

quality of life of the offender against the seriousness of the offence/offender, then both of these variables do not readily lend themselves to direct measurement. In line with this argument, it should be noted that the data considered below can only lay claim to indirect measurement of the phenomenon.

Given the wide range of ways in which a state can punish, a survey of the punitiveness literature reveals a surprising homogeneity in terms of its measurement. The majority of scholars appear content to focus on imprisonment rates (as the average number of prisoners per 100,000 population), even when advancing highly innovative (but also contentious) arguments relating to the connections between punishment and modes of governance or political economy. Garland (2001), for example, refers to an array of policy developments as constitutive of his 'culture of control' but otherwise only relies on two graphs showing the rise in English/Welsh and American imprisonment rates. Similarly, in drawing attention to the role of neo-liberal policies in explaining differences in state punitiveness, both Cavadino and Dignan (2006) and Lacey (2008) rely solely on imprisonment rates as a basis on which to advance their thesis. Clearly, these authors are aware of the limitations of these measures in acting as rough proxies for punitiveness, yet important questions remain as to whether these rates may be relied upon as satisfactory signifiers of states' penal sensibilities (McAra 2011; Nelken 2011). They may be more appropriately considered convenient 'ready-reckoners' (Kilcommins *et al.* 2004: 250) which, presented in their raw form, do not take account of a jurisdiction's crime problem (or, as Lynch (1988) colourfully puts it, the 'provocation' to which the state was exposed). Aside from imprisonment rates, a number of commonly used indices of punitiveness can be identified from the literature such as the use of the death penalty (Kury and Ferdinand 1999; Lynch 2005; Pratt *et al.* 2005: xii–xiv); enactment of mandatory sentences (Garland 2001; Pratt *et al.* 2005: xii–xiv); 'shaming' sanctions (Garland 2001; Pratt 2002; Pratt *et al.* 2005: xii–xiv); and sex offender notification schemes (Garland 2001; Pratt *et al.* 2005: xii–xiv; Brown 2008). The use of these singular or few-item measures is problematic not only in relation to the partial representation of the punitiveness concept, but also in terms of the bias which may be introduced in the selection process (Kutateladze 2009). Taking up this point, Matthews (2005) submits that the vagueness which surrounds the punitiveness concept often allows commentators writing in the area to categorize a wide range of developments under the broad rubric of the 'punitive turn'. In an effort to pin down its essentials, he notes that punitiveness was traditionally linked with retributivist policies but has now come to be accepted as carrying 'connotations of excess … either by extending the duration or the severity of punishment above the norm' (Matthews 2005: 179).

A Broader Lens?

Matthews's efforts aside, it is striking that the issue of the measurement of punitiveness has received such scant attention, precisely at the time when the 'punitive turn' was enjoying its moment in the criminological sun. A promising start in adding depth to this otherwise 'thin' concept (Matthews 2005: 178) was made several decades ago by American criminologist, Diana Gordon, through her endeavours to construct a 'topographical' analysis of variations in the criminal justice landscape. The distinctiveness of Gordon's (1989) contribution derives from her efforts to improve the accuracy

and adequacy of empirical characterizations of what she termed the 'get-tough' policy approach in the United States and, in doing so, to demonstrate that few states are uniformly punitive but instead elect to pursue different *penal strategies*. In her study, Gordon developed 32 indicators of criminal justice policy in United States states ranging from the number of police per 100,000 population to changes in exclusionary evidential rules to changes in parole practices. Using factor analysis, she found that there were two different dimensions of 'toughness' which she termed 'custody' and 'symbolic' factors. States following the 'custody' trajectory of punitiveness gradually increased their social control over as many offenders as possible by restricting parole, enacting mandatory sentences and extending preventative detention. Symbolic punishment states, on the other hand, were more likely to allow the death penalty and to have eroded the exclusionary rule in criminal proceedings, favouring 'more dramatic forms of control imposed on fewer people' (Gordon 1989: 197).

It is unfortunate that further detailed empirical investigation into the differentiated nature of state punitiveness had to await the seminal research carried out by Kutateladze (2009), the implications of which are discussed more fully below. Some developments in the intervening period are, however, worthy of note, primarily for their attention to the measurement of punitiveness across the criminal justice system *as a whole*. Pease's (1994) examination of punitiveness, for example, included not only various measures on the use of imprisonment, but also data on the number of suspects, prosecutions and convictions across a number of jurisdictions. While the main focus of his work was on prisons, and the need to relate imprisonment to crime, the broader range of measures included in this study represent important early efforts to better articulate and assess state punitiveness (see also Lynch 1988; 1995). Some years later, Australian criminologist, Lyn Hinds (2005), also drew attention to the possibility of increased punitiveness in law enforcement or what she terms the 'front end' of the criminal justice system. In a comparison of punitiveness in the United States, Australia and Europe, Hinds broadened the scope of her inquiry to include 'police rates' (the number of police employees per 1,000 population) and police expenditure as well as the conventional measure of imprisonment rates. Her findings suggest the existence of a 'crime control continuum', with Europe and Australia choosing to focus on social control at the 'front end' of the criminal justice system and states in the United States (particularly the South) exhibiting a preference for custodial control or the 'back end' of the criminal justice system. Hinds's (2005) work, like Gordon's, points to the importance of taking a holistic view of a state's crime control policy together with the need to recognize that states exhibit different 'national signatures' in the way they deal with the problem of crime.

Another important advance in this area has been made by Tonry in his recent comparative text on punishment. Recognizing the need for informed comparative analysis to move beyond the narrow measure of imprisonment rates, Tonry (2007) takes the unusual step of outlining a core set of measures that researchers of punitiveness should at a minimum incorporate. His definition is noteworthy as he adopts a broader system-wide approach which takes account of policy changes at the investigative and trial stages of the criminal process (see Table 1 for indices). In his view, *procedures* are directly relevant to charges of punitiveness as both the United Kingdom and the United States have witnessed systematically reduced procedural protections for defendants along with increases in imprisonment rates. These include weakened controls over police powers, weakened jury trial rights and the narrowing of exclusionary evidential rules.

Table 1 *Tonry's Indices of Punitiveness*

Measures of Punitiveness
Policies:
1. Capital punishment (authorization)
2. Mandatory minimum sentence laws (enactment)
3. Laws increasing sentence lengths (enactment)
4. Pretrial/preventative detention (authorization)
5. Prison alternatives (creation)
6. Juvenile waiver to adult courts (authorization)
7. Weakened procedural protections (enactment)
Practices:
1. Patterns of use of policies 1–7
2. Adult prison population and admission rates over time
(a) Disaggregated for pretrial and sentenced prisoners
(b) Disaggregated by offence for sentence lengths and admission rates
3. Juvenile institutional population and admission rates over time
(a) Disaggregated for pretrial and sentenced prisoners
(b) Disaggregated by offence for sentence lengths and admission rates
4. Procedures: Patterns of use of procedural protections

While the above analyses represent clear improvements in the measurement of changes in punitiveness over time, they continue to focus on a number of select areas within the criminal justice system such as policing, imprisonment and juvenile justice. In an important critique of researcher selectivity in the measurement of punitiveness, Kutateladze (2009) has argued for a reconceptualization of the concept which reflects its multidimensional character and which incorporates a broader range of indices of criminal justice activity. The instrument of penal harshness which he developed to measure American punitiveness includes 44 variables categorized under the following headings: (1) Political and Symbolic Punishment (e.g. death penalty, 'three strikes' laws); (2) Incarceration; (3) Punishing 'Immorality' (e.g. prostitution, gambling); (4) Conditions of Confinement; and (5) Juvenile Justice. Applying these criteria to all of the American states and comparing the results with those obtained using a more limited number of criteria, he found that nearly all states changed their places on the punitiveness ladder with a significant number of states moving from a non-punitive category into a highly punitive one and vice versa.

Kutateladze draws heavily on the work of Whitman (2003), a legal historian who conducted an examination of the relative harshness of North American and continental European systems. Whitman relies on a multiplicity of measures in his work, including those which gauge harshness in criminalization and law enforcement as well as harshness in punishment. The common thread running through the work of both Kutateladze and Whitman is that they recognize that sentencing occurs at the end of a lengthier process and is only one aspect of criminal justice policy. By the time at which the offender reaches the sentencing stage, s/he may have been detained by the police, interrogated, detained on remand, tried and/or arraigned. While, technically, the purpose of the earlier stages is not to punish but to determine guilt or innocence, the reality for the offender is much different. As first recognized by Feeley in his (1979) book *The Process Is the Punishment*, the distinction between the pre-trial and sentencing stages is largely illusory for the offender.

Methods and Data

In line with Gordon's arguments and the work of Kutateladze, Hinds and Whitman, a data set was constructed which incorporates several different policy dimensions of the criminal justice system. A crucial way in which punitiveness has been reconceptualized for the purposes of the study relates to the holistic, multifaceted approach taken to the concept. Such an approach is preferred in light of not only the literature above demonstrating the various ways in which a state can be punitive, but also the need to bring the lens to bear more closely on the experience of the offender (Feeley 1979; Lynch 1995). In endeavouring to 'understand state practices from the moment of identifying a suspect to the point of this person's death' (Kutateladze 2009: 13), this conceptualization of punitiveness takes account not only of punitiveness at the point of sentencing, but also system practices impacting on the offender before and after. Thus, the test also incorporates 'front-end' punitiveness through its sensitivity to, for example, increases in police powers and erosion of procedural protections as well as 'the increasingly complex penal infrastructure beyond the prison' (McAra 2011: 100).

Clearly, a more expansive understanding of punitiveness incorporating experiences across the criminal justice system as a whole requires a reconceptualization of punitiveness beyond the notion of excessive or disproportionate punishment *at the point of sentencing*. Advancing an argument not dissimilar to the instant one about the 'continuum of punitiveness', Matthews (2005: 181) posits the notion of 'toleration' as one better suited to address 'the complex and growing array of penal sanctions'. Interestingly, the idea of 'tolerance/intolerance' of deviance was also recently employed by Lappi-Seppällä (2013) in his empirical inquiry into punitiveness in Europe and overseas, following a characterization of the phenomenon developed by Tonry (2007: 7). It is expressed as follows: '... a mix of attitudes, enactments, motivations, policies, practices and ways of thinking that taken together express *intolerance of deviance and deviants* and greater support for harsher policies and severe punishments' (emphasis added). This conceptualization is arguably somewhat ambiguous and possibly circular but it is also useful in the sense that (when applied to *state* punitiveness) it locates punitiveness as something broader than sentencing policy. 'Intolerance' in this sense denotes a tougher approach that is, for example, rarely associated with de-escalating, front-end crime control policies such as the use of diversion or restorative justice, due process values or system-wide respect for human rights (Tonry 2001; Hinds 2005; Daems *et al.* 2013: 6). Given its consonance with a broader definition of punitiveness, and in the absence of any agreed criminological formulation, it is adopted as a working definition of the term.

In line with the above, the research presented here looks beyond imprisonment rates to other manifestations of 'tolerance/intolerance' at critical points throughout the criminal justice system. The selection of indices (clusters of variables) was strongly influenced by the literature in the area (including the authors cited above) but it was also strongly determined by practical considerations relating to the type of criminal justice data available. For example, the manner in which criminal justice data are collected and recorded in the three jurisdictions meant that data relating to arrest rates, conviction rates and important decisions at the prosecution stage could not be analysed. The indices and variables selected for analysis are outlined in Table 2.

Following Hinds (2005), variables in Index A (Policing) include police numbers, expenditure and complaints as well as (1) 'zero-tolerance' policing (2) political

Table 2 *Indices and variables of punitiveness included in the MDT*

Indices of punitiveness	Variables
A Policing (n = 6)	Zero-tolerance policing, police expenditure, numerical strength of police service, police powers, number of police complaints, strength of the private security sector
B Procedural Protections for Defendants (n = 5)	Right to silence, rule against double jeopardy, evidential exclusionary rules, use of civil law to control criminal behaviour, law relating to bail
C Use of Imprisonment (n = 6)	Presumptive or mandatory sentences; use of alternatives to custody; imprisonment rates and convicted prisoner rates; prison admission rates and convicted prisoner admission rates; imprisonment rates using different types of crime as a base; length of prison sentences
D Juvenile Justice (n = 4)	Age of criminal responsibility, compliance with human rights instruments, sanctions and alternatives to detention, detention rates
E Prison Conditions (n = 6)	Respect for human rights, deaths in prison, size of institutions, overcrowding, rehabilitative programmes, medical services and food
F Post-release Control (n = 5)	Sex/drug offender notification schemes, shaming schemes, post-release supervision, reintegration and expungement of criminal records
G Death Penalty (n = 2)	Date of abolition, date of last execution

rhetoric that emphasizes law and order themes of more police and wider police powers and (3) technologies such as private security companies that increasingly exclude targeted groups from public spaces. Index B (Procedural Protections) incorporates five variables relating to areas commonly associated with a shift towards crime control values and the 'rebalancing' of the criminal justice system in favour of the victim (Tonry 2004; Kennedy 2004; Hamilton 2007). Index C goes beyond the measurement of imprisonment per 100,000 of a country's population to examine remand and convicted prisoner rates (in terms of both the 'stock' (population) and 'flow' (entries) of offenders into the prisons) (Lynch 1995); imprisonment in relation to violent and property crime (Lynch 1988; Pease 1994); penal intensity or sentence length (Kutateladze 2007; 2009; Frost 2008) as well as the use of presumptive/mandatory sentences and alternatives to custody (Tonry 2001; 2007). Index D adopts Muncie's (2008) indicators of punitiveness in the area of youth justice, namely (1) the degree of compliance with international rights conventions and (2) comparative rates of juvenile custody. Index E examines variables relating to physical conditions in prisons (Neapolitan 2001), respect for human rights (van Zyl Smit and Snacken 2009) and the relative strength of rehabilitative ideals (Garland 2001). Index F examines post-release controls as evidenced by new forms of penal power such as sex offender registration, supervisory and notification schemes (Garland 2001; Brown 2008). Index G examines the death penalty in law and practice.

Each of the 34 variables identified in the table generated a score of 10, 20 or 30. These scores have the following interpretation: 10—low or less than moderate punitiveness; 20—moderate punitiveness; 30—more than moderate or high punitiveness. A score was awarded based on the punitiveness of the states at the end of 2006 but, in determining the score, consideration was also given to how policies and practices had evolved over the 30-year time period of the study. 1976 is therefore used as a basis for comparison in relation to all of the variables where possible (namely where data for that year were available and 1976 did not appear to be outlier year). This was considered important given that the research was investigating the existence of a *new* punitiveness.

In addition to detailed analysis of statistical data relating to crime, imprisonment and police rates/expenditure, the scores are based on interviews with key criminal justice stakeholders in each jurisdiction, including civil servants, academics, lawyers, politicians, crime editors and at least one current or former Minister for Justice. Further information on scoring, measurement levels and interview coding is contained in the Appendix.

The scores for all of the variables in each index were totalled and divided by the sum of the variables in that index to get overall punitiveness scores (OPSs) (Kutateladze 2009). OPSs are therefore the mean scores for each category A–G running to a maximum of 30. Finally, a mean OPS score for all the indices (the sum of the OPSs for each index divided by seven) was calculated for each of the countries. Given that the scores are all measured on the same scale, it was considered appropriate to adopt a traditional aggregation technique *viz.* the arithmetic mean as the simplest and easiest method of distilling the data into interpretable form. One of the drawbacks of this approach, however, is that it implies compensability between the variables/indices—something which arguably begs difficult theoretical questions relating to the nature of the underlying relationships between the variables. While space does not allow further discussion of this important issue (see further, Hamilton 2014), suffice it to note at this juncture that other options for aggregation are possible in accordance with positions on compensability (such as weighted averaging and different statistical techniques; see further OECD 2008: 31–4). Further, as discussed in the final section below, it is possible to adopt different resolution levels of the data (by index, score level, etc.) for the purpose of greater analytic rigour.

The results for all three jurisdictions can be seen in Table 3. While, again unfortunately, space does not permit detailed explanation of the reason for each individual variable score (see further Hamilton 2014), a general explanation for the scores attributed to the variables in the three jurisdictions is given in the next section, broken down by country.

Given the tendency in much of the literature to view punitiveness as a 'one size fits all' phenomenon extending from the United States into Europe and beyond, it was decided to test the limits of the 'new punitiveness' thesis through an examination of policy formation in three small jurisdictions with very different criminal justice profiles, namely Ireland, Scotland and New Zealand. Diversity in this regard was considered desirable given the pressing need for comparative studies which endeavour to explain difference (Cavadino and Dignan 2006; Tonry 2007). Ireland was selected given the author's familiarity with its criminal justice system, its apparent resistance to the 'culture of control' (Kilcommins *et al.* 2004) and its low rate of imprisonment in international terms. Overall, there has not been a 'sustained commitment' to the politics of crime control in Ireland and rehabilitation and individuated justice remain core aims of the sentencing system (Kilcommins *et al.* 2004). An interesting contrast is provided by New Zealand as a similarly sized jurisdiction which has become distinctly more punitive in recent years (Pratt and Clark 2005; Pratt 2007). The significant upward spiral of its prison population to reach 179 per 100,000 population in 2004 as well as the sustained commitment of its political parties to tough rhetoric on crime rest comfortably with this characterization. Scotland, on the other hand, is often presented as having escaped the worst effects of any putative increase in harshness but, like New Zealand, its high imprisonment rate sits uneasily with a highly progressive system of juvenile justice (McAra 2008).

TABLE 3 *Summary of punitiveness in Ireland, Scotland and New Zealand 2006 as measured by MDT*

#	Source	Variable	Ireland	Scotland	New Zealand
INDEX A					
1	Literature	Zero-tolerance policing	10	10	20
2	Literature/interviews/ legislation	Law and order rhetoric which emphasizes more police, more police powers	30	20	20
3	Literature/interviews	Private security leading to the exclusion of marginalized groups	10	10	30
4	Statistical Abstract; Garda Síochána Annual Reports/ Scottish Executive/ New Zealand Statistics	Strength of police	10	10	10
5	Dept of Finance/ Scottish Executive/New Zealand Police Annual Reports/interviews	Expenditure on police	20	20	20
6	Reports of Garda Siochana Complaints Board/Garda Ombudsman/ HM Inspector of the Constabulary/ New Zealand Police Complaints Authority Annual Reports	Complaints about police	10	20	20
		OPS	15	15	20
INDEX B					
7	Literature/interviews/ legislation	Right to silence	10	20	10
8	Literature/interviews/ legislation	Double jeopardy rule	10	10	10
9	Literature/interviews/ legislation	Evidential exclusionary rules	10	10	10
10	Literature/interviews/ legislation	Use of civil law to control criminal behaviour	20	20	10
11	Literature/interviews/ legislation	Right to bail	20	20	30
		OPS	14	16	14
INDEX C					
12	Literature/interviews/ legislation	Use of mandatory/ presumptive sentences	20	10	10
13	Literature/interviews/ legislation	Use of alternatives to custody	10	10	10
14	Annual Reports on Prisons/Statistical Bulletins: Scottish Executive/Ministry of Justice	Imprisonment rates and convicted prisoner rates	30	20	20
15	Annual Reports on Prisons/Statistical Bulletins: Scottish Executive/New Zealand Official Sourcebook; New Zealand Department of Corrections database	Prison admission rates and convicted prisoners admission rates	20	10	20

(*Continued*)

TABLE 3 *Continued*

#	Source	Variable	Ireland	Scotland	New Zealand
16	Annual Reports on Prisons/Statistical Bulletins: Scottish Executive/New Zealand Department of Corrections database	Length of sentences imposed	30	20	30
17	Annual Reports on Prisons/Garda Síochána Annual Reports/ Statistical Bulletins: Scottish Executive/ Ministry of Justice; New Zealand Police database	Imprisonment rates using violent and property crime as a base	20	20	20
		OPS	21.7	15	18.3
INDEX D					
18	Literature/legislation	Age of criminal responsibility	10	10	10
19	Literature	Compliance with human rights instruments	20	20	20
20	Literature/legislation	Alternatives to prosecution and detention	10	10	10
21	Annual Reports on Prisons/Statistical Bulletins: Scottish Executive/New Zealand Department of Corrections database	Detention rates	10	10	10
		OPS	12.5	12.5	12.5
INDEX E					
22	Literature	Respect for human rights	30	10	20
23	Literature	Size of institutions	10	20	10
24	Literature	Overcrowding	20	30	30
25	Literature	Medical services and food	20	20	20
26	Irish Prison service reports/Dáil Debates/ Scottish Prison Service/ New Zealand Department of Corrections Annual Reports	Prison deaths	30	20	20
27	Literature/interviews	Rehabilitation	20	10	20
		OPS	21.7	18.3	20
INDEX F					
28	Literature/legislation	Sex/drug offender notification schemes	10	30	10
29	Literature/interviews	Shaming schemes	10	10	20
30	Literature/interviews/ legislation	Post-release supervision	20	30	30
31	Literature	Reintegration	20	10	20
32	Literature/legislation	Expungement of criminal records	20	10	30
		OPS	16	18	22
INDEX G					
33	Literature/legislation	Date of abolition	10	10	10
34	Literature	Date of last execution	10	10	10
		OPS	10	10	10
		FINAL OPS	15.8	15	16.7

Given the divergence *within* as well as *between* these jurisdictions, important questions may be posed as to the distinct form that the 'new punitiveness' has assumed in each and the factors behind such developments.

Developments in all three countries were examined for the period 1976–2006 in light of the fact that commentators appear to have identified the last three decades as the period during which policies and practices have become more punitive (e.g. Garland 2001: 1–2). 2006 was chosen as the endpoint of the study given the difficulties anticipated in obtaining more recent data.

Results and Discussion

Ireland

In Ireland over the 30-year period, police powers have been significantly expanded, defendants' rights eroded and the country has become significantly more punitive in many of the ways in which imprisonment can be used. In response to various crime crises over the last number of decades, legislators have tended to focus on measures which enhance police powers and numbers, and there has been some erosion of procedural protections for defendants based on the idea that the balance of the criminal justice system had swung too far in favour of the accused (O'Mahony 1996; Hamilton 2007). In this connection, Walsh (2005) has counted 27 major criminal justice enactments since the passage of the Criminal Justice Act 1984 increasing the powers of the police and the prosecution. Policy makers have also briefly flirted with the concept of zero-tolerance policing in the period following two high-profile murders in 1996 but there has been little evidence of this in practice (Kilcommins *et al.* 2004). This period also provided the context for many significant reforms such as a constitutional amendment relating to the law on bail, civil forfeiture and the erosion of the rights to silence for those charged with serious drugs offences (Hamilton 2007).

Despite the significance of these changes, Ireland's punitiveness appears the most severe in relation to Indices C and E. Imprisonment rates have increased by 132 per cent and convicted prisoner rates by 300 per cent, albeit from a much lower base than the other two jurisdictions. These increases, considered together with increases in nominal sentence length (the number of offenders receiving sentences of two years' imprisonment or more 2006 figure is eight times the number for 1976) do appear to substantiate suggestions that the country is experiencing a 'punitive turn'. Repeated attempts have also been made by the legislature to curtail judicial discretion. By the end of the period, there were two major acts on the statute book making provision for presumptive and mandatory sentencing and this marks a significant departure for a country where proportionate sentencing has been elevated to near-constitutional status (O'Malley 2006). Turning to Index E, conditions in Irish prisons raise serious concerns about compliance with human rights standards (Hamilton and Kilkelly 2008). Increasing levels of prisoner-on-prisoner violence in recent years combined with degrading practices such as 'slopping out' and poor physical conditions in some older prisons mean that the experience of prison life may be very harsh. Indeed, it was highly significant that a contemporary report by the CPT (2007) categorized three Irish prisons as 'unsafe' for both prisoners and prison staff due to prisoner-on-prisoner intimidation and violence.

Measures across other indices present the Irish criminal justice system in a more positive light. Fundamental reforms relating to juvenile justice have seen the age of criminal responsibility increase to 12, provision made for a greater range of community sentences and (most) juveniles separated from adults within the penal system in line with international standards. All references to the death penalty have also been removed from the Constitution following a referendum in 2001. In concluding, what should not be forgotten is that an important aspect of Irish criminal justice is the failure to translate policy into practice (O'Donnell 2008). The punitiveness of the system on paper is thus 'offset' to some degree by the inherent conservatism of the system, the slow pace of change and by a certain failure of implementation. For example, there remains significant doubt about the extent to which sex offenders on the Garda 'register' are actively policed. Moreover, provisions limiting the right to silence were introduced in 1984 and 1996 but these have not been relied on by prosecutors during the study period. It is this same inertia, however, which has also meant that we are only now seeing matters such as youth justice reform and spent conviction laws being properly addressed.

Scotland

It is striking that Scottish interviewees were slow to characterize their country as 'punitive' despite it having one of the highest rates of imprisonment in Western Europe. This view is supported by the empirical data as Scotland achieved relatively low punitiveness scores on most of the indices. Both public and private policing practices cannot be characterized as overly punitive in Scotland. While the increase in police numbers and expenditure over the period appears to tally with Hinds's (2005) arguments concerning a concentration of control at the front end of the system, police *rates* have remained relatively stable (an increase of 34 per cent over the period) and police powers have been only incrementally enhanced. As Fyfe (2005) notes, there is a preference for a crime prevention rather than 'sovereign state' policing strategy in Scotland. This is probably mirrored in the private sector: exclusionary tactics aimed at certain groups and behaviours are less in evidence in Scotland than in larger jurisdictions such as the United States (Walker 1999). A relatively positive verdict may also be returned in relation to Index B. In contrast to England and Wales, reforms to the trial procedure have largely been resisted. For example, the English Criminal Justice Act 2003 which radically overhauled several of the well established rules of evidence such as double jeopardy was not adopted in Scotland.

Similarly, evidence of a *new* punitiveness is difficult to find in relation to imprisonment. Viewed in a historical perspective, namely against 1976 standards, several variables such as convicted prisoner rates (+39 per cent), convicted prisoner entry rates (+13 per cent) and prisoners per violent crimes (–30 per cent) show only a slight increase or even a decline in punitiveness. Scotland has also remained relatively immune to the trend towards mandatory sentencing. The introduction of mandatory provisions in 1997 was strongly resisted and—while those provisions that have been introduced over the period have no doubt contributed to the rise in sentence length—these are mainly directed at very specific crimes and offences (Tombs 2004). Finally, physical conditions in prisons have improved: slopping out has been practically eradicated, electric power has been provided in all cells, the numbers of suicides have decreased and there

remains a proliferation of programmes oriented around education and rehabilitation (Fairweather 2006). Overcrowding presents the main challenge to this more favourable environment (Fairweather 2006).

Despite the largely optimistic picture presented above, it would be misleading to suggest that change has not been visited on key institutional sites within the criminal justice system. Over the period, the data show that longer sentences were more frequently handed down (the number of adult offenders receiving sentences of two years' imprisonment or more 2006 figure is 3.4 times the number for 1976), and the use of imprisonment increased even as property crime rates fell in the last decade or so. Some years into devolution and in the aftermath of initiatives such as anti-social behaviour orders and youth courts for serious and persistent young offenders, there was speculation that Scotland's youth justice system was being 'detartanised' (McAra 2006; Piacentini and Walters 2006). The more punitive rhetoric has not given rise to an increase in detention rates, however, and the commitment to welfarism within the Children's Hearings System has largely been preserved (McAra 2008). Finally, English polices (such as notification requirements and extended sentences) which aim to control the dangerous 'other' *qua* sexual and violent offender have been adopted in Scotland, often on account of the border shared by the two countries. Since devolution, a new type of incapacitative order (Orders for Lifelong Restriction or OLRs) has continued the focus on risk and dangerousness. Policies in relation to less serious offenders reflect a more inclusionary approach, however: prison sentences of up to two and a half years are expunged after a certain period of time and local authorities in Scotland have a statutory responsibility to provide throughcare and aftercare services.

New Zealand

As noted above, New Zealand is widely understood to have followed the putative Anglophone drift towards punitiveness (Pratt and Clark 2005; Cavadino and Dignan 2006). Certainly, of the three, it is the jurisdiction in which punitive rhetoric on criminal justice issues is most readily discernible since the mid-1990s. Several indices employed in the analysis bear out its more punitive reputation such as variables relating to policing (Index A). There are suggestions in the literature that Maori and Pacific Islanders may find themselves the focus of selective and discriminatory law enforcement at the hands of the New Zealand police (Quince 2007; Human Rights Commission 2009) as well as increasingly exclusionary private security practices (Pratt 2008). This should be set against a background of stable police rates (an increase of only 32 per cent between 1976 and 2006), however, and relatively limited police powers (importantly, there is no provision for detention for questioning).

These minority groups have also borne the brunt of the significant increases in the prison population (Index C). Maoris comprised 17 per cent of sentenced receptions in 1976, 32 per cent in 1986, 45 per cent in 1996 and 53 per cent in 2006. While, as with Scotland, New Zealand's use of imprisonment over time casts it in a more favourable light than cross-national comparison, the significance of a doubling (from 91 in 1976 to 183 in 2006) of its imprisonment over rate over the period cannot be minimized. Further, clear signs of a 'new' punitiveness emerge when sentence lengths are examined: the number of offenders receiving long-term sentences of over two years in 2006

(1668) is over seven times the 1976 figure (224). On the other hand, continuities are also discernible. Considered in light of its (already high) use of imprisonment in 1976, increases in the order of 68 per cent over a 30-year period in its convicted prisoner rate are not suggestive of radical change. The same may be said of its prison admission rates which have increased only by 54 per cent over the period. Further, despite the strong endorsement given to minimum sentences by the citizenry in 1999, none have been introduced over the study period.

An increasing preoccupation with dangerousness is evident in New Zealand across a number of indices. Prisons, although small in size and relatively liberal in the past with home and work leave, have become more security-minded and risk-averse (Newbold and Eskridge 2005; Workman 2008). The country's post-release policies in particular epitomize Garland's (2001: 180–1) proposition that, in certain jurisdictions, 'there is no such thing as an ex-offender'. Under the Sentencing Act 2002, the incapacitative sentence of preventative detention (likened by Vess (2005) to American civil commitment statutes) is now available for a wider range of offences and offenders. Further, the Parole (Extended Supervision) Amendment Act 2004 introduced extended supervision orders allowing monitoring of medium and high-risk child sex offenders for up to ten years following release from prison. Expungement laws introduced in 2004 are highly restrictive, allowing only those offenders who did not receive a sentence of imprisonment to benefit from the provisions. Informal practices such as shopkeepers placing pictures of ex-offenders in their windows also have a highly stigmatizing effect (Pratt 2008).

On the other side of the balance sheet, however, procedural protections such as the right to silence have remained relatively immune from populist attack (Index B). Its internationally renowned youth justice system (Index D) reflects many of the principles incorporated in the UNCRC and other international conventions and retains powerful protectors among the judiciary (Lynch 2008). A high rate of diversion of young offenders (70–80 per cent, Chong (2007)) and downward trend in terms of the number of juveniles committed to prison has also been maintained over the period (Maxwell *et al.* 2004).

Discussion: Is More Better?

It is notable that, out of a maximum possible overall score of 30, all the countries obtained mean OPS scores below the moderate punitiveness level of 20. The results also clustered within a relatively narrow range: Scotland received the most favourable mean OPS at 15 points, Ireland scored 15.8 points and New Zealand 16.7 points. While the suggestion that Scotland may have resisted more punitive trends is far from new (McAra 1999; 2008), the homogeneity implied by the results is surprising given the suggestion in the research to date of a mild penal climate in Ireland (Kilcommins *et al.* 2004) and an increasingly populist tone in New Zealand (Pratt and Clark 2005; Pratt 2007). The key to understanding this is what Kutateladze (2009) refers to as the 'multi-level' and 'contradictory' nature of punitiveness or, more prosaically, the fact that all three countries possess both exacerbating and ameliorating features. These aggravating and mitigating features tend to cancel each other out as the level of aggregation increases. For example, New Zealand experienced significant increases in its prison population (Index C) and has introduced stringent measures to control serious offenders (Index

F), although, within the study period, this is 'offset' by its progressive system of youth justice and strong procedural protections (Indices B and D). Indeed, on Index B, New Zealand obtained the lowest scores of the three jurisdictions. This cancelling-out effect is also observable in Ireland, which attained its highest punitiveness scores in relation to two indices (C and E) and relatively low scores on the remainder. Scotland is more consistent in its scores across the six indices, although, even in this jurisdiction, scores for Indices E and F were higher than those for the other indices.

It is arguable that this finding *alone* highlights the importance of including a maximum number of variables in an instrument of state punitiveness and thus the superiority of the MDT. At least two of the states involved in the study may be regarded as relatively punitive on some indices of punitiveness and relatively lenient on certain others. However, the point may be further illustrated by comparing the results from the MDT with unidimensional tests and also multidimensional tests with a more restricted number of variables. It is to these comparisons that we now turn.

As measured by the standard singular criterion of imprisonment rates, it is quite clear that (as measured in 2006) New Zealand would be regarded as the most punitive state (183 per 100,000), followed by Scotland (140 per 100,000), with Ireland (75 per 100,000) lagging some considerable distance behind. The MDT results serve to complicate this picture quite considerably. First, all three jurisdictions obtained quite similar scores which raises questions about the degree to which they significantly differ. Second, the ranking of Scotland as the least punitive state (and Ireland's advance to second place) raises important methodological questions about the extent to which imprisonment rates accurately reflect penal sensibilities in a given jurisdiction.

Similar deficiencies are revealed even when punitiveness is measured by Tonry's (2007) multi-item test referred to above. Using data from the MDT test provided in Table 3, OPSs for the three jurisdictions can be obtained by totalling the scores obtained on the equivalent variable number in the MDT and dividing by the sum of the variables in Tonry's test (n = 15). Counting variables more than once was avoided to prevent distortion of the score (Gordon 1989). Also, for certain variables, no data were available in the three jurisdictions and one variable (juvenile waiver to adult court) was difficult to apply outside North American jurisdictions such as the United States and Canada. The results of the exercise are shown in Table 4. Despite this test being significantly more refined than many of the current offerings, the results arguably underestimate New Zealand's punitiveness through the omission of certain important categories for the measurement of the concept. On Tonry's test, Scotland retains its place as the least punitive state (score of 14) while New Zealand (14.7) is replaced by Ireland as the most punitive jurisdiction (16). Given that Tonry's test appears to map quite neatly onto Indices B (Procedural Protections), C (Imprisonment), D (Juvenile Justice) and G (Death Penalty), it is likely that differences in the overall scores obtained in the two tests can be attributed to the broader ambit of the MDT. The MDT test includes scores for Indices A (Policing), E (Prison Conditions) and F (Post-Release Controls), all incidentally indices on which New Zealand scored 20 or more (the score for moderate punitiveness). Contrariwise, Ireland's punitiveness is most likely overestimated in Tonry's test, as it does not measure variables relating to Indices A and F—indices on which it obtained two of its lowest scores. Given the co-existence of policies which can be described as both punitive and lenient in the same jurisdiction and high levels of cross-sectoral variation, it would appear that the MDT is better at capturing this complexity.

TABLE 4 *Punitiveness in Ireland, Scotland and New Zealand 2006 as measured by Tonry's (2007) indices (n = 15)*

Tonry's measures of punitiveness	Equivalent variable number of MDT	Score Ireland	Score Scotland	Score NZ
Policies				
Capital punishment	33, 34	10, 10	10, 10	10, 10
Mandatory minimum sentence laws	12	20	10	10
Laws increasing sentence length	16	30	20	30
Pre-trial/preventative detention	11	20	20	30
Prison alternatives	13, 20	10, 10	10, 10	10, 10
Juvenile waiver to adult courts	No equivalent	–	–	–
Weakened procedural protections	7–10	10, 10, 10, 20	20, 10, 10, 20	10, 10, 10, 10
Practices				
Patterns of use of policies 1–7	Captured by above-listed variables	–	–	–
Adult prison population and admission rates over time	14, 15	30, 20	20, 10	20, 20
Disaggregated for pre-trial and sentenced prisoners	14	As above	As above	As above
Disaggregated by offence for sentence lengths and admission rates	Information not available for individual offences. Data available for violent and property crime in variable 17	20	20	20
Juvenile institutional population and admission rates over time	21 (population rates only)	10	10	10
Disaggregated for pre-trial and sentenced juvenile offenders	Information not available	–	–	–
Disaggregated by offence for sentence lengths and admission rates	Information not available	–	–	–
Procedures Patterns of use of procedural protections	Captured by 7–10	Already included	Already included	Already included
	OPS (14 variables)	16	14	14.7

Conclusions: Reconceptualizing Penality

Given the importance of this issue for our ultimate assessment of the state of contemporary penality, the dearth of attention in the literature to matters of definition and the formulation of clear-cut social-scientific criteria to measure punitiveness is to be regretted. Many authors who are critical of the 'new punitiveness' (O'Malley 1999; Zedner 2002; Matthews 2005) are at pains to emphasize the variability and complexity of punishment and thus the partiality of focus assumed by those advancing 'catastrophic criminologies' (O'Malley 1999). Yet, with the notable exception of Tonry (2007), Whitman (2003) and Kutateladze (2009), few have actually taken steps to formulate a measure which would adequately capture some of the competing discourses and practices that

they seek to highlight. This is problematic, as it leaves these researchers equally open to charges of selectivity in the variables which *they* claim best represent penal sensibilities.

To be fair, given the limited number of countries included in the instant study, a full assessment of the validity of the MDT must await the completion of a study incorporating a larger number of jurisdictions. The point remains, however, that further empirical work into the 'punitive turn' must devote greater attention to the wide variety of ways in which state punitiveness can be expressed. The issue holds great importance for comparative criminology in particular for, as Kutateladze (2009) observes, it prevents a comparison (on unidimensional measures) of the most punitive aspects of one system with the least punitive aspects of another system. As he suggests, it would be interesting to compare the most punitive region in the United States (probably California or the American South) with those in Europe (probably one of the Eastern states) using a multidimensional measure. Perhaps the harsh prison conditions and weak procedural protections afforded inmates in the latter jurisdiction would cast the penal austerity of the southern United States states in a somewhat different light?

It is also important to acknowledge the disadvantages associated with the multidimensional scale as applied above. First, as seen in its application to Ireland, Scotland and New Zealand, an unexpected consequence of expanding the number of variables is that there is a 'cancelling-out' effect as the level of aggregation increases. Researchers must remain alive to this issue both in determining the optimal number of variables and also in interpreting their results. Disaggregating the scores by index may go a long way towards identifying these effects and may also reveal some interesting nuances in the data (as in the New Zealand case; see further Hamilton (2014)). Second, questions may be raised about the objectivity of selecting the criteria in an exercise such as this. This is a valid criticism and it is important for researchers to be as transparent as possible in providing the theoretical justification for the inclusion of each variable and the methods by which data were obtained. Clearly, accounts of penal change can never illuminate 'the whole stage' (Daems 2008: 249) and variables will always be found which militate for and against the punitiveness of a particular state. This does not prevent a serious attempt being made at a more comprehensive delimitation of the punitiveness concept, however.

Another important limitation concerns the manner of determining the score for each variable. In the instant research, scores were allocated to each jurisdiction based on the researcher's review of primary and secondary data sources at a given point in time (2006), having regard to the degree of change which had occurred over a 30-year period. Arguably, this was the best method available given the restricted number of countries or observations involved and the aim of investigating a longitudinal or 'new' punitiveness rather than any pre-existing differences between nations. The inclusion of several more countries or states, however, opens up several possibilities in this regard. Kutateladze (2009), for example, was able to rank the 50 United States states included in his study from least to most punitive according to the data relevant to each variable. He then scored each state from 0 to 4 by organizing the states into quintiles (ten states per quintile) ranging from least (0) to most punitive (4). An alternative method which could be explored by researchers in this field is to attribute a punitiveness score to each jurisdiction *relative to* certain widely regarded punitive or non-punitive states (such as Texas or one of the Nordic states). This method may prove particularly useful in conducting purely comparative rather than historical analyses of punitiveness in a

given grouping of states, although it does pose the problem of identifying states which are uniformly punitive across all dimensions. Finally, the relationship between the variables in a study incorporating a bigger data set can be tested using correlation analysis or factor analysis. In his study, Kutateladze (2009) used correlations testing to show the weak to moderate relationship between the variables, consistent with his argument that states vary in the ways in which they can be punitive. Gordon (1989), on the other hand, used factor analysis to determine which variables load onto a single factor, such as custody or symbolic punishment, thus demonstrating the different preferences exhibited by individual states.

All of the above requires a significant amount of work and it cannot be denied that practical considerations such as time and money have no doubt played a part in the privileging of narrow, unidimensional conceptualizations of punitiveness by criminologists to date. Given the unprecedented diversity and complexity of current crime control measures (Zedner 2002), it is unquestionably easier for researchers to resort to the shorthand of the imprisonment rate, issue the usual caveats and proceed regardless. The lack of wide-ranging and sound criteria for the assessment of punitiveness nevertheless has implications for the wider discipline of criminology. A 'persuasive public criminology' on this critical issue for our times will only maintain its legitimacy if informed by 'responsible speech' and 'analytical pluralism' (Daems 2008). The use of punitiveness as an umbrella term for policies and practices which criminologists simply consider undesirable while ignoring other more inconvenient truths is not sustainable, nor desirable. In this regard, it is striking that Diana Gordon's (1989: 185) words, first uttered nearly a quarter of a century ago, remain as relevant as ever today: '... we must improve the accuracy and adequacy of our empirical characterisations of the get-tough policy approach before we can effectively "explain" it.' The arguments put forward above form only a beginning to this challenging but necessary task.

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Appendix

Quantitative Data

Quantitative data relating to the numbers of police, police expenditure, violent/property crimes and the use of imprisonment/detention were key to determining scores for variables in Indices A, C and F. They were collated in their raw form and then adjusted for population changes over the period (for police expenditure, nominal figures were adjusted to take account of inflation and expressed in 2008 prices). Every effort was made to ensure that decision rules with regard to scoring were applied consistently between the three countries. As a general rule, a downward trend or marginal increase (<50 per cent) resulted in the lowest score of 10 being awarded. Significant upward trends attained scores of 20 or 30, having regard to the range of increases registered in the three countries.

Qualitative Data

Documentary sources

Qualitative readings of multiple documentary sources heavily influenced the scoring for some of the variables. Documents used included: the criminological literature; books and reports by national experts and NGOs; official reports (both national and international, e.g. CPT reports); political biographies; historical newspaper reports (accessed

on Lexis-Nexis); and parliamentary debates. Legislative analysis was also conducted for the purposes of assessing changes to procedural rules (Index B), post-release controls (Index D) and selected variables from the other indices. Detailed notes were taken of the main changes effected by all pieces of criminal justice legislation enacted in each of the countries for each year over the period 1976–2006 and inserted into an appendix.

Interviews

Documentary sources were supplemented in certain instances with data obtained from the interviews (see further Table 3). Transcripts were analysed and marked for emerging themes. Open coding was used involving the inductive and deductive development of thematic categories relevant to the data and the research purpose. This was done by means of a systematic indexing process whereby several sheets of paper were set up for each jurisdiction with the main areas of interest listed separately (Berg 2009). These included: Watersheds, Policy Origins, Risk Factors, Protective Factors, Volatile and Contradictory Policies, Front-End and Back-End Policy, Policy Transfer, and a country-specific catch-all category capturing data relating to punitiveness or leniency in that jurisdiction.

A fuller discussion of the sources and decision rules used in this study is available in Hamilton (2014).