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# How iron is the iron cage of new penology?

The role of human agency in the implementation of criminal justice policy

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## Abstract

This article addresses the extent to which the concept of 'new penology' is helpful in understanding penal currents, particularly as they relate to the older paradigms of retribution and rehabilitation. In the light of theoretical, historical and empirical evidence, support is lent to the arguments: that the new penology thesis downplays the role of human agency at the level of implementing criminal justice policies; that it ignores the potentially positive aspects of managerialism; and that it misses the continuity between past and contemporary penal features. It is concluded that, despite its merits, new penology remains a hypothesis, rather than a realized penal rationale.

## Key Words

actuarialism • human agency • managerialism • new penology • resistance

Contemporary criminologists, particularly those embroiled in penological research and theoretical analysis, are confronted with a challenging conundrum. Notwithstanding the liberal post-war penal expectations and, more recently, the exponential growth of community sanctions and the decline in crime rates, the last three decades have witnessed the apotheosis of imprisonment (e.g. Langan and Farrington, 1998; Garland, 2001a). What is more, this has been coupled with an array of interrelated developments like populist policy-making processes and risk-laden managerial discourses and practices (Bottoms, 1995; Garland, 2001b). But while there is common agreement as to the *phenomenal* attributes of contemporary penalty, its *noumenal* nature is a matter of spirited debate,<sup>1</sup> kindled largely by Malcolm Feeley and Jonathan Simon and their concept of 'new penology'. According to the two American theorists, the new penological era inaugurates an amalgam of actuarial policies aimed at the effective control of selected risk groups and efficient system management, rather than embracing the

traditional objectives of rehabilitation or punishment of individual offenders (Feeley and Simon, 1992, 1994; Simon and Feeley, 1995).

The question this article considers concerns the adequacy of new penology as a way of interpreting the shape, culture and practices of contemporary penal systems. Since the concept of new penology is largely informed by postmodernist analyses of the wider social structures, the same question could be whether, or to what extent, present penalty has actually moved beyond the parameters of modernism, and embarked on a phase of unprecedented transformation. The discussion sets out by exploring Feeley and Simon's model, both as originally proposed and subsequently expanded. What follows is the exposition of the major objections raised, with particular reference to their lack of attention to human agency and its dynamic possibilities for resisting or even subverting the logics and practices of the established order. A case is thus made against the unstated presupposition that misleads the new penology thesis into a dystopian cul-de-sac, that is, the perception of penal agents as executive automata or docile bodies entrapped in the 'iron cage' of an over-rationalized criminal justice system. It is concluded that, albeit insightful, the concept of new penology is theoretically incomplete, as well as poorly evidenced in both historical and empirical terms, thus failing to corroborate the dawn of a postmodern stage in penal matters. As such, its usefulness, at least for now, is limited to that of a mere hypothesis, or, at best, of a warning for the future. The initiated student will notice that the same critique may as well be levelled against all other macro-level analyses of contemporary penalty that ignore or undertheorize the dialectics of control and resistance within criminal justice organizations themselves. In line with the pertinent scholarship, the focus throughout the article is predominantly on Anglophone jurisdictions.

### THE NEW PENOLOGY THESIS

As Émile Durkheim (1893/1964) pointed out long ago, penal systems are inextricably related to the conjuncture of shared social understandings and emotions. Attuned to this view, it is no wonder that Feeley and Simon theorized the new penological network in the socio-political light of what they perceive as the already risen postmodern epoch (see Simon, 1993; Feeley and Simon, 1994; Simon and Feeley, 1995). Though delineating the structures and conditions of postmodernity is beyond the scope of this article – after all, astute theorists are still struggling to complete this labyrinthine undertaking – two salient features are of particular relevance to the analysis of new penology. First, the postmodern environment is defined in terms of a decisive break with its modern past including, among other things, the dismissal of grand 'metanarrative' schemata (i.e. worldviews like reform and humanitarianism; see Lyotard, 1984) and, consequently, the relativization of truth and knowledge (Jameson, 1984; Baudrillard, 1988). Second, it involves high levels of risk-awareness (Bauman, 2000) that provoke a 'pre-traumatic stress syndrome' (Zimbardo, 2003) and 'primitive fears of otherness' (Lianos and Douglas, 2000: 103; see also Giddens, 1991; Beck, 1992).

In such conditions of ambivalence, disorderliness and insecurity, Durkheim has argued, societal interventions and, more particularly, penal responses serve to reinstate social cohesion by healing the wounds done to collective sentiments (Durkheim, 1893/1964). To this goal, the state must either reassert its competence to materialize

its originally proclaimed pursuits, especially if these espouse welfarism and/or engender fiscal concerns, or seek more pragmatic solutions elsewhere (Habermas, 1976). It is towards the latter direction, although *in loose co-ordination*, Feeley and Simon maintain, that certain pivotal transformations have taken place to penal discourses, objectives and techniques, thereby giving rise to what is termed the 'new penology'. Most importantly, however, the uniqueness of these shifts lies in the fact that the new strategy they eventually form has overshadowed previous penal logics, either of the recent, or of the distant past.

Following various commentators, Feeley and Simon suggest that recent years have seen the demise of the optimistic post-war penal vision and of the criminological truth it claimed. Whether referred to as 'rehabilitative' (Allen, 1981), 'penal-welfarist' (Garland, 1985), 'Kennedyan' (Burgess, 1988, cited by Maruna, 2001) or otherwise, the ideal of 'normalizing' offenders by instilling moral values and producing behavioural change, while also facilitating their gradual resettlement into the community 'seem[s] utopian . . . [and] little is done in practice nowadays to implement [it]' (Morris, 2002: 195–7). Rooted in the 1970s, this decline was triggered by a kaleidoscope of factors, ranging from theoretical objections (Bottoms, 1980), adverse research findings (see, for example, Martinson, 1974; Lipton et al., 1975; Brody, 1976) and fiscal worries (Bottoms, 1995), to then increasing crime rates and disproportionate escalations of victimization fear (Bottomley and Pease, 1986). More recently, the rehabilitative project also proved irresponsive to the unintended side-effects and consequent demands of neo-liberal socio-economic policies. In particular, the emergence of what is seen as a permanently marginal and, thus, irredeemably dangerous segment of the population – the so-called 'underclass' – calls for their control and containment, while rendering any prospect of treatment and integration futile (Feeley and Simon, 1992; Wacquant, 2003).

Interestingly, Feeley and Simon (1992) propose that this waning of support has been equally true, *mutatis mutandis*, of the traditional goal of punishing criminals (see also Beckett, 1997). Particularly as concerns those permanently excluded from the socio-economic mainstream, any deterrent effect of punishment is illusory per se, since 'alternatives [to crime] involve successful participation in the labour market' (Brownlee, 1998: 324). The function of contemporary penalty, then, stretches beyond censuring and attaching unpleasant consequences to lawbreakers (retribution, that is), and producing either specific or general deterrence against future breaches of prescribed conducts. Nor is it about restoring social solidarity through communicating moral condemnation of offenders. Instead, responding to the need for increased accountability and rationality, the new penal totem is that security, or at least a gloss of it, be reinforced through effective regulation of designated risk groups, particularly of the 'underclass', and efficient system management. As Feeley and Simon put it, the goal of new penology 'is not to eliminate crime but to make it tolerable through systemic coordination' (1992: 455). Towards this end, contemporary penalty employs a new actuarial discourse, akin to that of the insurance industry and operations research (see Ericson, 1994), that de-emphasizes the individual offender as a clinical case and presents crime as a systemic issue in need of technocratic interventions. Within that context, current penal language also confers legitimacy on probabilistic risk calculations and statistical distributions applicable to aggregate groups, thereby paving the way for the institutionalization of expert actuarial knowledge and, eventually, for the exercise of governmental power.

To this extent, although utilitarian in scope, the new penology distances itself from the individual-focused deterrent-reformist project of the past, rather aiming to identify and incapacitate specific categories and cohorts assorted by levels of dangerousness (Feeley and Simon, 1994; see also Robinson, 2002; Auerhahn, 2003). If nothing else, by protractedly removing large groups of high-risk bearers into 'spaces out of sight and out of touch' – that is, prisons (Bauman, 2000: 39) – it is purported that significant, albeit still temporary, aggregate crime reductions can be effected (but see Petersilia et al., 1986). On the other hand, those classified as lower-risk offenders are distributed in a plethora of community-based sanctioning schemes that, disoriented from their originally intended rehabilitative and reintegrative aspirations, serve as low-cost surveillance mechanisms, often by means of frequent drug testing.

In establishing this 'custodial continuum' – reminiscent of the Foucauldian 'carceral archipelago' (Foucault, 1977) – the system deploys actuarial techniques that assess offenders 'not as coherent subjects . . . but as members of particular subpopulations and the intersection of various categorical indicators' (Feeley and Simon, 1994: 178; see also Castel, 1991; Hudson, 2003). In particular, risk classifications are now executed through statistical prediction models that process large-scale datasets on myriad offenders, rather than by clinically diagnosing particular individuals (Kempf-Leonard and Peterson, 2000; see also O'Malley, 1996). Increased emphasis is placed upon efficiently controlling internal system processes, as these are now evaluated not by reference to intractable social purposes (e.g. rehabilitation), but rather via self-directed indicators, tailored to feasible (and cynical) targets like the proper allocation of resources and streamlined case processing (see Peters, 1988; Raine and Willson, 1997; Kempf-Leonard and Peterson, 2000). Accordingly, recidivism either loses its prominence as a criterion for assessing penal schemes, or, when employed, is decoupled from any social implications. Instead, it is treated as a pointer to systemic success in imposing long-term custodial control over chronically troublesome aggregates of offenders. In Garland's words, 'new performance indicators tend to measure "outputs" rather than "outcomes", what the organisation *does*, rather than what, if anything, it *achieves*' (Garland, 1996: 458, emphasis in original). In this respect, contemporary penalty turns means into its *raison d'être*, and, consequently, divests itself of any high expectations.

## CRITIQUE OF NEW PENOLOGY

Since its conceptualization, the new penology thesis has received severe criticism on a number of fronts. Various commentators have cast strong doubt upon the suggestion that contemporary penalty signals a 'marked break with the past' (Simon and Feeley, 1995: 148). In their telling genealogy of risk, Rigakos and Hadden (2001) argue convincingly that the pervasion of actuarialism into criminal justice dates at least to the 1600s. By means of historical evidence, they show that aggregate risk management served the interests of the then emerging English bourgeoisie and, more specifically, its concomitant need to monitor those wayward masses that posed potential threats to its economic ascendancy. In this respect, 'actuarial justice is new only insofar as it has been recently described' (Rigakos and Hadden, 2001: 79; see also Rigakos, 2001; Coleman and Sim, 2005). Similar anti-postmodern voices, albeit less dismissing, are heard even among those theorists who trace the advent of actuarialism to around the 19th century

(e.g. as a characteristic of the Eugenics movement; see Garland, 1985) and view its current acceleration as resulting, at least partially, from the refinement of statistics and computer technology (see Pratt, 1995). Garland, for example, argues that, despite the upsurge of actuarial technologies and reasonings in recent years, 'both the "Old" and the "New" penologies . . . are neutral, knowledge-based, purpose-rational approaches, sponsored by social science professionals'. In this light, 'they represent two *adjacent* positions in a common field of instrumental penalty' (Garland, 1997: 203, emphasis in original). Thus, what we are currently witnessing is not the formation of a new, post-modern penal order, but rather the intensification of modern contours, wherein retributive and, to a lesser but still significant degree, rehabilitative impulses remain vital (Garland, 1995; see also Humphrey and Pease, 1992; Christie, 1993; Bottoms, 1995; Carrabine, 2000; Liebling, 2002).

Even if one denies the persistence of rehabilitation as a penal objective, one cannot miss the punitive impulses that largely dominate contemporary penalty, particularly as they echo the increasing public demand for harsher punishments and strengthened security (Morris and Hawkins, 1970; Cohen, 1979; Bottoms, 1995; Garland, 1996, 1997, 2001b; Brownlee, 1998; Cotton, 2000; Hannah-Moffat, 2001; but see also Coleman and Sim, 2005: 112–13). And the new penology alone, as Simon and Feeley (1995) admit themselves, fails to perform this fundamental expressive function of government.<sup>2</sup> What actuarial logics and practices *can* do is, in fact, to facilitate retributive punishment. Whereas for Feeley and Simon '[t]he new penology is neither about punishing nor rehabilitating individuals, [but rather] it is about identifying and managing unruly groups' (1992: 455), the first step towards 'render[ing] docile the unruly domains over which government is to be exercised' (Rose, 1996: 45) is to distinguish the 'dangerous' from the ordinary 'run-of-the-mill' offenders through actuarial prediction techniques (see also Foucault, 1977, 1980; O'Malley, 1992, 2001; Haggerty, 2001; Hudson, 2003).

But, whatever the viewpoint taken, the study of how power is wielded within the contemporary penal complex should not be focused solely on the interplay between macro-level and seemingly inescapable forces like the state, politics and the mainstream society. As Garland argues in his critique of Foucault's *Discipline and punish*, power is not a 'kind of empty structure, stripped of any agents, interests, or grounding, [nor can it be] reduced to a bare technological scaffolding' (1990: 170–1). Surprisingly, in attempting to fill this void in the 'strangely apolitical' Foucauldian logic, Garland himself reaches a no less dispiriting conclusion: that 'individuals and agencies play a crucial, but *by no means controlling*, part' (1985: 208, emphasis added) in the formation of penal strategies. Simon and Feeley (1995: 175) use this quotation to account for the role of human agency in the implementation of criminal justice policy, though, unlike Garland, they devote no more than an endnote to this critical theme. It is thus suggested (or, at least, readers are given the space to assume) that administrative fiat and other small-scale initiatives and pressures can only have a minimal impact, if any, on current penal trends. And, if taken to the extreme, this argument leaves open the possibility that the agency of the deliverers of justice is ultimately aligned with the cynical goals of a strong 'centre of calculation' (Rose, 1996). At the same time, a profusion of questions beg to be addressed, both about the ways in, and the extent to, which such an alignment is possible.

One is left to wonder: is it, as Parsons (1951) propounds, that actors internalize, and voluntarily adhere to, socially structured role prescriptions? Or is it, as Lukes (1974: 34) counterpoises, that 'men's wants may themselves be a product of a system which works against their interests, and in such cases, relates the latter to what they would want and prefer, were they able to make the choice'? Or is it even that the system employs its coercive power in a more direct manner, threatening or invoking sanctions against non-conformists (Bachrach and Baratz, 1970)? But this trifurcated question, however important, may take us only so far as to gauge the magnitude and illegitimacy of 'legitimate power', that is, the variety of subpopulations over, and the stifling mechanisms by, which the exercise of governmental power is routinely attempted in our times. Instead, I shall venture to contend, a more holistic analysis of penal currents would comprise an examination of whether, and the degree to which, professionals actually resist subordination to illegitimate systemic techniques and goals, and, if so, the forms such acts of resistance may take. As asked in the title of this article, how iron is the iron cage of new penology?

### Oppressed oppressors

We look for the creation of a nonhuman type in whom moral suffering, goodness of heart, affection, and love, those sole corrosive poisons of inexhaustible vital energy, sole interrupters of our powerful bodily electricity, will be abolished. (Marinetti, 1972: 91, cited by Shanken, 2000: 64)

As Liebling is right to pinpoint, while much has been written about the impact of managerialism on the various criminal justice organizations, but also on those caught up in criminal justice processes, '[f]ewer commentators have addressed the impact of managerialism on the deliverers of criminal justice: those who work in the new performance culture and those who manage it' (2004: 378). In what follows, I briefly sketch what I consider to be the three basic managerial forces that, *together*, serve subtly to rigidify the nature and scope of criminal justice work, and to mould professionals into patterns of conformity to systemic goals, while also paying attention to the human consequences of these forces.<sup>3</sup> My excuse for imposing errors of overstatement upon the reader is that such an analysis allows me to delve beneath structural patterns and effects that are not otherwise available to inspection, so that it is not windmills against which I am tilting later.

To begin with, the trend in recent years has been towards an *increasingly hierarchical division of labour* within criminal justice organizations. In England and Wales, for example, while the policy leadership of the Prison Service rests with the newly formed National Offender Management Service (NOMS), its core operational responsibilities flow downwards to a miscellany of subdivisions and officials, all aiding the mobilization of peers and subordinates towards organizational goals: from the Director General, to the Prison Service Management Board (comprising the Directors of Resettlement, Operations, Finance and Procurement, Personnel, Health, Corporate Affairs and the Deputy Director), to the Operational Policy Group (consisting of 14 Area Managers and Heads of Group), to prison governors, lower-level managers and officers. Such a firm division of labour confines professionals to narrow sets of formal tasks, thus not only optimizing control over the content of their work, but also preventing them from

gaining full comprehension of the overall strategy and the ultimate goals of the organization. Concurrently, the division of labour increases workforce expendability and, consequently, discourages lower-level professionals from challenging senior leadership on the ways their work is organized. Along these lines, Garland (1997) uses the term 'government-at-a-distance' to describe a new approach to the administration of penal organizations which stunts the agency of front-line criminal justice personnel, either through curtailing their discretionary powers and homogenizing decision-making processes (e.g. via formal guidelines), or by employing powerful mechanisms of accountability like key performance indicators (see Hood, 1991; Rose and Miller, 1992; Simon, 1993; Garland, 1996; McEvoy, 2001; Carlen, 2002; Liebling, 2004).<sup>4</sup> In point of fact, the logic and function of this amalgam of procrustean techniques resembles the 'responsibilization strategies' applied to imprisoned populations (see Garland, 1997). Although heavily restricting individual autonomy, the state still allows for the exercise of a small scale of localized judgement on the part of the professionals, through which to pursue their private objectives (e.g. upward career mobility), objectives, however, that are only met if in full alignment with the interests of the centralized government.<sup>5</sup>

The second force at play is a *hypertrophic inter- and intra-agency competition*. In Britain, for instance, at the same time as seeking to enhance inter-agency 'partnerships' (e.g. between the Prison and Probation Services, between the Probation Service and the police and so forth), the Government also exerts significant pressure upon each separate agency to improve its annual expenditure profile, as this compares not only to past fiscal years, but also to the rest of the organizations.<sup>6</sup> To add to this, criminal justice agencies also compete for best-quality recruits, programme responsibilities and reputation. As one might expect, inter-agency competition soon evolves into an internal priority, setting in motion the bureaucratic machinery described earlier, with headquarters pressuring senior management teams and lower-level officials to contribute as effectively as possible to the national targets of the organization. To this end, in 2001, the Prison Service even started producing a quarterly 'weighted scorecard', ranking the cost efficiency of individual establishments, and their performance against a range of indicators like the percentage of positive drug tests, the number of escapes and absconds and the time spent by prisoners in purposeful activities. And, as Liebling tells us, '[g]overnors are well aware that their competence is judged by whether or not they succeed in meeting [key performance indicators]' (2004: 65). As if this were not staggering enough, with the acceleration of criminal justice privatization in recent years, especially as concerns corrections, public sector officials are now faced with a new, strong antagonist. In an interview he gave to the *Guardian*, Martin Narey, then head of NOMS, underlined the centrality of 'contestability' to his agency's agenda, defining it as follows:

Contestability simply means that we will look at the work and give a chance to a range of people to do it. So we ensure that we get the best quality product for the best price. . . . It's about competition. We're not privatising large pieces of work. If the public sector competes and proves it's best it will keep the work. (Narey, 2004: 6, interviewed by Travis)

Finally, the third force pertains to *the breeding of a new, up-and-coming generation of blasé professionals*. If asked to describe the latent organizational stratification of contemporary criminal justice organizations, most insiders (or, at least, most older insiders)

would point to the rise of a 'bureaucratic kinship system' (to use Wilbert Moore's phrase), where pragmatically oriented, upper-level managers tend to recruit, promote and therefore keep control in the hands of, their young and culturally similar peers. To give a flavour of this, accelerated promotion schemes now allow young recruits trained in the skills and culture of performance management quickly to climb the ladder of the organizational hierarchy, often even outranking the older generation of criminal justice personnel and undermining the progressive ideology of the past. Because it eloquently reflects the point I wish to make here, let me cite at some length Liebling's account – Liebling describes the ways in which the role of the prison governor has changed with the onset of managerialism:

It is possible to detect a distinction between older and younger generations of governors, with governors recruited and trained 'in the old days' (i.e. those who attended the pre-managerialist version of the assistant governors' course) more likely to express idealistic aspirations and slightly more liberal perspectives, and younger (new generation) governors more likely to speak the language of performance. Using Alder and Longhurst's characterisation, more prison governors of older generations might have belonged in the 'professionalism–rehabilitation' cell of their means–ends discourse matrix, and more younger prison governors could be characterised as belonging in the 'bureaucracy–control' cell of this matrix today. (Liebling, 2004: 399)

So much to say that the criminal justice workforce is now routinely subjected to an ensemble of direct and indirect control mechanisms aimed at replacing traditional (and often anti-authoritarian) values and preferences with a utilitarian concern over craven impulses, thereby eventually turning individuals into mere relays in a hierarchical chain of bureaucratic command. In other words, what the triad of systemic forces which I have described brings in its wake is an increased sense of ontological insecurity, especially for those belonging to older generations of professionals, which in turn fosters Spartan loyalty to the organization, doxic acceptance of authority and blind conformity to prescribed modes of action. Under the ongoing threat of expendability, professionals are coerced into a 'self-definition by rejection', that is, they are forced to construct a new, market-oriented work identity, often by outgrowing their dynamic dispositions, working practices and ideologies and established alliances, in favour of an individualized, mechanistic routine – one which they hardly participate in formatting.<sup>7</sup> By corollary, incumbents are alienated not only from their colleagues, but also from their own labour. And, to the extent that 'man is the product of his labour', as Hegel would say, incumbents are also alienated from their own selves (see Fromm, 1955).

In so far as these techniques have permeated criminal justice, the remark by Simon and Feeley with regard to offenders that contemporary penalty 'has trouble with the concept of humanity' (1995: 173) may as well be extended to those who work in the new performance culture.

### **Human agency as resistance**

Man is a *zoon politikon* in the most literal sense; he is not only a social animal, but an animal that can be individualised only within society. (Marx, 1859/1971: 189)

I have gone to some lengths to spell out the ways in which managerialism extends its reach not only horizontally to those caught up in criminal justice processes, but also

vertically to those who work at the various levels of the criminal justice system. This, however, should not lead us to infer that power structures in contemporary penal organizations are as monolithic and ineluctable as the mechanistic character of managerialism suggests. To borrow Brownlee's words, '[such a] deterministic approach ignores the reflexive agency of the human actor and the capacity for well placed and charismatic individuals to influence the policy debate, notwithstanding the structural and cultural constraints of action' (1998: 325). There is an unmistakable, if less conflictual, Marxian note in Brownlee's account. '[W]hen one speaks of labour', Marx (1844: 93, cited by Marcuse, 2000) declares in his critique of the alienating effects of 19th-century industrial capitalism, 'one has to do immediately with man himself. The new formulation of the question already involves its solution.'<sup>8</sup> In this light, the potential to overcome the totalizing tendencies of penal managerialism (and to actualize its possibilities, as I argue later) is immanent to the agency of criminal justice professionals. My challenging, self-imposed task hence becomes to demonstrate that professionals incarnate their agentic capabilities, and, as a consequence of this, that actuarial logics have far from supplanted traditional goals of punishment like rehabilitation and/or retribution.

Broadly speaking, the concept of agency has become a *cause célèbre* in social thought. It has been approached from a range of theoretical standpoints, and under various names like selfhood, motivation, will, autonomy, freedom and creativity (see Emirbayer and Mische, 1998). My immediate concern here is to delve into human agency manifesting itself as resistance, especially as concerns the ways in which criminal justice professionals oppose subordination to what may be seen as mechanistic logics and practices of governmental power. The intention is to direct attention to viable forms of resistance whereby actors hold true to their worldviews and value commitments, as well as satisfying parochial self-interests and the need for self-preservation in particular – resistances that are *sacred* in their value-orientation and spirituality, yet also *profane* in their everyday occurrence and inner-worldliness. Such a discussion is undertaken not merely to argue that resistance is the omnipresent 'compatriot of power', as Foucault (1980: 142) would have it, but rather that 'resistance and the exercise of power are mutually shaping, defining, and changing in an ongoing dialectic' (McEvoy, 2001: 34).

A useful starting-point for present purposes is Weber's dichotomy between 'instrumentally rational' (*zweckrational*) and 'value-rational' (*wertrational*) action, the former constituting the cornerstone of, and the latter epitomizing a revolutionary counterforce to, authoritarian bureaucratic administration. Anticipating Anscombe, Schutz, Taylor and many later thinkers, Weber focuses his attention upon the content of passions, desires or values, especially upon the extent of their susceptibility to structural pressures, as the main determinants of human conduct. Indeed, it is one thing to seek the internal motivating forces behind human action, and it is quite another thing to assess the degree of artificiality or authenticity of those motives. To put it in Arlie Hochschild's words, 'the actual content of feelings – or wishes, or fantasies, or actions – is not what distinguishes the false self from the true self; the difference lies in whether we claim them as "our own"' (1983: 194–5).

On the one hand, then, instrumentally rational behaviour involves the calculative analysis of different, available means for attaining a given end. Under this prism, one's agency in criminal justice organizations (and we should not rule out some degree of agentic action, for even instrumental rationality presupposes minima of conscious

reflection, practical evaluation and the exercise of will) – one’s agency in criminal justice organizations is confined to the choice of means towards managerial goals predefined by ‘the system’. Such goals, as we have seen, are intrinsically oppressive and stultifying, inasmuch as they often undermine the morality of professionals and their labour, and entail patterns of isolation from social networks. (Recall here that the system may stifle inner values and worldviews by playing upon elementary human needs and personal interests, and pairing them with its own cynical pursuits.) Also, as Israel asserts, ‘certain goals may delimit the choice of means, and in addition they may themselves become means for other goals placed higher in a means–goals hierarchy’ (1971: 114–5). In the last analysis, then, the instrumental rational actor is not merely an atomized, egoistic computer who deliberately seeks to satisfy dull compulsions, but also a manipulable executor of structural mandates.

Value-rational, on the other hand, are

the actions of persons who, regardless of possible cost to themselves, act to put into practice their convictions of what seems to them to be required by duty, honour, the pursuit of beauty, a religious call, personal loyalty, or the importance of some ‘cause’, no matter in what it consists. (Weber, 1914/1978: 25)

Here Weber points to the role of higher spiritual and cultural values in engendering not just the particular ends men may seek, but also the asceticism required to accomplish these ends. Put in another way, value-rational action is the preserve of self-sacrificial, charismatic individuals, capable of blithely opposing traditional or rational norms, and giving leverage to their professed ideals. In his later work, Weber came to identify charismatic leadership – that is, power legitimized through extraordinary personal qualities – as the source of value-oriented and creative action, as the fount of innovation and revolution, and therefore as a form of counterbalance to traditional and bureaucratic authority (see Mommsen, 1987). Penological history supplies various instances of charismatic professionals who prioritized their humanitarian ideals over systemic dictates and personal interests, and zealously directed all their actions towards the achievement of their reformative projects – John Howard, Alexander Maconochie, Walter Crofton and Zebulon Brockway are but a few such examples (see, *inter alia*, Mannheim, 1960; Downes and Morgan, 1997).

But, as is so often the case with Weber’s ideal-typical accounts, neither the image of the puppet-like, rational impersonal bureaucrat, nor that of the charismatic revolutionary leader (nor of the radical sans-culotte, for that matter) can actually resonate with *ordinary* instances of professional life in bureaucratic organizations. Against instrumental rationality and the ‘rigorous mechanization’ of administration this purports to buttress, social research has consistently demonstrated the need for weakening vertical control ties, devolving decision making down the system and delayering administrative hierarchies (see Barnes, 1995: 193–222). Crucially, this need derives from the interplay between the inherent deficiencies of bureaucratic structures and the capacity of individuals largely to elude control and act on their own accord. For example, James Thompson (1967/2003) identifies three sources of uncertainty that force even the most perfect of machine-like organizations often to rely upon the personal discretion of single individuals, rather than on faceless procedures: a lack of cause–effect understanding in the culture at large, which hinders advance planning; contingencies in the environment

(e.g. in transactions at the boundaries of organizations) that escape calculation; and the human interconnections inside organizations that can hardly be reduced to programmatic formulae (see also Kanter, 1977).

Some additional comments by way of clarification and qualification are in order here. For better or worse, the ultimate fantasy in which there is little formal constraint and supervision, and professionals act *ultra vires*, does not even remotely approximate reality in any bureaucratic organization. Ronald Dworkin reminds us that '[d]iscretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction' (1977: 31). But, however elaborate, rules and guidelines cannot circumscribe the complexities of all possible contingencies. It is also the case that rules often fail clearly and unambiguously to explicate the goals of the organization. The profusion of rules 'may actually be an impediment to supervision. They may be so voluminous and contradictory that they can only be enforced or invoked selectively' (Lipsky, 1980: 14). Somewhat similarly, to the extent that job performance is evaluated in terms of the validity and quality of discretionary decisions, numerical output measurements are intrinsically insufficient means of exercising control over professionals, mainly due to the difficulty in outguessing and operationalizing the cognitive and emotional processes involved in individual, authoritative decision making. To add to this, given that professionals often are the primary source of information upper management receives concerning their performance, they are in a position to massage data to make the action taken appear to be responsive to organizational prescriptions when it may not have been (see Lipsky, 1980: 162–3).

Small wonder discretion is most relied upon in what Lipsky calls 'street-level bureaucracies', that is, in human service organizations such as the schools, police, courts and prisons, whose workers interact directly and regularly with clients, and are responsible for dispensing benefits or allocating public sanctions to them. More often than not, street-level bureaucrats work free from close supervision by superiors, in situations that require flexible, on-the-spot decisions on the human dimensions of complicated and diverse issues. Police patrol officers, for example, are given broad leeway to decide who to stop, who to search, who to search intrusively and who to arrest (see, for example, Smith and Gray, 1985). Not dissimilarly, prison officers may choose between enforcing the letter of the law and tolerating rule-breaking behaviours on the part of prisoners, '[moving] from tension to peace without incident, [and using] language rather than action to avert the requirement of force' (Liebling and Price, 2003: 87). In these and other instances of discretionary power, the interpretation and application of supposedly 'impersonal' rules are matters to be decided by active agents who 'sustain a shared sense of what rules mean by continually working to secure agreement in their practice', and 'authoritatively enact any of the innumerable possibilities that can plausibly be made out as consistent with rules and precedents' (Barnes, 1995: 205; see also Lukes, 1977). Said differently, what escapes the supervisory gaze of the 'system', no matter how Orwellian that may be, is the panoply of personal values and idiosyncratic meanings that individual decision-makers bring to their decisions (or their non-decisions, for that matter) and which eventually coalesce to sustain, form or reform organizational routines.

Implicit in these accounts is the notion that the exercise of power is not a one-way, top-down street, but rather a fundamentally associative process involving a perpetual negotiation between those placed in positions of dominance and those subordinated. It

is a 'continual probing on the part of the rulers and subjects to find out what they can get away with, to test and *discover* the limits of obedience and disobedience' (Moore, 1978: 18, emphasis in original). From this vantage point, subordinates can be thought of as dynamic agents who do not merely submit to a power structure, but also participate in the shaping of that structure by adaptively and strategically interpreting, imagining, evaluating, reconstructing and even pluralizing available choices in an ongoing dialogue with unfolding situations (see Bourdieu, 1990; Emirbayer and Mische, 1998). In her etymological exploration of power, Hannah Arendt arrives at a similar conclusion:

The word itself, its Greek equivalent *dynamis*, like the Latin *potentia* with its various modern derivatives or the German *Macht* (which derives from *mögen* and *möglich*, not from *machen*), indicates its 'potential' character. Power is always, as we would say, a power potential and not an unchangeable, measurable, and reliable entity like force or strength. While strength is the natural quality of an individual seen in isolation, power springs up between men when they act together and vanishes the moment they disperse. Because of this peculiarity, which power shares with all potentialities that can only be actualized but never fully materialized, power is to an astonishing degree independent of material factors, either of numbers or means. A comparatively small but well-organized group of men can rule almost indefinitely over large and populous empires, and it is not infrequent in history that small and poor countries get the better of great and rich nations. (Arendt, 1958/1998: 200)

Whether or not power vanishes when men disperse or act in isolation is a theme that I shall address later. At this stage, it is sufficient to note that, oddly enough, penological thought has long sought to credit as constrained individuals as prisoners with the power to exercise choice, refuse to obey orders, devise ingenious methods of resistance and 'make a difference' (see, for example, Sykes, 1958; Mathiesen, 1965; McDermott and King, 1988; Sparks et al., 1996; McEvoy, 2001), yet seems largely to withhold that affirmation from those shouldered with the beleaguered task of exercising power in coercive organizations (e.g. prison governors, prison, parole and probation officers; see Liebling, 2001).

What, then, of value-rational action? It would be hard not to sympathize with charismatic forms of revolutionary authority, at least to the extent that they are meant ultimately to serve the objective needs of society, but harder still to ignore the fact that they have never fully permeated the penal realm. To Feeley and Rubin we owe the reminder that, '[f]or every Stateville whose regime was harsh but just, there was a Cummins Farm [where prisoners were whipped if they failed to produce enough work]', and that, 'for every Texas convict who was inspired by George Beto to take the righteous path, another was brutalised in one of the dark corners of his clean, well-lighted prison' (1999: 286). Even progressive initiatives that found a broader constituency among penal professionals (e.g. the introduction of parole or temporary release), often fell prey to what Rothman (1980) terms 'administrative convenience', that is to say, they were mostly utilized as means to deal with operational difficulties like prison overcrowding or control over offenders, and less to promote their originally intended rehabilitative aims (see also Bottoms, 1980). Readers familiar with classical social theory will be quick to recognize that Rothman's observation traces clearly to the Weberian scheme of charismatic reform followed by the secularization or 'routinization of charisma' (see, for example, Garland, 1990: 178).

I shall return in a moment to the plausibility of this process in contemporary penal bureaucracies. As a general preliminary to such consideration, however, we may note that to a great many writers, and especially to Giddens (1991), human nature, or at least mundane human nature, seems to abhor the ontological insecurities of open conflict with the established order, seeking instead to engage with the consoling routines of abstract systemic networks. Robert Dahl, reflecting upon what he sees as ubiquitous political non-participation in the United States, takes a somewhat similar view. For the average American, Dahl explains,

political action [like protest or radical opposition] will seem considerably less efficient than working at his job, earning more money, taking out insurance, joining a club, planning a vacation, moving to another neighbourhood or city, or coping with an uncertain future in manifold other ways. (1961: 221)

But nowhere is the waning of oppositional politics more acutely proclaimed than in postmodernist thought. Francis Fukuyama (1992), to take the most well-known example, uses the term 'end of history' to posit that the historical struggle between competing political ideologies has irreversibly taken a back seat to the triumphant rise of neo-liberalism and the encroaching forces of globalization. Viewed thus, revolutionary energies have been largely usurped by a universal culture that favours material abundance, technological advancement and consumerism. Although such approaches are rather overstated, nevertheless they appear to contain an important element of truth: insurrection is less likely to occur in and against systems that continue firmly to uphold what Gaventa terms 'the rule of anticipated reactions' (1980: 15) to disobedience (the power to sanction deviants, that is), while also allowing for privatized modes of retreat through which one can satisfy, even if stingily, his or her instinctual needs and private interests (see Wrong, 1994: 226–36).

With these observations in hand, we can now take a step backwards and adjust our understanding of agency as resistance, particularly as concerns ordinary forms of resistance in bureaucratic organizations. To be sure, charismatic figures that draw subordinate groups into revolutionary movements will always exist, as indeed they should. In his later *oeuvre*, Weber himself went so far as to argue that '[r]evolutions under a charismatic leader, directed against hereditary charismatic powers or the power of office, are to be found in all types of organisations, from states to trade unions' (Weber, 1968: 252, cited by Mommsen, 1987: 49). But in overemphasizing the repressive nature of power relations and the vanguardist facets of resistance under leadership models, one ties revolt to the presence of a charismatic persona; reduces innovative minorities to mere followers of a leader; confines reform to rare moments of popular explosion; and, ultimately, underestimates the creativity of individual action (or else, the possibility of value-driven action) within day-to-day routines, no matter how constraining the latter may be (see Joas, 1996: 44–9). In much the same vein, so long as we restrict our conception of resistance to the quixotism of exceptional, heroic individuals who venture independently to contest the terms of their ordeal and initiate a revolutionary upheaval of their professed ideals, we are driven to mistake the outward tranquillity of the subordinate masses for widespread amorality, apathy, egocentrism, resigned acquiescence and political inertia. Whether taken singly or in concert, such analytical errors cannot but lead to pessimistic prognostications about the possibilities, or prospects of resistance.

That insurrection is the hardest path to maintain does not necessarily render subservience to far-flung systemic networks less illegitimate, discomforting or evitable in the eyes of subordinates, not even as concerns the most inward-turned among them (see, for example, Gaventa, 1980; Urry, 1991). As Durkheim proposes, and I would agree, '[a]bsolute egoism, like absolute altruism, is an ideal limit which can never be achieved in reality. Both are states that we can approach indefinitely without ever realising them completely' (1914/1973: 153). Following Durkheim's discussion of *homo duplex*, I would argue instead that action, whether at an individual or at a collective level, is stirred by a deeper contradiction inherent to embodied humans – one in which selfish impulses and biological tendencies clash with, but may well be largely regulated by, rationalistic, moral and inevitably societal expectations (see further Shilling and Mellor, 1998; Avededo, 2005). Dennis Wrong makes a similar point:

[a]ll purposive or goal-oriented action is indeed action *of* a self, but that does not necessarily mean that it is action serving only the interests of the self and remaining indifferent or oblivious to the interests or feelings of others. (1994: 194, emphasis in original)

Like all human action, then, practical instances of resistance to overregulatory structural conditions, whether in bureaucratic organizations or elsewhere, are principally to be found within the wide margins between the ontological security of instrumental rationality and the prometheanism of value rationality; between the philistine lust for *having* and the noble struggle for *being* (in Erich Fromm's sense of the words); between abysmal egoism and boundless altruism; and therefore between impotent obedience and overt, Homeric revolution.

It is in this spirit that James Scott (1990) urges us to seek most of the political activity of subordinate groups not in excesses of courage, but rather in the various day-to-day techniques by which they manage to insinuate their resistance, in disguised forms, into the public domain. Pivotal to this *dramaturgical* or *impression management* approach, as Goffman (1959) would call it, is discerning between *front* and *back-stage* performances, that is to say, between images of the self individuals routinely fabricate in the eyes of others, and revelations of their actual self out of public sight. Put in other terms, compliance is not singular in its manipulability, for subordinates may consciously engage with governmental logics in a way which is at odds with that intended by the powerful, strategically adjusting them to their own uses, or subtly employing them as means towards their chosen ends (Garland, 1997). It follows *a fortiori* that surreptitious resistance under adverse circumstances does not merely satisfy the indispensable need for self-preservation, but also creates the social space for the actualization of hitherto muted values and beliefs. As such, it is no less political than its photogenic equivalent, i.e. unveiled rebellion, as both are aimed at defying, appropriating or even approximating the power of the oppressors. Here again I concur with Scott when he argues that:

any argument which assumes that disguised ideological dissent or aggression operates as a safety-valve to weaken 'real' resistance, ignores the paramount fact that such ideological dissent is virtually always expressed in practices that aim at an unobtrusive renegotiation of power relations. (1990: 190)

The astute observer need not look long and hard to find examples of clandestine resistance within bureaucratic organizations. As discussed earlier, in the world of

experience, public policies and related management control systems can be subverted, adapted or accommodated through the manifold of discretionary decisions professionals make on a daily basis, whether these be to choose among alternative courses of action, or even to abstain from certain actions altogether. This is much too quick, however. For it would be a manifest error to presume that subordinates are uniformly willing or able to break, even if subtly, with the social order in which they are embedded. The immediate question revolves around the capacities individuals must have to turn discretion (or any other available means) into a secret weapon of resistance. In other words, what are the distinct qualities possessed by those who manage to work *in but not necessarily for* over-rationalized bureaucracies, to 'sustain and recover their humanity despite contributing to or being subjects of oppressive social systems' (Lipsky, 1980: xviii), or, in Weber's own terms, to effectuate the 'vocational' potentialities of their work under conditions of disenchantment?

The answer to this question is far from simple and would certainly require that some further light first be cast upon the nature of furtive resistance and its strategic presuppositions in particular – an endeavour eschewed here for reasons of space.<sup>9</sup> It is perhaps suffice epigrammatically to note that the way individuals respond to structural pressures is contingent not only upon differing temporal, spatial and power conjunctures, but also upon varying degrees of moral courage, individual reflectivity and the ensuing subjective conceptions of agentic possibilities of resistance – a tripartite set of human qualities, capacities, or dispositions (*à la* Bourdieu) that Moore calls 'iron of the soul' (1978: 91). This is the line also taken by Charles Taylor in his treatise on human agency, where he substitutes the Weberian language of instrumental and value rationality for what he terms 'weak' and 'strong' evaluation respectively:

Whereas for the [weak evaluator] what is at stake is the desirability of different consummations, those defined by his *de facto* desires, for the strong evaluator reflection also examines the different possible modes of being an agent. Motivations or desires do not only count in virtue of the attraction of the consummations but also in virtue of the kind of life and kind of subject that these desires properly belong to. . . . It is much easier to take up the formulations that come most readily to hand, generally those which are going the rounds of our milieu or society, and live within them without too much probing. The obstacles in the way of going deeper are legion. There is not only the difficulty of such concentration, and the pain of uncertainty, but also the distortions and repressions which make us want to turn away from examination: and which make us resist change even when we do re-examine ourselves. (Taylor, 1985: 25, 42)

Although Taylor, like Weber, hardly touches upon the grey areas between weak and strong evaluation, it is not difficult to see how covert resistance (which would fall within those grey areas) also presupposes the capacity to overcome the 'pain of uncertainty' (albeit to a lesser degree than open revolt), diagnose the structural 'distortions and repressions' and explore 'the different possible modes of being an agent'. It is therefore only to be expected that, whereas some professionals will exercise their discretion to undermine authoritarian bureaucratic administration on behalf of reformist goals,<sup>10</sup> others will still be intimidated by the potential repercussions of disobedience, miss the illegitimate nature of their subordination and/or fail to recognize, and capitalize on, windows of opportunity for disguised dissent.

But even in this limited sense, I contend, resistance remains part and parcel of power

relations, to the point that it may well function as a buffer against the 'routinization of charisma'. If human agency can influence structures as much as structures can influence human agency, by way of what Robertson (1992) terms 'glocalisation', then personal micro-political struggles and small localized triumphs should not be looked at as an occasional and fragmentary achievement of resistance devoid of macro-level implications. *Au contraire*, they convey the underlying persistence of a counterhegemonic ideology, while also reinforcing the possibility of a recalcitrant subculture capable of effectively unleashing its yearnings for enduring, large-scale progressive change. All in all, then,

[i]t is not merely, as Parsons would have it, that men are tempted to use other men in the service of their ends; the very existence of others constitutes an obstacle to realising the ends each and every one of them pursues given the fact of scarcity. (Wrong, 1994: 101)

At this point, I can imagine some readers objecting that all this may simply be a figment of wishful theorizing, or yet another symptom of an all-too-common nostalgia for recapturing old certainties. Be that as it may, the claim that criminal justice professionals, like their counterparts in other bureaucratic organizations, retain a crucial role in the implementation of policy agendas, often using their discretionary powers to prevent inhumane rationales and processes brought about by the advent of managerialism, also carries considerable evidentiary weight. To give a flavour of this, Lucken examined contemporary penalty from the perspective of penal actors in the jurisdiction of Florida, and found that 'objectives, practices and philosophies . . . continue to reflect the modern themes of normalization, classification, treatment, rationality, efficiency and progress' (1998: 119). In this respect, while acknowledging the managerialization of penal system operations on a number of counts, she views 'penalty as a balancing act' that embodies both punishment and treatment as complementary, rather than mutually exclusive functions (see Lucken, 1998: 113). Similarly, Lemert (1993: 460) demonstrated in his study of probation in California that the rise of actuarial discourse did not signal any 'revolutionary new form of social control'; rather, 'the most conspicuous change has been bankloading [namely processing only the most serious cases], an old practice with a new name' (see also Corbette and Marx, 1991; Garland, 1995).

Perhaps the most convincing empirical analysis of the 'resistance from the workers in the field to the new penological policies' is that by Mona Lynch (1998: 864, 2000), who conducted an ethnographic study in a parole field office of the California Department of Corrections. Contrary to the state-wide effort at the policy-making level to systematize parole as a mechanism for actuarial classification and aggregate management of danger (e.g. through the introduction of a computerized system for tracking parolees), Lynch showed, parole agents clung to the traditional notions of law enforcement and rehabilitation of individual offenders. To this end, they circumvented management demands to rely on faceless, bureaucratic risk-assessment techniques like scoring systems based on case histories, and chose actively to preserve and, most importantly, to prioritize 'an individualistic approach to the clientele and an intuitive approach to case management' (Lynch, 1998: 861–2).

Turning to some evidence from Britain, Robinson (2002) found that, although the Probation Service has now instituted a risk-based approach towards offender governance, having even introduced the use of statistical predictors of reconviction, rehabilitative

impulses and clinical decision-making practices still remain salient in the two English service areas she studied. Also, in two Scottish sites, Robinson and McNeill found that, despite an overarching emphasis on public protection as the official master narrative for probation practice, professionals exhibited a considerable degree of diversity of purpose and approach, to the point that the “softer” objectives of social inclusion and anti-custodialism’ (2004: 295) were pursued as well.

Similar examples abound (see, among others, Gordon, 1990; Maupin, 1993; McCorkle and Crank, 1996; Bayens et al., 1998; Brown, 1998; Brownlee, 1998; McIvor and Barry, 1998; McNeill, 2000; Kemshall and Maguire, 2001; Miller, 2001; Gartner and Kruttschnitt, 2004).<sup>11</sup> What all this evidence suggests is that, owing mainly to its inherently interactive and therefore affective nature, penal practice is more complicated, often also more hopeful, than Feeley and Simon’s broad brush allows. That is to say, unless our eyes catch the micro-level processes by which ‘the ideas that went into policy-making are re-examined and replaced, and the policy conflicts that first surfaced during enactment reappear’ (Lin, 2000: 17), we are misled to over-dramatise penal currents as being utterly mechanistic and irreversibly inhumane. But there is an additional reason, I believe, why the new penology paradigm carries overtones of undue pessimism. It is to this theme that the discussion now turns, albeit in substantially shorter compass.

### ***Coincidentia oppositorum***

So far, my analysis has proceeded in a somewhat Machiavellian manner: as if the symbiosis of managerialism or actuarialism and criminal justice cannot but be a deadly one, as if the two can only meet to the detriment of the true interests of either the offender or the society. No doubt this viewpoint, portrayed in great detail by the concept of new penology, is largely significant; yet, it is just one side of the coin. Having dwelt upon Feeley and Simon’s gloomy perception of contemporary penalty and its agents, it comes as no surprise that they downplay what Bottoms (1995: 30–2) terms the ‘consumerist’ dimension of managerialism (see also Rutherford, 1993; Raine and Willson, 1997). The latter, amid the search for technocratic solutions to the pressing calls for systemic efficiency – this is the ‘systemic’ dimension – concerns the effective delivery of individuals’ entitlements. In this view, people are not just seen as mere units within a framework of policy, but also as possessors of rights, ‘well able to judge (like a consumer in the private market) whether or not services are being well delivered’; thus, managerialism ‘contains both these images of personhood, but differently deployed on different occasions’ (Bottoms, 1995: 32). Under this model, offenders evaluate and, consequently, affect the system and its organization by means of lawsuits, and increased access to supervisors and formal grievance procedures (Lucken, 1998).

Besides, it has been argued that the original impetus towards introducing actuarial methods in criminal justice was to minimize problems of racism, sexism and other biases in discretionary decision making, and eventually to achieve equity and uniformity in punishment (see Gottfredson and Gottfredson, 1988; compare Petersilia and Turner, 1987; Tonry, 1996). There is also some evidence to suggest that ‘clinical’ assessments of the risk posed by individual offenders often are unduly pessimistic when compared with actuarial risk calculation (see, for example, Hood and Shute, 2000). Interestingly, Feeley himself, along with Rubin, has gone so far as to aver that

much of what we claim to dislike about bureaucracy – capriciousness, lack of accountability and unresponsiveness – represents the failure to bureaucratise our institutions sufficiently. . . . If bureaucracy and law are an iron cage that imprisons, they are also a bulwark that protects. (Feeley and Rubin, 1999: 284)

In a reversal of the Parsonian model, then, penal agents may well subscribe themselves to the use of certain managerialist methods, yet with a view to achieving deontological, rather than purely instrumental goals. To use Weberian language, under certain circumstances, charismatic reform may lead ‘into the path of rationality’ (see Mommsen, 1987: 49–51). Bureaucratic organizations, after all, are ‘not so much mechanisms as cultures, which opens the way to seeing them not only as instruments of rationalisation but as targets of it’ (Barnes, 2000: 86).

Two caveats should be issued here. This point is by no means contradictory to the perception of agents as either willing or able to place constraints on the managerialization of criminal justice. Nor is the purpose of the present analysis to lend support to such a hermaphrodite type of managerialism that embodies both systemic and consumerist elements. Rather, the intention is to highlight the possibility of a *coincidentia oppositorum*, that is, the unification of irreconcilables: if properly limited by responsible agents, and thus, if used as a means to clearly predefined humanitarian goals, rather than as an end in itself, managerialism can facilitate the ‘delivery’ of justice (see Liebling, 2004; also Raine and Willson, 1995, 1997; Bryans, 2000). Seen through this lens, to resist or negate the existing social order is not outrightly to dismiss all its content. Instead, much in accord with Hegel’s concept of *Aufhebung* (or sublation), progress or reform can be reached through a dialectical process of preserving positive contours of the present, while at the same time negating the negations that block human potentialities. In the words of John Holmwood, ‘although it is the case that innovation is always, in some sense, deviance [from systemic prescriptions], it does not follow that the reverse is true’ (1999: 286).

## CONCLUDING REMARKS

Reflecting upon what has been suggested so far, the new penology thesis suffers, more or less, from the same weaknesses as its intellectual *fons et origo*, that is, the early Foucauldian work on the technology of power (see Foucault, 1977). In particular, a holistic ‘history of the [penological] present’ (Simon and Feeley, 1995: 149) can neither ignore the conjuncture of social and penal developments that precipitated it, nor be limited to speculative macro-level analyses. Instead, it requires a more thorough historico-empirical examination of penal trends, in parallel comparison with the various micro-structures with which they interact (see Haney, 1996; Carrabine, 2000). To borrow the phrase used by Jonathan Steinberg (2002: 6) within a different context, one should take care to grasp the ‘banality of the good’, namely the power of human agents to resist and reverse unfortunate turns, wherever and whenever this power is found. This is not simply an issue of intellectual curiosity or epistemological holism. It is, above all, a task fraught with crucial ontological implications for penalty itself. In so far as criminology aspires to influence the penal policy debate to any significant extent, analyses that fail to identify ‘the real human stuff of disposition, choice and action – the stuff of which society and history are actually made’ (Garland, 2001b: 25) cannot

but be fatalistic and nihilistic, thereby inauspiciously (one could also say 'by way of benign neglect') contributing to the reproduction of the very crises they are supposed to pre-empt or combat.

On a more positive note, the amassing of critiques and, perhaps, the very tone of the present analysis should not be mistaken for a tirade against the concept of new penology. Although overstating penal currents, Feeley and Simon and their followers have undoubtedly done criminology and criminal justice policy a significant service by alerting us to some of the *potential* consequences of over-managerializing the penal sphere. As Schwartz and Friedrichs put it, 'if we ignore the postmodernists' warning, our future may be the seamless technological hyperreality that Baudrillard describes' (1994: 239), namely a world wherein, among others, simulations of justice will gain ascendancy over justice itself (see Baudrillard, 1981, 1983). Indeed, as demonstrated earlier, certain such implications may well be felt already, to a certain extent at least, among criminal justice professionals. Yet, in the dearth of convincing evidence that they signify a 'marked break with the past', and given that actuarialism is neither inevitable, nor necessarily undesirable in its entirety, the concept of new penology lacks interpretative adequacy and, consequently, remains a mere hypothesis. And this is a hypothesis which, in itself, Feeley and Simon would surely wish to see eventually disproved.

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### Notes

- 1 First introduced by Plato in his 'Republic', the distinction between the directly sensible world (phenomena) and the world of things as they truly are (noumena) is loosely used here in its early Kantian conception which provided for the intelligibility of noumena through pure reason (see Honderich, 1995).
- 2 Interestingly, in their latest account of new penology published in 2003, Feeley and Simon proceeded briefly to refine some of their main arguments. Most importantly, they admitted that new penology: is not wholly new; has not dominated contemporary criminology; and is not mutually exclusive with retribution. That being so, the present article should be read as a critique of new penology, not only as this has been developed by Feeley and Simon, but also as built upon by several other scholars.
- 3 To forestall disappointment, it should be noted that it is not the intention of this section to provide a comprehensive account of all pressures exerted upon criminal justice professionals; rather, the purpose is a selective review, to assist and illuminate the forthcoming analysis.
- 4 Interestingly, while Feeley and Simon view the new penology as emerging from an array of interconnected developments, rather than from 'a conscious and coherent agenda employed by a determinate set of penal agents or others' (Feeley and Simon,

- 1992: 449–50), Simon's own research on parole and his remarks on guidelines and the auditing of discretion lend considerable support to the opposite direction (see Simon, 1993: 230–49).
- 5 Taking this perspective one step further, Raine and Willson argue that, in England and Wales, such central directions to managerialism were not only effected by the drive of 'new right' politicians to inject private sector principles and practices into the public sector (see, for example, Cohen, 1985; Lampkin, 1991; Christie, 1993), but also, if not mostly, they 'have come to be seen as having a status and significance above party politics; as global phenomena of our time' (Raine and Willson, 1997: 82; see also Ritzer, 1993; Garland, 2001b; Newburn, 2002).
  - 6 This is by no means to say that inter-agency 'partnerships' are immune to conflicts. Crawford (1999), for example, argues that factors as diverse as organizational interests, access to information, claims to expert knowledge, working patterns and human and material resources often give rise to inter-organizational tensions.
  - 7 I borrow the term 'self-definition by rejection' from Anne Campbell (1987) who introduced it within a different context and from a more agency-conscious perspective, to describe how gang membership influences females' self-perception, particularly in opposition to the lifestyle expected from them by their local community.
  - 8 For the purposes of my analysis, I take labour to mean not only manual forms of work (which Marx, for reasons of historical specificity, addressed in main), but rather any situation where individuals sell their work for a wage (e.g. skilled work, office work and so on). It is noteworthy that, in light of the rise of service economy and managerialism after the Second World War, a small, but influential, group of radical leftist thinkers known as 'Socialisme ou Barbarie' sought to shift the focus from Marx's capitalist–proletariat dichotomy to what was seen as a new class division between 'order-givers' and 'order-takers'. In brief, Socialisme ou Barbarie (whose members included Cornelius Castoriadis and Claude Rebot) maintained that managerialism had superseded private ownership of the means of production as the key determinant of power relations, thereby placing workers (i.e. the order-takers) under the dominance of both capitalists and those who would give the orders in the workplace (Hetherington, 2003). What Socialisme ou Barbarie seemed to undermine, however, was the fact that, by and large, managers are 'order-takers' themselves, and that, for a variety of reasons, they may well be as eager to resist managerialism as their subordinates.
  - 9 As I argue in some detail elsewhere (see Cheliotis, forthcoming), despite ultimately serving given goals according to a plan that is objectively rational, acts of surreptitious resistance need not axiomatically be the outcome of genuinely conscious deliberations and scholastic ratiocinations. Instead, following Pierre Bourdieu, they may be viewed as spontaneous ripostes to social stimuli, rooted deep within an embodied practical reason (see Bourdieu, 1972/1977).
  - 10 Due to lack of space, I also eschew an examination of other reasons why professionals may resist subordination to systemic mandates. Such reasons usually include, but are by no means restricted to, unionization or what is commonly known as 'bureaucratic politics', and 'a tradition-oriented investment in "what worked" yesterday' (Liebling, 2004: 403).
  - 11 On the other hand, those studies that lend support to the concept of new penology

have neither the scope – they are most usually limited to a single dimension of penal practice – nor the conclusiveness to corroborate a ‘significant reconceptualisation of penology’ as a whole (Feeley and Simon, 1992: 470; see, for example, McWilliams, 1987; Simon, 1993, 1995; Shichor, 1997; Kempf-Leonard and Peterson, 2000). This, however, is not to deny the impact of managerialist ideologies on organizational practices. Liebling (2004), for example, has argued convincingly that managerialism has exerted a considerable influence on prison life since the mid-1980s. Rather, my intention here is to demonstrate the relative nature of Feeley and Simon’s remarks.

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