

Whither neoliberal penalty? The past, present and future of imprisonment in the US

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Abstract

Debates about the trajectory of prison rates in the US, on one hand, and about the prospects of the neoliberal international order, on the other hand, suggest the time is ripe for a reappraisal of penological scholarship on the relationship between neoliberalism and imprisonment. With the aim of responding to this challenge, this article considers the relevance of the so-called ‘neoliberal penalty thesis’ as a framework through which to interpret recent and ongoing developments in US imprisonment. We first set out the core propositions of the thesis and engage with a range of critiques it has attracted regarding the role of crime and government institutions, the evolution and functions of state regulation and welfare provision, and reliance on imprisonment as an indicator of state punitiveness. We then outline the principal arguments that have arisen about the direction of contemporary prison trends in the US, including since Donald Trump was elected to the presidency and took office, and proceed to distil their commonly opaque treatment of the intersections between neoliberalism and imprisonment, also clarifying their respective implications for the neoliberal penalty thesis in light of the main critiques levelled previously against it. In so doing, we go beyond the penological field to take into account concerns about the vitality of neoliberalism itself. We conclude that international politico-economic developments have cast considerable doubt over the pertinence of neoliberalism as an organising concept for analysis of emergent penal currents.

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Introduction

Across the Western world over the last five decades or so, many states have witnessed an immense growth in their rates of imprisonment. The parallel rise of neoliberal dogma and policy has stimulated a wave of research exploring the apparent connection between neoliberalism and imprisonment. Neoliberalism has come to be interpreted as a creed of governance in which free market principles are preeminent, government intervention in social provision is eschewed, and private enterprise is privileged. The ascendancy of neoliberal thought in policy-making has in turn driven a shift in the structure of capitalism, towards a form in which the domestic and international activities and profits of finance capital have been unleashed, thereby resolving what had been mounting pressures on the profitability of capitalism in its Fordist, production-focused iteration. Yet neoliberal agendas have not advanced equally or uniformly everywhere; in different jurisdictions, neoliberal policy-making has proved expressive of divergent views about the route required to achieving an unfettered market, including, to that end, the proper size and role of the state in social and economic fields (Gamble, 2009). It is little surprise that the contested and pluralistic character of neoliberalism has thwarted the emergence of a consensus regarding its relationship with imprisonment. Whilst it has generally been contended that higher imprisonment rates constitute an essential dimension of state punishment under neoliberalism, it has also been argued conversely that the reduced use of imprisonment would align more closely with neoliberal precepts, and attention has been drawn to the contingent and manifold articulations of neoliberal penalty across time and space (see e.g. O'Malley, 2015).

Debates about the recent, present and future trajectory of prison rates in the US, against the background of questions accumulating about the vitality of neoliberalism as such, suggest there is pressing need for a reappraisal of penological scholarship on the connection between neoliberalism and imprisonment. With a view to providing just such an appraisal, this article focuses on the US as a case study, a choice justified both by the central place accorded to the US in prior work on the relationship between neoliberalism and incarceration, and by the role commonly ascribed to the US as a key disseminator of neoliberal policy-making and the prime originator of the global neoliberal system. We begin by setting out the core propositions of the so-called 'neoliberal penalty thesis' and proceed to engage with a range of critiques it has attracted concerning the part played by crime and government institutions, the evolution and functions of state regulation and welfare provision, and reliance on imprisonment as an indicator of state punitiveness.

We then outline the principal arguments that have emerged over the direction of contemporary prison trends in the US, and distil their typically opaque treatment of the intersections between neoliberalism and imprisonment, also clarifying their respective implications for the neoliberal penalty thesis in light of the main critiques raised so far against it. In so doing, we go beyond the penological field to take into account doubts that have arisen about the prospects of the neoliberal international order itself.

The neoliberal penalty thesis

A large number of penologists concur that neoliberalism plays an adverse role in penal matters. No broad consensus exists, however, as to what this role precisely entails or how significant it actually is. For some writers, such as Garland (2001) and Simon (2007), neoliberalism has been a key backdrop to growing state punitiveness in the US and elsewhere, but not its cause. For others, such as Lacey (2008), neoliberalism has been a driving force, albeit one that has been mediated by a variety of institutional forces.¹ And then there are scholars who have put forward what has come to be known as the 'neoliberal penalty thesis'. Here, the rise of neoliberalism is singled out as the primary propellant of state punitiveness, with concurrent variables receiving recognition yet ultimately treated as of lesser importance.²

In line with the long tradition of research into the relationship between systems of production and the use of punishment, the neoliberal penalty thesis starts from the premise that the degree and form of state punitiveness in a society are largely determined not by crime trends but by economic and fiscal forces. At the same time, proponents of the neoliberal penalty thesis insist on the distinctiveness of punishment under neoliberalism as compared to under capitalism per se, typically evoking imprisonment trends to contend that state punitiveness has grown and continues to be at its most acute in jurisdictions where neoliberalism has advanced fastest and furthest.

In what is arguably the clearest and most influential exposition of the neoliberal penalty thesis, Wacquant (2009a, 2009b) suggests that neoliberalism entails the articulation of four specific 'institutional logics': economic deregulation, welfare retrenchment, the cultural trope of individual responsibility, and the expansion of the state's penal apparatus. That Wacquant treats the growth of the penal state as an integral component of neoliberalism is because, in his view, the former helps to manage the social reverberations of 'advanced social insecurity' that socio-economic policies pursuant to the latter generate amongst the lower and middle classes. At the bottom of the class structure, Wacquant explains, the threat and reality of punishment work to contain the disorders stoked by the 'objective' insecurity of the poor, faced as they tend to be not only with long-term unemployment or highly flexibilised conditions of work but also with severely weakened welfare protections. At the same time, 'punishing the poor' creates a convenient outlet for the 'subjective' insecurity experienced by the middle classes, 'whose prospects for

smooth reproduction or upward mobility have dimmed as competition for valued social positions has intensified and the state has reduced its provision of public goods' (Wacquant, 2009b: 300). Punishment of lower socio-economic classes thereby eventually provides a means by which political leaders can compensate for legitimacy lost in pursuit of neoliberal socio-economic agendas (see also Cheliotis, 2013; De Giorgi, 2006).

Notwithstanding some disagreement over the relative significance of class vis-à-vis race (see e.g. Gottschalk, 2015), it is commonplace in neoliberal penalty scholarship to illustrate neoliberalism's ascribed penal proclivity by reference to unjustifiably high rates at which poor citizens with a racial minority status (e.g. dispossessed African Americans in the US) are over-represented amongst incarcerated populations in different neoliberal societies. Attentive to the rapid rise of immigration from disadvantaged parts of the world over recent decades, a small but growing number of neoliberal penalty scholars have also begun extending their analyses to the treatment accorded by recipient societies to foreign migrants, and especially to those amongst them lacking documentation. Thus, for example, the systematic mass confinement of destitute undocumented migrants within either conventional prisons or administrative detention centres under the guise of security and legality in the US and other neoliberal countries has been interpreted as vital to the economic order in place, both in the sense of helping to discipline vast swathes of low-wage and surplus migrant labour and as a tool to divert and expend native middle-class anxieties of a socio-economic nature (see e.g. Cheliotis, 2017; De Giorgi, 2006; Golash-Boza, 2015; Melossi, 2015; Wacquant, 2009a).

Adding further nuance to the neoliberal penalty thesis, some writers have sought to stretch it beyond the state-centric boundaries within which it is commonly framed. Attention, in this case, has been focused predominantly on neoliberal commitment to the privatisation of public services under the often false pretext of saving taxpayer money, which is thought to have fuelled an expansion in the private provision of imprisonment, particularly in the US. A good amount of evidence has been presented to corroborate this effect, from the spread of the private prison estate itself to the hybridisation of public prisons, insofar as the latter have contracted out the delivery of select services (e.g. catering and security) to private firms, have allowed private and state-owned firms to exploit prisoner labour for profit, and have charged prisoners for costs related to their containment (De Giorgi, 2015; see further Kilgore, 2013; Parenti, 1999). Yet the role of corporate interests in driving the prison boom more generally remains contested. Whereas, for example, Schlosser (1998) speaks of the rise of a 'prison-industrial complex', in which private prison firms have collaborated with bureaucratic and political actors to effectively secure a steady supply of offenders for incarceration, Gilmore (2007) lends less significance to lobbying efforts by the private sector, pointing to the fact that the overwhelming majority of US prisons have continued to be publicly owned and operated (see also Kilgore, 2013; Gottschalk, 2015; Wacquant, 2009a).

Critiques of the neoliberal penalty thesis

Although – or, indeed, because – the neoliberal penalty thesis has proved highly attractive, it has also faced a barrage of criticisms from a host of penological and other perspectives. Below, we bring together and reflect on the most important of these criticisms. In so doing, we seek to establish a more rounded understanding of the connection between neoliberalism and imprisonment, from which we can then go on to assess the implications of contrasting perspectives on contemporary penal trends in the US for the neoliberal penalty thesis.

Imprisonment and crime: Are they really disconnected? As mentioned earlier, proponents of the neoliberal penalty thesis have so far tended to gauge state punitiveness by reference to the use of imprisonment, at the same time as taking for granted that levels of imprisonment have little, if anything, to do with trends in crime. Evidence on crime trends in neoliberal and other contexts does not provide unqualified support for a massive disjuncture between crime rates and levels of imprisonment, however, thus casting doubt on the notion that neoliberalism is causally related to penal expansion in a simple linear fashion. Lacey and Soskice (2015), for instance, have argued that the US stands out from other similar economies not just in terms of its extensive use of imprisonment but also in terms of its officially recorded prevalence of serious violent crime, whilst Lynch's (2007) state-by-state analysis of the US case has shown that higher rates of imprisonment are usually to be found in states with higher rates of crime (see also Nelken, 2009; Newburn, 2010).

The general thrust of the neoliberal penalty thesis is nevertheless salvageable, so long as it can be shown that state punishment under neoliberalism has risen at a substantially faster pace than crime itself. Such discrepancy with regard to the US, for example, can be identified in Lynch's (2007) juxtaposition of annual nationwide percent changes in the number of index crimes and the number of imprisoned individuals between 1973 and 2002, and in Ahn-Redding's (2007) state-by-state comparison of percent changes in the rate of violent crime and the rate of incarceration between 1980 and 2002. This being the case, one could argue, following Western (2006), that trends in crime are not the cause but the context for the expanded use of imprisonment in the country, in that they contributed to feelings of vulnerability amongst Americans and created a political opening for a shift in crime policy that ultimately increased the incarceration rate (see also Cheliotis, 2013).

State punitiveness: Imprisonment and beyond. Beyond crime trends, critics of the neoliberal penalty thesis also argue with the tendency found in pertinent scholarship to assess the punitive outcomes of neoliberalism by reference to prison rates alone. Stretching their descriptive accounts beyond imprisonment, yet without necessarily disputing the value of politico-economic explanations per se, such commentators have commonly problematised the notion that the ascent of neoliberal socio-economic policies has brought about distinctly different levels or patterns of

state punitiveness as compared to past experiences. Harcourt's (2010) account of varying forms of detention in the US from the 1930s onwards, for instance, has shown that the rapid rise in the use of imprisonment as of the 1970s was preceded by comparably high rates of confinement in mental institutions. This enables Harcourt to suggest that the overall form and mission of what is commonly referred to as 'neoliberal penalty' are actually not unique to recent decades, insofar as the capitalist state has always sought to maintain order in the marketplace by criminalising deviators from the market and locking them away in one site or another.

This is not to imply that gauging state punitiveness solely by reference to rates of imprisonment is necessarily helpful in terms of substantiating the neoliberal penalty thesis. The US case suggests that imprisonment trends may exhibit important variation both between and within neoliberal economies. It is nevertheless possible to argue that a broadened conceptualisation of state punitiveness, one attentive to the array of institutions that may have punitive effects, might allow for unearthing evidence in support of the neoliberal penalty thesis. We have already alluded to this point with reference to research on the rise of immigration detention, on which more presently. But it is equally likely to trace a link between neoliberalism and state punitiveness by dissecting recent penal developments of an avowedly welfarist orientation, such as the rise of restorative justice and the proliferation of prison programmes that claim to 'empower' and 'rehabilitate' prisoners (see e.g. Cheliotis, 2014). That exponents of the neoliberal penalty thesis have so far largely missed this opportunity is partly because they have been inclined to neglect evidence that penal welfarism has not necessarily waned in scope and importance, and partly due to a tendency amongst them to treat penal welfarism as inherently antithetical both to state punitiveness in itself and to political projects of disciplinary control over disadvantaged populations that it may latently support.³

The promise and challenge of institutionalist analysis. Leaving aside debates over the core premises of the neoliberal penalty thesis as such, it is still unclear how public concerns about crime translate into punitive penal policies and practices. Helpful pointers can be found in institutionalist scholarship that has otherwise complicated linear cause-and-effect accounts of the relationship between neoliberalism and state punitiveness. Most famously, Lacey's (2008) international comparative work suggests that the penal effects of neoliberalism are mediated and filtered by a range of political and legal institutional forces. Thus, Lacey argues, if neoliberal economies are more likely to pursue punitive penal policies, this is in good part because they tend to have two-party majoritarian electoral systems. On one hand, such systems encourage parties to focus on attracting the 'floating' median voter through exploiting salient issues such as crime and its control, and on the other hand, they produce governments relatively unconstrained by the need to negotiate and compromise with the opposition, as well as being more likely to ignore the expertise of the professional bureaucracy when this interferes with political expediency. If, Lacey argues further, the US is more prone than similar

economies to deploying imprisonment, this stems in significant measure from institutional characteristics peculiar to the US itself. These include, for instance, a court system where the large majority of judges are elected by the public, which inevitably weakens a key barrier between popular demands for punishment and sentencing (see also Barker, 2009; Lacey, 2011; Lacey and Soskice, 2015; Lynch, 2010; Miller, 2008).

But just as institutionalist insights could be thought of as filling an important ‘procedural’ gap in the neoliberal penalty thesis whilst leaving its essential core more or less intact, so too it is possible to interpret institutionalist findings as cautions against overestimating the generative role of neoliberalism in the field of punishment. The latter possibility is especially likely when institutionalist analyses highlight the historical embeddedness of penal policies and practices observed in the context of neoliberal economies. Such is the case, for example, with Gottschalk’s (2006) account of the integral role of prison policy in the political development of the US, in which she identifies several pre- and post-war developments directly impinging upon the institutional scope and nature of the law-and-order apparatus in the country, from the growth of the Federal Bureau of Investigation and the militarisation of crime control to the expansion of the federal prison system. The earlier emergence of these developments, Gottschalk explains, augmented the state’s operational capacity to punish and, in so doing, helped lay the practical foundation for the subsequent incarceration boom that began in the 1970s under neoliberalism.

Neoliberalism in practice. Whilst the penal efficacy credited to neoliberalism has been challenged or at least qualified by a large number of scholars and from a variety of vantage points, a priori assumptions regarding the existence and precise components of neoliberalism as a socio-economic reality have usually been taken at face value. If one distinguishes between the socio-economic rhetoric and practical manifestations of neoliberalism, however, one is confronted with a range of contradictions that bear important implications for the analysis of its relationship to punishment.

Before anything else, as Gottschalk (2015) argues in her account of the US case, the very observation that state punitiveness increases with the neoliberalisation of the economy implies essentially that neoliberalism fails on its own terms, to the extent that it is axiomatically supposed to entail minimal state intervention across all spheres of life.⁴ Gottschalk goes on to argue that the vast cost incurred by the public purse in order to support the expansion of an apparently counter-productive penal system makes this failure even more grave, as neoliberal minimalism is largely propounded on grounds of economic efficiency and cost-effectiveness. What has allowed US neoliberalism to sustain its vitality is, in Gottschalk’s view, a range of ‘political sleights of hand that keep those contradictions out of the public eye and out of the public debate’ (ibid.: 13).

But whilst it is plausible that the political need for obscuring the budgetary implications of penal expansion is especially high under neoliberalism, the

politico-economic functions penal expansion is thought concurrently to perform require, of necessity, that it maintain a sufficient degree of visibility. How else could punishment work to threaten those at the bottom of the class structure into accepting their sustained or deepening poverty? And how else could punishing the poor serve as an outlet for the insecurities experienced by the middle classes? From this perspective at least, Wacquant (2009b) appears justified in his choice to treat the growth and rollout of the penal apparatus as an integral and necessarily visible component of neoliberalism, rather than an uncomfortable deviation from it (although, as we shall see below, other key practical manifestations of neoliberalism may indeed be cloaked).

One way or another, if punishment is the field where the neoliberal state is thought to expand and intensify its operations, the economy is the field from which it is thought to withdraw itself as a matter of course in the dual sense of market deregulation and welfare retrenchment. As mentioned earlier, the neoliberal penalty thesis in fact suggests an inverse causal relationship between developments in the two fields. In the words of Wacquant (2009b: 19), 'the poverty of the social state against the backdrop of deregulation elicits and necessitates the grandeur of the penal state'. Upon close inspection, however, both market deregulation and welfare retrenchment turn out to be less self-evident than neoliberal penalty scholars tend to have us believe.

As Harcourt (2010) argues, just as it is wrong to believe that markets of the past were excessively regulated, so too it is erroneous to assume that today's free markets are under-regulated. The chasm between neoliberalism-in-theory and neoliberalism-in-practice is no accident, Harcourt claims; it is rather part of a political ploy intended to mask both the neoliberal state's own regulatory role in the market and the enormous wealth distributions systematically occurring therein. A similar argument is raised by Soss et al. (2011) in relation to social welfare provision under neoliberalism, at least with regard to the US. Here, too, the state is argued not to have abandoned its traditional interventionist role, despite its rhetoric essentially suggesting otherwise. Indeed, Soss et al. contend that the neoliberal state has actually expanded social programmes that target the poor, if with subtle conditionality designed to push recipients into exploitative low-wage work. Thus, Soss et al. conclude that the neoliberal agenda of disciplining the poor has entailed not only penal but also, in tandem, welfarist forms of regulation, with logics of the former having increasingly infiltrated the latter (in the sense, for example, that state authorities employ close supervision and sanctions to control welfare recipients' conduct).⁵

Although such critiques do not discredit the utility of neoliberalism as a concept for penology, they do imply that one can neither properly speak of neoliberalism's penal efficacy as such, nor ascertain its scope and degree, without first accurately grasping what neoliberalism concretely entails in socio-economic terms (see further Cheliotis and Xenakis, 2010). At least as concerns the case of the US, the suitability of neoliberalism as an analytic tool for the purposes of contemporary penology has been further complicated over recent years, including since Donald Trump was

elected to the presidency and took office, due to important developments in the economic arena, as well as in politics and penalty. In the remainder of the article, we go on to explore key debates surrounding these developments and draw out their implications for the continuing relevance of the neoliberal penalty thesis in light of the main critiques levelled previously against it.

Whither neoliberal penalty?

In recent years, evidence of a decline in the US prison population has provoked questions about the likely future trajectory of state punishment in the country. The overall size of the prison population began to fall in 2010, and by 2015, it had dropped by 8.4% to return to 2005 levels (Carson and Anderson, 2016). Whereas optimistically inclined commentators have interpreted this downward trend as portending the rollback of punitive policies and practices, pessimistic others have problematised the occurrence of a decline as such, whilst also warning that the prospects for penal liberalism under the Trump administration are dim. Below, drawing on scholarly, media and civil society sources, we elaborate the reasoning behind each of these divergent assessments.

Optimistic outlooks. Optimists have argued that the incipient pattern of declining prison rates will be embedded by a combination of factors, ranging from crime drops and what they perceive to be the fading of public memories of high-crime eras to rising pressures for fiscal constraint in the public sector. The latter pressures, as Dagan and Teles (2014) explain, have emanated not simply from multiple state-level fiscal crises following the 2001 and 2008 recessions but also, and more importantly, from the rise of politicians with greater ideological commitment to budgetary retrenchment.

Positive prognoses along these lines have been reinforced by a series of developments. First, over recent years, liberalising penal reforms have been adopted in several states. California, Massachusetts and Nevada, for example, voted to decriminalise marijuana, California and Oklahoma passed initiatives to reduce penalties for several offences, and New Mexico brought in a constitutional amendment to prevent the jailing of those unable to afford bail. For optimists, the sustainability of such reforms is credible given the rise of cross-party support for the reduced use of imprisonment, a development facilitated by a marked move away from allegiance to 'tough on crime' policies within conservative right circles. The establishment and activities of the 'Right on Crime' lobby group for criminal justice reform, for instance, have attracted support from an array of high-profile current and former politicians and elected officials on the right, as well as from powerful special interest groups such as the Koch Institute and the Heritage Foundation. In addition, optimists point to the fact that several Republicans close to Trump are known to have previously voiced support for reforms to criminal justice (Newsweek, 2016; Reuters, 2016), and it has also been argued that the

record of even some reputed hardliners has been exaggerated (Greene and Schiraldi, 2016; New York Daily News, 2016).

Optimists also invoke evidence of significant public support for liberal penal reform, whether in the form of opinion polls indicating the presence of strong sympathy for more moderate sentencing and prison policies (Enns, 2016), or in the form of victories for reformist candidates in prosecutorial elections within several states (including some, such as Florida and Texas, which voted for Trump in the latest presidential race) (Vox, 2016). This has led to hopes and expectations that apparently emergent decarcerative trends will in due course be strengthened through greater use of diversionary measures and the renaissance of a rehabilitative logic behind penal practices, which together have been credited with the potential to bring about 'one of the most equality-enhancing institutional shifts' of our times (Phelps and Pager, 2016: 198).

For optimists, the developments outlined above, allied with long-established constitutional limits to federal intervention at state and local levels (whereby sovereignty is divided between the central federal government and state governments), mean that the impetus already garnered for penal reform is unlikely to be impeded in the face of whatever punitive intentions the Trump administration may have (Grawert, 2017; Phelps et al., 2017; Vox, 2016; see also Lynch and Verma, 2015). That federal incarceration rates may become inflated under Trump is taken to be of negligible import to broader penal trends anyway, given the small size of the federal prison sector, its imprisoned population estimated at a mere 12% of the national total (see e.g. Pfaff in Newsweek, 2017).

Pessimistic outlooks. By contrast, pessimistic commentators have pointed to mounting evidence of continuing and, indeed, growing state punitiveness. Before anything else, pessimists argue, the much-hailed decline in prisoner numbers has been neither uninterrupted nor system-wide: the total prison population rose both in 2013 and 2014, and half of US states still saw increases between 2009 and 2013. The fact that an overall reduction has nevertheless been registered, pessimists go on to suggest, should not be taken to imply that the scale of the reduction has been equally stark amongst those states where it has occurred (see further De Giorgi, 2015; Lynch and Verma, 2015; Martin, 2016).

At least two other, albeit by no means incompatible, pessimistic perspectives have sought to reveal ways in which recent penal reforms have practically served to sustain and even enhance pre-existing punitive trends. On one hand, the apparent decline in prisoner numbers has been interpreted as an exercise in the decentralisation and diffusion of punishment along 'transcarceral' lines (De Giorgi, 2015), much more so than a shift towards decarceration per se. For instance, Cate (2016) points out that, despite reductions in the volume of juveniles held in state-run prison institutions, the overall size of the juvenile population behind bars has not really dropped. Rather, responsibility for juvenile imprisonment has merely been devolved and dispersed from the state level to local and private authorities (see also Lynch and Verma, 2015; Martin, 2016). Indeed, as Gottschalk (2015)

underscores in her account of the growth of the private prison sector, this diffusion has been facilitated in no small part by the rise of the narrative calling for cuts to state budgets related to incarceration amidst conditions of economic recession, even though in practice its cost effectiveness is doubtful.

On the other hand, the scope of recent penal reforms has been criticised as inherently limited and their effects consequently as contradictory, even when their liberalising aspirations have not necessarily been questioned. For example, Cadora (2014) argues that the reversals of punitive legislative statutes at state level could not have singly ensured significant reductions in imprisonment, and that the additional institutional and community measures required to this end have typically been absent. That lawmakers have often treated freezes or marginal drops in prisoner numbers as indicators of sufficient success has meanwhile worked to pre-empt and, ultimately, forestall moves towards more extensive reform (see also Gottschalk, 2015; Tonry, 2017). What is more, according to Beckett et al. (2016), legislative reforms have also lent legitimacy to increasingly severe punishment for the mass of offenders not qualifying for the comparatively lenient treatment introduced by new provisions.

More recently, pessimists have drawn attention to the notice effectively given by the Trump administration of its intention to put more people behind bars, starting with its withdrawal of previous Department of Justice guidance to the Federal Bureau of Prisons to reduce the use of private prisons, on the grounds that the Bureau's ability to meet the future needs of the federal correctional system would otherwise be impaired (NPR, 2017). The subsequent instruction to federal prosecutors to 'charge and pursue the most serious, most readily provable offence' has similarly been interpreted by many observers as signalling the reinvigoration of a harsher sentencing ethos, particularly towards drug offenders, and thereby raising the prospect of a rise in the federal prison population (see further Lynch interviewed in Slate, 2017; The Sentencing Project, 2017). Such concerns have been sustained by the addendum provided by the Department of Justice to the administration's federal budget proposal for 2018, setting out its expectation that the federal prison population would grow by 2% that year as a consequence of higher numbers of prosecutions (Wall Street Journal, 2017).

The new administration's focus on immigrant criminality, pessimists claim, has made this prospect all the more likely (Wall Street Journal, 2017; CBS News, 2016). Several facts point to this direction. On one hand, irregular entry and re-entry into the country have in recent years come to account for roughly half of all federal criminal prosecutions, and the increase in foreign-born prisoner numbers appears to have made a disproportionately large contribution to the expansion of the federal prison population (Macías-Rojas, 2016). On the other hand, the Trump administration has sought to tighten immigration law enforcement further: an Executive Order issued in January 2017, for example, introduced an array of measures to enhance the enforcement of federal immigration laws (White House, 2017), and a subsequent memo by the Department of Justice directed federal prosecutors to prioritise criminal immigration enforcement (Department of

Justice, 2017a). Thus, between January and April 2017, a 38% increase was reported in the number of immigrants arrested by US Immigration and Customs Enforcement (ICE) as compared to the same timespan in 2016, despite the fact that the volume of undocumented migrants caught crossing the US-Mexico border saw an ‘unprecedented drop’ of 40% over January and February (USA Today, 2017). As of late March 2017, moreover, 22% of federal prisoners were foreign-born, against the majority of whom ICE had issued or was pursuing a deportation order (Department of Justice, 2017b).

More broadly, Trump’s apparent penchant for exploiting his privileged role in shaping public discourse so as to pre-empt, suppress or otherwise undermine resistance to his agenda, combined with the considerable success his administration has already had in promoting punitive policies beyond the carceral field itself, has provoked concerns as to the fate of the momentum seemingly achieved towards liberal penal reform to date. Pessimists underscore not only that Trump has publicly denigrated and even issued threats against those placing checks on his administration, from members of the judiciary and the intelligence community to segments of the mainstream mass media and the citizenry (see e.g. Ben-Ghiat, 2017; The Atlantic, 2017). With a steady stream of inflammatory rhetoric on crime and its control, he has also sought to whip up public pressure in order to bring or keep officials behind his criminal justice initiatives as such. The implication here is that public fear of criminal victimisation may be raised by Trump’s repeated gross overstatement of crime trends and his insistent call for harsher criminal justice measures in response, and this in turn could bring a halt to the reformist plans of liberal-minded elected officeholders hoping to retain popular support (Grawert and Camhi, 2017).

Relatedly, pessimistic expectations regarding liberal reform in the use of imprisonment have been couched in accounts of an upturn in punitiveness already effected across other parts of the criminal justice system. Critical scrutiny has been directed most notably towards steps taken by the Trump administration to embolden the police and augment their powers – from the decision to limit the Department of Justice’s pursuit of civil rights suits against police departments, to the rescinding of restrictions on the federal forfeiture of assets seized by state or local police forces, to the lifting of limits on the transfer of surplus military equipment to local police agencies – alongside the intensification of zero-tolerance policing of underprivileged ethnoracial communities and the adoption of a more draconian approach to tackling civil disobedience on the streets (see further Ben-Ghiat, 2017; Levitsky and Ziblatt, 2017; ThinkProgress, 2017; The Guardian, 2017).

Post-neoliberal penalty? Whatever the merits of the distinct optimistic and pessimistic perspectives above, they have generally not reflected on the impact neoliberalism has on penal trends.⁶ Yet implications for the neoliberal penalty thesis can still be extrapolated from both. From the former perspectives, the foundational principle of the neoliberal penalty thesis seems to be inverted, neoliberalism apparently intensifying whilst imprisonment declines. That is to say, optimistic outlooks

often attribute an important role to neoliberal politico-economic dynamics in shaping penal trends, crediting meso-level fiscal pressures on policy-makers of all political shades as a key factor behind the seeming reduction in imprisonment. But – and this is not necessarily a challenge to the neoliberal penalty thesis as such – optimists do tend to suggest that prison rates are tangentially related to crime, insofar as falling crime rates have enabled the emergence of more liberal public sentiment, and that in turn has facilitated the decreased use of imprisonment. Nevertheless, in heralding the growth of cross-party support for penal reform, as well as a swing towards more liberal public opinion and, related to this, the election of reformist public prosecutors, optimists also strikingly invert that institutionalist argument which ties the penal excesses of the US to the competitive electoral demands woven into its apparatus of government. Rather, optimists underscore the leeway provided for liberal agendas by the federalist rules of the US Constitution, to the extent that the latter allow punitive policies pursued by central government to be legally contradicted at state and local government levels.

From pessimistic perspectives, meanwhile, a modified version of the neoliberal penalty thesis can be discerned, with a more diffused mode of neoliberal penalty unfolding, if one no less dystopian than its predecessor. This is a version in which the state may be retreating following the logic of neoliberal budgetary pressures, but only in the sense that it devolves more of its authority and responsibility for the delivery of punishment to private actors, both commercial and third sector (e.g. charities). It is also a version in which the authority of criminal justice institutions is subject to heightened challenge, to the extent that there have been repeated efforts on the part of the Trump administration to subvert formal structures and processes, both directly, through intervention in what are constitutionally prescribed as independent decision-making procedures, and indirectly, by stoking punitive public sentiment to put pressure on elected officials.

At the same time, pessimistic observations of the subjects of punishment suggest the potential for a departure from the operations and functions of neoliberal penalty as commonly conceptualised to date. Albeit with new vigour, the overt targets of central government's punitive imperatives continue to match the profile of those previously identified as the 'preferred clients' of inflated prisons under neoliberalism (Wacquant, 2009a), regardless of actual crime trends. Insofar as stigmatising invective in relation to issues of crime and punishment has been directed by the Trump administration against members of the judiciary, the intelligence agencies, journalists of the mainstream media and protesting members of the public, however, it represents a new threat to the middle classes. Should this threat be pursued further – the broadening and emboldening of police powers signalling that it might – the function of punishment would no longer be the general discharge of displaced middle-class insecurities and the containment of unruliness amongst the lower classes, as foreseen within most iterations of the neoliberal penalty thesis. Punishment would displace the insecurities of some (e.g. relatively disadvantaged white conservative) members of the middle classes, whilst disciplining others (e.g. affluent educated urban-dwelling liberals) in terms

of their participation in public life, whether in their capacity as professionals or as private citizens.

Beyond debates between optimists and pessimists about the present trajectory of penal policies and practices as such lies a further debate of crucial importance to any assessment of the continuing relevance of the concept of neoliberal penalty; that concerning the status and future of neoliberalism as a socio-economic reality. Both optimists and pessimists have appeared to assume continuity in the neoliberal context to policy-making going forward, treating it, respectively, as either a motor behind a disempowering contraction of the state or as a force sustaining the reach of the state even whilst diffusing its authority. Over recent years, however, the future of neoliberalism has attracted greater scrutiny, not least as a result of the financial crisis that struck the US, as well as much of Europe, between 2008 and 2009, and the ensuing reactions of governments. On one hand, the crisis appeared to lay bare the ideological and institutional failings of neoliberalism, particularly with regard to its assertion of the market's self-correcting properties. On the other hand, the speed by which governments cast aside key tenets of the doctrine to intervene, providing massive bail-outs and stimulus packages so as to avert the collapse of banking and financial institutions, exposed the shallowness of their commitment to neoliberal principles (Birch and Mykhnenko, 2010).

Although much commentary in the immediate aftermath of the crisis lamented that it was effectively 'business as usual' for neoliberalism, it has more recently been argued that ongoing economic strains should be interpreted as signs of a deep structural crisis and an impending major institutional restructuring of capitalism, in which central tenets of neoliberalism will be jettisoned (Kotz, 2015). Economic analysis uncovering a retreat of core elements of globalisation since 2008 suggests this restructuring may have already begun. Salient features of what have been identified by some experts as nascent processes of 'deglobalisation' include a decline in net international flows of goods, services and finance relative to GDP (Gross Domestic Product), and a rise in state interventionism and trade barriers (see e.g. BMI Research, 2016), with negative implications for neoliberalism given the priority accorded by the latter to removing obstacles that encumber these flows.

The likelihood of large-scale dismantling of global trade and, more broadly, the institutions, rules and norms that underpin (neo)liberal international order, has been regarded as a coming step closer with the arrival into office of an avowedly isolationist anti-free-trade US president, one as ambivalent about NATO (North Atlantic Treaty Organisation) as about NAFTA (North Atlantic Free Trade Agreement) (see e.g. Applebaum, 2016; *The Independent*, 2017). Following through from the Trump administration's declared commitment to 'put America First', the US has withdrawn from the Trans-Pacific Partnership (TPP) trade pact and has committed to re-negotiating NAFTA. Having additionally triggered an unprecedented set of investigations into a wide range of foreign imports with a view to unilaterally imposing trade tariffs in ways that would likely violate World

Trade Organisation (WTO) rules (Bown, 2017), the Trump administration has also emphasised that ‘Americans are not directly subject to WTO decisions’ (OUSTR, 2017: 3; see further NPR, 2017).

To the extent that such steps portend the demise of neoliberalism, they cannot but also signal the end of neoliberal penalty, both as a practical reality where it has been present and as a useful theoretical framework for scholarship seeking to interpret levels and patterns of punishment going forward. In the case of the US, neoliberalism would thus clearly lose its traction as an organising concept for analysis of penal trends as they unfold.

The neoliberal penalty thesis: Past, present and future

Over the last couple of decades or so, the thesis of a positive relationship between the pursuit of neoliberal socio-economic policies, on one hand, and the expansion of imprisonment, on the other, has attracted considerable attention and debate. The identification of limitations of the thesis has arguably extended its mileage by indicating ways in which it might be refined, whether in terms of the method required to test it (e.g. the need for comparative perspectives) or in terms of substantive insights (e.g. the mediating role played by institutional forces).

At least as regards the US case, however, a striking alternative vision of a carceral rollback arose and has gathered ground since 2010. Although some have gone so far as to predict the end of excessive state punitiveness, others have questioned the extent of the rollback itself. And whilst optimistic outlooks have shown notable tenacity in the face of Trump’s election to the White House in 2016, pessimistic assessments have multiplied. Both camps have typically appeared to assume the persistence of neoliberal socio-economic policy, optimists treating this as a push factor behind what they see as the reduced use of imprisonment, and pessimists conversely approaching it as a propellant of punitive criminal justice policies and practices. Our brief foray into emerging debates on the future of the neoliberal international order leads us to question this assumption. It is quite conceivable that the US may be on the cusp of a period of increased incarceration (as well as a rise in other forms of state punitiveness), yet one driven not by neoliberalism, but by a nationalist authoritarianism.

More generally, our findings suggest that the historical specificity and contingent nature of economic systems need to be acknowledged, not just in order to avoid the reductive attribution of neoliberalism to a single variant type but also in order to avoid reifying neoliberalism as a key referent with which contemporary penal trends are interpreted. To this end, however, politico-economic approaches to penalty need to go beyond national-level insights so as to reflect on hitherto neglected international-level trends. Lack of attention to the latter has risked a failure to appreciate the potential for fundamental economic and political change within Western states, a potential that many commentators believe is currently on the horizon and, indeed, one likely to spread, since an abandonment of neoliberal

policy-making in core Western states and an associated collapse of the international neoliberal order would inevitably challenge the prospects of neoliberalism in other countries around the globe. Even this eventuality, we contend, would not make the notion of neoliberal penalty redundant; the latter would retain analytic purchase, if primarily for the study of a past phase in the relationship between economic conditions and punishment.

Notes

1. Drawing on Hall and Soskice's (2001) Varieties of Capitalism paradigm, Lacey's discussion of neoliberalism concerns cases of liberal market economies that have shown particular, if still variable, propensity to adopt neoliberal policies. Lacey is, in fact, critical of the concept of neoliberalism as such (see e.g. Lacey, 2010).
2. There are also those who have drawn attention to neoliberal penalty in all but name. Western and Beckett (1999), for example, have shown how the intensified use of imprisonment as compensation for the decline of welfarism has served both to hide and, ultimately, to expand the pool of unemployed labour (see also Michalowski and Carlson, 1999).
3. This latter tendency is ironic. First, because neoliberal penalty scholars have themselves drawn attention to the interweaving of social welfare provision and criminal justice in the context of poverty governance, if typically restricting that affirmation to the infusion of social welfare services with penal rationales. And second, because there are many studies that have discredited essentialist assertions of the benevolent character of penal welfarism, including some that have explicitly tied the punitive manifestations and disciplinary functions welfarist interventions may assume in contemporary criminal justice to core features of neoliberal governance in society as a whole (such as the discourse of 'responsibilised' citizenship), albeit not to the substantive claims of the neoliberal penalty thesis as such (see e.g. Hannah-Moffat, 2001).
4. Similarly, O'Malley (2015) suggests, drawing on Gary Becker's (1974) work on crime and punishment, that the ideal type of neoliberal minimalism would have rather required the expanded use of fines and their primacy over imprisonment as the main penal technique. Yet the use of fines in lieu of imprisonment long predated the neoliberal era (Faraldo, 2015) and was already the norm at its inception, as Becker (1974: 28, 44) himself contended at the time. Nor does a rise in the use of fines necessarily bring about a downscaling of state punishment; it may even work to preserve and strengthen the penal system, including imprisonment (Natapoff, 2015).
5. This observation carries strong echoes of Wacquant's (2009b: 290–291) earlier analysis of what he describes as the 'double regulation of poverty by the joint action of punitive welfare-turned-workfare and a diligent and belligerent penal bureaucracy'. So close, in fact, are Soss et al. to Wacquant's approach that they also repeat his claim regarding the gendered bifurcation of poverty governance, whereby women are thought to be disciplined through workfare and men through 'prisonfare'. But theirs is an account of welfare expansion, not contraction.
6. Rare (and in some respects substantively different) exceptions include e.g. De Giorgi (2017) and Gottschalk (2015).

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