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Policing, punishment and comparative penality

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Apparently growing punitiveness in many countries toward the end of the twentieth century prompted considerable criminological activity which focused on attempting to understand trends and contrasts in systems and patterns of punishment. Although to date this literature has tended to treat policing and punishment as being largely separate spheres of activity this paper advances two reasons for paying greater attention to policing in this context. First, and briefly, to reflect the fact that the police are the 'gatekeepers' to the penal system, and therefore in some senses inseparable from other penal practices. Second, and more centrally, that in various forms policing both involves, and is often experienced as, punishment. Attempts to understand the nature of and differences between penal states will be enhanced by the inclusion of policing within its ambit.

KEY WORDS: policing, penal politics, comparative penality, sociology of punishment

INTRODUCTION: COMPARING SYSTEMS OF PUNISHMENT

The last quarter century has seen burgeoning scholarly interest in comparative penology. Early studies focused primarily on similarity and convergence, particularly the possibility that, influenced by macro social-structural forces, some leading liberal democratic societies were following the Unites States's punitive direction of travel (Christie 2000; Wacquant 1999). In turn this prompted studies that explored difference and divergence in penal trends within and between national systems (Barker, 2006; Melossi 2004; Tonry 2007), often highlighting ways in which 'global' forces were resisted, mediated, or reshaped by distinctive national and local legal, political and cultural contexts. In varying ways, such scholarship advocated a more explicit and detailed engagement with the *politics* of penal control in order to develop more nuanced accounts of penal change. While terms such as 'penal populism' (Pratt 2007) and 'populist punitiveness' (Bottoms 1995) – in some countries at least—conveyed the sense that politicians and their publics were symbiotically entwined in an increasingly punitive embrace, until recently detailed empirical analysis of the ways in which penal politics play out in different jurisdictions remained relatively rare (O'Malley 1999). Increasingly, however, comparative scholars have

made a major contribution to our understanding of the relationship between politics and penality in different countries (Cavadino and Dignan 2005; Lacey 2007; Lacey and Soskice 2015; 2017; Lacey *et al.* 2018).

While comparative penology has made very significant strides (Melossi *et al.* 2018), it continues to face considerable challenges, ranging from the theoretical and substantive to the empirical and methodological. There is the task of moving from broad structural analyses to more particular examinations of the 'proximate causes' of penal change (Garland 2013). As the 'Southern' criminological critique reminds us, there is also the challenge of shifting attention away from a preoccupation with western liberal democracies to other parts of the globe (Carrington *et al.* 2016; Sozzo 2018; though see Moosavi 2018). As with all comparative study, there are the questions of 'what' to compare and 'how' to undertake comparison in a way that is meaningful (Nelken 2009). Finally, there is the necessity of moving beyond the limitations of making comparisons based on singular measures such as imprisonment rates (McAra 2011) to find a wider range of indices to capture the differentiated nature of state 'punitiveness'. Authors have proposed a focus on a wider range of penalties (Newburn 2020), the inclusion of 'procedural' as well as outcome measures (O'Donnell 2004; Tonry 2007b; Kutateladze 2009; Hamilton 2014), and for a more capacious conception of the constitution of 'penal cultures' (Karstedt 2015).

In sympathy with, and in responding to such work, here we argue that the analysis of comparative penality would potentially be much enhanced by seeing a wide range of policing[1] activities as a crucial part of the state's penal apparatus. In short, we wish to pursue the argument that beyond the influence on punishment systems that they exert through their role as gatekeepers to penal systems, police institutions draw on powers and practices that both *involve* punishment and *are experienced* as punishment. In short, from this perspective policing is not just part of the explanation of penal change but is a significant element *in* penal change. It is an argument for seeing policing as a penal practice, and viewing the police as a penal institution, not just as an institution with penal consequences.

Of course, this is not an entirely novel suggestion, and a number of scholars have already proposed the inclusion of policing-related factors within 'multi-dimensional' approaches to analysing cross-jurisdictional penal change. This has included such matters as the nature and degree of controls over police investigative powers (Tonry 2007b), the scale and nature of policing (Hinds 2005; Hamilton 2014) together with such matters such as the prevalence of political rhetoric that advocates tougher approaches to law enforcement such as 'zero tolerance' (Hamilton 2014). The argument that aspects of policing should be viewed as part of the wider 'punishment complex' has been reinforced by recent work that has applied to the field of policing influential conceptual frameworks first developed in connection with the sociology of imprisonment. Analysis of police detention (Skinns and Wooff 2021) demonstrates that there are significant 'pains of policing' which in many ways mirror, but also extend beyond, the 'pains of imprisonment' (Sykes 1958). Also drawing on Sykes's work, Harkin (2015) highlights a wider range of physical (and psychological) 'pains of policing' – many of which arise from the state police role as the repositories of legitimate force—and which are shaped by wider penal sensibilities. Such work underscores the point that particular aspects of policing are clearly *experienced* as akin to punishment. This observation resonates strongly with Fassin's (2019) work which takes the analysis beyond the subjective experience of lawful police detention and contends that the police are de facto involved in the *delivery* of state punishment via the frequent and ubiquitous use of extra-judicial force/intimidation. In Fassin's view, these police activities should viewed

1 We acknowledge that, ideally, a full understanding of penality in different societies would require us to extend our gaze beyond the remit of the formal criminal justice system and include community-organised and commercial forms of policing. However, we concur with Hamilton's (2014: 322) observation that 'the inexhaustibility of the subject of social control necessitates some selectivity'. The discussion in this paper will thus be confined to 'state centric' definitions of policing.

analytically as *punishment* (rather than simply as examples of police deviance or brutality) because such practices are perceived as retribution by those on the receiving end, and are often justified in these terms by those who deliver them. The routine and systematic underplaying of such matters by the authorities offers further grounds, he argues, for seeing these interactions as part of the wider complex of state punishment. In Fassin's view, therefore, formal legalistic definitions of punishment (which clearly distinguish legal punishment from illegal acts of pain delivery) are so dislocated from the empirical reality of some citizens' daily experiences of state control agents that they have little analytical or normative utility.

This paper—while sharing in the wider project of linking the sociological literature on punishment to that of policing—takes a somewhat different approach by asking how considerations of policing might aid the analysis of penal systems. It sees within policing a wider and more varied range of punitive elements than have hitherto been considered, encompassing a spectrum of judicial *and* extra-judicial forms of policing—from statutory delivery of penalties, through police use of (lethal force), arrest and detention, stop and search, as well as the general role of surveillance and control of 'risky' populations. In advocating such an approach, the rationale, again in contrast to some earlier contributions, is deliberately comparative in intent. Crucially, we think, this offers a means by which the comparative political economy of punishment literature might be enhanced through the inclusion of the politics and practice of policing within its ambit[2].

The paper follows two broad lines of argument. The first proceeds from the fact that the police are the *gatekeepers* to the criminal justice and penal systems. Given this role it is not tenable to imagine that trends in punishment—in the main the outcome of who ends up in court—occur independently of police action. Such an observation is so uncontroversial it might even be regarded as banal. Despite this, work in the field of comparative penality rarely pays any attention to the role of the police, something which is known to vary markedly within and across jurisdictions and which, in principle, might reasonably be thought to exert an important influence on patterns of punishment.

Our second line of argument, and one explored at greater length, is that policing both *involves* and is *experienced as* punishment. In the first instance, this includes the allocation and delivery of punishment as formally defined in jurisprudential terms, via the police role in administering 'out of court' penalties. In addition, however, as Harkin, Skinns and others have noted, it is possible to view many other elements of policing as akin to punishment, even where such activities would not strictly be defined as such. Many of the adversarial aspects of policing—most obviously in relation to the practices of arrest and detention, but more generally in relation to the wider activities of stopping and searching citizens and general surveillance/control of particular populations—are arguably experienced directly *as* punishment. To these activities—often justified formally by the relatively permissive legal police mandate—can be added a significant area of extra-judicial policing (brutality, harassment, intimidation) that is often viewed as punishment by both perpetrators and victims, if not by lawyers and criminologists (Fassin 2019). Our overall argument, therefore, is that any full understanding of the nature of a 'penal state', and of comparisons among penal states, including their penal politics, is likely to be fuller and more nuanced as a consequence of the inclusion of a wider range of policing activities within its ambit. Given the importance of developments in the United States in stimulating scholarly debates about punitiveness in general, and comparative penality in particular, this paper draws in particular on examples from that country. However, we feel that the general argument applies

2 In addition, as de Maillard and Roche (2018) have noted, the growing body of research on comparative policing has yet to examine in any detail the relationship between political-economic institutions and processes on the one hand, and the nature and organisation of policing systems on the other.

to all societies with state-organized policing systems, and where space permits, illustrative examples are provided from other countries.

POLICING AND PUNISHMENT

As Michel Foucault observed in his lectures on the 'punitive society': 'there is no penitentiary system without general surveillance; no carceral confinement without control of the population. No prison without police. Prison and police are chronological twins.' (2015: 135). Foucault here refers to the concept of police in its original, wider meaning as a form of statecraft, as well as to the particular state policing agencies that emerged in the eighteenth and nineteenth centuries. The modern administrative state of courts and legal power on the one hand, and the carceral state of prisons and police on the other, have a 'twinned' subject: the criminal law violator and the abnormal subject. The former, 'having broken the social contract, is considered the proper target of retributive communal anger' (Simon 2017: 1633). The monitoring and control of the latter, by contrast, has less to do with their violation of the social contract. 'Rather, the carceral state reaches out to touch them because of their abnormality, i.e. those traits or features that stand out as in some degree monstrous, aberrational, and above all dangerous' (Simon 2017, ibid). These observations reinforce two simple points. First, that in the context of thinking comparatively about the penal trajectories of different nations, it is important to remember the central position of police and policing as gatekeepers to the 'carceral state'. Second, that significant amounts of control are exercised outside the courts, involve no contest over innocence or guilt, and are to be found in the everyday surveillance and management of communities and public spaces.

Policing as prelude to punishment

As Mayeux (2018: 55) observes, so ubiquitous has the term 'criminal justice system' become, 'almost no one thinks to question the phrase'. Rarely thought of in this way before the 1960s, increasingly the idea of a 'system' took hold. Though debates over the rationality and functioning of the 'system' began to appear (Feeley 1973) few doubted the basic appropriateness of the metaphor. It was recognized that the institutions of criminal justice were linked, changes in the practices of one almost inevitably led to changes elsewhere, and it was acknowledged that 'desirable reform in any one part of the system almost certainly require[d] changes in other parts, and these in their turn [led] to changes elsewhere (Tuck 1991, 22). The role of the police at the front end of the system was revealed to be complex and not as often been imagined. Crucially, early studies emphasized the extent of police discretion (Banton 1964; Wilson 1978) with consequent and very considerable potential to influence what happens *downstream* in the criminal justice system. The extraordinary levels of discretion available to the police and to other penal professionals might even be thought to be among the most consequential, and problematic, features of contemporary criminal justice (Dubber 2005). Critical criminologists have long viewed the police as dominant parties in a process of case construction, beginning with their role as key definers of suspect populations (McConville and Sanders 1995). It is clear, of course, that policing has far wider objectives than crime control (Smith 1997), and that making an arrest is a fairly rare activity for a police officer (Chappell *et al.* 2006). Though not the only (or even the primary) function of policing, law enforcement is clearly a key influence over the first stage in the supply chain of formal state punishment. The extent to which, and the ways in which, police organisations undertake the law enforcement aspects of their role inevitably influence penal outcomes. The contribution of police to the 'production line' of offenders is crucially shaped by the broader legal and policy context and by the politics of policing (Jones *et al.* 1994), matters which vary jurisdictionally. Whereas the United States 'War on Drugs' involved both

significant increases in sentences for drug-related crime and an enhanced emphasis on proactive law enforcement that significantly expanded total numbers available for processing by the criminal justice system (Daly and Tonry 1997), other countries, most notably the Netherlands and more recently Portugal, have taken very different approaches to drugs regulation, involving significantly different patterns of policing and punishment. However, in much of the scholarship responding to the growth of United States mass incarceration and to penal change elsewhere, policing has occupied a somewhat marginal position.

None of this is to claim that patterns of arrest are close to being the main determinant of trends at the back-end of the system. Analysing recent penal developments in the United States, for example, Zimring (2020: 40; see also Neusteter *et al.* 2019) argues that 'if patterns of arrest were the primary driver of increases in the rate of imprisonment, the increase in rates of persons behind bars by 2007 would be closer to 40 per cent than to 400 per cent .' Zimring's analysis should make us cautious, while nevertheless confirming that patterns of arrest are far from insignificant in their impact on matters like incarceration rates. Such analysis raises the important empirical question of what role policing has played in different jurisdictions and/or at different times. To date, comparative considerations of the possible policing contribution to the penal complex have been restricted to the relatively crude indicators such as total police strength or expenditure (e.g. Hinds 2005; Ruddell and Thomas 2009), measures that clearly cannot capture variations in factors such as political and legal context, policing policy and practice and occupational culture. Nevertheless, interesting questions and possibilities are raised. Hinds (2005), for example, suggests that the relative prominence of order maintenance policing in European countries pre-empted the need for formal punishment in the later stages of the criminal justice system whereas the enforcement-oriented policing styles more prevalent in the United States may have resulted in a greater use of imprisonment in that country. By contrast, Ruddell and Thomas (2009) speculate that countries with higher police strengths may demonstrate a focus on 'front-end' control via policing (through deterrence or suppression of dissent) as opposed to back-end controls such as high imprisonment rates. Such divergent views illustrate how little light comparative research has yet been able to shed on the extent and nature of the influence of 'front end' practices (policing) on the 'back-end' manifestations of punishment at the sentencing stage and beyond.

Policing as penal practice

This brings us back to practical questions of the ways in which policing activities can be viewed, not just as means to punishment, but as *intrinsically* penal practices. We begin with police delivering 'punishment' in ways consistent with jurisprudential definitions thereof: in this case via the example of the issuance of 'out-of-court' disposals. We then consider a range of police activities which are not legally defined as punishment, but in line with the arguments outlined earlier, are often experienced as such. We take these in order of their relative punitive intensity: the police use of (lethal) force, arrest and detention, police stops and, finally, general surveillance and control of particular population sub-groups.

Out-of-court disposals

Police in many countries are involved in the *de jure* allocation and delivery of punishment via what has been termed 'summary justice' (Young 2008). Delivered directly by the police, these 'technologies of responsibility … directly target "inadequate" or "irregular" citizens who already occupy precarious places at the margins of society' (Ashworth and Zedner 2021: 29). In a number of countries, such as Australia and the United Kingdom, the police have powers to impose punishments of this kind, without the need for the involvement of any other part of the criminal justice system. In England and Wales, the 'penalty notice for disorder' (PND) was introduced

in 2001 and was available for offences ranging from 'wasting police time' and 'being drunk and disorderly' to 'trespassing on a railway' and 'causing harassment, alarm and distress'. The use of such powers expanded rapidly with over 2,00.000 PNDs recorded in 2007, a development described by Morgan (2009) as a 'quiet revolution'. Concerns about the potentially punitive implications of the rising use of out-of-court-disposals (OOCDs) led to calls for safeguards to ensure they were being using proportionately, consistently, and equitably. Though this led to a steady decline in usage (Gibson 2021), interpreting this fall is not straightforward. Whereas those particularly concerned with the punitive implications of the use of OOCDs viewed the decline positively, others interpreted it as a signifier of up-tariffing and therefore of greater punitiveness (minor offenders who would previously have been given a caution or fine, for example, were increasingly charged and processed by the courts—see Robinson 2018). Since this time, of course, considerable controversy has accompanied the substantial increase in the usage of OOCDs which accompanied the onset of the COVID-19 pandemic. In the United Kingdom, concerns have again been focused on the punitive aspects of such regulations, including the sheer scale of usage, the inconsistency of their application and disproportionate enforcement against ethnic minority groups (Liberty 2000; Joint Committee on Human Rights 2021). In short, there is the potential for police 'summary justice' to contribute both to penal severity and to penal moderation. The clear implication is that research on the nature and extent of the police delivery of such punishments in different jurisdictions offers one potentially important avenue for the ongoing development of our understanding of comparative penality.

Use of lethal force

Violence, in a fundamental sense, is a core attribute of policing (Westley 1953), at the core of which there is the actual or threatened use of force as a means of resolving conflict. As noted earlier, authors such as Fassin (2019) have argued that the state delegates elements of retributive justice to the police primarily for the management of the poor and minorities. In addition to our main focus in the remainder of this article—police use of force as coercive problem-solving—here we offer a few remarks on police action in its most extreme and most retributive form—the use of lethal force. As is well-publicized, in a number of countries including Brazil (Ceccato 2017) and the United States (Zimring 2017) unusually large numbers of civilians die at the hands of the police. Focusing on the United States Zimring (2017: 19) argues that 'the magnitude of harm inflicted by police killings makes it the single greatest problem … in police-community relations in the United States.' In seeking an explanation, research by the University of Chicago (2020) links such patterns to the absence of procedural safeguards that are compliant with International Human Rights Law. Here, we make only two general points, first to acknowledge the existence of considerable and complex variation in cross-national patterns in police use of force, the other to link it to issues already raised about the nature of police power.

A focus on police violence is a further potentially important way of adding detail to a comparative consideration of systems of punishment and control. Neopolitan (2001) found an inverse relationship between national imprisonment rates and measures of excessive and lethal use of police force, suggesting that some states adopt penal strategies that prioritize street-level coercion over penal control (see also Ruddell and Thomas 2009). As Chevigny (1995: 7) notes, 'If the work of the police does help to reproduce the order of society, then a comparison of the ways in which the work is done should open a window on what sort of order is perceived in different societies, both by the police and the poor, who are usually the objects of police action.' Zimring's (2017) research suggests that the United States is something of an outlier among liberal democracies, with its rate of police killings being over four times that of Canada, 40 times higher than Germany's and over 140 times higher than England and Wales. By contrast, whereas deaths in custody only represent a very small proportion of police killings in the United States,

in England and Wales, though small in number they far outweigh fatal shootings involving the police.

Second, while the use of lethal violence is often portrayed as something of an outlier where police actions are concerned (certainly its consequences are extreme) it is intimately linked with, and a great many such cases arise out of, the most mundane forms of routine street policing. Recent cases in the United States that helped stimulate the emergence of both the Black Lives Matter and 'defund the police' movements—such as those involving the killings of Michael Brown in Ferguson, Eric Garner in New York City, and George Floyd in Minneapolis—drew attention to the apparently increasing aggressiveness of United States urban policing (Vitale and Jefferson 2016) and its growing militarization (Coyne and Hall 2018). What such cases also highlighted was the relative triviality of the alleged offences that brought Brown, Garner and Floyd (and many others) into contact with the police in the first place. Michael Brown was alleged to have stolen some cigars from a convenience store, Garner to be illegally selling single cigarettes, and Floyd was alleged to have passed a counterfeit $20 bill. The growing emphasis in recent decades on the policing of misdemeanours and low-level incivilities has had profound effects on the policing of social marginality. These consequences range from apparent increases in the use of lethal force at one extreme through to the more quotidian forms of surveillance and control of particular populations via the use of stop and frisk (and similar powers used in other countries) and the contemporary equivalents of 'vagrancy laws'.

Arrest, detention and questioning

One of the most obvious and formally punitive aspects of policing is the ability to deprive citizens of their liberty (Bittner 1967). Arrest may lead to extended periods of detention (widely varying across jurisdictions), while exposing the detainee to a range of other restrictions and 'harms'. First, it is important to note that of the arrests the police make, the vast majority are for minor, often very minor, offences. In this context Fassin (2019) reminds us of the important lesson from Feeley's (1992) study, *The Process is the Punishment*: that despite the way it is presented, the reality of the bulk of criminal cases, especially minor ones, is that they are dealt with outside formal procedures. Fassin rightly draws the link between this and the way in which much policing occurs. The police play a central part in what might be thought of as 'a sort of pre-pretrial, which may or may not precede a trial – or even a pretrial' (2019: 544). This process is often bounded, effectively self-contained, consisting of 'a corporeal and/or moral chastisement'. That is, 'for many of those who, whether guilty or not, have regular encounters with them, the police *are* the punishment' (2019: 544, emphasis added). It is in this context that Lerman and Weaver (2014) use the term 'custodial citizens', to refer to those who come into contact with formal police and penal institutions, the majority of whom have never been found guilty of a criminal offence. In the United States at least, a significant element of this is a consequence of what Kohler-Hausmann (2013: 353) refers to as the rise of 'misdemeanour justice': 'the processing, adjudication, dismissal, plea bargaining, sentencing and punishment of misdemeanour cases'. Research suggests that barely half of misdemeanour arrests in urban areas result in a conviction and, of those around one third lead to incarceration (Chauhan *et al.* 2014). As we will come to below in connection with the policing of urban environments, misdemeanour justice can be viewed as another form of 'constrained disciplinary power addressed to the task of social regulation of marginal populations' (2013: 357) and one which is intimately bound up with policing practices.

Misdemeanour justice invites us to further widen our gaze to the punitive elements of social control that potentially involve no formal sanctioning at all. In this context, the character of police custodial detention, which may leave no lasting mark so far as criminal records are concerned, is itself often experienced as a form of punishment. A recent comparative study of police

custody (Skinns 2019) suggested that in all the facilities studied some degree of coercive control was exercised over detainees. This could be seen in numerous, often mundane ways, ranging from being addressed as 'prisoners' through to being held in poor-quality, physically oppressive and sometimes degrading conditions. Safeguards for those held in detention vary by jurisdiction, but the same study found that in terms of the legality of detention, departures from the rules were evident in each of the cities studied. In the American city 'there was a strong sense of the symbolic authority of the police in police detention, i.e., of "total police detention", leaving detainees with the impression that they had little choice other than to do as they were asked by staff. This was rooted not only in the fear induced in detainees by threats of the use of serious forms of force … but also in the manifestly coercive police custody environment as a result of its physical conditions, routines and rituals' (Skinns 2019: 153).

The study of police detention thus offers one illustration of useful comparative analysis in the field of contemporary punitiveness, covering *inter alia*: the nature of suspects' rights and the recognition and observance of those rights; the nature of police interrogation; the more general conditions of confinement; the nature of charging procedures and whether charges indeed are brought; and, the general attendance to the physical and mental health of those detained, particularly where 'vulnerable' detainees are concerned.[3] In his overview of police interrogation in America, Leo (2019) notes that false confessions are far more common than is frequently assumed, and that the main risk factors leading to such outcomes are 'situational', such as length of custody and police lying, and 'dispositional', such as the maturity, cognitive functioning and malleability of the suspect. As Choongh (1998: 631) observes, '[d]etainees are locked into a system of rewards and punishments. The police have power over such matters as search of the defendant's premises, strip searches, the speed with which to process the defendant, whether or not to charge, the choice of charge, whether or not to grant police bail and whether or not to recommend a remand in custody when the defendant is presented before the court'. Moreover, and as importantly, detainees are also aware 'from past personal experience or the experience of friends and relatives, that at any moment while in custody they could be subjected to the pain and, far more importantly, the humiliation of violence' (1998: 631).

Earlier we noted that one classic view of the role of the police is to see them as the 'gatekeepers' to the criminal justice system, the first port of call on the conveyor belt of justice. While this may capture the nature of policing in some instances, it is far from the only way, or perhaps even the best way, of understanding police powers of arrest and detention. There is, and returning to the general observation that derives from Feeley's (1992) work, a whole class of cases in which the police station is the end rather than the beginning of a process. 'Here, arrest activates a police system of summary punishment in which the police station becomes the site in which the on-going conflict between the police and particular individuals, groups and classes is played out' (Choongh 1998: 625). Such cases, Choongh argues, are *police* cases as opposed to *criminal* cases. This 'social disciplinary model' of policing is in many respects uninterested in legal or factual guilt but, rather, is concerned with police authority and social control. That is, it is less concerned with 'crime' and more obviously focused on 'abnormality'. Rather than aiding criminal investigation, the purpose of police coercion in this model is 'to remind an individual or community that they are under constant surveillance: the objective is to punish or humiliate the individual, or to communicate police contempt for a particular community or family, or to demonstrate that the police have absolute control over those who challenge their right to define and enforce "normality"' (1998: 626).

Comparative research on pre-trial procedures, and in particular, the procedural protections afforded to police suspects, has much to offer our understandings of cross-national variations

3 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment offers a good source of information on at least some of these subjects (Daems, 2017; CPT, 2019).

in penality. For example, Hodgson (2019) has highlighted a number of problematic aspects of procedural protections provided within 'inquisitorial'-type justice systems in some continental European systems (characterized by political and economic institutions associated by comparative political economy scholarship with less punitive penal systems). In practice, she argues, these have provided relatively fewer protections to suspects in police custody than those in operation in the context of the 'liberal market economy' (LME) and more 'punitive' system of England & Wales. In a similar vein, within a number of Scandinavian countries that are often associated with less punitive penal practices (though see Barker 2013) the reality is complicated once differences in pre-trial procedures and protections are taken into account (Scharff Smith 2017). In challenging elements of the taxonomies developed in the comparative penality literature such studies indicate the potential richness offered by extending our gaze beyond traditional and narrow notions of punishment to include a variety of policing practices.

Police stops and searches

The ability to stop citizens, to ask questions and, potentially to search them is a fairly universal police power. The circumstances under which it can be used, and the limitations placed upon it, vary fairly markedly but, for certain people at least, it is one of the most likely ways in which they will interact with the police (Weber and Bowling 2013). Whether undertaken for questioning or search, though stops fall short of arrest, they nevertheless involve the deprivation of liberty (Bowling and Weber 2011). As Chief Justice Warren noted in the Supreme Court in the *Terry* case, a police stop is 'a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.'[4] Further, a failure to comply with a stop can, in some jurisdictions, result in quite significant punitive consequences—failure to comply in Hungary may lead to a fine or custody and in India to up to six months imprisonment (Belur 2012; Tóth and Kádár 2012). This is another field in which comparative research evidence is currently slight but has great potential importance. It is the case that the nature of such street policing—these police penal practices—varies markedly across jurisdictions. Thus, de Maillard et al's. (2018) research illustrates how even such proximate and in some respects similar nations as France and Germany offer marked contrasts—France with its more proactive street control style compared with Germany's less formal and more reactive practices. In thinking about police stops in the context of punishment, we might begin with two fairly routine observations: first, in many jurisdictions they are very extensively used; and second, the likelihood of being subject to such police intervention varies markedly according to various demographic factors. As Bowling and Marks (2015: 182) observe: 'The earliest manifestations of stop and search powers targeted already marginalized communities and in practice in many parts of the world this has not changed. There is evidence of specific targeting of racially or culturally defined "others" within many societies.'

It is estimated that the police make over 18 million traffic stops every year in the United States. Around 12 per cent of drivers are stopped annually, rising to 24 per cent of African Americans. As Epp *et al.* (2014: 2) observe, 'No form of direct government control comes close to these stops in sheer numbers, frequency, proportion of the population affected, and, in many instances, the degree of coercive intrusion.' So frequent was this experience in his study of Chicago that Skogan (2018: 254) described it as the 'predominant experience residents have with the police' (2018: 254) and that for young people, men and African Americans it was a 'common' rather than an 'exceptional' experience. Further, and confirming other studies, Skogan noted that such encounters were not 'quick and harmless' but for ethnic minorities in

4 The Supreme Court decision that underpins the use of stop and frisk in the U.S. Terry v. Ohio, 392 U.S. 1, 16-17 (1968).

particular a significant proportion of cases involved 'threatening them with a weapon or pushing them around' (2018: 263).

The power of the police to stop, frisk or search is a contentious one. It is contentious because of claims of racism, profiling and disproportionality, and because of the lack of civility or even aggressiveness with which it can often be undertaken. But it is also contentious because its apparent ineffectiveness in crime control terms—its 'low yield': the small proportion of stops that result in outcomes such as the discovery of illegal goods or weapons, or the making of an arrest (see Meares 2014). Police defensiveness about this tactic raises the question of its value. Though practices vary, and only through comparative research might we learn more about how its impact, positively and negatively, might fully be assessed, the explanation for such defensiveness most likely lies with the fact that these powers have 'a wider social purpose … [that of] the keeping of order, and the management – and indeed creation – of social marginality' (Bradford and Loader 2016: 253). The wider social purpose of policing becomes all the clearer if we turn our attention to other expressions of police power beyond stop and frisk.

Surveillance, public space and social control

In their respective works on the 'police power', Dubber (2005) and Neocleous (2021) examine its gradual transformation from the broad activity of governing behaviour to a narrower, modern conception of policing as matters associated with a particular institution. To do this their genealogies focus very particularly on the centrality of vagrancy law, seeing it as a central tool in police power in its original, wider sense and as broadly indicative of the strategies involved. Such power, Neocleous (2021: 22) says, involved 'a set of apparatuses and technologies not only fabricating social order in general, but the law of labour in particular.' Vagrancy illustrated much of the essence of police power, something different from and essentially unconstrained by the principles of the criminal law. Vagrancy, Dubber (2005: 136) observes, 'lacked not only a *mens rea* … it lacked an *actus reus.* The offense consisted of being a vagrant, i.e., a status, rather than an act, not becoming a vagrant, or acting like a vagrant. Thus, people were not "convicted" of vagrancy, as they might be of, say, robbery, they were "deemed" and "declared" a vagrant instead … The point of police, after all, was not to punish wrongdoing, and thereby to redress wrong. Instead, it sought to identify and eliminate threats. The relevant status of the vagrant was that of a human threat.' We will return to this argument below, suggesting that this broad form of governing conduct remains central to many applications and practices of policing, particularly where urban marginality is concerned.

The relevance to our concerns here is that it draws attention to a very significant element of contemporary policing, and one that is often highly punitive in nature and consequence. The governance of 'human threats', particularly, human threats in public places, has always been and continues to lie at the core of much policing activity. We can illustrate its contemporary practice with a small number of examples. In their study of Seattle at the beginning of the new millennium, Beckett and Herbert (2007) describe the 'return of banishment' in one of America's most progressive cities. They focus on the range of new techniques of banishment that have emerged as the basis for the creation and enforcement of zones of exclusion. These new codes, they argue, 'enable a significant increase in the power of the police … to monitor, arrest, charge, and jail those considered disorderly' (2007: 37). Such techniques 'represent a return to the traditional vagrancy and loitering laws … [broadening] … definitions of crime to the point of criminalizing the mere presence of some in contested urban spaces.' The consequences of 'banishment' are severe, and include 'impaired geographic mobility, diminished safety and security, loss of income and access to work, diminished access to social services, police harassment, and frequent entanglement in criminal justice institutions.' Furthermore, 'these material hardships were significantly exacerbated by the pain, hurt, shame, and anger triggered by banishment'

(Beckett and Herbert 2007: 125). Crucially for our purposes here, such practices were experienced as both burdensome by those subject to them and often deepened their entanglement with criminal justice and other state agencies. 'The argument that these exclusion orders are civil and nonpunitive is thus in marked tension with both the experiences of the banished and the court data' (Beckett and Herbert 2007: 139), leading Beckett and Herbert (2010: 34) to argue that 'the consequences of banishment were analogous to those identified by Sykes as characteristic of imprisonment'.

Such practices, often hugely consequential, are often relatively invisible to all but those subject to them. Underpinning much of such activity is what Herring (2019) calls 'complaint-oriented policing'. In his study of the regulation of the homeless he observes a form of policing that is generally initiated by complaints outside the police force, which relies on punitive interactions 'that most often fell short of arrest and did not involve services' and 'was aimed at neutralizing the complaint through incapacitation and invisibilization' (2019: 5). The consequence of the interactions initiated by complaints 'was a constant churning of homelessness in public space' (2019: 17): being moved along, forcibly relocated or seeking temporary places of potential safety and shelter. Though police officers did not think their actions especially punitive, their efforts coalesced into a process of what Herring *et al.* (2020) refer to as 'pervasive penality': 'a punitive process of policing through move-along orders, citations, and threats of arrest that falls short of booking but is pervasive in its reach across a targeted population and in its depth of lingering impact' (Herring *et al.* 2020: 22). There are a number of important conclusions from Herring's research. First, the trigger for much of this policing often does not lie within the police organisation itself, but comes from below (citizens, businesses), horizontally (from other city organisations) or from above (political leaders). Second, as is clear from Beckett and Herbert's (2007) study of banishment, both arrest and punitive sanctioning are rare. Nevertheless, for those on the receiving end of such policing, much of it is experienced as punitive and, as Herring *et al.* (2020: 26) describe it, as something which exacts 'material, psychological, and social suffering'.

These necessarily brief and selected examples illustrate the myriad ways in which harm is inflicted, directly or indirectly, on the citizens of marginal urban communities (Rios 2011; Stuart 2016). Though in some cases such actions may act as a pipeline to more formal interventions and to the penal system more particularly, more often they will not. Although much criminological attention in recent times has focused on the punitive shifts associated with so-called 'broken windows' policing[5] it is important to recognize the array of other policing practices, many of which have little direct link to or implication for formal systems of punishment that nevertheless ought to form part of any fully-realized account of the nature of modern carceral states.

THE COLLATERAL CONSEQUENCES OF POLICE PENAL PRACTICES

Contemporary scholarship has focused not just on trends in punishment but also on the implications of such trends, what in some quarters have been referred to as their 'collateral consequences' (Mauer and Chesney-Lind 2002). Though work in this field occasionally describes its focus as being on 'the collateral consequences of contact with the criminal justice system' (Kirk and Wakefield 2018: 172), in practice it rarely includes policing. As the argument thus far should have made clear, there are good reasons for thinking that this is something of an oversight.

5 We have deliberately avoided terms such as 'broken windows policing' and its close associates 'zero tolerance' and 'quality of life' policing, because of their somewhat vague and malleable nature (Newburn and Jones 2007). In the context of thinking about comparative systems of punishment it becomes all the more important to avoid such generalisations and to think much more concretely and specifically about the precise nature of policing practices in operation in different locations.

The consequences of incarceration include potentially negative impacts on employment prospects, physical and mental health, family functioning, education, housing, civic engagement, and much else including crime itself (Kirk and Wakefield 2018; Bor *et al.* 2018; Geller 2014). Much the same might be said of criminal sanctioning more generally and, indeed, even the existence of a criminal record. As Pager (2007: 4) remarks, like other forms of credential, a criminal record 'constitutes a formal and enduring classification of social status, which can be used to regulate access and opportunity across numerous social, economic and political domains'. It is this that underpins what Miller and Stuart (2017: 533) call 'carceral citizenship': 'a novel form of citizenship emergent in the carceral age [which] … begins at the moment of a criminal conviction and is distinguished from other forms of citizenship by the restrictions, duties and benefits uniquely accorded to *carceral citizens,* or to people with criminal records'. The centrality of the police to such processes makes them a crucial component in the state's role as a 'credentializing institution, providing official and public certification of those among us who have been convicted of wrongdoing' (Pager 2007: 4). As we have already observed, in addition to such certification there is of course that vast array of police interactions which, though falling short of arrest, and therefore the potential for such credentializing, nevertheless have wide-ranging impacts on the urban poor and often do material and psychological harm.

There is now a growing body of scholarship which seeks to extend the idea of 'collateral consequences' in a way that moves beyond ideas such as reduced life chances—important as they are—to consider broader and deeper implications for the nature of community and democracy, introducing ideas such as 'carceral' and 'custodial citizenship'. Custodial citizenship, Lerman and Weaver (2014: 10) argue has the effect of socialising the citizen so that 'they learn to stay quiet, make no demands, and be wary and distrustful of political authorities' (2014: 10). Where the carceral citizen is concerned, 'the lines between punishment, welfare, state and family are blurred … [and the] combination of legal exclusion, selective inclusion into coercive and caring networks … reveal the deep penetration of the state into their everyday lives' (Miller and Stuart 2017: 544). Such analyses speak directly to the question of how citizens experience the state and learn of their place and role in the world. For many communities, much of this political socialisation comes through contact with the state's controlling 'second face', and via policing in particular (Soss and Weaver 2017). Given that policing is intimately involved in restricting movement, in designating and defining spaces as accessible or otherwise to particular classes of citizen, police-public encounters are 'daily rituals indicating who is suspicious, who can be trusted with freedoms, and who deserves the benefits afforded to citizens in full standing' (Miller and Stuart 2017: 579). In short, such work illustrates how 'criminalization is embedded … in the fabric of everyday life' (Rios 2011: 27) not least through the experience of policing. It is precisely such findings which have led scholars increasingly to focus on the way in which contemporary systems of punishment—including policing—have come to play a central role in shaping the nature of modern democracies. As Dzur *et al.* (2018: 8) observe, to think democratically is inevitably to 'seek to ask sharper questions about the collateral effects of the transformations of the carceral state upon political participation, the formation of civic identities and the associational life of impacted communities.'

CONCLUSION

The central focus of the argument developed here has been to suggest a number of ways in which policing involves punishment, is experienced as punitive, and therefore should be recognized an integral part of the penal landscape for the purposes of both local and comparative analysis. The study of patterns of punishment ('punitiveness', penal policy, penal politics etc) requires a broad conceptualisation of penal power. It is increasingly recognized that too much reliance has been placed on incarceration rates as the central indicator of the nature of a penal

state (inter alia Pease 1994; Sozzo 2018) and that it is necessary to look beyond quantitative indicators to incorporate markers of the quality and intensity of penal sanctioning. Where comparative understanding is concerned, as Garland (2013: 501) notes, 'one wants to know which modes of exercising power are deployed by a particular penal state and in what proportion' and, one might add, to what effect. The gains made by widening the gaze beyond imprisonment rates are fairly easily illustrated. A number of scholars have begun to focus attention, for example, on differences in the use of non-custodial penalties across jurisdictions. In this regard, Phelps' (2017) state-level analysis of the use of probation in the United States shows that once such penalties are added to trends in the use of custodial measures, the picture of penal regimes that emerges is quite different from that produced by reliance on imprisonment only, often quite radically so. Indeed, she suggests that comparative research which relies on incarceration rates 'fundamentally misconstrues state variation' (2017: 66).

In addition to the benefits derived from including formal penalties other than the custodial, in our view, similar gains in our understanding of penal regimes are likely to be made if greater attention is paid to their 'front end' (Hinds 2005). Our argument here has been that an analysis of policing can potentially play an important role in the study of comparative penality, not simply as part of the explanation of penal change but as a significant element *in* penal change. That is to say, it is an argument for seeing policing as a penal practice, and viewing the police as a penal institution, not just as an institution with penal consequences. Indeed, recent shifts in the politics of policing linked most obviously with the Black Lives Matter and the Defund the Police movements, take just such a stance (Akbar 2018). In just the same ways that penal expansion, as illustrated by the growth of prisons, probation and parole, prompts *comparative* questions, changes in policing, and the politics of policing, should do so also.

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