

THE PRISONERS' DILEMMA AND POLITICAL SYSTEMS: THE IMPACT OF PROPORTIONAL REPRESENTATION ON CRIMINAL JUSTICE IN NEW ZEALAND

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This is the text of the 2010 Shirley Smith Address delivered by Nicola Lacey on 8 December 2010, organised by the Wellington Women in Law Committee. The lecture offers an analysis of why New Zealand has attached itself to increasingly punitive criminal justice policies over the last 25 years, and considers in particular how far this has to do with the shape of New Zealand's political system.

I INTRODUCTION

I was honoured and delighted in equal measure by the Wellington Women in Law Committee's invitation to deliver this lecture in memory of Shirley Smith. I did not have the luck to know Shirley: but I do have the good fortune to count her daughter and son-in-law among my dearest friends. What I have read about Shirley Smith's life, and learnt from Helen and Keith, makes me wish intensely that I had known her – and deepens my sense of the honour of this invitation. As I read about her life, I reflected in particular on the way in which she shone even out of the shadow of two very powerful and charismatic men – her father and her husband – in her own rich and distinctive integrity. I have been lucky enough to forge my own career as a female legal academic in a path opened up by pioneers like Shirley Smith. Having spent three years as the only female fellow at New College in Oxford in the mid 1980s, and having managed to complete my own higher education without once being taught by a woman, I strongly identified with many of her stories. But

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I also recognised something in her with which I also identify: an excitement and energy in the pioneer role, however difficult and lonely it can be. So I think that one of the really important things about this lecture series is that it will help to keep the inspiration of Shirley's example alive for new generations. Women in this country have a proud record of achievement across the spheres of public and professional life. The progress of women in the law may make it seem that solidarity among women and the fight for further progress is less important than it was a generation ago. I do not agree with this: and I strongly suspect that Shirley Smith would not have done so either. The latter part of Shirley Smith's career, however, was concerned not primarily with the social disadvantages attendant on being a woman, but rather on the effects of poverty and ethnicity in shaping her fellow New Zealanders' lives. And it is her work as a criminal defence lawyer with which I hope to connect, albeit indirectly, in my lecture tonight.

Last year, Dame Sian Elias gave a predictably astute and impressively passionate account¹ of the ways in which criminal justice policy in this country had increasingly turned its back on the key question which Shirley Smith repeatedly posed: how do "blameless babes" turn into offenders, and what can be done about it. In a searing critique of many of this country's more punitive ways of dealing with crime, and in particular of the decision to give the voice of victims a more central place in penal decision-making, Dame Sian made a resounding case for greater moderation, reason and humanity in criminal justice policy. I agree with every word of her lecture. But I have to confess that it was quite an intimidating text for me to read, not only because it added to my already acute sense that Dame Sian would be a very hard act to follow; but also because I could hear Shirley Smith applauding enthusiastically.

In my own lecture, I want to ask a somewhat different question, one in which I know that Shirley Smith was intensely interested, though I am fearful that she might not have approved of the tentative answer which I shall give to it. The question is this: Why has New Zealand attached itself to increasingly punitive criminal justice policies over the last 25 years, and, in particular, how far can this be attributed to the shape of New Zealand's political system? I should preface my lecture by saying that I regard this upswing in punitiveness, which we have also seen in Britain, as deeply unfortunate, although I will not have time to argue for this proposition. As Shirley Smith herself put it in 1999: "To provide only a prison at the bottom of the cliff is not a solution. Criminals will just go on falling into it, at great cost to the community."² Eleven years on, and notwithstanding those huge social and economic costs, ever greater numbers of offenders are falling into the pit of imprisonment in this country. Why?

1 Sian Elias "Blameless Babes" (2009) 40 VUWLR 581.

2 Shirley Smith "Kneejerk reaction" *The Dominion* (Wellington, 17 November 1999) at 12.

II THE PRISONERS' DILEMMA: THE POLITICAL LOGIC OF CRIMINAL JUSTICE POLICY³

Recent scholarship on criminal justice in developed countries has been preoccupied with a sharp politicisation of criminal justice policy and a consequent increase in the degree of penal severity. The literature is dominated by a widespread and influential diagnosis of "populist punitiveness" or "penal populism";⁴ New Zealand criminologist John Pratt, on whose work I draw in this lecture, has been a leading exponent of this argument.⁵ The salience of law and order in electoral politics sits, in the view of this literature, alongside rising crime, economic forces and cultural factors in explaining the rising imprisonment rates and punitive penal climate of many Western countries since the 1970s. Yet, notwithstanding the obvious status of punishment as a product of political action and the general acknowledgement that punishment has been moving up the political agenda, interdisciplinary scholarship explaining different levels of punishment in different societies has tended to focus more closely on cultural, demographic and economic variables than on political ones. Shaped by the prevailing concerns of sociology on the one hand and of political economy on the other, the influence on punishment of factors such as cultural norms oriented to solidarity and altruism, or of the structure of labour markets, unemployment rates and the distribution of wealth, has dominated the effort to understand punishment in its full social context.⁶ In particular, curiously little has been done in the way of trying to understand the impact on criminal justice policy-making of the institutional structure of contemporary political systems.⁷ How, if at all, do factors like the electoral system, the availability of citizen-initiated referenda, the relationship between executive, legislature, judiciary, the status of the expert civil service bureaucracy, federal structures or the distribution of veto points around the political system affect the formation of criminal policy?

3 An expansion on the argument in this part of the lecture, incorporating comparisons with England and Wales and with Scotland will appear as Nicola Lacey "Political Institutions and Criminal Justice: the Prisoners' Dilemma and Coalition Politics" (2011) *Current Legal Problems* (forthcoming).

4 Anthony Bottoms "The Philosophy and Politics of Punishment and Sentencing" in C Clarkson and R Morgan (eds) *The Politics of Sentencing Reform* (Clarendon Press, Oxford, 1995) 17; David Garland *The Culture of Control* (Oxford University Press, Oxford, 2001); John Pratt and others (eds) *The New Punitiveness* (William Publishing, Cullompton, 2005); Robert Reiner *Law and Order: An Honest Citizen's Guide to Crime and Control* (Polity Press, Oxford, 2007).

5 John Pratt *Penal Populism* (Routledge, London, 2007).

6 Georg Rusche and Otto Kirchheimer *Punishment and Social Structure* (Russell & Russell, New York, 1968) (this text was first published in German in 1939); David Garland *Punishment and Modern Society* (Oxford University Press, New York, 1990).

7 There are of course some honourable exceptions: see for example Lisa L Miller *The Perils of Federalism: Race, Poverty and the Politics of Crime Control* (Oxford University Press, New York, 2008); Vanessa Barker *The Politics of Punishment: How the Democratic Process Shapes the Way America Punishes Offenders* (Oxford University Press, New York, 2009).

I should immediately confess that I have a special interest in this issue, and in particular in the question of how political structures which facilitate coalition politics affect criminal justice. In a book published in 2008,⁸ I suggested that the structure of electoral competition in winner-takes-all, first past the post systems like that of England and Wales tends to produce what we might call a law and order arms race between the two main parties.⁹ I now need to tax your patience by summarising my general argument, before returning to the specific question at issue.

A The General Argument

My starting point was the striking fact that, though most advanced countries saw proportionately comparable rises in crime from the early 1970s to the mid-1990s (since when most countries have similarly experienced a modest drop in crime), their reactions in terms of punishment had been markedly different (see Figures 1–3).

8 Nicola Lacey *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge University Press, New York, 2008) [Nicola Lacey *The Prisoners' Dilemma*].

9 This paper is one of a series in which I am working on to refine this broad argument by using case studies to isolate and examine the impact of particular features of the political structure to explain the differences between (and within) countries with similar forms of electoral system. On the diffusion of electoral politics and its penetration of the criminal justice system in the United States see Nicola Lacey "Why Globalisation Doesn't Spell Punishment" in Adam Crawford (ed) *International and Comparative Criminal Justice and Urban Governance* (Cambridge University Press, Cambridge, 2011) 214; Nicola Lacey "American Imprisonment in Comparative Perspective" (2010) 139(3) *Deadalus* 102.



Figure 1: Imprisonment Trends (1950–2010)¹⁰

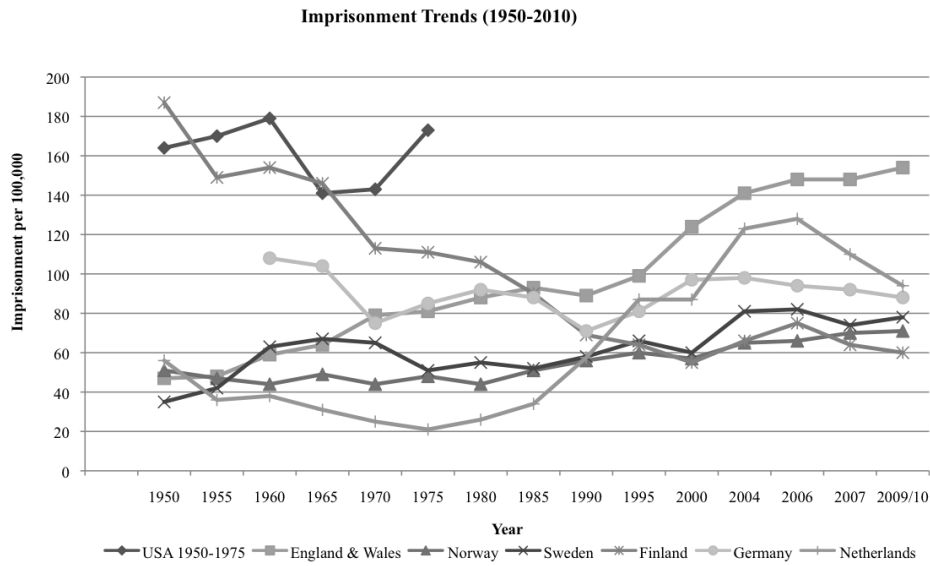


Figure 2: Imprisonment Trends (1950–2010)¹¹

10 Compiled from International Centre for Prison Studies "World Prison Brief" (2010) <www.kcl.ac.uk>; John Pratt "Scandinavian Exceptionalism in an Era of Penal Excess: Part I 'The Nature and Roots of Scandinavian Exceptionalism'" (2008) 48 Brit J Criminol 119 and John Pratt "Scandinavian Exceptionalism in an Era of Penal Excess: Part II 'Does Scandinavian Exceptionalism Have a Future?'" (2008) 48 Brit J Criminol 275.

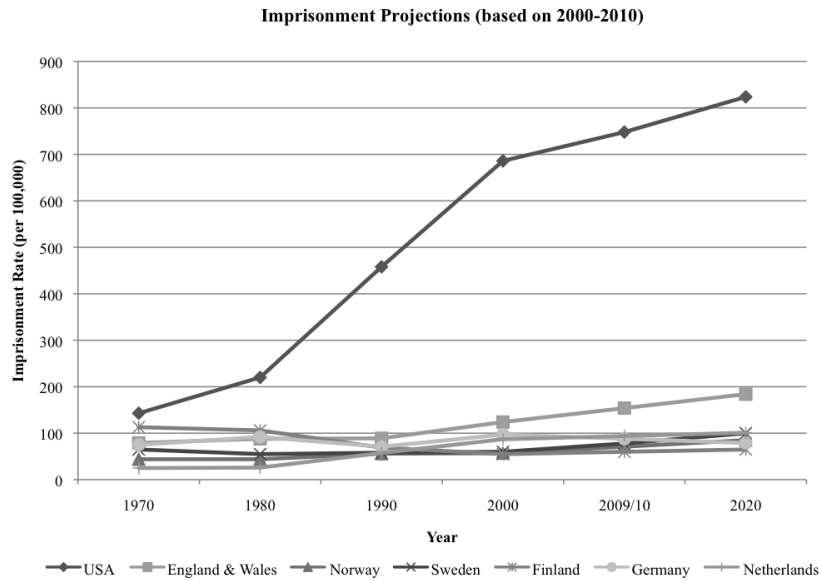


Figure 3: Imprisonment Projections (rate per 100,000 inhabitants; based on 2000–2010)¹²

These differences, it seemed to me, undermined the diagnosis of a burgeoning "culture of control" or "neoliberal penalty" grounded in factors such as a common reaction to the economic restructuring following the global economic crisis of the 1970s.¹³ Notwithstanding the increasing interdependence of national economies, nation states had maintained striking differences in penal policy. Looking at the trajectory of punishment over time and space, we could see a number of

11 Compiled from International Centre for Prison Studies "World Prison Brief", above n 10; Ministry of Justice, Research and Documentation *European Sourcebook of Crime and Criminal Justice Statistics – 2010* (4th ed, Boom Juridische Uitgevers, Den Haag, 2006) Onderzoek en beleid series, no 285 (available online at <www.europeansourcebook.org>); John Pratt "Scandinavian Exceptionalism in an Era of Penal Excess: Part I 'The Nature and Roots of Scandinavian Exceptionalism'", above n 10 and John Pratt "Scandinavian Exceptionalism in an Era of Penal Excess: Part II 'Does Scandinavian Exceptionalism Have a Future?'" , above n 10.

12 Compiled from International Centre for Prison Studies "World Prison Brief", above n 10; Ministry of Justice, Research and Documentation *European Sourcebook of Crime and Criminal Justice Statistics – 2010*, above n 11; John Pratt "Scandinavian Exceptionalism in an Era of Penal Excess: Part I 'The Nature and Roots of Scandinavian Exceptionalism'", above n 10 and John Pratt "Scandinavian Exceptionalism in an Era of Penal Excess: Part II 'Does Scandinavian Exceptionalism Have a Future?'" , above n 10.

13 David Garland *The Culture of Control*, above n 4; Loïc Wacquant *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press, Durham, 2009).

patterns, widely noted in the sociological literature:¹⁴ countries with lower levels of inequality, more generous welfare states, higher levels of unionisation and higher levels of social trust, for example, showed consistently lower rates of imprisonment. But how were we to move from an observation of these patterns or correlations to an explanation of how they were being reproduced over time, even amid shared pressures created by a globalising economy?

In my book, I argued that these differences could best be understood within the framework of an argument in comparative political economy known as varieties of capitalism.¹⁵ Developed by political scientists Peter Hall and David Soskice,¹⁶ this analysis argues that there is a distinction between liberal and coordinated market economies. A coordinated market economy functions in terms of long-term relationships and stable structures of investment, not least in education and training oriented to company- or sector-specific skills, and incorporates a wide range of social groups and institutions into a highly coordinated governmental structure. Such a system is more likely to generate incentives for the relevant decision-makers to opt for a relatively inclusionary criminal justice system. It is a system which is premised on incorporation, and hence on the need to reintegrate offenders into society and the economy making it structurally less likely to opt for exclusionary stigmatisation in punishment. Typically, moreover, the interlocking and diffused institutions of coordination of the coordinated market economy conduce to an environment of relatively extensive informal social controls, and this in turn supports the cultural mentalities which underpin and help to stabilise a moderated approach to formal punishment.

A liberal market economy – of which the extreme case, significantly for any argument about criminal justice, is the United States of America – is typically more individualistic in structure, is less interventionist in economic regulation, and depends far less strongly on the sorts of coordinating institutions which are needed to sustain long term economic and social relations. In these economies, flexibility and innovation, rather than stability and investment, form the backbone of comparative institutional advantage. It follows that, particularly under conditions of surplus unskilled labour – conditions which liberal market economies are also more likely to produce – the

14 David Downes and Kirstine Hansen "Welfare and Punishment in Comparative Perspective" in S Armstrong and L McAra (Eds) *Perspectives on Punishment: the contours of control* (Oxford University Press, New York, 2006); John R Sutton "The Political Economy of Imprisonment in Affluent Western Democracies, 1960–1990" (2004) 69 *American Sociological Review* 170.

15 Nicola Lacey *The Prisoners' Dilemma*, above n 8, at ch 2.

16 Peter A Hall and David Soskice "An Introduction to the Varieties of Capitalism" in Peter A Hall and David Soskice (eds) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, Oxford, 2001) 1. The varieties of capitalism framework was developed specifically in relation to the "advanced economies" which made up the original group of the Organisation for Economic Cooperation and Development (OECD) countries. Its hypotheses require adaptation in relation to the countries of southern Europe such as Spain, Portugal, Greece and Turkey and all the more in relation to other regions such as Latin America. My analysis is accordingly restricted to the "advanced economies".

costs of a harsh, exclusionary criminal justice system are less than they would be in a coordinated market economy. You will have no difficulty in discerning that both New Zealand and Britain fit firmly within the typology of the individualistic, liberal market economy (see Figures 4 and 5).¹⁷

Political Economy, Imprisonment and Homicide

	2002/3	Imprisonment per 100,000 2006	2009/10	Homicide per 100,000 2008
Neo-liberal countries (Liberal Market Economies)				
USA	701	737	748 [^]	5.2
New Zealand	155	186	203	1.3
England & Wales	141	148	154	1.2
Australia	115	125	134 [^]	1.2
Scotland ^a	128	140	153	2.2*
Conservative corporatist countries (Coordinated market economies)				
Netherlands	100	128	94	1*
Germany	98	94	88	0.8
Social democracies (Coordinated market economies)				
Sweden	73	82	78 [^]	0.9
Denmark	58	77	71	1.4*
Finland	70	75	60	2.5
Norway	58	60	71	0.6*

[^] Prison rate for 2009

* Homicide rates for 2007

^a Prison rates for Scotland are estimated on the basis of average daily prison population for 2002/3, 2006/7, 2009/10

Figure 4: Political Economy, Imprisonment and Homicide¹⁸

17 As Figure 4 illustrates, the liberal/coordinated market economy distinction maps neatly onto Cavadino and Dignan's fourfold typology (Michael Cavadino and James Dignan *Penal Systems: A Comparative Approach* (Sage, London, 2006)): their social democratic and (most of their) corporatist systems are, in these terms, coordinated market economies while their neo-liberal countries are liberal market economies.

18 Compiled from Peter A Hall and David Soskice (eds) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, Oxford, 2001); Gordon Barclay and others *International comparisons of criminal justice statistics 2001* (Issue 12/03, 24 October 2003); Michael Cavadino and James Dignan *Penal Systems: A Comparative Approach* (Sage, London, 2006); Peter A Hall and Daniel W Gingerich *Varieties of Capitalism and Institutional Complementarities in the Macro-Economy: An Empirical Analysis* (Max-Planck-Institut für Gesellschaftsforschung, Cologne, 2004)

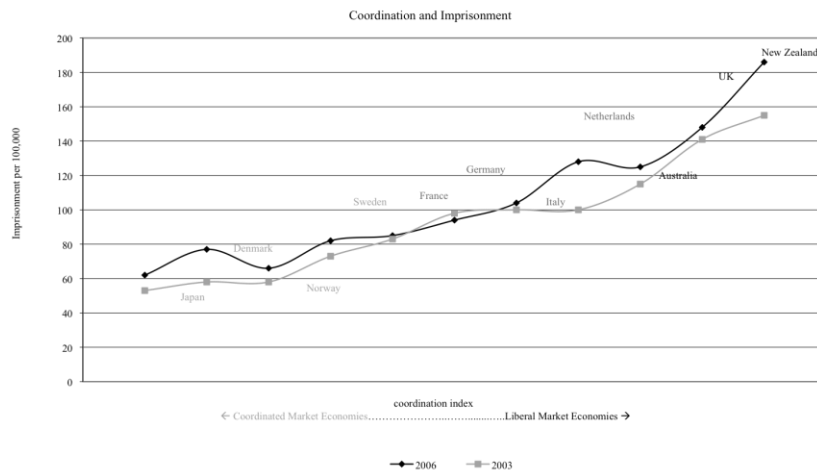


Figure 5: Coordination and Imprisonment¹⁹

Where do political systems fit into this account? The organization of political systems varies widely of course, both between countries and between sub-national regions.²⁰ But it is striking that the two families of the capitalist system turn out to be distinguished not only by differently structured production regimes and welfare states, but also by different electoral systems, with the coordinated market economies featuring, without exception, proportionally representative electoral systems, and the liberal market economies, with a small number of exceptions, first past the post

Discussion Paper 04/05; International Centre for Prison Studies "World Prison Brief", above n 10; Ministry of Justice, Research and Documentation *European Sourcebook of Crime and Criminal Justice Statistics – 2010*, above n 11; United Nations Office on Drugs and Crime "UNODC Homicide Statistics" <www.unodc.org>; General Register Office for Scotland "Revised Mid-year Population Estimates 1982–2000" (2001) <www.gro-scotland.gov.uk>; The Scottish Government "Statistical Bulletin Criminal Justice Series" (20 December 2010) Publications <www.scotland.gov.uk>; The Scottish Executive "Statistical Bulletin Criminal Justice Series" (August 2007) CJr/2007/ <www.scotland.gov.uk>.

19 Compiled from Peter A Hall and Daniel W Gingerich *Varieties of Capitalism and Institutional Complementarities in the Macro-Economy: An Empirical Analysis*, above n 18; International Centre for Prison Studies "World Prison Brief" (2007) <www.kcl.ac.uk>.

20 Nicola Lacey *The Prisoners' Dilemma*, above n 8, at ch 2–4; Michael Tonry (ed) *Crime, Punishment and Politics in Comparative Perspective* (University of Chicago Press, Chicago, 2007); Michael Tonry "Determinants of Penal Policies" (2007) 36 *Crime and Justice* 1; Vanessa Barker *The Politics of Punishment*, above n 7; Lesley McAra "The impact of multi-level governance on crime control and punishment" in Adam Crawford (ed) *International and Comparative Criminal Justice and Urban Governance*, above n 9, 276.

systems. This, I argued, makes a substantial difference to criminal justice in a number of ways. Of indirect but real importance to punishment, the structure of the political system affects the capacity to build coalitions capable of providing stable support for long-term investment in institutions such as the welfare state, the education system and, crucially, the more welfarist versions of criminal justice intervention whose benefits are hard to quantify and are realised only in the medium or long term. More directly, the shape of the political system affects the ways in which perceived anxiety about crime or insecurity register in the electoral process. In proportionately representative systems, to be brief, there are significant checks and balances constraining executive power, as well as robust institutional arrangements facilitating coordination between settled interests and underpinning, in Lijphart's terms, a consensus orientation in politics.²¹ In first past the post systems, by contrast, a typically adversarial and individualistic political culture, along with a decline in electoral turn-out and in the number of voters who identify consistently with a particular party, has fostered the volatility of law and order politics amid an unedifying scramble for the short-term support of the floating or reluctant voter.

Features of political systems, in other words, conduce to – or militate against – support for the economic and social policies which make it easier for governments to pursue inclusionary criminal justice policies. In liberal market economies with majoritarian electoral systems, particularly under conditions of relatively low trust in politicians and declining electoral turn-outs, relatively low deference to the expertise of criminal justice professionals,²² a reduction in the proportion of the electorate who vote on stable party lines, and a weakening of the ideological divide between political parties focused on the resultant floating (or potentially abstaining) voter, with the unmediated responsiveness of politics to popular opinion in the adversarial context of a two party system making it harder for governments to resist a ratcheting up of penal severity. These dynamics become particularly strong where both parties take up a law and order agenda,²³ and where – as in

21 Arend Lijphart *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press, New Haven, 1999); Arend Lijphart *Democracies: Patterns of Majoritarian and Consensus Governments in Twenty-One Countries* (Yale University Press, New Haven, 1984).

22 On the links between different forms of political system and the status of expert bureaucracy see Nicola Lacey *The Prisoners' Dilemma*, above n 8, at 72–75 and 191–192; Joachim Savelsberg "Knowledge, Domination and Criminal Punishment" (1994) 99 *American Journal of Sociology* 911; Joachim J Savelsberg "Knowledge, Domination and Criminal Punishment Revisited" (1999) 1 *Punishment and Society* 45. Particularly in recent years, the increasing relative importance of political advisors and the concomitant decline in influence of the civil service in the criminal justice field appears to have been driven by growing domination of political parties by their leaders who multiply specialist advisor appointments in their own offices to maximise their control over the policy-making process. Again, this is driven by the chase for the swing voter.

23 David Downes and Rod Morgan "No turning back: the politics of law and order into the millennium" in Mike Maguire, Rod Morgan and Robert Reiner (eds) *The Oxford Handbook of Criminology* (4th ed, Oxford University Press, New York, 2007) 201; Tim Newburn "'Tough on Crime': Penal Policy in England and Wales" in Michael Tonry (ed) *Crime and Justice* (University of Chicago Press, Chicago, 2007) vol 36, 425.

the United Kingdom, the United States and New Zealand in recent years – economic inequality and insecurity has fed popular anxiety about crime so as to mark out penal policy as an especially suitable platform on which politicians from all points of the political spectrum may appeal to undecided voters. The result, I argued, is, loosely speaking, a prisoners' dilemma in which neither party can afford, electorally, to abandon its tough stance, while everyone (other than those with a financial interest in the prison build-up) loses from the increasing human and economic costs of an ever more punitive system.²⁴

Conversely, I argued that in the proportionally representative systems of the coordinated market economies of northern Europe and Scandinavia, where negotiation and consensus are central, and where incorporated groups can have greater confidence that their interests will be effectively represented in the bargaining process which characterises coalition politics,²⁵ the dynamics of penal populism may be easier to resist. Due to the discipline of coalition politics in proportionally representative systems, in which bargains have to be struck, voters can be more confident about what policy slate they are voting for – a striking difference from majoritarian systems, where a party with a comfortable majority is more or less unconstrained by its own manifesto once elected. The result, I argued, is that longstanding proportionally representative systems typically produce a significant buffer between a popular demand for punishment and the formation of penal policy.

III COALITION POLITICS IN ADVERSARIAL SETTINGS

The ability to form stable coalitions based on binding political deals is key to this argument. But what happens when the coalition politics typical of proportionally representative coordinated systems occur in liberal market economies? The outcome of the May 2010 general election in Britain produced a situation typical of proportionally representative systems: a minority government which has entered into a formal, long term agreement with a smaller party in order to govern. Of particular interest is the fact that this coalition government – despite being dominated by Conservatives, traditionally the party of law and order – is advocating the most moderate prisons policy for twenty years. The coalition agreement, and its long term stability, is premised on precisely the kind of effective negotiation and policy compromise which I argued had been associated with moderation in penal policy in many proportionally representative countries. So can we expect coalition politics in the United Kingdom to produce the same sort of orientation to stability in criminal justice policy which they seem to have fostered in the long-standing proportionally representative systems of Northern Europe and Scandinavia?

To answer this question, we need to understand how far the institutional features of political systems which I have just discussed operate as independent factors, and how far their influence is

24 Nicola Lacey *The Prisoners' Dilemma*, above n 8, at ch 2.

25 See Torben Iversen and David Soskice "Electoral Institutions and the Politics of Coalitions: Why Some Democracies Redistribute More Than Others" (2006) 100 *American Political Science Review* 165.

mediated by other institutional arrangements. In this respect, New Zealand's experience of grafting a proportionally representative electoral system onto what had hitherto been a majoritarian, first past the post system is of the utmost interest.

This country presents an obvious difficulty for any argument that a proportionally representative political system and consequent coalition politics are necessarily associated with more stable levels of punishment, with a higher status professional bureaucracy, and with less highly politicized criminal justice. The implementation of multi-member voting proportional representation in 1996 came at a time when penal severity, as measured by imprisonment rates, had already been sharply increasing for the last decade (see Figure 6).

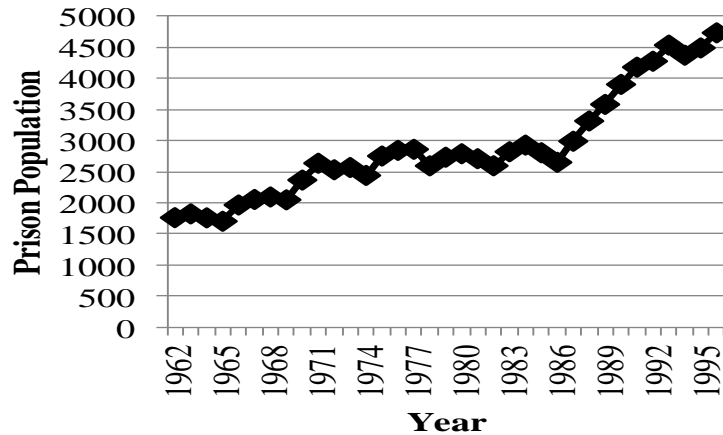


Figure 6: New Zealand Prison population 1962–1996²⁶

I am not an expert on your criminal justice policy, though I gather from my reading that something like the prisoners' dilemma effect helped to produce this upswing. But, contrary to what I would have expected, the period since proportional representation was introduced has gone hand in hand with an acceleration of law and order politics,²⁷ with a decline in the influence of those traditionally regarded as experts on penal policy, and with an increase in levels of punishment. The imprisonment rate has risen substantially, from 128 per 100,000 of the population in 1995 to 203 in October 2010 (see Figure 7).²⁸

²⁶ Criminal Justice Policy Group *The Use of Imprisonment in New Zealand* (Ministry of Justice, 1998) at [41].

²⁷ John Pratt and Marie Clark "Penal populism in New Zealand" (2005) 7 *Punishment and Society* 303; John Pratt "The Dark Side of Paradise: Explaining New Zealand's History of High Imprisonment" (2006) 46 *Brit J Criminol* 541.

²⁸ International Centre for Prison Studies "World Prison Brief" (2010), above n 10.



Figure 7: Imprisonment Rate for New Zealand with Political Markers²⁹

Striking as they are, these overall figures mask a further pattern which would have been of particular concern to Shirley Smith: a staggering over-representation of Māori citizens relative to their presence in the population. As a thoughtful Department of Corrections Report in 2007 put it:³⁰

... Māori make up just 14 per cent of the national population, why do they feature so disproportionately in criminal justice statistics – 42 per cent of all Police apprehensions, and 50 per cent of the prison population?

This apparent rise in punitiveness has come about notwithstanding the fact that proportional representation has been associated with stronger electoral performance by left of centre parties; by consequently longer tenure for Labour governments; and, accordingly, by a reduction in inequality

29 Compiled from International Centre for Prison Studies "World Prison Brief", above n 10; "OECD Factbook 2010" Statistics from A to Z – Beta version (2010) <www.oecd.org>, specifically economic, environmental and social statistics; Gordon Barclay and Cynthia Tavares and others *International comparisons of criminal justice statistics 2001* (Issue 12/03, 24 October 2003); Roy Walmsley *World Prison Population List* (8th ed, International Centre for Prison Studies, London, 2009) (available online at <www.kcl.ac.uk>).

30 Department of Corrections *Overrepresentation of Māori in the criminal justice system: an explanatory report* (Policy, Strategy and Research Group, Department of Correction, 2007) at 38. The World Prison Brief reports that in June 2009 foreign nationals constituted 20 per cent of the New Zealand prison population (see International Centre for Prison Studies "World Prison Brief", above n 10. I have been unable to determine the composition of this group but it seems likely that it includes a significant proportion of Pacific Islanders.

in the lower half of the economic spectrum.³¹ We have seen that proportionally representative electoral systems are, in a large number of systems, associated with a more moderate penal politics. What is it about New Zealand which is different?

In my original argument, proportional representation is itself articulated with key economic and cultural features of coordinated market economies: with a tradition of bargaining in which a diversity of economic interests – within both unions and management – are incorporated; with a long-running multi-party system in which negotiated political compromises both within and between parties are the order of the day; with a set of parties which typically represent sectors with relatively stable and common interests rather than particular issues; and with production arrangements which depend on long term investments in education and training. This alone might give us reason to think that proportionally representative electoral arrangements, when grafted onto a substantially different set of economic, social and political institutions, would have a somewhat different impact on criminal justice.

A closer look at the recent history of criminal justice politics in this country confirms this point. While New Zealand conforms to the left of centre pattern of partisanship characteristic of long-run proportionally representative systems in northern Europe, the power which those systems accord to small parties appears to have enhanced the political influence of pressure groups advancing a law and order agenda, by giving such groups bargaining power, via small parties, vis à vis larger parties unable to command sufficient support to form a government.³² Of particular importance is the fact that the small parties which have risen to prominence as a result of proportional representation have tended to be characterised in terms of their policy stance on particular issues rather than by their identification with the socio-economic interests of a particular sector of the population. Parties committed to a limited range of issues tend to be attractive coalition partners to larger parties, because their specific focus means that a bargain can be struck with them without the larger party

31 See Torben Iversen and David Soskice "Electoral Institutions and the Politics of Coalitions: Why Some Democracies Redistribute More Than Others", above n 25. Electoral structure, in other words, has implications for both partnership and the substance of the political, social and economic outcomes. Iversen and Soskice explain this finding in terms of the need within proportionally representative systems for multiple political parties to form coalitions, and hence to be able to commit to governing partners – and thus to the electorate – about policies to be pursued during a given term of office. Within such a structure it is also the case that interests represented within smaller parties forming coalitions have a greater chance of finding a political footing, while the volatile force represented by the power of the median voter, who floats between the two parties characteristic of majoritarian systems, is correspondingly less, being mediated by credible commitments made during the bargaining process. In such a system, where coalition partners can hold each other, during government, to pre-election bargains, centrist parties holding the balance of power will tend to have more to gain, in terms of economic interests, from aligning themselves with left than with right wing parties: the middle classes which they represent have an interest in maintaining good levels of public services, and the minority centrist party will be able to bargain with the left of centre party to prevent it from moving too far left, with the risk of a substantial rise in taxation, during its term of office.

32 John Pratt *Penal Populism*, above n 5.

having to negotiate across a range of policies. At first sight, therefore, the New Zealand experience suggests that the dynamics set up by the electoral system are rather different in a country in which proportional representation is introduced in a society otherwise organised on liberal market lines than in one in which a long-standing proportional representation system reflects established class interests articulated with the production regime and embedded social identities represented by political parties.³³

To deepen our understanding of the mechanisms at work here, it is worth looking in a bit more detail at the origins of New Zealand's decision to reform its electoral system in the mid-1990s, and at the broader institutional context in which those reforms have taken root. I hope, therefore, that you will bear with me while I rehearse the main elements of a history with which you are undoubtedly much more familiar than I am. The simple version of this history is that multi-member voting based on the German model was adopted in the mid-1990s following the recommendations of a Royal Commission and two referenda – and in the teeth of opposition from both the main political parties. But this simple account masks the real reason for reform. This was a catastrophic collapse of public confidence in politicians' competence and integrity in the face of a long period in which the manifesto-burning capacities of the executive-dominated pure form of Westminster-style parliamentary system had been exploited to a spectacular degree. A Labour government initially elected in 1984 on a basically social democratic manifesto had taken the country in a radically neo-liberal direction. The country had also experienced an extended economic recession. The legitimacy of the entire political system was at risk, and radical change was needed to restore some measure of trust. It is almost certainly significant that the move to proportional representation in this country itself aspired, explicitly, to increase the responsiveness of politics to popular opinion in the light of a collapse of trust in the existing democratic system.³⁴

There is an extensive political science literature on the impact of the move to proportional representation in New Zealand on factors such as the size, range and orientation of political parties; the style of politics; the efficiency and decisiveness of governmental decision-making; and the stability of governments.³⁵ For our purposes, there are two key lessons to be learnt from this literature. The first is that the move to proportional representation has had much less impact on the efficiency, decisiveness and stability of government than might have been expected, and that in

33 Torben Iversen and David Soskice "Distribution and Redistribution: The Shadow of the Nineteenth Century" (2009) 61(3) *World Politics* 438.

34 John Pratt "When penal populism stops: Legitimacy, scandal and the power to punish in New Zealand" (2008) 41(3) *ANZJ Crim* 364 at 371.

35 See for example Jonathan Boston and Stephen Church "The Budget Process in New Zealand: has Proportional Representation Made a Difference?" (2002) 54(2) *Political Science* 21; Fiona Barker and Elizabeth McLeay "How Much Change? An Analysis of the Initial Impact of Proportional Representation on the New Zealand Parliamentary Party System" (2000) 6(2) *Party Politics* 131.

particular the adversarial nature of Westminster-style first past the post politics has largely survived. The second is that the move to an electoral system which facilitates the parliamentary representation of smaller parties, and which makes minority (and hence coalition) government a virtual certainty, has somewhat increased the number of parties who win seats, although to a relatively moderate degree. Yet more crucially, while the move to proportional representation has, as one would expect, led to the creation of a number of new parties, it has not led to the emergence of any stable new dimension in political preferences beyond the basic left-right socio-economic division represented by the two largest and longest established parties, National and Labour.³⁶ This means that it is in the interests of the two large parties to form coalitions which leave their hands free to pursue their traditional agenda on socio-economic measures. And this in turn implies that they are likely to be relatively relaxed about compromising on particular issues such as law and order where a small, populist party makes specific policies a condition of coalition or a confidence and supply agreement.

Certainly, the Green Party has been successful in gaining a larger number of representatives in recent years: but the picture with other small parties is quite volatile in terms of both policy and their own stability. Indeed the history of small parties over the last decade reads something like an extended soap opera of disputes, splits, re-formations and re-naming: I am afraid that, despite my best efforts, and a regular resort to the websites of the various parties (and indeed Wikipedia!), I am still not confident I have really got a clear view of it. These parties' number and success is circumscribed by the fact that no party can gain representation unless it meets a 5 per cent threshold in the popular vote or wins a constituency. The relatively liberal rules adopted in 2005, which allow coalition partners to opt out of collective responsibility on particular issues by building a "party distinction clause" into their agreements, perhaps somewhat weakens the discipline posed by coalition government. Nonetheless, the constraints of coalition government have necessitated a greater degree of negotiation between parties, and the discipline of coalition agreements has significant force.

From 1999 to 2008, through three general elections, Helen Clark led a Labour minority government in coalition on the basis of confidence and supply agreements with a number of smaller parties. Yet in spite of this long period of left of centre rule, not to mention a reduction in recorded crime of about 25 per cent between 1994 and 2006,³⁷ the prison population rose significantly, and had already reached 198 per 100,000 of the population by 2007. This was fairly clearly the result of the Labour-led coalition's feeling the need to assert its tough on crime credentials very much in the style of, and for similar reasons to, the Blair government in Britain: in view of popular and media preoccupations with crime, Labour saw a tough criminal justice policy as key to seeing off any

36 André Kaiser and Thomas Bretchel "Party System, Bargaining Power and Coalition Formation After the 1999 New Zealand General Election" (1999) 51(2) *Political Science* 182.

37 John Pratt "When penal populism stops: Legitimacy, scandal and the power to punish in New Zealand" above n 34, at 364.

electoral challenge from the National Party – a particularly salient motivation given New Zealand's three year electoral cycle. Notwithstanding the coalition government, the history of New Zealand politics during this period is strongly reminiscent of the prisoners' dilemma race for the toughest credentials between the two main political parties in a first past the post system. But to understand just how this came about, and how New Zealand's electoral reforms may even have left the country with some of the most penal populism-friendly aspects of both proportional representation and majoritarian systems, we need to add two other (related) factors to the political picture: the power of small issue-based parties; and the referendum system.

A The Referendum System

In 1993 – against the recommendations of a Royal Commission – legislative provision was made for the holding of (non-binding) referenda initiated by the support of 10 per cent of the population (about 280,000 signatures). I gather that referenda remain a controversial political topic in New Zealand, but it is worth noting that its supporters have included the conservative advocacy groups the Sensible Sentencing Trust and Family First New Zealand as well as right-leaning parties such as the Association of Consumers and Taxpayers (ACT) Party and the Kiwi Party. Only four citizen-initiated referenda were held between 1993 and the end of 2009. But – as you know better than I do – one of them had a significant impact on criminal justice policy. In 1999, Norm Withers, the son of a woman severely injured in a brutal assault, collected the signatures of 10 per cent of the population so as to initiate a referendum on criminal justice policy.³⁸ In the referendum, almost 92 per cent of voters, on an 83 per cent turnout – a staggeringly large majority – backed a:³⁹

... reform of our criminal justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences[.]

The resolution contained in the referendum might be seen as illogical – there is, after all, little evidence that hard labour and long sentences advance a decent range of victims' needs, while it is certainly inimical to compensation and restitution. But this hardly mattered: the Clark Government was compelled to support the result, and a mere three years after the inception of proportional representation, the referendum appears to have set the tone of a new penal politics, placing law and order at the heart of the political agenda. Two years later, in 2001, the so-called Sensible Sentencing Trust was formed, and started to operate as a significant social movement, organising protests and lobbying in favour of tougher sentencing. Within a remarkably short period of time, the Sensible

38 The referendum was drafted by Graham Capill, then leader of the Christian Heritage Party, and now doing fieldwork on the policies he advocated: at the time of writing he is serving a lengthy prison sentence for sexual offences against minors.

39 John Pratt "When penal populism stops: Legitimacy, scandal and the power to punish in New Zealand", above n 34, at 371.

Sentencing Trust inserted itself as a serious player in criminal justice politics in New Zealand, and its impact was felt as early as 2002, with legislation – the Sentencing, Parole and Victims' Rights Act – that year encouraging judges to make more use of maximum penalties, placing restrictions on parole, and making provision for victims of crime to have a say in sentencing and parole proceedings, and the extension of preventive detention to first offenders over the age of 17.⁴⁰ The definition of expertise in the area of criminal justice appeared to have been removed from academics and civil servants and handed to pressure groups.⁴¹

B Small Issue-Based Parties

In the light of this history, it may seem that my argument about the potential power of small parties under coalition government pales into insignificance beside the impact of the referendum process and of a crime-obsessed media which is not tempered by any robust tradition of public service broadcasting. But this would be to ignore two important facts. First, the salience which the referendum process gives to pressure group interests potentially increases the power of small parties, whose volatile policy orientation makes it possible for them to exploit the political opportunity opened up by popular concern with a particular set of issues. Second, the power of small parties seems likely to have made it harder for Helen Clark's Labour Government to resist the populist demand for tougher punishment. The reason is very simple. At the time of the Parole and Victim's Rights Act 2002, Ms Clark's Government was dependent on confidence and supply agreements with two small conservative parties, United Future New Zealand and New Zealand First, both of which published "tough on crime" position papers that year.⁴² By contrast, expanded provision for restorative justice and strengthened community penalties in the same legislation were in part a gesture to Labour's coalition partner up to 2002, the left-leaning Alliance party.⁴³

In its last two years in office, the coalition Labour government made some moves towards a moderation of its penal policy.⁴⁴ It is interesting to speculate on whether this betokens, as John Pratt has argued,⁴⁵ intrinsic limits on penal populism premised on the need for legitimacy: or whether – as the British Conservative administration of the 1980s discovered – the misfortune of winning too many successive elections can undermine the law and order agenda where it becomes clear that a high profile, tough on crime policy sustained over a number of years has failed to deliver reductions

40 Ibid, at 372. See also John Pratt and Marie Clark "Penal Populism in New Zealand" above n 41, at 306.

41 John Pratt and Marie Clark "Penal Populism in New Zealand", above n 27, at 315–317.

42 Ibid, at 306.

43 Ibid, at 318.

44 John Pratt "When penal populism stops: Legitimacy, scandal and the power to punish in New Zealand", above n 34, at 364–365.

45 Ibid.

in crime.⁴⁶ In any event, with Labour's defeat in 2008, the moderated plans for sentencing contained in the Sentencing Council Act 2007 have hit a brick wall: they sit on the statute book, but seem unlikely to be implemented.

Over the last two years, the nature of the parties fostered by the proportional representation environment has attained yet more obvious importance. To reiterate, instead of being articulated with long-standing economic, religious or regional interests – as in, say, Germany – most of the emerging small parties in this country have been strongly shaped by single issues or constellations of issues, becoming the potential voice of the floating or reluctant voters, disaffected with the two main parties, which were a feature of the pre-existing first past the post system. These issues include crime and immigration. Given the salience of law and order to the pre-existing majoritarian political system and the relatively polarized social and economic relations, and high levels of inequality, typical of liberal market economies, we might have expected that some of these parties would be tempted to focus on criminal justice interests such as victims' rights. Add to this equation the additional salience given to criminal justice by the referendum system, and the fact that single issue parties are attractive coalition partners for larger parties, in that they do not set policy constraints in relation to the economic issues which are those parties' key electoral platform, and it begins to become clear why proportional representation, instead of moderating law and order politics, had the potential to give them a new spin in New Zealand.

This potential is illustrated by the recent adoption of three strikes legislation.⁴⁷ In 2008, the National Party regained power, forming a minority government with an interesting mix of support from the Māori Party on the one hand and the right-leaning ACT. In a clever piece of electoral strategy opened up by the specificities of the proportional representation system, it appears that the National Party decided not to push their own candidate in a safe National constituency, making it known instead that they would welcome the election of the ACT candidate, that party's leader Rodney Hide. Although ACT has been known to poll at less than the five per cent of popular support which would normally be necessary for allocation of the seats from the party-based list, that one success in the constituency voting, which remains based on first past the post, guaranteed that ACT would be eligible for further seats from the party-based list from which representation is topped up to achieve proportionality in the House of Representatives. ACT therefore gained more seats by winning the constituency than would have National, hence generating sufficient seats overall for National to form a coalition.

46 Nicola Lacey "Government as Manager, Citizen as Consumer" (1994) 57 MLR 534.

47 Sentencing and Parole Reform Act 2010. For discussion of the run-up to the reform see Sophie Klinger "Three Strikes for New Zealand? Repeat Offenders and the Sentencing and Parole Reform Bill 2009" (2009) 15 Auckland U L Rev 248; Warren Brookbanks and Richard Ekins "Criminal injustice and the proposed 'three strikes' law" (Maxim Institute Guest Paper, April 2010).

A relatively recent addition to the ACT party list was a lawyer called David Garrett, whose main claim to fame at the time was his position as legal advisor to our old friend the Sensible Sentencing Trust, that most outspoken and influential pressure group advocating tougher punishment. Elected to parliament in 2008, Mr Garrett had, as ACT's spokesman on law and order, the opportunity to push for and to shape the Sentencing and Parole Reform Act 2010, s 86 of which institutes a three stage warning regime which is similar to the three strikes legislation in California and the two strikes regime instituted in England and Wales by the Crime (Sentences) Act 2003. On first conviction of one of the qualifying offences – a relatively wide range of offences against the person including robbery – a court issues a warning; on the second conviction of such an offence, the offender receives a final warning, must serve the full sentence given, and is not eligible for parole; on the third conviction for such an offence, the court must impose the maximum sentence for the offence, and the offender will be ineligible for parole unless the court decides that this is manifestly unjust. Strikes do not lapse over time. The legislation was passed in the face of opposition from parties other than National and ACT, and notably from the Māori Party, which decried the potential impact on the already hugely disproportionate number of Māori in prison: Māori citizens make up just under 15 per cent of the population, but over half of those in prison, with the disproportion particularly stark in the case of Māori women and young Māori men – a dismal fact which quite rightly attracted a great deal of Dame Sian Elias's attention in her lecture last year.⁴⁸ Mr Garrett resigned his seat in Parliament in September of this year when it emerged that he had committed two offences of his own: an assault, and the falsification of a passport using the identity of a dead child. The long term impact of his short-lived legislative career on the prison population remains to be seen: in view of late amendments restricting the legislation's scope, there is reason to think that it will be modest. But the knock-on effects and the symbolic significance of this successful piece of governmental law and order posturing should not be discounted.

New Zealand's experience tells us that proportional representation is not in itself an exogenous factor in explaining penal policy: rather, its impact depends on its articulation with its institutional and cultural environment. Within a coordinated market economy cluster of institutions, with sectoral parties, proportional representation has served to stabilise punishment; within a liberal market economy cluster, notwithstanding its orientation to the electoral success of the left, it produces a very different species of smaller party, and it can serve to accentuate dynamics towards penal severity by consolidating the electoral influence of single-issue interests. In New Zealand, it was, in addition highly significant that citizen-initiated referenda had been introduced shortly before the move to proportional representation, the composite electoral package reflecting a desire to make politics more responsive to popular demand. This has undoubtedly played into the hands of small

48 Sian Elias "Blameless Babes", above n 1. The figures cited here are drawn from New Zealand Department of Corrections *Overrepresentation of Māori in the criminal justice system: an explanatory report*, above n 30; see also John Pratt "When penal populism stops: Legitimacy, scandal and the power to punish in New Zealand", above n 34.

parties, leaving New Zealand with what one might see as the worst of both majoritarian and proportionally representative worlds: confronted with a combination of two large parties chasing swing voters susceptible of the prisoners' dilemma, and populist issue-based small parties who have the potential to shape the policy agenda on issues such as criminal justice which leave a government's economic policy-making hands free.

The New Zealand experience also highlights the interlocking and interdependent nature of complex institutional systems. Institutional structure is important. But no single institutional arrangement amounts to destiny; for its force is heavily dependent on its articulation with other such arrangements. Even citizen-initiated referenda, such an obvious vehicle for the propagation of populist penal politics both here and in California, do not necessarily conduce to volatile law and order policy. Vanessa Barker's fascinating comparison of the relationship between political structure and culture and penal policy-making in California, New York and Washington State⁴⁹ shows that the referendum system had vastly different effects in California and in Washington, stoking penal populism and generating the three strikes law in California, while facilitating a richer form of citizen deliberation and political participation in Washington.

Further afield, we are beginning to see that in the long run proportional representation systems of Europe, too, it may be the nature of parties generated by the political and social system rather than the fact of coalition politics which is significant. In a number of countries including Austria, Belgium, Denmark and the Netherlands, newly emerging nationalist, anti-immigration parties have gained a key influence on policy through the medium of coalition politics, swinging the political spectrum to the right in the wake of both the social democratic parties' understandable reluctance to negotiate with them and their more natural affinity with the political right.⁵⁰ Thus far, the impact on imprisonment rates has been relatively modest. But ongoing research on the number of foreign nationals in European prisons suggests that the overall data may be masking a more worrying pattern, and that the effective criminalisation of many migrants is exerting a disproportionate amount of such upward pressure as we currently see on prison systems in hitherto penally moderate countries. Note, however, that while the xenophobic and indeed racist views of these parties are not unreasonably associated with the extreme right, they are right wing parties in a very different sense from, say, the Tea Party in the United States. For they are not typically against government intervention in the economy, anti-taxation or anti-welfare state. Rather, their agenda is to preserve the benefits of the local system for insiders. Again, the relationship between political systems and the underlying structure of economic production, education systems and welfare regimes is apparent.

49 Vanessa Barker *The Politics of Punishment*, above n 7.

50 Ian Traynor "Immigration: Far right fringes exploits European Coalitions" *The Guardian* (London, 15 November 2010).

IV CONCLUSION

Where does this leave those of us who share Shirley Smith's deeply held view that prisons at the bottom of the cliff are not a solution to crime? In case my argument might be seen as a recipe for despair about the prospects for a return to a more moderated prisons policy in this country, let me end on a more optimistic note. First, it must surely be possible to interpret – or to amend – electoral law to prevent any future de facto evasion of the five per cent threshold which is key to the design of proportional representation in New Zealand. Second, there are several features of the proportional representation system which should, over time, militate towards a moderation of punitiveness. Of these, the longer term policy-making horizon afforded, other things being equal, by coalition government, and the alleviation of economic inequality, spell good news for criminal justice.

There is challenge here: to look closely at just how political action can counter existing institutional tendencies and to consider how to reshape institutions to temper the unreflective responsiveness invited by a simple "yes" or "no" voting structure or the recording of unconsidered views, whether at a sentencing hearing, in a referendum vote, or in an opinion poll. There is evidence to suggest that, when citizen participation is involved in the formation of criminal policy, it makes a real difference how that participation is organised.⁵¹ Research on public attitudes to crime and punishment in a number of countries show that these attitudes are highly contextual, and that the punitive reactions regularly reported in key parts of the news media are not the whole story.⁵² This, combined with the results of Barker's comparisons of California and Washington State,⁵³ suggests that a deliberative consultative structure may be crucial. So if referenda could be used as a jumping off point not for immediate policy change but for consultation and deliberation through a body such as a Royal Commission, with some representation from the relevant stakeholder groups, this could make a significant difference.

The future, it seems to me, lies in the construction of policy-making institutions which are accountable to the popular will in the medium term, but not reactive in the short term; which are transparent in their operations yet protected from external pressures; and which operate through reasoned deliberation rather than through simple voting. As many aspects of our constitutional systems show, democratic legitimacy can be provided through a number of means, and not merely through the ballot box, the focus group or the opinion poll.⁵⁴ Just as aspects of economic and

51 Lisa Miller *The Perils of Federalism*, above n 7.

52 Julian V Roberts and Mike Hough (eds) *Changing attitudes to punishment: Public opinion, crime and justice* (Willian Publishing, Cullompton, 2002).

53 Vanessa Barker *The Politics of Punishment*, above n 7.

54 See for example Ian Loader and Richard Sparks *Public Criminology? Criminological Politics in the Twenty-First Century* (Routledge, London, 2011). Loader and Sparks argue against the insulation of criminal justice policy-making from politics, but our views overlap in relation to the relevance of the quality of political decision-making and consultative processes.

environmental policy-making have been entrusted to expert bodies and stakeholder bodies under conditions of indirect accountability – and just as aspects of the execution of criminal justice policy is entrusted to the judiciary – we can surely devise some more effective consultative, advisory and decision-making institutions in criminal justice.⁵⁵ It is time to apply some of the inspiring energy and commitment which characterised Shirley Smith's life and to work towards institutional reforms which will inject greater reason and humanity, more evidence, less anger, and less short term political advantage into criminal justice policy-making.

55 This argument is developed in relation to the United Kingdom in Nicola Lacey *The Prisoners' Dilemma*, above n 8, at ch 4.

