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Papers from the British Criminology Conference

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An Online Journal by the British Society of Criminology

2011 Conference, (3-6 July)
Economies and Insecurities of Crime and Justice
Hosted by Northumbria University

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Contents

Editorial <i>Andrew Millie</i>	1
Recession, crime and mental health <i>Jill Peay, London School of Economics</i>	3
Prison and university: A tale of two institutions? <i>Rod Earle, the Open University</i>	20
Policing wildlife: Perspectives on criminality in wildlife crime <i>Angus Nurse, Birmingham City University</i>	38
Financial regulation enforcement and the criminal dimension: Irish perspective, EU context <i>Shaun Elder, University of Limerick</i>	54

Editorial

Andrew Millie

The British Society of Criminology Conference in 2011 was hosted by Northumbria University from 3rd to 6th July, under the heading “Economies and Insecurities of Crime and Justice”. At the conference Professor Robert Reiner was awarded the BSC outstanding contribution prize, presented to him by his colleague Professor Jill Peay. Plenary presentations were provided by Jill Peay, along with Jackie Harvey, Liz Kelly, Mike Levi, Ian Loader, Stephen Shaw and Loïc Wacquant. Thanks are due to Northumbria University for organising the event. In 2012 the conference makes a welcome return to the University of Portsmouth who were hosts back in 2004. For 2012 we have already been promised plenaries from David Garland, Katja Franko Aas, Roger Hood and Sharon Shalev. We hope to produce Volume 12 of our online journal “Papers from the British Criminology Conference” for the Portsmouth event, so if you are planning to speak it would be great if you would also consider submitting your paper to this journal.

For the current Volume of the journal we have maintained a rigorous review process and four papers have made the final selection. All submitted papers were reviewed by at least two academics.

We are pleased to include a paper from Professor Jill Peay’s plenary address to the conference. Picking up on the main theme of the conference, the paper provides a fascinating assessment of relationships between recession, crime and mental health. Jill concludes that, despite current ‘austerity’, investment in “some relatively modest mental health and social initiatives ... can have considerable pay-offs”.

In the second paper Rod Earle takes an unusual approach in comparing prisons to universities. Rod promotes a ‘convict criminology’, one that derives from ‘insider’ perspectives of those who have experienced prisons. Convict criminology originated in the US but, according to Earle, there is scope for its development in Britain.

The third paper is provided by Angus Nurse and considers wildlife crime. More specifically, the paper offers a typology of wildlife offenders

arguing that enforcement regimes need to be adapted to fit different type of offenders.

The fourth and final paper is by Shaun Elder. This paper looks at financial regulation enforcement in Ireland and the European Union focusing on the criminal dimension of regulation - for instance that imprisonment can have a 'signalling' importance. The current financial crisis provides the context.

The production of this journal was only possible with the assistance of colleagues who all gave their time freely. Thanks are due to the editorial team of Karen Bullock and Simon Mackenzie. Thanks also to Spencer Chainey, Ben Crewe, Hazel Croall, Rosie Erol, Alex Hirschfield, Christina Pantazis, Peter Squires and Rob White who all proved to be excellent reviewers.

Andrew Millie, Edge Hill University, December 2011

Recession, Crime and Mental Health

Jill Peay, *London School of Economics*

Abstract

This article adopts a holistic approach to the complex interconnections between economic circumstances, crime and mental health. It reviews some of the criminological and economic literature on unemployment, property crime, health inequality and worker well-being. It stresses the explanatory importance both of adopting a chronological approach to people's experience of economic circumstances relative to others and of pursuing economic remedies on two levels: individually (investment in mental health treatment and protective strategies) and at a societal level (avoidance of strategies that will increase unemployment etc). Four conclusions are drawn: first, criminologists should strive to enhance links within and across disciplines; second, that injecting resources into protective strategies may be significantly more cost effective than merely punishing individual offenders; third, that the economic and personal consequences of these issues are sufficiently serious to make this task urgent; and finally, that current economic circumstances should make such proposals irresistible.

Key Words: Unemployment, crime, conduct disorder, economic costs, inequality

I do not concern myself with such petty things as fingerprint powder, telltale pieces of pocket fluff and inane footprints. I see the solution to each problem as being detectable in the pattern and web of the whole. The connections between causes and effects are often much more subtle and complex than we with our rough and ready understanding of the physical world might naturally suppose (Adams, 1988: 115).

Douglas Adams' fictional detective Dirk Gently, and his eponymous Holistic Detective Agency, thrives on the fundamental interconnectedness of all things. This admittedly ambitious approach – a holistic approach – is adopted here only in modest form; but its central thrust is the notion that

individuals, and their social and economic environments, are interconnected both contemporaneously and historically, and that this understanding should underpin any analysis of the linkages between economic circumstances, crime and mental health. The article also draws loosely on Merton's (1938) notion of relative deprivation: significant inequalities in the relative positions of the employed and the unemployed are likely to be associated with poorer mental health and greater criminal activity by those experiencing the stresses of material inequality.

In this short article it is not possible to explore all of these potential linkages. Terms such as crime, mental disorder and recession all require careful definition (and may be incapable of being defined to everyone's satisfaction across a number of disciplines); moreover, the quality of the evidence deemed necessary to draw more than inferences of association between them will vary. Just thinking about the relationship between crime and mental health has for me occupied an entire book (Peay, 2010). And, of course, what one finds when one explores the literature in such a leisurely form are a series of contradictions and further unanswered questions. To give one illustration: when thinking about the relationship between the two factors of mental disorder and crime it is clear that some disorders, for example personality disorder and drug dependence, are self-evidently and, to a degree, tautologically linked with crime. Yet dementia, chronic schizophrenia and depression can all have a protective effect, making crime less likely. Sometimes this is because the nature of the symptoms deprives one of the necessary wherewithal and motivation to offend, and sometimes because their occurrence coincides with age or reduced mobility, again considerably reducing the opportunities for offending. Paradoxically some disorders, for example, forms of schizophrenia, can have contrary effects dependent on the stage of the disorder, and seemingly counterintuitive effects according to the precise nature of the symptoms experienced and by whom (see for example, the role of threat/control override delusions, Peay, 2010: 84). But this is not an article about what causes what; rather it is about the kinds of strategies that might reduce the likelihood of certain adverse outcomes arising, whether those outcomes are couched in terms of poor mental health or criminal behaviour.

With these caveats in mind this article merely seeks to provide glimpses of the extensive literature available with a view to raising some questions about the potential for criminologists to broaden their dealings with each other and with those in other disciplines. It also argues that, in times of austerity, criminologists can make compelling arguments in terms of the effectiveness of assorted interventions. Moreover, these arguments can be based not only on grounds of social justice, but also on the notion that social justice and individual treatment can bring significant cost benefits and social harmony (the latter, of course, being a bolder and less empirically well-grounded claim than the former).

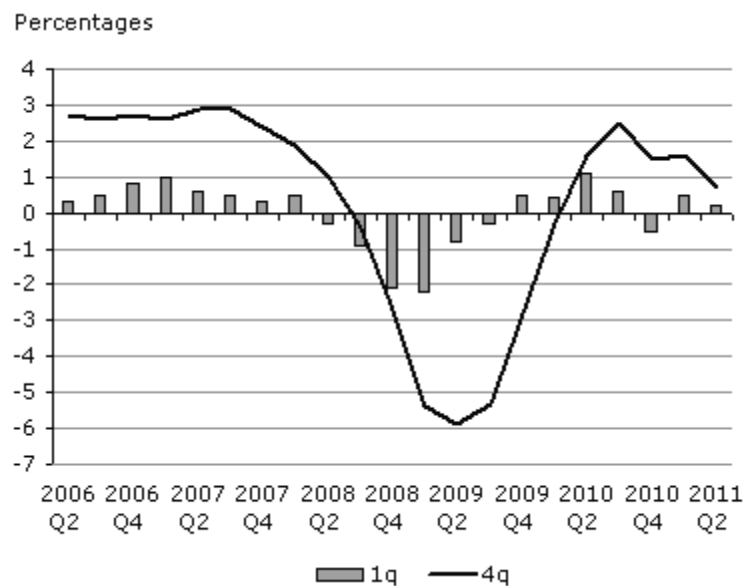
What is a recession?

President Harry Truman is reputed to have said “It’s a recession when your neighbour loses his job; it’s a depression when you lose your own”, and whilst not wholly accurate, his observation reflects some of the psychological literature and the important differences between objective and subjective approaches. Paradoxically, the economic literature is more concerned with subjective measures than many criminologists might otherwise assume.

There is a further paradox in that little of the literature on the recession makes reference to either crime or mental health (and for a light-hearted article on a leading financial website, see thisismoney.co.uk, 2008). The failure to mention mental health in this financial piece is perhaps understandable, since such potentially stigmatic issues would be unlikely to play well given the article’s frivolous take on the recession; but the absence of any mention of crime is more telling and might reflect a tendency by criminologists to overvalue the importance of crime to others. Perhaps we have been as blinkered by the fascination of some parts of the media with crime and thereby misled ourselves. Could it be that in the same way we frequently point out where the public have failed to understand issues familiar to criminologists (for example, the role of sentencing in crime and in the levels of sentences awarded, Hough and Roberts, 2005), and in so doing attribute partial causal responsibility to the role of the media, that we have failed to acknowledge the influence of those very media outlets on our own thinking? Or perhaps the issue is too complex – with the recession having a variable impact on different types of crime – for any irreducible message to emerge for inclusion in the economic literature. After all, even my initial belief that property crime was alleged to go down in economic good times (why would you buy dodgy electrical goods when you could obtain them legitimately with a warranty?) and violent crime to increase when economic circumstances permitted more public drinking and socialising, was revealed not to be wholly supported by the literature.

As a lawyer/criminologist I recognise that lawyers can broadly settle on what constitutes a crime, even if criminologists would regard defining the term ‘crime’ as a career consuming activity. In this context I would be loath to suggest that economists are *ad idem* as to what constitutes a recession. However, my understanding is that many would agree with the notion that a recession occurs where a country’s economy, as measured by its Gross Domestic Product, shrinks for two consecutive quarters. On the basis of this definition Britain went into a recession in 2008, a recession which the Prime Minister David Cameron described as “the longest and deepest since the war”. And although we had not, at the time of writing, experienced the greatly feared double dip recession (see Figure 1 below) Bank of England forecasts for 2012 predicted only a 1 percent rise in growth for the year and many economists were predicting zero growth (Allen, 2011).

Figure 1. Real Gross Domestic Product Quarterly Growth up to the 26th July 2011 (Office for National Statistics, 2011a)



Britain had experienced periods of recession in 1948, 1978, 1981 and 1992; this leads to two questions. First, what is the effect on an individual, perhaps aged 50 now, who had experienced a recession in 1981 when he or she was in their early twenties? And second, what do these figures of a country's marginal or 'flat-lining' economic performance disguise for individuals? Are some people doing immeasurably better than others and are some, for all intents and purposes, experiencing their own personal recessions?

The economic evidence (Gregg and Tominey, 2005) strongly suggests a scarring effect on men's subsequent economic well-being following a period of unemployment in their youth; and even where that period of unemployment is a one-off, a modest residual wage scar can be observed much later. Bell and Blanchflower (2010) document not only how unemployment while young, and especially if it is of long duration, causes permanent scars, but also how the effects of lost work-experience on wages can be seen over 20 years later. Moreover, unemployed young people, by comparison with other young people, were "significantly more likely to feel ashamed, rejected, lost, anxious, insecure, down and depressed, isolated and unloved" (Ibid at R14).

And here the economic literature is fascinating, since although inflation during the recession has been held largely in check, for some individuals their experience of inflation is much more pronounced. The Institute for Fiscal Studies (see Levell and Oldfield, 2011) has observed the impact of very differing levels of inflation on households during the recession, indicating that some people are likely to be much more badly affected than others. Levell and Oldfield (2011) found that between 2008-2010 the poorest fifth of the population experienced a rate of inflation of

4.3 percent whilst the richest fifth experienced the lower rate of 2.7 percent; and over the last decade that difference magnifies to an average annual inflation rate which is nearly 60 percent more for the poorest sections of society than the richest sections. The reason is simple: poorer people spend a greater proportion of their budgets on energy and food which have increased in price disproportionately, whilst richer households benefitted from low interest rates on mortgages, and on mortgages which represented a disproportionate element of their household expenditure. Relative inequalities are thus critical: the recession doesn't just hit the poor, it hits them harder. Even low to middle income families have been affected (see Plunkett, 2011, noting that individuals who are in work, but on low or moderate wages, are made limited in both time and money); and differences across the age ranges are marked, with younger people being particularly badly affected with respect to their employment opportunities and long-term aspirations (Collinson, 2011; Toynbee, 2011). Notions of relative affluence and relative deprivation may lie at the heart of any linkages there are between economic circumstances and crime; and these measures need to be understood in their individualized context, even though they may be produced in a macro form.

For criminologists therefore, interested in the causes of crime and its potential relationship with mental disorder, the interesting questions are not about the recession per se, but about unemployment, about the fear of unemployment and about the Mertonian questions of relativities: how do you compare with others, who may or may not be your neighbours, and with your own aspirations and expectations?

Unemployment and crime

In a context where economists are cautious about what constitutes unemployment and criminologists are equally cautious about what constitutes crime, thinking about the relationship between them is going to be hazardous. However, historically there does appear to be good evidence that there is some association between the two: for property crime it is generally held that a 1 percent increase in unemployment will be associated with a 1-2 percent increase in property crime. Lin's (2008) study of a large data set from 1974-2000 in the US is bolder in its claim: using more sophisticated measures of unemployment and controlling for endogeneity Lin asserts a 1 percent increase can lead to a 4-6 percent increase in property crime. Indeed, he makes the claim that 33 percent of the drop in property crime in the US during the 1990s can be attributed to changes in unemployment. Notably Lin is an economist and accordingly has adopted a nuanced analysis of the unemployment statistics; yet his crime figures are derived from the FBI's Uniform Crime Report data, data which are, of course, subject to all the same criticisms that any official records in any jurisdiction rightly endure. Notably, anxieties about the robustness of the data on violent crime have precluded any conclusions, other than negative ones, being drawn about their relationship with unemployment. However, his analysis, in finding a positive association between

unemployment and property crime over a period of a quarter of a century, is consistent with the existing literature.

Hooghe et al.'s (2011) Belgium study, published in the *British Journal of Criminology*, notably makes no claims to causality but similarly observes significant associations in unemployment and crime. They used a measure of deprivation, made up of income level, income inequality and unemployment, and noted its association with both levels of property and violent crime. The element of unemployment, supporting Lin's finding, had a significant impact, being positively associated with both property and violent crime. In contrast, income inequality had a significant positive impact on property crime but a negative impact on violent crime. Since in Belgium minimum income levels are entrenched, the authors speculated that the existence of this equivalent of a state safety net may help to obviate the worst aspects of inequality for violent crime. It is notable that since there is no upper limit on income, income inequality was found to be most pronounced in the richest municipalities, raising interesting (and unanswered) questions for those interested in the influence of relative deprivation. Crucially though, for both property and violent crime, the effect of unemployment was larger than that for income level.

Unemployment and well-being

Clark's (2011) study of the mental well-being of workers, based on panel data from the British Household Survey from 1992-2007 and drawing on responses from 10,000-15,000 of those in work, results in a complex picture of pro-cyclical relationships. Using the General Health Questionnaire 12, an instrument which measures strain, depression, anxiety, insomnia and ability to concentrate, as a proxy for 'well-being', Clark observes that the well-being of workers is significantly higher in times of boom than recession. Unemployment reduces the well-being of both those who lose their jobs and those who keep them (see also the interim findings of the Marmot Review (2010) that poor working conditions can have a detrimental impact on health); although those who keep their jobs do become more satisfied with what they do in work in times of recession. None of this is surprising; however, Clark's data reveal that those who are unemployed are psychologically less 'well', as measured by the GHQ12, than both those in work, and those not in the labour force. Regression analyses indicate that these are not mere selection effects – that is, they are not attributable to the least satisfied or most vulnerable workers losing their jobs - but rather that it is comparative psychological perceptions and expectations that are critical. As Clark noted in 2003: "Heuristically, unemployment always hurts, but it hurts less when there are more unemployed people around" (Clark 2003:346); unemployment may thus hurt less when your neighbours are also unemployed because, as he has suggested, it is less stigmatic.¹ Or in Mertonian terms, the comparators for judgements about relativities are less stark (neighbours), less

¹ Personal communication 27 February 2011

proximate (the wider employed) and less pertinent (aspiration is depressed).

Some of these key issues of social inequality were examined extensively in Daniel Dorling's book *Injustice: why social inequality persists*. With respect to mental well-being he asserts (2010:269) that inequality has a dose response effect, by which he means that increases in inequality are associated with poorer mental health. Others have documented a similar effect with respect to health generally (Wilkinson and Pickett, 2007:1973) and assert that the relationship is sufficiently strong to support a causal inference. Wilkinson and Pickett explain this effect as a response to the burden of relative deprivation, with increasing inequality increasing the burden (ibid at 1974; see also Wilkinson and Pickett, 2009); they conclude by noting:

If inequality has psychosocial effects, perhaps involving chronic stress and the aversive effects of low social status, then it is possible that some of the health and social problems marked by social gradients share roots in chronic stress. Rather than providing ever more prisons, doctors, health promoters, social workers, educational psychologists and drug rehabilitation units, in expensive and at best only partially effective attempts to offset the problems of relative deprivation, it may be cheaper and more rewarding to tackle the underlying inequalities themselves. (Wilkinson and Pickett, 2007: 1976).

The observations of the House of Commons Health Committee's Report on Health Inequalities (2009: para 45) are also apposite. Whilst they noted that the health of the nation had generally been improving over the previous ten years, inequalities between social classes had widened 4 percent for men and 11 percent for women (a finding which has even more force in the light of the unemployment figures: by June 2011, 1.05 million women were out of work, the highest figure since 1988, Office for National Statistics, 2011b; and by September 2011 youth unemployment had also passed the one million mark, Office for National Statistics, 2011c). It is simply not true to say, as George Osborne did to the Conservative Party Conference in 2009, that "we're all in this together".

Unemployment not only reduces well-being but has also been shown to have a strong independent association with suicide (Lewis and Sloggett, 1998; Stuckler et al., 2009; 2011). In their 2009 analysis of data from 26 European countries over three decades, Stuckler et al. observed, in those under 65, that an increase in unemployment of more than 3 percent increased suicides by 4.45 percent (95 percent CI 0.65–8.24). And consistent with the Belgium data above, the authors made a number of predictions about the protective effects of strong social support networks and active labour market policies – some but not all of which look to be substantiated by their later work in 2011. A recent study from the US by the Centers for Disease Control and Prevention (Luo et al., 2011) has also

observed rises and falls in the suicide rate alongside recessions and expansions in the economy, based on data for 1928-2007; notably, the associations are strongest amongst the working age population. Again, there are all sorts of caveats about the definition of terms, with Lewis and Sloggett's (1998) data for England and Wales including both suicides and undetermined deaths between 1983 and 1992, since suicide is so difficult to establish before a Coroner; but the association with unemployment is evident. And it should be noted that other research on suicide would stress that it would be both inappropriate and unjustified dismissively to link all suicides to psychiatric disorder (see Scourfield et al., 2011).

Thus, the thrust of these assorted publications is clear; unemployment and its anticipation are not good for one's health and probably not good for one's mental health. The corollary, that 'work is a powerful aid to recovery' from poor mental health, has also been asserted in the context of a major report which has looked at the evidence base for psychological therapies to treat depression (Layard et al., 2006:6).

The economics of mental health

Knapp et al. (2011) examined the costs of mental health problems in 2007 and made an attempt to estimate the projected costs up until 2026. It should come as no surprise that it is the costs of dementia that will have the greatest economic impact (the figures relate to England): but dementia is largely a disease of the elderly and has little relevance to the incidence of crime. As with many others suffering from mental health problems, those with dementia are almost exclusively the victims rather than perpetrators of crime: indeed, dementia may well preclude the possibility of a finding of criminal responsibility even in the context of what might otherwise be criminal behaviour.

However, it is the analysis of the financial gains to be made from relatively modest interventions in the mental health arena that should be of most interest to criminologists. Knapp et al.'s report deals with some 15 interventions: these include parenting interventions, screening and brief interventions for alcohol abuse, early detection and intervention for psychosis and suicide prevention methods, including the introduction of bridge safety measures. The latter might seem almost humdrum, but it is consistent with the effective policy of removing ligature points in prisons and psychiatric hospitals and is amongst those rated as outstandingly good value for money over time.

Moreover, it is important to note that many of the economic savings to be made derive from not only the predicted reductions in crime but also all the costs associated in processing offenders through the criminal justice system, and subsequently punishing them if convicted. And it is here that the report identifies parenting interventions, and school-based social and emotional learning programmes for the prevention of persistent conduct disorders, as representing the greatest public sector savings.

Conduct disorder and offending

Conduct disorder is the most common psychiatric condition found amongst children and young people; there are also many cases which do not reach the clinical criteria for diagnosis but nonetheless remain important as 'sub-threshold' diagnoses (Sainsbury Centre for Mental Health, 2009; see also Moffitt, 1993). A third of children with conduct disorder are also co-morbid, with additional diagnoses such as anxiety disorders or attention deficit hyperactivity disorder. The complexity of their problems, and associated behaviour, has multiple precursors but adverse influences in children's early lives and harsh parenting are claimed to be significant contributory factors. Whilst the Sainsbury Centre (2009) are careful not to attribute later criminal behaviour by those with early conduct disorder solely to that disorder, since socio-economic disadvantage and below average cognitive ability clearly have a role to play, they do make some very bold claims about the attributable costs. In part these claims are bold because of the obvious difficulty of reliably assessing the costs of crime when so many crimes go unreported and the scale of others (most notably those associated with the banking crisis) are unquantifiable.² However, and drawing on the Home Office's figures for a total cost of crime at £75 billion per year, the Sainsbury Centre estimate £22.5 billion is attributable to those with conduct disorder in childhood and £37.5 billion to those with sub-threshold problems. This makes up 80 percent of the attributable costs of crime.

The strength of the claim derives from the notion that although offending is widespread, persistent prolific adult offending is not; yet where it is found, it is typically amongst male offenders who started offending at an early age. And amongst this group, conduct disorder is argued to be common. And whilst conduct disorder is not a term used as such by the Cambridge Study in Delinquent Development (see Farrington, 1995) this major study provides evidence that a high proportion of chronic offenders had amongst the highest scores on the study's prediction scale, based on "troublesome behaviour, economic deprivation, low intelligence, a convicted parent and poor parental child-rearing techniques" at age 8-10 (Ibid:941). Moreover, of those first convicted at ages 10-13, 91 percent of this group did not give up offending after their first offence, and they had on average longer and more prolific criminal careers (Farrington et al., 2006:65). The policy implications of this complex work have been variously addressed, and will continue (Loeber and Farrington, 2012 forthcoming).

It is the combination of these data, namely the high costs associated with conduct disorder and the prevalence of subsequent prolific offending amongst this group, which underpins the claims made by Knapp et al. (2011) that effective early intervention can have real economic (and

² The silence surrounding these economic crimes was tellingly examined in the 21st Eve Saville memorial lecture '*Recession, riots, social change: Can psychotherapy contribute to a policy response?*' given by Susie Orbach on 16 November 2011. Available from: www.crimeandjustice.org.uk/opus1872.html

health) benefits. For, as the National Institute for Health and Clinical Excellence (2006) has illustrated, the costs of interventions with this group are relative modest, particularly where group-based programmes are utilised, but the savings over a life-time of potential offending (avoided) massively outweigh them: indeed, the Sainsbury Centre (2009:10) estimate these at £225,000 per case for conduct disorder (of which £160,000 are the costs in reduced offending). Treatment and other protective strategies, where they can be effective, rather than punishment of young offenders with either diagnosed conduct disorder or sub-threshold problems, is manifestly the preferable option. As the Sainsbury Centre (2009: 11) conclude:

There can be little doubt that a range of evidence-based programmes aimed at preventing or reducing childhood conduct problems should be more widely available than is presently the case. In the long term nothing would do more to reduce crime.

However, is it sufficient just to focus such preventive efforts on the clinical 'hard-core' cases? The answer to this is also clear, albeit in the negative. There is a paradox associated with preventive strategies familiar to all criminologists: "although those belonging to a high-risk group are at increased risk of an adverse outcome, nonetheless the majority of those experiencing the outcome do not belong to the high risk group" (Fergusson et al., 2005:486). Frequently, this is attributable to the low-base rate of the event to be predicted. Exceptionally for conduct disorder the base rate for subsequent offending is not particularly low; some 40 percent of those with childhood conduct disorder will desist from crime altogether, implying that 60 percent will not. But, for this 60 percent, only a minority of those will go on to become prolific offenders (Sainsbury Centre, 2009: 7). Yet of that group it is important to recall that a significant preponderance experienced behavioural problems in early life (see Farrington, 1995; and Farrington et al., 2006 above). If they cannot be identified in advance, and trying to single out those at risk is rarely a successful or popular policy, the strategic preventive strategy is to employ modest initiatives with both the clinically significant and sub-threshold individuals. And then to build on the known protective factors.

Much, of course, is known about such protective factors, albeit deriving in part from the US where critical appraisals of these interventions are both long-standing and on-going (see, for example, the work of the Washington State Institute for Public Policy (WSIPP, 2009) on prevention). In particular, the Sainsbury Centre (2009: 10) refer to the work of Drake et al. (2009) as evidence that "punitive measures usually have negative returns, with programme costs exceeding benefits". Whilst this is not a point seemingly made explicitly by Drake et al., indeed it is a point that hardly needs making, their meta analysis does conclude by observing that "evidence based – and reasonably priced – programmes that achieve even relatively small reductions in crime can produce attractive returns on

investment” (2009: 194). This reinforces again the notion that protective strategies may have considerable economic merit. Finally, the recent initiative by the Washington State Legislature in instructing WSIPP “to calculate the return on investment to taxpayers from evidence-based prevention and intervention programs and policies” (Aos, 2009: 1) is of note. The research remit was to include, amongst other areas, issues of crime, mental health and employment, so as to demonstrate which policies had improved outcomes on a cost-effective basis; this is consistent with the holistic approach being advocated here, assuming that a non-segmented approach is adopted and the interactions between these areas is a key focus of the final report.

Why this matters

When I was invited by the organisers of the 2011 British Criminology Conference in the spring of 2010 to address the subject of ‘Recession, Crime and Mental Health’ I did not realise how opportune their topic would become. Preparing the plenary lecture took me into economic territory wholly unfamiliar to me; reformatting the material in the weeks following the August 2011 English riots make the resonances still more powerful. Whatever convincing explanations ultimately emerge for the riots (see, for example, ‘Reading the Riots’ joint project by The Guardian and LSE, 2011), the intersection of increasing unemployment amongst those young people who are chronologically at the peak age of offending is likely to be an important factor. Although it would be unwise with the benefit of hindsight to draw more from this than can currently reasonably be extracted, as I indicated in the oral presentation the economic prospects for particular individuals, and for those sections of society who were vulnerable to unemployment or job insecurity, are dire.³

Taylor-Gooby and Stoker (2011: 14) had documented this economic risk when evaluating the coalition government’s austerity programme:

The coalition programme ... involves a restructuring of welfare benefits and public services that takes the country in a new direction, rolling back the state to a level of intervention below that in the US – something which is unprecedented.

Indeed, they drew attention both to the International Monetary Fund’s prediction that our public spending as a proportion of GDP will likely have fallen below that of the United States by 2015 (2011: 6) and to predictions made by the Office for Budgetary Responsibility. The OBR had noted that the cuts programme “will cost 500,000 public sector jobs, but that unemployment overall will fall from 2.6 million (8.1 per cent) in mid 2011, to 1.9 million (5.8 per cent) by 2016” (Taylor-Gooby and Stoker, 2011: 13).

³ See *the Guardian*’s preliminary map of the locations of the principal riots and areas of urban deprivation alongside areas of relative affluence ‘Mapping the riots and poverty’. Available from: www.guardian.co.uk/news/datablog/interactive/2011/aug/10/poverty-riots-mapped

The coalition's strategy relies on the private sector to generate jobs to reduce unemployment overall; and although the figures published in August 2011 of those employed were increasing, so were the figures on those unemployed (Office for National Statistics, 2011b). As noted above, the figures for female unemployment have risen disproportionately, in part a consequence of the shift from 'family-friendly' public sector jobs, as have those for young people. All of this suggests that the rewards and penalties that individuals suffer, and face the prospect of suffering, will continue to differ markedly. And that is not a recipe for social cohesion.

Conclusions

The connections between the recession, crime and mental health are complex, multifaceted and of variable strength. The direction of those associations and their facilitative and protective impacts are also heterogeneous. However, it would be too simplistic to leave it at 'everything affects everything else': the strength of the various associations does differ and our ability to make a difference to these linkages also differs. So what is being proposed?

First, criminologists should be encouraged to build as many channels as possible, not just between their various sub-specialisms, but also across disciplines. The insights to be gained from some of the economic and psychological literature are considerable: and it would not be true to stereotype the former as being based solely on macro analyses and the latter on some individualised or pathological evidence base. The commonalities rather than the differences are striking. Facilitating greater interconnectedness by engaging with this broader literature is advocated.

Second, the economic and personal costs of a failure to address and redress these issues are significant. An individual's personal chronology has evident consequences for him or her; but acting en masse, where their experiences of macro level economic conditions are shared, these chronologies will impact on others not so blighted. The analysis by Reicher, Stott and Drury of crowd behaviour, which predates the 2011 August riots, was presciently showcased in a collaboration between the Academy of Social Sciences, the British Society of Criminology and the British Psychological Society (2011); and their subsequent analyses (Reicher and Stott, 2011a; Reicher and Stott, 2011b) are but one example of a more nuanced understanding of what are undoubtedly complex social interactions. Their research rejects an analysis based on mere mindless irrationality. Those who took part in the riots were individuals, they argued, acting with a shared social identity and on the basis of a "collective understanding, norms and values": in short, these actions were a "response to a shared sense of illegitimacy and a lack of alternatives". And they were individuals certainly with a history and, possibly, with a shared sense of their own frustrated economic expectations. Although none of this is offered to justify the unjustifiable, it may be one important link in achieving a better understanding of what must be a mesh of causal factors.

Thus, whilst a careers based criminology has examined offending on a longitudinal basis (see, for example Farrington et al., 2006; and Odgers et al., 2008), and the economics literature has looked at the long-term effects of periods of unemployment, there may be some scope in bringing the two closer together. Whether it is the very direct effects of rioting, or the more subtle but equally damning effects of a long-term impoverishing of the quality of people's lives brought about by unemployment, or even the undermining of people's expectations, a coalition-criminology (Player, 2011⁴) may have much to offer.

Third, if poor mental health is a primary outcome measure of unemployment then tackling those mental health issues can be addressed both individually and, and perhaps more importantly, at a preventive macro-level. Or as Loïc Wacquant asserted in his plenary lecture to the Conference (Wacquant, 2011) we need to "rebuild the economic and social capacities of the state". In the present climate this looks an unlikely outcome, but the work of Wilkinson and Pickett (2009), documenting the correlation between inequality and mental health at a comparative country level, makes its neglect poignant. That these country level differences exist to be documented should come as no surprise to those familiar with Lacey's (2007) illustrations of how key institutional differences in contemporary democracies underpin the extent of penal moderation (or excess). And it is worth recalling the implications of the work from Belgium that the nature of a country's welfare system can seemingly make a difference to the incidence of violent crime; a state safety-net in the form of entrenched minimum income levels reduces the level of relative social and economic differentiation at the bottom end.

Finally, in an era of austerity (albeit such arguments make sense in an era of prosperity as well) investing in some relatively modest mental health and social initiatives, as recommended by Knapp et al. (2011), can have considerable pay-offs. Although the direct benefits are to the individuals assisted, the indirect economic benefit to society through reduced offending, and all of the costs saved that would otherwise be entailed in policing, processing and punishing offenders, has to have magnetic qualities for those charged with guarding the national wealth.

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⁴ A term coined in discussion by Elaine Player, June 2011

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Prison and University:

A Tale of Two Institutions?

Rod Earle, *The Open University*

Abstract

For many years prisons have had a reputation as universities of crime providing novice criminals with opportunities to learn from more experienced criminals. Over the last 20 years, as prison populations have grown there has been a simultaneous expansion of university places and of courses specialising in studying crime. Academic criminology has experienced rapid growth with some suggesting that there are more students studying criminology now than sociology. There have never been more criminology courses on offer, or institutions offering them. Amidst this growth, there are indications that there are significant numbers of criminologists with more personal experiences of both crime and prison, combining experience of the Academy and its poorer relation at the opposite end of the social structure. What accompanies the transition from crime and prison to criminology and university? The instrumental relationships between prisons and criminology are notorious, long-standing and controversial, but rarely examined at the personal level. In this paper the author reflects on such an experience of prison, conducting research, studying and teaching criminology. The intention is to foster a reflexive exploration of relations, both institutional and structural as well as personal, between prison and university.

Key Words: Prison, convict criminology, reflexivity, university

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity... (A Tale of Two Cities, Charles Dickens)

Caveats and cautions

The ideas in this paper are conjectural and personal. I am prompted to outline them because of recent experiences of conducting an ethnographic study of men's social relations in prison. These have confronted me with a number of dilemmas of an epistemological and personal nature that I thought could be worth sharing and developing within the British Society of Criminology, hoping, that at some level, that it is what it is for. The paper

presented here was part of a panel convened by the author under the title 'Putting Prison in its Place' that sought to bring together a variety of reports of prison research to situate ethnographic approaches in a reflexive perspective.

I want to attempt two things in this paper. The first is to signal what I feel may be an underexplored aspect of relations between two institutions, prison and university, that have otherwise been widely seen as contributing to, respectively, the denial of social mobility and its promotion. The second is to open a space to consider the significance of personal experience of crime and prison for its academic study. This second aspect draws narrowly and inevitably from my own experiences but seeks to make links with the development of 'convict criminology' in the US academic community.

Tales of growth – the rich get university, the poor get prison?

The growth of penal populations is, as ever, a great source of animation within criminology. The 2011 BSC conference in Newcastle hosted the most pre-eminent and eloquent theorist of this growth in the shape of Loïc Wacquant who graced a conference plenary with the briefest of summaries of his complex and controversial account of this phenomenal expansion (Wacquant, 2008; 2009a; 2009b). Prison's role in the management of crime, to loosely paraphrase Wacquant, is to certify the poor and marginal in a kind of social 'lock-down'. To be convicted of a crime, and more, to go to prison, is to be awarded a negative credential that, more or less, guarantees you stay at or close to the bottom of the social structure. For those in the UK, in the days of the Criminal Records Bureau, this certification follows you around relentlessly, casting shadows wherever you step (Earle and Wakefield, 2012). Universities offer the opposite, a positive credential, a degree certificate that lights the road to higher salaries, safer jobs and more satisfying work – the professions - even the middle class!

Wacquant's penal thesis is that American neoliberal hegemony is leading to the development of novel and alarming reconfigurations of capitalist statecraft. Listening to Wacquant, and reading his analysis, it can seem that in the penal dimensions of neo-liberalism he recognises a kind of reverse imperialism. It is an imperialism in which the state is no longer simply extending its sovereignty beyond its borders to secure its interests, but has turned back in on itself now to confront and pacify its internal threats. In the process it revisits and reasserts the masculine and martial priorities that accompanied the emergence of European nation states in the 16th century. As a result, the benign Keynesian hybrid that dominated the second half of the twentieth century (in the 'West' at least) is ditched in favour of another, more muscular and aggressive state, armoured as much against its own populations as against external others. It recalls Polanyi's

(1944) crustacean state through its emphasis on hardening its defences against threat.

Although there was unfortunately little opportunity for conference delegates to interrogate this thesis with its author, Wacquant's work has prompted vigorous critique and commentary within British, and other Anglophone criminological communities (O'Malley, 2000; Zedner, 2002; Lacey, 2010; Newburn, 2010; Brown, 2011; Pratt, 2011). This is not the place to extend that commentary or critique (see Squires and Lea, 2011), except to note that Wacquant's identification of the transfer of neoliberal penal re-structuring from the USA to the UK, contested as it may be, shares a number of uncomfortably analogous features with trends in the current radical re-structuring of higher education in England and Wales, not least its identification of market mechanisms and commercial incentives as the principal, inevitable and natural driving force of change.

As David Brown (2011:130) observes - notwithstanding his own and wider critiques of Wacquant's overbearing theoretical ambition - what has been accomplished is the 'naming of neoliberalism as a subject or actor in criminological and political debates over penalty'. Brown (*ibid*, 131) notes with surprise that the subtitle to Wacquant's (2009a) *Punishing the Poor: The Neoliberal Government of Social Insecurity* "is the first time... that neoliberalism has made it into a criminology book title". Criminologists, he suggests, are sometimes more adept in the analysis of general manifestations and permutations of neoliberalism than they are conversant with the particulars of its political economy. For Brown the theoretical potential lies in greater appreciation of the mechanics of neoliberalism as a political project, a project subject to widespread contestation and resistance. Neoliberalism is more readily recognisable as an active project than the more fatalistic, 'bloodless', accounts of an inevitable transition to 'late modernity' characterised by much of 'governmentality' literature (e.g. with varying degrees of emphasis, Young, 1999; Garland, 2001).

Wacquant is likewise congratulated by many for bringing in the state (again) as an active partner that manages and deploys a variety of institutions to advance neoliberal objectives. Although the prison and wider penal complex is the principal target of Wacquant's analysis he argues persuasively about a wider and more general reconfiguration of state resources and priorities. Higher education is far from being exempt from this process.

I wonder, but do not find much to read about, the relationship between universities and prisons in sorting and securing populations, largely but not exclusively through class, in which 'communities of fate' are increasingly processed and reproduced by penal mechanisms and 'communities of choice' by educational ones. Neoliberalism, as Hirst (1994) argues, addresses 'communities of choice' with urgent appeals to immerse themselves in the business of choosing what is best for them, and that unfettered markets are best providers of this opportunity. For members of the modern middle class command of such choices, in everything from education to coffee, has become the hallmark of their status, endowing

them with the prestige of the discerning but ever omnivorous consumer. With a university degree they are only more likely to be the successful 'entrepreneurs of themselves' while the penal system is exhorted to ever greater efforts in rehabilitating those who are less successful in 'optimising themselves' to the shiftily versatile equilibriums of neoliberalism.

Quantitative easing: from Robbins to Browne

The neoliberal re-structuring of higher education is currently entering a remarkable phase in which central government funding for the undergraduate study of the arts and humanities has been unilaterally withdrawn, preserving government sponsorship only of STEM subjects (Science, Technology, Engineering and Maths). Although still in the early process of implementation the consequences are clear. They will sharpen and accelerate the effects of the preceding marketization of the sector, initiated by the Conservative government in 1993, sustained by New Labour into the twenty first century, and passed into the enthusiastic hands of the Coalition government via the Browne Report (2010). They effectively kill off the higher education settlement that took root in the 1960s following publication of the Robbins Report (1963) which committed large public funds to the expansion of higher education. That the execution is administered by a party who went to the electorate promising to reverse government policy on charging student fees only adds to the sense of tragedy and farce.

It is undoubtedly the case that higher education provision in the UK has expanded dramatically since the 1990s, and specifically under New Labour, with one of New Labour's early Education Ministers, Estelle Morris, promising to ensure that universities do not remain the exclusive 'birthright' of the middle classes. The evidence, however, points pretty conclusively in the opposite direction. The expansion of higher education has "disproportionately benefitted children from relatively rich families.... [and] widened participation gaps between rich and poor children" (Blanden and Machin, 2004: 231). As Kogan and Hanney (2000) argue the rise in participation that has occurred has been driven by many factors and complex interactions, but a significant aspect has been 'demand led' as students respond to changes in the UK economy and shift toward service industry-friendly qualifications. The phenomenal growth in the availability of criminology courses in both new and old Universities over the last fifteen years, with over 100 colleges now offering undergraduate courses in criminology, is perhaps symptomatic of this process.

The influence of the US in the restructuring of higher education is considerable and just as controversial as the penal borrowings that alarm Wacquant. Although the second stages of UK reform and expansion of higher education by New Labour were undoubtedly influenced by the Australian Labour Party's experience of government between 1983 and 1996, and specifically its introduction of student loan financing (Johnson and Tonkis, 2002), Hotson (2011) identifies the more recent acceleration of

market influence in the sector being due to the influence of the high ranking of certain US institutions in global measures of university performance. The comparisons drawn with the US experience of higher education by leading proponents of reform are disingenuous, inaccurate and inappropriate according to Hotson, leading him to conclude that “[t]he data which appear, at first glance, to demonstrate the great strength of the US university system are revealed, on even the most rudimentary analysis, to demonstrate nothing of the kind”. His analysis lays bare the ideological impetus behind the Coalition government’s acceleration of neoliberal market priorities, leading him to suggest there will be no identifiable benefits to students, potential students or academics. Economic costs will rise and academic standards will fall, Hotson predicts, if the US model endorsed in the Browne Report is adopted. Collini (2011) goes on to examine how one of the most radical and far reaching reorientations of higher education is being conducted in the total absence of any democratic mandate and any defining rationale other than a confused and largely incoherent convergence with the basic tenets of neoliberalism.

Straws in the wind or footsteps in the sand?

Asking what kind of criminology is likely to prosper in this unprecedented environment seems like a reasonable proposition. How is the market for criminological knowledge to be transformed by the re-positioning of funding behind student demand for ‘industry friendly qualifications’ rather than government sponsorship? Perhaps it will then be more likely to fulfil Foucault’s mordant description of the criminology that flourished in the early Robbins phase after the establishment of the Institute of Criminology at the University of Cambridge in 1961:

Have you ever read any criminological texts? They are staggering. And I say this out of astonishment, not aggressiveness, because I fail to comprehend how the discourse of criminology has been able to go on at this level. One has the impression that it is of such utility, is needed so urgently and rendered so vital for the working of the system, that it does not even seek a theoretical justification for itself, or even simply a coherent framework. It is entirely utilitarian (Foucault, 1980: 47).

As Cohen (1981), Rock (1994; 2007) and Garland (1994) are at pains to point out, there is no simple or easily reducible linear history to the emergence of criminology in Britain. Garland’s (*ibid*) original formulation of the synthesising influence of the twin governmental and Lombrosian projects remains compelling. It situates the formal establishment of British criminology in the post-war Keynesian compact that neo-liberalism targets most intensely; specifically its apotheosis in the 1960s. Rock (2007) describes the way in which criminology’s “young turks”, the ‘fortunate generation’ who were so “striving, expansive and

quarrelsome”, subsequently found themselves in the sunlit uplands of the rapidly expanded academy, a journey I return to later in the paper.

The second phase of expansive institutional development in the 1990s witnessed a process in which the sister disciplines “of psychology, law, social policy and above all, sociology were heavily colonised” (*ibid*, 7). It now seems likely that there are more undergraduates studying criminology than sociology, and an A-level in criminology is under development by AQA (Crimspace, 2011). Criminology prides itself in Britain on being a *rendezvous* discipline but if criminology departments and awards prosper while others wither it may come to be seen as more of a cuckoo in the nest than a collaborative partner. It is beginning to look more like a *rendezvous* at the O.K. Corral than a search for truth in the gardens of academe.

As neoliberal priorities and the emerging impacts of re-structuring have become more apparent, questions about the changing role of Universities have been posed. In the light of subsequent events the alarmist tone of Robinson and Tormey’s (2003) ‘*Gleichschaltung*’ critique now seems a little less wayward. It is Phil Cohen (2004), prompted perhaps by the same straws in the wind, who indicates the scale of the challenge. “What are universities for?” he asks, if not as places to think. The crisis of the neoliberal university, as Cohen puts it, involves an urgent struggle against a return to the crude class ascendancy of the past in which the ‘top’ universities educate the future governing elite and “the less well-endowed institutions...train up the routine ‘knowledge workers’ by means of a thoroughly vocationalised curriculum”. In view of the Coalition’s plans for higher education the erstwhile ‘reasonable ambivalence’ (Robinson and Tormey, 2003) that characterised many left liberal responses to New Labour has given way to a kind of paralysed horror. The dimly discerned social democratic lights at the end of the tunnel (“Education, Education, Education”) have turned out to be those of the oncoming neoliberal train.

The dangers of a vocationalised curriculum for criminology are manifold, taking it firmly in the direction of its narrowest, most instrumental and utilitarian tendencies. Notwithstanding Garland’s widening revisions of Foucault, revisiting and refreshing that territory remains central to criminology’s critical potentials. Pasquino (1991) may have misconstrued the birth of criminology ensuing from the marriage of the university and the prison, but his account of the Positive school of Italian Criminology remains richly evocative of the present conjunction of economic crisis, national manoeuvring and ideological upheaval (see Valier, 2002). For these reasons, I briefly outline the relevance of his account by extending his deployment of a literary classic as a way of developing a more open, reflexive criminology, before going on to explore further aspects of such a criminology through a biographical lens, revisiting the experiences of criminology’s ‘fortunate generation’.

A man of certain qualities: Criminology makes a difference

So regulations had now become a substitute for the interest the world had once shown in him, and Moosbrugger thought: 'You've got a long rope around your neck and can't see who's pulling it.' (Musil, 1979: 283)

Robert Musil's novel of the declining Austro-Hungarian monarchy and empire provides Pasquino (1991) with a literary account of criminology's role in the struggle for order, then and now. Moosbrugger is the hapless 'criminal' who simultaneously represents the collectively seething masses and the individuated 'devious other' that Pasquino recognises as '*homo criminalis*' of the Italian *Scuola Positiva*. Moosbrugger fascinates and repels the novel's central character, Ulrich, the eponymous 'man without qualities', as he narrates the transitions of European modernity with eloquent distraction. No other work of fiction, to my mind, quite so acutely fixes and dramatizes the ironies and paradoxes of criminology that Young (2011) insists should be the source of its inspiration. In Moosbrugger there is criminology's eternal nominal object and *raison d'être*, the criminal; *homo criminalis*, as Pasquino dubs him. But Moosbrugger cannot be so reduced in the novel and, as the remark above indicates, he is given to insightful reveries on his actions and predicaments that serve to illuminate his incommensurability with both the calculating rationality of law, *homo penalis*, and the emerging *homo economicus* of the neoliberal order: in prison (and out) he admits to finding "people hard to endure" (Musil, 1979: 110) and finds dignity only in the abstract dance of his thoughts. Throughout the three volumes of this unfinished epic his presence lingers as an episodic and essential counterpoint to the novel's presiding themes: the search for an ethical compass in a collapsing order and a yearning for the sublime. In tumultuous times Moosbrugger's elemental presence appears to represent the hopes and fears of the modern imagination, its dreaming and fitful nightmares. He has a voice, a mind and a body, and none of them are docile.

As Pasquino (*ibid*, 245) notes of Musil's novel, it provides critical insights into criminology's "general regime of knowledge", its "special savoir", at a particular historical and cultural conjuncture. It also exposes criminology's facility for reducing people to type and its rather lifeless way of talking/writing about "crime and criminals". Musil's deployment of Moosbrugger's unruly sentiments and predicaments seems to capture and make vivid criminology's perennial blend of philanthropy and misanthropy. It is a synthesis given most concrete form in the institution of prison.

It is a novel with profound resonance for criminologists, as Pasquino demonstrates, but also for anyone studying contemporary conditions of social and political life in a country coming to terms with the collapse of its imperial ambitions (Gilroy, 2004). Nairn (2000), for example, draws extensively on Musil's novel to illuminate his analysis of the post-imperial

tensions that gather, increasingly urgently, around the cultural, constitutional and political configuration of the United Kingdom. Notwithstanding the efforts of such anti-criminologists as Ruggiero (2003), Musil's trilogy is unlikely to find its way onto criminology reading lists, overloaded as they are with "policy oriented criminal justice repair kits sitting spine to spine with a few token theoretical tomes" (Hobbs, 2002: 215), but as a guide to the conditions that gave "birth to [the] special knowledge" we call criminology and for insights into our political culture, it remains uniquely rewarding.

The epistemological difficulties that inhere in the representation of crime and criminals for criminologists, and particularly those researching prison who have been in prison themselves, is what I turn to now. These sometimes personal observations are offered in the spirit of C. Wright Mills (1959: 226) injunction to consider "both biography and history, and the range of their intricate relations" in connecting private troubles to public issues.

Prison optics, criminological rhetorics

One of the first criminology conferences I attended was the BSC at the University of Portsmouth in 2004 and in one of the sessions Francis Pakes was giving an excellent paper about comparative criminal justice (Pakes, 2006). Discussing the new prison building programme in the Netherlands he put up a slide of the accommodation in one of the prisons and a ripple of amused recognition went round the auditorium because the rooms he showed bore such a close resemblance to the student rooms that conference delegates had just been allocated.

I think that was the first moment I felt there might be a need for me to think a bit more carefully about the relationship between prisons and universities, and the way the two interact in my own biography and relationship to contemporary British criminology. Pakes' pictures of rooms with en suite shower and toilet did remind me of the room where I had just left my bags, but not of the cell I shared in HMP Norwich in 1982, with its metal bunks, piss bucket and slopping out routines. In the early 1980s with 43,000 prisoners in a system intended to accommodate 38,000 overcrowding was a serious issue, as it is today. I shared a cell with one, and sometimes two other prisoners. We had no in-cell sanitation. When three men are locked, from 7pm, in a cell designed for a single person, the inevitable result is an unwelcome journey the following morning to the wing's latrine to empty the piss bucket.

Conducting research in HMP Maidstone and HMYOI Rochester between 2006 and 2008 (Earle and Phillips, 2009; Phillips and Earle, 2010; Earle, 2011; Earle 2012, forthcoming; Phillips, forthcoming) I discovered that, post-Woolf, the men there have both toilets and televisions in their cells. Some have playstations. There are telephones on each wing, and a vibrant economy in illicit, and thus unmonitored, mobile phones. The men are mostly in single cells. They are entitled to wear their own clothes,

though most adopt, for convenience or out of necessity, those provided for them by the prison. A well-behaved and well-resourced prisoner is entitled to buy a duvet, several feather pillows. They can study and may receive training in computer technology, brick laying, or basic literacy. During the course of the research the Prison Officers Association, not usually noted for its sense of humour, issued a national statement expressing its concern that the reason more prisoners weren't escaping from custody was that life's too good for them inside. A novel angle on maintaining penal security but just a little surreal! So much had changed since I was in prison 25 years previously, albeit for only three months. But during the course of the research I was reminded of much that was also intensely familiar, and how so much about prison life seemed to depend on which side of the cell door you stood.

One prisoner asked me how I would like to be locked in a toilet for up to 23 hours a day, or eat all my meals there, next to the lavatory bowl. Another asked me how I could possibly understand his predicament if I had not been in prison myself, forcing me to tentatively disclose I had. Why did prisoners still talk of the glaring senselessness of prison, just as I and my cellmates had done during my time inside? Why, still, the overriding sense of its grinding monotony, institutional inefficiency and implicit, frequently explicit, brutality? Why did some men make light of their incarceration, and others not? How did they make their lives viable in prison under these exceptional conditions of constraint, regimentation and deprivation? And some could not.

I developed a strong rapport with an older (mid-50s) man, wracked by the uncertainty of his indeterminate sentence. I enjoyed hours of discussion with this man, who I'll call Greg, and hoped he might agree to more extensive life history interviews to allow me to develop my PhD thesis on prison masculinities. Greg persistently declined my overtures for a recorded interview. "*Cui Bono*, Rod? *Cui Bono*?" he repeatedly asked. Who benefits indeed? He deeply resented the terms of his incarceration and the particularly degraded conditions at HMP Maidstone. He liked me, I think, but he hated the idea of being a prison research object and I failed to convince him that my research interests served any greater purpose than helping to secure my academic career prospects.

A more specific biographical dilemma surfaced when I met 'Warren' a 30 year old young man I'd last seen 15 years previously in the London borough of Lambeth. I'd worked extensively with him in an education project in Kennington when he was 15 years old, excluded from school and getting into trouble with the law. I remembered good times and though some of these we shared, his life and his mind had been shattered in the intervening 15 years. "It's been a bumpy ride for me" he said of his struggle with drugs and relationships. I could see two biographies here, two very different trajectories; mine, back into the university life I had fallen out of, and onward into children and family life; and his, into the prison and isolation I had hoped he would avoid. Communities of choice and communities of fate.

My encounter with 'Warren' coincided with the publication of a special edition of *Theoretical Criminology* (2007 Vol. 11 No.4) dedicated to revisiting that classic of Chicago ethnography, Clifford Shaw's *'Jack Roller'* (1930). The journal's rich and detailed discussion of this work, built as it is around the tangled biographical threads of a young man and an academic, takes up questions of representation and theorising of people's lives in criminology. Gadd and Jefferson (2007), for example, examine the almost pathological tendency to elide accounts of characters like Stanley with a 'social type' – the delinquent young male. Contributors note how rarely criminological theorising draws deeply from the 'thick data' of such studies of a single case (Maruna and Matravers, 2007) and defer to conventional empirical priorities of scale. Gelsthorpe (2007) stresses the co-production of biographies in the telling of such tales as Stanley's in the *Jack Roller* by Clifford Shaw, and the significance of appreciating the multiple stories that make up a criminological narrative, many of which remain backstage and obscured. Including and developing a reflexive perspective leads away from conventionally scientific criminological priorities toward the cultural and the linguistic 'turns' that preoccupy the arts and humanities, the areas of scholarship the government now declines to sponsor at undergraduate level. It challenges criminology and criminologist alike (Phillips and Earle 2008).

Another prompt toward considering relationships between university and prison came when I was teaching a third level crime course with the Open University. One of my best students disclosed rather awkwardly, in a tutorial session, that he was relatively recently released from prison. I could feel how difficult it was for him, but didn't immediately share my own history. We talked afterward about it and I invited him to join me, some years later, at a conference to launch *The Handbook on Prisons* (Jewkes, 2007) at the Open University where he was asked to join the contributions of ex-prisoners, such as the representative from Unlock, Bobby Cummins. Sharing the long drive back to our respective homes in the South East he expressed his frustration at not being able to contribute as effectively as he would have liked to the conference. He had so much he wanted he say, so much pent up intellectual energy, that he felt his contribution had become garbled and merely anecdotal. It was not, but he felt he had not done himself or his ideas justice. His remarks revealed to me the way I had under-estimated how difficult it can be to make the transition from tutorial discussion to conference paper, let alone from prison wing to academic hall.

The fortunate generation take stock

I am sure many of us 'reading' or teaching criminology have similar experiences of working with students who have something of a criminal record, and the idea of encountering crime and 'criminals' while doing criminological research is hardly earth shattering. It is not unusual to bump into another criminologist who has moved from, say, probation, the police

or the prison service, into criminology, or who moves to and fro between. Not so an ex-prisoner. It is still less common to find theoretical reflection on what Rock and Holdaway (1998) call the subterranean features of this experience of criminology, the presence of biography and affective hinterlands. Their attempt to 'demystify' theory and connect it to their life stories and criminological practice, reveals the ways in which for the 'fortunate generation' of criminologists who embarked on their careers in the wake of the Robbins Report (Frances Heidensohn, Robert Reiner, David Downes, and Clifford Shearing, among others in this collection), the work of theorising was far from abstract or impersonal and a long way from an interest in 'industry friendly qualification'. Rock and Holdaway remark (1998: 11) on the extent to which these authors' accounts expose the way that "theorizing came to represent the evolving resolution of issues central to the self, how early were those issues implanted in the criminologist's mind, and how bound up with his or her identity and life-project". "Facts" they remind us, citing Lafferty (1932), "are bits of biography".

Rock and Holdaway's collection can be seen as a response to Bennett's (1981) concern for the 'rhetoric of criminology'. Bennett connects the traditions of oral history with the early biographical emphasis on the person in the proto-criminology of the 19th century works of Mayhew (among others), a focus that was subsequently picked up by the Chicago School. In these Bennett sees a rhetorical potential "to overcome public indifference and communicate to a variety of audiences the human traits of offenders, the individual's social world" and thus "the need for community programmes to prevent delinquency" and expose "the futility of imprisonment" (*ibid*, flysheet notes).

Bennett's hopeful speculations that such a reflexive project might produce something other than the "'stick figure' of the over-socialised individual or rational actor" (Maruna and Matravers, 2007: 429) remain largely unfulfilled, even though they precede the explosive growth of academic criminology by some twenty years. The almost total absence in British criminology of prisoner's accounts or analysis of prison is only the more remarkable and impoverishing. Bennett (1981: 248) reaffirms C. Wright Mills' (1959) warnings of the oversights that might arise in the disconnections we fashion to present our work as distinct from ourselves:

Although these criminologists see themselves as scientists working in the micro-analytical tradition, they apparently assume that developing a personal relationship with a delinquent and transmitting urgent messages to an audience are more important than analysing the many small causes that influence the acquisition and publication of those messages – more important than giving an auto-biographical account of themselves...

Stowaways on the Atlantic crossing: Convict criminology?

The influence of the symbolic interactionism of the Chicago School reaches deep into British criminology (Rock, 2002), as is reflected in that special issue of *Theoretical Criminology*, and Rock and Holdaway's anthology. Frank Tannenbaum (1938), one of its precursors and someone often credited with catalysing the labelling perspective in the 1930s for Howard Becker to refine in the 1960s, served a year-long prison sentence. He was one of the first radical academics to openly identify himself as an ex-convict (Jones et al., 2009); but it was not until John Irwin published *The Felon* (1970), *Prisons in Turmoil* (1980) and *The Jail* (1985) that the potential benefits of a distinctive, prisoner/ex-prisoner perspective began to be recognised in the US. Irwin had served five years for armed robbery in the 1950s before studying with David Matza and Erving Goffman to complete his PhD. As Jones et al. (2009) note, he remained guarded about the significance of his prison experiences in these texts. The subsequent explosive growth in the US penal population during the 1980s and 1990s, at least in part fuelled by the 'war on drugs', pulled in increasing numbers of white middle class prisoners and by the 1990s "there were a significant number of ex-convict graduate students and professors using their prior experience in the criminal justice system to study jails and prisons" (*ibid*, 154). It was their increasing frustration with "the failure of criminologists to recognise the dehumanising conditions of the criminal justice system and the lives of those defined as criminal" (Ross and Richards, 2003: xvii-xxii) that led to the establishment of an organised grouping calling themselves 'Convict Criminologists'. Notwithstanding the smaller, less diverse and more liberal characteristics of both British criminology and the criminal justice system, these sentiments strike a chord for me.

The Convict Criminology group is an informal collectivity of serving and released convicts that claim they are "able to do what many previous researchers could not: merge their past with their present and provide a provocative approach to the study of their field" (Jones et al., 2009: 153). In doing so they hope they may undermine "the misunderstanding [that] leads to a distorted view of prisons and prisoners based on the judgemental ideas of the sheltered middle-class academic hired by or serving government taskmasters" (*ibid*, 158). They are often in a position to comment, with the authority of direct experience, on the variable conditions that apply across the enormously extensive US penal system, indicating the frequently hidden internal diversity among the constituent elements of the apparently monolithic whole.

There are complex epistemological and methodological issues surrounding the claim to insider status that are only sharpened by the poignancy of the term in its prison context. Convict criminologists in the US are not claiming analytical exclusivity, promoting a specious authenticity or insisting on a dogmatic research credentialism, but they are exposing missing parts of the picture and demanding more honesty, transparency and accountability about its generation. Much of this story is implicitly

about class and the troubled relations between the two institutions that characterise its polarities. It is also, to an extent, about scale, and the unique characteristics of the explosive growth of the US prison population. The convict criminology group recognise the irony of this contributing to their viability.

Wacquant (2002) identifies the contraction of ethnographic studies of US prisons as a tragedy, but, as in many other dimensions, the research scene in the UK is very different. The rude health of the prison research community in the UK, which has produced both methodological innovations and works of outstanding quality, provides opportunities that may compensate for an absence of scale. An example is Crewe and Bennett's (2012) collection, *The Prisoner*, a creative attempt to populate the void of scholarly accounts by prisoners on prison:

Little of what we know about prison comes from the mouths of prisoners, and very few academic accounts of prison life manage to convey some of its most profound and important features: its daily pressures and frustrations, the culture of the wings and landings, and the relationships which shape the everyday experience of being imprisoned. (Bennett and Crewe, 2012: ii)

An Afterword is provided by someone who has made/is making the journey from prison to PhD, and can testify that the autobiographical accounts of such 'celebrity' cons as "Jeffrey Archer, Charles Bronson or Norman Parker, whose accounts of prison life dominate this field, are not representative" (Warr, 2012). Warr notes that the alarmingly widespread 'cultural ignorance' of what prison life is like, is not confined to "those who have friends, family members and loved ones behind bars" but is shared by "many academics who are actively engaged with the literature on prisons and imprisonment" (*ibid*, 143). His brief and moving account of the way "prison affects every aspect of your being" and his suggestion that "very few students or academics with whom I have contact have any understanding of what truly occurs behind bars" indicates the urgent need for more insider perspectives in British criminology.

I share Warr's sense of the deep psychic impact that prison has on 'the soul' that escapes academic scrutiny, and also the way Maruna and Matravers (2007: 429) suggest vital insights into order and disorder, crime and justice, are provided by works of fiction, not least because of its capacity and intentions to 'move the reader' and address their affective world rather than present 'evidence' or data.

Positive convictions

Since completing the ESRC funded study of Identity, Ethnicity and Social Relations in prison I have begun to encounter academics who have 'graduated' from both university and prison to pursue the kinds of careers described by the convict criminology group. Some began (and/or completed) their journey with the Open University, an institution launched

in 1971 as an extension of the sentiments expressed in the Robbins report that Higher Education might be a public good that fosters 'the democratic intellect'. The Browne report and Coalition government policy mean that even OU fees will treble or quadruple. How many people in prison will have the funds to pay them? How many leaving prison will be in a position to take up the offer of a debt in excess of £30,000 in return for an opportunity to continue their education?

The fragile and precarious paths broken by students making the journey from prison to university are likely to become harder to find and more difficult to follow. The period of expansion, as characterised by the Prisons Research Centre at the Institute of Criminology in Cambridge, has widened the field of research and encouraged more sensitive participation but, although the increased traffic from the campus to the convict has embraced staff and prison managers, including prisoners has proved far more elusive. It is pretty much one way traffic as far as prisoners are concerned.

Those making the journey from prison convict to university campus may be entitled to more recognition, support and consideration from an academic community whose discipline has thrived on popular myths about them, their personal mishaps and misdeeds, if only because such people may offer a vital corrective to some of its most myopic, persistent and blinkered correctional tendencies. If, as Freud suggested, dreams provide the psychoanalyst with a 'royal road' to the subconscious, then direct experience of HM prisons, here in the UK, offers a path into the heart of the criminological imagination. It is a path less taken by conventional academics, for reasonably sensible reasons, but it does not mean it is not there for us to explore with those who have.

Postscript:

A British Convict Criminology group is being established and can be contacted at: bcc4bcc@hotmail.co.uk; or r.earle@open.ac.uk. The US Convict Criminology Group kindly provide a 'page' for the British group on their website: www.convictcriminology.org/bcc.htm

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Policing Wildlife:

Perspectives on Criminality in Wildlife Crime

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Abstract

This article presents green criminology research on wildlife law enforcement in the UK, an area of insecurity both about its place within criminal justice and about how it should be resourced and laws enforced. Wildlife crime predates the Government's Big Society in being primarily driven by Non-Governmental Organisations (NGOs) who shape the public policy and police response to wildlife crime. NGOs frequently argue for a strengthened wildlife enforcement regime with tougher sentences for wildlife offenders. Yet this article contests the perception of inadequate wildlife laws and the need for a more punitive regime, arguing that inherent enforcement problems undermine an otherwise adequate legislative regime. It offers a new typology of offenders, arguing that changes to legislation and a more punitive regime are inadequate solutions to address wildlife crime levels unless the existence of different types of offender and criminal behaviour are recognised and addressed in policy and enforcement practice.

Key Words: Green criminology, neutralization techniques, wildlife and environmental crime, NGOs

Introduction

This article examines criminality in wildlife crime, a distinct aspect of green criminology (Situ and Emmons, 2000; Lynch and Stretesky, 2003) within animal abuse (Henry, 2004; Linzey, 2009) and species justice discourse (White, 2008). The research examined criminality, UK wildlife crime, policy and law enforcement between 2001 and 2009, with a subsequent review in 2010.

While some non-governmental organisations (NGOs) define wildlife crimes according to moral values, raising substantive arguments for legislative reform on ethical grounds or the perceived effectiveness of legislation (Wilson et al., 2007; Schneider 2008; RSPB, 2010), this research

is primarily concerned with wildlife criminality. Its definition of wildlife crime adapts the legal concept of wildlife from the UK's Wildlife and Countryside Act 1981, namely naturally occurring wildlife, i.e. any, bird, animal, mammal or reptile which is resident in or a visitor to Great Britain, in a wild state or which is a non-native bird, animal mammal or reptile subject to UK legislation by virtue of its (European Union) conservation status.

In addition to the commercial trade and smuggling activities commonly associated with wildlife trade, wildlife crime includes the following types of criminal activity:

- Unlawful killing or wounding
- Robbery (Taking a protected species from the wild)
- Disturbance of a protected species
- Cruelty and animal welfare offences
- Unlicensed (and unlawful) gambling
- Damage to property
- Illegal poisoning and unlawful storage and/or use of pesticides
- Theft and handling 'stolen' goods
- Deception
- Fraud and forgery
- Criminal damage (of protected sites)
- Firearms related offences

A wildlife crime is thus an unauthorised act or omission that violates UK wildlife or environmental law, is subject to criminal prosecution and criminal sanctions and may involve harm or killing of wildlife, removal from the wild, possession, sale or the exploitation of wildlife incorporating any of the activities above.

This article briefly considers the importance of wildlife crime as a distinct area of study and identifies perceived problems with wildlife crime and its enforcement, before outlining specific offender types involved in wildlife crime. Finally it makes some recommendations on dealing with wildlife offenders and criminality.

The importance of wildlife crime

Wildlife crime is significant as a case study of policing, criminal behaviour, NGO activity and environmental law enforcement within green criminology. NGOs exert considerable influence on criminal justice policy; some carry out operational law enforcement activities. Statutory agencies' reliance on voluntary organisations offers an opportunity to study a fringe area of policing and co-dependence between NGOs and mainstream justice agencies in protecting wildlife. This also provides an opportunity to study the application of environmentalism, animal rights, green criminology and perspectives on environmental justice to a specific area of crime.

However wildlife crime policy predominantly treats all offenders as rational profit-driven actors, while public policy statements often fail to identify wildlife crime's causes, or clarify the intended impact of policy on potential offenders beyond basic ideas of detection or apprehension. This research explicitly considered distinct aspects of criminal behaviour and what the abuse of animals in the wild and the exploitation of wildlife reveal about criminal personalities, motivations and behaviour. Comparative analysis of all data collected during this research identified issues relating to offenders often missing from NGO and policy literature, and informed a comprehensive assessment of contemporary wildlife offending.

Methodology

The research methodology consisted of 24 semi-structured interviews with wildlife crime practitioners, policy makers and researchers to include representatives of the leading wildlife crime NGOs: the Royal Society for the Protection of Birds (RSPB), the Royal Society for the Prevention of Cruelty to Animals (RSPCA) (and its Scottish equivalent), the League Against Cruel Sports (LACS), and Scottish Badgers; plus selected Police and other statutory enforcement representatives. Interviews were supplemented with documentary analysis of published policy perspectives, media releases and campaign material, transcripts of cases and submissions to Government on wildlife crime issues.

Specific questions concerning investigative problems and the perceived reasons why people committed wildlife crime were asked in interviews and considered in documentary analysis to represent a form of interpretive interactionism (Denzin, 2001), making the closed world of wildlife crime and environmentalism inhabited by NGOs, enforcers and offenders understandable. The research also critically evaluated previous wildlife and environmental crime literature, also incorporating the author's participant observation of wildlife crime investigations casework and environmental NGO culture.

Perceived problems

While policy and campaigning documents often reflect a shared perception of UK wildlife law's inadequacy in deterrence, sentencing and punishment, closer examination identifies inherent practical enforcement problems in UK wildlife law enforcement. In 2002 University of Wolverhampton researchers identified that public policy attitudes towards the illegal wildlife trade were 'erratic' in their response with the result that "the courts perceive wildlife crime as low priority, even though it is on the increase" (Lowther et al., 2002: 5).

Although the Wolverhampton report's focus is wildlife trade, its conclusions on inconsistent and inadequate legislative enforcement are echoed by NGOs in looking at other aspects of wildlife crime (Nurse, 2003; 2008). Analysis of the available enforcement literature reveals wildlife crime as being subject to an inconsistent enforcement regime (albeit one

where individual police officers contribute significant amounts of time and effort within their own area). Legislative inconsistency (e.g. variance in police powers and penalties across different legislation) is often reflected in NGO policies as evidence of wildlife law's inadequacy and need for wholesale reform to achieve deterrence and punitive objectives. However, the ad-hoc development of wildlife policing where many officers' wildlife crime responsibilities are in addition to their 'main' duties (Kirkwood, 1994; Roberts et al., 2001) creates a risk that, no matter what the legislative regime, the enforcement of wildlife legislation and its ability to address criminality may itself be inconsistent and inadequate, even if campaigners become fully satisfied with the legislation and any sentencing provisions.

Cook et al. (2002) later analysed evidence of organised crime involvement in the illegal trade in wildlife, confirming evidence that "organised crime elements are becoming increasingly involved in the most lucrative parts of the illegal trade and they are prepared to use intimidation and violence" (2002: 4). Their findings were consistent with evidence of practitioners to this research that "parallel trafficking of drugs and wildlife along shared smuggling routes [takes place] with the latter as a subsidiary trade" and "the use of ostensibly legal shipments of wildlife to conceal drugs" (Cook et al., 2002: 5) while illegal shipments of wildlife are often also disguised as legal ones (Nurse, 2008).

Linking wildlife crime to organised crime and, in particular, the trade in drugs is an important step in bringing wildlife crime (albeit only this one aspect) within the remit of mainstream criminal justice and legitimising its value as a distinct area of study. Synergy exists between wildlife trade's similarity with classical positivist notions of crime (Vold and Bernard, 1986) and offenders clearly motivated by profit (particularly with respect to trade in endangered species which can sell for thousands of pounds) and involved in other forms of crime (Hutton, 1981; Linzey, 2009). Schneider (2008) and Lowther et al. (2002) found that organised crime recognises wildlife crime as a 'soft option' where its traditional operations and transit routes can be utilised with a lesser risk of enforcement activity. A Police representative interviewed for this research confirmed:

... an organised criminal group will deal with anything that will make a profit and there [are] profits to be made from the trade in rare and endangered wildlife...One particular area of interest is to determine where an organised gang might have established routes for the trade in various commodities. Where this is the case, it is possible for a gang to switch from one item, such as drugs, to another like wildlife. While the commodity may change the criminal activity doesn't.

While the UK has an excellent network of Police Wildlife Crime Officers (WCOs), wildlife crime is enforced reactively, relying on charities to do the bulk of the investigative work, receive crime reports and collect

wildlife crime data. Despite high profile publicity for wildlife crime it remains at the fringes of mainstream criminal justice allowing offender denial of their criminal activity and, particularly within the game-rearing industry, to justify the illegal killing of wildlife as legitimate employment-related activity (e.g. predator control) or simply an error of judgment but not a criminal act. This concern was reflected by a number of interviewees. One NGO representative identified that gamekeepers are sometimes supported by employers and “have been told all the way through right up to the trial, ‘It’s OK you’re going to get fined, the worst that can happen is that you’ll get fined’”. Another from a Scottish conservation organisation confirmed that:

There are certain [shooting] estates where there’s a certain amount of pride taken that its pest free. When they’re talking about killing pests they’re not just talking about your common rat but killing anything right up to anything with a hooked beak. It’s their tradition in some respects ... As far as they’re concerned, two hen harriers is OK but more than two is a nuisance and is unacceptable. One badger sett is fine, more than one badger sett, no, they don’t want it.

Matza (1964) identified that delinquents often accept a moral obligation to be bound by the law but can drift in and out of delinquency, fluctuating between total freedom and total restraint, drifting from one behavioural extreme to another, accepting the norms of society but developing a special set of justifications for behaviour that violates social norms. These techniques of neutralisation (Sykes and Matza, 1957; Eliason, 2003) allow offenders to express guilt over their illegal acts but also to rationalise between those whom they can victimise and those they cannot. While offenders are not immune to the demands of conformity they find a way to rationalise when and where they should conform and when it may be acceptable to break the law, an issue which explicitly emerged in interviews and documentary analysis of wildlife criminality. Many fox hunting enthusiasts, for example, strongly opposed the UK’s Hunting Act 2004 as being an illegitimate and unnecessary interference with a traditional activity expressing this view via formal legal challenges to the legitimacy of the Act in *R v Jackson* [2005] UKHL 56 and the *Countryside Alliance* cases [2007] and in the European Court of Human Rights (*Friend v the United Kingdom* application no 16072/06). Thus their continued hunting with dogs is seen as legitimate protest against an unjust law and is denied as being criminal (Skidelsky, 2003; Prado and Prato, 2005).

Wildlife crime policy is primarily based on “a belief in the preventive effect of law enforcement and the criminal justice agencies” (Bright, 1993: 63). Emphasis on detection and apprehension, however, can result in a regime that simply punishes offenders but fails to achieve other objectives - for example, preventing victimisation or repeat offending. While, theoretically, if severe punishment and the likelihood of apprehension and receiving that punishment is known (e.g. by providing and publicising

detection rates and severe mandatory sentences for offences) the rational offender will choose not to commit crime, wildlife crime investigators regularly re-encounter the same offenders; evidence exists that even those offenders who are repeatedly caught, convicted and fined are not deterred (Wainwright, 2006).

Identifying the wildlife offender

Crime and criminality are predominantly male concerns (Groombridge, 1996) reflecting the role of gender and predominance of male offenders in serious and violent crime and concerns over youth crime; in particular both the propensity towards violence of young males and the extent to which young males might become victims of crime (Norland et al., 1981; Campbell, 1993; Flood-Page and Mackie, 2000; Harland et al., 2005). The socialisation of young men and the extent to which routes to manhood leave young men confused or anxious about what it means to be a man can influence young males' criminality (Harland et al., 2005; Kimmell et al., 2005). Restrictive notions of masculinity dictate that many men are forced into roles as defenders and protectors of their communities (Harland et al., 2005) and are also encouraged to comply with the image of the "fearless male" (Goodey, 1997: 401) and achieve the ideal of hegemonic masculinity (Connell, 1995; Harland et al., 2005). Men are encouraged to reject any behaviour construed as being feminine or un-masculine or which does not conform to traditional masculine stereotypes and engage in behaviour (such as the 'policing' of other men) which reinforces hegemonic masculinity (Beattie, 2004).

Many wildlife crimes involve appropriate male behaviours such as aggression, thrill-seeking or having an adventurous nature. Recklessness and assertiveness are conducive to committing wildlife crime in sometimes difficult and dangerous outdoor conditions, with a requirement to negotiate wildlife (e.g. dangerous species and adult wildlife protecting its young) and the attentions of law-enforcement and NGOs. In addition, the outlet for aggression allowed by such crimes as badger-baiting and badger digging, and hare coursing, and the opportunities for gambling related to these offences (and others such as cock fighting) appeal to young men seeking to establish their identity and assert their masculinity and power over others. Such crimes by their very nature provide opportunities for men to engage in and observe violence (Flynn, 2002), and to train animals (fighting cocks, dogs) that represent an extension of themselves and reinforce elements of male pride, strength, endurance and the ability to endure pain.

Wildlife offenders are predominantly male, and men occupy many of the predator control jobs in the game rearing industry in the UK, in which significant illegal killing of wildlife takes place. Huntsman Julian Barnfield in his submission to the Burns Inquiry on Hunting with Dogs observed that his job came with a tied rent free house without which his family could not live in the countryside (Burns et al., 2000). Gamekeepers and huntsmen are thus placed firmly in the male provider role and lack of success in predator

control, and by inference a failure to perform adequately in the job, potentially leads to loss of the family home, the resultant feelings of inadequacy, and damage to male pride and self-esteem. While masculinities may not be the cause of all wildlife crime, it is certainly a recurring factor in some wildlife crimes.

Green criminologists and sociologists in the US have established a discourse concerning the links between animal abuse and violence towards humans which informs analysis of wildlife offending. Conboy-Hill (2000) defines animal abuse as “the deliberate or neglectful harm of animals and can include beating, starvation, slashing with knives, sodomy, setting on fire, decapitation, skinning alive amongst other actions” (2000:1). Ascione’s definition of animal abuse and cruelty identified it as being “socially unacceptable behaviour that intentionally causes unnecessary pain, suffering, or distress to and/or death of an animal” (1993: 228). Similarities between these definitions and this article’s definition of wildlife crime exist and, in particular, the prohibited methods of killing animals (stabbing, burning, crushing etc.) contained in the Wild Mammals (Protection) Act 1996. The increasing evidence of US research is that childhood abuse of animals is linked to later interpersonal violence (Felthouse and Kellert, 1987; Ascione, 1993). Beetz (2009) suggests that abuse which affects empathy may be a primary factor in determining what type of offender an individual becomes and that violent attitudes towards animals can indicate a lack of empathy (Beetz, 2009; Brantley, 2009). While not all wildlife crime involves violence or violent abuse, where it does occur it indicates that offenders may develop a tendency towards violence that manifests itself first in animal abuse but which sometimes escalates into adult human violence (Nurse, 2008; Flynn, 2009). In particular, offenders engaged in thrill-seeking or ‘sport’ activities that involve the exploitation of animals are frequently motivated by the power that they gain over animals and justify their activities by denial of pain. Fox-hunting, fishing, deer-hunting or hare coursing enthusiasts commonly argue that their quarry does not anticipate death and enjoys the chase (Burns et al., 2000). In addition, a belief in the widespread support for the activity, and a questioning of the legitimacy of those who wished to see it outlawed (Sykes and Matza, 1957) persists among many hunting enthusiasts. Arguments raised include that “to criminalise an activity - such as foxhunting - in response to a campaign which itself is largely criminal sets a precedent which threatens all law abiding citizens whether they love foxhunting or loathe it” (Ashford Valley Hunt Submission to the Burns Inquiry on Hunting with Dogs, 2000). Such arguments rely on the perceived criminality of organisations like the Animal Liberation Front (ALF), while at the same time ignoring the political legitimacy of organisations like LACS, Animal Aid and the RSPCA.

Denial of injury reinforces the offender view that their activities cause no harm while also confirming the view of animals as a commodity rather than as sentient beings suffering as a result of the individual’s actions. The concept of inequality between humans and non-humans is

central not just to the legal status of animals but also to how individuals treat animals (Wise, 2000) and allows for denial of consequences similar to that employed by burglars who, when confronted by their victims in restorative justice conferencing, often express surprise about the impact of their actions (Shapland et al., 2007; Sherman and Strang, 2007).

Attitudes towards regulation are also an important factor. Eliason's (2003) assessment of poachers in Kentucky (which included those illegally taking wildlife resources) concluded that convicted poachers routinely employed neutralisation techniques. These techniques included denial of responsibility, claim of entitlement, denial of the necessity of the law, defence of necessity and recreation and excitement (Sykes and Matza, 1957) both before and after engaging in illegal activity. Significant numbers of Eliason's interviewees claimed minor or technical infringements and denied the right of law enforcement officers to take action against them or contended that there were better uses of officers' time. This theme was also present in this research.

The involvement of environmental NGOs without which offenders might not be apprehended provides an additional motivation for some individuals to commit crime. Different offenders may use different neutralisations and, may also be subject to different motivations. By considering the different motivations and behaviours of offenders it is possible to determine if there are distinct types of wildlife offender, as follows.

Developing offender models

A range of evidence including interviews, and comparative analysis of NGO and practitioner views with documentary sources informed the development of new offender models by this research.

The analysis indicates that wildlife offenders commit their crimes for the following general reasons:

1. Profit or commercial gain
2. Thrill or sport
3. Necessity of obtaining food
4. Antipathy towards governmental and law enforcement bodies
5. Tradition and cultural reasons

While these are the primary motivations, ignorance of the law is also sometimes a factor employed as justification or neutralization technique (Sykes and Matza, 1957). Roberts et al. (2001: 27) surveyed 87 organisations about their perceptions to identify what NGOs considered to be the motivation for wildlife crime. Both this article's and Roberts' research (2001) indicate that when asked, NGOs accept different factors involved in motivating individuals to commit wildlife crimes, and are able to articulate what these are, even though this is not always reflected in their published policies.

This article's analysis thus concludes that wildlife offenders fall into four (relatively) distinct types defined by their primary motivator; a new classification of offenders is developed by this research as follows:

1. *Model A: Traditional Criminals* - who derive direct (and sometimes personal financial) benefit from their crimes. These are rational offenders involved in a low-risk, high return form of crime. Wildlife is viewed simply as a resource through which profit can be obtained (Fox, 2002) and their offences are viewed (by them) as minor or technical crime.
2. *Model B: Economic Criminals* - who commit wildlife crimes as a direct result of particular economic pressures (e.g. direct employer-pressure or profit driven crime within their chosen profession). This category is distinguished from the previous category because of the specific, mostly legitimate, employment-related nature of their motivation to commit crime. The Bat Conservation Trust representative, for example, commented that builders meant to survey for bats "will get a survey done and will just try to wriggle out of it. They think 'what's the fine going to be and what's the cost to me?' Often they will, just go ahead and do the work and take a chance anyway." Junior gamekeepers on shooting estates through differential association (Sutherland, 1973) learn techniques of poisoning and trapping from established staff (Nurse, 2008) as a means of ensuring healthy populations of game birds for shooting. Their crime is white-collar crime (Nelken, 1994), the responsibility of others (such as an employer). Awareness of the illegal nature of their actions leads to the justifications outlined by Sykes and Matza (1957) but the association with other offenders, the economic (and employment related) pressures to commit offences and the personal consequences for them should they fail are strong motivations to commit offences (Merton, 1968).
3. *Model C: Masculinities Criminals* - who commit offences involving harm to animals, exercising a stereotypical masculine nature both in terms of the exercise of power over animals and the links to sport and gambling. Perceptions by the offender of their actions being part of their culture where toughness, masculinity and smartness (Wilson, 1985) combine with a love of excitement. Offences are seldom committed by lone individuals and, in the case of badger-baiting, badger-digging and hare coursing for example, gambling and association with other like-minded males are factors and provide a strong incentive for new members to join already established networks of offenders (Hawley, 1993; Forsyth and Evans, 1998). In interview one NGO representative stated "I can't see a criminal society allowing Joe Soap the commoner, and his mates to be having badger baiting and betting on them, without wanting a cut... Badger crime is all about money... I think money, tradition, the figure in

the flat cap and with the whippet and the terriers is still around.” There is thus some link between these offences and low level organised crime.

4. *Model D: Hobby Criminals* - who commit those high status , low level crimes for which there is no direct benefit or underlying criminal ‘need’ and for which the criminal justice reaction is disproportionate. For example, mature egg collectors argue that there is no harm in continuing an activity that they commenced legitimately as schoolboys. Examination of case files and newspaper reports on egg collecting confirm that new collectors continue to be attracted to the ‘hobby’ and learn its ways through interaction with more established collectors, sometimes in an obsessional manner as egg collector Derek Lee acknowledged:

There are quite a few who are obsessed with it. Every single spring and summer they can’t wait to get out. If you put a child in a chocolate factory their eyes light up with excitement. It’s like that. When spring and summer come, the eggers are on edge. They’re like big kids. (cited in Barkham, 2006).

These offenders are distinguished from the previous category by the absence of harm/cruelty as a factor in the offences. The ‘hobby’ element is the primary motivator.

While the nature of the offences may be different, there is inevitably some overlap in the behaviours of offenders within the different models, although the weight attached to various determining factors varies. Egg collectors, badger diggers and gamekeepers are all, for example, keeping a traditional activity alive but in different ways and for different reasons. The egg collector pursues his ‘traditional’ hobby, whereas the gamekeeper perpetuates learned traditional behaviour in the form of a type of predator control handed down from gamekeeper to gamekeeper irrespective of changes in the law. The masculinities criminal may derive some financial gain from gambling but it is not a primary motivating factor whereas money is for the traditional criminal. What all offender types share is likely knowledge of their activities’ illegality (although there may be denial as to whether this should be the case) and that the likelihood of detection, apprehension and prosecution remains low.

These models will be developed in more detail in further work but a preliminary assessment of their primary motivating factors follows in Table 1.

Table 1: Motivating factors and offending type

Type of Criminal	Ignorance of the Law	Pressure from Employer or commercial Environment	Financial gain	A feeling of power	Excitement thrills or Enjoyment	Low risk crime	Keeping tradition or hobby alive
Traditional Criminal	No	No	Yes*	No	Yes	Yes	No
Economic Criminal	No	Yes*	Yes	No	No	Yes	Yes
Masculinity Criminal	No	No	No	Yes*	Yes	Yes	Yes
Hobby Criminal	No	No	No	No	Yes	Yes	Yes*

(* indicates the primary motivator)

Preliminary perspectives on dealing with offenders

Current policy treats all wildlife offenders as rational (financially motivated) criminals. Yet, the primary motivators identified for different offender types by this research indicate that different elements drive offenders making a uniform approach to offending and enforcement ineffectual. The wildlife crime enforcement regime thus requires modification, allowing for action appropriate to the circumstances of the offender and specific nature of the offence to be taken. For traditional criminals financial penalties may work as a means of negating any benefit they derive from their activity, but the same approach is unlikely to work with economic criminals. An argument can also be made that increased sentencing and use of prison has been unsuccessful in mainstream criminal justice (Wilson, 1985) and so the evidence that it will be effective in reducing or prevent wildlife crime is lacking. For traditional criminals, greater efforts should be made to attempt situational crime prevention, making the physical cost of committing the crime prohibitive as well as the actual cost and removing the perception that wildlife crime may be seen as a soft option.

For economic criminals, their employment provides the source of their offending behaviour and so any policy approach must include pressure on and penalties for the employer as well as actions which dictate that the risk of losing employment as a direct consequence of committing wildlife crime is a real possibility. The current legislative regime does not generally provide for culpability of landowners/employers for the actions of their staff (although the concept of vicarious liability has recently been introduced in Scotland), nor do countryside and game industry employees

suffer the stigma of conviction. As a practical means of dealing with these offenders this position should be altered so that conviction of a wildlife crime carries with it the threat of lost employment in the countryside and in the game rearing or fieldsports industries, as well as significant penalties for the employer.

For the masculinities offender, the effectiveness of prison or high fines is also questionable. Much like gang members in the inner-city US, those involved in organised crime, or youths who see ASBOs as a badge of honour (Youth Justice Board, 2006), masculinities offenders may come to see prison as simply an occupational hazard which also reinforces their male identity, providing confirmation of society's lack of understanding of their needs and culture. For these types of offender, situational crime prevention should be attempted and a real effort at rehabilitation made alongside the traditional law enforcement approach of detection and prosecution. Consideration may also need to be given to the circumstances in which groups of young men turn to crime with a violent element and whether the type of social work intervention combined with law enforcement activity that now takes place in parts of the US with animal abusers (Brantley, 2009; Clawson, 2009) could be applied in the UK.

Hobby offenders present a distinct policy and enforcement challenge as the drive to collect and the obsessive behaviour of such offenders cannot easily be overcome; fines and prison sentences could even strengthen the desire to offend by the drive to replace lost items such as a confiscated egg collection.

While prevention and detection of crimes should continue to be employed for these offenders, treatment to address the issues of collecting as well as education in the effects of wildlife crimes should be considered. Again, a strong situational crime prevention element could be attempted and in the case of hobby offenders this could be linked to sentencing to ensure that any sentencing provisions contain measures to prevent future offending as well as measures that attempt to address the causes of these crimes.

Conclusions

This research identifies different types of offenders involved in wildlife crime, concluding that, contrary to the assumptions inherent in current policy, offenders do not all share the same motivations, behaviours, or operate within similar communities or control mechanisms. The research evidence informed development of models that reveal different types of offender and the motivations of each - based on what NGOs and practitioners have said in this research, case records and the research into animal abuse and wildlife crime that has been evaluated as part of this research. There is thus little point in treating all wildlife offenders as if they were the same and one conclusion that can be drawn from this research is that a blanket approach to wildlife criminality, offenders and enforcement is unlikely to be successful. The UK wildlife crime enforcement regime therefore needs to be adapted to provide for appropriate action that fits the

circumstances of the offender and allows the specific nature of the offence to be taken into account.

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Financial Regulation Enforcement and the Criminal Dimension:

Irish Perspective, EU Context

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Abstract

Criminal law and regulation constitute a binary divide which police the financial regulatory control domain. Pre-crisis financial regulation in both Ireland and the European Union failed leading to reform calls and for an expansion of the criminal law dimension. Returned to the aegis of the Central Bank in 2010, the Irish Regulator established a new dedicated Enforcement Directorate and introduced a new Enforcement Strategy promising that criminal prosecutions will be pursued in all appropriate cases with increased penalties sought. Within the European Union the Commission itself has engaged in a new centralised process of enforcement and sanctioning standard setting and rule convergence; has emphasised the 'signalling' importance of imprisonment for serious crime; and financial regulatory enforcement based on effective, proportionate and dissuasive sanctions is regarded as one of four intrinsically linked priority principles grounding reforms. In Ireland and the European Union a reform convergence or commonality has emerged which potentially will impact globally.

Key Words: Criminal Law, Financial Regulation, Enforcement, Reform, EU Convergence

Introduction

Criminal dimensions of enforcement illuminate the tension between the market preference for administrative sanctioning and new reform demands for increased criminal law involvement within the financial regulation sub-domain. Criminal law and regulation are a binary divide policing the control domain for the financial services market, where Ireland, subject to political, economic, legal, and market influences, lies within a double European Union (EU) cocoon of Euro-zone membership itself within the wider Community populated by twenty-nine separate criminal justice

systems. This paper examines this tension within the reform agenda tasked towards seeking an Irish/EU commonality. Set against the aftermath of the 07-09 financial crisis, the unique position of Ireland, and the future EU approach which has major international implications, are explored for themselves and juxtaposed against other jurisdictions.

Commencing with an exploration of background influences within the financial regulation domain, schematically this overview paper highlights the essential importance of enforcement within this complex and dynamic sector as found in both Ireland and the EU. Criminal law and regulation binary tension is discussed and traced through both a new conceptualisation and the operational enforcement pyramid which is derived from the responsive regulation approach. Financial regulatory reform actions are described and explored, conclusions are drawn and outstanding issues identified.

Enforcement reform is an essential reform pillar. The methodology is the enforcement pyramid where criminal law sanction is sandwiched between administrative regulatory options. Post-crisis there have been calls for greater criminal law involvement. EU innovation will affect all 29 criminal justice systems, including Ireland, and influence many others internationally. The importance of these developments cannot be understated.

Background influences

Ireland's history of financial regulation has been inextricably wedded to both foreign and political influences and the banking industry with its endemic scandals and failures. In 1942 the Irish Central Bank was statutorily established¹ based upon the British model. For Ireland since the new millennium, the most significant change to formal institutions of regulatory governance has been the establishment of statutorily independent regulatory agencies, such as the Financial Regulator in 2003². Similarly Ireland's history of criminal justice bears a heavy British influence, both at common law and statutorily.

In EU terms the adoption of the international Treaty known as the Single European Act 1986 presaged numerous pieces of legislation described variously as 'the emergence of an EU regulatory state', or perhaps better described as an instance of 'regulatory capitalism' (Braithwaite, 2008). Many of these related to financial services, for instance, capital adequacy, information transparency, market abuse, competition law, and investment vehicles. Moloney (2008) has described a 'juggernaut' of EU legislation which required national transposition and still does.

The financial regulation sub-domain is concerned with increasingly complex financial products and institutions and adaptive and innovative markets (Regling and Watson, 2010: 17). Further, the long promulgated

¹ Central Bank Act 1942

² Central Bank and Financial Services Authority of Ireland Act 2003

creation of an integrated, open, competitive, and economically efficient European financial market requires convergence of national sanctioning regimes. Financial regulatory enforcement, based on 'effective, proportionate and dissuasive' sanctions, the concept grounded in the Greek Maize case³ and utilised in financial regulation in both Ireland and the EU, is regarded by the EU Commission as one of four intrinsically linked priority principles grounding post financial crisis reforms (EU COM, June 2010/301: 4).

The control domain

Regulation is 'government in miniature' control of policy objectives by central instrument, generally by the use of rules or principles, and a public administrative policing of private activity (Mitnick, 1980; Prosser, 1997; Prosser, 2010). Regulation defines the domain border - the control domain - between government and, in this instance, the financial market where the prime objective is risk analysis and risk reduction (Foy, 1998).

Financial regulation is a sub-domain weighed down by systemic risk (Seve, 2010). While, tasked to maintain trust in the pyramid of breakable financial promises (Wolf, 2010), the financial regulator has two distinct objectives or mandates: first, 'Prudential' to avoid a systemic failure of the banking system particularly; and second, 'Consumer Protection' to counter the particular problem of asymmetric information. The main types of financial services regulated in Ireland - and since November, 2010 covered by three EU supervisory watchdogs - include banking, insurance, securities and asset management.

The catalyst for Irish financial services regulatory reform in the 1990s was an international movement to establish stand-alone regulators (Gilardi, 2008) and a series of financial failures and scandals, including the NIB and Ansbacher (both bank) and DIRT (tax) scandals. The replacement of the old Central Bank regime was recommended by the McDowell Report⁴ which outlined that Ireland needed a "dedicated first class regulatory authority operating to high standards". This report set off a lobbying clamour from the banks and other financial services firms. Following a political fudge on the 1st of May 2003 (Westrup, 2007; Regling and Watson, 2010) the hybrid Financial Regulator - the Irish Financial Services Regulatory Authority (IFSRA) - was established as the regulator. Later by the Central Bank and Financial Services Authority of Ireland Act 2004 statutory amendment sanctioning powers were granted, effective August 2004.

The Irish regulator however failed, was too 'deferential', effectively 'captured', and operated a 'retreatist' regulatory enforcement style (Honohan, 2010: 46, 59-60; McAllister, 2010:61). In essence, the 'soft-touch' Irish regulatory approach was 'deferential' to the industry and

³ Case C 68/88 Commission v Greece [1989] ECR 2965 (Greek maize case)

⁴ Advisory Group on the Establishment of a Single Financial Regulator established 1998, otherwise known as the McDowell Report, 1999, especially at chapter 6.

political concerns, attempts to strengthen the approach had limited effect, key governance architecture elements were not put in place, 'retreatist' sanctioning was only reluctantly applied to micro-prudential functions, regulatory resources were demonstrably limited, and important regulatory principles were never codified. The Irish banking system imploded with massive private debt becoming sovereign debt. Thus, in June 2010 a new targeted risk focused regulatory approach was announced, with institutional change when the regulator returned to the aegis of the Central Bank⁵.

The EU system of governance, where economic motivations are prevalent, is the most developed and progressive trans-national system in the world (Majone, 1994, 1997; Levi-Faur, 2010). Ireland, a member of the inner Euro-zone cocoon, lies within the wider vertical and horizontal EU relationship, with a mix of EU and member state institutions and procedures. According to Donnelly (2010) these include new consultation, co-ordinating and supervisory structures, legitimate national variations in economic and social policy, a single integrated market, a bottom-up norm formation approach where norm convergence is non-uniform, and three separate policy regimes for companies, financial markets and accounting standards.

The binary divide

Criminal law/justice and regulation constitute a binary divide (Wells, 2010) being separate but inseparable, and inter-dependent. Criminal justice historically set the pattern for regulation, indeed criminal law regulation of markets may be traced to medieval times, while an array of Nineteenth Century statutory interventions established new regulatory crimes (Scott, 2009). At core the spine of both paradigms is a mirror image: control rationale; crisis response; institutionalized; principled; legally grounded; contract underpinned - although the detail differs and sometimes significantly. Wells (2010: 373) has recently clarified this difference through the lens of sanctions:

Regulation can involve civil or criminal penalties. It is distinguished from criminal law – which applies across the board – in two ways: it targets those engaged in specialised activities and its underlying purpose is said to be different in that regulation seeks to mould or encourage behaviour rather than condemn it.

Scott (2009) has argued regulation a 'bifurcation' in the criminal law, and highlighted differences between 'real' and 'regulatory' crime, due in part to the absence of *mens rea* in strict liability offences, but also in investigation, prosecution, function, defences available, sentencing, and enforcement style.

⁵ Central Bank Reform Act 2010

For Zedner (2004:64) "Practices of enforcement are essential to understanding the reality of the criminal law, and, by implication, crime". Lacey (1985:460) posed two questions under the rubric of defining 'criminal law': should the accused be punished for what is alleged and, if so, how severely?

But a new vision or pattern of criminal law intervention, and one increasingly utilised in administrative regulatory sanctioning, has more recently emerged.

The enforcement context

Increasingly crime is being reconceptualised – with the emergence of a new pattern - from economic influences beyond the normal criminal law rationale of abnormality or deviance (Zedner, 2004). There has been a consequent shift towards engineering prevention involving surveillance and security, what Zedner otherwise called 'preventive governance'. This prevention amounts to an actuarial justice (or economic) assessment or targeting for high-risk categories which includes white collar financial service criminals. The tactics of reactive risk are applied, exemplified by the 40 percent reactive effort in Ireland's new regulatory enforcement strategy (2010) more fully explained later. Another tactic is the signalling or 'messaging' of the price of crime - effectively the sanction tariff - to potential offenders. Reflections in financial regulation both in Ireland and the EU (and elsewhere) find an increasing shift post-crisis towards stability mechanisms converging upon risk, systemic risk, such as the European Financial Stability Facility (EFSF) heavily active in the Euro-zone crisis; and, targeted risk-based regulatory approaches which target financial service firms according to risk hazard with the most risky gaining greater regulatory attention.

In considering the regulation of financial services and the criminal dimension, the EU Commission (COM, 2010/716) has recently highlighted the following six important issues: the 'interplay' between administrative and criminal sanctions imposed at member state level; that criminal sanctions, and in particular imprisonment, generally send a strong message of disapproval; that existing EU financial services law is without prejudice to the right of Member States to impose criminal sanctions; that criminal sanctions may not be appropriate for all types of financial regulatory violations and in all cases; that it will assess whether and in which areas the introduction of criminal sanctions, and the establishment of minimum rules on the definition of criminal offences and sanctions may prove to be essential; and, that in such endeavour it will target 'coherence and consistency' across different sectors, in particular when considering the type and level of criminal sanctions included in EU directives.

The Pyramid Strategy

Gunningham (1987) a quarter of a century ago categorised two main enforcement strategies: confrontational deterrence and co-operative compliance. These were amalgamated from the Australian experience, principally by John Braithwaite for business regulatory purposes and became known as the hybrid 'Responsive Regulation' (Ayres and Braithwaite, 1992). This conceptualisation - which mixes punishment and persuasion, and more recently restorative justice (Braithwaite, 2002) - has over the last two decades been globally adopted by regulators.

The principal framework advocated by 'responsive regulation' from a sanctioning viewpoint is the Enforcement Pyramid. Enforcement strategies within such practise have been arrayed in a five level ascending and descending dynamic pyramidal approach, with criminal penalty a rung or two below apex where the removal of authorisation or licence lurks, and where the objective is to maintain as much enforcement activity as possible at the 'persuasion' base of the pyramid.

Ireland, like the EU where it has competence, has favoured an administrative approach to sanctioning. A survey of the thirty-three settlement agreements⁶ entered into between the Irish financial regulator and regulatees between the commencement of sanctioning in 2004 and February, 2011 revealed an enforcement pyramid broadly in line with the 'responsive regulation' model with criminal penalties absent however, since like the UK there is a double jeopardy administrative and criminal procedure prohibition⁷, and with revocation, disqualification, fine and reprimand as the downward flow. This is a far cry from the more menacing US parallel proceedings approach (Brightman, 2009), which allows for simultaneous or successive investigations, prosecutions, or other actions brought against a person, a corporation, or some other entity by federal and state governmental departments or agencies, or by a government entity and a private party.

Farrell (2010) has argued that, because the legislative structure of the Irish criminal justice system is geared almost exclusively towards the prosecution of non-regulatory crime all prosecutors are bound by the considerations which bind public rather than regulatory prosecutors, resulting in the history of regulatory prosecution being modest in scope and effect. Indeed, the Central Bank's own Strategy Document (2010) issued in December 2010, post reforms, clearly re-states a preference for Administrative Sanctioning over summary criminal prosecution, although criminal prosecutions will be pursued it is stated in exceptional cases and where necessary will be pursued in all cases (2010).

⁶ see www.centralbank.ie

⁷ Section 33 AT 1942 Central Bank Act 1942, as inserted by Central Bank and Financial Services Authority of Ireland Act 2004; and see McGinn, Dominic, "An Overview of Banking Regulation", a paper delivered at the Irish Criminal Bar Association White Collar Crime Conference, 25th March, 2011 held at The King's Inns, Dublin, at p 9

Public consultations upon this strategy area were promised for 2011 in Ireland just as in the EU. No Irish consultation has yet taken place. The Feedback Statement⁸ prepared by the EU Commission recited inter alia that although there was general agreement that criminal sanctions could considerably increase deterrence, there was disagreement about their use, and even those agreeing appeared to favour strict conditionality and application to ill-defined 'serious offences' only.

Reformation Irish style

In March 2008 the Irish Financial Regulator, seeking measurement against international comparators, commissioned the Mazars Report (2009) which recommended the creation of a new Directorate which would have overall responsibility for five areas including a dedicated enforcement team. Within the re-integrated regulatory structure established by the Central Bank Reform Act 2010, important moves were afoot, including the establishment in late 2010 of a dedicated Enforcement Directorate enlarging the Mazars approach. The Central Bank on the 21st December 2010 introduced the new, and its first, standalone Enforcement Strategy covering the period 2010-2011, while its existent 2005 Administrative Sanction Procedure would continue to be utilised.

The regulator's new plan is to align the enforcement and supervisory directorates in tandem (*a la* US SEC practice), and to target their enforcement resources in two ways:

- (a) Pre-defined Enforcement - 60 percent targeting - where cases taken will be focused on seven themes chosen by the regulator, based against priority areas identified by supervisory colleagues; and
- (b) Reactive Enforcement - 40 percent targeting as already highlighted - which entails taking decisive enforcement action where serious concerns arise from the regulator's supervisory work and other sources of information and events, both internal and external.

Re-iterating post-2005 practice, the 2010 Strategy document proclaimed (2010:4-5): "Enforcement actions must have a deterrent effect and will engender confidence in the financial services regulatory regime".

⁸ COM (2010) 716 December, 2010 established the consultation process which ended in February, 2011. See Feedback Statement On Public Consultation On Commission Communication - Reinforcing Sanctioning Regimes In The Financial Sector, May 2011, available at http://ec.europa.eu/internal_market/consultations/docs/2010/sanctions/feedback_en.pdf

The EU evolving patchwork

EU criminal law, un-codified and absent a discrete EU criminal law concept, is an evolving, hybrid, multi-layered patchwork of legislation and case law from both national and European jurisdictions (Klip, 2009). Conway (2007) has explained that cooperation in criminal matters (which was decreed by the European Court of Justice (ECJ) in the Pupino⁹ decision and is known as the enforcement obligation where Member States must take all measures necessary to guarantee the application and effectiveness of EU law (Tridimas, 2006) developed as an offshoot from a primary concern with economic freedom of trade and the free movement of economic actors.

For Klip (2009) the EU is no longer a purely economic entity where citizens have rights, since the Lisbon Treaty 2007 coupled with ECJ rulings effectively created one single institutional framework merging the internal market and the criminal law including applicable EU enforcement mechanisms. Whilst norms are formulated at EU level both implementation and enforcement take place at national level. However, in two major decisions between the EU Commission and the Council, dating from 2005 and 2007¹⁰, the EU Commission itself has now had implied direct powers recognised by ECJ ruling where ‘serious crimes’ are involved, a formula taken up by the EU Commission¹¹.

Legislatively, the EU may by way of Directive establish minimum rules concerning the definition of criminal offences and sanctions regarding serious cross-border crime including inter alia money laundering, corruption, counterfeiting, and computer and organised crime¹². In addition, other crimes may be added to the list including those affecting financial services. ‘Serious crime’ in the EU context generally refers to offences attracting a sanction stipulation of imprisonment for five or more years.

Resulting from a cross-sectoral stocktaking review of member state financial regulatory enforcement practices, in December, 2010 the EU Commission (SEC, 2010, 1496 final: 11-14) identified serious shortcomings in such EU sanctioning and in particular six divergences and weaknesses in national sanctioning regimes:

- (a) Some competent authorities lack important types of sanctioning powers for certain violations;

⁹ Pupino (2005): Case C-105/03 criminal proceedings against Maria Pupino [2005] ECR I-5285

¹⁰ Case C-176/03 Commission v Council [2005] ECR I-7879; Case C-440/05 Commission v Council [2007] ECR I-9097

¹¹ The view that regulatory offences should only have a criminal dimension where ‘serious’ was proposed in the UK also (and thus influenced Ireland) by the Macrory Review, Regulatory Justice: Making Sanctions Effective, Final Report, November 2006, Professor Richard B. Macrory, and legislated in part 3 of the UK Regulatory Enforcement and Sanctions Act 2008

¹² Klip (2009: 157-158); art 83 (1) TFEU and art 69B.1 inserted into TEU by Art 2.67 Lisbon Treaty

- (b) The levels of administrative pecuniary sanctions (fines) vary widely and are too low in some;
- (c) Some competent authorities cannot address administrative sanctions to both natural and legal persons;
- (d) Competent authorities do not take into account the same criteria in sanction application;
- (e) Divergence exists in the nature (administrative or criminal) of sanctions provided;
- (f) The level of application of sanctions varies.

The paradigmatic financial crisis response however has led to calls for greater convergence reform of 'divergent and fragmented' transposition of EU legislation into national law with EU legislation itself establishing the necessary common minimum standards.

The EU Road to 'speedy and effective' financial regulation can more recently be traced from 2007 when the financial crisis began to bite. In December, 2007 the EU Council invited the EU Commission to conduct the cross-sectoral stock-taking exercise of Member State sanctioning powers and regimes, which resulted in the publication of the six identified shortcomings.

The post-crisis EU sponsored de Larosiere Report (2009) - which was purposed towards financial regulatory reforms - recommended the deployment of, "sanctioning regimes that are sufficiently convergent, strict, [and] resulting in deterrence". Effectuating solidarity these recommendations were approved by the Irish regulator in his annual report¹³. Hard on the heels of de Larosiere in March, 2009 the EU Commission published a Roadmap (COM, 2009/114) which specified that one of five key objectives was to ensure more effective sanctions against market wrongdoing.

In synchronised choreography, within two weeks the ECOFIN Council (COM, 2009/114: 3) called for better regulation of financial markets advocating "rigorous enforcement of financial regulation and transparency, backed by effective, proportionate and dissuasive sanctions, in order to promote integrity in financial markets".

In early December, 2010, the EU Commission, simultaneous to its announced conclusions from the 'cross-sectoral stocktaking exercise', identified sixteen key financial regulatory sanction actions (COM, 2010/716: 11-16) including inter alia, the following four:

- (1) Ensuring appropriate interplay between administrative and any criminal sanctions imposed ;
- (2) Levels of fines should exceed the potential financial benefits;
- (3) The EU Commission will assess (consultation process to aid) whether and in which areas the introduction of criminal sanctions

¹³ See Irish Financial Regulator 2008 Annual Report at p16 and de Larosiere Report p 13-37 for recommendations

- and the establishment of minimum rules on the definition of criminal offences and sanctions may prove to be essential;
- (4) Proposals in the field of criminal law must ensure appropriate ‘coherence and consistency across different sectors’.

The EU Commission (COM, 2010/716: 14) stressed that, “...criminal sanctions when appropriately applied, in particular imprisonment, send a strong message of disapproval”; and concluded by envisaging:

... an EU legislative initiative to promote convergence and reinforcement of national sanctioning regimes ... [because] these objectives cannot be sufficiently achieved by the Member States alone: in the absence of a common EU framework, national initiatives cannot ensure consistency in the reinforcement of sanctioning regimes (COM, 2010/716: 11).

Simultaneously, in December 2010 the EU Commission Impact Assessment recommended¹⁴:

- (1) Introducing criminal sanctions for the most serious violations, on a par with Irish reform pronouncements;
- (2) Reinforcing mechanisms facilitating both detection of infringements and enforcement sanctions; and
- (3) Introducing minimum EU-wide common criteria addressing the type and level of administrative sanctions.

Conclusion

Enforcement in the financial regulation control domain post crisis has been recognised in Ireland and at EU level as an essential reform pillar. This conclusion also resonates elsewhere such as the UK and US where regulatory reform agendas are actively pursued. This ‘reform-talk’ is against a backdrop of historical and other influences. A renewed call for greater involvement of the criminal dimension impacts the enforcement pyramid which is the prime enforcement framework. Within the EU regulatory space sanction convergence is essential for single market coherence. In Ireland controlling systemic banking risk is a top policy priority.

Irish and EU Financial Regulatory reforms, including the criminal dimension, mutually impacted by foreign influences, politics, economics, and the markets including corporate (banking) failure, coupled with the administrative versus criminal sanctioning tension, are drawing the financial regulatory paradigms closer in an effective commonality. This is shown by their use or reliance upon ECJ rulings which are central for both, for instance: (a) the Greek Maize ECJ ruling that the 3 principles “effective,

¹⁴ SEC (2010) The Impact Assessment Procedure is part of the EU Commission’s Better Regulation principles

proportionate, dissuasive” apply to sanctioning; (b) The two Commission v Council ECJ rulings that the EU Commission may act itself in relation to ‘serious’ crime; and (c) Pupino where in a member state setting the Treaty co-operation principle was applied to (EU) criminal law.

Further, both draw inspiration from the EU commissioned de Larosiere Report recommendation for “Clear rules and enforcement powers” and, for example, have recognised the powerful place of criminal sanctioning including imprisonment for serious offences and have thus re-aligned or re-emphasised (not shifted) the Responsive Regulation paradigm towards coercive deterrence.

Reflecting Scott’s (2010) broader constitutionalist approach to regulatory governance (which embraces non-state actors and mechanisms for governing that go beyond legal rules) both increasingly use the public consultation process in US ‘notice and comment’ style to identify and define enforcement elements within the financial regulatory ‘control domain’. Both also use the new criminal law conceptualisation economic rationale for deterrence ‘messaging’ or ‘pricing’ and in ‘targeting’ a hallmark of the risk-based regulatory approach adopted by the G20, the EU and Ireland. A new ‘mechanisms’ definition of financial regulation has emerged based around the concept of ‘risk’ where new special resolution regimes and vehicles have been established in both jurisdictions, and indeed beyond, exemplified in the UK by the Debt Management Office (DMO) and Asset Protection Agency (APA) as well as the ‘bespoke’ administrative apparatus to manage them (Black, 2010), and in the US by the Troubled Asset Relief Program (TARP).

But is this ‘reform-talk’ merely rhetoric, or to what extent will meaningful change occur? There is normally a narrow window of opportunity for reform and if attitudinal and legal changes are delayed, the latter a common feature of EU governance, then pre-crisis ‘softer touch’ enforcement may well persist. Clearly, industry favours a diluted form of criminal law involvement and political will towards meaningful reform must be closely monitored. Even if implemented, future criminal prosecution will likely centre on the more serious offences. Braithwaite (2010) himself, post crisis, has argued that white-collar crime is more under-deterred than other forms of crime, and suffered more under-investment in prevention and preventive policing. Perhaps his eminent opinion, added to the many others, will carry sufficient weight to establish the necessary reforms both legislatively and in practice.

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