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## Penal elitism: Anatomy of a professorial ideology

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### ABSTRACT

In recent decades, many scholars have invoked the concept of *penal populism* to explain the adoption of “tough on crime” measures and a wider politics of “law and order” across the post-industrialized world. But scholars who invoke the concept often betray an implicit commitment to its twin ideology—*penal elitism*—the belief that penal policymaking should not be subjected to public debate and that matters pertaining to crime control and punishment should be left to experts or specialists. The doctrine contains four key properties: *isolationism*; *scientism*; a narrow notion of “the political”; and a thin conception of “populism.” *Isolationism* involves creating insulating buffers around arenas of social life—including criminal justice systems—to remove them from what is held to be undue democratic influence. *Scientism* is the overvaluation of scientific reason and the dismissal of a public believed to be emotional, irrational, or exceedingly simplistic. *Politics conceived narrowly* limits “the political” to that which takes place within the formal political system, ignoring the wider notion of politics as the exercise of symbolic power in everyday life, which extends far beyond the political system as such. The *thin conception of “populism”* ignores the fact that populism is an ideology promising to protect the public from harms of neoliberal capitalism that nevertheless fails to offer a plausible alternative to market rule. In this article, I argue that in place of either *penal populism* or *penal elitism*, academics should engage in democratically grounded practices to reverse harsh justice by including the public in a reformulated politics of punishment.

### KEYWORDS

democratic theory; law and order; penal elitism; penal populism; punitivity

### Introduction

The concept of *penal populism* has, in recent years, produced extensive debate within the sociology of punishment (see, e.g., Bottoms 1995; Pratt 2007; Shammass 2016). Anecdotally, a search for “penal populism” on Google Scholar now returns more than three thousand articles and books making reference to the term.<sup>1</sup> The notion has become so prevalent in penological discourse that a definition of the term hardly seems necessary: it has been absorbed into the penological lexicon as a common idiom or phrase. In brief, scholars of crime and punishment have taken penal populism to refer to the ways in which politicians, political parties, and other governing elites have competed with one another in presenting themselves as leading exponents of a politics of “law and order,” promising electorates a “tough on crime” approach, including raised sentencing levels and increasingly austere conditions of confinement, while abandoning rehabilitation and related goals (see, e.g., Anselmi 2018: 73-77; Pratt 2007; Roberts et al. 2003). Scholars have used the concept of

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<sup>1</sup> The phrase “penal populism” resulted in 3,730 hits on Google Scholar on 1 August 2019.

penal populism to account for a “punitive turn” across large parts of the Western, post-industrialized world in recent decades (Green 2012; Newburn and Jones 2005; Pratt and Clark 2005), where one of the central contributing factors is considered to be the transfer of the power to determine penal outcomes from bureaucrats, judges, and technocratic elites to politicians, legislators, and other representatives of the masses.

A populist politics of punishment, then, is held to involve an incapacitating (rather than rehabilitative) and retributive penalty. As Pratt (2007:92) laments, penal populism is a “political force driven more by emotion than rationality,” echoing the widespread view of populism as the “politics of the *Stammtisch* (the pub), i.e., a highly emotional and simplistic discourse” (Mudde 2004: 542).<sup>2</sup> Indeed, penal populism is premised on retribution and revenge instead of championing rehabilitation, according to Ward and Maruna (2007), who establish a contrast between, on the one hand, “evidenced-based correctional policy,” and, on the other hand, “penal populism or punitive retributivism” (Ward and Maruna 2007: x). Penal populism is predicated on what Daniel Defoe, in an earlier age, termed “the rage of the street” (1961: 244), supplanting the (putatively) reflective, restrained, and rehabilitation-oriented dispositions of rational, reasonable elites who were (so the story goes) previously tasked with shaping the field of crime control in past times, which Pratt (2007: 37) labels the “decline of deference”: No longer deferring to the authority of legal and correctional expertise, it is little wonder that the Western world turned to popular, emotive, quick-fix solutions to criminal justice issues. Thus, Zimring, Hawkins, and Kamin (2001: 215) maintained that the solution to punitive policymaking lay in “protecting punishment policy from populist overrides” and “restoring faith in the authority and expertise of sentencing judges.”

From judges to correctional administrators to scholars of criminology, law, penology and sociology, those elevating the concept of penal populism to a central position in their explanatory accounts claim that professional expertise has rarely been more denigrated, disparaged, and devalored than today—by politicians, political parties, and governments, as they formulate penal policy, produce symbolic discourses on offenders and inmates, and, more broadly, deploy the resources of the state to manage crime and administer punishment.<sup>3</sup> “By privileging the penal expectations of the public over those of the criminal justice establishment, it follows that there is a commonsensical anti-intellectual nature to penal populism,” Pratt (2007: 17) writes. In an indictment of the literature on penal populism, Dzur (2010: 356) observes that “political entrepreneurs use the promise of criminal justice reform to focus and channel the worries of publics increasingly frustrated with a government seen as ineffective at helping them cope with the insecurities of late modern lives.” If the post-industrialized world has undergone a punitive turn, tilting towards excessive or over-criminalization and a form of “surplus-punishment” in recent decades (see, e.g., Wacquant 2009a; 2009b), as critics of the phenomenon of penal populism claim, then one of the factors driving the growth in imprisonment rates and the (concomitant) decline in rehabilitative intent is the steadily declining fortune of rationality and technocracy—a trend that has been

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<sup>2</sup> *Stammtisch* is German for a table used by or reserved for regular customers in a pub. In this context, it denotes the kind of jocular, anti-intellectual (masculine) fellowship typically associated with reactionary politics, similar in kind to what then-presidential candidate Donald J. Trump called “locker-room talk” and its concomitant political positions.

<sup>3</sup> This is by no means a phenomenon limited to criminal justice. As Brisman and South (2017) show, the problem of global warming also reveals tension between, on the one hand, expertise-driven insights about the need to reverse catastrophic climate change by switching to a decarbonized economy, and, on the other hand, a public culture of anti-intellectualism and skepticism toward scientific and governing elites. In some sense, the conflict between democratic participation and technocratic governance looks set to become *the* defining political problem of the twenty-first century.

evidenced by the (re-)emergence of an emotive, irrational, and mercurial politics, more generally.

Some have bristled at the ease with which the notion of penal populism is dropped into sociological explanations of rising punishment. In an account of “hyperincarceration” in the United States (US), Wacquant dissects the assemblage of social forces responsible for the spectacular resurgence of the prison between the 1970s and 2000s, which he presents as both political and expertise-driven. “The need for these punitive policies,” Wacquant (2008: 2) explains, “is conveyed everywhere by an alarmist, even catastrophist discourse on ‘insecurity’...broadcast to saturation by the commercial media, the major political parties, and professionals in the enforcement of order—police officials, magistrates, legal scholars, experts and merchants in ‘urban safety’ counseling and services—who vie to propose remedies as drastic as they are simplistic.” To Wacquant, then, it is not elites that have failed to guard against the rising tide of American punishment; instead, hyperincarceration is precisely the work of a specific constellation of elites drawn from academia, the media, politics, think tanks, and other entities (see also Wacquant 2009b; Page 2011). Similarly, Zimring and Hawkins (2001: 12) see the implementation of California’s “Three Strikes” sentencing law as the work not of unbridled political elites eager to take advantage of the electoral profits associated with adopting a tough stance on crime and punishment, but as a failure to act within formal political arenas: “The legislative process that passed Three Strikes into law in March 1994 was...remarkable in that neither the governor nor the legislature made any attempts to question or change the Three Strikes proposal.” In short, some academics have opposed this elitist or anti-populist turn in penological discourse.

While penal populism has gained wide traction in scholarly work on crime and punishment, its mirror concept, penal elitism, has remained an implicit, unstated element of a professional ideology of the penological professorate. The concept of *penal elitism* centers on the normative *overvaluation* of elites and consequent devaluation of the right of the public to determine the shape of the field of crime control. To invoke Bourdieu (2014: 173, 375), we can think of penal elitism as a symbolic category—a “principle of vision and division” (see also Shamma 2017a)—that has structured much thinking about the rightful role and desirable place of expertise in shaping systems of “criminal justice.”

Penal elitism has not been subjected to much scrutiny. What is so peculiar about the idea that only “experts” should have a say in determining criminal justice policies is that most of those affirming it would likely agree that most other major policy areas should be a part of the democratic decision-making process. Why does it seem permissible, sensible, and perhaps even self-evident, that prisons and punishment should be taken out of the democratic process when other policy areas, such as education, foreign policy, and taxation seem so obviously to be a part of what the voting public should have a say in influencing? We might ask, then, how we are to make sense, analytically speaking, of penal elitism, its constitutive features, and what if anything sets it apart from these other policy areas.

The next section anatomizes how penal elitism is expressed in the sociology of punishment and shows that this scholastic ideology is premised on four central, and problematic, dimensions. The section following it argues that academics, in so far as they are serious about their commitments to liberal democratic values, have no choice but to engage the public and attempt to make their voices heard in the democratic process. Finally, a concluding section discusses the benefits of framing criminal justice policymaking not in immanent penological terms but in terms of political economy; a renascent welfare state offering generous social provisions and durable social safety nets may very well reduce the social need to mobilize the police, courts, jails, and prisons in the first place, thereby rendering obsolete the strictly binary choice between harsh or tolerant forms of justice.

### **The four properties of penal elitism**

For analytical reasons, it may be helpful to anatomize the constitutive features of penal elitism, for without a firm grasp of what penal elitism is, we cannot hope to understand penal populism. For Mudde (2004: 544-545), elitism is “populism’s mirror-image: it shares its Manichean worldview, but [it] wants politics to be an expression of the views of the moral elite, instead of the amoral people.” In summary, *penal elitism* can be said to contain four key properties: *isolationism*; *scientism*; *politics conceived narrowly*; and *populism as a term of abuse*. And while, admittedly, these terms overlap to some degree, it is helpful, for strictly analytical purposes, to maintain their separation. They are discussed in turn below.

#### *(i) Isolationism*

*Isolationism* involves the separation (and insulation) of penal matters from the rest of those issues thought to be suitable for democratic debate. Thus, Roberts and colleagues (2003: 180) recommend creating a “policy ‘buffer’ between politicians and the criminal justice system” because “the closer that politicians come to directly determining sentencing policies, the more likely it is that these policies will reflect the forces of blind populism.” Such buffering, isolation, and insulation often results in the depoliticization of penal policymaking. But this invocation involves a narrow conception of “politics” and “the political.” It is the same narrow distinction that Foucault attacks in his indictment of the courts of law developed during the French Revolution (see Deleuze and Foucault 1977), which judged political offenders through an insulated, bureaucratic, legal form of professional judgment. This system, Foucault explains, “defers to a justice that could be just, to a judge that could pronounce a just sentence. The very form of the tribunal belongs to an ideology of justice which is a bourgeois ideology” (Deleuze and Foucault 1977: 210). If the law is inherently undemocratic, it is because it elevates justices or judges to a position of isolated preeminence, above and beyond the grasp of the public; even if their appointment takes place through representative channels, the mediating effects of legislatures, whether bicameral or not, ensures that the bureaucratization of juridical forms produces the kind of autonomy of action that is intended to be insulated from public pressure and democratic influence.

If, on the other hand, we take a broad view of “the political” as that which involves the collective allocation of scarce material and symbolic resources, it becomes readily apparent that the determination of the field of crime control can never truly be depoliticized. It was this expansive usage of the term (“the political”) that allowed feminists in the 1970s to proclaim that the private (or the personal) is political: in other words, issues such as the division of labor in the family—between child-rearing and wage-labor, for instance—are really *political* issues because they involve the allocation of resources (e.g., energy, time) that both emanate from and, in turn, affect broader distributions of power. It is this enlarged view of the political, too, that allowed early social democrats to claim that what transpires in the workplace—where, after all most individuals in the post-industrialized world spent around one-third of their lives and slightly more of their *waking* lives—cannot be removed from the political process because workplaces effect a distribution of resources (e.g., deciding what to do, with whom, to what ends, and towards whom). When penal elitists claim, directly or implicitly, that isolationism is a necessary step towards purging penal affairs of the pollution or taint of the political, they are staking out a normative claim that the direction of such affairs should be removed from the arena of democratic contestation. They are not, however, able to rid the penal domain of its *actual* political content because the political is an intrinsic and necessary, rather than contingent and extrinsic, aspect of the penal complex. Punishment cannot be made apolitical precisely because punishment necessarily involves the allocation of collective resources in a particular manner, e.g., placing certain bodies within particular

institutions for a certain period of time. Essentially, not everything is political, but a good deal is—and a substantial amount more than penal elitists are willing to admit. Isolationism does not actually yield depoliticization, which runs contrary to the expansive definition of the political; rather, isolationism leads to *bureaucratization*, which is an attempt to insulate the handling of penal affairs from the processes of democratic contestation, shutting them up behind thick layers of technocratic managerialism.

## (ii) *Scientism*

*Scientism* involves a strong belief in the supremacy of rationalism and science. One of the problems with scientism is that it tends to reify and reproduce a stereotypical opposition between reason and emotion, rationality and intuition, science and lay knowledge—in short, between (elevated) scientific expertise and the (debased) “people.” These dichotomies, however, rarely withstand closer scrutiny. Reason always involves particular forms of valuation, drawing nourishment from feeling and intuition, perhaps even, in some sense, *prejudice*; moreover, “the people” are not reducible to a single, homogeneous entity: instead, they are sliced and diced by so many sociological categories, including ethno-racial backgrounds, gender, generational divides and socioeconomic class. In addition, the category of (so-called) “experts” often conceals a vast range of ideological preferences, implicit biases, and normative preferences not reducible to the pursuit of a “pure” science; instead, experts are bearers of various kinds of “spontaneous philosophy” (Althusser 1990). Every scientific theory, as Althusser points out, is premised on a certain ideology; the moment one reaches a “certain level of abstraction, *that, precisely, at which every scientific theory is situated and constituted*, one is hopelessly given over to the fatality of philosophical ‘choices’ and of the ‘will’—in short...*to ideology*” (Althusser 2016: 3-4 (emphasis in original)). All science is suffused with ideology because of the willful and willing element of the scientist, who produces the unmistakable traces of “relativism and arbitrariness” (Althusser 2016: 4) in the choices he or she makes. In other words, there is no escaping subjectivity in science. And while it may be tempting to try to distinguish between “bad subjectivity” and “good subjectivity”—or between verifiable history and fictitious myth, through an objectivist deliberateness, or the craftsmanship of the professional historian (who is said to be methodical, rigorous, and who produces verifiable statements)—Althusser deems these attempted solutions unsatisfying. Writing history—or engaging in any kind of scientific practice whatsoever—means adopting certain stances towards the world. Science is sabotaged by its reliance on axioms, which are precisely not amenable to further proof. The appeal to reliable methods—an “intention of objectivity” or “the craft of the historian” (Althusser 2016: 7)—has, at least, the virtue of attending to the labor-process of the scientific practitioner, and so smuggles *praxis* into the philosophy of science. But these phrases fail to address the overriding issue at hand: scientific analyses require making definite choices, inserting the self into the capture of reality, so that there are, in reality, no data (from *datum*, “that which is given”), only “capta” (from *captum*, “that which is captured”). Not “data analysis” but “capta construction”: this is the business of science (Chippindale 2000). Finally, the “craft” itself is suffused with arbitrary structures: the scientific profession is never a neutral ground, as Bourdieu (1988) argues persuasively.

Summarized briefly, then, we must learn to escape the trap of scientism, whose exponents are, like Keynes’s ([1936] 2013: 383) “practical men,” who think themselves above and beyond intellectual (meaning non-scientific) influences, probably the “slaves of some defunct economist” or political ideology. In the philosopher Reza Negarestani’s (2018) view, “those who wear the badge of science-mongering...are slaves of their own unconscious metaphysical assumptions” precisely because they do not see that science requires a

metaphysics to function, while engaging in a science that (purportedly) excludes the possibility of metaphysical speculation or even simply middle-range theorizing.

We should also ask whether any implicit set of categories of evaluation could be reduced to a particular practice of penal policy (e.g., “rehabilitation” or “moderation”), as some of the scholars who have advanced the notion of *penal populism* implicitly or overtly contend. Pratt (2007: 17) notes that “by privileging the penal expectations of the public over those of the criminal justice establishment, it follows that there is a commonsensical anti-intellectual nature to penal populism.” One might take note of the fact that the “criminal justice establishment” is assumed to be a necessary, universal bearer of scientific reason and reasoned intellectualism. Whether this is so must remain an empirical issue, however, which is not to be decided from the vantage point of armchair speculation. A casual glance at the history of the US penal complex, for instance, will reveal a diverse array of agendas, inclinations, and preferences towards “evidence-based” policymaking and, more broadly, punitivity and rehabilitation by a broad range of agents that might all credibly be called members of the “criminal justice establishment.” Many of these—from the California prison guard’s union (Page 2011) to neoliberal and neoconservative think tanks (Wacquant 2009b)—have mobilized evidence, reason, and science carefully and in such a way as to defend a “tough on crime” approach. To dismiss such entities as anti-intellectual proponents of folk knowledge is to miss the larger issue: these are conflicts not over *epistemic truths* but over *ideological preferences*—struggles in the realm of symbolic power, struggles over who gets to decide what the state, as the preeminent “site of accumulation of symbolic and legitimate power” (Bourdieu 2014: 142), gets to do.

Incidentally, the “epistocratic” perspective of the critics of *penal populism*, which skews heavily towards the overvaluation of a scientific reason said to be free of values, has much in common with recent emphasis by liberal elites on the supposed “post-truth” paradigm and the putative role of “fake news” in paving the way for Brexiteers and Trump on either side of the Atlantic (see also Brisman 2018). But, as Fenwick (2013: 223-224) points out, there is nothing inherently punitive about so-called “populist” modes of address and communication. They are not necessarily tied to a “law and order” agenda, but can, at least in theory, be used to advance penal leniency as well as harsh justice. “A participatory crime policy would not necessarily be intolerant and repressive,” Johnstone (2000: 161) suggests. “To the contrary, participation is likely to develop and foster the very qualities people need to imagine, formulate and implement more rational responses to escalating rates of crime, violence and disorder.” Public opinion on crime and punishment remains uninformed *by design*, Green (2006) argues, and he goes on to advocate a remedy for this state of affairs: ensuring that the public is provided with appropriate contextual information may help inform and facilitate a wholly different and more participatory form of penal policymaking. Decision-making in criminal justice matters could be transformed if the public were actually allowed to engage with the issues that on or about which they are asked to deliver judgment. Green (2006) shows how deliberative opinion polls, for instance, where members of the public are invited to discuss and debate issues of social importance in a community setting, rather than simply offer a one-off answer to an anonymous telephone interviewer.

Certainly, there are instances of public influence that have generated vengeful penal policies. For instance, a whole research tradition, primarily centered on the US, focused on the notion of “racial threat”—the subjective sentiments whereby majority populations feel that their economic, political, and cultural interests are “threatened” by ethno-racial minorities—has documented that such feelings often correlate with punitive attitudes by white populations towards these ethno-racial minorities (see, e.g., King and Wheelock 2007). But it is sufficient for the sake of the validity of the argument presented here that there remains no logically necessary connection between popular influence and punitivity: the

existence of negative cases, where the public can be said to exhibit traits of leniency, for instance, dismantles one of the central principles undergirding the critique of penal populism—namely, that the public must *never* be permitted to determine penal outcomes. Indeed, in the US, there is growing evidence that large swaths of the population now support concerted criminal justice reforms, including moves towards decarceration. For example, in 2017, the American Civil Liberties Union (ACLU) released public opinion data showing that 71 percent of respondents believed it was “important” to reduce the scale of prison populations (including 57 percent of Republicans); two in three respondents “would be more likely to vote for an elected official if the candidate supported reducing the prison population and using the savings to reinvest in drug treatment and mental health programs” (ACLU 2017). Under the right circumstances, the *populus* can certainly exhibit rehabilitative tendencies.

The problem here, conceptually speaking, is that of mistaking a *field* for an *apparatus* (see, e.g., Bourdieu and Wacquant 1992: 102; Goodman, Page, and Phelps 2017): while a *field* is agonistic, dynamic, and fractured—fragmented into a multiplicity of divergent factions—an *apparatus* is, on the other hand, unchanging and uniform. The “criminal justice establishment” that Pratt (2007: 12, 14, 49, 123 and *passim*) speaks of is assumed, like all apparatus or establishments—one might consider Owen Jones’s (2014) journalistic work on *The Establishment* in Britain as a case in point—to be monolithic and static, when, in fact, it is agonistic, fragmented and historical. It changes over time and is not really a whole “it” at all, but is broken up into multiple competing groups. This simplistic conceptualization of what is in actual fact a *penal field* (see, e.g., Goodman et al. 2014) is problematic if we are to get a good sociological sense of the actual dynamics of penal change; if we remain caught in the dualisms of the exponents of *penal elitism*, we are liable to fail to appreciate which agencies are responsible for penal change and how such changes can be modified or reversed.

### *(iii) Politics conceived narrowly*

Penal elitism involves a narrow conception of “politics”—a feature that loops back onto and both fuels and is fed by scientism. In political theory, there has arisen a quite clear distinction between Anglophone and continental European conceptions of the political. The narrow view of “politics” as limited to party political squabbling and “inside the Beltway” in-fighting is largely a symbolic construction of Anglophone provenance; the (broad) view of politics as pertaining to collective struggles over the allocation of resources is largely continental, resonating with a whole host of mainly French and German philosophers and social theorists, from Hegel through Rancière to Bourdieu. When penal elitists speak of depoliticization, they are making reference to *politics understood narrowly* as the competitions taking place between formal political agents, such as lawmakers and political parties, rather than *the political*—a distinction that has long been understood in French political theory as the difference between *le politique* (the formal political process) and *la politique* (the broadly political) (see, e.g., Marchart 2011).

### *(iv) Populism as a term of abuse*

The three features of penal elitism, discussed above, are related closely to a fourth issue—the underspecified nature of the very notion of populism. The term is used increasingly to derogate political ideas, movements, parties, and politicians to which (or to whom) one is simply opposed, often on the basis of aesthetic or stylistic grounds, such as a distaste for manners of address, modes of discursive construction, and forms of reasoning found within those the political movements or ideologies subjected to critique. A demagogue—literally, a leader of the people (in the sense of leading them *away*, that is, causing the people to stray

from their true path—a conception that only raises the question of who decides what is the rightful way for a people to choose)—is whomever one happens not to like in the political field. Put simply, to Democrats in the US, Trump is a demagogue, while to some of the Republican faithful, he represents the promise of salvation from the vicissitudes of unkind market forces. What one risks with a notion like populism is that it gives the former opinion the veneer of scientific legitimacy—a halo of respectability and scientificity surrounding a view that is simply a subjective take on reality. This is not terribly helpful, either analytically or strategically. It prevents us from comprehending the real causes of the rise or resurgence of political movements that are labeled—and dismissed as—“demagogical” and “populist.” Perhaps equally worryingly, populism also blocks off modes of political engagement that may produce real political successes: for what if those movements labeled “populistic” have strategic and communicative lessons to offer that may prove valuable to progressive or centrist movements (e.g., addressing poverty and unemployment)? To fall into the trap of labeling movements one does not like as “populist” is to be resigned to a state of puzzlement at certain political events.

A demagogue, as noted above and as defined by the *Oxford English Dictionary*, is a figure who appeals to “popular desires and prejudices rather than by using rational argument.” But this only raises the question of how we are to define and differentiate (so-called) “rational” arguments from “non-rational” or illicit claims. In the philosophy of science, which has long struggled to generate a set of unassailable procedures for distinguishing “real” science from “pseudoscience,” this issue has, at times, been described as the “criterion problem,” derived from the skeptical philosophy of thinkers such as Sextus Empiricus (Westphal 2009): the criteria used to differentiate the scientific from the non-scientific presuppose a ground on which to stand and from which one can engage in the differentiating. But this ground must, in some sense, simply be willed into existence—or posited—and is therefore itself necessarily “groundless.” In truth, we find ourselves in a state of infinite regress: if we establish a set of criteria with which to distinguish the rational from the irrational—or the scientific from the non-scientific—we raise the issue of *with what right*, that is, *on what grounds*, we do so: what are the criteria for selecting one and not some other set of criteria to demarcate what is considered scientific, rational, and so on (see, e.g., Feyerabend 1993)?

Outside of the philosophy of science and back in the realm of the political, we might also note that political movements enjoy success to the degree that they address subjectively felt needs, mobilize enthusiasm and, in some sense, manufacture the very ground on which they ultimately stand. Political movements create the conditions of their own success—a trait that they share with the sciences, which must also constantly invent and forge ways of making their results *sensible* (see, e.g., Latour and Woolgar 1986). Condemning political movements as “populist” misses the wider point—namely that political movements retroactively reconstruct the conditions of their own success (Johnson 2011; Žižek 2002): dismissing them as irrational or excessively exuberant loses sight of the fact that a constellation of fortuitous social circumstances, combined with a particular political will, permit such movement to arise and enjoy success.

### **Beyond populism and elitism**

One problem with the use of penal populism as a master category is that scholars of crime and punishment have, by and large, failed to engage reflexively in the *critique of the critique of populism*. This would consist of an attempt to ask whether the academic (over)usage of the concept of populism carries with it problematic or reductive elements, speaking more to the unreflective biases of agents contained within the relatively privileged field of academic production than serving to explicate the purported objects of explanation. The growing



popularity of “populism” as an explanatory concept in the media and scholarly circles might be said to betray the proclivities of social elites to castigate political tendencies that they oppose but that they lack the capacity or will to dissect thoroughly. “Populism” has become a catch-all term, allowing the expression of political dissatisfaction within a seemingly innocuous, analytic-sounding conceptual framework. Branding those things that one simply does not like as yet another instantiation of populism smacks more of prejudice and arrogance than explanatory sophistication.

This critique of the critique of penal populism could be parsed through Bourdieu’s sociology of symbolic power. Part of the trouble with the notion of penal populism is that it does not contemplate sufficiently the various “principles of vision and division”—ways of seeing and acting—that dissipate through semi-autonomous *domains of social action* (or fields) or the dynamics that obtain in the movement of such categories between and within fields. For instance, it is too simplistic to claim that the media is responsible for heightened punitivity because “the media” is not a static, ahistorical entity, but is, itself, subject to shifting trends and tendencies—in financing, ideational currents, modes of journalistic training, ownership structures, “public moods” (Ringmar 2018), and societal sentiment. The media obeys certain structural logics, but it is also highly contingent and capricious—a point driven home by Derrida’s distinction between two conceptions of “the future,” which in French can be denoted with two terms: *futur* and *l’avenir* (see Hill 2007: 10). While *futur* denotes a mechanistic, regular future that can, at least, be predicted (albeit approximately), Derrida notes that *l’avenir* (literally, *à venir*, or “to come”) is a coming-to-be—that is, chaotic, erratic, full of surprises, whose “arrival is totally unexpected” (see White 2007: 407)—such as the election of a political leader, the advent of a financial crisis, or the surprising outcome of a referendum. These are examples of the contingencies of a future coming-to-be that is inherently unpredictable, in the sense of being non-predictable. The same can be said to apply to social fields, including such entities as the media: none can decide in advance that the media and its growing influence must—a priori and necessarily—entail a plea for criminalization and punitivity (e.g. Pratt 2007: 66-93). On the contrary, the media can be a powerful instrument in communicating and bolstering pro-rehabilitation and anti-austerity sentiment. Social fields are only weakly mechanistic; they contain the seeds of a world-coming-into-being which can take on a myriad different forms.

To take but one example: In Norway, the left-wing (but relatively widely read) daily newspaper, *Klassekampen*, has regularly criticized heightened sentencing levels and austere carceral policies vis-à-vis foreign offenders. In 2010, the right-leaning Norwegian Progress Party (*Fremskrittspartiet*) proposed cutting daily allowances to Romanian inmates serving time in Norway on the basis of an argument drawing on the logic of “less eligibility”—that Romanian inmates were attracted to the Norwegian prison system because they could—so it was claimed—generate more income by receiving (relatively generous) prison wages than by working in the domestic economy in Romania. By mobilizing whatever scholarly resources were at my own disposal, nourished by ethnographic fieldwork and extensive interviewing inside the Norwegian prison system, I contacted one of the newspaper’s journalists and pointed out that the Norwegian Progress Party’s claims were factually inaccurate: average wages in Romania far *exceed* what inmates earn in Norwegians prison; the result was a piece of investigative reportage that forced one of the party’s members in the Norwegian Parliamentary Standing Committee on Justice (similar to the United Kingdom’s Parliament’s Justice Committee in scope and intent) to retract his claims and admit that they were both exaggerated and inaccurate (Brox 2010). Whether this is enough to undermine the rhetoric of law and order is another question, of course—and there is much to suggest that political movements, typically labeled as “populist,” are not affected by procedures of epistemic

validation or “fact-checking” (e.g., Bershidsky 2017).<sup>4</sup> The episode illustrates, however, the spuriousness of a wholesale disavowal of the media tout court.

The media can be a powerful ally in the dissemination of analytic insights and scholarly knowledge; at the very least, scholars and policymakers must not shy away from engagements with such channels on the basis of theoretical preconceptions. Instead, they should make it a central component in a strategically informed labor of public criminology (Loader and Sparks 2011), including what Barak (1998, 2007) has referred to as “newsmaking criminology” (which attempts to dispel popular myths and influence media representations of criminal justice issues)—a project that should, one hastens to add, be under no illusions about its probable impact, given the likely limitations that remain inherent in many journalistic spaces (see, e.g., Bourdieu 2001). But the recent trend towards drug decriminalization—from Portugal and Switzerland to Canada and the US (California and Oregon) to Costa Rica—and demonstrated in a joint statement by the United Nations and World Health Organization (WHO 2017) pleading the benefits of “reviewing and repealing punitive laws that have been proven to have negative health outcomes,” including drug use and possession, has been transmitted by many media agencies, largely without resistance. While Pratt (2007: 78) may claim that “crime and punishment issues are likely to be exaggerated and dramatized in news programmes to capture audience attention,” we should ask whether this tendency is not, instead, a spatially and historically circumscribed phenomenon that expressly does not obey an iron law of mediatized punitivity.

While there is now a very extensive literature on populism, we can see some of the problematic ways in which this notion has been conceptualized in recent years in one of the most acclaimed works in this tradition, *What is Populism?*, by Jan-Werner Müller (2016). Müller’s widely lauded book relies on liberal-democratic political theory in an attempt to think through such collective “traumas” as Brexit, the election and presidency of Donald J. Trump, and xenophobic movements in Eastern and Southern Europe (see also Shammas 2018). “Populists,” Müller asserts, are political movements that present themselves as opposed to both “corrupted” elites and pluralism as such. Populists oppose *pluralism* when they claim that they are the only rightful representatives of “the people,” and populists oppose “corrupted” elites insofar as they (the “populists”) present themselves as emanating organically from the depths or roots of the public—as opposed to effete elites far removed from the gritty realities of everyday life. Crucially, Müller thinks this is a problem of *style*—of ways of talking; his emphasis is, first and foremost, on how so-called “populists” are said to speak, even as he proceeds to recognize that to be opposed to populists on the grounds of discursive production alone would probably be excessively aestheticized or insufficiently attuned to their substantive political actions.

Populists are ultimately problematic, Müller (2016: 102) continues, because they move from a certain discursive style to three activities: (i) they occupy the state; (ii) they

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<sup>4</sup> In the first year of Donald J. Trump’s presidency, *The New York Times* tallied “Trump’s lies” from his inauguration in January 2017 to mid-November of that same year (Leonhardt and Thompson 2017), arriving at a conclusion that seemed almost unsurprising: Trump “said something untrue, in public, every day for the first 40 days of his presidency.” While this work is perhaps valuable in its own right, it is unclear to what degree it could serve as an effective foil to the kind of political dynamic Trump relies upon and has unleashed, in turn. It is not so much that we live in a “post-truth” society, as some commentators have claimed, for Trump seems to care deeply about whether he is *truly popular*, whether his hotels are *truly profitable*, or whether the Republican Party *truly controls* the Supreme Court. Rather, Trump’s presidency represents a slide toward a *post-civil social order*, where basic standards of civility seem not to matter—not so much because “the truth” has become uninteresting, but because certain moral behavioral standards have come to seem quaint and outmoded. It is not so much *truth* that has been lost but *decency*, which Žižek (2016) calls “the return of public vulgarity” (with the important caveat that this vulgarity is precisely not of the *vulgus*, or the “common people,” but is itself a top-down political project manufactured by a political elite).

engage in clientelism and corruption; and (iii) they suppress civil society. In short, however, the trouble with problematizing such actions is that *all* successful political movements engage in some or all of the above: these are really preconditions for *any* kind of long-lasting political success. One of the first orders of business attended to by President Barack Obama upon taking office in 2009 was to install thousands of favorably inclined individuals at the upper levels of the American federal government's sprawling bureaucracy—something that all American presidents (must) do. Mass clientelism is just another—albeit loaded and derogatory—term for political maneuvering, offering tit for tat, engaging in the age-old art of political horse trading—exchanging, say, support for a piece of legislation in a parliamentary body for rewards by the executive (such as promising renewed investments in the member of parliament's home district or constituency). Furthermore, the suppression of civil society lamented by Müller occurs in even the most liberal of governments, if only through the production of particular regulations (such as registries listing charitable organizations eligible for tax deductions) that distinguish between legitimate and illegitimate members of civil society. In other words, civil society is always *coproduced* by the state (Bourdieu 2014: 31-32, 36). In this sense, Müller's triadic conception of populism collapses because it enumerates only what most political movements accomplish most of the time once in power.

Meanwhile, Mudde (2004: 543) defines "populism" as an "ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite', and which argues that politics should be an expression of the *volonté générale* (general will) of the people." But in this casual dismissal of the Rousseuian will of the public, presented in starkly sinister, non-Anglophone terms, there is faint whiff of Dickensian horror at the specter of the leveling French Revolution, which Orwell (1968: 423) identifies in one of his essays when he notes that "to the average Englishman, the French Revolution means no more than a pyramid of severed heads." There resides a thinly veiled form of anti-democratic sentiment: For what is democracy if not some form of (mediated) expression of the desires of the public? Mudde's liberal opposition to populism betrays its very *illiberalism* in this compressed definition; if one is, on principle, opposed to the general will, then all one could plausibly put in its place is some sort of bureaucratized, elitist, and insulated system of rule by the select few: oligarchy, not democracy, then.

### **Conclusion: From populism to political economy and beyond**

As I have argued elsewhere (Shammas 2016), what the definitions of populism offered by scholars such as Müller and Mudde fail to appreciate is the *substantive*, rather than stylistic or discursive, aspect that unifies all so-called "populist" movements—their concrete political promise to counteract damaging and disruptive (neoliberal) market forces and rescue the toiling classes from unemployment, precarious life, and social insecurity. The problem with this promise, however, is that populist politicians largely fail to offer any durable remedying measures or sustainable structural alternatives to market capitalism. Instead, they remain firmly committed to market rule, content to distance themselves from market forces and their deleterious effects largely at the level of rhetoric. Essentially, populism is fake anti-neoliberalism. Its falsity rests in the failure to erect any meaningful or long-lasting alternative in neoliberal capitalism's place, perhaps with the exception of moderately protective trade measures, which are likely to be slowly whittled down by those corporate and financial interests that populist politicians depend on for support and which wield their own insidious forms of political influence with their own particular (pro-market) agendas.

Populism promises, usually from the right-hand side of the political spectrum, what the left has yearned for since the era of Reagan and Thatcher—an escape from the tyranny of the market and the dictatorship of capital. But since populism remains wedded firmly to the

doctrinal axioms of the hallowed nature of private property rights, the power to extract surplus-value from flexible labor pools, and the preeminence of market transactionality as the core mechanism of social distribution, the anti-neoliberal or counter-capitalist promises of populism are typically vacuous. Populism promises to deliver (a) capitalism with a human face, not by surgically transforming the wicked countenance of market rule, but by throwing a virtuous mask onto it. The same sort of market society still lurks beneath its disguise, however.

Certainly, the concept of *penal populism* can be deployed in a more purely descriptive fashion without necessarily advocating an elitist form of politics. Barker (2009) uses the notion and its related invariant, “neopopulism,” to study the ways in which California’s highly punitive history has been said to have emerged partly as a result of a certain direct style of politics. Taking as an example the failed 2004 grassroots initiative, Proposition 66, which would have curtailed the state’s “Three Strikes” law, Barker argues that this counter-punitive measure failed because politicians led a campaign of “fear and loathing” against the measure. These politicians “tapped into the public’s fear of random violence, its sense of victimization and insecurity about crime, moral outrage about child molesters and sex offenders, and emphasized the unworthiness of criminal offenders, deemed ‘hardcore criminals who’ve worked hard to be in prison’” (Barker 2009: 82). But the failure of Proposition 66 could also be read as a victory for penal elitists: on Barker’s account, it was precisely the “grassroots” movement advocating in favor of this ballot initiative that failed in the face of concerted efforts by political elites, including “a political action committee made up of crime victims groups, law enforcement organizations, and high-profile state officials such as the governor and attorney general” (Barker 2009: 82). This points to an interesting duplicity at the core of so-called “populist” political movements—that even as they would bask in the redemptive light of the people, their efforts are necessarily mediated through a complex machinery of top-down organizations, hierarchical leaders, and “experts” whose aim is not so much to allow some unmediated form of popular will to come to expression as to manage and massage the populace in their own favored direction.

Moving beyond either penal elitism or penal populism might entail reforms in the domain of political economy, including establishing a form of political economy, such as that found in the Nordic countries, where generous social provisions, low unemployment, low levels of inequality, comprehensive institutions of the welfare state, and generally high levels of social protection have resulted in relatively tolerant forms of penalty (Shammas 2017b). The case of the Nordic countries suggests that political economy is crime control by another name: a politics of the welfare state is simultaneously a politics of punishment. Social democracy has had a tendency to generate a reduction of prison populations and produce high levels of rehabilitation (see, e.g., Smith and Ugelvik 2017). Perhaps another way beyond *penal populism* or *penal elitism*, then, lies in the transformation of political economy. What social-democratic political economy promises is not so much a transformation of the criminal justice process as an escape from it altogether: with ameliorated social conditions, the need, finally, for policing and punishment tend to wither away. Cropping the clientele of the carceral state by mobilizing the assistive wing of the state means that the tension between *penal elitism* and *penal populism* recedes into the background.

Perhaps yet another way out of the impasse—the deadlock of choosing between populism or elitism—is offered by Hans-Georg Gadamer’s (2001: 83-84) deliberative concept of *societal reason*. Gadamer (2010: 83) notes that reliance on expertise in advanced societies is unavoidable: “Experts have become indispensable in the most varied realms, in order to assure the requisite management and control of complex theoretical and technical processes.” But, on the other hand, it is a mistake to think that the functional necessity of expertise relieves us of our duty to develop a participatory politics of social life. Deferring to

technocracy is impermissible insofar as it deceives us into thinking that such a move can “take away from us our praxis in society” and “relieve us from decisions on matters we all have to deal with as political citizens working with each other, matters that we all have to face and deal with” (Gadamer 2010: 83). Societal reason (*gesellschaftliche Vernunft*) involves coordinating the deployment of political power to particular ends in a common, deliberative fashion.

If Gadamer is to be faulted for anything, it is that his vision is excessively Habermasian—too communicative, too rationalistic. Gadamer speaks of “prudent choices” in pursuit of “common goals,” which are taken following “practical reflection,” with each of the modifiers in these phrases concealing potential processes involving the exercise of symbolic power and social domination—a point echoing Bourdieu’s (1991) implicit critique of Habermas’s concept of communicative rationality. What Gadamer gets right, however, is the idea that the democratic route involves making hard decisions by coordinating with and deferring to popular sovereignty, even if he, along the way, neglects both the Bourdieusian concern with how those processes are shot through with symbolic violence and Carl Schmitt’s notion that politics is a war of irreconcilable differences, wherein seizing political power necessarily involves one group obtaining the capacity to control institutions, resources, and social energy—and thereby subject other groups, or “enemies,” to their particular will. Developing a politics of punishment that is neither elitist nor populist might mean upholding the value of “societal reason,” informing the public, and laying the choice of future roads to be taken at their door. We might abandon the trope of penal populism, at least in its current form, because it is conceptually underdeveloped, serves as an instrument of disapprobation rather than analysis, and smuggles an elitist conception of politics into what should be a democratic arena of conflict and contestation. Scholars would better be served engaging with the public (Green 2006; Johnstone 2000), rather than trying to exclude the public from a process that remains ineluctably political in its underpinning principles and future ramifications. There can be no punishment without a *politics* of punishment.

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