

The Criminal Justice System in Late Modernity

**Gary Potter, PhD
Professor, School of Justice Studies
Eastern Kentucky University**

(Draft Version)

A number of noted scholars in the fields of criminology and criminal justice including Zygmunt Bauman, David Garland, Pat O'Malley, John Lea, Jonathan Simon, and Jock Young have tried in recent years to develop coherent theories which might explain recent trends in crime, incarceration rates, citizens' fear of crime and shifts in criminal justice system policies by suggesting that these sometimes dramatic changes are part of macro-social changes occurring in late modern society. The suggestion is that seemingly incoherent and often draconian changes in criminal justice policy are simply reactions and adaptation to social conditions emanating in late modernity.

Pre-modernity was a period that was characterized by clan-based agricultural or hunter-gatherer societies. These societies were often dominated by strong religious belief systems or systems of understanding mixing nature and religion, such as early Pagan societies. They usually had strong, centralized, autocratic governments, frequently monarchies and made use of the most rudimentary technologies (Lea, 2002).

Modernity was a period of human history embracing the ideas of the enlightenment, which effectively ended the Dark Ages in human evolution. Social relations were based on rationality and reason (Young, 1981). Social progress was tied to the scientific method and empiricism in explaining the natural world. A complex division of labor and advanced technology tied to production ushered in the economic era of mercantilism and capitalism. Government was a social contract which provided security for its citizens, looked after the mechanics of social welfare so vital to the development of an educated and healthy workforce required by capitalist production, and provided "public order" so that business and production could proceed and profits could be made. Modernity extended human rights, expanded

democracy, advanced science, and provided at least enough social welfare to keep the wheels of production turning (Lea, 2002).

Late modernity is, of course, our current era of human existence. What it is, how it developed and what its impacts are make up the substance of late modern theorizing. It is clear that these questions are still awaiting adequate answers.

Actuarial Justice

The defining characteristic of social control in late modernity is actuarialism (Simon, 1987; Feeley and Simon, 1992; 1994). Actuarial justice drastically changes the nature of the criminal justice system. No longer is there a concern with criminal justice as a system of crime prevention, victim protection or the defense of the community against criminal acts. The causes of crime and deviance are seen as irrelevant to crime policy and of little interest in dealing with the problem of crime. Actuarial justice is primarily concerned with statistical probabilities. It seeks to calculate risk, minimize the harm from criminal acts, and limit the damage from crime, rather than eliminating it. It is the ultimate anti-utopia where the best we can do is to create defended safe zones and gated communities. The outside world is seen as hopelessly hostile. The only crime control policy is seen as one where we keep the barbarians outside the gates in fortress-like defensive zones where the well-off might live and commerce might be conducted.

This hostile world of criminal actors and evil doers is all around us. The risk of crime and its attendant harms to individuals and social institutions is pervasive and omnipresent. Crime has become a social fact, a normal part of everyday life. Criminals roam the streets and rule the ghettos. But they also occupy political offices, corporate suites and the agencies of the criminal justice system itself. Every stranger is a potential predator. Nannies, teachers, daycare workers, those charged with the duties of caring for the elderly, family members, youth group leaders, hitchhikers and vagrants all pose threats to our safety. Risk is everywhere and we have no idea of its causes. The best we can do is predict risk and safety by the magic of statistical probability, or as Jock Young calls it, “voodoo criminology” (Young, 1999).

The law itself becomes confusing because the rules change so often. In actuarial justice we have different rules for different people, as evidenced by

laws related to crack and cocaine hydrochloride, or the laws requiring the registration of sex offenders for behaviors engaged in by the majority of the population. The rules change. Gambling is illegal and then legal. Loansharking is a crime, but not when it is engaged in by a check cashing agency. Drugs are illegal but dangerous drugs are prescribed by doctors and required for unruly children in schools. Concepts of right and wrong play no role in actuarial justice. Individual responsibility for criminal acts is of little consequence. The question becomes what is the probability of victimization and the probability that laws will be violated, and more importantly by whom. It matters little if the offender is a victim of blocked opportunities, insane, or simply carrying out his or her required corporate duties. Concepts of free will and social determinism are irrelevant. Avoiding trouble and minimizing risk takes precedence over understanding or even condemning criminal behavior.

Actuarial justice is a symptom of what Zygmunt Bauman calls adiaphorization. Adiaphorization is “the stripping of human relationships of their moral significance, exempting them from moral evaluation, rendering them 'morally irrelevant'” (Bauman, 1995: 133; Simon, 1987; 1988). Adiaphorization not only addresses issues of risk and safety but also the diversity of late modern life. Actuarialism is a matter of calculating risk and avoiding trouble. Multiculturalism is the late modern response to difference. An increasingly diverse world threatens the personal sense of self and the security of knowing who and what we are. In late modern society we surrender to that threat by celebrating diversity and then arguing that diversity is not a matter of choice (if it were everyone would be like us) but a predetermined outcome of culture. People define themselves as Irish, African, Jewish, Arab, gay, straight, male, female, Christian, Moslem, Jewish, conservative, liberal etc We define ourselves by where we came from and the daily rituals we engage in rather than by who we really are.

Neo-Liberal and Neo-Conservative Politics

Neo-liberal political philosophy is constructed on a view of society that presupposes open markets and free trade as the rational means to attain economic prosperity by allowing for the expansion of capitalist markets and by reducing labor costs through the globalization of production. Inherent in this philosophy is the idea that the welfare state, which provided educated and healthy industrial workers is no longer needed and is both a drain on capital through taxation and a crutch which prevents neo-social Darwinism

from eliminating the unfit and elevating those with ambition and potential for work. Neo-liberalism also takes a very contradictory view of the state, regarding it as an interference with market because of over-regulation, but also demanding that it be strengthened to maintain domestic order and protect against external threats, such as terrorism. Neo-liberals seek to protect the consumption society by extending markets, protecting private enterprise, and rewarding the “worthy” in the work force. Personal security is more and more seen as an individual responsibility. Making the right choices about behavior will protect individuals from crime. Utilizing private security services will augment the police and the criminal justice system. In a very real sense neo-liberalism represents a return to classical criminology in its view of crime and criminal justice. Crime policy is seen as a mosaic of punishment which fits the crime, surveillance and corrects choices about individual behavior and responsibility (Lea, 2002; Young, 1999).

Neo-conservative political philosophy embraces a view of humans as animals in need of control. The argument is that human beings possess both an instinctual and a social aspect to their existence. The problem is, according to neo-conservatives that our animalistic, atavistic natures are continually threatening to break through and destroy the veneer of civilization which society has socialized us to display. Humans therefore must be restrained in some manner. The lower and most base urges of the human beast can only be controlled by an ideology of sacrifice, discipline and submission to authority (Young, 1981).

Jock Young postulates that neo-conservatism is actually a delayed reaction to the French Revolution (Young, 1981). Neo-conservatism stresses the organic nature of society and defends tradition against both individualism and rationalism. In order to hold society together it is necessary to subordinate self-interest to the overall good of society (in this case a capitalist society). Young points to the neo-conservative view of the family as an example of this commitment to traditionalism and social “good.” In neo-conservative theory the unity of the family and its patriarchal structure is a long-term social and moral good. No matter what changing circumstances or attitudes impinge on family structure and life, neo-conservative theory insists that self-sacrifice and order, embodied in the family, should never be reduced to utilitarian calculations of individual pleasure and pain, effort and reward. Translating this into crime control it is fair to say that for neo-conservatives order always takes precedence over justice. To quote van den Haag: “order is indispensable to justice because

justice can only be achieved by means of social and legal order” (van den Haag, 1975: 35). Van den Haag goes on to say: “objections to inequality of condition are objections as to the system of distributive justice, unless they are objections to God” (1975: 46). Simply put, coercion is an inevitable part of the system, and its focus must of necessity be on those most tempted by crime, namely the poor.

For neo-conservatives the notion that it is those activities which threaten order that should be criminalized is paramount. This includes acts that offend neo-conservative morality as well as those which endanger person or property. Attacks on tradition and respect for authority are seen as a major threat to an orderly society.

Neo-conservatives see criminal behavior as an individually rational endeavor - if the potential criminal feels that the likelihood of being caught and punished is greater than the benefit that will derive from the criminal act then a criminal act will not take place. The social policy implications of this are clear. First, the police should focus their efforts not on law enforcement (catching people after a crime has been committed), but upon the maintenance of social order. The role of the police is "pro-active" involving functions such as (Lea, 2002):

- Maintaining a strong presence "on the ground".
- Keeping in close touch and working with "local people" to prevent crime.
- Keeping the streets clear of "potential criminals" (youths, drug abusers, beggars, prostitutes and so forth).

Neo-conservatives focus on the "conformity" aspect of control theory. They see informal social controls as being most effective in preventing crime from taking place. The role of the police is an active one of preventing the breakdown of community life by making it safe for the "law-abiding" citizen. If the police are successful in protecting the law-abiding members of a community then "informal social controls" can be more effective and efficient, ultimately reducing levels of crime (Young, 1981).

For neo-conservatives the causes of crime lie in the pursuit of individual gratification (usually incommensurate with effort), the undermining of traditional loyalties and the unwillingness of the individual to accept

discipline. The weakening of the social ties has been undermined by a lack of recognition of the necessity for coercion in the preservation of order.

Contradiction and Incoherence in Criminal Justice Policy

Theorists focusing on late modernity postulate that the rapid changes in society at large have produced confusion and doubt about personal biographies, rules of conduct and the identification of self. This same confusion, it is said, has spread to the criminal justice system. The formal governmental system of crime control has grown rapaciously, but so has the private security sector. Crime prevention is juxtaposed to punitiveness and extremes of punishment. The police become both militarized and community-oriented. Theorists explain this incoherence in several ways. The inability to control crime has called the efficacy and legitimacy of the criminal justice system into doubt according to Garland. Feeley and Simon, on the other hand suggest that actuarial justice itself is responsible for the contradictions in the system. None of these explanations are sufficient to explain the problem. The breakdown of rational crime control policies is far more complex and requires a return to more basic social concepts to be understood.

The Decline of State Sovereignty

Garland points out that crime control efforts have become dispersed in late modernity with government agencies, community organizations, and private sector security services all playing a key role. The state cannot control, or for that matter even influence crime. The response is to redistribute authority and responsibility to non-state actors. It replaces substantive policies with symbolic and rhetorical references to law and order. He points to Foucault's concept of governance as a key consideration in this diffusion of state power. That concept is indeed key to understanding everything that impacts crime control and criminal justice in late modernity.

The Socially Exclusive Society

The exclusive society is defined by the rejection of the underclass. The unemployed are stigmatized and the underclass is stereotyped as criminogenic. Deviance is defined by racialization, as with the demonization of drug users. In an exclusive society the unworthy and dangerous are not just excluded from economic opportunities or political and civil rights, they

are denied the basic status of citizens in civil society (Lea, 2002; Young, 1999).

A socially exclusive society is multi-dimensional. It involves political, economic and spatial exclusion. But it also involves exclusion from decent housing, effective policing, medical services, and resources through which one can attain information. Exclusion entails all aspects of civil society (Lea, 2002; Young, 1999).

Exclusion is not based on deviance, or marginality, or the identification of a few dysfunctional individuals. Social exclusion is collective. It is directed at an underclass, or a dangerous class rather than specific acts or life conditions (Lea, 2002; Young, 1999).

Exclusion is not rooted in localized conditions, it is globalized. The decline of manufacturing industries, the creation of an underpaid and insecure service industry, and the normalization of structural unemployment are all problems of a global economy. The causes are global, but the outcomes are local (Lea, 2002; Young, 1999).

Economic changes in patterns of production and mass consumption increase public disorder, and at least the perception of crime, if not actual instances of victimization itself. Formal laws and informal rules of conduct are continually questioned and violated with ever greater regularity. Society becomes more and more segmented and divided. People become more suspicious and fearful of other people because of what Young refers to as “ontological insecurity” (living in a society marked by pluralism where individual attributes are less important and certain than in the past) (Young, 1999). There is great economic uncertainty and material insecurity. A combination of the questioning of the rules and the rise of actuarial justice leads to increasing incivility, a sense of disorder, and intransigent pockets of crime. The capitalist market is by definition “exclusive,” handing out the greatest the rewards to small number of people and excluding the majority from those rewards. As the mass consumption market grows and intensifies that exclusion becomes ever more pervasive.

The market itself is driven by the diversity of late modern society. In fact, the capitalist market consumers, digests and reproduces that diversity as products offered for sale, magazines, television shows, movies, and music. In late modernity diversity and difference is absorbed, marketed and

sanitized. But in late modernity there is no tolerance for people with difficult problems who cannot be absorbed and marketed. Just like the early days of capitalist development in the 19th century, late modern society of the 21st century simply cannot abide the dangerous classes (Lea, 2002; Young, 1999).

In the exclusive society our personal insecurity is mirrored by a fear of an “inferior” and dangerous social “other.” Our inability to address structural problems in late modernity and late capitalism leads to scapegoating, projecting all of our problems onto to others. Those others are demonized and criminalized. The constant nagging of material and economic insecurity lead us to seek out some “other” person or some “other” group to blame (Bauman, 1995). Exclusion becomes economic, cultural, racial, anthropological, religious and political. Assimilation ends with those “others” who must be excluded, punished, and contained if we are to have any feeling of security at all.

Theoretical Dysfunction

Each of these five main areas of theorizing about late modernity reflects a basic truth about contemporary society. The problem is that they are micro-truths, only tenuously connected and never satisfactorily understood. The big questions are never answered and only occasionally speculated upon. How did this happen? Where did actuarial justice come from? How did a risk society evolve? Why did a society based upon exclusion spring from a society struggling with the ideals of inclusion? Where did the powerful state of the cold war era go and why has it become so ineffective and confused? When and how did incoherence become the descriptor of crime control policy? These things do not just happen. They do not fall from the sky. People don't simply wake up with pervasive social insecurity. Something has changed and changed drastically. The very concept “late modernity” implies a process at play, a progression from pre- to modern to late to post. That evolution, that progression in social life does not happen outside of the basic structures of society. Late modern theorists see the trees but not the forest.

As we exited the 20th Century and entered the 21st Century two things became painfully clear. First, the new era of playful experimentation which would tap the roots of our human diversity and usher in a new era of both prosperity and human enlightenment has not been realized. Instead, we have

seen widespread and particularly cruel and vicious wars, extreme and pervasive inequality, cultural exclusion, and a pervasive xenophobia that harkens back to the Dark Ages. Second, it is also clear that the new millennium is characterized by unprecedented levels of social and political conflict, instability, and economic deprivation and plunder, which actually threatens the continued existence of human life on this planet (Bauman, 1998).

Our concern here is with chaos and plunder, or as we have come to know it, crime. In the 20th Century we understood crime as a social force that disrupted social, political and economic life. Crime was a waste product of a capitalist system which produced worldwide misery and violence. But, today it is increasingly clear that crime is no longer a disruptive aspect of social life. Crime has become the fuel for the engines of 21st Century capitalism. Crime is no longer a waste product; it is an integral part of the machinery of the state and the economy (Bauman, 2000; Lea, 2002; Simon, 1997; Young, 1999). As Bill Chambliss (1988) noted three decades ago, crime is the perfect lubricant for capitalism's engine.

Traditional criminology has viewed crime as a product of the relationship between an offender and the state. But, crime can only be understood when we analyze the actions and reactions of communities, the criminal justice system, offenders and victims. These relationships have both a contemporary and historical focus to them. Crime control is not merely a process of interaction. It is conditioned by historical circumstances and by historical conditions. Crime control is a process of power, communication and interaction through which social conflicts come to be regarded as "crime" (Lea, 2002).

The social relations of crime control are reflections of the social division of labor in modern capitalist societies (Lea, 2002). The ways that people and communities are linked to the state are clearly power relationships. The state is clearly more powerful than offender, victims and communities. In addition, the social relations of crime control are characterized by marginalization and exclusion (Young, 1999). Offenders are feared, shunned, and segregated by other members of the public and the community at large. The community and its constituent populations legitimize the criminal justice system and idealize and support the victims of crime.

Crime does not exist and cannot exist, apart from the institutions which are charged with defining and controlling it. We have crime only because we have criminal justice system. We have crime because there is a set of historically constituted social relations which form the foundations of that system and makes it possible for the criminal justice system to act (Lea, 2002).

Foucault (1977; 1991) saw modernity as a period of history involving the transition in the form of state power from sovereignty to government. Sovereignty was a form of state power that derived from the will of the Sovereign (kings, czars, etc.) and subsequent obedience to that will by the populace. Government involves the regulation of a complex society. When a Sovereign rules the state simply concerns itself with the issue of obedience that particular point in time. But, when the state governs it concerns itself primarily with the issue of how society reproduces itself. A state that governs must concern itself with public health, social stability, workplace discipline, and conditions of employment. Crime is an issue not because it insults the will of a Sovereign but because it is disruptive to the orderly functions of social and economic processes. Crime is inherently inefficient. So the process of governing extends well beyond the state itself to involve the family, corporations, schools religions, charities, etc. in maintaining a system of crime control (Lea, 2002). Crime control is a form of governance. It is a set of processes which regulate social conflicts by handing those conflicts over to the state and the criminal justice system (Lea, 2002). These processes also create socially constructed definitions and languages which define crime. The key question for scholars studying the criminal justice system in late modernity is why are those processes breaking down and why is crime control failing?

Late modernity is characterized by social fragmentation and polarization. The social cohesion promised by the neo-liberals as “democratic” forms of capitalism expanded markets across the world is a myth. The “trickle-down” spreading of wealth promised by the neo-conservatives as new markets opened and industrial production spread to the third world never happened. Instead economic inequality grew more pronounced and poverty exploded, not just in the third world, but in the industrial democracies as well. Instead of global assimilation into “democratic” capitalism growing awareness of and concerns about “differences” dominate late modernity. Increasing inequality, relative deprivation and environmental degradation

were the major products of the expansion of capitalist markets (Lea, 2002; Young, 1999).

Karl Marx pointed out that in order to survive capitalism needs to constantly expand its sources of profitability. As we entered late modernity, that basic need of the economic system had become a frenzy to accumulate more and more capital. Good-paying industrial jobs were shipped from the industrial democracies to the third world, where labor was cheaper, work rules were lax, and states were easily compromised. The export of industrial production jobs meant that there was no longer a need to invest in education, health, housing, and the general welfare of workers, after all they were no longer producing and had been shunted off to the service sector of the economy. The welfare state was just another cost which could be cut to maximize profits. The impact of this change in labor relations is profound for local communities and for the legitimacy of the state. As long as capitalism promised life-time jobs, good retirements, health care, and the like, workers could be induced to share the basic values of the economic system. With the basic social contract broken those consensual values disappear (Lea, 2002).

In addition, the export of capital and jobs to the “not yet industrialized” world seriously weakened national economies. This is important for two reasons. First, a weak, recession-prone economy increases misery, economic desperation and a sense of relative deprivation. Second, the strong state of modernity was totally dependent on a strong economy to finance its military, police and the welfare system. The system of political compromises that kept the state strong and provided for security and public health and welfare collapses into strident ideological warfare as the state weakens (Lea, 2002).

As capitalism consumes itself in its lust for profits three things begin to happen with relation to crime, the criminal justice system and crime control policies. First, the system becomes criminogenic. Crime is normalized. Second, the state begins to give up its role its governance and retreats to sovereign rule. And, third, crime is integrated into local communities as an income-producing mechanism and as a source of social welfare, taking over the functions of governance (Lea, 2002).

In late modernity crime has become normalized. It is no longer seen as something which disrupts the political-economic system, but it is part of that system. The rich have become internationalized; they no longer need a

strong social infrastructure, a system of political compromise and accommodation or a stable working class. Transnational corporations make deals with the most brutal and corrupt of regimes, engage in constant searches for new tax havens, adopt illegal accounting practices and enter into a worldwide alliance with organized crime to move their cigarettes, weapons, and chemicals, while disposing of their toxic wastes. At the other end of the economic spectrum the state reduces expenditures on education, health care, social security, and aid to children. In a state characterized by social exclusion crime becomes a form of survival for the poor. Legitimate and illicit economies merge at the top and the bottom of society (Lea, 2002).

The strong state which had been concerned with governance through social planning and social regulation now finds itself depleted of resources. Welfare, health care and education are privatized for profit. The state retreats from governance and focuses on one central concern, security. Crime control is reduced to marginalizing and neutralizing troublesome populations. The state devolves into a debilitated, under-funded authoritarian regime which constantly seeks to augment its police powers to manage the dangerous classes. At the same time, real risk management is privatized to gated communities, private security and the extension of property rights defined in such a way as to exclude the undesirable “others” from even basic human services. Those undesirable others are same people they have always been, those at low end of the social class scale. Transnational corporations and the wealthy are beyond the control of the state having fled across international borders. The best the sovereign state can do is to engage in tactical warfare against inner city communities through zero tolerance policing, sweeps and crackdowns (Lea, 2002).

But the new sovereign state has the same problems as the old sovereign monarchies. Kings could never control all of their lands. Some communities were simply outside state power, as in the Robin Hood legend. In late modernity ever larger geographic areas around the world are outside of state control. In these regions criminal organizations and illicit economies are tolerated by the marginalized and poor. All the weakened state of late modernity can do is to engage in episodic and virtually useless incursions, but it can never exercise control. Normalized crime comes to dominate neighborhoods, cities, regions and even entire countries. At the other end of the economic spectrum, transnational finance and commerce, acting in concert with its allies in organized crime, are virtually immune from even

the most powerful states. In much of the world the state exercises sovereignty, but criminals engage in governance. The concept of a national state becomes virtually irrelevant (Lea, 2002).

In late modernity capitalism is returning to its past. The deep state of crisis in capitalist economies is roughly akin to the crisis of the early development of the capitalist economy. Socially excluded and marginalized populations now dominate the social structure, particularly in urban areas. Just as they were in the early years of capitalism these groups become the targets of the law and the police (Young, 1999). Urban areas are segregated into secure, protected “gated” locations and “wild zones,” areas beyond the capacity of the state to control or regulate. The reintegration of criminality into the economy and into normal everyday life looks much more like the 1850s rather than the 21st Century. A frenzied war on its own population becomes the last gasp of a dying system of state sovereignty. The desperate foraging for short term profit and capital become the last gasps of an economic system that can no expand, no longer produce, and must therefore consume itself as its only source of wealth (Lea, 2002, Young, 1999).

Jock Young suggests that late modernity is a period of “cannibalism and bulimia” (Young, 1999). Capitalism consumes itself in a desperate foraging for easy profits and new sources of capital while vomiting out the underclass, the mentally ill, the physically infirm and those “others” who simply do not fit. John Lea (2002) argues that capitalism in late modernity has entered an era of “destructive self-reproduction” where it eats itself to sustain its failing life. In late modernity crises and dislocations in capitalism have become permanent features of the system, rather than episodic crises like the Great Depression. These crises are “spread out, both in a temporal sense and with regard to their structural location. What we have now is a depressed continuum, exhibiting the characteristics of a cumulative, endemic, more or less permanent and chronic crisis, with the ultimate perspectives of an ever deepening structural crisis” (Meszaros, 1995: 597-598). Bauman says that he is unsure of how this will all turn out, but he suggests that “mixophobia” (fear of the mythical “other”) has the upper hand. Late modernity reads like a Hunter Thompson book full of “fear and loathing.” But as Jock Young and John Lea suggest, maybe, just maybe, Karl Marx has already written the climax. And maybe, just maybe, that might be the forest made up of all those trees.

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