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Review Symposium: Rethinking the Pendulum Model of Criminal Justice History

Consensus in the Penal Field? Revisiting *Breaking the Pendulum*

Joshua Page, Michelle Phelps and Philip Goodman

This Essay responds to thoughtful analyses from Ashley Rubin, Johann Koehler, Geoff Ward, and Fergus McNeill on our book Breaking the Pendulum: The Long Struggle Over Criminal Justice *(2017). In particular, we revisit our claim that consensus within the penal field is illusory. Drawing inspiration from our interlocutors, we argue that while recognized actors constantly struggle over the character and scope of criminal justice, they agree (at least implicitly) that certain positions are "unthinkable" and certain actors must remain outside the field. This "conflictual consensus" limits radical transformations of criminal justice. Our revised perspective encourages scholars to analyze how marginal positions and actors become part of the field, as well as the effects they produce while trying to reshape its boundaries. We conclude by sketching out how scholars have extended and revised the agonistic perspective we advance in* Breaking the Pendulum *and where we might turn next.*

INTRODUCTION

While writing *Breaking the Pendulum: The Long Struggle Over Criminal Justice*, we wrestled with two apparently competing perspectives. First, in American punishment and society scholarship there is an influential macro-level or national approach that highlights similarities across place and overarching trajectories in the history of criminal justice. A second perspective focuses on the well-established set of empirical facts—documented in numerous case studies—that there is important variation in what punishment looks like and how it operates from place to place and across time. These perspectives seemed to pull us (and, we suspect, many other scholars) in opposing, perhaps even irreconcilable, directions. We describe in the introduction of the book, for instance, the struggle we experienced in our classrooms as we tried to get the story of American punishment "right" in a way that honored local variation and

Joshua Page is Associate Professor of Sociology and Law at the University of Minnesota. He can be reached at page@umn.edu.

Michelle Phelps is an Assistant Professor of Sociology at the University of Minnesota and a Faculty Affiliate at the Robina Institute of Criminal Law and Criminal Justice, University of Minnesota Law School, and Minnesota Population Center. She can be reached at phelps@umn.edu.

Philip Goodman is Associate Professor of Sociology at the University of Toronto and has a cross-appointment at the Centre for Criminology & Sociolegal Studies. He can be reached at p.goodman@utoronto.ca.

complexity, while also recognizing that, in some ways, punishment has shifted in a recognizable arc over time.

Rather than follow one approach exclusively, we developed an agonistic perspective that attempts to bridge the gap between them, offering a mid-level theoretical account of the what, why, and where of penal change. Vis-à-vis the second perspective, for instance, we argue that local and state-level variation is produced by struggle among actors (each equipped with different arsenals of resources, from public legitimacy to policymaking power, money, and so on) who compete to determine the nature of punishment within the structural confines of a given time and place. Mindful of the first perspective, we posit that this struggle, in turn, can both accord with and push against the dominant (or national-level) penal orientation, leading to a kaleidoscopic array of institutions and practices. Consequently, penal change can appear both variegated and coherent—i.e., divergent across locations, but moving in one overall direction (and not others), such as toward rehabilitation rather than retribution. Equipped with an agonistic framework, we can recognize variegation and granularity, without having to jettison concepts and shorthands such as penal populism, mass incarceration, and the culture of control, all of which have been used, sometimes appropriately, to denote that punishment in states and countries has shifted in important and traceable ways over time.

Our main goal in *Breaking the Pendulum* was to produce a theoretical perspective that could help scholars and teachers better describe and explain punishment—and, perhaps more idealistically, help agonists bring more justice to our system of punishment. Judging from the thoughtful reviews and introductory essay in this symposium —each of which complements and challenges our perspective—we are gratified to see that *Breaking the Pendulum* has indeed generated conversation and debate. To that end, we use our brief space here to respond primarily to the issues of penal stability and consensus, revisiting our perspective on the tension between the field's two lodestars and on the usefulness of pendular thinking.

A CONFLICTUAL CONSENSUS

In *Breaking the Pendulum*, we propose three mid-level theoretical claims about penal development. While our first (penal development is the product of struggle) and third (large-scale trends matter in proscribed ways) claims have received relatively little resistance, our second has generated heated discussion herein (and elsewhere). That second claim states: "Contestation over how (and who) to punish is constant; consensus about penal orientations is illusory." It makes sense that people have pushed back against this axiom. After all, it directly challenges one of the field's guiding ideas— that there have been dramatic moments or decisive shifts in punishment. Without consensus, how might we explain the rise, peak, and partial decline of mass incarceration, for example? Surely rising incarceration rates across all fifty states in the late 1970s and early 1980s represented a veritable swing of the pendulum?

In an important new variation of this critique, Koehler argues that by focusing our analysis on more visible contestation (e.g., political struggles), we rendered invisible key areas of consensus. For example, there is general agreement among actors in the penal

field about certain positions, including, for instance, the necessity of imprisonment for at least some types of lawbreakers, the role of the state in managing punishment, and the ludicrousness of certain punishments (say, crucifixion). These critiques prompt the clarifying question: consensus (and conflict) among whom?

In *Breaking the Pendulum*, we focused primarily on what we referred to as "agonists," the individuals and groups that struggle over priorities, policies, and institutional practices. Our analysis treated all relevant actors—or all of those actors generating visible effects in the field, including eliciting ridicule or rejection—as part of a general sphere of action. While these actors (state bureaucrats, politicians, unions, policy wonks, media, activists, et al.) may strongly disagree about core penal issues, they typically agree on the rules and stakes of the game and share general assumptions about what is "in" versus "out" of bounds. Struggle in the penal field requires believing that work to reform criminal justice (or maintain the status quo) is worth the effort.

At the edges of our analysis, however, were actors and groups on the periphery (or even outside) of the penal field. In some cases, these individuals and organizations pushed for systemic change to upend the established rules of the game. In other cases, these actors created friction through daily acts of resistance (Rubin 2015). In our chapter on mid-century attempts at rehabilitation, for example, we described calls from radical actors inside of prison such as George Jackson and their allies on the outside to dismantle the penal system. These calls (in combination with violence against prison staff) generated responses from other actors in the field, including campaigns by prison staff and state officials to institute harsh security measures. Although these actors did not achieve their stated goals, they generated important effects within the field. As Koehler highlights, such actors are not agonists (as we label everyone in the penal field), but rather antagonists—enemies with radical ideas that are painted by insiders as dangerous to reform and the status quo alike.

Koehler is right to note that we could have highlighted these edges more clearly, articulating who/what was allowable within the penal field and working harder to make visible the struggle of subaltern actors and antagonists (see also Piché 2017 on the near invisibility of abolitionists in *Breaking the Pendulum*). In addition to broadening our depiction of conflict (spanning outward to show even greater contestation), focusing on the edges would have allowed us to see how agonists struggled to keep certain positions, ideas, and people outside of the field—literally "out of bounds." In this way, influential agonists maintained at least a weak consensus that particular positions were (or were not) within "common sense." We could have highlighted these efforts at social closure—e.g., keeping "radicals" off consequential task forces, ensuring prison "reform" never seriously entertained abolition, and so forth—and their import for the field.

Drawing on Mouffe (2013) and Koehler, we can thus revise our second axiom to acknowledge "conflictual consensus." On one level, there is a general consensus within the field that some positions are "unthinkable," and these general boundaries shape the particular orientations and practices agonists struggle for and against. On another level, however, actors outside of the field (or on its margins) contest this consensus, working to alter what is deemed "thinkable" (Mouffe 2013, 9). The consensus among agonists helps to explain perceptions of stability, since much of the conflict in any given time and place is over small-scale tweaks to the status quo (reforms to sentence length, treatment options, etc.), rather than radical challenges to the legitimacy of the entire endeavor.

However, distinguishing a firm line between agonists/antagonists or hegemonic/subaltern may prove challenging, as ideas (and people) shift from thinkable, to unthinkable, and thinkable again as actors struggle over time—e.g., the abolishment and reintroduction of chain gangs. Indeed, for cases straddling the margins between legitimate and illegitimate, a key form of symbolic struggle involves casting competing actors and their goals as illegitimate "troublemakers." Simonson (2017) argues that this labeling process reifies boundaries between "us" and "them" and cleanses politics of productive conflict (often deemed "disruptive" and "out of line").

The essays from McNeill and Ward in this issue provide additional entry points into thinking about the importance of social closure. Focusing on the history of probation in Scotland, McNeill offers a fascinating case study of how an overarching narrative comes to dominate a field, not only positioning some actors as what we might call antagonists, but also erasing the very presence of ongoing conflict. In particular, McNeill argues that accounts of Scottish probation's early history are besieged by a "myth of a developing consensus around Scottish penal welfarism" that frames early conflicts and turning points as decisive victories for "treatment" (led by women who were social work professionals) over "supervision" (led by men in law enforcement). In reality, however, McNeill finds that during the passage of a critical Probation Act in 1931 and into the 1950s, there were vigorous debates about the best form and purpose of probation. Further, practitioners often grounded their work in "intensely practical" duties, like how to best link adults to employment while constrained by high caseloads, in ways that cannot be neatly summed as either "treatment" or "supervision." Thus, while the meta-narrative of consensus and scientific progress makes little room for actors who advocated for alternative models, such contestation was critical to the contours of debate at key junctures and continues to influence the everyday practices of supervision today.

Focusing on the history of juvenile justice in the United States, Ward documents how the pendular model only applies to white youth. He shows stability in treatment of black youth, who have been consistently subjected to exclusion and harsh punishment. In addition to providing a new lens for thinking about stability versus contestation, his essay shows the value of thinking about who gets to "play" in the penal field. Ward's scholarship reveals that throughout the development of juvenile justice systems, black reformers were systematically excluded from the field by white elites who worked to maintain the boundaries and rules to advantage white interests. Simply by asking for equal justice for young people, black reformers were expelled as "radical" and operating beyond the limits of thinkability. Even today, efforts to argue that black children's lives "matter" as much as white children's lives are at times met with skepticism, open hostility, and even violence.

Ward's example shows how a focus on both consensus and struggle would have enriched *Breaking the Pendulum*'s theoretical contributions. As we argue in *Breaking the Pendulum*, punishment is thoroughly racialized—criminal justice practices both reflect and remake the daily experiences of race. Yet despite our focus on racial inequalities in the experience of punishment, we did not pay as much attention to the role of race (and, in particular, whiteness) in providing the foundation upon which penal struggles take place (see, for example, Schoenfeld 2018). Put differently, it seems clear that some black actors have been made into antagonists because mainstream, largely white,

agonists framed their ideas about equality and universal personhood as too "radical." A more sustained engagement with these themes would have showed how race relations are not "external" social forces that mechanistically open or close opportunities in the penal field, but rather are mutually constitutive of the field.

PENDULUMS AND PENAL ZOMBIES

Rubin argues forcefully to save the pendulum—or, at least, to retain the possibility that claims about pendular swings can have real and lasting effects in the penal field. Echoing the "Thomas Theorem," Rubin argues that if actors in the field believe there is a "pendulum swing," they may adopt (or claim to adopt) that policy position to be seen as legitimate in the eyes of other key players. Likewise, the view of a pendulum swing can motivate individuals and actors who support the general orientation of the swing to push even harder, creating a feedback loop. Returning to the example of rising incarceration rates in the late 1970s and early 1980s, actors saw "tough on crime" measures passing with wide success, heard the rhetoric that the pendulum was swinging away from rehabilitation, and were therefore emboldened to become even more punitive. Similarly, as Rubin writes, events like the public denigration of the Pennsylvania System of solitary confinement can have big impacts on the field, reshaping national norms or "common sense" that then produce constraints and opportunities for agonists.

Rubin emphasizes the importance of oscillation or recurrence—or how the same ideas, institutions, and practices reemerge over time. We see these returns, however, not as evidence for a mechanistic pendular process, but, rather, as the way in which the struggles of actors get baked into institutions. As Rubin (2019) argues, penal technologies and guiding ideas (what she calls "legal templates") continually reappear because they grant legitimacy in certain contexts. Seeking advantage with regard to the competition, actors draw on templates to strengthen their positions and advance their interests. So, for example, when conservative politicians and penal administrators in places as diverse as Ontario (Canada) and Arizona (United States) search for ways to establish their bona fides, forms of punishment like the "chain gang" may seem appealing, despite having been out of use for decades. This is because the cultural underpinnings of practices (e.g., that prisoners ought to be subject to degrading and hard work, the use of painful punishment as retribution, and the desire not to spend state resources on prisons) never went away, even if the practice of having men and women don striped uniforms and perform particular forms of manual labor did. In this sense, penal orientations and practices are like zombies—far outliving the actors that introduced them into the penal field and shaped their various iterations. As actors, in the context of struggle, resurrect technologies and templates from the past, they reinforce cyclical (or pendular) understandings of penal development.

MOVING FORWARD

One thing that ought not be a zombie is *Breaking the Pendulum*. Rather than stubbornly cling to its errors (and, perhaps, successes), we welcome sustained engagement that will keep the book relevant for understanding and altering penal development.

As we noted in *Breaking the Pendulum*'s conclusion, we think the agonistic perspective is useful for understanding other criminal justice phenomena and contexts outside of the United States. These extensions can help us understand how some of the key tensions look different when we change the topic or venue and prove instructive as we refine the agonistic perspective. With that goal in mind, we were thrilled to see McNeill use our perspective to explore the history of probation in Scotland, just as one of us (Goodman) has employed the perspective to better understand the closing of federal prison farms in Canada, arguing that actors (especially liberals and progressives) seized on the farm closings as a moment for creating struggle and building novel political coalitions (Goodman and Dawe 2015).

In sum, we are grateful for the symposium's productive essays. Revisiting the book gave us a chance to clarify our perspective regarding radical and subaltern actors and to highlight the important work they do in contesting consensus and creating space for more transformative visions of social control. The task ahead is to better understand struggles to classify certain positions as "unthinkable" and their proponents as antagonists; strategies that facilitate movement from outside to inside of the penal field; and the effects of including antagonists and their conflictual politics in the policy process.

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