

**Throwing Away the Key: An Examination of the Renaissance of Preventive
Detention in New Zealand**

By

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Abstract

The indeterminate sentence of preventive detention has experienced a renaissance in New Zealand since the 1980s. What was once a seldom used, emergency provision intended for application to the most dangerous offenders in our society, is now used with alarming frequency: while fifteen offenders served sentences of preventive detention in 1981, the number had risen to 263 by 2014. This thesis seeks to explore the forces driving the renaissance of preventive detention in New Zealand.

Throughout advanced liberal democracies, there has been a shift toward risk driven penal policy. Significant social, political, and economic changes in these societies from the 1980s onwards - such as the neoliberal reforms, and the associated uncaging of risk; social liberation and restructuring; and the cultivation of lifestyles; have contributed to, and exacerbated ontological insecurity and anxiety. The delegation of risk by the state to the individual has produced the variety of benefits and opportunities it was intended for, however it has also left people feeling insecure about their safety and wellbeing within the modern society, knowing that the shrunken state is unwilling, or unable to intervene and protect them. The expansion of preventive detention is an example of the state stepping in and performing a ‘spectacular rescue’ (Pratt and Anderson, 2016: 12). The revival and expansion of preventive detention has been part of the response of the New Zealand government to the intolerable risk of irreparable and irredeemable harm, posed by violent and sexual offenders in particular.

The significant increase in the use of preventive detention is representative of a wider trend of risk driven penal policy throughout the main English speaking societies. While the parallel strand of punitive penal policy has been explored in great depth, the trend toward risk driven penal policy has elicited less focus. Within the literature, there is a lack of identification of risk driven penal policy as a separate strand of development, subject to a separate line of inquiry. This thesis seeks to add to the literature on the influence of risk, exploring it as the driving force behind the revival of preventive detention.

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Chapter One – Origins of Preventive Detention

The 1981 Report of the Penal Policy Review Committee contained a range of recommendations for the New Zealand government. Among these recommendations: the abolition of preventive detention. The use of this measure was examined by the Committee: a panel of experts, drawn from the fields of law, justice, social work, policing, courts, and prisons. The Committee deemed the sentence to be unable to fulfil any role that a lengthy finite term could not; it was ‘arbitrary, selective and inequitable’ (Penal Policy Review Committee, 1981: 59). This indictment was meant to spell the end of this measure in New Zealand.

Preventive sentencing had been designed in the early twentieth century as an explicitly incapacitory measure to protect the public by preventing further crime. An early form of preventive detention was introduced in New Zealand in the 1906 Habitual Criminals and Offenders Act as a response to recidivist offenders, who could be continually detained in a reformatory prison upon the expiration of their finite sentence (Brookbanks, 2013). The Act introduced supplementary sanctions that would apply to ‘habitual criminals’ convicted for a series of crimes, the most serious of which were categorised Class I: sexual offences and abortion, with a higher threshold for recidivism for Class II offences, such as housebreaking, burglary, mischief, theft, and robbery (Habitual Criminals and Offenders Act 1906). Upon the expiration of an offender’s initial finite sentence, such habitual offenders could be held indefinitely in ‘reformatory prisons’ (these often took the form of general prisons in practice). The release of a habitual offender could only be permitted by one of the

judges of the Supreme Court, following a successful application by the offender proving themselves reformed (Habitual Criminals and Offenders Act 1906).

Following the 1906 introduction of habitual offender legislation, special sentences for habitual criminals were incorporated into the Crimes Act 1908, further establishing the legislative basis for the sentencing of these offenders. The Crimes (Amendment) Act 1910 (s23) went on to more clearly establish the unusual territory of habitual offenders within the penal system, declaring that though they were not ‘imprisoned’ under any statutory definition, their detention must be deemed ‘imprisonment’ for the purpose of utilising the detainees for hard labour. This distinction allowed the courts to avoid statutory restrictions on the maximum periods of imprisonment for a given offence, bypassing the protections built into earlier sentencing legislation intended to prevent excessive and disproportionate terms of imprisonment. The 1910 Act also removed the guise of ‘reformatory prisons’, legalising the detention of all habitual offenders in general prisons. The legislative momentum around the habitual commission of violent, sexual, and dishonesty crimes meant that within four years of its introduction, the specialised sentencing of habitual offenders had been firmly established in New Zealand law.

In these respects, indeterminate sentencing of habitual offenders had existed in New Zealand sentencing policy from the early twentieth century. However, preventive detention as a specific sentence was introduced decades later in the 1954 Criminal Justice Act. In its 1954 form the preventive detention sentence operated more as a flexible version of a finite sentence. The Parole Board were charged with control over the early release of those on preventive sentences, with the legislation requiring a

three year minimum, and a fourteen year maximum duration of detention for a single sentence of any offender (s26, Criminal Justice Act 1954). In addition to providing parameters for the duration of preventive sentences, the 1954 Act stipulated that preventive detention could only be applied to those offenders aged twenty five years and over. The preventive purpose of the 1954 legislation was evident in the requirement that the Parole Board were not to recommend any offender for early release unless they were of the opinion that he was 'not likely to commit crimes' (s33, Criminal Justice Act 1954). Preventive detention continued to develop over the following decades, and it was with the removal of the maximum sentence length in the Criminal Justice Amendment Act 1967 that the preventive sentence became recognisable in its modern, indefinite form. The 1967 amendment refined the scope of preventive detention to focus on sexual offenders, particularly those convicted of offences against children. The amendment increased the minimum term of the preventive sentence to seven years, and removed the fourteen year cap that had been fixed in the 1954 law. Echoing the 1954 requirement, the Parole Board were expected to recommend the release of a preventive detention prisoner only when they were satisfied that the offender would commit no further sexual offences. The 1967 amendment signalled a shift away from consideration for rehabilitation or reintegration of the offender, toward sole deliberation over the incapacitory and custodial value of the sentence, containing within it the potential to detain recidivist offenders for their entire lives (Brookbanks, 2013). At this juncture the focus of indefinite sentencing had shifted from habitual offending itself to those thought likely to repeat crimes which endangered other citizens.

Though there was significant legislative development throughout the twentieth century concerning the confinement of habitual criminals, and later dangerous offenders, these sentences were always intended to target a small section of the criminal population. In keeping with the social democratic ideals of the New Zealand government, the limited scope of the sanction was aimed at the most serious repeat offenders, and their application was limited in practice. Though preventive detention initially experienced some judicial favour following its introduction in New Zealand, with the sentence being imposed on 28 and 29 occasions in 1957 and 1958 respectively, its use steadily declined over time (Hurd, 2008). Between 1965 and 1967, the average number of sentences of preventive detention handed down had significantly dropped to less than three per year (Hurd, 2008). Following the 1967 amendments to the preventive detention policy, the sentence was used on only 23 occasions over the following 18 years, with at least five of these applications eventually being quashed on appeal (Meek, 1995). When preventive detention is examined in the context of its practical application throughout its existence, the recommendations of the Penal Policy Review Committee do not seem surprising. By 1981 preventive detention seemed to be approaching extinction, and its rare application ‘served no purpose a lengthy finite sentence could not’ (Penal Policy Review Committee, 1981).

The introduction of preventive sentencing in the early twentieth century in New Zealand had initially been thought necessary to incapacitate those habitual property offenders and career criminals who were apparently unaffected by the harsh deterrent messages of the penal system (Pratt, 2016). Preventive sentencing then began to prioritise the protection of the public at large ahead of the traditional classical

emphasis on the rights of the offender (Bottoms, 1977). The pattern of development found in New Zealand legislation can be observed in the origins of preventive detention among other advanced liberal democracies over the same period.

The Origins of Preventive Sentencing

The lack of use of preventive sentencing in New Zealand was characteristic of the way in which such a measure had been regarded with great suspicion across the English speaking common-law jurisdictions. In the United Kingdom in 1910, freshly appointed Home Secretary Winston Churchill launched an investigation into the sentence of preventive detention, introduced in the Prevention of Crime Act 1908, in order to examine the impact it was having. Prior to his investigation, Churchill had maintained that preventive detention should not become an easy option for the state to segregate nuisance offenders out of convenience. Churchill supported Lord Gladstone's assertion that preventive detention had been devised solely for 'the most hardened criminals' and that serious ethical issues would arise with its application to people 'who were a nuisance rather than a danger to society' (Gladstone quoted in Ruggles-Brise, 1921:51). Churchill maintained that the intention of the sentence was to deal with 'professionals' with 'active intention to plunder their fellow creatures', rather than 'mere habituals' (Churchill quoted in Ruggles-Brise, 1921: 52). He was concerned about the application of preventive detention to any person outside of this 'professional' group, but believed that the legislative definition provided sufficient clarity to safeguard against too liberal an interpretation of the new sentence.

At the conclusion of Churchill's 1910 investigation, he utilised his position as Home Secretary to express concern over the nature of preventive detention once more, stating that 'there is a very grave danger that the administration of the law should under softer names assume in fact a more severe character' (Churchill quoted in Hostettler, 2009: 249). His inquiry revealed 'scores of cases where grotesquely heavy sentences had been imposed on petty habitual criminals' (Morris, 1998: 140). Churchill indicated to the judiciary that preventive detention should not be viewed as the simple solution to the very difficult issue of habitual crime, but instead as 'an exceptional means of protecting society from the worst class of professional criminals' (Morris, 1998: 141). '[Professional criminals] deliberately, and with their eyes open, preferred a life of crime, and knew all of the tricks and turns and manoeuvres for that life' (Churchill quoted in Ruggles-Brise, 1921: 52). The result of Churchill's intervention and critique was a momentous shift away from the use of indefinite sentencing in the United Kingdom: the year Churchill took office, there were 177 sentences of preventive detention imposed; the following year the number had dropped to 53; and by the 1920s the annual average was 31 (Morris, 1998).

Thereafter, Commissioner of Prisons for the United Kingdom, Evelyn Ruggles-Brise, suggested that there were fundamental ethical issues with preventive detention that should limit its use. Ruggles-Brise referred to the sentence as a 'defensive power' due to its protective purpose, and insisted that it should be solely and cautiously used as a defence against grave habitual offenders (Ruggles-Brise, 1921, 58). Like many of his legal and political contemporaries (e.g. Dicey, 1905), Ruggles-Brise fundamentally objected to excessive state intervention into people's lives. Ruggles-Brise proposed that serious ethical complications would arise with any misapplication

of the sentence to ‘that large army of habitual vagrants, drunkards, or offenders... who figure so largely in the ordinary prison population’ (Ruggles-Brise, 1921: 58). Again, the message was that preventive detention should therefore only be used for the sentencing of the most serious recidivist offenders.

Indefinite sentencing continued to be regarded with suspicion in the United Kingdom throughout the twentieth century. Because of the ethical qualms of the public, experts, and legislators alike, preventive detention maintained its position on the periphery of the sentencing policy throughout most of the twentieth century. Indeed, despite the perceived danger posed to the public by the targeted offenders, there was little public support for preventive detention for any expanded use. The English Report of the Departmental Committee on Sexual Offences Against Young Persons (1925: 61) summarised that ‘the public mind is distrustful of any kind of indeterminate sentence’ and preventive detention had rarely been used during the early twentieth century. According to Pratt (2016: 9) as far as the public were concerned, the risks posed by ‘dangerous’ offenders were insufficient to warrant as drastic a sentence as indefinite incapacitation. There was considerable suspicion from the public about such extensive use of the state’s power to punish.

In Australia, preventive sentencing took much the same route as development in New Zealand, one of the first such initiatives being the New South Wales Habitual Criminals Act 1905. ‘What this Bill proposes is to establish some method and some safeguard whereby the risk [of repeat offending] shall no longer exist’ (Habitual Criminals Act, 1905). This allowed judges to impose an indeterminate sentence following a finite penal term. This Act was followed by the Victorian Indeterminate

Sentence Act 1908 and the Queensland Criminal Law Amendment Act 1914. During the post-war period in Australia, these measures began to more specifically target 'sex perverts'. For example, the Queensland Criminal Law Amendment Act 1945 (s18) provided that an indefinite sentence could be imposed on any person convicted 'of an offence of a sexual nature, committed [on] a child under the age of 16 years', following the recommendation of up to two medical practitioners that they are 'incapable of exercising proper control over their sexual instincts'. However, the principle of indeterminate sentencing had never been welcomed in Australia. The initial New South Wales legislation had been strongly opposed in parliament, one member objecting that 'it was a tremendous thing that a man might be all his days rotting in a gaol and yet be innocent' (Habitual Criminals Act, 1905). In this country as well, and notwithstanding post-war anxieties about sex offenders, the preventive sentence had fallen by the wayside by the 1960s.

The position of the public was much the same in the United States of America, although the preventive sentencing mechanism was slightly different. In the 1930s and 1940s, state level legislation against 'sexual psychopaths' began to spread throughout the states. The general pattern of this group of laws was to take extreme powers over the lives of offenders until they were "cured" of their condition – a milestone very difficult to test under any circumstance (Morris and Howard, 1964: 166). A 'sexual psychopath' was considered to be any person with a criminal propensity for the commission of sex offences, and the sexual psychopath laws authorised the commitment of these offenders to mental institutions (Sutherland, 1950). Upon being 'cured', they would then be sent to prison for a finite term for the crimes they had committed. Fear of the sexual psychopath had been proliferated by

J. Edgar Hoover (1947: 32), who was particularly concerned for vulnerable women and children, announcing in 1947 that sexual psychopaths were ‘taking [their] toll at the rate of a criminal assault every 43 minutes, day and night, in the United States.’ The sexual psychopath laws demonstrated a shift toward the sexualisation of dangerousness in the United States, and by 1960, 26 states had introduced these laws in some form (Pratt, 1998).

Implicit in the ideology of the sexual psychopath laws that developed in the United States between 1937 and 1960 were several important foundational assumptions. The laws assumed that a sexual psychopath could be identified with precision, potentially before he had even carried out a crime (Sutherland, 1950). It was assumed that sexual psychopaths had no control over their sexual impulses, and that any society that punishes an offender and then “releases them to prey upon women and children” was failing in its duty to provide a reasonable degree of protection to its citizens (Sutherland, 1950: 544). The high level of discretion and power given to psychiatric experts within the sexual psychopath laws was deeply problematic, and the laws demonstrated how public anxieties could be “scientifically articulated” to produce “monsters” who were beyond the control of the ordinary penal apparatus (Pratt, 1998: 45). However, despite Hoover’s 1947 insistence that sexual psychopathy was prolific in the United States, these laws were hardly ever used (see Tappan, 1956). Various states periodically declared them unconstitutional because they amounted to a ‘double punishment’ for the same crime, and many had otherwise fallen into disuse by the 1960s.

In Canada, the federal parliament unanimously voted in favour of the introduction of adopting sexual psychopathy legislation in 1948, based the United States laws that had originated in Michigan in 1937. Sex crimes against children emerged as one of the most urgent problems in Canada after the Second World War, and there was a general acceptance of the premise that repeat sexual offenders were not deterred by threat of incarceration, because their actions were driven by an uncontrollable impulse to commit their crimes (Chenier, 2003). Chenier (2003: 77) proposed that, as in the United States, Canadian sexual psychopath laws ‘married psychiatric expertise to political prerogative’, allowing the state to incarcerate offenders until an expert psychiatrist deemed them to be “cured”. The ushering in of the sexual psychopath laws in Canada was a reaction to the perceived threat of danger to the community, rather than the claims of potentially beneficial treatment for offenders, and the legislative process both exploited and magnified social anxieties around these issues (Chenier, 2003: 83). However, the lack of effective treatment programmes, and the nature of indefinite terms of detention caused great concern among the Canadian public. Here too, preventive sentencing laws had largely fallen into disuse by the 1960s.

The origins of preventive sentencing in these societies reflects the changing understandings and definitions of dangerousness. As a protective sentence, early forms of preventive sentencing were intended to provide safety from dangerous offenders who would apparently inevitably reoffend. Initially, the ‘dangerous’ group consisted of recidivist property offenders. Thereafter, with the advent of mass production and insurance, which made property at least replaceable, the ‘dangerous’ label transformed, and became more fitting for sexual offenders.

False Positives and Problems of Prediction

By the 1960s, there had been a shift toward the consideration of the more complex ethical issues with indefinite sentencing, which seemed to further affirm that preventive measures should have no place in modern sentencing systems. In the *Baxstrom v Herold* (383 US 107 [1966]) verdict, the Supreme Court of the United States determined that detention of an offender in a facility managed by the Department of Corrections following the completion of their sentence was unlawful without proper expert review. The verdict resulted in the transfer of 967 patients from Corrections-managed facilities to civil institutions. Concern over the fate of these 967 people prompted Henry Steadman's research into 'this group of patients who had been so feared' (Steadman, 1973: 190). Prior to their transfer the 'Baxstrom Patients' had been considered dangerous to society, and were therefore detained post-sentence on Corrections-managed facilities. Steadman's research endeavoured to determine the accuracy of this assessment of dangerousness.

Despite his reservations about the use of the word 'dangerous', which he believed to be a term 'weighed down by imprecision and connotation', Steadman (1973: 191) determined that the Baxstrom patients were much less dangerous than expected. Of the 967 Baxstrom patients, 50 per cent had no subsequent institutionalisations of any type (Steadman, 1973). He concluded that psychiatric predictions of dangerousness were overly conservative, and he made the critical assertion that there was a definite 'tendency to institutionalise many people who are not dangerous, rather than to inadvertently release the very few that are' (Steadman, 1973: 193). The discovery of

the tendency to detain the many to protect the few was exacerbated by the faith put in the reports of experts like psychiatrists, whose capacity to predict dangerousness was ‘firmly held and constantly relied upon, in spite of a lack of empirical support’ (Rubin, 1972: 397). The process of psychiatric prediction of dangerousness was therefore highly unethical due to its lack of accuracy, with a failure rate of at least 50 per cent according to Steadman’s (1973) research.

In what became a seminal paper, Tony Bottoms (1977) also identified the tendency of any agent of the state tasked with predicting risks to err on the side of caution. Bottoms expands on Steadman’s research, arguing that the prediction of risk becomes particularly problematic with the psychiatric assessment of the likelihood of future offending, because such serious crimes are infrequent events in the general population. The more infrequent the behaviour, the greater the number of false positives that will occur. Because only extreme behaviours warrant preventive sentencing, and because these extreme behaviours are inherently rare in the population, there will always be a high number of false positives within the expert psychiatric predictions of dangerousness (Bottoms, 1977). This was a scathing indictment of the ethics of psychiatric involvement in preventive sentencing, and one that has never been resolved: ‘there is no way for advocates of preventive confinement to avoid the false positive problem’ (Bottoms, 1977: 80). The psychiatric prediction of dangerousness maintained a false positive rate between 55 per cent and 70 per cent of all those being held on preventive detention (Bottoms, 1977: 80). Despite its inconsistency with the foundational principle of the justice system to minimise erroneous confinement, preventive detention revealed in the state a willingness to ‘lock up the many to save ourselves from a few’ (Bottoms, 1977: 81),

a position that then seemed incompatible with the cardinal principle of justice, with their emphasis on protecting the rights of individuals from the penal excesses of the state that preventive detention represented.

The consensus of liberal elites in the 1970's appeared to be opposed to a significant role for clinical prediction of risk, and its use went into decline. By the 1990s however, risk prediction had experienced a 'reversal in fortune' as the widespread introduction of actuarial risk prediction accompanied the political shift in law and order policy throughout the advanced liberal democracies (Simon, 2005: 397). While clinical risk prediction had served as an instrument to decide who to release from confinement, the actuarial process served as a structured, standardised instrument of risk assessment used to justify extended confinement or surveillance of dangerous subjects (Simon, 2005). This standardised process was modelled in part on the actuarial process famously used in the insurance sector, where pre-determined risk factors are accorded values which are then combined to produce the overall assessment of risk. This actuarial risk assessment process has become a largely uncontested cornerstone of the criminal justice process (Simon, 2005).

Despite the standardised and scientific nature of the actuarial process, research into its application reveals further problems with modern risk prediction. Hannah-Moffat et al (2009) found that despite official claims to the contrary, considerable latitude exists which allows practitioners to continue to exercise considerable discretion at each stage of the process, culminating in significant influence over recommendations and case management. This potential for manipulation of the process by practitioners has been established to adversely affect marginalised groups, while also ignoring

intangible influences on offending such as poverty and healthcare needs (Hannah-Moffat et al, 2009). While some progress has been made in the shift away from clinical prediction of dangerousness of “pathological” and “mentally disordered” offenders, the problem of false positives still exists within actuarial risk prediction (Simon, 2005). In addition, actuarial prediction has been established to violate the cardinal principles that justice should be known, and that the rule of law should apply.

The Resurgence of Preventive Detention

Despite enduring doubt over the ethics of risk prediction, forms of preventive sentencing have since re-emerged in stronger forms across the main English speaking societies, with their constitutionality generally re-established. This issue was examined, for example, in the Canadian Supreme Court in *R v Lyons* (1987). The appellant was sixteen year old Thomas Lyons, who had been designated a ‘dangerous offender’ by the court after pleading guilty and being convicted of breaking and entering a dwelling house, using a weapon or imitation thereof in committing a sexual assault, using a firearm while committing an indictable offence, and stealing property worth in excess of \$200 (*R v Lyons*, 1987). The ‘dangerous offender’ designation was upheld by the Supreme Court, as was the constitutionality of indeterminate sentencing. The judges stated that ‘fundamental justice has not been infringed by Parliament’s identifying those offenders who, in the interests of protecting the public, ought to be sentenced according to considerations not entirely based on a “just desserts” rationale. Such a sentence serves both a punitive and preventative role and its purpose, the protection of society, underlies the criminal law in general and sentencing in particular’ (*R v Lyons*, 1987). Though the application of an

indeterminate sentence would appear to violate the foundational justice principle of proportionality, the court clearly determined the punishment to be consistent with the constitution.

In the United States, the Sexually Violent Predator Laws were enacted in Washington in 1990, allowing for sexually violent offenders to be detained indefinitely through civil commitment upon completion of their finite prison terms. By 2011, another twenty states had enacted similar laws, and several cases had triggered federal responses restricting the rights and movements of specific, dangerous offenders in the United States. The federal Adam Walsh Child Protection and Safety Act 2006, named following the 1981 murder of six year old Adam Walsh, enabled the post-sentence detention of those who *might* commit a sex crime for the first time – expanding the civil commitment mandate. The volume of state and federal legislation restricting the rights and freedoms of offenders, particularly sexual offenders, has grown exponentially in the United States since 1990.

In the United Kingdom, the Criminal Justice Act 2003 introduced the Imprisonment for Public Protection [IPP] sentence. According to the Home Office (2002: 95) the IPP sentence was intended to ‘ensure that the public are adequately protected from those offenders whose offences do not currently attract a maximum life penalty but who are nevertheless assessed as dangerous’. They believed that such offenders ‘should remain in custody until their risks are considered manageable in the community’ (Home Office, 2002: 95). Though it was repealed in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the IPP sentence is demonstrative of the desire of the government to contain risk at great cost to the individual rights

and freedoms of offenders. The 2012 Act exchanged the indeterminate IPP terms for finite mandatory extensions of sentences. For many prisoners in the UK and other similar jurisdictions, the end of a custodial sentence no longer meant mean freedom.

Canadian legislation has also enabled a convicted person who is designated a 'dangerous offender' to be subjected to an indeterminate prison sentence since the passing of the Criminal Law Amendment Act 1977. In the Tackling Violent Crime Act 2008, the definition of 'dangerous offender' was adjusted to apply to repeat offenders convicted of their third or subsequent offence. These 'dangerous offenders' are subject to a reversal in the burden of proof in court, and must therefore provide evidence to the court to prove that they are *not* dangerous in order to avoid an indeterminate prison term (Tackling Violent Crime Act, 2008). Once the indeterminate sentence has been handed down to the 'dangerous offender', the review process commences after seven years, with subsequent reviews every two years. Upon release, the offender will be subject to indefinite supervision. The primary objective of this legislation is protection of the public, and the cost of the containment of risk is the offender's right to freedom.

In Australia, a series of new preventive detention measures have emerged for sexual or violent offenders who were considered to be a serious danger to the community, provided the offence is of sufficient severity (for example, Penalties and Sentences Act 1992 [Queensland] s163) were introduced in the 1990s. New Zealand has experienced a similar resurgence. Since the Criminal Justice Act 1985, there has been a flurry of legislation widening the mandate of preventive detention: expanding the number and types of qualifying offences, lowering the qualifying age, and eliminating

the threshold for repeat offences. The Sentencing Act 2002 established preventive detention in its existing form, and was a legislative response to a 1999 law and order referendum that received overwhelming public support. The referendum called for the imposition of ‘minimum sentences, and hard labour for all serious violent offenders’, providing some momentum for the transformation of preventive detention from an emergency measure to an increasingly normalised part of New Zealand penal policy.

In New Zealand, at the time of the inquiry of the 1981 Penal Policy Review Committee, there were fifteen offenders held on sentences of preventive detention, among a total prison population of 2700 (Ministry of Justice, 1998). In the decades since, there has been a resurgence of the use of preventive detention, and continual expansion of its jurisdiction. By 2014 there were 263 preventive detention prisoners in New Zealand – an increase of more than seventeen-fold since the 1981 report. This thesis will examine how the renaissance of the sentence of preventive detention happened in New Zealand since 1981, and the forces that have driven the transformation of these ‘emergency’ powers into a more central feature of the penal system.

Within the thesis, Chapter Two will explain the broader context and development of punitiveness among the main English speaking societies. There are a variety of theories surrounding the causes and consequences of the ‘new punitiveness’, of which the resurgence of preventive detention would seem to be a prominent part, and there is general consensus among academics of its strength and momentum as an influence on law and order policy among these societies. Utilising the works of the foremost

academics in the field of punishment, this chapter will establish punitiveness as a strand of policy development that has produced significant changes throughout advanced liberal democracies, driving the creation of populist and harsh sentences as part of a movement toward a state that is seen as ‘tough on crime’.

Chapter Three will establish that the ‘uncaging of risk’, however has driven the creation of a separate strand of penal policy development among these advanced liberal democracies. As a result of neoliberal restructuring and significant social and economic change, risk has been uncaged, generating a sense of insecurity and anxiety among the public about the state of society. As part of the fallout from the uncaging of risk, individuals have become frustrated with the lack of action by the state to control crime, and fearful of the lurking risk of unavoidable and irredeemable harm that exists in public space – particularly for the most vulnerable members of society.

Within Chapter Four, the focus of the argument narrows to the New Zealand context of risk driven penal policy. New Zealand serves as an excellent example of the impact of the neoliberal reforms, and of the effects of uncaging risk and delegating risk management responsibilities to individuals. Since the 1980s, individuals have been marooned, left on their own by a state no longer willing or able to provide the guidance and support it once had. The cultivation of lifestyle and other opportunities for personal enhancement provided within the restructuring were not sufficient to ease the concerns of New Zealanders about the crime control problem portrayed by the deregulated media, nor the monsters they thought to be lurking in public space.

Finally, Chapter Five will argue that the renaissance of preventive detention in New Zealand has been specifically caused by the uncaging of risk. The policy reaction of the state to increasing pressure from the public around issues of crime control has included retention and expansion of preventive detention. Despite the inconsistency of the sentence with the traditional social democratic values of the New Zealand government, under intense pressure to protect the most vulnerable members of society from otherwise unavoidable harm, successive governments have legislated to expand the mandate of preventive detention.

Chapter Two – Explaining the New Punitiveness

The main English speaking societies have experienced a striking rise in punitive penal policy since the 1980s. The shift in direction since then has represented a significant departure from what had previously been expert driven penal policy, framed around the general assumption that punishment for crime should be ameliorated and used sparingly. As a consequence, laws have been introduced that seem to abandon previous long-standing limits to punishment. These limits had been informed by the cardinal principles of modern justice: that justice should be swift; known; proportionate to the harm caused; and distributed in accordance with the rule of law. These limitations were expertly built into the justice systems of these societies, theoretically creating effective, fair judicial mechanisms with high levels of transparency. Foucault (1995) suggested that it was with the emergence and development of the modern prison system, that punishment through arbitrary and destructive force gave way to more productive, restrained and rational policy themes in modern societies. This ‘new punitiveness’ negates Foucault’s idea of ‘the gentle way in punishment’, and the new system suggests punitive interventions that fail to seek or expect improvement from the offender (Pratt and Clarke, 2005).

The impact of the increasing punitiveness is easily observable throughout advanced liberal democracies. New policies breach the principles of proportionality, and the increase in length and frequency of custodial sentencing has caused an exponential increase in prison populations. The United States of America incarcerates 716 people per 100,000 – the most of any country (Institute for Criminal Policy Research, 2015). Though the United States dwarfs the statistics of all other nations, the high

incarceration rates of the United Kingdom (147 per 100,000), New Zealand (194 per 100,000), and Australia (151 per 100,000) are demonstrative of a larger trend: all reflect dramatic increases from the 1980s (Institute for Criminal Policy Research, 2015).

However, the rise of punitiveness encompasses more than an exponential increase of the length of custodial sentences. Punitive penal policy has extended to the resurrection of shaming punishments (Pratt, 2000), denial of access to custodial ‘privileges’, and even restoration of the death penalty in the United States. New punitiveness extends to schemes that curtail the liberties of ex-prisoners, including offender registry, community notification, and public humiliation. These policy developments are indicative of a rise in punitiveness that reverses long-standing and foundational principles of modern democratic penal culture. What such developments show, first, is the range and depth of this level of penal ‘saturation’ (Pratt & Eriksson, 2013) that has taken place across these societies, and, second, the diversity of themes that are likely to be behind this: from, for example, the moralistic denunciation implicit in three strikes laws to the concern to prevent risk of future crime that are found in a range of indefinite sentences now available.

This chapter reviews of the most well-known accounts and explanations of the new punitiveness. As is shown, what is striking about these, irrespective of the difference in the explanations that are put forward, is that all of them fail to differentiate between the different strands of development that collectively make up ‘the new punitiveness’: for example, shaming and publicly humiliating punishments are seen as having a common origin with the range of sanctions, including indefinite prison sentences that

are intended to prevent future offending and thereby control risk. As will be argued, penal arrangements based around risk control have a specificity of their own and demand their own particular analysis of their origin and subsequent development.

Neoliberalism & Law and Order

Anglophone societies responded to the economic crisis of the 1970s and the collapse of faith in what the post-war welfare state could achieve, with a decisive ‘swing to the right’ (Hall, 1983). Though there had generally been a post-war consensus between left and right wing parties that the welfare state was necessary, the economic crisis of the 1970s broke the consensus, and brought an end to Keynesian economic policy. The Conservative Party in the United Kingdom began to see the welfare state as inefficient while in opposition in the 1960s (Gamble, 1983). It was both too controlling, as it was facilitating welfare dependency; while simultaneously proving not controlling enough, as the ineffectiveness of welfare politics was linked to the undermining of security, increasing inflation and rising crime levels. The 1979 election of Margaret Thatcher’s Conservative Party in the United Kingdom was the first in a trend in the Anglophone countries towards the radical right. Over the following decades, the neoliberal policy that this new political force espoused was enacted by leaders throughout the Anglophone jurisdictions, including Ronald Reagan in the United States, Stephen Harper in Canada, Bob Hawke in Australia, and David Lange in New Zealand.

During this period, successive governments elected throughout the Anglophone nations generally adopted policies aligned with economic liberalism. In their analyses

of Thatcherism and the economic overhaul of the late twentieth century, both Hall (1983) and Gamble (1983) determine that the consequences of the swing to the right were exclusively oppressive. Indeed, the need for much stronger state action on law and order had been a key theme in Thatcher's political success, and was periodically repeated by both left and right political parties across these societies. These authors of the 1980s wholly focus on the harsh outcomes of the reforms and the negative consequences of the liberalisation of economic policy. Within the ideology of the radical right is a focus on the need for social discipline to keep the population as a whole in order, thereby requiring a strict law and order policy (Hall, 1983). Economic restructuring disrupted traditional alignments, and Hall (1983) suggests that it was on the grounds of this disruption that 'the people' began to unite as a single populist political subject – this singular 'us'. Hall (1983) suggests that this unity was strengthened by a broad base of support within society, not only from those who would typically support the right wing, but also from those people who were 'scared into' the conservative camp through fear mongering around law and order issues.

Hall (1983) explains that there was a heavy focus on Victorian values and moral issues within the Thatcherite version of neoliberal ideology, and new right law and order policies included more policing, tougher sentencing, and better family discipline. The neoliberal governments used the rising crime rates as an index of social disintegration, to evidence the threat to ordinary people posed by the wave of lawlessness, and was justification for more punitive penal policies (Hall, 1983). For Hall, the rise of punitive policy thus began in the neoliberal policy environment of the 1980s and was based around an entirely negative view of the use of political power. This view was of the New Right, emboldened by economic liberalism,

redrawing the social arrangements of the post-war ‘solidarity project’ (Garland, 1996), with a view to allowing the powerful to become more so, and using the police and punishment to keep working people more firmly in their place.

The writings of Loic Wacquant follow a similar explanation, except that the focus of law and order is transferred to the United States, and ‘working people’ on the receiving end of these strategies in the work of Hall (1983) and Gamble (1983) and so on, have become African Americans. Wacquant (2005: 21) attributes the ‘grotesque overdevelopment of the penal sector’ to a political attack on the urban African American underclass in the United States. He argues that carceral hyperinflation in that country was not symptomatic of the frequency of criminal activity. Though the official explanation for rising rates of imprisonment characterise it as a response to the relentless growth of crime, Wacquant (2005: 21) argues that discourses seeking to link crime and punishment in the United States ‘have no value other than ideological’. Instead, the rise in the use of imprisonment in America can be attributed to the attitude of governments, and the responses of authorities toward delinquency and its principal source – urban poverty concentrated in big cities (Wacquant, 2005). Rather than addressing crime, the prison became the principal means of keeping the poor under control.

The free market economics promoted by the neoliberal policy agenda directly results in rising patterns of interpersonal crime (Wacquant, 2009). The ‘exclusionary agenda’ of this neoliberal state enables the sanctioning of coercive measures to regulate rising crime and its consequences (Wacquant, 2009). Like Garland as well, Wacquant (2009) accepts that the political shift toward punitiveness is an adaptation to the

failures of welfare state capitalism and the social mode of regulation with which it is associated.

The trend toward punitiveness has been an integral aspect of control among post welfare societies (Wacquant, 2009). Fear over the rising crime rate, in particular, public concern following the targeting of young black drug users, was exacerbated by sweeping cuts to the welfare state and the impact of the emphasis on the free market within neoliberal society (Wacquant, 2009). This rising rate of crime was a legitimating rationale for reselling punitive solutions to an increasingly insecure and security conscious society (Pratt and Clark, 2005). In the United States, the ‘fight against crime’ became the highest policy priority, resulting in rapid growth of the penal system (Wacquant, 2009). Wacquant (2009) argues that this process of the creation of punitive crime control policy targets the poor, particularly African Americans within the United States, who are over-represented at every level of the criminal justice system. Within this system, minorities, and the poorest, most vulnerable members of society are targeted, while elite members in society benefit from the system – even enabling it when necessary (Wacquant, 2009). Wacquant (2005) refers to this imbalance as the ‘criminalisation of poverty’.

Punitive penal policy was the result of social insecurity spawned by the fragmentation of wage labour and the shakeup of what Wacquant refers to as ‘the ethnoracial hierarchy’ – the hierarchal structure of the belief that certain ethnicities are superior within societies, and are therefore inherently entitled to superior rights and privileges. Law and order became a uniting force in a divided political environment, and the ‘main bulwark’ against the necessary expansion of the welfare state required to

alleviate the crushing poverty and racial inequality still plaguing the nation (Wacquant, 2005: 17). The law and order ticket quickly transformed from the 'rallying cry of politicians anxious to reassure white, middle-class voters', to the ubiquitous sound bite of every electable politician eager to keep their seat (Wacquant, 2005: 18). Alongside this increasing law and order focus ran an opposition to any expansion of welfare provisions or affirmative action, which were seen as undeserved favours to a black minority who were responsible for the destruction and riots of the 1960s (Wacquant, 2005). The prison, in essence, became a kind of surrogate welfare state. The political favours that criminal justice was receiving in the form of massively increased expenditure (Simon, 2007) was also exacerbated significantly by the growing primacy it began to receive from the media.

Crime became the favourite territory of news journalists in the late 1980s in the United States, soon to be followed by a wave of reality television shows in the 1990s. Between 1989 and 1993, the number of crime reports on the nightly news in the United States quadrupled, reaching an average of five reports per night (Wacquant, 2005: 18). The increasing intensity of the journalistic focus on crime encouraged the advent of crime reality television. The result of the intense media focus on crime was the exposure of depictions of crime that were far more frequent and violent than the reality. With the erosion of the authority of penal experts, the media has been able to shape the law and order mission, and as a result, any attempt to re-establish a rationale for incarceration that goes beyond retribution has been undercut (Wacquant, 2005: 19).

In addition to the political and media forces driving the penal hyperinflation, Wacquant (2009) argues that the prison has been expanded as a show of political force against African American men. The prison has ‘partly supplanted, and partly supplemented the ghetto’ in the modern United States (Wacquant, 2005: 19). Prisons have provided a new place for the young black sub-proletarian in the changing social dynamic that has emerged out of the upheavals of the 1960s and following the restructuring of the metropolitan economy (Wacquant, 2005). Since 1995, black men have consistently constituted more than 50 per cent of prison admissions in the United States, despite comprising approximately seven per cent of the total population (Wacquant, 2005: 19). Black men are more likely to receive a sentence of imprisonment than white men when all other variables are controlled, and is a consequence of preferential enforcement of those laws most likely to lead to arrest and prosecution (Wacquant, 2005).

The result of the destructive relationship between the political, media, and penal fields has been the proliferation of repressive laws that lengthen sentence duration, extend carceral applicability, enforce mandatory minimum sentencing, and create extreme punitive responses to recidivism such as Three Strikes laws (Wacquant, 2005). The ‘War on Drugs’ started by Richard Nixon and amplified by his successors represented a conscious decision to penalise poverty, and the anti-drug campaign has consistently focussed on the ‘declining dark ghetto’, not the private college campus or middle class suburbia (Wacquant, 2005: 20). Wacquant (2005) argues that the combined result of these factors has been the emergence of a structural, functional symbiosis between the modern prison and the ghetto. In addition, the neoliberal capitalist

revolution has contributed to the construction of an overgrown and intrusive penal state, deeply injurious to the ideals of democratic citizenship.

The New Punitiveness and the End of Civilisation

Pratt (2002) argues that the systems of punishment maintained in the developed world for much of the nineteenth and twentieth centuries conformed to typically ‘civilized’ Eliasian values, and covered over the more debasing and distasteful features of society. For German sociologist Norbert Elias (1939), the qualification of a state as ‘civilised’ implied much more than a normative quality that modern states possessed by right. Indeed, he argued that what we understand as ‘civilisation’ is the result of a series of long-term historical processes encompassing significant social, cultural and psychic change.

The formation of modern society and the processes that govern it has occurred due to a complex series of social developments and cultural and technological advancements. According to Elias, the strength of the state, the behaviour of the people, and the cultural and social mores that govern their lives are determined by a series of long-term ‘civilising processes’ that have a determinative influence on modern modes of conduct. Elias argues that the manners, culture and personality of the members of society also developed in a consistent direction: toward civilisation (Mennell, 1990: 207). Elias (1939) claimed that ‘civilisation’ has become a term used in western society to differentiate and describe its special character and what it is proud of. Elias analysed the effects of the civilising process on English speaking European nations, and found that civilisation was a fragile process of social,

psychological and cultural development that had a formative role in the construction of modern conventions within society. However, these can be reversed at any time by catastrophe or rapid social change. Under these circumstances, a 'decivilising' interruption is likely to occur, invoking behaviour, values and norms more usually associated with the past.

Elias's interpretation of the formation of modern society is important for the understanding of the way people are punished. The main English speaking societies are typically viewed as 'civilised' in the normative sense, and the passing of time in these states has typically seen progression toward increasingly measured and rational modes of punishment. However, developments in penal policy over the past three decades have cast a shadow of doubt over the nature of the civilising process. It is these 'de-civilising' effects that Pratt incorporates into his argument regarding his cultural explanation for new punitiveness. Pratt (2007) argues that the modern penal systems of English speaking societies had been formulated by the 'liberal establishment', a group of educated elites. Made up of judges, civil servants and academics, the major actors in penal policy formation had approached the task in a measured, evidence-based manner. Policy created by the establishment maintained the goals of rehabilitation and reintegration, and was not excessive by nature. These characteristics become an emblem of 'civilised punishment'. Policies created by these experts were also created within the limits of modern principles of justice, with the general public largely excluded from any role in shaping them. Instead, implementation of policy formulated by expert stakeholders engendered trust from the public in the ability of the state to handle penal strategy, and issues of law and order.

These arrangements, however, have been disrupted by the emergence of penal populism - an expression of public resentment against the liberal establishment, who are seen to have undue influence over public policy. The establishment, it is claimed, favours the unworthy and ignores the needs of the law-abiding majority, who feel alienated from their government (Pratt, 2007). The slighted 'majority' desire the removal from power of these liberals in favour of a government more responsive to the demands of 'ordinary people', in particular more punitive crime centred policies. The effect of this power shift would be that those who break the law would no longer prosper or benefit through their illegal activities, and the state's power to apply punitive sanctions would be fully restored.

Pratt (2007) details five causes of penal populism: the decline of deference; the decline of trust in politicians and political processes; ontological insecurity; deregulation of media; and the enhanced status of victimhood. He argues that Anglophone economic and political reforms of the 1980s weakened each state, and saw them delegate or surrender many of their powers. The supremacy of the free market, privatisation, the diminution of the welfare state, and the increasing responsibility of the modern individual had unintended negative effects. The high levels of insecurity and anxiety among the public regarding the state of society and their individual security became crystallised in the fear that crime is out of control (Pratt, 2007). Exacerbating this fear is the nature of modern society, now atomised and transient, as well as the deregulated media that provides the window into its changing social arrangements and patterns of life (Pratt, 2007). Most importantly, Pratt claims that a loss of faith in the state leads people to feel let down and alienated

by the authorities (Pratt, 2007). The lack of faith in the state also causes the erosion of the expectation of policy informed by credible expert opinion, and, in a bid to shore up their own, discredited authority, politicians are likely to make alliance with anti-establishment law and order lobbyists, claiming to speak on behalf of ‘the people’: in this way, restraining influences on punishment of experts have been jettisoned, in favour of much more common sensical and excessive penal policies.

Pratt thus argues that the impact of the neoliberal reforms of the 1980s – the fragmenting of state power and the delegation of responsibilities back to communities - can be seen as an aspect of a wider decivilising trend that involves a shrinking of the state’s authority and a more intolerant approach to crime. But rather than this bringing about a simple resurrection of behaviour and state policy from the past, Pratt suggests that decivilising processes can coexist with the products of civilisation. Pratt (2011) argues that decivilising processes will not cause the products of civilisation to simply disappear; however, evidence of the weakening of the civilising process will still be seen as the trajectory of cultural development is altered. Changes in penal policy such as the resurrection of shaming punishments and punishments involving public humiliation (relics from the past), could therefore be attributed to a punitive and decivilising process occurring within the wider social context of development and civilisation.

Garland’s Culture of Control

David Garland (2001) provides an analysis of the deep structural changes within society in the United Kingdom and the United States during the 1970s and 1980s,

examining the relationship of these changes to the rise of punitiveness. Garland (2001) argues that the 'coming of late modernity' brought on a distinctive pattern of social and cultural change that has facilitated the shift toward more punitive policy. This involved a cluster of risks, insecurities, and control problems that had a determinative influence on the state response to crime (Garland, 2001). Garland's work can be applied to societies that experienced the same late modern patterns of development as the United States and the United Kingdom – those that experienced the same risks, critiques of traditional criminal justice, insecurities, perceived problems of ineffective social control, and the same recurring anxieties about social change and social order.

Garland suggests that the 'penal welfarism' of the last century has been replaced by a new wave of policies as a consequence of late modern development and economic circumstances. Penal welfarism had been the dominant mode of crime control throughout the western world from the end of the nineteenth century. It combined the control and discipline that were traditionally necessary in the penal system, with a much greater level of care and assistance for the offenders (Garland, 1985). The urge to punish was moderated by the requirement to discover the disorder or cause of the criminal behaviour, and rectify it where possible (Garland, 1985). Penal welfarism incorporated features such as expert scientific treatment of criminal offenders by psychological and social work experts, and the use of expert data analysis to achieve the goal of paternalistic individual reform. The moral outrage and hatred of the criminal that had been pronounced during the nineteenth century gave way to the expert and professional management of penal policy during the twentieth, coming to fruition with the development of the post-war welfare state. This also reflected the

broader shift of modern twentieth century government toward the use of experts and science more generally.

From the early twentieth century, industrial capitalist society generally increased state intervention to improve quality of life for the people, utilising the Keynesian economic model, developing the welfare state, and employing expert opinion in the development of social and public policy (Garland, 1985). However, this modality of punishment that had then 'shaped the common sense' of policy makers, academics, and practitioners was fundamentally disrupted from the 1970s onwards (Garland, 2001: 3). While the penal welfare model posed the interests of the offender and the state as ultimately reconcilable, the policy initiatives of late modern development have undermined this potential for reconciliation (Garland, 2001).

Following the end of the Second World War, increased globalisation and favourable economic conditions combined with the welfare focussed Keynesian model to lift quality of life for western societies (Garland, 2001). But from the 1970s, with the shift in economic policy from Fordism to consumerism came drastic social and cultural changes such as the decline of marriage, the entrance of women into the workplace and the general increase of the mobility of individuals (Garland, 2001). In effect, the Keynesian model of economics and governance simply became outdated. According to Garland (2001), the significant cultural and lifestyle changes of this period were structurally related to the rise in crime that occurred during the same period throughout the western world. The boom that had facilitated and was carrying these changes ended suddenly with the economic slump of the 1970s.

In the United States and the United Kingdom, political problems flowed from the combination of high rates of crime and disorder, with the growing realisation that the mode of criminal justice they employed was limited in its capacity to control crime and deliver security (Garland, 2001). It was in response to these new problems that governments created or resurrected strategies to adapt to, or evade these issues. Like the drastic new economic policies, the new wave criminal justice policies enacted by these nations completely changed the trajectory of crime control policy.

The strategies that were successful in the late modern policy environment were those that resonated with the popular and political cultures that were emerging during this time. The ideological lines are unclear among the new wave policies, as new practices of policing, prosecution, sentencing, and penal sanctioning, pursued new objectives, embodied new social interests, and drew upon new bases of knowledge that defied or contrasted with the orthodoxies that had prevailed for most of the twentieth century (Garland, 2001). Garland lists twelve 'indices of change' that he defines as the important elements of the new penal field, including: the decline of the rehabilitative ideal; the rise of the victim; politicisation of penal policy; reinvention of the prison, that is, abandonment of its periphery position in its sentencing structure, and a move to a more central place; and the perpetual sense of crisis about the state of society (Garland, 2001). Policies within these 'indices of change' were not adopted because of their ability to solve complex crime problems, but rather because they allocated blame in popularly accepted ways, and empowered community groups (Garland, 2001). The success of punitive crime control policies became a populist, rather than a scientific measure. The effect of penal policy was no longer measured by its actual

progress, but instead by perceived satisfaction of societies now plagued by the insecurities of late modernity.

Along with the populist policies such as longer sentences and the end of the rehabilitation focus, the state reacted to its past failure to contain crime through the process of delegation of responsibility for traditionally state-managed tasks to communities and individuals (Pratt and Clark, 2005). New crime control policy would seek not to respond to the complex sociological causes of crime, but would instead engineer incremental change that would make the commission of crime more difficult. Crime prevention strategies were chosen that allowed the state to distance itself from direct responsibility for security, transferring the responsibility for safety to the embattled individual. In a similar vein to Pratt, Garland (2001: 3) argues that with these changes in crime control policy, the well-established long-term tendency toward rationalisation and civilisation had been ‘thrown into reverse’. Late modern development brought an end to the solidifying agreement between crime control industry experts, which meant that the wider policy process lacked a clear sense of the big picture (Garland, 2001).

According to Garland (2001) the rise of punitiveness is an adaptation on the part of a state whose limits have been exposed by rising crime, and by its failure to contain it. Rather than a sign of political strength, the punitive response is an expression of the weakness of state power, and a symbolic attempt to reassert sovereignty and authority in a bid to arrest what, until the mid-1990s, had been the seemingly inescapable rise in post-war crime in modern society (Pratt and Clark, 2005). Garland’s analysis of the structural changes in modern society differentiates his work from the more

prevalent focus on the individual response to the changes. The most important changes to the criminal justice policy environment have been in the cultural assumptions that animate them. To Garland (2001), crime control was shaped by the distinctive organisation of late modernity, and the impact of the free market on state policy.

Governing Through Crime

Jonathan Simon (2007) views crime as a significant strategic issue for modern government. Once again, the causal impact of the neoliberal reconstruction of society is acknowledged, along with the fear of crime it has created as the average person began to see their own involvement with ‘sudden and terrible violence’ as a distinct possibility (Simon, 2007: 3). Crime has been an increasingly pivotal instrument of government in the United States since at least the 1960s, and governing through crime has become part of the fabric of American society (Simon, 2007). A new civil and political order has been created in the wake of the reforms, structured around the issue of crime.

The ‘new order’ has meant a redefining of values like freedom, and new forms of power have been institutionalised and embraced. Many Americans have come to tolerate the new punitiveness as ‘a necessary response to unacceptable risks of violence in everyday life’ (Simon, 2007: 4). The collapse of the New Deal (guarantee of full employment along with state spending on civic infrastructure) in the 1960s caused a decline in public confidence in expert-guided government policies, sending political leaders searching for new models of governance (Simon, 2007). The

neoliberal law and order ideology was embraced with fervour as it became generally accepted that left-wing liberalism had caused the perceived crime crisis. The conservative right absorbed the issue of crime control with little regard for the scientific or statistical reality, as law and order policy became a crucial card in the political game of early conservative politics.

Crime became a category to be deployed in order to legitimate state interventions that had other motivations. Throughout advanced liberal democracies, 'crime control' policies have been enacted that, at best, serve a dual purpose, but which more likely utilise the momentum of crime policy to facilitate broader state controls. Examples of this include the expansion of government surveillance capabilities, including the collection and analysis of metadata, legitimating the collection of massive amounts of information that would seem irrelevant to criminal activity; and also restrictions placed on gatherings in public space, allowing tighter state control on movement and assembly. These criminal interventions, serving dual purposes, enable the state to muster support for moral issues that would otherwise polarise voters (Simon, 2007). Simon's (2007) concept of 'governing through crime' utilises the 'tough on crime' mantra to group voters together, and scare dissenters into the same broad-based camp, reworking policy and terminology to create government through criminal justice issues. The result has been a state based on fear implementing policy distorted by insecurities and agendas.

Crime gained priority status as a policy issue, creating a new world of fear and insecurity, where 'litigation and prosecution can both be expected to rise in order to establish social control in the absence of trust' (Simon, 2007: 7). The new punitive

policy schedule was perceived by the people as a ‘necessary response to unacceptable risks of violence in everyday life’ (Simon, 2007: 4). The ‘War on Crime’ instituted in the wake of the end of the New Deal in the 1960s necessitated revisions of hitherto foundational American values such as freedom and equality. The ordinary citizen was redefined as a potential crime victim: a representative of the ‘common person whose needs and capacities define the mission of representative government’ (Simon, 2007: 7).

Governing through crime has had a myriad of effects, including increasingly punitive crime control policies. Rather than making people more secure, the result of governing through crime has been the fuelling of a culture of fear and control that inevitably lowers the threshold of fear, even as it places greater burdens on ordinary Americans (Simon, 2007: 6). Simon argues that the consequences of the use of crime as a governing tool have been far-reaching and severe. The redistribution of resources to the criminal justice system has shifted the United States from being a ‘welfare state’ to being a ‘penal state’, within which custodial sentencing is well above normal levels and government interference has reached levels uncharacteristic of a neoliberal state (Simon, 2007: 6). Though the poor are disproportionate victims of this system, the middle-class has also been transformed by a fear of crime, and in modern America, members of every class make choices with reference to crime daily (Simon, 2007).

The state and federal executives of the United States have been reduced to a group of ‘lonely crime fighters’ whose elected existence is dependent on their ability to empathise with the community’s outrage at crime, and take action accordingly

(Simon, 2007). Punitive penal policy and the resulting carceral boom have been the consequences of governing through crime. The reshaping of political authority around crime has created a more authoritarian executive, a more passive legislature, a more defensive judiciary, and a fearful and outraged public (Simon, 2007). Governing through crime has navigated the main institutions in United States society, extending from the overhaul of criminal law into the family, the school, the workplace, and the residential community.

Crime Control as Industry

With some similarities to Simon's work, Nils Christie (2000) proposes that the new punitiveness and accelerating prison populations among western nations are normative features of modern society: indeed, the crime control industry has become the biggest growth of public and private investment and employment. Christie (2000) argues that the rise in punitiveness within modern societies, particularly the acceleration of imprisonment among western nations (with the United States as the exemplar), is primarily caused by the flexing of state power in an attempt to civilise and bureaucratised, and that the solution to western penal woes is to be found in our common humanity and a return to a form of community justice. Christie (2000) rejects the notion of high prison populations as anything other than a representation of a bureaucratised system of incapacitating 'others' as a result of wayward penal policy. However, the notion of the rise in punitiveness being caused by an overly powerful state is unique among Christie's contemporaries analysed here, most of whom attribute much of the rise in punitiveness to a weak and powerless state.

Christie (2000) argues that the mode of crime control employed by the state is a conscious decision on the part of government. He uses the example of Finland in particular to illustrate the capacity of a government to choose to drastically alter its punitive policy strategy to change the outcomes of the system. According to Christie, Finland provides an excellent example of how alterations to penal policy can reverse increasing incarceration rates, proving that crime control is an issue of morality rather than a state reaction to actual rates of crime (Christie, 2000, p. 38). Because crime is a social construct, the government can effectively choose to limit sentence lengths, improve prison conditions, and treat people with humanity to improve their penal circumstances – just as Finland had in the twentieth century (Christie, 2000).

In his analysis of the current punitive policy environment among western nations, Christie paints a harrowing picture of United States penal institutions, drawing comparisons between these and Nazi Germany. Prisons in the United States are moving in a direction that echoes the relentless systematisation that produced the extermination camps: bureaucratisation, industrialisation, social control, organisation, are the characteristics of ‘civilised society’, yet they can lead to highly uncivilised consequences, such as mass incarceration (Christie, 2000, p. 180). There is a strong emphasis on the increasing privatisation of United States prisons in Christie’s work. The punitiveness of the west has come about through the growth of state and penal bureaucracy, which has enabled the perpetuity of the penal industrial complex. Christie views the absolute deprivation within United States prisons that has resulted from the punitive policy shift as a cruel and inhumane crime control response.

Christie (2000) proposes that the potential for understanding and empathy in sentencing and rehabilitative measures is diminished by distance within criminal justice systems. For example, in the United States the distance within the centrally controlled judiciary prevents independent judgment, avoids equity, and in an attempt to provide consistency and efficiency it often attacks the most vulnerable in the community (Christie, 2000, p. 157). Mathematical formulae, rather than independent judgment, are used to sentence offenders in order to maximise efficiency and consistency throughout the system. While the speed and cost-effectiveness of the judicial system may have been enhanced, the true cost may be humanity and the understanding of the human experience. The choice of the state to prioritise efficiency over effectiveness has exacerbated the problem of increasing incarceration rates, and is demonstrative of the state's punitive strategy.

Within his argument, Christie (2000) details a pathway out of the punitive penal industrial complex – he believes that the solution to the crime control woes of the west simply lie in community spirit, equity, teamwork, and belief in the fundamental goodness of mankind. Though it seems characteristically optimistic of Christie, Zygmunt Bauman (2000b) also agrees that in a situation where personal knowledge within a community is high, punitive desire is diminished proportionately. Unfortunately, it is possible, considering the increasingly transient and fractured nature of society, that these communities of understanding cannot be formed on any grand scale. While some would consider Christie naïve within the modern social reality, he brings a sense of realism to the arena of penal policy. Much of his argument conveys fear of the terrifying potential of modernity, expanding on Max Weber's idea that 'bureaucracy develops... the more perfectly it is "dehumanised"' (Weber quoted

in Parkin, 2002, p. 35). Christie's work also expands on Nietzsche's famous warning: 'beware all those in whom the urge to punish is strong'. His argument serves as both a warning of the danger of a highly bureaucratised and dehumanised penal system, and a hopeful call for penal reform.

Christie (2000) argues that the rise in punitiveness among western nations represents a movement 'toward gulags western style'. The new punitive features of advanced liberal democracies constitute a 'natural outgrowth of our type of society, not an exception to it' (Christie, 2000: 178). For Christie, the features of new punitiveness are the consequences of the social processes of modernity, and although the punitive status quo Christie describes is ominous, he is optimistic about the capacity of humanity, and their ability to manage community justice, and treat people humanely, suggesting throughout his work that people need to reclaim the duty of punishment from an engorged state.

Volatile and Contradictory Punishment

While there are differences between these various scholars on what they see as being the cause of the new punitiveness, what unites them is the way in which penal development is seen as a unitary phenomenon. Very little differentiation is made between what is likely to have the distinctive genealogies of each strand of new punitiveness: longer finite prison sentences, the rise of indefinite prison sentences, the 'emotive and ostentatious punishments' that feature in Pratt (2000) are all explained through the same theoretical prism. Only Pat O'Malley (1999) goes some way to acknowledging that there are different processes at work in the progression of

punishment in modern English speaking societies. O'Malley (1999) discusses the 'inconsistent and sometimes contradictory' developments in penal policy, and considers the anomalous nature of the development and the variety of causes to which 'volatile and contradictory' areas of punishment can be attributed.

In order to understand the shift of preventive detention from its place as an emergency power, to something much more central in modern western penal systems, it is important to analyse the motivations behind the individual strands that, overall, constitute the new punitiveness, and that can range from boot camps to life imprisonment without parole; from anti-social behaviour orders to preventive detention and so on. In these respects, I want to argue that the renaissance of preventive detention is related to the rise of the 'risk society' (Beck, 1992). Controlling risk is separate from the law and order concerns of recent decades that have led to 'incarceration mania' (Harcourt, 2001). In that modality of punishment, 'those who refuse to become responsible, to govern themselves ethically, have also refused the offer to become members of our moral community. Hence, for them, harsh measures are entirely appropriate. Three strikes and you are out: citizenship becomes conditional upon conduct' (Rose, 2000: 335). In contrast, as Richard Ericson (2007a: 201) explained, '[it is as if] Western societies are governed through the problem of uncertainty. The problem of uncertainty subsumes and replaces the problem of order.' Reacting to crime already committed with increasingly exorbitant penalties is not in itself enough to prevent future crime and provide security. *To prevent crime*, citizenship becomes conditional upon risk abatement.

Chapter Three – Risk Society and Punishment

The rise of risk based punishments that seek to control or remove risky members of society has been driven by very different forces to the moralistic punitiveness and fear that is thought to be behind the new punitiveness. Risk has been an unanticipated outcome of the development of modernity, and has brought to an end much of the stability, security, and sense of safety of the post-1945 era (Beck, 1992). In addition, though, risk, already present in modern society due to the consequences of technological development (e.g. climate change) has been exacerbated by neoliberal political and economic change (O'Malley, 2004). While the neoliberal political and economic reforms did create opportunities for individual advancement, such as freedom of choice and the cultivation of lifestyles, they also fostered anxiety and insecurity, because they stripped away all the previous ties and loyalties that secured the individual's place in their community; be it through work, community groups, or otherwise (Pratt, 2015). Within the 'risk society', anxiety and insecurity have influenced the worldview of individuals, and driven penal policy development over time.

The weakening of the authority of the central state among English speaking societies due to neoliberal economic reforms has driven a reliance on increasingly punitive law and order regimes, and an inability to govern without the threat of exclusion from society (Bauman, 2000a; Pratt, 2015; Garland, 2001). The governments of these societies are now much more limited in the ways they are willing or able to step in to assist the people, and their punitive policy agendas should not be viewed as a sign of the strength of government, but rather the opposite. Of all of the limitations on state

intervention to come out of the 1980s, diminished security of the individual and the community has had a particularly acute effect. Delegation of responsibility for security to the individual has contributed to the huge rise in private security developments; in addition it has also led to a desire for irredeemable and unavoidable risk beyond the individual's ability to do anything about, to be cleansed from society. Such risks – sexual attacks on women, child molestation, are now thought of as causing irreparable damage that cannot be accepted. The consequential threat of exclusion for those who constitute such risks is part of a larger penal framework emerging in advanced liberal democracies, seeking primarily to provide protection from such matters.

Measures to prevent such risks have been enacted in many forms since the 1980s. An example of this throughout the main English speaking societies has been the momentous changes in occupational safety and health. Legislation regulating occupational health and safety existed in some form in all of the modern western societies prior to the 1980s. The United States Department of Labour administered provisions created in the Health and Safety Act 1970; New Zealand had a series of fourteen acts servicing workplace health and safety; the Canadian Centre for Occupational Health and Safety Act 1966 created an administrative body for workplace health and safety; the United Kingdom enacted the Health and Safety at Work etc. Act 1974. Following the 'uncaging of risk' (Pratt, 2015: 10) in the 1980s through economic deregulation and the privatisation of what had previously been state services, these countries began to reconsider the position of risk in the workplace. The result of the risk driven occupational health and safety changes that

commenced in the 1980s has been the increasing shift of liability to certain individuals in the workplace.

Australia began the process of harmonising their legislation (promoting consistency between all state and federal legislation) with the creation of administrative sanctions throughout the 1980s, and more recently the Inter Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety 2008 (Johnstone, 2013). The agreement required consistency between all Australian states and territories with the federal government. The ideals promoted within this agreement were very similar to those found in the Health and Safety at Work Act 2015 in New Zealand, and the federal Model Work Health and Safety Act 2010 in Canada. All provide comprehensive risk management and safety precautions required of all workplaces, taking responsibility away from the state and placing it on organisations and/or their employees. Employers, rather than the state, become accountable for management of all types of risks in the workplace, including physical danger and mental health. The principle behind this is best described by the sentiment behind the United Kingdom's regulations, 'those who create risks are best placed to control them' (European Agency for Safety and Health at Work, 2016). The development of occupational safety and health policy over time among these jurisdictions is demonstrative of the broad shift away from state accountability for risk toward the accountability of the individuals concerned.

Where occupational health and safety development is demonstrative of the delegation of risk to individuals in modern society, risk has also driven a variety of protective policies designed to control threats, or remove them altogether. Tolerance for anti-

social behaviour declines in the insecure and anxious society. Civil controls have been utilised throughout the main English speaking jurisdictions to discourage, and control or prevent ‘anti-social behaviour’. The 1998 Crime and Disorder Act targeted young people in the United Kingdom, detailing specific controls on behaviour and creating exclusion zones. The Anti-Social Behaviour and Policing Act 2014 extended the preventive reach of the 1998 law, allowing injunctions to be served to any person ‘thought capable’ of behaving in a way that causes disruption – the breach of which constitutes contempt of court (Pratt and Anderson, 2016). Risk driven legal provisions within modern western societies target vagrants and beggars, disenfranchise gangs, and past offenders among others on the grounds that their status or previous record is in itself indicative of future risks that thus have to be controlled or removed.

The legislative focus on ‘controlling risks’ has developed from the 1980s toward the aim of containing risk of sexual harms in particular. In the United States, registry laws for sex offenders attempt to monitor their locations, and regulate the concentration of offenders around areas containing schools, parks and other public amenities. Permanent restrictions on the rights and freedoms of sex offenders were the result of the 1989 kidnapping of eleven year old Jacob Wetterling, which was followed by the 1994 federal Wetterling Act, requiring states to create registration requirements for sex offenders, and offenders against children. The 1994 rape and murder of seven year old Megan Kanka led to the extension of the Wetterling Act, as the federal Megan’s Law created notification requirements, enforcing the release of the information contained in the Wetterling registries to the public. Some states also require, through local ordinances, parole license conditions, or probation orders, that

sex offenders are not allowed to enter 'Child Safety Zones', including schools, parks, beaches and other public areas (Pratt, 2015). The United Kingdom's Sexual Offences Act 2003 provides that sex offenders, would similarly be barred from visiting schools or parks (Pratt, 2015). Registry and community notification requirements again show the willingness of the state to intervene to control specific types of risk (although not all risks).

In addition, restrictions on the movement of individuals identified to pose significant future risk of sex crime have been enacted. Pratt and Anderson (2016) explain that the aforementioned Sexual Offences Act 2003 enables the prevention of future sexual harms by including anyone participating in, or seemingly about to participate in, a so-called 'trigger event' – activities like waiting outside a children's playground. This focus on prevention removes any customary presumption of innocence, and allows the state to control and regulate individuals before any offence has occurred. Similar controls have been created for the prevention of sexual harm in the Anti-social Behaviour, Crime and Policing Act 2014 (United Kingdom); the preventive supervision of sex offenders for up to a decade in the Parole (Extended Supervision) Amendment Act 2004 (New Zealand); and in similar legislation throughout the states within Australia, Canada, and the United States.

The drive to prevent future criminality, instead of penalising crimes committed, imposes a new moral imperative on penal systems. As was discussed in the introduction to this thesis, the traditional framework for western penal policy incorporated foundational principles of democracy and justice, including swiftness, proportionality and equality. In advanced liberal democracies, policies that violate

these principles have more recently been permitted in the name of the protection of community interests over individual rights: governments have allowed community safety and public protection to trump other policy justifications. Risk has become a determinative factor in penal policy, and rather than representing the strength of the state, once again these exclusionary policies represent the weakening of the state's grasp on power. Containment of extreme interpersonal risk has become the role of governments eager to exert their authority and demonstrate that they are still steering the ship of state.

A growing body of literature that endeavours to account for the impact of risk and dangerousness on criminal justice policy has existed within criminology since the 1970s. Tony Bottoms' 1977 lecture 'Reflecting on the Renaissance of Dangerousness', addressed the benefits and problems of policy changes then occurring throughout the United Kingdom that were designed to minimise the impact of dangerousness. Thereafter, Feeley and Simon's 1992 assessment of 'the new penology' and the administrative and actuarial shift occurring within penal policy, the field of 'risk' was extended once more. Only recently however has the depth of analysis of risk and its causation and determinative impact on the penal policy begun to fully develop. As Levi (2000) noted, 'this move away from the language of punishment, drawing heavily on languages of risk, management, knowledge, and common-sense – representing a mix of expert and non-expert rationalities – has developed into a strategy for advanced liberal governance in the area of criminal law'. In effect, it is as if risk can now inform penal development. The remainder of this chapter will show that the growth of 'risk society' has led, in turn, to the

reorganisation of punishment to the effect that it increasingly focusses on preventing future harm rather than reacting to crime that has already been committed.

The Creation of the Risk Society

The weakening of the authority of the modern state since the 1980s due to economic reform has significantly influenced policy processes, particularly those regarding the politics of risk management. Bauman (2000a: 40) argues that the public sector consistently ‘fails to perform its past role’ as the strategic principles of public power have frayed into escape, avoidance and disengagement. The confidence of the population in the power of their central government has declined with the minimisation of inclination by the state to intervene, and the general withdrawal of the state from areas of life it had previously occupied. Private interests now rule, and the state that once defended the autonomy of the citizens began to require defence itself, as it continued to shrink away from its past strength and status (Bauman, 2000a). With the loss of its ‘awesome and resented oppressive potency’ since the 1980s, state power has lost a significant part of its enabling capacity, and its inclination to use the traditional legal apparatus of control to provide security for its subjects has been diminished (Bauman, 2000a: 51).

In ‘Liquid Modernity’, Bauman (2000a) proposed that the fluid nature of life in modern society has brought about profound changes to all aspects of the human condition. Bauman (2000a) argues that the modern state is shifting toward a light, software based ‘advanced’ modernity, and away from the hitherto solid, anchored, and hardware focussed modernity. The solid nature of the latter had meant that

western societies were dependable in their provision of services, security, and safety. As Rose (2000) explains, from the late nineteenth century but especially in the era of the post 1945 welfare state, collective security had been maintained through universal provisions by the state on behalf of its citizens, ranging from pensions and housing, to socially funded services such as the police force and fire brigade. Expectations and provisions were predictable, and the state ensured stability. In contrast, by its fluid nature, 'liquid modernity' means that the destination of individual, self-constructing labours is 'endemically and incurably undetermined' (Bauman, 2000a: 7). Within this new liquid state, all norms are fragile, and therefore the fragility of all identities is magnified (Bauman, 2000a). In a practical sense, within liquid modernity values such as mobility, flexibility, and individuality become inevitable, and success is earned by those individuals elastic enough to seek it for themselves. Within this model of society, the traditional importance of communitarian values and social solidarity is traded for the increased value attributed to individualism and the pursuit of personal success that this is thought to bring with it.

Bauman argues that the safety nets that had previously existed in many forms, including structural features like social welfare, the dependability of the traditional nuclear family, and community ties and values, quickly began to fade into obscurity as neoliberal economic changes began to take effect. According to Bauman (2000a), that economic restructuring combined with 1970s demands for greater individual freedom to create the 'liquid state'. The 1970s was a particularly volatile time of social reform, where various rights movements and historical events facilitated significant lifestyle changes and social policy change. Issues including questions over indigenous people's rights throughout the western societies; controversy over

participation in the Vietnam War; growing awareness of environmental crime; the growth of the second wave feminist movement, and an insistence on the right of sexual preference and identity contributed to the galvanising of activists against the state and the existing normative forms of behaviour it had imposed on its population.

As a result, policies were adopted throughout western societies that altered lifestyles. Changes such as the rise of indigenous peoples rights within legislation with the Treaty of Waitangi Act 1975 in New Zealand, the Constitution Act 1982 in Canada, and similarly the Civil Rights Restoration Act 1988 in the United States; and the establishment throughout these societies of legislation around sexual harassment and marital rape to protect women: New South Wales was the first Australian state to outlaw marital rape in 1981, followed by all other Australian states and all other western jurisdictions, while civil legislation controls penalties around sexual harassment throughout the jurisdictions. In such ways, modern society began to recreate itself, the advancement of the individual with new social movements was prioritised over and above any sense of collegiality or solidarity with the state and its authorities. In addition, the plethora of social changes that occurred throughout the 1970s irrevocably altered the lifestyles of individual members of these societies, and began the shift toward enabling the individual that was solidified in the political and economic reforms of the following decade and where, indeed, the projection of lifestyle choices came to be seen as both a right and a boon that neoliberal economic reforms had created and made available to all (Pratt, 2016).

The decade of volatile social change was followed by significant political and economic changes with the neoliberal reforms of the 1980s. The extensive

incorporation of private sector values into the state sector in the 1980s brought an end to the social democratic provisions of the post-1945 era, such as the cradle to grave social welfare and decades of state guaranteed security. The shift toward the privatisation, corporatisation, and individualisation of the economy was intended to foster the growth of entrepreneurialism and private sector values amongst individuals. The neoliberal movement spread across much of western society during this decade, with its leaders driving ideological and practical change. The New Public Management system of state organisation was also implemented, through which the pursuits of efficiency and private sector values were prioritised (Shaw and Eichbaum, 2011). What was left of the public sector after the reforms subsequently began to be modelled along the lines of the private sector. The practical consequences of the overhaul of the political system and the broad incorporation of private sector values into the public sector, included the growth of sentiments of suspicion and disillusionment among the public. The public no longer had faith in the ability or willingness of the state to determine direction and exert control over society, leaving individuals at the mercy of an insecure state. Thus, while being given much more freedom of choice, and much greater purchasing power because of the economic restructuring, social and political restructuring also left many feeling insecure, and disenchanted with the government. The government was retreating from its previously accepted responsibilities and transferring the expectation for maintenance of security and welfare to individuals instead.

Among the intentions of the minimisation of state intervention throughout the 1980s was the targeted expansion of the domain of the individual. General responsibilities that had been held and managed by the state throughout the post-1945 era, including

social housing, employment and economic security were delegated to the individual as part of the shift toward making individuals take more responsibility for their own welfare and security without the state being prepared to provide guarantees of this anymore. One of the consequences has been, as Bauman (2000a) has argued, that nothing at all is certain in the modern, fluid world, and all norms are fragile, thereby leading to high levels of anxiety and insecurity. Where the state had once provided security and stability for its citizens, it now embraced a minimalist, competitive approach to government. Assurances of comprehensive economic, political, and social security by the state were finished, replaced with delegation to individuals themselves, and encouragement of those individuals to take up the opportunities created by the neoliberal arrangement. The diversification of authority among many stakeholders was now a key to modernity. However, when authorities are many they can cancel each other out and confuse people (Bauman, 2000a). The neoliberal redefinition of the public sphere included a reshuffle of authority, and as Bauman (2000a: 67) argues, in a world of ‘chronically undetermined ends’, it is the number of followers that determines where true authority lies. The implication of Bauman’s statement is that, should the state surrender power through delegation for any reason, it risks the loss of the confidence of the people, potentially relinquishing its mandate.

Overall, the emphasis on individualism facilitated many flourishing successes within private enterprise, and opened the market to entrepreneurialism and the dominance of private sector values. At the same time, it gave the impression that no-one was left in control of where society was heading. Alongside the benefits of the 1980s reforms came a series of formidable problems that would come to haunt the citizens and governments of advanced liberal societies.

Crime in an Insecure World

Risk influences our understanding of all facets of the modern lifestyle. O'Malley (2004) argues that since the 'uncaging' of risk in the 1980s, individuals have required greater knowledge of risk and have engaged in risk assessment. Because risk assessment is rarely based on full situational knowledge, this process can foster uncertainty, leading to the tendency toward risk avoidance and the limitation of the freedom of others in the name of security. Discourse about the positive impact of risk assessment and avoidance is also commonplace in fields such as medicine, public health and crime prevention (O'Malley, 2004). In these fields, statistical evidence and data analysis are used to produce predictive formulae which are expected to exceed the ability of human experts in providing the most risk averse course of action (O'Malley, 2004). Ericson (2007a) argues that the newfound emphasis on risk within criminal justice policies reflects this broader change in the way risk is perceived, managed, or abated throughout everyday life.

Ericson (2007b) establishes that the new punitiveness is a direct result of the neoliberal reforms, and that the neoliberal ideology has facilitated the twenty first century obsession with uncertainty; in particular, the consequences of the uncertain world of market based competition. This volatility and uncertainty is pervasive in all parts of modern western society. Governing through uncertainty has replaced the traditional risk management processes of the twentieth century, and insecurity is at the top of every western nation's political agenda (Ericson, 2007b). Among the responses to pervasive uncertainty has been large-scale criminalisation.

Criminalisation equates to a discernible effort by criminal justice stakeholders to establish the appearance of certainty and social control (Ericson, 2007b). Ericson (2007b) proposes that the intensification of criminalisation is the strongest statement of authoritative certainty by a government, regardless of that government's level of authority and certainty.

Criminalisation has not been the only large-scale response to crime, with significant delegation of responsibility for crime control occurring throughout the main English speaking countries. Responsibility for crime prevention and control has been deputised to businesses, schools, neighbourhoods, families, and individuals. The traditional model of criminal law has been radically transformed in the neoliberal environment, leading to the erosion of due process standards in the name of risk management and security (Ericson, 2007a). The emergence of neoliberal ideology within modern society has included the delegation of many responsibilities. The diversification of the response to crime has seen a variety of institutional mechanisms for crime prevention and security emerge. This 'surveillant assemblage' by other institutions, such as businesses, schools, and neighbourhoods, works in conjunction with criminalisation and supplements the modern criminal justice system (Ericson, 2007a: 2).

Within the neoliberal environment of risk, it is the law that functions as an institution for responding to uncertainty and governing the future (Ericson, 2007a). The precautionary legislative process of criminalisation entails the creation of malicious demons or 'Leviathans' by the state, and the subsequent legislative response to reassure society that the government has firm control of security (Ericson, 2000a: 37).

The modern day Leviathan created by the state is criminalised through two forms of ‘counter-law’. Counter law criminalises not only those who actually cause harm, but also those suspected of being harmful, as well as authorities deemed responsible for security failures (Ericson, 2007a).

In the first form of counter-law, ‘law against law’, new forms of criminal law are created, and civil and administrative law are used to reduce or eliminate due process protections that created uncertainty within investigations (Ericson, 2007a: 207). The discretionary capacity for pre-emptive strikes against the suspicious character is increased, in the form of incapacitation that will lead to public protection (Ericson, 2007a). The second counter law is labelled ‘surveillant assemblage’, and involves the broadening and deepening of surveillance by more actors within society to detect signs of threat in the hope of pre-empting disasters waiting to happen (Ericson, 2007a). These counter-laws signify the increasing institutionalisation of precautionary logics and crime control, contributing to a neoliberal social order of individual responsibility, vulnerability, and insecurity (Ericson, 2007a). The traditional principles, standards, and procedures of criminal law are eroded or eliminated altogether in favour of widespread criminalisation (Ericson, 2007a: 2). The enactment of counter laws can be seen throughout the advanced liberal democracies in their adoption of indefinite detention policies, probation conditions, restrictions on movement, and registry, among others.

Risk, and the ‘Community’ of Individuals

Garland (2006) argued that once security ceases to be guaranteed to all citizens by a sovereign state, it tends to become a commodity that, like any other, is distributed by market forces rather than according to need. It follows that the movement of the state toward wholesale incorporation of free market values has allowed the commodification of security among advanced liberal democracies. The groundbreaking emancipation of the individual from the many hitherto unavoidable obligations to the state meant that the nature of community life itself became irrevocably altered.

Bauman (2000a) and Pratt (2007) recognise that the idea of community can be seen as a form of safe haven against the anxieties and insecurities beyond its limits, and it became a highly valued commodity itself amidst all of these insecurities. The ideal of community provides stability and security for those within its bounds, and grounds people in some form of belonging and homogeneity. It also allows the obscuring of 'otherness' and capitalises on the benefits of familiarity, including the dominance of desire for simple compensation for any harm done, over desire for retribution and punishment within the penal sphere (Bauman, 2000b). However, within 'liquid modernity' the brittleness and transience of bonds between people may be an unavoidable price for the right of individuals to pursue their own goals, and yet it is simultaneously a most formidable obstacle to pursue them effectively (Bauman, 2000a). The atomisation of the community has rendered human bonds fragile, and has made individuals less tolerant of those who are different: 'others'. Growing public intolerance can be linked to a decline in social capital. The decline of social capital throughout these societies generally began in the 1970s, accelerating with the neoliberal reforms of the 1980s. Robert Putnam (2000) provides the United States as

a case study of this phenomenon, utilising the official membership of community groups as a helpful barometer of community involvement and cohesion, and that American membership slumped from the 1970s onwards. The 1960s had been the peak of community group involvement and religious worship in the United States, with community activity continually increasing up to this point, and more Americans worshipping together than any time in history (Putnam, 2000: 19). The ‘social capital’ that these networks, created through community activities and religious worship produced held value in their ability to affect the productivity of individuals and groups (Putnam, 2000). As this social capital has dwindled in the main English speaking societies, communities have become less cohesive, losing the stability and security by which they were once characterised. As Bauman (2000b) states, we now live in areas among people we do not know, most of whom we will never know, and this divorces the individual from any empathetic obligation he once had to his neighbour. The safe haven of the community has disintegrated with the development of liquid modernity, leaving individuals vulnerable to misunderstanding and lacking empathy for their fellow members of society.

People desire to be among a community for their own safety, and traditional communities are becoming increasingly difficult to find in our modern time. ‘Men and women look for groups to which they can belong, certainly and forever, in a world in which all else is moving and shifting, in which nothing else is certain’ (Hobsbawm quoted in Bauman, 2000a: 171). It is important however to consider the old form of community accurately, as there is a tendency to accept rosy retrospect about safe communities of days gone by – it is often the case that retrospect actually alters the perception of the “good old days” (Bauman, 2000a). Though the community

may never have been the homogenous and concerned body it is often nostalgically remembered as being, it is certainly true, as Putnam (2000) argues, that communities have become estranged with the process of modernity. Despite the urbanisation and condensing of the populations of advanced liberal democracies, spatial proximity has not translated into strength of community bonds, and the community is becoming increasingly atomised over time (Bauman, 2000b).

Without an adequate sense of community, the ‘unholy trinity of uncertainty, insecurity and unsafety’ can dominate the worldview of the individual (Bauman, 2000a: 181). The root cause of this anxiety is the absence of security surrounding the future (Bauman, 2000a). Bauman (2000a: 181) continues that this ‘unholy alliance’ results in a perpetual thirst for more safety. The absence of the features of the traditional community allows the ‘other’ who was once tolerated to become an alien, permanently locked in this condition, having been stripped of the personal uniqueness which alone could have prevented stereotyping and potentially mitigated the impact of the law (Bauman, 2000b). ‘Others’ of today have not always held their mysterious and threatening status on the periphery of society. As Christie (2000) explains, the personal familiarity that prevailed within the traditional community meant that concern over retribution and punishment were not often the natural reactions to harm done; instead these reactions were replaced with greater concern over compensation for harm. Bauman (2000b: 208) argues that estrangement has been the primary influence on the shift toward intolerance: modern community living entails living among people ‘whom we are unlikely to ever know’. It is this estrangement within modernity that ‘reduces, thins down, and compresses’ the view of the ‘other’,

allowing media sensationalism to exacerbate imaginings, and resulting in a very low level of tolerance of ‘others’ in modern western communities.

Bauman (2000b) then continues by arguing that among the consequences of the atomisation of the community has been the growth of the appeal of penal sanctions for the insecure individual. With the use of penal sanctions designed to prevent future risk, ‘others’ can be forcibly evicted from the unstable community through imprisonment, which is seen as an effective method to neutralise this threat, and consequently calm the public anxiety which they evoke (Bauman, 2000b). The threat of total exclusion from society through indefinite imprisonment and permanent supervision attracts the attention of the anxious individual as a certain cure for society’s ills. In such ways, the dominance of insecurity and uncertainty among modern communities can aid in the perpetuation of reductionist and populist criminal justice policies, particularly those that seek to cleanse risky behaviour from society.

At the same time, the inability of individuals to rely on the state for basic security and protections has clouded the ability of individuals to consider criminal offenders, among other minority groups, as anything more than an unwanted risk (Pratt, 2014). The atomisation of the community exacerbates this problem in the extreme, as people are almost solely reliant on the media to ascertain the details of the danger lurking in their communities (Bauman, 2000b). The deregulated modern media outlets do nothing to calm the fraught nerves of the increasingly isolated and insecure public: intolerance within the already atomised society increases with tabloid sensationalism, putting minorities including criminal offenders at risk. Bauman explains how a severe

and overzealous reaction to antisocial, risky, or criminal behaviour can thus occur within the media and the community.

The Rise of the Security Sanction

The media has become particularly important in defining social problems and fuelling anxieties because the interdependencies that had traditionally stabilised social relations within the modern state have become progressively undermined (Pratt and Clark, 2005). The result of these dislocating processes has been the growth of insecurity in a world where stability and certainty have become absent.

This has meant that the opportunities for individual advancement that were gained with the neoliberal economic reforms have come at a significant cost. Pratt's work contains a unique acknowledgement of the benefits brought about by the post 1980s restructuring. Hitherto unimaginable economic freedoms, access to global markets, and greater mobility could be experienced alongside the lifestyle changes occurring throughout this period. However, the cost of these rewards was that individuals were now tasked with responsibility for their own personal security. Where, though, individuals can do nothing to protect themselves from risks that would cause irreparable harm; the state then intervenes, leading to what Pratt and Anderson (2016) have referred to as 'the rise of the security sanction': a protection oriented policy agenda seeking to keep the public safe by controlling those individuals thought to be at risk of committing such crimes in the future. Legislative responses have included the provision of indeterminate sentences for offenders deemed likely to reoffend,

post-prison detention, post-prison supervision, restriction of movement, and registration requirements.

In these ways, the security sanction enables those who pose the risk of irreparable harm to be removed from public space completely (Pratt, 2015). The concepts of ‘irreparable harm’ and the threat posed by ‘intolerable risks’ are central to the understanding of the security sanction. ‘Irreparable’ harms should be considered as physical and psychological damage that is impossible to remedy, against that which has become most valued, causing lifelong trauma, and against which there is no insurance available.

In effect, the most dangerous and risky offenders are now considered to be those who would cause damage through violent or sexual harms to the human body. In particular, the bodies of women, in the forefront of the ‘new economy of bodily pleasures’ that has emerged since the 1980s, while simultaneously, through their increased public prominence, becoming exposed to significant risks in public space (Pratt, 1997: 140). The modern woman was encouraged to perfect her body, as explained in Elizabeth Wissinger’s (2015) analysis of modelling, femininity, and the ‘making of glamour’.

The ‘model life’ of the twenty first century involves both the physical and virtual management of the body – for this process Wissinger (2015: 3) coins the term ‘glamour labour’. Glamour labour encompasses the construction of image, the cultivation and perfection of the body, and the technological tinkering of one’s ‘look’. This is not just the everyday preoccupation of models, but all women are encouraged seek to reap the rewards of their own version of glamour labour, and the enhancement

of bodily improvement and perfection. As Featherstone and Hepworth (1982: 112) observed, grooming and body care now take up a significant portion of the modern individual's day: the body is the machinery, without which 'life, as we understand it, is meaningless'. In addition to the now central importance of the female body to the modern lifestyle, also contributing to the vulnerability of the modern woman is her newfound visibility. Throughout the main English speaking societies, women's employment has steadily increased since the 1960s, as has their earning power (Wolf, 1990). The female body more important to individual lifestyles than perhaps ever before, and thereby more at risk, particularly from the threat of harm from predatory violent and sexual offenders thought to be lurking in public space, waiting for their next victim.

Alongside women, children are the other group that has come to hold particular value which has generated the need to protect them from any violation. Pratt (2005) suggests a number of explanations for the rising value of children over the late twentieth century. First, the value of a thing is usually influenced by its quantity, so the way children are valued is associated with their number within the general population. From the 1970s there has been a sharp downward trend in the number of live births recorded in all of the advanced liberal democracies. The falling number of children gives each child the value of inherent scarcity. However, it is also a scarcity of time spent with children that has made them more precious. Booming childcare industries across the west have been the result of the economic imperative for double income households. People who are essentially strangers are now tasked with the supervision of our children for much of each day, fostering the fear that this reliance could put them at risk: there is no guarantee of security in the leasing out of childcare

(Pratt, 2005). Perhaps most importantly, the relationship of a parent with their child provides stability and support unique among the transient relationships found in the insecure and unstable modern world. As Furedi (2001: 107) explains, ‘at a time when very few human relations can be taken for granted, the child appears as a unique emotional partner in a relationship... unlike marriage or friendship, the bond that links a parent to a child cannot be broken; it is a bond that stands out as the exception to the rule that relationships cannot be expected to last forever.’ Children have thus come to be uniquely valuable in advanced liberal democracies, and any risk of irreparable harm to them thus becomes absolutely intolerable, and has alerted attention to the threats to them posed by ‘sexual predators’ and ‘child molesters’. These concerns have been exacerbated by the mainstream media, enhancing such anxieties and the frustration of individuals unable to provide comprehensive safety and protection for their children.

In these respects, the security sanction serves to remove those individuals posing significant and irredeemable risk from society, while those who are filtered back into mainstream society face intensive restrictions and surveillance. It is in the circumstance of the emergence of the risk of irreparable harm - the sentencing of a child sex offender, a serial rapist - that modern society is willing to step in and perform what Pratt and Anderson (2016: 12) call ‘spectacular rescues’. Such intolerable risks posed to the community become high priorities for the government, allowing ‘previous barriers in the penal framework limiting the scope for preventive measures [to] be thrown aside’ (Pratt, 2015: 12). The containment of the most extreme risks is prioritised over upholding cardinal principles of justice throughout modern western societies.

What now follows is the way in which New Zealand society has come to be organised around risk, and the way in which this led to the resurgence of the sentence of preventive detention as one particular example of the ways in which the security sanction has emerged as a penal antidote to these risks, now thought to be intolerable.

Chapter Four – Crime, Insecurity and Anxiety in New Zealand

New Zealand provides an excellent case study for the effects of the uncaging of risk. As a relatively young, geographically isolated nation with a small population, the neoliberal economic reforms from the 1980s provided a particularly radical and transformative change to the hitherto insular, protected nation state economy. This chapter will explain how economic and political changes, along with the social liberation and restructuring of this period, had a determinative influence on the lives of everyday New Zealanders. This influence served to exacerbate ontological insecurity and promote anxiety about safety. Where once the community and the state provided guarantees of security amidst a general commitment to the abatement of risks, the economic and social restructuring meant that there seemed to be nothing separating the individual from an array of dangers awaiting them each time they entered public space. From the 1980s onwards, safety nets that had previously existed in many forms in New Zealand were dissolved.

New Zealanders have become risk averse decision makers. Within the last decade, catastrophic local events such as the 2011 Canterbury earthquake, which killed 185 people, and the Pike River Mine Disaster, which killed 29 people, have contributed to a lively discourse about risk in the media. In addition to local disasters, the restructured mass media bombards New Zealanders with news of future catastrophes such as climate change, as well as the news of terrorism and war. The disaster focussed current events stream contributes to the risk averse mentality. Along with greater wariness of potential catastrophe, the lifestyles of New Zealanders have developed around risk in much more subtle ways. The adoption of risk driven routines

and practices by both individuals and the government has also been the product of political decisions intended to set risk free during the 1980s (O'Malley, 2004): it has not simply been the unanticipated outcome of modern scientific development (Beck, 1992). Social and political restructuring since the 1980s has shaped the worldview of New Zealanders, and has contributed to the creation of the modern, risk averse lifestyle. The social theory behind this cause and effect - restructuring and change creating risk aversion - shows that risk aversion conversely creates insecurity, rather than facilitating the creation of security that it seeks (O'Malley, 2004). Beck (1992: 9) argued that, rather than guiding society into a hazard-free future, actuarial prediction of risk fixes us in the past, 'dim[ming] the horizon' of the future by telling individuals only what they cannot do. The insecurity created and exacerbated by risk is worse for its scientific nature, because the more that science discovers, 'the more it demonstrates that life is saturated by risks' (O'Malley, 2004: 2).

1984 Neoliberal Reforms

Alongside the social transformation of personal life that began to emerge in the 1970s, the New Zealand government began to undertake significant political and economic restructuring during the 1980s. New Zealand had traditionally been known as a progressive and egalitarian social welfare state. However, the 1980s saw sweeping changes to the political system and economic policies that significantly changed the nature of government intervention. The neoliberal reforms that had swept across the main English speaking societies in the late 1970s and 1980s arrived in New Zealand with the 1984 election of the Fourth Labour Government. The reforms, enacted by Prime Minister David Lange and Finance Minister Roger Douglas, comprehensively

restructured the New Zealand economy. The government sold assets, overhauled social welfare, restructured government departments, and implemented new systems based on private sector values, such as ‘user pays’. What had previously been state provided public services were sold off and then became commodities to be purchased by the public. The 1980s also saw the implementation of New Public Management, a system of state management that pursues efficiency, and emphasises the idea that private sector values can and should be effectively carried across into the public sector (Shaw and Eichbaum, 2011). Neoliberal economic policies enabled privatisation and the incorporation of private sector values into what remained of the state sector, with the intention of fostering entrepreneurialism and the overall growth of the economy.

The 1980s saw the end of New Zealand’s ‘cradle to grave’ welfare state, and a distinctive shift away from the social democratic roots of the government. Globalisation did not transform the capitalist economy until the 1970s, and until this time, western governments sought to maintain and protect ‘nation state economies and their empires’ (OECD, 1993: 14). In New Zealand, an embedded culture of loyalty to the British motherland had meant that there remained a heavy reliance on trade with Britain, but the economy was otherwise insular. Comprehensive provision of welfare introduced in New Zealand in 1935 embedded social democratic ideals in the culture of New Zealanders. Kelsey (1995: 19) explains that the impact of the combined forces of the nation state economy, and historically high living standards and quality of life in New Zealand bred ‘a complacency that the world would always stay the same’. The conditions created by the New Zealand economy and welfare policy led people to put their faith in the ‘harmonious, classless society based on the conformist, upwardly mobile, two-parent, consumption oriented family unit, cosseted

by a benevolent government' (Kelsey, 1995: 20). The perception of the stability of the state, and of high levels of social cohesion, meant that the neoliberal reforms of the 1980s had a particularly significant impact on New Zealanders, who were 'ill-equipped to respond to... the onset of radical change' (Kelsey, 1995: 19). With globalisation of the capitalist economy gathering pace in the 1980s, advanced liberal democracies were faced with a choice: profiting through a global, capitalist, free market; or protecting their welfare states through further government intervention (Kelsey, 1995). In New Zealand though, there was little choice. However, a variety of events contributed to the economic downturn in New Zealand in the 1970s: the world economy was changing, and the formation of the European Economic Community reduced trade opportunities with Britain; the oil shocks caused the price of fuel to increase; the population was rapidly declining as an increasing number of New Zealanders moved overseas; the very short term success of Prime Minister Robert Muldoon's 'Think Big' projects – the government's bid to gain economic traction through large-scale investment in infrastructure – which demonstrated that state intervention was not working; and unemployment was rising, topping 50,000 by 1984. In this dire economic context, and in an environment of growing uncertainty, with the 1984 election of the Fourth Labour Government came the move to initiate neoliberal restructuring.

The fundamental principle of neoliberalism is individual freedom, and the consequences of the newfound freedom created for New Zealanders through the neoliberal reforms were significant. Restrictions and regulations were lifted, and the everyday New Zealander was able to participate in the globalised economy. Neoliberalism fostered entrepreneurialism, investment, and positive economic

activity; features which were particularly helpful to the middle and upper class who possessed the wealth to capitalise on the economic opportunities created by the reforms. The government opened the New Zealand economy to the world, allowing foreign investment, and removing restrictions on currency exchange. Taxation was radically changed, with reduced income tax for high income earners, and the creation of the universal goods and services tax, that thereby raised revenue through indirect taxes. Trade unions were marginalised, transforming workplaces once defined and controlled by collective bargaining, into meritocracies where individual prowess determined one's level of success and the payment of competitive bonuses. As Kelsey (2015) argues, facilitation of investment, deregulated labour markets, and powerless unions meant that, alongside all the success stories of wealth creation, individual failure was also to be expected, and tolerated in this new risk-based approach. Responsibility for the cost of individual failure was no longer held by the state, but was transferred to the individual themselves, relieving the state of the need for caution, and for contingency planning. The cost for individuals was imagined by the state to be a worthwhile price for the opportunities provided by the reforms for those that were successful. The reforms were planned to relieve the international and domestic pressures on the economy, and they succeeded to an extent: freeing up the hitherto stagnant economy, and creating opportunities for individuals to improve their own position within the economy.

Alongside the opportunities afforded by the reforms, insecurity and anxiety about the state of the world was growing. New Zealanders accustomed to the stability and reasonable quality of life guaranteed by the traditional welfare state were disenchanted by the radical changes. The restructuring of the economy broke up

communities, and alienated much of the wider public who had no interest or buy-in in the economic opportunities afforded to them by the changes. The government had retreated from its previously accepted responsibilities, and transferred accountability for welfare and security to the individual. The reforms contributed to the increasing isolation of the individual from the state, and irrevocably changed the nature of the New Zealand community.

Careful construction and maintenance of protective measures for New Zealanders had been thought necessary throughout the early twentieth century. This period saw the state generally taking responsibility for improving the lives of the people. Now this security that had been provided by the state for generations was stripped away with the neoliberal reforms, making access to support much more difficult for the individual (Pratt, 2015). The government had embraced risk as part of their new economic policy, and the refuge that people once found in the protective arms of their government was lost. Garland (2006) argues that once a sovereign state ceases to guarantee security to all citizens, security becomes a commodity like any other, distributed and controlled by market forces, rather than in accordance with need. It follows that the movement of the state toward wholesale incorporation of free market values has facilitated the commoditisation of security in New Zealand.

One consequence of this has been a boon in the private security industry, with a variety of private policing options now available to any anxious consumer. The unwavering faith that New Zealanders once had in the state-run police force has faded, with large sections of society now replacing their dependence on police with a ‘mentality of self-protection’ (Sarre and Prenzler, 2011: 9). As Bradley (2014)

demonstrates with regard to New Zealand, the licensed private security industry has grown by 1000 per cent between 1976 and 2012, while the number of sworn officers in the New Zealand Police has grown by only 117 per cent during the same period. Furthermore, the proliferation, and newfound reliance on private security has been supplemented by the revival of voluntary citizen-based policing initiatives, adding to this newly diversified model of policing (Bayley and Shearing, 2001). The plurality of this modern form of ‘hybrid policing’ (Bradley and Sedgewick, 2009) is a response to the growing insecurity, and the declining faith of New Zealanders in their government’s willingness or ability to protect them. While the state embraced risk in order to reap the economic benefits, the sacrifice of security has clearly also had a significant and detrimental impact on individuals and communities.

Globalisation and the ‘New’ New Zealand

The political shift away from universal provision of security coincided with the aforementioned social changes that also served to strip individuals of their sense of certainty, definition, and predictability of everyday existence (Pratt, 2015). The restructuring of the trade based New Zealand economy was significantly impacted by globalisation, as the nation state economy was opened to the world. New Zealand’s homogeneity was removed by the restructuring and the ‘uncaging of risk’, and the modern community became more atomised and diverse than ever before (Pratt, 2015: 10). Growing multiculturalism of New Zealand communities has been enabled by immigration encouraged by the global minded public policy of the neoliberal reforms.

The monocultural hegemony of New Zealand society had begun to wane in the 1960s, as Maori urbanisation began to accelerate. New Zealand historian Michael King (2003: 467) suggests that Maori urbanisation stirred ‘challenges, prejudices and conflict’ as it provided the first opportunity for Maori people to participate and contribute to mainstream New Zealand cultural, social, and political life. While the improvement of the position of Maori people within society was positive for Maori themselves, the ethnic diversification of communities was a significant and rapid social change for those used to the monocultural neighbourhood. Immigration from the Pacific Islands then provided further diversification of the modern New Zealand community.

In the past, New Zealand had been a colonial society with very tight restrictions on immigration from countries other than the United Kingdom. The government had created policies to encourage migration from across the Pacific during the 1960s and early 1970s. In 1960, New Zealand’s immigration policies were changed to allow recruitment of skilled workers for essential industries, allowing the entry of many Pacific people, particularly from Samoa and Tonga (New Zealand Parliamentary Library, 2008). A special quota for Samoan immigrants was introduced in 1970 that allowed 1100 Samoans to obtain permanent residence each year, in addition to those already entering New Zealand for skilled work (New Zealand Parliamentary Library, 2008). The tolerance shown to workers from the Pacific Islands during the skills shortages of the previous decades were brought to a sudden halt with what became known as the ‘Dawn Raids’ in 1972. The police carried out these raids of the homes of Pacific families in order to deport those whose work permits had expired (King, 2003). The rapid pace of change in the ethnic composition of hitherto homogenous

New Zealand communities created hostility toward new groups, and contributed to a wider sense of ontological insecurity (Haigh, 2014).

Thereafter, growing Asian immigration throughout the 1990s further disrupted the stability of New Zealand society. The neoliberal restructuring caused the loosening of hitherto tight restrictions and regulations on immigration. A 1986 review of immigration policy concluded that it had been discriminatory, leading to 1987 legislation that allowed an influx of culturally diverse immigration (Spoonley et al, 2007). In particular, the legislation change caused the number of Hong Kong Chinese, Taiwanese and Korean immigrants to grow exponentially. The total number of Asian New Zealanders increased from 1.7 per cent of the population in 1986, to 12.2 per cent by 2013. A series of articles targeting the 'Inv-Asian' in Auckland newspapers in 1993 marked the beginning of a moral panic about the quantity and ethnicity of immigrants to New Zealand (Spoonley et al, 2007). This moral panic grew into a political movement, with the anti-immigration stance of the New Zealand First party helping them to secure significant gains in the 1996 General Election. With globalisation, the homogenous New Zealand community had become a relic of a bygone era. The modern community seemed to be made up of strangers, and the growing Asian population elicited high levels of hostility from sectors of society.

Along with the rapid diversification of the community, globalisation had a determinative influence on the restructuring of the economy through the neoliberal reforms, which had an acute impact on trade. The assurances of the protected nation state economy were taken away, and there were no longer any guarantees. Farmland was opened to international investment, subsidies were eliminated, and the secure

reality New Zealanders had relied upon in the past was gone. However, while the onslaught of change and instability perceived as negative by many in New Zealand, it also afforded many others opportunities for advancement hitherto thought impossible.

Through this economic restructuring, a system of winners and losers was created. Many took the opportunity for financial gain through stock market investment, currency trade, and purchase of property, and quickly became winners. The New Zealand 'Rich List', first compiled in 1986, was a testament to these successes. At the same time, others found themselves to be losers following the 1987 stock market crash. Where New Zealand was once known as an egalitarian society with homogeneity of wealth, the nature of the deregulated market has created a significant disparity. The transformation of wealth composition in New Zealand has been exacerbated by various influences by over time, including property speculation, and foreign currency speculation. In effect, while some New Zealanders have generated significant fortunes for themselves, the growing inequality has had a severe impact on those at the losing end, many of whom may never have had the capital to partake in the opportunities.

The Cultivation of Lifestyle

As in similar societies, New Zealand also experienced significant social change in the 1970s. This then gained momentum throughout the 1980s. The incorporation risk management and abatement had become the everyday reality of the modern individual. Among advanced liberal democracies, 'risk based routines and practices

of government pervade most areas of our lives' and have come to have a determinative impact on the everyday decision making of individuals (O'Malley, 2004: 1). Public discourse considering risk is now a common occurrence within a range of fields, and this discourse centres around harm reduction and maximising benefits for the general population. However, it is important to consider the significant individualised impact that the uncaging of risk has had on the lifestyle of the individual (O'Malley, 2004). The cultivation of lifestyles that took off in the 1980s had expanded the hitherto narrow horizons of the individual in New Zealand.

Though the government has surrendered its previous level of responsibility for risk assessment and control, it still takes a guiding role at times, and major government projects are often coordinated to educate the population in the need to practice everyday risk assessment (O'Malley, 2004). These programmes are not always necessary to control behaviour, as knowledge of the risks can be sufficient. For example, while the United Kingdom enforces a compulsory motor vehicle insurance policy, motor vehicle insurance is not compulsory in New Zealand. Though the New Zealand government enforces compulsory subscription to Accident Claims and Compensation, which essentially insures for personal injury, there is no legal requirement for vehicle owners to purchase insurance. Despite this lack of enforced direction, New Zealand has a similar level of insurance to those nations with compulsory insurance laws, with 7.6 per cent of New Zealand's driving population uninsured, versus 6 per cent uninsured in the United Kingdom (Ministry of Transport, 2009). The pervasive nature of risk assessment and avoidance at a grassroots level in New Zealand society today is demonstrative of the results of a state governing through risk. The private sector is also maximising the opportunities associated with

the anxieties of the modern consumer. As O'Malley (2004) explains, the marketing of motor vehicles targets the risk averse nature of the individual, from features such as seatbelts and airbags, to proximity alarms and vehicle crumple techniques in the event of an accident. The modern individual is surrounded at every turn by suggestions and opportunities for risk avoidance.

A good example of this is the calculation and attempted aversion of health risks, which determine the dietary and exercise decisions of many New Zealanders. The tobacco issue is one where the government does choose to step in, providing guidance for the people to enable a risk averse lifestyle. Tobacco smoking is a risky activity with a negative impact on health that the government has sought to eliminate altogether by 2025. Minimising tobacco smoking has been a long term policy initiative for the government, with steps in the last five years including tax increases on tobacco products, increased public campaigns, and increased access to quitting services (Ministry of Health, 2015). Through both overt and indirect policy initiatives, the government has been effective in their contribution to the risk averse decision making and behaviour of New Zealanders – smoking is continuing to decrease, and the Ministry of Health (2015) has stated that New Zealand is on track to become a 'smoke free nation' by 2025. Governing through risk has enabled the state to provide guidance to the population with a minimal level of intervention.

As New Zealand's vehicle insurance rate demonstrates, guidance from the government is not necessary to influence the risk averse behaviour of the individual. Throughout the early twentieth century, physical exercise was thought unnecessary and regarded with suspicion to a great extent throughout the western world, as doctors

linked excessive exercise to heart attacks and diminished sex drive (Mayer, 1953). The 1953 report of Dr. Jean Mayer disproved these links, arguing that exercise in fact diminished risk, sparking a fitness revolution in the United States that eventually spread to this country. With the new scientific information available from experts like Mayer, individuals were able to begin making informed decisions about avoiding personal health risks. A 2014 survey by Sport New Zealand (2015) showed that gym and fitness club memberships are becoming increasingly popular, with approximately twenty per cent of adults having full memberships. As more accurate information has become available over time, individuals have been able to analyse their health risks alongside the benefits of exercise, and their behaviour has been shaped by a tendency toward risk aversion.

While avoidance of health risks associated with poor diet and lack of exercise is an important element of the 'fitness revolution', it is equally important in the consideration of the cultivation of lifestyles. The maintenance and perfection of the body, particularly the bodies of women, also became increasingly important over this time in New Zealand as elsewhere. With the sexual liberation and newfound opportunity to express personal identity growing throughout the 1980s, the body began to be seen as a vehicle for pleasure and self-enhancement. The Sport New Zealand (2015) survey found that almost all women participate in recreational exercise, at gyms or otherwise, with the goal of improving fitness. As Wissinger (2015) argues, improvement of the aesthetic of the body has become more important than ever before, and fitness is an important aspect of the aforementioned 'glamour labour'. Fitness, and responsibility for personal health choices, has provided

opportunities for self-enhancement and wellbeing, and at the same time social advancement gave them much more prominence in public space.

The rise of the women's liberation movement in New Zealand was part of the wider movement throughout advanced liberal democracies toward improving the status and situation of women (Dann, 1985). The movement sought to liberate women from 'narrow, limiting social roles' and provide them with opportunities for fulfilment and development (MacDonald, 1993). As Dann (1985) explains, the movement was particularly strong in New Zealand, where the first women's liberation groups formed in 1970, with dozens more running throughout the country by 1973. The place of women in New Zealand society was transformed by social changes such as the rise of family planning; the movement toward equality in the workplace; the increasing number of women in higher education; and a general shift away from the hitherto prevailing restrictive ideals around the role of housewives, and expectations around motherhood. The liberation movement contributed to the freedom of women from many of their traditional obligations, and generally served to improve their place in modern society. However, with this increased visibility of women, their vulnerability increased. Where the woman was once protected in her traditional role in the home as mother and housewife, and within the nuclear family, which was itself protected within tightknit New Zealand neighbourhoods and communities, these traditional layers of protections began to dissolve with the uncaging of risk. The liberation of women won them advancement, but it also contributed to their increased vulnerability within society. The role of women in society had won more value, inherently leading to concern about behaviour which puts them at risk, particularly their vulnerability in

public space. The strength of the community could no longer be relied upon to protect women, because the traditional community itself had become a relic of the past.

The women's liberation movement contributed to meeting the calls for greater individual freedom of personal identity and sexual expression in New Zealand. Other influences that enabled these freedoms included changes in social and family arrangements that served to shake up traditional expectations. These social changes are themselves consequences of the changing position of risk in modern society, and have led to increased isolation and insecurity. By the 1980s, familiar landmarks had begun to disappear from the community, and the result has been an increasing awareness of risk and danger. Declining religious worship is an example of this fraying tradition. The Christian religion and tradition has historically had a strong presence in New Zealand, starting with the English missionaries who were sent to help colonise the nation and turn the Maori people to God (King, 2003). Christian churches of various denominations served New Zealand communities as places of worship, and as providers of social services and moral guidance throughout the nineteenth, and much of the twentieth century. Starting with the Christian evangelising of many Maori people from 1814 and throughout the nineteenth century, New Zealanders had been highly receptive to the beliefs and community encouraged and provided by Christian churches (King, 2003). The church was representative of the security and stability that could be found within the community, and was the provider of a higher moral code necessary for the continuity of harmony within the community.

However, Census data indicates that those identifying as 'No Religion/No Religious Adherence' increased from five per cent in 1981, to 39 per cent in 2013. The broader impact of the decline of the church can be observed in a variety of social changes in New Zealand during this period. The strict Christian moral code of the traditional New Zealand community loosened as religious adherence declined, initiating significant changes in the nature of the nuclear family. The Christian rite of marriage became much less popular with the decline of the church. The number of marriages in New Zealand dropped from 22,981 in 1980, to 20,125 in 2014 despite significant population increase. The divorce rate in New Zealand also underwent significant change during this period. The passing of the 1980 Family Proceedings Act shifted the focus of divorce proceedings away from finding individual fault, to helping people make arrangements to move on with their lives. In conjunction with the establishment of the Family Court in the 1980 Family Courts Act, the process of divorce was made more accessible for married people. The 1981 implementation of the legislation caused a sharp increase in the number of divorces, growing from 7.4 per 1000 estimated existing marriages, to 17.1 per 1000 by 1982. In 2015, with marriage rates continuing to decline, the divorce rate was 9.3 per 1000. With diminishing public support for the institution of marriage, one person households became more common: increasing from 16 per cent of all households in 1981; to 23.5 per cent in 2013. One parent families have also become more common over this period, increasing from 12 per cent of families in 1981, to 17.8 per cent in 2013.

Along with changes in religious adherence and the related moral expectations, legislative change contributed significantly to the changing nature of the modern family. The 1973 introduction of the Domestic Purposes benefit by the Third Labour

Government provided support for single parents caring for children, altering the lives of many and contributing to the waning necessity of the traditional nuclear family (Haigh, 2014). For the first time, those who were solo parents by choice were financially empowered by the government. The entrance of women into the workforce in significant numbers, driven in part by the growing number of solo parents, has also radically impacted the nature of the family.

Between 1994 and 2014, labour force participation of women has risen from a total of 54.5 per cent, to 63.3 per cent (Flynn and Harris, 2015). While the participation rate of women with no dependent children is higher than that of mothers, the working experience of partnered mothers and sole mothers is becoming increasingly similar. In 1994, 18.8 percentage points separated the participation of sole and partnered mothers in the New Zealand workforce, with partnered mothers able to participate more fully in the labour force (Flynn and Harris, 2015). By 2014, only 3.5 percentage points separated the two groups. The statistical convergence of the labour market participation of sole and partnered mothers demonstrates a growing tendency for mothers to work, regardless of their relationship status. Though working motherhood was initially enabled through the introduction of financial incentives and benefits, it has also become necessary for many families struggling in the modern economy. Increased labour force participation of mothers has also meant that care of dependent children has been increasingly delegated in the form of formal or informal childcare.

The 1947 Bailey Report on preschool education in New Zealand found that the prevailing attitude of the public regarding non-familial childcare was that it was only for ‘deviant families where the mother “had to work”’ (Goodger, 1998). Social

attitudes around the nature of motherhood began to change with the liberation of women during the second wave feminist movement of the 1960s and 1970s. The benefit reforms of the 1970s, including the introduction of the Domestic Purposes Benefit, secured the financial stability of sole parent households in New Zealand, again contributing to the changing attitudes around the nature of motherhood and parenting. Increasing social acceptability of working mothers, combined with the initiation of government subsidies for formal early childhood education services following a 1986 inquiry, meant that a growing number of children aged zero to six years were being enrolled in formal childcare and early childhood education (Goodger, 1998). Since these 1986 reforms, the use of childcare in both formal and informal capacities has significantly increased in New Zealand. By 2009, 53.9 per cent of children between zero and six years of age attended at least one form of formal childcare, while 44.1 per cent of children the same age attended some form of informal childcare (Statistics New Zealand, 2010). Care of older children is also increasingly being delegated by parents, with the same 2009 survey showing that 8.8 per cent of children between five and thirteen years of age are enrolled in some form of formal childcare outside of school, while 39.6 per cent of the same age group attend informal childcare (Statistics New Zealand, 2010).

Delegation of childcare is a particularly concerning task in a community of strangers. The atomisation of communities in New Zealand, combined with the increasing mobility of individuals in modern society, has meant that individuals are more likely to live away from close family, and are less likely to know those living within their own community. As Pratt (2005) argues, modern childcare often consists of handing children into to the care of people who are essentially strangers. The growing

estrangement within the modern community serves to compress the view of the stranger, and the lack of knowledge caused by this social blindness often results in individuals assuming the worst. The issue of estrangement is exacerbated by the point that any risk posed to a child is inherently more dangerous in modern society, due to the scarcity and preciousness of children. As elsewhere, as the number of children being born in New Zealand has decreased, children have become 'scarce human commodities'; and during this time we have also become increasingly aware of the plethora of risks to their health and wellbeing (Pratt, 2005). The widely held view that crime was increasing in New Zealand, valid or not, increased the perception of danger to women and children from 'others' in the community.

With the scarcity of children, and limitations on the time parents are able to spend with them, the nature of the relationships between them and their children has been given added meaningfulness. The transience of most modern relationships is demonstrated by the decline of marriage, and increased instances of divorce in New Zealand. In modern society, there is no longer any guarantee of lifelong partnership. Increased mobility and globalisation has meant that individuals are able to follow opportunities wherever they lie, and this has resulted in the scattering of people who would once have been geographically immobile. Lifelong friendships are therefore more difficult to maintain, and the individual is marooned without any guarantee of support from anybody. The bond between a parent and child thus becomes inherently and uniquely enduring.

The Deregulated Media and Perceptions of Crime

From the 1980s, these concerns about risk to both women and children have been given added force as a result of the consequences of mass media deregulation. Technology has facilitated the emergence of the twenty-four-hour news cycle, which has resulted in the ubiquity of news. The importance of the media in the lives of individuals has changed, drastically transforming along with the nature of the community. The atomisation and diminished communal features of neighbourhoods and communities has resulted in what Christie (2004: 89) explains as an 'increased reliance on the media for describing what happens and what gives meaning to the occurrence'. Associated with this reliance is a greater dependence on the state to resolve the risks and dangers the individual perceives as a result (Christie, 2004). Individuals are more likely than ever before to acquire their knowledge about the state of the world from the media, which has become a pervasive part of their everyday lives. With the decline of the community, it is becoming increasingly likely that the individual has an inaccurate or uninformed worldview. The sensational nature of the media, and its enormous focus on the reporting of crime, have elicited fear among these isolated individuals, and has resulted in the expectation for the state to come to the rescue.

In keeping with the shift toward incorporation of free market principles and neoliberal ideals, privatisation and deregulation of the media were part of the broader economic and political shift that occurred in New Zealand in the 1980s. The deregulation of the media in the Broadcasting Act 1989 played a significant role in the exacerbation of the anxiety around violent crime and law and order issues. The Act removed restrictions on foreign ownership of broadcasters, created a new set of standards around advertising, election campaigning, and established the Broadcasting

Standards Authority (Broadcasting Act 1989). It also removed many restrictions that had hitherto controlled broadcasting and print media, and introduced television network competition to New Zealand. The Act also removed the state broadcaster role, eliminating the previous drive to create balanced educational New Zealand programmes and eliminated the use of television and radio as sources of public information and education in New Zealand. The traditional state media has been replaced by more sensationalised news stories involving accounts of risks and dangers. As Pratt (2007) argues, the media is increasingly likely to focus on the ineptitude of the criminal justice system than its successes, and exaggerate the leniency of the courts, when they have in fact become more punitive. For example, an interview of Christchurch Councillor Norm Withers published in *The Dominion Post* (1 January 1999: 2) attempted to provoke the emotion of readers, '[you] read the papers every day, look what's happening. It's time to toughen up so we can deter [criminals] from wanting to go back to prison. These do-gooders and civil libertarians who want to look after the wellbeing of criminals, its time they got real and thought about the victims.' More recently, *The Dominion Post* (9 April 2005: A5) published an article that summed up New Zealand prison conditions as follows: 'count in free meals and toiletries, spare time, no responsibilities, computer and gym access, paid part time work, student loans, sex, drugs, and gambling, and suddenly jail doesn't seem so tough'.

Another result of the deregulation of the media has been the increased intensity and frequency of crime reporting. In the tabloid style newspaper (there is no authoritative broadsheet tradition in this country) or broadcast in New Zealand, violent crime in particular was disproportionately reported, perpetuating general public anxiety

around law and order. The lurid presence of troubling cases in mainstream media had a particularly significant impact on the level of anxiety. Detailed accounts of sexual crimes and the exploits of child sex offenders and rapists were published in newspapers, and shocking elements of the cases were broadcast. Dramatic use of superlatives, monikers, and emotive terminology in the media has contributed to this fear. In 1996, Stewart Murray Wilson was sentenced to imprisonment for serious sexual and violent offending against sixteen women and girls, including rape, attempted rape and indecent assault (New Zealand Parole Board, 2012). The offences for which Wilson was sentenced spanned over twenty two years, from 1972 to 1994, and also included charges of stupefying and bestiality (New Zealand Parole Board, 2012). During the reporting of Wilson's 1996 trial, Bernadette Courteney popularised the moniker Wilson was given: 'Beast of Blenheim'. The use of language by the media regarding Wilson, and the proliferation of the moniker contributed to the fear of 'monsters' like Wilson, lurking in public space (Mediawatch, 2012).

During a discussion on Radiolive in 2012 (Mediawatch, 2012), the origins and effects of the moniker 'Beast of Blenheim' were discussed. The labelling of offenders by the media indicates to the public how they should feel about offenders, and can be the primary driver behind public opinion. Dubbing tells the public that they are allowed to loathe the person concerned with a clear conscience, and that we 'need not restrain our abhorrence in any way' (Mediawatch, 2012). For the isolated individual relying on the media for information on the state of the 'outside world', the impact of the deregulation of the media in New Zealand was severe. The media reporting of these cases has had such a significant impact that discussion of sexual predators, their creation myths, and the risks they pose, have become part of everyday discourse in

modern society. Fear of the ‘sexual predator’, lurking in public space, has been compelled and exacerbated by the media, and has become a part of everyday life in the modern world. As Pratt and Anderson (2016) explain, the term ‘predator’ has only recently been transformed for use referring to human predators – specifically sexual predators. The term ‘predator’ had only been used in reference to the animal kingdom prior to the 1980s, however its use in reference to sexual offenders in the media has transformed the expression.

With crime on the rise according to the media, and social control apparently in decline, public anxiety around law and order in general, and risks and dangers from strangers in public space in particular has grown. Social change has continued to bring a strong sense of precariousness into people’s lives (Garland, 1996). Despite the gains that were made by many factions of society through the opportunities created by economic restructuring, the sudden and momentous change experienced in New Zealand during this period has contributed to uncertainty about the future, and a growing sense of insecurity.

The Effects of Insecurity and Change in New Zealand

This was because social control was perceived by the public to be eroding, which in turn increased levels of anxiety and insecurity about the state of society and the future. Social restructuring created fundamental changes to entrenched daily routines, challenging the status quo and testing value systems. The rise of ontological insecurity exacerbated fear and anxiety about ‘others’ in the community, and generated support for excessive responses to crime. The vulnerability that rapid

reform and restructuring provoked had an impact on New Zealanders' perspectives on crime within their communities.

Bauman (2000a: 106) is accurate in his assessment of the modern community, that 'the ability to live with differences, let alone to enjoy such living and to benefit from it, does not come easy and certainly not under its own impetus'. The reforms of the late twentieth century redefined the modern community, enabling a range of successes for many individuals, at the cost of the traditional way of life. The series of reforms in New Zealand are demonstrative of the risk averse policy process, which has been born out of ontological insecurity and the isolation experienced by the modern individual.

Bauman (2000a) argues that the community can be a safe haven against the anxieties and insecurities beyond its limits. The community can provide stability and security for those within its bounds, and it can ground people in a form of homogeneity and belonging. The community also allows the obscuring of 'otherness' and capitalises on the benefits of familiarity. The atomisation of the community has rendered human bonds fragile, and removed the barriers obscuring 'otherness'. Bauman (2000a) argues that the modern community is made up of people we do not know, most of whom we will never know, and that this atomisation has divorced the individual from any empathetic obligation he once had to his neighbour. The safe haven of the community has disintegrated, leaving individuals vulnerable to misunderstanding, and lacking empathy for fellow members of society. The brittleness and transience of the bonds between people today may be the unavoidable price for the right of

individuals to pursue their own goals, while also representing the most formidable obstacle to effectively pursuing these goals.

This has serious implications for the formation of policy. Without an adequate sense of community, the ‘unholy trinity of uncertainty, insecurity and unsafety’ can dominate the perspective of the individual (Bauman, 2000a: 181). The root cause of anxiety is the absence of security surrounding the future, and Bauman (2000a) argues that the ‘unholy trinity’ results in a growing demand for more safety. Bauman (2000b) argues that among the consequences of the atomisation of the community is the growth in the appeal of penal sanctions to the insecure individual. With the use of punitive penal sanctions, ‘others’ can be forcibly evicted from the unstable community through imprisonment, which is seen as an effective method to neutralise the threat they pose, and calm the public anxiety which that threat evokes (Bauman, 2000b).

The overwhelming insecurity and anxiety about the state of modern society has immobilised individuals, and has left the responsibility for management of extreme and unavoidable risks to the state. Where the community may once have tolerated others, and lacked awareness of the details of offences occurring outside of their own frame of reference, there is now a knowledge base of lurid detail perpetuated by the media, combined with a widespread fear of the unknown. The New Zealand government is expected by their citizens, to control the unavoidable risk of irreparable harm that lurks within public space. In endeavouring to address this expectation, the government has adopted a range of policies that seek to control these risks,

particularly those that would otherwise cause intolerable, irredeemable harm to those whose enhanced value – women and children – also draws more attention to their vulnerability. The expansion of preventive detention from a seldom used, emergency provision, into a central feature of the criminal justice system has been a prime example of this risk driven policy making process. The following chapter will discuss the renaissance of the sentence of preventive detention in New Zealand.

Chapter Five – The Renaissance of Preventive Detention in New Zealand

The recommendation for abolition of preventive detention in the 1981 Penal Policy Review Committee Report indicated that the sentence appeared to be approaching extinction. However, rather than dying away quietly, and as was noted in the introduction, this sanction has enjoyed a renaissance. It has moved from its previous status as an emergency provision, to something much more central in the New Zealand criminal justice system. The series of protections built into preventive detention legislation, such as minimum age limits, recidivism thresholds, and the restricted list of qualifying offences, have also been removed or narrowed. This chapter examines the renaissance of preventive detention in New Zealand. It argues that this has been the product of ‘setting risk free’ through economic deregulation and other forms of social restructuring. While such measures gave individuals considerably more freedom of choice, they also made the public much more apprehensive of, and sensitive to risks and dangers that would otherwise cause them irreparable harm.

That said, the renaissance of preventive detention was not a straightforward process, put in place by some simple legislative fiat. It involved the growing response of the criminal justice system to issues of risk as well as law and order, the periodic merger of risk and law and order concerns, which gave simultaneous momentum to both, and an initial reluctance, certainly by the Labour Government of the 1980s, to rescind its social democratic credentials on criminal justice, notwithstanding their willingness to embrace neoliberal economic policies.

The Report of the Penal Policy Review Committee was commissioned by the Minister of Justice in 1981 in 'recognition of a growing disquiet over the amount of crime occurring in the community, and the apparent ineffectiveness of present remedies' (McCormick et al, 1984: 33). The Committee included a series of criminal justice experts: Chief Judge of the District Court; a community social worker; members of the police, courts, and Parole Board; legal and justice experts. In addition to a series of more specific requests, the expert Committee was given eight general issues to examine, including: the effectiveness of existing means of dealing with offenders; considering options to reduce the rate of imprisonment; assessing the applicability of increasing community based sentencing; considering the place of victims within the criminal justice system; and considering the adoption of policies to accommodate New Zealand's growing multiculturalism (Penal Policy Review Committee Report, 1981).

The response of the Committee came in the form of the Penal Policy Review Committee Report: a comprehensive, well evidenced document of over 200 pages. As requested by the Minister of Justice, the Report made a range of recommendations, although, reflecting the power and status of criminal justice experts at this time, their subsequent report shifted their terms of reference and became, indeed, a lengthy critique of New Zealand's over-reliance on imprisonment. They recommended, inter alia, the abolition of preventive detention, due to fundamental ethical issues that caused its application, though minimal, to be 'arbitrary, selective, and inequitable' (Penal Policy Review Committee, 1981: 59). The Committee argued that instead of preventive detention, a lengthy finite sentence could be imposed in appropriate cases, still serving the same end of public protection. However, this recommendation was

never adopted by the government. Instead, a series of events throughout the 1980s shifted the direction of the government away from expert opinion, dramatically changing the penal policy environment, and contributing to the revival of the sentence over the decades since.

A Neoliberal New Zealand

Neoliberal polity advocates small government, and New Zealand's economic restructuring from the 1980s was demonstrative of the commitment of successive governments to reducing the size of the state. New Public Management was put in place; the economy was deregulated; state services were privatised or corporatised; and private sector values were incorporated into what was left of the minimised public sector. For the individual, the neoliberal reforms meant significant lifestyle changes. The Fourth Labour Government had not included extensive neoliberal reform in its election platform, and New Zealanders watched on as significant changes were enacted through the restructuring: the government withdrew 'cradle to grave' welfare; 'sold the family silver' through sale and partial privatisation of assets; corporatised the public service model through adoption of New Public Management; deregulated the 'nation state economy'; and opened New Zealand to extensive foreign investment and trade (Kelsey, 1995: 19).

Government policy of reduced state intervention extended to crime control. Now the state began to acknowledge its limitations in this realm: it simply could not control all crime. Contemporary criminological theory appeared to be consistent with the actions of the state, as it reasoned that crime was a normal, commonplace aspect of

modern society – referred to by Garland as ‘the new criminologies of everyday life’ (1996: 450). The ‘responsibilisation strategy’ was utilised by the New Zealand government to diversify and delegate the response to crime by utilising multi-agency partnerships, and varying the stakeholders in crime prevention and criminal justice (Garland, 1996). New Crime Prevention as a broader concept, unlike more traditional forms of crime prevention, acknowledged the limits of the state in preventing crime, and generally sought to diversify crime prevention to communities: businesses, households, neighbours, and families (Knepper, 2003). The process of responsibilisation essentially incorporates private sector values into the management of law and order by central government. Responsibilisation and New Crime Prevention policies more generally have further contributed to a dissipation of social capital in New Zealand, fuelling suspicion and anxiety about crime problems, with the media coming to play an increasingly prominent role, at the expense of experts, in informing the public about these matters.

The 1980s saw the beginning of what became a widely accepted perception that the crime rate was rising, and that violent and sexual crimes were a growing problem in New Zealand. Among the results of the significant restructuring and change experienced by individuals in New Zealand was a decline of support for the main political parties and politicians in general. Pratt (2007) argues that the decline in deference for the state and its representatives fostered the creation of a concerned and insecure public that sought some reinstatement of authority over their apparently disintegrating society. The collapse of public faith in the political system, and the restlessness surrounding the law and order issue resulted in the government’s recognition that this matter had important political purchase. Although the neoliberal

ideology promoted minimal state intervention, it became clear that support for the Labour Government would be problematic in the 1987 election unless law and order was addressed.

Politically charged newspaper coupons at that time became a means of channelling and publicising growing public apprehension about crime. Later analysed in the Report of the Ministerial Committee of Inquiry into Violence (1987), or the ‘Roper Report’, the newspaper coupon phenomenon then became a mechanism to conjure public support by extra-parliamentary organisations or individuals for crime policies that would involve much greater public protection. Coupons were printed in newspapers by ‘publicly minded citizens’ who would call on readers to cut the coupon out, fill it in with their personal details, and post it somewhere specific such as a government department, where it would generate its impact: demonstrating tangible and measurable public support for the coupon’s argument (Roper Report, 1987: 11). The Police Association, which had been much more politically active during the 1980s, placed one such coupon throughout New Zealand newspapers, asking readers to demand action from the Department of Justice over rising levels of crime (Meek, 1995). Thousands responded to this coupon, and many thousands more would have read the advertisement and been impacted by the fact that the Police Association did not support the government’s sentencing policy. In order to regain public support and deference, and to retain power through the 1987 general election, the Labour Government had to act on the issue of law and order.

Edging Away from Extinction

Between the establishment of preventive detention in the 1954 Criminal Justice Act and the 1981 Penal Policy Review Committee Report, the sentence was only sporadically imposed. Fifteen people were imprisoned on the sentence at the time of the Penal Policy Review Committee Report in 1981. The 1954 introduction of the first form of 'preventive detention' was intended to establish a special means of dealing with persistent offenders, and above all, to provide 'public protection' (Criminal Justice Act 1954: s24(2)). The conditions built into the policy are demonstrative of the legislature's intention for the sentence to be used only in the most serious cases: qualifying offenders must be at least twenty five years old; must have convicted of one or more sexual offences since they were seventeen, *or* convicted at least three times on separate occasions of crimes warranting prison sentences of three years or more, *or* convicted at least seven times on separate occasions of crimes warranting prison sentences of three months or more (Criminal Justice Act, 1954: s24). The Act also specified that sentences were only truly indefinite for sexual offenders: while all those sentenced to preventive detention would serve no less than three years in prison, non-sexual offenders could not be held longer than fourteen years in prison. The 1967 Criminal Justice Amendment Act made minor adjustments to this stipulation, simply requiring all those sentenced to preventive detention to serve no less than seven years. The result of the meticulous conditions within the legislation was that preventive detention was seldom applied in practice.

The Criminal Justice Act 1985 included the first amendment to preventive detention in eighteen years, and the alteration represented a clear departure of the legislature from the expert recommendations found in the Report of the Penal Policy Review

Committee. The departure from the Committee's preventive detention recommendation is an intriguing feature of the 1985 legislation, because despite the flouting of the recommendation for abolition, the Report of the Penal Policy Review Committee did form the basis of the Act (Meek, 1995). Within the Act itself, community supervision of early release prisoners was enacted; remission after three quarters of the sentence was reduced to two thirds; improvement of prison services – the comprehensive Act was clearly written with due consideration of the recommendations of the Penal Policy Review Committee. The strong relationship between the recommendations of the Report and the Act makes it all the more unusual that the government chose to retain the preventive detention sentence against the Committee's advice.

It is also unusual that preventive detention was not specifically mentioned during any parliamentary debate or reading of the Criminal Justice Bill, and that no reason has ever been publicly stated for the decision to retain preventive detention in lieu of incorporating the recommendation of the Penal Policy Review Committee (Meek, 1995). Also conspicuously absent was any explicit mention of the 1983 Donaldson Report. The Donaldson Report was the result of an inquiry set up to examine the circumstances of Ian David Donaldson's crimes following his release from psychiatric detention. Donaldson had a history of sex offences against young girls, and an administrative error that discounted his time on psychiatric detention had authorised his release following his arrest after being found in possession of chloroform and attempting to break into a young girl's bedroom. Donaldson committed suicide two weeks after his release on bail, leaving a note confessing to a number of sexual offences committed since his initial release from psychiatric

detention. Although the case was not discussed in the parliamentary debate of the 1985 Criminal Justice Act, it may well have influenced the decision to retain of preventive detention. Donaldson would have been a prime candidate for preventive detention, and the Report explicitly addressed the recommendation of abolition by the Penal Policy Review Committee, stating that ‘very great caution should be exercised before deciding to abolish this form of detention’ (Temm, 1983: 83).

Though motivations for retention of preventive detention were not explicit in the parliamentary debate, within the Act itself, the nature of preventive detention as a sentence intended for *infrequent* and *emergency* use was used to justify its retention. It was envisaged that the 1985 legislation would thus retain preventive detention as an exceptional measure for the very worst offenders, and it included provisions that could have been expected to reduce the severity of preventive detention. Authority to approve release was retained by the Parole Board, and the Act added the requirement that the Parole Board must be satisfied that the offender was unlikely to commit further sexual offences before recommending release (Meek, 1995). Preventive detention was restricted to sex offenders over twenty five years of age, who had been convicted of at least one qualifying sexual offence since they were seventeen, and who were being convicted of another such offence (Criminal Justice Act 1985, s75). However, despite the continuing restrictions on its use, the preventive detention provisions within the 1985 Act initiated a series of legislative amendments that have continually expanded the scope and jurisdiction of preventive detention in New Zealand.

Changes made to preventive detention since the 1985 Criminal Justice Act have had a significant social impact. In its departure from the Penal Policy Review Committee recommendations, the 1985 Act was demonstrative of the legislature symbolically shifted away from favouring the expert opinion of 'liberal elites' including academics, judges, and policy experts (Pratt, 2007: 37). The preventive detention provision within the Act was constructed as an emergency measure, with the intention of a limited scope and practical application to a small number of recidivist sexual offenders. By then though, there was growing recognition of the need to protect the public from particular risks they could not defend themselves from. Although initially, this was met with caution from governments in deciding whether to abandon the social democratic criminal justice principles which had always treated preventive detention with caution, each amendment since the 1985 revival of the sentence has appeared to continue the trend away from consideration and incorporation of expert opinion. The result has been the vast increase in the number of prisoners on preventive detention in New Zealand today. Within an environment of heightened anxiety and insecurity among the public, the deterioration of social democratic values in New Zealand politics has resulted in populist penal policies that are no longer based on expert opinion. From the fifteen prisoners serving sentences of preventive detention at the time of the Penal Policy Review Committee Report in 1981, that number has increased more than eighteenfold to 263 in 2014 (the latest available data).

Among the first widely publicised applications of the 1985 Act was the case of John Douglas Bennett, involving sexual violation of a level that gripped the nation. Bennett had previously been convicted and imprisoned for rape, and in 1986, just five weeks after his release from prison, he abducted, raped, and attempted to murder a

young Christchurch woman named Lollett Newman. Bennett forced Newman to undress and perform sex acts on him, made her watch on as he dug what Newman believed to be her grave, attempted to rape her, and hanged her by the neck. Newman survived and was found after being thrown from the boot of Bennett's car, naked, bound and gagged, as it left the road and overturned (Meek, 1995). The case received a large amount of publicity, and during Bennett's sentencing in the Christchurch High Court, he received verbal abuse from the public gallery as he was sentenced to twelve years for attempted murder, and five years for abduction (Meek, 1995). The judge in Bennett's case, Justice Holland, remarked that 'in my opinion, you should not be released into the community again unless the Parole Board is satisfied either that the medical evidence before me is wrong, or that you have so changed your personality that the risk of your reoffending is minimal' (as quoted in Meek, 1995: 226).

Just days after Bennett's sentencing, in response to the public interest in the case, New Zealand television channel TV1 aired a special series of its nationally broadcast investigative current affairs show 'Close Up' focussing on the Bennett case, entitled 'Just Another Victim'. The series was viewed by a large audience, and the 'emotional and accusatory' tone combined with the singular viewpoint triggered a furore among the public, with a torrent of letters arriving at the Ministry of Justice demanding greater consideration of victims and harsher sentences for offenders such as Bennett (Meek, 1995: 226). His case exacerbated the existing unrest around risk and crime control issues, and the perceived lack of concern of the state around fundamental matters of public protection. Public unrest continued to build, worsening with trigger events such as the abduction and murder of six year old Louisa Damodram by Peter Joseph Holdem on 15 October 1986. Discontent over the risks the public were facing,

and doubt of the government's willingness or ability to take control of the situation contributed to heightening anxiety and insecurity among the public throughout 1986.

With the general election just one year away, the public perception that the government was weak on crime control issues, particularly on those related to public protection, was particularly significant. The Labour Government's Minister of Justice Geoffrey Palmer had announced the details of an Inquiry into Violence in April 1986, with results and community consultation to be presented to the Minister on 1 March 1987. The reliance on specialist inquiries was a typical feature of the traditional social democratic government, which had always sought to produce policy based on expert opinion. However, the selection of members for this Commission of Inquiry was problematic. The Report of Ministerial Committee of Inquiry into Violence, which became known as the Roper Report after Chairman Sir Clinton Roper, was not based on the advice of criminal justice experts. Though Roper himself was a retired Judge of the High Court, the other members of the committee included a secondary school teacher, a family therapist, a social worker, two councillors, and a lawyer.

Unlike the expert members of the 1981 Penal Policy Review Committee, these were not people with extensive knowledge and experience of the criminal justice system nor violent crime. In addition, the Report was opened to public contribution and consultation, receiving well over a thousand submissions from groups and individuals in the community. As a consequence, the view of New Zealand society and the circumstances of violent crime exhibited in the Roper Report were markedly more negative than the earlier Penal Policy Review Committee Report. In summarising the state of New Zealand society, in a section labelled 'The Unpalatable Truth', the Roper

Report (1987: 15) states that for decades in New Zealand, ‘permissiveness has gone unchecked; domestic violence is rampant; the “macho” image has been encouraged by advertising for commercial interest to the detriment of women; aggressive behaviour and violence in “sport” has become accepted; pornography has become accepted as the norm, as has violence in the visual media; racism has increased; economic inequality with its attendant stresses and frustrations has increased; illiteracy and lack of parenting skills are common and awareness of spiritual values is sadly lacking.’ The gloomy view of New Zealand society presented in the Report was representative of the sentiments of the public about their communities, and the state’s apparent inability or unwillingness to resolve the social ills. Traditionally, the social democratic government would await the recommendations of an expert inquiry, using these to formulate policy and therefore avoiding establishing a position on the issue (Pratt and Treacher, 1988). However, the last social democratic ideals of the Labour Government, that had introduced neoliberal reforms across all other areas of society, appeared to be falling away in favour of more populist responses to public concerns.

On 17 November 1986, before the Roper Report was completed, and just weeks after the sentencing of John Douglas Bennett, Palmer announced to the public a range of sentencing amendments proposed by Cabinet in attempt to quell the disquiet around law and order (Meek, 1995). The first allowed the expansion of the range of sentences warranting preventive detention to include violent offences, in addition to those qualifying sexual offences already specified. Though Palmer denied any connection between the high profile Bennett case and the proposed amendments to sentencing legislation, the second and third amendments were essentially direct responses to the

issues that had received heavy criticism in 'Just Another Victim'. The minimum age of eligibility for preventive detention was to be lowered from 25 years to 21 years, and the Parole Board were given greater discretion over the release of offenders, with the additional ability to require sentences to be served in full.

When the Roper Report was eventually released, it made multiple positive references to the announcements of the Minister of Justice, and supported his policies. The Report itself included research that appeared to support Palmer's policies: one study showed that while 15 per cent of those in the study that had been convicted of rape had been convicted of sexual offences before, 49 per cent has previously been convicted of violent offences (Roper Report, 1987: 123-138). In response to these findings, Palmer announced that the Report showed alarming increases in the instances of rape, as well as the violent tendencies of those convicted, and that taking the average age of the victims into account, it was now absolutely necessary to expand the scope of the sentence of preventive detention. In the wake of the Bennett case, and within the restless political climate around crime control, the Labour Government continued to publicly announce policies that would appear to assist in the protection of individuals from otherwise irredeemable and unavoidable harms. This shift is indicative of the way in which risk was now beginning to shape criminal justice policy, with growing recognition that such violation of women and children had become intolerable. The public had generally been very suspicious of state action since the neoliberal restructuring, and government popularity was very low. The concession of Labour's foundational social democratic values in the form of populist policy creation is demonstrative, at least in part, of an attempt to prevent any further alienation of the public.

In the debate over the 1987 Criminal Justice (Amendment) Act, which contained all of the alterations promised by Palmer, the National Opposition did not dispute the necessity for the toughening of sentencing legislation. Instead it maximised the utility presented by the newfound prominence of the law and order issue. Its unifying nature allowed the Opposition to present a cohesive front despite their own suspicion *at that time*, even though a conservative party, of neoliberal restructuring. The debate perhaps marked the beginning of the crime control political consensus, and the subsequent one-upmanship between New Zealand's two main political parties: when the Labour Government proposed greater crime control provisions and harsher sentencing in the Act, National argued that they were not tough enough, and that more severe provisions were necessary. For example, in 1987 the Opposition unsuccessfully attempted to introduce Victims' Rights legislation to parliament, creating a dichotomy that presented National as victim-focussed and caring, and showed the Labour Government to be uncaring (Pratt and Treacher, 1988). The political debate surrounding crime control became a single sided competition between the main parties to appear the toughest on controlling those violent and sexual criminals threatening the security and safety of individuals within New Zealand society.

The amendments within the 1987 Act extended the scope of preventive detention, as Palmer's proposals had promised. Preventive detention had applied to a limited range of serious sexual offenders as specified in the 1985 Act, and the 1987 amendment expanded the sentence to also include a number of serious violent crimes. The promise of a lower age of eligibility was also fulfilled, with the minimum age

dropping from 25 years to 21 years, while the minimum term of the sentence was increased from seven to ten years (s93, Criminal Justice (Amendment) Act 1987). The 1987 legislation thus marks an important part of the revival of the preventive sentence, as it was no longer necessary that the offender be ‘habitual’ – only that they pose a future risk of being so labelled, with Brookbanks (2013: 89) arguing that concern over the length of an offender’s history of convictions was replaced by ‘official concern for its gravity and repetition’. This change is also broadly representative of the shift away from sole consideration of the events of the past, to preoccupation with the risks in store in the future. Though the government was clearly increasing the reach and power of preventive detention through legislation, the sentence was still considered very exceptional at this point. Even after the 1987 amendment, it was not considered a central part of the criminal justice system. It was not until 2002 that the use of the sentence significantly increased, and it could be identified as a more ‘normal’ part of the criminal justice system (Department of Corrections, 2015).

Nonetheless, despite its peripheral status, the government clearly saw an important place for preventive detention in the criminal justice system, not only ignoring the 1981 expert recommendation to abolish the sentence, but expanding the application of the sanction just a few years later. Now it was recognised that the unavoidable risk of irreparable damage to vulnerable members of the community was impossible to insure against, specifically the effects of violent and sexual harms. As we have seen, recognition of such risks beyond the ability of individuals to insure themselves against had gained increasing prominence during the 1980s. Women and children were seen as particularly vulnerable to such risks. Though new laws protected women

from familiar harms such as sexual harassment in the workplace, and marital rape – they were not protected from the unavoidable risk posed by the sexual predator lurking in public space.

Similarly, children occupied a new and precious space. The scarcity of children, combined with the unique surety of the bond between a parent and a child within a world of uncertainty, gave children a new and increased value. By the end of the twentieth century, the sexual molestation of children had also come to be widely understood as causing lifelong damage (Royal Australian and New Zealand College of Psychiatrists, 2016). This could include a range of psychiatric effects, including greater likelihood of depression, anxiety, post-traumatic stress disorder, eating disorders, suicidal thoughts, and substance abuse, as well as atypical sexual behaviours and sexual aggression (Royal Australian and New Zealand College of Psychiatrists, 2016). In addition to the innate and ultimate preciousness of the child, these effects have made the thought of the child molester, ready to violate their purity in a world where purity has become tainted in so many other aspects of society, all the more intolerable.

As such, the retention of preventive detention had become an opportunity for the government to intervene and make its ‘spectacular rescues’ from such risks (Pratt and Anderson, 2016: 12). The protection of its most vulnerable members of society from such dangers has been reclaimed by the state as part of its mandate.

Monsters in the Media

Shocking cases involving violent sex crimes against women and children occurred throughout the 1990s in New Zealand, and their impact on the wider community was exacerbated by sensationalism in the media. As seen, the 1989 Broadcasting Act deregulating the airwaves, had the result of both allowing more (private and/or satellite) television channels, which also lead to TVNZ establishing a tabloid style of news reporting, given that it was now compelled to compete for an audience and advertising with its rivals. The result was that cases of serial rapists and child molesters were not just documented on the national news and in newspapers; these offenders were turned into monsters by the media, with considerable discussion of their background and the details of their offending, how they must now be tamed, and what the government was prepared to do to protect its most vulnerable citizens from them.

During the 1990s, New Zealand seemed to be plagued by an unusually high number of high profile sex offenders at large. The media tended to sensationalise these cases, and utilised monikers in this process. Serial rapists were dubbed with threatening names: Malcolm Rewa, convicted of a series of rapes in 1998, became the ‘Parnell Panther’; Joseph Thompson, convicted of a series of rapes in 1995, became the ‘South Auckland Serial Rapist’. The comprehensive coverage of these offenders contributed to the anxiety and insecurity of individuals, and in particular enlarged the perception of the risk of the predator lurking in public space.

Perhaps the best example of the media creating and exacerbating public anxiety, though, has been the case of Stewart Murray Wilson. The aforementioned myriad of sexual and violent crimes for which Wilson was convicted in 1996 were targeted by

the media. The construction of Wilson's image as a kind of 'frenzied sex beast' began in the wake of his trial in 1996. Because the dubbing of Wilson as the 'Beast of Blenheim' would not occur until after Wilson's conviction, the coverage in the major New Zealand newspapers throughout the duration of his trial were comparatively mundane. It was the media coverage of the 'Beast' case immediately following the announcement by the Department of Corrections of Wilson's impending release in 2012 that saw an excessive, hysterical response from New Zealand's print media in particular. With a regular series of articles, often multiple accounts in one newspaper, chronicling the developments and reactions to Wilson's pending release, the local and regional newspapers maintained sensational coverage of the case throughout the six months between the announcement of Wilson's release in September 2012 and his recall to prison in February 2013. Of the articles published in *The Dominion Post* regarding Wilson's release and its implications, 53 per cent had the term 'Beast' in the headline. Of the articles published within the period between the announcement of Wilson's release to Whanganui in August 2012 and the release itself four weeks later, 56 per cent provided detailed repetition of the nature of Wilson's offences and the details of his sentences. The hysterical response of the press would indicate, as Judith Baxter (2012) wrote, 'he will never be free from the title "The Beast" – the news media will make sure of that'.

The case of Jules Mikus, who was convicted in 2002 of the 1987 rape and murder of six year old Teresa Cormack, was also accompanied by shocking articles and headlines in New Zealand newspapers, which chronicled his life and gave lurid details of his crimes. Caught and convicted based on DNA evidence fifteen years after the crime occurred, his conviction was followed by headlines such as 'The Making of

Predator Jules Mikus’ (The New Zealand Herald, 2002). The media coverage of sex offenders and their crimes has served to sensationalise information and incite public fear and anxiety. More recently, the announcement of the release of Ronald van der Plaats, who infamously kept his daughter as a sex slave for 23 years in his Te Atatu home, has been accompanied by media commentary including ‘High-risk crim returns to scene of his crime’ (Braunias, 2016), ‘One of New Zealand’s worst child sex offenders will be released back into the community he offended in’ (Cowlshaw, 2016).

The sensational coverage of the actions and exploits of these sex offenders enhances the sense of risk within our society. With the visibility of women and the scarcity and value of children had come a consequential vulnerability. The ubiquity of the fear of sex offenders is demonstrated in the discussion of ‘predators’ within parliamentary debate. The power of the view that predators were lurking in the community, impossible to avoid, has been strengthened by the supporting statements of Members of Parliament. Within the Second Reading of the Crimes Amendment Bill 2011, then Minister of Justice Simon Power (2011) stated that ‘there must be adequate provision in the law to hold those who inflict serious offending against the most vulnerable members of our community’ – the offenders to whom Power referred had been detailed in the House in many debates. During the Second Reading of the Crimes (Intimate Covert Filming) Amendment Bill 2006, National Member Sandra Goudie (2006) explained the impact of technology on the modern sex offender, turning ‘the general concept of a peeping Tom into a far more menacing predator’, while Green Member Catherine Delahunty (2015) explained during the Third Reading of the Publication Classification Amendment Bill 2015 that action needed to be taken to

‘change the sickness in a society that objectifies women and children, and makes them vulnerable to predators.’ Debate in parliament has also served to perpetuate myths and fears about the ‘predator, with a Member suggesting during the In Committee phase of the 2010 Sentencing and Parole Reform Bill the fear that ‘a child who is raped at the age of five by his father may indeed turn out to be a sexual predator at age twenty five’ (Cosgrove, 2010). Oral questions about predators are also relatively common, with accusatory undertones that signal the continuity of the crime control one-upmanship over time. New Zealand First’s Ron Mark (2004) asked of the Minister of Corrections whether an offender ‘described as a predatory paedophile, [was] on home detention at the time that he raped, sodomised and sexually molested three young girls?’ National Member Anne Tolley (2007) inquired how ‘yet another teenage sexual predator on a 24-hour-a-day supervision from Child, Youth, and Family is escaping from his minders and playing with neighbourhood children?’ The existence of such frank discussion of the nature of sexual predators in New Zealand society by Members of Parliament shows the ubiquity of concern about the risks they pose, as well as the deep fear of the lurking sexual predator, free to roam in public space.

The media have created monsters out of particular sex offenders, and have more generally ensured that silhouettes of these lurking predators aggravate insecurities within New Zealand society. It has also ensured that ‘sexual predator’ has become an established feature of public and political discourse. Even Members of Parliament have perpetuated fear and exacerbated anxieties around the dangers of public space, and the risks that the most vulnerable members of society are exposed to when they go out in public.

A Central, Rather than an Exceptional Sentence

In such ways, not only the need for preventive detention, but much wider use of this risk control measure, come to be firmly established. Legislative amendments to preventive detention throughout the 1990s continued to remove the restrictive conditions built into the policy in order to minimise its use in the past. With each amendment, the applicability of preventive detention was expanded. The first major amendment to preventive detention after the 1987 Act was the 1993 Criminal Justice (Amendment) Act. The Act removed the statutory requirement of a previous conviction for offenders convicted of sexual violation (Criminal Justice (Amendment) Act 1993). In lieu of the requirement of a specified previous conviction, the court could now impose preventive detention on a first time offender when they had a psychiatric report confirming that the offender posed ‘substantial risk’ to commit a specified offence upon release (s75, Criminal Justice (Amendment) Act 1993). In addition, the ten year minimum term that had been increased in the 1987 legislation could be altered on recommendation from a judge, provided that the judge was satisfied that a longer minimum term was justified (s80, Criminal Justice (Amendment) Act 1993).

A judicial review of the use of preventive detention was thus undertaken by the Court of Appeal regarding its use in the 1997 *R v Leitch* case. The Report of the Court of Appeal (Coleman et al, 1998: 29) stated that the reason for the review was simply that it was ‘considered timely’. The review produced a list of factors that were relevant to the protection of the public, to assess the risk of reoffending: ‘the nature of the

offending, its gravity and the time span; the category of victims and the impact on them; the response to previous rehabilitation efforts; the time elapsed since any previous offending and the steps taken to avoid reoffending; acceptance of responsibility and remorse for the victims; predilection or proclivity for offending taking account of professional risk assessment and the prognosis for the outcome of available rehabilitative treatment' (*R v Leitch*, 1998: 429). The review summarised that the decision to impose preventive detention was at the discretion of the sentencing court, and that the *protective purpose* of the sentence must be considered – whether the necessary protection could be provided by a finite sentence, or whether the flexibility of an indefinite sentence would provide the necessary protection (*R v Leitch*, 1998: 430).

Meanwhile, there has been a marked increase in the frequency of use of the sentence between 1987 and 2001, during which period preventive detention was imposed, on average, nine times per year. The general increase cannot be directly attributed to the specific changes created in preventive detention legislation, as only 7.5 per cent of offenders handed preventive sentences during this period were under the age of 25, and only two received the sentence for violent offences (Ministry of Justice, 2001: 25-26). Though the increase was not the direct effect of legislative change, the intertwined nature of the law and order climate in New Zealand and the paramount importance of protecting women and children from those who would violate their wellbeing, seem certain to have had a broader impact on judicial decision making, thereby likely increasing the frequency of the use of preventive detention (Hurd, 2008).

What had also contributed to the paramountcy now given to the need for the criminal justice system to provide protection from such risks, was the 1993 change in the New Zealand electoral system. Before this time, New Zealand had functioned using the First Past the Post system, which critics decried as fostering what Palmer (1990) called an 'elective dictatorship', but even more to the point, the system had led to effective power sharing between National and Labour, both of which were now seen as gravely undermining New Zealand's social cohesion (Pratt and Clark, 2005): both had been tainted by the introduction and enhancement of neoliberal restructuring when in government. The 1993 Electoral Act established a more 'representative' electoral system in New Zealand in the form of Mixed Member Proportional representation. The Act was complemented by the Citizens Initiated Referenda Act 1993, which established citizens initiated referenda as part of this more representative system. This significant change to the political system is particularly pertinent within the environment of declining trust and support for the government. As Pratt (2007) argues, the decline in deference for the state caused the public to become increasingly prepared to participate in the system themselves, or at least to support those politicians, or extra-parliamentary individuals or organisations who claimed to speak on their behalf, and have their say in order to generate the change they viewed as necessary to protect their fragile society. The public did not trust politicians to make these changes, and the Electoral Act provided an avenue for this public participation.

In 1999, the first such direct opportunity for public participation arose when New Zealand held a law and order referendum in conjunction with the general election. For the first time since the establishment of citizens initiated referenda three years earlier, the ten per cent quota had been reached. Following an attack by an intruder

that had left his pensioner mother severely injured, Christchurch Councillor Norm Withers had organised the collection of the signatures of ten per cent of New Zealand's eligible voting population in support of a referendum on justice. The referendum asked voters '[s]hould there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them, and imposing minimum sentences and hard labour for all serious violent offenders?'. The question itself was written by leader of the Christian Heritage Party Graham Caphill (later convicted under the resulting 2002 Sentencing Act for sexual offences against young girls and sentenced to nine years imprisonment)). Notwithstanding the confusing and ambiguous nature of the question, the response was overwhelming, with over 92 per cent of voters expressing agreement. The 1999 referendum and the resulting legislation serves as an illustration of the consequences of the removal of penal policy from the hands of experts. The 1999 referendum has been the only non-binding referendum to be followed by the government since they were created in the 1993 Electoral Act. Out of this referendum, provisions within the Sentencing Act 2002 were formed specifically in response to the issues addressed by the question it poses. The 2002 Act demonstrated a deliberate shift toward protecting public safety as the primary motivation for crime policy. Labour were eager to lead the coalition to a replication of the success of New Labour in the United Kingdom, with their 'tough on crime, tough on the causes of crime' mantra (Pratt and Treacher, 1988). In passing this legislation, the Labour Government was still establishing itself as being 'in control' of law and order, and being further prepared to make public protection from future risk a central feature of this.

The scope of preventive detention was thus extended once again in the 2002 Sentencing Act. This increased the number of qualifying sexual and violent offences; removed all requirements that an offender must previously have been convicted of a qualifying offence; lowered the age of eligibility once again from 21 to 18 years; and lowered the minimum sentence term from ten to five years. The minimum term reduction at first appears to deviate from the general trend of making the sentence more severe, however the court was charged with ensuring that the minimum term both reflected the gravity of the offence, and to consider the risk posed by the offender in order to impose a minimum term that would adequately protect the safety of the community (s89, Sentencing Act 2002). The act also served to codify the findings of the 1997 *R v Leitch* judicial inquiry: that in cases where a finite sentence that is suitably adequate cannot be agreed upon based on ordinary sentencing principles, then consideration of a sentence of greater severity, such as preventive detention, is warranted (Coleman et al, 1998). The Sentencing Act served to meet the proposals of the 1999 referendum in combination with the Parole Act. The Parole Act 2002 (s28) required that once the offender has served their minimum term, the Parole Board must then undertake a risk assessment investigation. Release can only be granted once the board is satisfied that an offender sentenced to preventive detention poses no further 'undue risk' to the community. In addition, following release, that offender would be subject to parole conditions which would include the lifelong possibility of recall (s6, Parole Act 2002). The lifelong possibility of recall extends the reach of preventive detention to be truly indefinite, punishing offenders for their potential risk forever.

Amendments to parole laws continued throughout the 2000s, generally promoting longer sentences for all offenders on custodial sentences. While the 2007 Parole

Amendment Act did not alter preventive detention, the 2010 Sentencing and Parole Reform Act markedly increased the severity of the sentence for serious violent and sexual offenders. The 2010 Act added a condition to the standard minimum sentence length of five years for offenders on preventive detention who have committed serious violent and sexual offences, stating that the minimum term of imprisonment should be equal to the finite sentence the offender would otherwise have received, unless the court deems that length to be manifestly unjust (s86, Sentencing and Parole Reform Act 2010). Furthermore, the National led coalition government integrated preventive detention into their proposed 'Three Stage system' which serves as the New Zealand reproduction of the Three Strikes laws found in the United States. Though preventive detention was not compulsory at the 'third stage', the legislation enabled it as an option, providing an illustration of the way in which risk driven and punitive driven policy can intersect.

During the parliamentary debate of the 2010 Sentencing and Parole Reform Bill, support for continuation and expansion of preventive detention was expressed. The National Government had proposed the Bill, and Minister of Corrections Judith Collins explained the relationship between her Three Stage regime and preventive detention. National Member Melissa Lee (2010) supported the provision and verified what had become the political consensus for the need to ensure that preventive measures were in place to control otherwise intolerable risks: 'everyone in the sector, even the most liberal person, accepts that there are some criminals who should never get out of prison, and this legislation will ensure that'. During the In Committee stage of the debate, Labour Member Chris Hipkins (2010) also voiced support for preventive detention, explaining that Labour had also expanded the sentence during

their term in order to ‘make the public safer’. The lack of consideration of expert opinion, overwhelmingly to the contrary to what the government was trying to do, and any critical analysis of the impact of penal policy is clear throughout the 2010 debate. But what is also clear is the impact on public and political discourse of both the national media and extra-parliamentary populist organisations such as the Sensible Sentencing Trust, in affirming the legitimacy and wider use of preventive detention.

Their enthusiasm relates to the way in which preventive detention seems to provide insurance against the risk of irreparable harm in the future, while contributing to a tough law and order platform for the government, and satisfying the public anxiety around violent crime. The New Zealand government has become willing to pass legislation expanding preventive detention and other sentencing policy in order to appease the public, to quell uproar about risk management, and to monopolise on the political capital that can be gained through manipulation of the law and order issue.

Throwing Away the Key

The renaissance of preventive detention has been accompanied by a range of other measures designed to offer protection from risk. It is impossible for the individual to insure against the risk of random attack by dangerous people, and the sentencing measures taken by the government throughout the period since the 1980s reflect a willingness to ensure public safety at this extreme point – the ‘spectacular rescue’. However, the legal position of some of these measures has been complex and dubious,

due to conflicts with the aforementioned justice principles, as well as human rights legislation like the Bill of Rights Act 1990.

One such complex and dubious measure, the Public Safety (Public Protection Orders) Act 2014, seeks to protect the public from the imminent offending of violent and sexual offenders who are due to be released from prison. Under the Act, despite having served their sentences, offenders deemed to be dangerous would be liable to further, potentially indefinite detention by the state. The intention of the Act, as stated within the legislation, is for dangerous subjects to be detained by the state until they no longer posed a risk to the public, therefore ensuring ‘protection’ (Public Safety Act, 2014). The detention of individuals under Public Protection Orders would very closely resemble imprisonment, and could potentially be implemented within a prison. The detainee, while technically not subject to punishment in accordance with the Act, would nevertheless be subject to searches, drug and alcohol testing, controlled visitation, monitoring of all communication, and other restrictions within their ‘residence’ (Public Safety Act, 2014). Upon the determination by a Corrections delegate that an offender under a Public Protection Order no longer poses a significant threat of violent or sexual offenses to the public, the Parole Board would manage their reintegration, which would begin with an Extended Supervision Order.

With particular reference to section 26(2) of the New Zealand Bill of Rights Act, the Law Society (2013) argued that provisions within the Bill effectively amounted to ‘double punishment’. The United Nations Human Rights Committee also stated that policies like this, that amount to retroactive increases in sentence are unjust, and that no state should ‘impose equivalent detention under the label of civil preventive

detention’ (Human Rights Committee quoted in New Zealand Law Society, 2013: 3). Prestigious domestic and international institutions denounced the Public Safety Bill as inconsistent with human rights conventions and the New Zealand Bill of Rights Act. Nonetheless, the Bill was passed into law in 2014, adding a third option to the range of risk driven indefinite sentencing measures. In these respects, it seems that the previous ways of thinking about punishment that took regard of the need to protect individual rights from the state’s penal extremes have, with each case and legislative change, been eroded. Today, protecting the public from those individuals who might otherwise put them at intolerable risk, is the absolute priority, and the safeguards that had limited the application of preventive detention in the past no longer exist.

Ultimately then, far from approaching extinction, preventive detention has thus been revived in New Zealand legislation since 1985. The consequences of the ‘uncaging of risk’ (Pratt and Anderson, 2016: 9) have enabled the series of legislative amendments and new legislative action around preventive detention and similar risk driven measures. With the newfound freedom available to New Zealanders following the neoliberal reforms of the 1980s, individuals had greater mobility and potential than ever before. The positive opportunities provided by the policy overhaul of the 1980s should not be overlooked; however, consideration of the negative consequences is paramount in the discussion of the rise of preventive detention over the last three decades. The delegation of risk management to the individual, and the general withdrawal of the state from its previous role as protector created anxiety throughout the community. The response of governments to such anxieties has been to perform ‘spectacular rescues’ in order to demonstrate that it is still able to impose

its authority, control the gravest risks, and thereby strengthen social cohesion (Pratt, 2015:12).

Nonetheless, the renaissance of preventive detention since the 1980s brings into question the very foundations of New Zealand's justice system. New Zealand's preventive detention policy flouts the foundational principles of justice, violates domestic and international precedent, as well as the United Nations Convention for Arbitrary Detention. The erosion of cardinal justice principles demonstrated through the revival of preventive detention since the 1980s shows a concerning willingness of the New Zealand government to sacrifice its doctrines for the sake of public safety and appeasement. This brings into question the extent of the government's willingness to disregard its own tradition and regulation, whether it is for the sake of public safety, or some other justification: where does it end? What has become clear, is that the renaissance of preventive detention is representative of a new and separate strand of penal policy development, driven by risk, and with a newfound power to bypass precedent, international law, and principles of justice.

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