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Is Criminal Justice Politically Feasible?

Philip Pettit

One of the most striking features of contemporary democracies, developed and developing, is that they organise criminal justice — in particular, the system for penalising convicted or confessed offenders — in a way that answers to no particular rationale or mix of rationales: no determinate ideal as to what it should be trying to achieve. Not only is this true at the moment, indeed. It has been true since criminal justice systems were first systematically developed under the control of central government. Of all the features of social organisation, criminal justice has proved the most resistant to the effect of reasoned deliberation and discussion about the nature of the good society and the good polity.

Is the criminal justice system designed for the reduction of crime, for example, as a principal rationale suggests? If so, the bulk of criminological evidence suggests that it is not well fitted to that purpose. 'No clear relationship exists internationally between levels of crime and the prevalence of official punishment' (Gordon 2001, p.2958). Is the system supposed to rehabilitate offenders? If so, it fails on that score too: by all accounts prisons remain arenas of abuse and domination, not institutions of reform. Is the system meant to protect society from dangerous offenders? If it is, then it is guilty of serious overkill, since most of those incarcerated are not a particular threat to anyone. Is it intended to distribute penalties in a pattern that is proportional to the offences and that makes for retributive justice (Von Hirsch 1993)? If so, it is unclear why it shouldn't go for lesser penalties, not harsher ones. But is it meant, perhaps, to deliver an eye for an eye, a tooth for a tooth, as in the lex talionis? Even then, it doesn't look too good, for there is evidence in few societies of a systematic fit between punishment and crime.

Not only does the criminal justice system not fit any of these traditional rationales, it cannot be represented even as an attempt to meet any plausible mix. Nor, even more clearly, does it fit any of the recent, softer rationales (Braithwaite 1989; Braithwaite and Pettit 1990; Pettit 1997). If it is supposed to put the effects of crime right, for example, communicating censure to the offender and providing some compensation

or satisfaction for the victim, the degree of failure is grotesque: few victims are compensated in criminal law and few offenders are treated in a manner that communicates anything other than disdain and dismissal.

I take these claims here as granted, rather than trying to support them by reference to the literature of empirical and normative criminology. I can think of no philosophy of criminal justice that would regard existing systems as adumbrating or approximating the ideal it endorses, short of the purely punitive philosophy of making life unpleasant for offenders. On the assumption that criminal justice systems fail to live up to any of the established rationales for their existence, I want to ask after why this might be so and what, if anything, might reduce their resistance to the effects of systematic, reasoned discussion.

My paper is in three sections. In the first, I describe a dynamic in policy-making that was first identified by nineteenth century studies of the rise of the administrative state — I call it the outrage dynamic — and I show how this force also operates in the case of crime. In the second section, I look at the upshot of this dynamic for criminal sentencing policy, arguing that it makes it difficult for democratic politicians to enact or maintain any policies, no matter how well argued or successful, that routinely fall short of what by cultural standards are the maximal, acceptable sanctions. It may be no surprise that undemocratic societies do badly by criminal justice in this way but I hope it will be useful to see that there is something about democracies that militates against reasoned policy-making. Finally, in the third section I identify one institutional arrangement that might make it politically feasible to shape the penal system by reasoned debate. I pin my hopes on the possibility of putting this sort of arrangement in place, for short of achieving it I am very pessimistic about the prospects for a decent system of criminal justice.

1. The outrage dynamic in sentencing policy

In order to make sense of why penal systems have resisted reform in the direction of any of the existing ideals of criminal justice, we need a model of the crucial factors in

play. In this section I describe a model introduced by the historian, Oliver Macdonagh, in his explanation for the rise of the administrative state in nineteenth century Britain and then I go on to demonstrate how that model can be used to make sense of the resistance of the penal system to change. To show that the model would make sense of this resistance is not to establish definitively that it applies, of course, but it does provide powerful evidence in its support.

The outrage dynamic

In a seminal article on the growth of administrative government in the last century, MacDonagh developed a novel explanation of why the British government sponsored the dramatic growth in regulative legislation and regulative agencies, especially in the period between 1825 and 1875 (MacDonagh 1958; see too MacDonagh 1977 and Braithwaite 2000). The policy initiatives with which he was concerned introduced a regulative machinery to govern matters as various as public health, factory employment of children, workplace safety procedures, the condition of prisons, and the ways in which people were treated on emigrant ships. He argued that we could find similar elements at work in the generation of policy in these different areas and that we could identify more or less the same stages in the evolution of such policy.

In each area there is an evil to be dealt with by policy, usually an evil associated with the industrial revolution and the results of that revolution for the organisation of social life. And then three elements come into play in sequence. First, this evil is exposed, usually in the more or less sensational manner of the developing 19th century newspapers; the exposure of the evil may be triggered by some catastrophe or perhaps by the work of a private philanthropist or fortuitous observer. Second, the exposure of the evil leads to popular outrage; this outrage connects with the increasing humanitarian sentiments of people in 19th century Britain, sentiments in the light of which the evil appears as intolerable. And third, the popular outrage forces government to react by introducing legislative or administrative initiatives designed to cope with the evil; this reactiveness of government is due, no doubt, to the increasingly democratic character of 19th century British government.

Exposure, outrage and reaction: these are the elements that play a crucial role in the MacDonagh model. The role they play becomes salient as we look at the different stages distinguished in a typical process of evolution. I now describe those stages, though not exactly in the terms presented by MacDonagh himself.

In the first stage of evolution some evil is exposed, this leads to popular outrage and the government of the day responds by some change in the law.

> Once it was publicised sufficiently that, say, women on their hands and knees dragged trucks of coal through subterranean tunnels or that emigrants had starved to death at sea, or that children had been mutilated by unfenced machinery, these evils became ‘intolerable’; and throughout and even before the Victorian years 'intolerability' was the master card. No wall of either doctrine or interest could permanently withstand that single trumpet cry, all the more so as governments grew ever more responsive to public sentiment, and public sentiment ever more humane. The demand for remedies was also, in a contemporary context, a demand for prohibitory enactments. Men’s instinctive reaction was to legislate the evil out of existence(MacDonagh 1958, p.58).

The first stage of evolution, described in this quotation, involves a popular scandal and a legislative response. The second stage identified by MacDonagh also involves a popular scandal, but one that is followed in this case by an administrative response. The scandal arises when, a number of years after the original legislation, it is discovered and revealed that the original evil remains more or less as it was. Again there is public outrage and again the government responds to this. But the response now is to appoint some individuals to look into the evil and to investigate how it may be remedied. The response, in short, is administrative rather than legislative.

If the first two stages are characterised by popular scandal, the next two are characterised by surprise on the part of the administrative experts appointed to look into the evil. At a third stage these experts come to realise that the original law was inadequate. They recommend amendments to the law, and they recommend a variety of administrative changes, usually involving a drift towards centralisation. The administrative changes require the systematic collecting of data on the problem, the

appointment of officers required to monitor that information, and so on.

The fourth and last stage that we may identify in MacDonagh's evolutionary description involves a second phase of expert surprise: a surprise, this time, at discovering that even the amended law and amended administrative arrangements have not adequately coped with the original problem. The response now is to recognise that the problem cannot be eradicated by a single, once for all legislative or legislative-cum-administrative response. It requires the putting in place of a regulative bureaucracy, concerned with monitoring, reviewing and intervening in the activities where the original evil arose. The evolution is complete. We now have rule by professionals and the appearance of a new area of bureaucracy.

MacDonagh originally introduced his model of the growth of government as an alternative to the view that the changes were driven by an overarching, commonly accepted ideology such as utilitarianism. What he characterises is an outrage dynamic in the formation of public policy. He does not say, nor need we judge, whether the changes introduced in the 19th century made, in the end, for more good than harm. If we think that they were changes for the good, then we will say that MacDonagh describes an invisible hand whereby they emerged. If we think that they were for ill, then we will say that he describes an invisible backhand or, as it has also been called, an invisible foot. In either case we will say that he shows us how a certain novel set of arrangements, a novel order in things, came about without being designed by any individuals or organisations.

The outrage dynamic in criminal justice

There are three crucial requirements in a society where the outrage dynamic is to work. First, that the society in question is literate or at least has access to channels of communication whereby exposure of an evil can be broadcast. Second, that the society embraces values such that people will generally be outraged by the evil in question: in the case discussed, broadly humanitarian values. And third, that the society is democratically organised in such a way that politicians are going to be required, on pain of electoral sanction, to respond in a more or less persuasive way to

the outrage. Wherever these conditions are satisfied it is going to be possible for an outrage dynamic like that which MacDonagh describes to operate.

I believe that the dynamic is at work in a variety of different areas in contemporary democracies, and indeed elsewhere as well. I have argued in another paper, on which I have drawn for the above account, that the rise of ethics committees for the approval and control of academic research on human subjects has been generated by just such a dynamic (Pettit 1992). There was a sequence of scandals in such research throughout the twentieth century, as one evil after another came to be exposed. These led in each case to popular outrage and governmental reaction. At a first stage the reaction gave rise to a call for codes of ethics to be established by different professions and later to the legislative imposition of codes, and eventually the establishment of formal ethics committees in each research institution.

The interest of the outrage dynamic for us, however, is that it offers a useful perspective on the pressures to which policy-making about criminal justice is subject: pressures under which penal policy has been made in the past and pressures that continue to shape penal policy today. Any crime, certainly any crime involving harm to persons, will constitute an evil by the lights of most people in a society. And the elements of exposure, outrage and reaction are poised in the case of such criminal evil — especially in the case of criminal evil that is in any way out of the ordinary — to release the dynamic we have described.

Exposure is ready to operate, because the media in contemporary society have a particular incentive to home in on any newsworthy crime, particularly any crime of a shocking variety. It makes for an increased readership of newspapers and an increased audience for the electronic media. Tapping into people's voyeuristic and condemnatory appetites, as the sensational media routinely do, is a sure way of attracting their attention.

There is an interesting contrast with the motive to exposure in this case and the motive in the case described by MacDonagh. There it required the philanthropic dedication of the humane society, or the investigative drive of a determined reporter. Here in this case it requires, not that sort of moral or professional commitment, but

merely an interest in maximising readership or audience on the part of media executives.

As exposure is poised to occur with any criminal evil, or at least with any that is out of the ordinary, so outrage is also available on demand. For there is a powerful and praiseworthy instinct in all of us to feel indignation and anger at anyone who is seen to do harm to an innocent victim, in particular a victim with whom we identify. The point needs no labouring. Let criminal evil be exposed in the media, especially with the vivid impressions that can be created in contemporary television, and there will be no shortage of popular outrage.

We noted the striking difference between the motive to exposure in the case of crime and the motive in the case described by MacDonagh. There is an equally striking contrast between the outrage in this case and the outrage in MacDonagh's. Where the outrage that emerged in response to stories of child labour and factory conditions was driven by essentially humanitarian values — values that we all think require nurturing — the outrage that is prompted by the exposure of ciminal evil is comparatively instinctual and basic. It is the sort of response that calls naturally for vengeance to be wrought on the agent who harms another.

The third and final element in the outrage dynamic is the reaction of the public authorities to the popular outrage engendered by the evil exposed. And this too, of course, is always there to be elicited in the case of crime. The first essential in those who are to gain or retain a position of voluntarily supported leadership in any group of people is that they maintain credibility in claiming to speak for how the group feels and thinks. And if the group is already aroused to a high pitch of feeling in relation to a particular crime, then the only way the authorities can maintain credibility — especially within the constraints of the television soundbite or the newspaper headline — is to reflect that feeling in equal or enhanced measure. They will have to react to the popular outrage by showing themselves to be at least as outraged as the general run of people— and to be determined, with the resources at their disposal, to do something about it.

In the case described by MacDonagh, the thing to be done was always

essentially instrumental in character: what was needed, and what was called for, was an expansion of governmental inspection and control that would eradicate or reduce the evil identified. In the case of crime, however, there is a further contrast with that original paradigm of the outrage dynamic. For what is naturally demanded in the first place is an act that will serve to express the public horror and revulsion at the crime committed: an act that will show what the society thinks of what was done. The act need not serve any instrumental purpose, so long as it effectively decries the deed and denounces the doer.

This being the case, it is clear that elected politicians will have little choice in responding to outrage over a crime but to call for a level of sentencing that will give satisfaction, by local cultural standards, to that sense of outrage. The routine response, then, will be to announce a determination to establish tougher sentences or, in the event that sentences are already at a maximum, to call for stricter policing or greater efforts to apprehend the offender.

What will it be for sentences to be at a maximum? The maximum will be set relative to the standards that determine when people will be generally satisfied that an offender has suffered enough for what they did; their thirst for punishment, as we might put it, will be sated. Those standards will be cultural variables, of course, and will be variables even in the case of capital punishment. Such punishment is the maximum for certain crimes in many societies today but none of those societies would now countenance past practices like burning offenders alive, torturing or maiming the offender prior to execution, or quartering the body after death.

2. The effect of this dynamic

The resilience of heavier sentencing

The upshot of this set of observations is not that we should expect to find in the case of crime the sort of staged development that MacDonagh identified in the rise of the administrative state. But it is something close. What we can expect to find is that in areas of crime that are exposed to media attention, heavier sentencing — that is, sentencing that approaches the cultural maximum — will tend to predominate and endure, even in face of attempts to reduce it. Heavier penalties will be resilient, lighter

penalties will be fragile.

Consider what is likely to happen in societies that resemble contemporary democracies in relevant respects, including cultural ones, but that start from different points in the spectrum of penalties for different crimes: in particular, for the sorts of crimes that will naturally attract media attention. With a society that already has culturally maximal penalties for those crimes, the reaction dynamic will serve to keep the penalties at that level. And with societies where the penalties fall short of that maximum, it will serve to push the penalties towards the maximum, as crimes are exposed, outrage generated, and politicians called upon to establish that they are in touch with the feelings of their constituents.

I do not say that the outrage dynamic will prevent occasional initiatives in the reduction of sentences. There was a period in the mid twentieth century when criminal penalties were reduced in a number of western societies, prison conditions were improved and opportunities for parole were increased. And I do not say that such initiatives will always be reversed; in some areas of crime they may be more or less insulated from media attention, say because of legal restrictions on naming juvenile offenders. But I do think that wherever the outrage dynamic can get a grip, it will tend to drive sentences back towards the cultural maximum.

The reasoning is easily explained. No matter how good the average, comparative statistics in any period of reduced sentencing, there is bound to be a crime committed sooner or later that would not have been possible had the sentencing remained at earlier levels. And that very fact will prompt the exposure of the crime in the media, the emergence of popular outrage, and the political reaction of calling for a return to earlier, tougher policies. The outrage dynamic is bound to be there, ready to reverse any leniency. Thus it should be no surprise that the more lenient policies of the mid twentieth century were brought under heavy pressure and have generally given way to distinctively punitive measures.

A salient example of how the dynamic can work is associated with the second public debate between the candidates in the 1988 campaign for the presidency of the United States. As governor of Massachusetts, Michael Dukakis had maintained a

regime of of comparatively lighter, criminal sentencing than was common in other States. Despite the fact that the crime figures for Massachusetts compared favourably with those elsewhere in the U.S., he came under severe criticism — and arguably lost the initiative in the election — when his opponent, George Bush, drew attention to a particular, heinous crime that the more lenient measures had made possible; this was committed by Willy Horton, a prisoner on furlough under a Massachusetts State program. Dukakis was readily presented as soft on crime, and became an object lesson to politicians the world over. The message was: never allow yourself to be upstaged in the expression of popular horror at criminal acts; always stay at the front of the pack that bays for revenge.

Couldn't Dukakis have argued harder and more effectively to give the message that his policies worked well in the aggregate — better than harsher policies elsewhere — and that he shouldn't be judged by particular, deeply regrettable cases? Probably not. It is now well-established in social and cognitive psychology, that vivid examples weigh disproportionately in people's judgments and that as a species we are not very good at letting aggregate statistics have their proper effect on the opinions we spontaneously form (Tversky and Kahneman 1982). The point comes out in this report of the campaign. 'The Horton instance was atypical of the Massachusetts furlough program. In fact, it had a 99.9% success rate. Reporters used descriptive language to analyze the Horton story. Dukakis' rebuttal came in the form of statistics and abstract concepts. Compared to the visual, personalized fear of Horton, the American public vividly remembered that a convicted black man brutally raped a white female,and attacked her fiance while out on furlough, not that the circumstances were unusual, and specifically chosen.' (See http://www.kennesaw.edu/pols/3380/pres/1988.html .)

The function of heavier sentencing

If this line of reasoning is right, then the outrage dynamic ensures in the areas where it can get a grip that heavier sentencing is the only stable equilibrium. Let there be a departure from that level of sentencing and, sooner or later, it will tend to be reversed. Heavier sentencing will be like an attractor that drags sentencing policy in its direction — at least with crimes that attract media attention — and that does so, even

in face of an intention on the part of policy-makers to shape sentencing to a systematically justified rationale.

The language of equilibria is common in economics and is naturally available here to characterise the explanatory power of the outrage dynamic. But it is worth mentioning that where the dynamic is at work, we can also describe what is happening in the language of functionalist sociology. This is worth mentioning, because of the tradition in sociology, probably initiated by Durkheim, of arguing that the punishment of crime serves an important social function in expressing the collective disapproval of the society and that its serving this function gives it a certain inertial, policy-resistant profile (Lukes 1973).

Functionalist explanation invokes the fact that an institution has a certain effect — purportedly a certain socially functional effect — to explain why the institution is there: if not why it emerged, at least why it remains. But a standard criticism of the approach is that there is no mechanism to make sense of why the functionality of an institution in that sense should explain its presence. There is no designer in evidence, of course, but neither is there a plausible story about the selection of functional systems in a history that would parallel the history of natural selection (Elster 1979).

Arguably, however, this criticism rests on a mistake about the proper intent of functionalist explanation. For the work of functionalists like Durkheim, Malinowski, Parsons and others suggests that what primarily interested them was the task of identifying those institutions that played a function which would make them more or less indispensable — and so difficult to dislodge — even if it did not play a role in their historical selection (Pettit 1996). The idea was to look for the core features of a society and to distinguish them from the marginal and the peripheral. Functionalist method is cast throughout the tradition as a means of providing 'a basis—albeit an assumptive basis—for sorting out "important" from unimportant social processes' (Turner and Maryanski 1979, p.135).

If we understand functionalist explanation on these lines, as an attempt to discern functional, relevantly resilient features in a society, then we can give our story about sentencing a functionalist gloss. What we have seen in our discussion of the

outrage dynamic is that a more or less punitive criminal justice system — a system that supports heavier sentencing — has a function of a kind that makes it more or less indispensable, at least under current political arrangements. It has an effect, that of assuaging public outrage, which can broadly be described as functional or useful. And its having that effect ensures that it will survive a variety of hostile forces, in particular the forces of rationalising policy-makers.

Montesquieu famously described the pursuit of criminal justice as being in danger of representing a 'tyranny of the avengers' (Montesquieu 1989, 203). If what I have just argued is correct, then this is not just a danger; it connects, at least under current institutions, with a function served by heavier sentencing. The pursuit of criminal justice has an inbuilt resistance to policy-making reform, even reform of the kind that Montesquieu called for over two hundred years ago.

3. A remedy?

Few of us will want the criminal justice system to be shaped by the outrage dynamic. Even those who laud the rule of popular will must admit that the dynamic is subject to too much exploitation by media or politicians to count as a channel for the undistorted expression of that will. We might be relaxed about the role of the dynamic, of course, if the result of its operation answered to some persuasive story about the rationale of the criminal justice system. But the result will seem tolerable only to those who are content that sentencing should be punitive — that it should satiate the avengers — and have no concern with other matters: no concern, for example, with the kind or degree of punishment delivered, with the relative levels of punishment that are allocated across crimes, or with the effects of the punishment on the offender, on the victim, or on overall crime statistics.

Assuming that we are unhappy to allow the outrage dynamic to shape sentencing policy, is there anything that we can hope to do about it? I believe there is. The dynamic will operate in any society where the media can give exposure to crime; where this exposure will give rise to outrage; and where the public authorities are forced to respond to that outrage, in particular to respond in a manner that reflects the feelings in the community. These conditions are jointly sufficient and, in the

circumstances we described, individually necessary. The dynamic may be blocked from operating, then, if we can undo any one of these conditions. It is hardly desirable to put curbs on the media in their reporting of crime; such a policy would have many obvious costs on other fronts. And it is not possible to do anything about the feelings of outrage that naturally arise in people who learn from the media about this or that criminal offence. But what of the third factor? Is there any possibility, in particular any possibility that is not otherwise undesirable, of removing from the public authorities the onus of having to respond in kind to feelings of outrage on the part of their constituents? I believe there is.

A possible arrangement

The arrangement I have in mind is one whereby general sentencing policy — the policy that fixes the sentencing standards for the courts — would be taken out of the direct hands of parliament and given in the first instance to a body that operates at arm's length from parliament and government (see Holmes 1988). The model of such arm's length arrangements is the central bank or the federal reserve bank, though the body I have in mind would not have quite the same degree of independence; it would operate by making periodic reports and recommendations to the elected authorities and those recommendations would have effect only when given parliamentary or government backing.

Like a central bank the members of the penal policy board that I envisage would be appointed by the government from among members of the community. They would include experts in relevant areas of law and criminology but also community representatives: say, representatives of associations like victims' groups, prisoner rights movements, different ethnic or religious blocks, and so on. In order that their independence from politics would be secure, they would be appointed for fixed terms, not at the pleasure of their political masters, and the appointment process would be governed by protocols designed to ensure appropriate expertise and representativeness.

The idea behind the arrangement would be to remove decision-making in the area of sentencing policy from the immediate pressures of popular outrage. Confronted with that outrage the politicians in parliament and government would be able to say something on these lines. 'Look, I agree that this is a heinous crime and my own inclination is to come down hard on the sort of offender who would commit such an act but the decisions about such matters are in the hands of this other body, at least in the first instance. I will be looking hard at the recommendations that body makes, the next time recommendations come our way, but in the meantime we must all wait on their deliberations.' Thus the politicians might avoid the burden of making policy on the run, under the heat of popular emotion.

But wouldn't the members of the penal policy board, as we might call it, be subject themselves to just the same sort of pressure? Not necessarily; at least not necessarily to the same degree. For those members would not be public, electorally exposed figures like politicians and might be readily protected by a convention whereby only the chair can speak to the media. They would not be subject to re-election and so, were they to speak to the media, they would not have an electoral motive for playing to the gallery. And besides, the elected politicians would be in a position to argue for the insulation of the sentencing policy board from public attention and pressure. They could say, and would surely win electoral points for saying, that it is unfair to expose the members of the board to the pressure that they as elected representatives have a duty to face, and that the proper thing is to give the board a chance to do its business and to report in the fullness of time on whether sentencing standards should or should not be altered.

The case I am making for a penal policy board is analogous, of course, to the case that has been generally accepted in contemporary democracies for making the central bank relatively independent and for giving it control over interest-rate policy. It is widely agreed that politicians will find it difficult to resist the popular pressure that can grow up in time of economic crisis for the lowering of interest rates and that, given the best policy will not always be to lower those rates, elected authorities should therefore give over their power to a more or less autonomous body. My proposal is that since politicians will equally find it difficult to resist the popular pressure for harsh sentencing policies and

that, given harsh policies may have no reliable rationale, politicians should give over their power — or at least distance themselves from the exercise of power — in the area of penal policy.

I stress that the proposal does not envisage a penal policy board which would be totally independent of parliament and government. The most plausible way of organising things would have the parliament determine the criteria that ought to guide the board in its recommendations and to have the parliament receive the reports of the board and be required to give or deny its support to the recommendations made. By setting criteria, the members of parliament would assert their right, as popular representatives, to determine the broad direction of penal policy and criminal justice policy more generally. And by being in a position either to endorse or refuse the recommendations of the board it would ensure that the recommendations enacted could not be challenged on grounds of lacking democratic legitimacy.

What sorts of criteria might parliament set down for the board to be guided by? The candidates are more or less salient, for the problems in penal policy arise when it comes to the application of criteria, rather than their abstract articulation. Thus the board might be enjoined to set policy so that while the overall cost to the community is kept within certain pre-determined bounds, the following goals are served as well as is jointly possible: that the rate of crime is minimised; that the rights of offenders are respected; that the claims of victims against offenders are satisfied as well as possible; that the community is generally persuaded at once of the adequacy and the humanity of the penalties imposed; that there is a certain proportionality between the seriousness and wilfulness of a crime and the penalty it attracts; that judges are not prevented from exercising mercy, when mercy seems appropriate; and so on.

I take it as given that the penal policy board I envisage is a real institutional possibility. One reason for doing so, of course, is that already there are sentencing commissions in existence in a limited number of jurisdictions which serve a function related to the role I have described (Clarkson and Morgan 1995). Those commissions have usually been designed, however, with a narrower brief than that envisaged here — say, with an emphasis on the need to make sentences tougher (Doob 1995). And even

more strikingly, they have been much more susceptible to political influences than the boards I have in mind. Thus Andrew Von Hirsch writes of the Minnesota Sentencing Commission. 'Supposedly, the sentencing commission is more insulated from political pressures than the legislature. But its insulation is only a relative matter...When the Minnesota legislature urged the Commission to raise the prison terms for violent crimes and imprison street drug dealers, as it did in 1989, the Commission had little choice but to accede' (Von Hirsch 1995, 166)

A desirable arrrangement

It may be hard to challenge the claim that the arrangement envisaged here is an institutional possibility. But would it be desirable? I offer two reasons for thinking that it would: the first, that it promises a procedurally reliable pattern of policy-making; the second, that it promises a pattern that is attractive in a democracy.

The first consideration is that the arrangement holds out the prospect of a pattern of penal policy-making that is more systematically responsive to the sorts of criteria mentioned than any policies elected representatives would be likely to implement without the mediation of a board. This consideration breaks into two points: first, that the board should be in a good position to identify the recommendations that are truly responsive to the criteria on offer; and second, that such recommendations would be more likely to be implemented if the board proposes them to the parliament or the government than if they have to be proposed in the first place by the elected representatives.

This second point is fairly uncontentious. While the recommendations of the board might not always be accepted by parliament or government, the fact that they are made by an independent board should make it easier for parliament or government to endorse them: and to endorse them even in the case where they advocate an increase in leniency. . Elected representatives could justify themselves in endorsing such policies, on the ground that the board had worked long and hard on the evidence for and against them. And in any case they would generally be making judgments on the recommendations at a time when there was no relevant surge of popular outrage with which they had to deal.

But why think that a board of the kind envisaged would be good at identifying policies that were responsive to the criteria set? The members of the board, being subject to an appointment process, could be vetted to ensure that none had a particular grievance or special interest which would warp their motivation. They would be protected by the usual measures of confidentiality from the pressures of outside intimidation. Thus they would be in a position where natural conscientiousness could rule, relatively unobstructed by countervailing temptations or pressures. And, should such natural conscientiousness fail, they would still have an institutionally induced motive in self-interest to deliberate in a conscientious way: that of winning the esteem, and avoiding the disesteem, of their colleagues. Being charged to respect certain criteria, they would each know that if they are cavalier or careless in their attitude towards that brief, then they are going to lose status in the group as a whole (Brennan and Pettit 1993; Brennan and Pettit 2000).

Not only would members of the board be motivationally primed in these ways to be reliable judges of what the criteria require. They would also be in the best possible epistemic position to make reliable judgments. For they could be provided with continuing data on the effects of current policies, and would be able to make informed judgments on whether certain actual initiatives should continue to be supported, should be reinforced, or should perhaps be reversed. Penal policy-making is never going to be easy but the board I envisage would certainly be better positioned to tackle it than elected authorities.

So much for the first consideration — essentially, a consideration of procedural reliability — that argues for the desirability of the arrangement. The second is that quite apart from the prospect of enhancing proper, criteria-responsive policy, the arrangement holds out the best prospect of discharging policy in a way that answers to people's avowed, or readily avowable, common interests in this area. In this respect it has important democratic credentials. It is a democratic arrangement so far as it involves a regime of control — albeit arm's length control — by the elected representatives of the people. And it stands out from rival arrangements in promising to secure more reliably the democratic end of empowering people's common interests, and only their common interests: not, for example, the interests shared just by this or that group or grouping (Pettit 2000).

Why does the arrangement promise to secure the empowering of common interests better than the existing way of doing things? I think of common interests as those matters such that admissible considerations of public debate — considerations that all of us must think relevant to the evaluation of shared, public arrangements — argue for their collective promotion. Such admissible public considerations clearly argue for the existence of a centrally organised criminal justice system, and in particular a centrally organised penal system. And equally clearly, so I think, they argue for a penal system that is shaped by criteria of the kind illustrated earlier. What they demand at the level of detail in penal policy, however — at the level where we are concerned with specific guidelines for the punishment of specific offences — is certainly not clear. And so the important common interest in policy-making at that level is that the judgments which connect general criteria with specific guidelines should be made in a manner that is least exposed to the perturbing effects of irrelevant influences. If the penal policy board holds out the best prospect of achieving criteria-responsive policy-making, as the first consideration has it, then in this respect it also has the best democratic credentials.

So much for the two considerations that argue for the desirability of the arrangement I proposed. In conclusion, however, it may be said that no matter how well it would serve our common interests in the area of penal policy, the board arrangement offends against our democratic sense that penal policy belongs with the people and should not be put in the hands of an unelected elite. Even as things now stand — and despite the impact of the outrage dynamic — many writers complain that various aspects of penal policy are driven by the beliefs of elites, not beliefs that are popularly shared (Fried 2001). Wouldn't that complaint have an even firmer basis, were my proposal to be enacted?

I don't think that this complaint is really telling. It derives from a confusion between two distinct desiderata. On the one hand, the desideratum — central to any ideal of democracy — that the electorate should be the ultimate arbiter of public policy. And on the other, the very different, and very questionable, desideratum that the electorate should be the proximate source of public policy.

There is no good, democratic reason to complain about a procedure that gives the electorate ultimate power over a certain area of policy, as my proposal would do, even if it leaves the elaboration of proposals in that area of policy to a penal policy board, and of course the assessment of those proposals to an elected parliament or government. In particular, there can be no reason to complain if, as I have argued, this way of making penal decisions promises to answer best to the avowed or readily avowable common interests of members of the community. To think otherwise would be to endorse nothing short of a rank populism: the belief that the best way of making a public decision on any issue is to allow the popular will, however that will is determined, to govern day-to-day decison-making.

There is also something else to say in response to this line of complaint. That is that the penal policy board I envisage can be given a very natural place — and would benefit from having a place — in a network of sites at which criminal justice policy comes under democratic discussion. Thus it might be connected up with exchanges among judges and other officials of the courts — or among those associated with restorative justice conferences (Braithwaite 2001) — about the accumulating experience in those forums. And the board might seek regular feedback about different criminal justice initiatives from citizens' juries or from deliberative opinion polls (Fishkin 1997). The existence of a permanent board in this area of policy should serve to give direction to inclusive exercises of democratic deliberation among bodies of those kinds. The board should serve as a catalyst for democratic deliberation about criminal justice, not as an instrument for removing penal issues from public debate.

I am conscious that the argument and the proposal in this paper are sketched only in the barest outline, and that they raise a range of issues which I have not tried to address. I put them forward out of a despairing sense that the main positions in penal philosophy are condemned to irrelevance under current institutional arrangements. Those who defend those positions have a responsibility to consider whether their ideals can be made politically feasible, say in the context of a penal policy board. If they fail to consider the issue of feasibility, then they run the risk that their ideals will be fit to

survive only in the orderly presentations of the seminar room, not in the hurly burly of everyday politics.[1]

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