

**Policy making Processes, Mobilising Consent, and Contesting Penal
Populism**

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Introduction

I want to begin this presentation by suggesting that those penal activists and practitioners who have been working on both sides of the Irish Sea over the last few years to limit the damage that our respective governments regularly inflict on those often disadvantaged people who break the law have not had an easy time.

In the UK both the Labour and Conservative parties - at least before the present fiscal crisis – promised to significantly expand the prison population, and Ian O’Donnell has reminded us that as late as 2008 the Irish government was planning a similar expansion, even though the population of sentenced prisoners had changed very little, if at all (O’Donnell 2008) And some of you will no doubt have also read one of Ireland’s most experienced prison education administrators Kevin Warner’s address to a Nordic conference in Tromso at about the same time hinting at possible wider (and unwelcome) policy exchanges when

he suggested that the “pressures” on prisons had led to “things getting very out of hand in other countries, especially in English speaking countries”, a very timely warning, not least about developments in America (Warner 2008)

This drift, towards more *punitive times*, when even those who manage to escape a prison sentence are being subjected to ever more surveillance in the community through measures such as curfews, asbos and electronic tagging, presents us with something of a paradox, since many English speaking countries where this punitive drift is taking place have experienced declining crime rates, so most people should feel safer than – rather than more insecure – than they have ever been. (Roberts et al 1998; Pratt et al 2005 et al; Pratt 2007) I hope to return to this paradox later.

I acknowledge, of course, that the significance and nature of this punitive drift is contested. Some see it as a fundamental and lasting change that challenges Norbert Elias’s view that modern societies have turned their backs on brutal, cruel and unusual punishments. (Garland 1990). Others, as you will know, stand by Elias arguing that in the

longer term the current punitive climate will be seen as minor deviation, that manacled prisoners, the rising number of those dying through lethal injection, should not divert out attention from the longer historical arc. (Matthews 2005; Garland 2001)

Still others cast doubt on whether there has really been a punitive drift, arguing that if you broaden out the penal archipelago beyond the prison per se it arguable that some western societies have become less punitive. Ian O'Donnell and Sean O'Sullivan made this case for the Irish Republic in their swashbuckling article in *Punishment* just last year. (O'Sullivan and O'Donnell 2007; Matthews 2005)

So we have to accept that we have a serious academic argument here, and I know that several of you at this conference have made impressive contributions to this ongoing debate. I do believe, however, that just about all the parties in the debate acknowledge that in spite of this ongoing academic jousting (for example, Hallsworth 2004) there is a perception among influential reform groups and penal administrators that we are seeing a drift towards less liberal penal regimes and that penal optimism is in pretty short supply.

This not to say that there not some progressive penal practices on both sides of the water, or to deny that there are more tolerant voices to be heard, but even when we allow for these qualifications, liberal sentiment in both our countries has been, rightly or wrongly, on the back foot.

In these circumstances it is not difficult to understand why some penal activists, prison administrators and academics look abroad to countries that have more progressive penal practises. There is nothing ignoble about this. Borrowing “best practice”, to use modern management jargon, is sensible. So, for example, Kevin Warner looks north and hopes – and here I quote directly - -

“that if Nordic countries can keep their sane and humane penal policies in these difficult times, [they] may, from [the] northern edge of Europe, help the rest of us in the future to abandon the madness that has overtaken so many, and share with us [their] knowledge of how to deal with the troublesome in or societies in a wiser way.” (Warner 2008)

He then went on to compare these countries as keepers of the liberal faith in penal matters rather as Celtic monasteries had sustained Christianity in the Dark Ages.

While we can understand this somewhat rhetorical flourish, it came at the end of a very inspiring paper that attempted – very well I thought - to portray the basic strengths of Nordic penal practice; the problem I have is that all too often comparative work like this is undertaken without sufficient attention being paid to the particular (and dynamic) policy making processes in which specific, national penal policies are generated.

And the problem with this is that without considering how these dynamic policy processes work, abroad or at home, we cannot sensibly devise, let alone borrow from elsewhere, strategies to combat penal populism.

Irish and English Voices

Let me give you two examples of how this works, one commentator is from Ireland, one from England. I should say that both write admirably

and with integrity, and more to the point, I doubt if the penal philosophy that inspires them is much different from my own.

Now on the Irish side I have already drawn attention to Kevin Warner's interest in the Nordic states, and he reinforced this interest in a paper he gave to this very conference at UCD last year entitled, *Resisting the New Punitiveness; Penal Policy making in Denmark, Finland and Norway*. (Warner 2009) This pushed further his appreciation of how these countries were responding to the new harsher penal climate and then, having asserted that there "were many points of similarity in terms of history, economic and social structures" between these countries and Ireland he lists eight possible "modelling" lessons for the Irish Republic, including the practical possibility of a reduction of 1.000 in the existing prison population.

Now, I am not much at odds with this, or many of the other seven progressive possibilities that Warner lists, however he tells us little about how public support for these might be mobilised.

It is true that in five or six lines at the very last paragraph of his paper he makes reference to Loader (2006) and the need to engage with public opinion. But this is little more than a very under - developed after thought, and not much use it seems to me to those in Ireland, who, to take from the title of his own paper, are in the business of “resisting the new punitiveness”.

In other words, it offers an inviting menu of things that other more progressive penal systems do, but little analysis of how penal policy is made in the Republic, or how its processes might be negotiated secure these desired changes.

It is, of course perfectly reasonable for Kevin Warner to claim that he never set out to do this, to provide strategic insights into how the Irish penal policy making process work, how it might be engaged with to secure these changes. And I would be the first to accept this defence, but I also think I would be reasonably justified in questioning the utility or limitations of such an approach as a contribution to the struggle to secure a more progressive penal policy - that requires thinking in

broader terms, and critically, it involves thinking about the changing policy processes in which politicians operate.

In an attempt to be even handed here, I can think of English commentators who have made, if not the same limited pitch, have also under theorised the policy making process in modern democracies. The most obvious of these is perhaps Andrew Rutherford's. In his well received text *Transforming Criminal Justice Policy* (Rutherford 1995) Rutherford discusses, among others, the work of Scandinavian criminologists Nils Christie (1982) and Thomas Mathiesen (1995) and some of the high ranking Nordic officials, sources later referred to by Kevin Warner whose work I have just referred to.

Rutherford is much impressed by Nils Christie's idea of a *moral community* that depends on "the involvement of an inner core of decision makers, consisting of experts and other elites". Rutherford takes the existence of such a community as being necessary to sustain a progressive penal policy.

He gives the example of Finland where no more than twenty five key decision makers, civil servants, judges, administrators, and academics were involved in reducing that country's unusually large prison population. (Rutherford 1995; Tornudd 1993) Members of this group often met informally, sometimes in each other's homes. In the British context he specifically identifies senior civil servant David Faulkner as being a leading light in sustaining such a moral community in the UK. (Rutherford 1995) He is far too modest to say this, but as chairperson of the Howard League for Penal reform, Rutherford also contributed to the informal gatherings that constituted this moral community in the UK.

Building on the idea of a moral community, and adapting a framework used by Thomas Mathiesen, Rutherford tries to theorise about the position some of the *other* actors involved in the penal policy making process and to explore the relationship between them.

So for Rutherford there is an *outer* sphere of opinion that involves what can be identified as the broader public, including the mass media.

Then there is an *inner* sphere. These are the people who run the criminal justice system, including prison administrators, magistrates, judges and the like. Finally, there is what we have identified as the *moral community* or the *kernel* as Rutherford calls it.

There is, of course, a degree of overlap between these three schematic groups. For example, there are many progressive criminal lawyers, justices' clerks and probation officers who can rightfully claim a place in the *moral community* or the *kernel*. Also, of course, the relationship between these groups is always in a state of flux.

The moral community will often have its back to the wall, trying to sustain a principled liberal position against the latest public outrage. So for example, the moral community in the UK managed to secure the Criminal Justice Act (1991) which aimed to reduce the prison population, but could not sustain it, the *inner* and *outer* spheres intruded and upset the proposed new order. Similarly, the moral community in the Netherlands lost ground in the early 1990s. (van Swaaningen and de Jonge 1995)

Setbacks like this are normal; the moral community needs to be vigilant and flexible, willing to re-group, devise new strategies, and propose new measures. True, this is probably more difficult to manage in large complex, industrial societies like the UK, arguably more difficult than in Norway.

Overall though, I think Rutherford's heuristic framework is a reasonable way of understanding how penal policy has been traditionally made, not only in Nordic countries, but in England and Wales also.

And in looking at Rutherford's contribution you cannot say that he has not thought about the policy making process and offered us some pointers about how we might intervene to produce a more progressive penal politics.

He has moved on from simply looking at the progressive characteristics of Nordic penal practice as Warner does and at least left us left us with some sort of framework to explore how these practices have been (and might be) be politically engineered in other western democracies.

And certainly there is a lot of empirical evidence, as my own work on England and Wales over the years has shown, to support the view that a small, unrepresentative community of reformers, fearing the “ignorant” public voice and “hard-line ” operatives, have sought to shape the direction of penal policy making in the countries that are represented here at this conference. The “irrational public”, often whipped up into a punitive frenzy by the media, has been deliberately kept out of the frame. (Ryan 1978, Ryan 2003)

The Public Voice and The Policy Making Process

Now, I am not much interested here in asking whether or not this determination of the *moral community* to influence the direction of penal policy behind closed doors is arrogant, whether in the UK in particular it represents little more, in truth, than a snobbish, middle class, liberal, disdain for the views of ordinary people in these matters.

I am, however, interested in asking whether or not such a *moral community* can sustain its influence in our changing democracy, that is

to say, to question whether Andrew Rutherford’s description of the policy making process is any longer sustainable in large modern democracies.

And this question is of pressing importance because if his analysis of what drives the penal policy making process is wrong then any strategic interventions we might suggest here today to support progressive change could be misdirected.

My answer is that I think Rutherford is out of time.

What I mean by this is that the hierarchical society that supported such a closed pattern of policy making is changing in the UK and in a number of other western democracies. People are less and less prepared to leave questions, including difficult penal questions, to their educated “masters”.

In short, to argue for what Mill once described (Williams 1976) as the value of “superior wisdom” of elites, be it of politicians, pressure groups, university professors like Andrew Rutherford, Nils Christie or

other administrative experts like Kevin Warner, nowadays cuts far less ice in political cultures which are moving away from *deference*, trusting instead to exerting more direct pressure through mechanisms *outside* of the formal political process and its network of consultative committees and processes. Sometimes, indeed more often than not, this sentiment, in deliberately eschewing expert opinion and the academy, is crudely populist (Canovan 1999)

This growing public “independent” voice which stands outside of established policy making frameworks, if I can describe it thus, is evident across a number of modern democracies, it is a post-modern phenomenon that has been extensively researched. Robert Inglehart, for example, writes:

“Mass publics have played a role in national politics for long time of course, through the ballot and in other ways. Current changes enable them to play an increasingly active role in formulating policy, and to engage in what might be called “elite - challenging”, as opposed to “elite-directed” activities. Elite-directed participation is largely a matter of elites mobilising mass support through established organisations such

as political parties, labour unions, religious institutions [such as the Catholic church], and so on. The newer elite - challenging style of politics gives the public an increasingly important role in making specific *decisions*, not just a [mere] choice between two or more sets of decision makers. (Inglehart 1997 p 3)

In other words, democratic politics is no longer simply about the mass public choosing every few years between two competing sets of elites, and then sitting back and waiting for the winning elite to govern in Parliament as it think fit– instead the public now seeks to intervene between elections on a whole range of specific policies.

This new political clout is partly the result of increased mass education and the growth of the information society through new technologies. These changes enable the masses to participate more in politics, they help ordinary people to acquire the skills (and information) previously enjoyed only by those within the formal political and administrative networks. One result of this according to Inglehart is that;

“Western publics are developing an increasing potential for political participation. This change does not imply that mass publics will simply show higher rates of participation in traditional activities such as voting, but that they may intervene in the political process on a qualitatively different level. Increasingly they are likely to demand participation in making major decisions, not just a voice in selecting the decision makers... These changes have important implications for political parties, labor unions and professional organisations; for mass politics are increasingly likely to be elite - challenging rather than elite-directed.....” (Inglehart 1997 p 294)

While it is important to remember that Inglehart’s research crossed several continents, and that England and Wales, Ireland and some Nordic countries maybe, for all the decline in deference, are still more deferential than Ronald Inglehart’s America, what he is saying has a clear resonance for a number of western democracies.

Here parties have become far more responsive to changing public sentiment on specific issues as opposed to offering broad, ideologically distinctive programmes to the electorate once every four or five years.

The force of this change is well illustrated if we reflect back on the intense public pressure on the UK Home Office that was generated in response to the tragic death of Sarah Payne. It is, of course, easy to berate the simplicity of the arguments of many of those who took part in this campaign for Sarah's Law. They initially called for what amounted to an unguarded, accessible public register of paedophiles, a simple populist solution to what is, in truth, a complex policy problem about how to monitor convicted paedophiles, something that governments and their expert network of advisory committees, police and probation officers continue to wrestle with.

However, the crucial point is that the scale of this protest demonstrates is how easily the public voice can be translated into effective political action quite outside of the parties, or indeed, any of the other traditional institutions that channel communication between people and government in modern democratic societies.

Furthermore, the fact New Labour had to negotiate on this issue is a testimony to the claim that there is:

“An upgrading of the public voice in political communication. Instead of being positioned only to attend to and overhear the views and arguments of others (politicians, journalists, pressure group spokesmen) the experience and opinions of quite ordinary people are being aired more often.” (Blumler and Gurevitch 1996 p 129)

This upgrading of the public voice is partly a consequence of the growth in commercial media outlets from the late 1950s onwards, and new media technologies. The days have long since gone when the only voice governments in the UK, for example, had to listen to on controversial issues like capital punishment was the respectful BBC. The introduction of commercial television in 1957 began upgrading the public voice, and the truth of the matter is that with the recent arrival of digital networks there are so many outlets that any old “riff raff” are invited on air to give their views on such subjects, indeed, some even do some agenda setting of their own. Or if you cannot get air space to talk about what concerns you, why not Email the Prime Minister’s Office, or log on to the Downing Street web page?

It also needs to be pointed out that these wider, political and cultural changes which have upgraded the public voice have been reinforced by significant changes within the UK criminal justice system itself. That is to say, it seems fairly obvious to me that the repositioning of the public voice is a partly a reflection of the simple fact that governments now need to engage with the public in a way that was not envisaged in the past.

Until recently the machinery of law and order, as we know, was firmly in the hands of a highly centralised State and the security of each and every one of us was entrusted to, and jealously guarded by, those who operated the formal levers of law and order.

This began to change in the 1980s when it became apparent that the central state could no longer deliver on law and order from the centre and the result has been has been the restructuring of the delivery of these services, including penal services, to engage the public. Sometimes it engages them in a voluntary rather than a paid capacity, sometimes they participate at local level rather than national level.

The result is that as individuals and as groups, often in partnership with professionals from both the private and public sectors, citizens are being invited back into the criminal justice network. (Garland 1996)

The involvement of the “active citizen” in England and Wales leading to the “re-invention” of governance in this important aspect of our daily lives has been traced by others. (Benyon and Edwards 2001)

This increasing public stake has enhanced the public voice.

Governments cannot mobilise active citizens and then ignore them.

A dialogue, sometimes it can be both crude and ill informed, is now increasingly demanded. *The public refuses to be air brushed out of the penal equation*, it is now more embedded in the architecture of the policy making process.

Pulling Things Together

So then, for quite a complex set of reasons western democracies are changing; the transmission of public preferences into the heart of

government, demanding day by day that more attention be given to them, is something that all politicians increasingly have to learn to live with, and this most certainly includes those Ministers who make penal policy. This has helped to re shape the penal policy making process, tilting it outwards rather than inwards. (Ryan 1999; Ryan 2003)

I am, of course, the first to admit that my focus has latterly been a bit Anglo centric, and it may be that in our discussion you will suggest that political life in the Republic is much the same as it always has been, and that established policy making processes can still be taken for granted. So, to re - locate one of my examples, it may be that Irish people are still happy to stand back and leave management of child abuse to traditional forms of authority, the Catholic church, its national politicians and the department of justice...Or it may just be that populist pressures are easier to resist in a more deferential, conservative society.

I would therefore need to give more attention than I have so far managed to the growing body of work on the Republic's penal policy making processes to be confident of making any judgement. (O'Donnell 2008; Rogan 2008; Behan 2010)

And I can understand why people in the Republic might take some comfort from holding on to this position.

The prospect of paying more attention to the public voice in an age of what Thomas Mathiesen (1995) has labelled “communicative irrationality” is not at all promising.

Yet, if you continue to keep faith, as I do, with Mill’s demand that a meaningful democracy must include the promise of widespread political education in all matters of public policy, then we have a political duty pay to serious attention to engaging with the public voice, or else penal policy will simply degenerate into a form of crude penal populism.

This means not only that progressive forces must work harder, but also that they must work differently to accommodate these changes in the policy making process. That is to say, they no longer have the government all to themselves in the corridors of power over tea and biscuits, so to speak, they must mobilise consent by increasingly

engaging outwards with the public voice, the consumers of criminal justice.

Of course, suggesting this outward looking strategy for the *moral community* is no easy business, nobody is suggesting that it is, again not least in the UK, which more than in most other European countries, has a mostly right wing populist press, now assiduously cultivated by *all* the major political parties, that makes “communicative rationality” difficult. (Downes 1991) Who would rather not look *inwards* than confront marauding parents using children who can barely walk in their ill- informed crusade against paedophiles named and shamed by the red top *The News of the World*? Add to this malign press influence a political culture which, since the mobilisation of the Bloody Code in the eighteenth century, has secured wider political change in Britain around the rhetoric and symbols of law and order (Hall et al 1978) and the difficulties of engaging in a constructive dialogue with the public becomes readily apparent.

However, Golding (1995) has done well to remind us that there are other more optimistic views about the possibility of a “communicative

rationality” around the emergence of the new technologies and new social movements which suggest a more vibrant, progressive, less purely nationally focussed, homogeneous “public voice(s)” than we sometimes suppose. So there is some hope for Thomas Mathiesen’s “alternative” public forum (Mathiesen 1995 pp8 - 9). If people, often young and poorly resourced people, can organise across national boundaries and mobilise against world trade negotiators using the new technologies I fail to see why others cannot do the same on narrower terrain. Indeed, there are already a number of quite sophisticated “alternative” web sites on penal questions, including capital punishment (Roberts et al 2002). This encouragement, however, does come with the warning that this “alternative” public can all too easily degenerate into a small group of activists talking to themselves; which was where we came in, so to speak.

So, the *moral community* needs to engage more. Without reaching out to the active citizen, by making more use of Mike Hough’s research, for example, which shows that if properly informed the *public voice(s)* is not as crude or as homogeneous as the tabloids represent it, the *moral community* will be left simply reacting to punitive populist responses

(Hough and Roberts 1998). Of course, conventional “policy communities” as political scientists define them are still in place and will continue to be used.

However, in late modernity where the power of the public voice(s) is growing, a far more proactive approach is needed and a successful strategy needs to involve more than just making sure that members of the *moral community* are in the “right” places talking to the “right” people. (Ryan 2003) In the UK certainly, where the prison population is projected to rise to over 95,000 by 2015, there is a lot of ground to be recovered.

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