

Social Policy, Civil Society and the Institutions of Criminal Justice

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In these days of (supposed) globalisation, it has become common to suggest that the vitality of nation states and the power of their governments is on the wane: key decisions, it is argued, are increasingly made at supranational or local levels; and by international or private institutions. For scholars and practitioners of criminal justice, this claim has an odd ring to it. Notwithstanding significant developments in the emergence of criminal justice institutions at both international and local levels—notably the institution of an international criminal court and a proliferation of ‘community-based’ initiatives—in the field of criminal justice, the nation state, whether federal or unitary is, as it seems appropriate to record in this location, alive and well.

In this lecture, I do want to suggest, however, that certain developments in the political, cultural and economic structure of late modern societies such as Australia, Britain and the United States are having an impact on the role which criminal justice policy plays in politics. I want to suggest, first, that the state’s criminal justice power may be becoming (relatively) more important in establishing governments’ legitimacy and credibility, and to offer some speculative reasons as to why that might be the case. Secondly, I shall examine the difficulties posed for governments by high levels of popular concern about crime and by governments’ commitment to responding to such popular demands.

After setting out these issues, I shall sketch what I take to be a persuasive normative framework for criminal justice policy.¹ My overall argument is that, in developing criminal justice policy under contemporary conditions, a key insight is that we should regard a wide range of

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¹ In this section of the paper, I shall draw on work which I undertook for the Prison Reform Trust’s Committee of Inquiry on Women’s Imprisonment: see Dorothy Wedderburn et al, *Justice for Women: the Need for Reform* (Prison Reform Trust 2000) Chapter 3.

institutions within civil society—schools, families and other forms of structured personal relationships, clubs and so on—as, if not criminal justice institutions, at least highly relevant to the potential effectiveness of criminal justice institutions strictly so called. In shaping this argument, I shall take punishment as my main example. This may seem counter-intuitive: punishment is, after all, only one aspect of criminal justice, and one to which we perhaps tend already to give too great an emphasis.² However, punishment, being the most difficult criminal justice practice to detach from its apparently closed logic and fully to integrate with broader issues of public and social policy, provides a challenging case study for the general position which I want to defend.

Finally, I shall return to political matters, examining the implications which current trends in the political, cultural and economic development of societies such as Australia and Britain have for the resources available for the deployment of criminal justice power and for the development of criminal justice institutions.

The political salience of criminal justice

There are many reasons to think that criminal justice policy, and the institutions through which that policy is realised, have a particular importance in establishing the legitimacy and credibility of governments. For a start, leaving aside the example of war, the power to convict and punish represents the most vivid exercise of state force in relation to individual citizens. Furthermore, and partly because of this, the nature of criminal justice power may be seen as a telling index of how humane and civilised a society really is. This is why evidence about matters such as the racial inequalities which mark the enforcement of criminal law—evidence which is depressingly plentiful in both Australia and Britain—cause such widespread concern. Neither of these features is, however, new: these would have been reasons to think of criminal justice as especially politically salient at least since the inception of liberal notions of the proper limits of state power and of the importance of respect for human rights.

In this context, globalisation in the specific sense of the increasing interdependence of national economies does provide a clue to the particular salience which criminal justice policy enjoys—or perhaps suffers from—in

² In this context it is worth noting the tiny proportion of criminal justice spending devoted, for example, to crime prevention: in few countries is this more than 1% of total criminal justice spending; in Australia in 1997 it was a mere 0.22% of the Federal Government's Public Order and Safety Budget: see Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press 1998) p.200.

many countries. As governments struggle to establish their legitimacy in a world in which a range of policy questions are no longer within their exclusive power, decisive criminal justice policies become a useful tool in establishing the credibility and identity of an administration—whether at national or state level. Particularly when a relatively weak government is confronted with relatively high levels of popular concern about crime, there is a strong temptation to respond directly in terms of legislative initiatives expanding the reach of criminal law, or policy initiatives designed to make the processes of prosecution and punishment more effective in terms of, for example, crime reduction. Other factors canvassed in the literature on this topic include the increasing focus on risk-management, often fostered by technology, as a governmental strategy, and the weakening of traditional party affiliations, along with a consequent increase in the proportion of ‘floating voters’ whom political parties must try to attract with a variety of, often highly emotive, policy responses.³

It is crucial to recognise, however, that the salience and politicisation of criminal justice varies from country to country, with countries such as the USA at one end of the spectrum and those such as the Netherlands at the other.⁴ Research on these differences announces one common, intriguing, fact: that the more successfully socially integrated a society is, the less obsessed it tends to be with law and order. At an anecdotal level, this was brought home to me when, five years ago, Lucia Zedner and I employed a German research assistant to work on a project on community-based crime prevention. One of his tasks was to track and compare newspaper crime reporting in Britain and Germany. A week into this task he was in a state of shock: in Germany, he had not encountered the sensational crime reporting which now pervades even the ‘quality’ press in Britain. Australia, it seems to me, is somewhat better off on this front than Britain: while the *Sydney Morning Herald* devoted much of its front page to the new drug laws to be introduced in New South Wales on the 28th of March, this was the only crime story in the whole paper. On the other hand, the visitor to Canberra is greeted on every main road by a sign advertising the local policy, in the military language so reminiscent of law and order politics, of ‘fighting crime and winning’.

In Britain in recent years the popular law and order dynamic has spawned a range of developments, both expanding the terrain of criminalisation and increasing the severity of punishment. These pragmatic responses range from legislation specifically geared to controlling dangerous dogs and ‘raves’ through to mandatory sentencing for offenders

³ See Pat O’Malley, ‘Risk, Power and Crime Prevention’ (1992) *Economy and Society* p.252; Hogg and Brown (op. cit.) p.116-120.

⁴ See F. Adler, *Nations Not Obsessed by Crime* (F.B. Rothman 1983); see also Hogg and Brown (op. cit.) pp. 135-7.

who have repeated certain serious offences.⁵ While not all of these developments are necessarily repressive—a recent example being measures designed to expand the range of sentences available for young offenders, with a view to keeping them out of custody where possible⁶—the overall tendency is indeed both to expand the terrain of criminal regulation and to increase the severity of the range of punishments available to the courts. The justification for these developments is the promise of crime reduction through incapacitation or deterrence and the satisfaction of crime victims' grievances by meting out punishments which are seen as deserved. But can these promises be delivered, and, if so, can they be delivered consistently with a civilised and rights-respecting criminal justice policy?

The elusive promise of crime reduction through criminalisation

It is not only inevitable but, of course, perfectly appropriate that democratic governments should seek to respond to the concerns of their electorates. Where governments respond to popular demands by promising things which cannot be delivered, however, they create long term problems for themselves. In Britain, an intriguing example was provided by the plight of the successive conservative administrations from 1979 to 1997.⁷ In early years, the government attempted to pursue the vigorous 'law and order' policy which had undoubtedly helped to elect it. As the 1980s passed, it began to realise that it was confronting a double bind presented by the high expectations which that policy stance had created. Notwithstanding significantly increased spending on criminal justice and in particular an expansion in police numbers and in the prison system, crime rates were rising sharply. None of this came as any surprise to criminal justice scholars and practitioners. Even leaving aside relevant factors such as levels of unemployment and poverty, headlines such as 'Crime rates rise despite increased spending on police' reveal some very basic misunderstandings—notably a failure to grasp the fact that the immediate effect of putting more resources into policing and prosecution will be likely to be just such a rise in recorded crime, as citizens are encouraged to report crime and a better resourced enforcement system becomes better equipped to record and pursue it.

But such headlines—which are still common in Britain and I imagine not unknown in Australia—reveal something very important about the

⁵ Criminal Justice and Public Order Act 1994; Crime (Sentences) Act 1997.

⁶ Crime and Disorder Act 1998 ss. 67-8.

⁷ For further discussion of these developments, see Nicola Lacey, 'Government as Manager, Citizen as Consumer: the Case of the Criminal Justice Act 1991' (1994) 57 *Modern Law Review* 534.

nature of our public debate about crime. This is that it is extremely unsophisticated. For it is premised on the idea that the majority of crime is indeed processed by the criminal justice system and hence that governments can achieve decisive changes in the extent and severity of crime *by modifying the criminal law, the criminal process and the penal system*. This premise, as any first year criminology student knows, is a false one: the majority of offending behaviour never comes to the notice of the formal authorities, and a large proportion of that which does is either not proceeded against at all or is dealt with by informal or managerial strategies. The inevitable conclusion is that social policy and social institutions beyond the criminal process are the context in which the vast majority of crime problems are managed.

In Britain, the New Labour administration has tried to refine its approach to criminal justice policy by teaming the principle of being ‘tough on crime’ with that of being ‘tough on the causes of crime’. Nonetheless, when the Home Secretary comments upon or responds to the latest figures of recorded crime or the results of the annual British Crime Survey (which is based on self-report and victimisation studies), his approach is invariably to proffer policy initiatives within the criminal process.⁸ The causes of crime—social disintegration, poor housing and education, social exclusion—are, inevitably, complex political issues which lend themselves to the media sound-bite far less readily than do the promise of being tough on crime. Policies to tackle the sorts of social problems—structural social exclusion, the effects of long term discrimination, drug abuse, poor education and housing—which we know to be implicated in crime levels are costly and their effects are both hard to measure and medium or long term in their impact. For these reasons, Governments are constantly tempted to confine their responses to crime to the toughening or modification of the criminal justice system, asserting that criminal justice policies themselves can deliver deterrence, reform and incapacitation.

The social conditions which foster this difficulty include the discipline of electoral politics and the social fragmentation which attenuates the capacity of institutions in civil society to contribute to social ordering in such a way as to make reliance on the hard end of the state criminal justice

⁸ See, most recently, *Criminal Justice: The Way Ahead* (Cm 5074, HMSO 2001). A central feature of this document, which is effectively the Government’s election manifesto in the criminal justice field, is an ambitious target for crime reduction. Other notable features include the pervasiveness of the managerial language of efficiency, performance indicators and targets; and the fact that the document has been published in advance of two significant public reports on aspects of criminal justice (Lord Justice Auld’s review of criminal courts and the Law Commission’s report on double jeopardy).

process less necessary and hence less politically compelling. Significantly, these may well be less characteristic of Australia than of Britain, and certainly less intractable in both of those countries than in the USA. For example, the greater levels of social integration characteristic of Australia⁹ undoubtedly give it a greater capacity to pursue the socially less disintegrative routes available in the development of criminal justice policy and institutions. Nonetheless, a comparison with Britain is, I would argue, worthwhile; for there are some worrying signs of a law and order politics comparable to that in Britain emerging in Australia. The obvious example is in the area of drug-related crime, where the long-standing 'harm-minimisation' policy appears to be being eroded by a 'tough on drugs', zero-tolerance approach.¹⁰ The new measures recently announced in New South Wales, in which a swingeing set of new police powers, penalties and offences designed to tackle a social problem in Cabramatta will be applied across the state, provide an instructive example of the dangers of pragmatic, populist policy-making.¹¹ Though one should not be too quick to take drug policy as the archetype for criminal justice policy as a whole, the fact that in this country it is one of the few federally directed areas of criminal policy gives it a special significance in both practical and symbolic terms.

Criminal justice principles

I now want to step aside from this social analysis to think about the principles which might usefully govern the development of criminal justice policy in particular in late modern, social democratic societies.

First, it is important to keep in view the fact that punishment is a practice which poses a considerable burden of justification on the state. Even leaving aside the obvious disparity of power between state institutions and individual offenders, criminalisation is, on the face of it, a social evil: a practice which is costly in both human and financial terms, and one whose practical and moral advantages are often uncertain. Its very familiarity—the fact that we have come to take it for granted—arguably increases rather than decreases the need for a conscious effort to scrutinise the moral basis on which our practices are founded. Perhaps one of the most important preconditions for any reasoned public debate about criminal justice policy is

⁹ See F. Gruen, 'The Quality of Life and Economic Performance' in P. Sheehan et al (ds) *Dialogues on Australia's Future* (Centre for Strategic Economic Studies, Melbourne 1996); see Hogg and Brown (op. cit.) pp. 161-5.

¹⁰ See Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Law Book Company 2001) pp. 821-833

¹¹ *Sydney Morning Herald*, 28.3.01, p.1

the recognition that a society has difficult choices to make about forms and levels of criminalisation. These choices include decisions about how many of our limited public resources should be devoted to the costly practice of criminalisation as opposed to other social policies such as education, employment, health and housing—each of which may have important practical implications for crime.

Secondly, the controversies about proper forms and levels of state punishment which surface regularly in political debate cannot themselves be analysed except in terms of some broader view of the rationale for the criminal justice system. For example, the argument for a reduction in the use of imprisonment, or for the introduction of a new penalty such as electronic curfew or reparation orders, takes place against the backcloth of more general views about the functions of criminal justice, and about the proper limits of state power. For these reasons among others, it is worthwhile explicitly to consider the principles which ought to inform the state's deployment of its criminal justice power.

As a starting point for thinking about criminal justice institutions, I suggest that we should focus on three very broad issues:

The basis for an adequate justification: citizenship

Ideally, the principles governing criminal justice would appeal to values widely shared across the political community. In the real world of diverse societies, such consensus is rarely attainable. However, I will set out from a very general proposition which I assume to be relatively uncontroversial in contemporary Australia: that criminal justice practices should be designed so as to recognise and respect the rights and responsibilities of all members of the community to the greatest degree which is compatible with a similar respect for others. In short, criminal justice must be compatible with the basic ideals of civic reciprocity in a liberal and democratic society.

Secondly, the goals and values informing criminal justice practice should be consistent with those informing other important areas of social policy. Thus although the specific context of criminal justice poses its own distinctive political and moral demands, a criminal justice practice which flew in the face of other valued social principles—the minimisation of social exclusion, for example—would be vulnerable to objection.

Thirdly, principles of criminal justice and practices of punishment should be such as to be capable of being applied in an equitable and non-discriminatory way to members of different social groups. I assume, in particular, that the same general principles of punishment should be applied to different groups of citizens—to men and women, to members of different ethnic groups, to young and adult offenders. However, the equitable

treatment of different groups does not in itself imply equal treatment in a literal sense.¹² Rather, equity is to be understood in terms of treatment *as an equal*—an idea which implies a respect for social difference. Hence facts about social context of offending among certain groups and about specificities in patterns and forms of offending are of direct relevance to proper penal policy for those groups. To take the example of gender, to the extent that women offenders present lower levels of social danger—both qualitatively, in the sense of the seriousness of the crimes they commit, and quantitatively, in terms of their levels of offending and likelihood of reoffending—this would imply substantially different treatment for women in the criminal justice system.¹³

Perhaps more controversially, the idea that criminal justice should cohere with other social values suggests that on occasion facts about the social context of offending may affect the legitimacy or at least the proper extent of state punishment. For example, if a large proportion of certain groups of offenders are people whose basic citizenship rights—such as the right to physical or sexual integrity—have been violated by abuses from which the state has failed to protect them, this must be a relevant factor in determining the nature, if not the fact, of their punishment.¹⁴ Similarly, at a yet more basic level, where an offender has received less than their fair share of public resources such as education, this should affect the state's investment in the educational or other relevant aspects of their sentence. Though criminal justice creates its own moral imperatives, these can never be entirely insulated from broader questions of social justice. As I try to demonstrate below, this argument of principle is one the realisation of which promises substantial social benefits, not least in alerting us to what it is realistic to expect of penal practices.

Principles of punishment

I now want to move on to some principles bearing more specifically on the practice of punishment. What arguments have been advanced in favour of state punishment?¹⁵ Standard rationales for punishment divide broadly into two groups.

¹² Pat Carlen, *Sledgehammer* (MacMillan 1998).

¹³ See Wedderburn et al, *Justice for Women* (op. cit.) Chapters 1, 4 and 5.

¹⁴ See Barbara A. Hudson, 'Mitigation for Socially Deprived Offenders', in Andrew von Hirsch and Andrew Ashworth (eds.) *Principled Sentencing* (Hart Publishing 1998) p.205.

¹⁵ For general discussions of the justification of punishment, see R.A. Duff, *Trials and Punishments* (CUP 1986); Ted Honderich, *Punishment: The Supposed Justifications* (Penguin, 1976); Nicola Lacey, *State Punishment: Political Principles and Community Values* (Routledge 1988).

The first set of arguments may be described as backward-looking or retributive: they advance the idea that punishment should be proportional to the offender's deserts, and that proportional punishments are required by justice. Retributive arguments have moved on from the ancient *lex talionis* which spoke in terms of 'an eye for an eye'—and today argue—consistently with modern notions of human responsibility—that the measure of punishment should reflect not only the gravity of the harm or wrong done by an offender but also the degree of her culpability in doing it.¹⁶ Nonetheless, the modern theory of just deserts shares one key feature with the ancient approach to retribution; in looking exclusively backwards to the offence, each implies that there is some intrinsic moral worth to the practice of punishment which cancels out its *prima facie* wrongfulness, *irrespective of its having any further beneficial social consequences*.

By contrast, forward-looking or goal-oriented approaches start out from the idea that punishment is evil and must be justified by compensating good effects.¹⁷ Such effects come in narrower and broader, more or less crime-oriented forms. Specific goals include the deterrence of actual offenders through the experience of punishment or the general deterrence of potential offenders through fear of punishment; the incapacitation of offenders in the name of public protection; and the use of punishment as an occasion for reform or rehabilitation. Broader ambitions are espoused by approaches which see punishment as a potentially socialising institution whose educative effects go beyond mere deterrence or coercion and reach to the inculcation of values enshrined in criminal law.¹⁸

Unfortunately, these general principles of punishment are notorious for saying rather little about what form punishment should take. Views differ as to what desert requires: the calculation of actual or probable consequences of punishment is difficult to assess. This poses some limits to the help which we can get from the two 'pure' retributive and utilitarian approaches to punishment in shaping principles governing the use of, for example, imprisonment. But a focus on a concrete question such as imprisonment suggests that the forward-looking approach has some discrete advantages over its retributive rival. Clearly, either principle has to take into account the uniquely intrusive, stigmatising, psychologically painful and expensive nature of prison as a penalty. Yet while on the forward-looking

¹⁶ For a modern statement of desert theory, see Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (Hill and Wang 1976).

¹⁷ The classic statement of this approach is to be found in Jeremy Bentham's utilitarian philosophy: see *An Introduction to the Principles of Morals and Legislation* (ed. J.H. Burns and H.L.A. Hart, Methuen 1983; first published 1789).

¹⁸ See John Braithwaite, *Crime, Shame and Reintegration* (CUP 1989); Antony Duff, 'Punishment as Communication' 1 *Punishment and Society* (1999).

approach, the deterrent, rehabilitative, incapacitative and other effects of imprisonment can in principle be assessed, the relation between a certain prison term and a certain level of culpability or desert is subject to no objective metric. It is therefore vulnerable to swings in popular or political reaction to crime.

On a more general level, the strengths and weaknesses of each of these approaches mirror those of the other. While desert-based approaches appear to offer certain prescriptions about the proper scale of punishment, and fit with certain pervasive moral intuitions, the suspicion remains that the imposition of punishment irrespective of beneficial social consequences equates either to a form of vengeance or—perhaps more charitably—to the proposition that two wrongs make a right. Conversely, the goal-oriented approach to punishment, while its cost-benefit principle appears to have transparency and efficiency on its side, has difficulty in generating persuasive principles for the distribution or quantum of punishment. Why not punish an innocent person if the deterrent consequences would outweigh her suffering? Why not merely pretend to punish if this would achieve deterrence without incurring cost? Why not threaten draconian penalties for trivial offences if this would effectively prevent them?

Finally, and most importantly from my point of view, in their most common forms, each of the pure theories tends to ignore the interaction between criminal justice and broad questions of social policy: how far is an offender's just desert for crime affected by broader social injustice? May the short-term and direct pursuit of policies of crime reduction through increased punishment turn out to be counter-productive in the longer term and in the light of broader policy objectives?

These complementary strengths and weaknesses mean that penal policy in real social orders rarely reflects a purely desert-based or consequence-oriented approach. Yet ideas about rationales of punishment incontrovertibly inform government policy and penal practice. It seems important therefore to focus on those ideas which currently express themselves in criminal justice practice.

The prevailing rationale for punishment in Britain, for example, is a somewhat uneasy mix of desert- and goal-based considerations. The Criminal Justice Act 1991 introduced a general principle that punishment should be commensurate with the seriousness of the offence except in a limited range of cases where the offender's dangerousness justified a longer sentence. But, due to a combination of legislative, judicial and political factors, the general principle has become substantially diluted by deterrent and incapacitative concerns.

In particular, three myths have fostered the unfortunate dynamic which I identified in the early part of this lecture: i.e. the governmental

tendency to respond to popular concern about crime by making commitments to crime reduction based on empirically dubious claims about the criminal justice system:

First, in the context of rising crime, an almost irresistible fantasy for government is the idea that crime reduction can be improved by the identification and selective incapacitation of a small group of especially 'dangerous' offenders who are responsible for a disproportionate amount of crime. This myth has become particularly powerful in relation to drug-related crime. Over the years, this claim has been investigated in a number of empirical studies, none of which has been able to produce criteria of identification which provide anything like the kind of accuracy which could make such a selective policy acceptable from a civil libertarian point of view.¹⁹ In the absence of such evidence, the claim amounts to an attribution of a global disposition of 'dangerousness' rather than a rigorous assessment of the likelihood of serious reoffending. This has not, unfortunately, prevented governments in a number of countries from introducing selective incapacitation policies through the back door via mandatory sentencing systems.

A second myth has to do with the capacity for increased deterrence to be gained by increasing levels of sentence. A careful study of the facts about offending undermines the argument that there is untapped potential for deterrence through increased severity.²⁰ In this context, too, the introduction of forms of mandatory sentencing in the USA, in Britain and in parts of Australia represent in my view one of the most retrogressive policy developments in contemporary criminal justice.

A final myth has to do with the reductive potential of incapacitative punishments over the long term.²¹ Since the vast majority of the prison population is released into the community within a relatively short space of time, the disruptive effects of imprisonment in terms of personal and employment relationships, housing and so on suggest that the long term effects of imprisonment are counter to the interests of public protection. It is important not to lose sight of the fact that the social costs of penal severity reach well beyond the pecuniary costs of prison sentences; those sentenced to custody return to the community, and incapacitative effects are therefore smaller than political rhetoric implies. It is apposite to note that there is

¹⁹ Roger Tarling, *Analysing Offending: Data, Models and Interpretation* (HMSO 1993).

²⁰ For a review of the literature on deterrence, see Andrew Von Hirsch, A. Bottoms, E. Burney and P-O Wikstrom, *Criminal Deterrence and Sentencing Severity: An Analysis of Recent Research* (Hart Publishing 1999).

²¹ For a general discussion of incapacitation, see Roger Tarling, *Analysing Offending: Data, Models and Interpretation* (op. cit.).

strong reason to think that the indirect costs of imprisonment are especially high for women.²² This is so not least because social structures which still accord women primary responsibility for domestic labour and child-rearing, along with the growing number of female-headed households, mean that the practical and emotional implications of a woman's imprisonment for her family is often utterly devastating. The effect on the intergenerational transmission of social exclusion is of particular concern.²³

It might be thought that the move in many countries, including Australia, towards a more desert-based approach to punishment over the last twenty years might have provided an effective limit on the pursuit of incapacitative and deterrence policies. Indeed, the move towards sentencing guidelines was shaped in part precisely by scepticism about the reductive effect of sentencing, and by an awareness of the civil libertarian implications of an unlimited pursuit of reductive goals—whether by rehabilitation, deterrence or incapacitation—at the level of individual sentencing. There are unfortunately, however, four main reasons why desert-based interpretation of penal policy cannot deliver these necessary limits. *First, the desert criterion is indeterminate*: it fails to establish any concrete guidelines as to the proper measure of punishment. It gives no reason for sentences of imprisonment as opposed, say, to corporal punishments such as those prescribed in the Islamic tradition. *Second, and following from this, in the context of insistent popular anxiety about crime, the desert criterion offers no firm basis for a principled resistance to increased, ineffective severity in punishment*, and indeed sits happily with a political rhetoric which celebrates rather than tempers the retributive emotions and the demand for vengeance. In this context, arguments about the incommensurability of current levels of punishment become a matter not of reasoned judgment but of convention and intuitive appeal. *Third, this upward drift in levels of punishment—and notably in the use of imprisonment—is susceptible of no evaluation or assessment: it is simply presented as justified irrespective of its social costs or consequences*. Hence, *finally, the desert framework tends to become diluted by the judicial and legislative introduction of a number of goal-oriented considerations—principles whose pragmatic and piecemeal adoption results in a fragmented and ultimately incoherent penal policy*.

²² Toby Wolfe, *Counting the Cost: The Social and Financial Consequences of Women's Imprisonment* (Prison Reform Trust 1999: a summary appears as Appendix D of *Justice for Women* op. cit., p.97).

²³ See John Hobcraft, *Intergenerational and Life Course Transmission of Social Exclusion* (LSE Centre for the Analysis of Social Exclusion Working Paper 15, 1998).

R probation, reparation and reintegration: revised criminal justice principles for a modern social democracy

The case for a moderate criminal justice policy can, however, be made in a more compelling way within the context of a revised set of principles—principles which draw on the deeper intuitions underpinning the present system, yet which also relate these intuitions to the values and commitments informing other areas of social policy. In particular, it is important to integrate a principled criminal justice policy with the general commitment to policies which minimise social exclusion. It is to this revised set of principles that I therefore turn.

First, to reiterate the point with which my discussion of principles began, the criminal justice system should be designed so as to foster respect for the rights and responsibilities of civic co-existence, and to provide for the potential realisation of those rights to the greatest extent compatible with a similar possibility for all other citizens. These reciprocal obligations both inform the justification of punishment and set limits to penal practice: crime violates duties of citizenship and hence demands censure; yet society's response to crime must itself be consistent with offenders' civic status and must aim to foster social inclusion.

Second, criminal justice policy should be judged in terms of its social outcomes, and these outcomes should be closely monitored and evaluated through research. This is not to imply that the various effects of punishment can simply be measured and traded off against one another. Clearly, some social values—respect for human rights, for example—will generate standards which penal practice should respect independently of any cost-benefit analysis. The evaluation principle does imply, however, that social decisions about punishment must always be made in the light of the best evidence about its likely impact.

The principle of evaluation by social outcomes coheres with governments' commitment to the efficient use of public resources, and with a commitment to evidence-based criminal justice policy development. Yet it also has an important civil libertarian dimension: the costly state power to punish should only be exercised to the extent that it can reasonably be believed to have beneficial social outcomes. Crucially, however, these outcomes must be measured in terms of a broad set of indicators of success: in other words, the evaluation must draw on broad social policy criteria and not merely on short-term (apparent) crime reduction.

Third, and connected with this last point, criminal justice policy should always be designed with the full range of criminal justice and social policy objectives in mind. This principle has two dimensions. On the one

hand, it implies that practices of punishment must cohere with other practices in the criminal justice system, taking full account of interaction between practices at different stages of the criminal process. Thus, for example, the effect of mandatory sentences in increasing the importance both of discretionary decisions about prosecution and of plea- and charge-bargaining between defendants, prosecutors and courts must always be taken into account. On the other hand, the principle of integration implies that criminal justice policy in general, and penal policy in particular, must also serve broader social goals. This means that short term gains in crime prevention—whether through deterrence, incapacitation or otherwise—must be balanced against principles of civic co-existence and goals such as social inclusion: the content of criminal law and penalties must serve social as well as criminal justice goals.

These preliminary principles bring me to the substantive principles according to which punishment may be justified. In common with John Braithwaite and Philip Pettit,²⁴ I would argue that the fundamental rationale of punishment should consist in the twin objectives of reprobation and reintegration; penal policies and penal practices should aim to make these objectives compatible with one another, and strike a balance between the two wherever they conflict.

First, the adjudication of criminal wrongs is, as a matter of logic, concerned with reprobation: it is at root concerned to express, through state censure, the community's disapproval of an offender's violation of a key social standard. Reprobation may involve harsh treatment or may take a primarily symbolic form: in this, it differs from the retributive notion of 'an eye for an eye'. However, in common with the key insight of the retributive tradition, penal reprobation is a judgment upon an offence; it does not express a global judgment on the character of the offender.²⁵ The offender remains at all times a person who is entitled to be treated with dignity and to be treated as a responsible subject. The stigmatising and otherwise exclusionary effects of punishment must therefore always be minimised.

Secondly, and conversely, the civic rights of both victims and the community at large dictate that punishment should, wherever possible, provide an occasion for the offender to make reparation to those affected by the offence.²⁶ The development of penalties which allow or require

²⁴ *Not Just Deserts* (Clarendon Press 1990).

²⁵ Hence the English Criminal Justice Act 1991's sentencing criterion of 'commensurability with the seriousness of the offence' may be interpreted in reprobative as much as retributive terms; cf. Andrew von Hirsch, *Censure and Sanctions* (Clarendon Press 1993).

²⁶ On the relationship between reparation and retribution, see Lucia Zedner, 'Reparation and Retribution: Are They Reconcilable?' 57 *Modern Law Review* p.228 (1994).

offenders to make reparation either directly to their victims or to society as a whole—examples include the new English system of reparation orders for young offenders²⁷—are therefore to be preferred to penalties which fracture the very social ties and relationships which underpin the possibility of her future reintegration.

Thirdly, therefore, social reintegration should be a guiding principle in the design of criminal justice policy. We must, however, be clear about the scope and limits of this particular argument. Many crime problems simply cannot be resolved exclusively in terms of criminal justice policy. Without the substantial benefits of civic co-existence—employment, decent housing, good education—many offenders have an insufficient stake in society to give them adequate incentives to avoid future offending. In this context, penalties such as imprisonment have little effect, and such effect as they have consists in short term incapacitation combined with longer term stigmatisation, which is liable to destroy any chance of reintegration.²⁸ Yet, in the context of widespread social exclusion, even restorative, deliberately reintegrative penalties have little hope of making a serious impact on rates of reoffending. The scope for genuine reintegration purely through criminal justice is severely circumscribed: the best that can be done is to design penalties so as to limit their disintegrative effects and to provide opportunities, where possible, for social reintegration. This is precisely why criminal justice policy must be integrated with other goals of social policy—with good education, adequate housing, decent welfare safety nets and high levels of employment. Hence government initiatives in fields such as housing and education, to name but two of the most obvious, should be seen as integral to criminal justice policy.

From these basic principles follow three further, more specific precepts. First, the principle of evaluation by social outcomes implies that the state's power to punish should be exercised parsimoniously. Some punishment is needed for minimum levels of necessary deterrence and, in special cases, for incapacitation. But the state should inflict the smallest amount of punishment adequate to serve the goals which I have elaborated.²⁹ Secondly, all practices and principles of punishment should be

²⁷ Crime and Disorder Act 1998 s.67-68.

²⁸ The most influential statement of a reintegrative approach to punishment is to be found in the work of John Braithwaite: see his *Crime, Shame and Reintegration* (op. cit); Braithwaite and Philip Pettit, *Not Just Deserts* (Clarendon Press 1990); Braithwaite and Kathleen Daly, 'Masculinities and Communitarian Control', in T. Newburn and E. Stanko (eds.) *Just Boys Doing Business?* (Routledge 1994): see also R. A. Duff, *Trials and Punishments* (op. cit.)

²⁹ On the parsimonious use of custody, see Norval Morris, *The Future of Imprisonment* (University of Chicago Press 1974).

such as to be capable of being applied in a non-discriminatory way to all citizens irrespective of sex, racial, ethnic, religious, class or other differences. And thirdly, all practices of punishment should be subject to processes of democratic accountability.

It is readily apparent that these principles have broad practical implications. For example, the reprobative/reparative as opposed to retributive approach to punishment has important implications for the victims of crime. It is often argued that only retributive punishments take seriously the victim's experience: only by meting out the offender's just deserts can victims feel that 'their' offender has been held properly accountable. Yet, ironically, the sorts of penalties conventionally understood as retributive do little, beyond the symbolic, to address the victim's feelings of affront, pain and fear. Clearly, in the case of very serious offences against the person such as homicide or other grave violence or sexual abuse,³⁰ the scope for genuine reparation is minimal, and the demands of reparation—and, in some cases, of incapacitation—may speak in favour of a sentence of imprisonment. But in the case of the vast majority of crimes—property crimes, less serious offences against the person, as well as regulatory offences—there may well be scope, as the Australian initiatives on restorative justice show, for bringing offender, victim and community representatives together to work out a package of reparation which makes compensation to victims. This may also alleviate victims' anxieties, while bringing home—particularly to young or first time offenders—the full implications of their behaviour.³¹

The principle of parsimony implies the development and application of a rich set of community penalties, incorporating adequate means of tackling drug and alcohol dependence.³² And it dictates that, in the cases where an incapacitative penalty such as imprisonment is absolutely necessary, the degree of security and control exercised should be strictly proportionate to the degree and quality of risk posed by an individual offender. Taken together, the principles of reparation, reintegration and parsimony imply that imprisonment should not be used as a last resort for petty persistent offenders but rather reserved for the most serious cases where the need for incapacitation and public protection outweighs other considerations. And the principle of accountability entails, for example, the regular gathering and publication of data about state punishment, including

³⁰ See Barbara A. Hudson, 'Restorative Justice: The Challenge of Sexual and Racial Violence' 25 *Journal of Law and Society* 237.

³¹ As has been recognised in the piloting of reparation orders for young offenders under the Crime and Disorder Act 1998, (op. cit.)

³² See Norval Morris and Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (OUP New York 1990).

its financial cost; the funding of long-term research evaluating the broad effects of punishment; the development of adequate—properly funded, independent—inspectorates monitoring all areas of penal practice, and their investment with sufficient power to ensure that their recommendations are implemented.

From principles to practices: social resources for an integrated criminal justice policy

Let me now move back from these principles to the political issues canvassed in the first part of my lecture. The principles which I have proposed are grounded in intuitions, commitments and values which are widely shared in contemporary Australia and Britain. Yet their application in the field of criminal justice is vulnerable to increases in the popular demand for expanded criminalisation and greater severity in punishment. This demand is fostered by governments whose policies assert, in recognition of the misery caused by crime, the validity of the retributive emotions, and—crucially—go on to make extravagant promises about their own capacity to reduce crime through criminal justice policy as traditionally, that is narrowly, conceived.

In modern electoral democracies, perhaps the most important barrier to parsimonious and enlightened penal policy lies in the quality of public debate about crime. A responsible government is one which makes available the facts on the basis of which that electorate can make informed decisions; filtering and interpretation by the media are, however, inevitable. In a culture such as Britain, in which police practices geared to enhancing clear-up rates and crime reduction through selective recording of reported offences come as a shock to the public, there is clearly a problem about the quality of information on the basis of which perceptions of the crime problem—and hence demands for punishment—are being formed. There is a need for honesty and realism on the part of both Government and media: honesty about the real proportion of crime actually processed by the system, and realism about the impossibility of ‘perfect enforcement’; honesty about the consequences of punishment, and realism about its potential to reduce crime.

If governments effectively promise to satisfy the retributive demands of an anxious populace, irrespective of the social consequences of doing so, it appears as if we have, as a society, no choices in this area. We simply have to expand the criminal law and punish to the extent of (what is at the particular moment regarded as) desert, and the necessary prison places must be provided. In this context, the prison budget becomes effectively ring-fenced—a situation which is exacerbated by the possibility of

privatisation, which distances the immediate fiscal implications of prison expansion.

The development of a criminal justice policy which is genuinely integrated with broader social policies presents, however, a complex challenge to any government whose electorate not only cares deeply about crime but has been encouraged to think that it can be solved by punishment. Let me turn, finally, then, to the resources available in different late modern societies for the pursuit of criminal justice policy and the shaping of criminal justice institutions.

In this context, I would argue that Australia has a number of decisive advantages over Britain. First, it may be an advantage of Australia's federal system that criminal justice policy rests primarily at the state level, where a variety of interest groups and views can more easily find a voice in the policy-making process. It is not clear, however, that this is sufficient to prevent crime from becoming a political football in the pursuit of electoral goal-scoring, and it must be admitted that the federal system, conversely, presents obstacles to the development of an integrated nation-wide criminal justice policy. This is illustrated by the sad fate of the impressive Model Criminal Code.³³ One would like to think, however, that the federal-state relationship in criminal justice policy might develop, particularly in the context of increasing international influence on and cooperation in criminal justice strategy, towards a realignment in which the advantages of localism are combined with a more coherent approach at the federal level. Secondly, Australia's dense institutions of civil society, and its tradition of local initiative and independence, may have the capacity to foster the involvement of a wide variety of social institutions in the fields of not only crime prevention but also—notably in the restorative justice movement—the enforcement of criminal law. These underlying social conditions might be expected to facilitate precisely the kind of re-integrative criminal justice policy for which I have been arguing, along with the integration of criminal justice with broader social institutions, at least at the local level.

Though the British experience provides instructive examples of possible pitfalls, I would therefore argue that we have more to learn from Australia than vice versa. But I would like to conclude with a very broad question of social policy and social theory. It is worth asking how far it is possible for British practice to move in a reintegrative direction; and whether it is a serious danger that Australia will be drawn further along the politicised, disintegrative route which characterises current British policy.

³³ In this context, I was amazed to discover that Simon Bronitt and Bernadette McSherry's recently published *Principles of Criminal Law* (op. cit.), which integrates its study of criminal law with criminal justice and social policy issues, is the first national text on the subject.

To the extent that the integrative route depends on the existence of a rich set of institutions in civil society, it is hard to see how effective practices of restorative justice and other 'community-based' initiatives can be implemented successfully in Britain. There is a painful irony, it seems to me, in the resurgence of an appeal to 'community' in the construction of British social policy at just the time when government policies and economic forces had effected a decisive decline in the vitality of the local, intermediate institutions which might have formed the infrastructure for the realisation of such policies.³⁴

Conversely, it is depressingly easy to see how current trends in the development of the Australian economy—trends which are already bringing with them an increase in unemployment and in casual and insecure part time labour, and a widening of wage differentials and hence of the gap between rich and poor—might over time disrupt the levels of social integration which foster a relatively liberal criminal policy.³⁵ We can also imagine how a fragmentation of civil society in Australia might damage the infrastructure which fosters a criminal justice policy relatively integrated with social policy and social institutions. In this respect, support for institutions intermediate between individuals and state, and a recognition of their relevance to the long term management of crime problems, is probably the single most important issue in criminal justice policy in this country today. In arguing this, as a relatively ignorant outsider, I am comforted to discover that I am echoing many of the themes of the Federal Justice Office's 1992 Report, *Creating a Safer Community: Crime Prevention and Community Safety into the 21st Century*. It is not so comforting to note two influential Australian scholars' comment that the release of this Report 'was barely noticed in the national news media.' and that 'Its objectives and principles are of course subject to the exigencies of electoral politics of law and order laden with rhetoric and symbolism calculated to appeal to a popular, punitive commonsense.'³⁶ Our two systems, perhaps, confront some rather similar problems.

³⁴ See Nicola Lacey and Lucia Zedner, 'Discourses of Community in Criminal Justice' (1995) *Journal of Law and Society* 301

³⁵ See Hogg and Brown (op. cit.) pp. 142-160

³⁶ Hogg and Brown (op. cit.) p. 183: see generally their Chapter 7 for an excellent analysis of the relevant issues.

