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 CHAPTER 9
 

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## Prisons, Politicians and Democracy

*Philip Pettit*

Fergal O'Connor has always been outstanding among Irish political theorists for his capacity to relate abstract theory to concrete issues. To those of us who were lucky enough to be able to learn from him – in my case as a colleague at University College, Dublin – the first lesson he represented was the need to justify theoretical ideas by the perspective that they gave us on day-to-day questions. I am conscious of not having learned that lesson well enough but it is never too late to make amends. And so, in the spirit of his example, I start with lowly but pressing problems in penal practice and try to reveal a connection with issues in high democratic theory.

### The prison problem

One of the most extraordinary features of today's democracies is that, regardless of other differences in their aspirations and achievements, they more or less uniformly rely on imprisonment as the principal response to crime. I say that this is extraordinary because it has long been a matter of common sense observation, and it is now a well-established finding of criminology, that prisons do not serve well the cause of combatting crime. Not much knowledge is required to see that prisons are brutalising and stigmatising institutions that deepen the alienation of offenders from the general society. And not much reflection is needed to see that they are likely to serve as recruiting and organising networks for those of dedicated criminal intent.

Why have prisons proved such a resilient feature of the democratic landscape? How have they managed to survive the growing evidence about their counter-productivity and the efforts of those

professional and associational groups who have subjected them to a barrage of criticism? Criminologists, prisoners' rights groups, civil liberties associations, even victims' movements have subjected prison to withering criticism. And all to no avail. The resort to incarceration remains a steady and indeed a strengthening feature of many western democracies.

In searching for an explanation it may prove useful to move away from prisons, and even away from contemporary democracies. The Irish-Australian historian, Oliver MacDonagh (1958), is well known for his explanation of the emergence of the nineteenth-century administrative state. And that explanation, I want to suggest, offers a very plausible model of why imprisonment has proved so resilient.

The MacDonagh thesis is an attempt to explain the cascade of administrative reforms that emerged and stabilised in Victorian Britain: reforms in the mines and factories, in the employment of children, in the conditions on emigrant ships, and in a variety of other areas. The thesis is that those reforms materialised under the impetus of one and the same mechanism. The mechanism involved, first, the discovery of a scandal; second, the development of public outrage about the scandal; and third, a requirement on politicians to do something in order to respond to the scandal. We can call it the scandal machine.

According to MacDonagh, this scandal machine served in the first instance to introduce reforms in a given area and then, later, to reinforce and increase the effect of the reforms. As he describes the typical story, the machine initially had the effect of getting government to make an inquiry and to set up regulatory constraints; some years afterwards, when the scandal was found to have survived those constraints, it goaded government into establishing a regular inspectorate; and then a few years later, after the revelation of continuing scandal, it forced government to set up a proper bureaucracy to oversee the area in question.

The MacDonagh thesis is that we can explain the growth of the nineteenth-century administrative state by the cumulative effects of this simple but powerful mechanism. That state was not the intentional product of a Benthamite project of reform; it did not come of a utilitarian spirit sweeping through the halls of Westminster. It was the precipitate rather of a pattern that no one planned and

that few understood. The growing administrative state was forced upon British democracy by systemic pressures, not by philosophical ideology or political will.

It is easy to reconstruct the elements that made the scandal machine so powerful. Nineteenth-century Britain was a more or less literate culture in which the press offered a ready outlet for the revelation of scandal; it was a more or less humanistic culture – the response to the Irish famine notwithstanding – in which scandal easily ignited outrage; and it was an increasingly democratic culture in which politicians had to prove themselves responsive to the feelings of the people. It was the combination of those forces, and not the vision of the leadership of any individual or group, that gave rise to the different aspects of the new governmental regime.

When we read MacDonagh's account of the rise of the administrative state it is easy to think of the mechanism at work as a sort of benign, invisible hand. Or at least that is easy for those amongst us who see the administrative developments that he charts as positive and progressive measures. But the scandal machine is not inherently benign in its effects, or so I now want to suggest. It can operate as often in the manner of an invisible foot as an invisible hand.

Consider the manner in which social work agencies are constrained by the scandal machine in their decisions as to whether certain children should be taken into care. If an agency decides that the children are better left with their parents or guardians then it runs a serious risk. Should anything bad happen, the newspapers and the television can be relied upon to reveal the scandal, to generate popular outrage and to call government down upon the head of the agency responsible. If the agency takes the children into care however, then short of large numbers being involved it can be more or less certain of escaping such bad effects. And this is so even if the reasons for taking the children into care are not professionally compelling; even if the option of taking the children away from their homes is a matter of just playing bureaucratically safe.

It does not take much imagination to see how in this type of case the scandal machine may operate like an invisible foot, not an invisible hand. The machine can easily ensure, at least in the absence of other safeguards, that social work agencies work for ill, not for good, in dealing with children at risk. It can have the result that

children who would be much better left in their homes, perhaps under some sort of monitoring arrangement, are actually taken into institutional care.

We have seen what the scandal machine is and we have noticed that it may operate for good or for bad, depending on the circumstances in question. It is time, with these observations in mind, to return to the case of prisons. What I want to suggest is that the MacDonagh model provides a good explanation of what may be happening in this area. It does not need a lot of thought to see that the scandal machine operates with particular momentum in matters of criminal justice and that it can readily account for the resilience of the resort to imprisonment.

We can see how the scandal machine operates at the heart of penal practice if we ask ourselves what would be likely to happen in the event of a government reducing the maximum sentences available for given crimes, introducing new opportunities for early release, and arranging for a greater use of alternatives to imprisonment: say, a greater use of fines and community service orders. It is as sure as night follows day that at some point after the inauguration of such reforms an offender who would otherwise be in prison will commit some more or less sickening sort of crime. And it is equally sure that when such a thing happens it will constitute a matter of scandal, a cause of public outrage and a ground for calling on politicians to roll back the reforms which they had begun to institute.

There is no difficulty in seeing why such a crime would be a matter of scandal and outrage. We live in a society where the press and television have a vested interest in presenting people with the sensational and the shocking and in drumming up moralistic sentiment about the horrors involved. It is a well-tested Flect street formula that people like savouring the scandalous and having their outrage pumped and primed; it is common wisdom indeed that they are willing to pay for the pleasure.

As there is no difficulty in seeing why the crime envisaged would be a matter of scandal and outrage, so there is no difficulty in understanding why it would force politicians, in all likelihood, to backtrack on the reforms they had initiated. When politicians are called upon to respond to the occurrence of a sickening crime, then there is only one plausible response they can make. They

have got to show themselves as concerned and as angry as the most outraged in the community. And they have got to do that in the newspaper headline or the thirty-second sound bite. Let them fail to be sufficiently expressive of concern and anger and they will easily be upstaged by more vociferous opponents.

How can politicians be expressive in the required way? How other than by calling for a return to hard and harsh punishment? We will show these vandals, these vermin, what ordinary, decent folk think of such behaviour: the metaphors and the cadences will be familiar to every ear. We will crack down like government has never cracked down before on this sort of affront: the melancholy message is dreadfully predictable.

The reason why politicians are bound to be driven to this retributive, punitive response is that the forum in which they operate lends itself to no other language. The theatre of public responsibility and political will requires nothing less than an operatic display of fellow feeling and fellow outrage. Never mind if the words get lost. The audience isn't interested in what you are actually going to do; it wants to see and know that you care. Your job is to give the outrage voice and, in giving it voice, to orchestrate a chorus of demands for a return to the world where society is tough on crime.

If this line of thought is right then the criminal justice area is governed by the logic of the scandal machine and is subject to the control of an invisible foot. It is guaranteed never to move away from the pattern of counter-productive imprisonment that currently dominates our response to crime. Montesquieu (1989, 203) spoke over two hundred years ago of the danger that society would be subject, in its criminal laws, to what he called 'the tyranny of the avengers'. The scandal machine looks like a mechanism that ensures, unfortunately, that this sort of tyranny we will always have with us.

### **The depoliticising solution**

But perhaps I should rephrase that message. The tyranny of the avengers looks like something we will always have with us, at least so long as decisions about imprisonment are made by democratically elected politicians under the pressure of public, theatrical demands. For just as democratic responsiveness played a part in ensuring that the scandal machine produced those positive reforms described

by MacDonagh, so it plays a crucial part in ensuring that that machine produces the resilient pattern of imprisonment with which we have learned, at no small cost, to live.

The observation is important because it points us towards the only sort of feasible change that might save us from the tyranny of avengers. The change I have in mind can be described in a single word: depoliticise. If decisions about sentencing and penal policy were depoliticised, if they were entrusted to a network of expert and impartial committees that monitored the aggregate effects of every initiative taken, then – then and only then – there might be some chance of rationalising the way in which we run our criminal justice system.

Without going into the details of the change envisaged, it is clear why we might look to it with a degree of confidence. Think about how central banks have come to depoliticise various financial decisions in most contemporary democracies and think of the way in which this enables politicians to resist popular pressures to introduce what might very well be irresponsible policies. They can say that the issue is not one in their province. And they can say that it is an issue on which it would be improper for them, or for any amateur or outsider, to criticise the decision-making body. Thus they can protect themselves from media assault by passing the buck elsewhere and they can ensure that there is somewhere else to pass the buck – there are people willing to accept appointment to central bank boards – by arguing that those who are appointed for their expertise and impartiality are not fair targets of popular criticism.

The depoliticisation move is known in discussions of constitutional democracy as a gagging initiative: an initiative in which the politicians silence themselves, or have silence thrust upon them (Holmes 1988). I think that the failure to resist the pressure of the scandal machine in the criminal justice system, the failure to rectify manifestly irrational aspects of our criminal justice practice, shows that the only way to make ground in this area may be to gag the politicians and to transfer the decisions to non-political bodies. If war is too important to be left to the generals, criminal justice is too important to be left to the politicians.

I realise that I have not presented an adequate argument for depoliticising criminal justice decisions. In order to make a proper

case for such a reform I would need to marshal the empirical evidence of current failure. I would need to canvass the problems with alternative possibilities of reform. I would need to detail the proposal I have in mind and I would need to establish its attractions by showing how well analogues work in other areas. Also I would need to plan an implementation procedure that would allow for bringing the strategy into play in stages, with evidence of the success of each stage being necessary for progressing to the next stage.

I hope I may be forgiven for assuming in the absence of a proper argument that the depoliticisation option would be better than the status quo. That assumption is not outlandish, if only because the status quo is so barbaric. For anyone familiar with the brutal practice of prisons on the one hand and the evidence of their counter-productivity on the other, the status quo in criminal justice must begin to look about as morally compelling as a system of slave-holding (Braithwaite and Pettit 1990).

### **Depoliticisation and democratic theory**

One reason I may be forgiven for not arguing properly in favour of depoliticising criminal justice is that my interest in the proposal, for present purposes, derives from an interest in the theory of democracy. Assume, if not that it is certainly better to depoliticise criminal justice, at least that this is likely to be so. Assume, if you prefer, that whether or not criminal justice should be depoliticised, certainly depoliticisation is an attractive option in other areas of government: say, in the area of central-bank decisions. Any such assumption will serve to generate the question to which I now want to turn.

That question bears on how the theory of democracy can look with any favour on a depoliticising proposal. Under most accounts of democracy, the attraction of the arrangement is that it puts public decisions – say, decisions on matters relating to public goods – where they properly belong: in the hands of the people or in the hands of the people's representatives. The orthodox democratic theories suggest that good public decisions are decisions that express the popular will or, if not the actual popular will, at least an informed counterpart of that will: for example, the sort of will that might be expected to emerge among popularly chosen representatives who

systematically debate the issues involved. In a democracy the people are politically sovereign, it is said, albeit they may cede legal sovereignty to their representatives (Dicey 1960). And under most assumptions that means that the polity works well, and the point of democracy is achieved, just so far as things are organised so that the sovereign's will is ... well, sovereign.

The problem with any depoliticisation arrangement is that on these will-based or voluntarist theories of democracy, it is not clear how such an arrangement could be justified. Depoliticisation involves taking decisions away from the people and away from the people's representatives. In particular, it involves taking away legislative and administrative decisions of the kind that belong with the people under established views of democracy: it is generally conceded that judicial decisions are reasonably left in unelected hands. And that suggests that if we endorse depoliticisation in any area of policy, then we are not true democrats but rather elitists of some kind. We wish to authorise not the people or the people's chosen spokespersons but rather, as it will be said, a corps of faceless, rational bureaucrats.

The challenge here is worth dwelling upon, even savouring. I remember attending a discussion among academics from different fields in Canberra about five years ago. The meeting was focused on some general political issues and a particularly forthright historian posed a problem for the gathering. He was a democrat, he said, or at least had always considered himself to be such. And yet he could not accept that decisions on a variety of matters – he mentioned capital punishment as one example – should be left in the hands of the people; he didn't even think that they should be left with representatives who considered themselves bound by the opinions of their constituents. The people, in his view, were just not up to making decisions of the sort envisaged. Was he inconsistent, he wanted to know. Did he have to make a choice between populism and democracy, on the one hand, or elitism and rationality on the other?

The issue before us is just the same. Can we endorse depoliticisation, in particular depoliticisation in the area of criminal justice, while claiming to be faithful to the ideal of democracy? I want to argue now that we can. It is true that voluntarist theories of democracy would represent depoliticisation as essentially inimical

to democratic ideals. But voluntarist theories of democracy, so I want to suggest, are not the only game in town. There is an alternative vision of democracy – a critical or contestatory theory I call it (Pettit 1997) – and under this approach depoliticisation can often be just the sort of thing that democracy requires.

### **The contestatory theory of democracy**

Where democracy exists then by almost all accounts the people as a whole enjoy a sort of collective autonomy that parallels the personal autonomy for which individual agents aspire. But there are two versions of the ideal of personal autonomy and they suggest, by analogy, two quite different versions of the democratic ideal.

The usual account of personal autonomy is voluntarist in character, like the usual account of democratic autonomy. What it suggests is that persons are autonomous just to the extent that they have taken charge of their own beliefs, their own desires and, consequently, their own decisions. They have tried, so far as possible, to suspend the formative influence of childhood and conditioning and they have sought to endorse only such beliefs and only such desires as they have found personally compelling. They have appropriated the intentional states that guide their behaviour, making them truly their own. They have achieved the sort of construction of the self for which existentialists yearned. They have become autonomous in the etymological sense of making the self its own *nomos* or law. 'Wo Es war', in Freud's expression of the idea, 'soll Ich werden'. Where there was just an impersonal process leading up to the formation of belief and desire – where there was It – there shall be a self in control: there shall be I.

While the voluntarist or existentialist ideal of personal autonomy has certain heady charms, it should be clear that it does not have any lasting appeal. It is entirely infeasible, since there is no one amongst us who is capable of the radical re-examination and reconstruction for which it calls. How can we probe into the origins of our every opinion and preference in order to decide whether it is the product of pathology or whether we can own it as the authentic property of the self? And even if it were feasible, we would still have reason to be unmoved by this voluntarist ideal. It gives expression to an atomistic longing to be isolated from community,

particularly the intimate presence which community assumes in parents and teachers and other sources of authority and influence. It represents, as Sartre freely admitted, a desire for godhead: a desire to be thought thinking itself, in Aristotle's phrase; a desire to be one's own creator. It is a shallow, characteristically adolescent ideal, not something vindicated in adult experience.

But it would be a great mistake if disenchantment with the voluntarist ideal of autonomy led us to give up on the notion of autonomy as such. For there is clearly another version that the ideal may assume: a critical or reflective version rather than a voluntarist one. Under this picture of autonomy the history of a person's beliefs and desires – the fact that they originate in childhood and conditioning, for example – is neither here nor there. The important thing is not where the beliefs and desires came from but whether they are maintained in such a manner that the person is capable of critically reflecting on them and capable, should reflection so prescribe, of changing them in certain ways. The crucial achievement is counterfactual or modal, not historical; it consists in the ability, in the event of criticism revealing problems, to stand back and amend.

There are two dimensions, of course, to this critical ideal of autonomy. People will score high in autonomy so far as they are exposed to critical reflection, first of all, and so far as they have the capacity, second, to allow the results of criticism to impact on what they believe and desire. Exposure to critical reflection arises mainly from exchange with others, however; you can fail to achieve it only by sealing yourself into a solipsistic or monocultural shell. And so the more salient aspect of autonomy is the critical or responsive dimension. To be autonomous is to be attached to your ideas and values, not in the pathological manner that would make it impossible for you ever to rethink them, but in the rational way that leaves you open to the possibility of change. It is to be unhindered, at least in the main, by such traditional pathologies as those that we describe as compulsiveness, akrasia and weakness of will, prejudice, bias and dogmatism.

As there is a voluntarist and a critical version of personal autonomy, so there are two versions of democratic autonomy. We are accustomed to think of a community as autonomous and democratic to the extent that the will of the people rules: whatever

is law is a matter of general consent, if only virtual or tacit or implied consent. But I suggest that we should think of a community as autonomous, not just to the extent that the people have chosen and endorsed everything that happens, but also to the extent that the people have a dual capacity in relation to whatever happens and whatever becomes law. They can challenge whatever happens – this parallels the possibility of critical reflection – and where the challenge is vindicated they can enforce a change: this parallels the possibility of critical reflection being effective.

The democratic ideal in question does not care essentially about where public decisions come from, any more than the critical version of personal autonomy cares about where a person's ideas and values originate. What is of primary concern from the point of view of this ideal is whether the people retain the ability to contest those decisions and to contest them with some chance of having an effect. The key feature of democracy consists, not in the fact of general consent and popular will – if there could ever be a fact about such matters – but in the capacity for people in every section of the community to raise a potentially effective challenge to any decisions that they judge to be inappropriate.

We can return now to the depoliticisation proposal and the problem that it raises for a voluntarist theory of democracy. For it should be obvious that if we go along with a contestatory component in our theory of democracy then we can take a very different view of such a proposal. Under the contestatory approach the important thing in the organisation of democracy will be to ensure in any given area of policy that there are channels whereby contestations can be raised and given a proper hearing; given a hearing in which the decision made can be reasonably expected to answer to our shared sense of the relevant considerations or, at least, to our shared sense of reasonable decision-making procedures. There is no reason in principle why the best way to establish this contestatory possibility may not involve a measure of depoliticisation.

There is every reason indeed to think that the only way to ensure the possibility of effective contestation in the area of criminal justice is precisely to depoliticise. Our argument in the first section, sketchy though it is, shows that there is little hope of politicians being able to hear and respond to the challenges of criminology and common sense to the barbarism and inefficiency of current penal practice.

Politicians are forced to hear those challenges in a forum where rituals of public outrage are also allowed and it is absolutely clear that in such a theatrical forum the challenges stand no chance of being taken seriously. The only hope of arranging for a proper hearing is to let the challenges be considered and assessed in a depoliticised environment: in precisely the sort of environment that might emerge under the proposal that we sketched.

The fact that we go along with the depoliticisation proposal, then, does not mean that we have to renounce democracy and accept that we are elitists. For while the proposal takes away power from the politicians, there is a real sense – a contestatory sense – in which it gives power to the people. Democracy and depoliticisation are not inherent opposites. They conflict with one another only under a voluntarist image of democracy, not under the image that we have sketched in this section.

### **Republicanism and the contestatory theory**

But I would like to add a few words in order to emphasise that the contestatory theory of democracy is not a novelty – not an invention of my own – and not something disconnected from received values. The theory belongs with the long, republican tradition of thinking about politics (Pocock 1975, Skinner 1978, 1983, 1984). And that tradition has a powerful attraction in the contemporary scene.

The republican tradition is associated with Cicero at the time of the Roman republic; with a number of writers, pre-eminently Machiavelli – ‘the divine Machiavel’ of the *Discourses* – in the Renaissance Italian republics; with James Harrington, Algernon Sydney and a host of lesser figures in and after the period of the English civil war and commonwealth; and with the many theorists of republic or commonwealth in eighteenth century England and America and France. These theorists – the so-called commonwealth men (Robbins 1959) – were greatly influenced by John Locke and, later, the Baron de Montesquieu; indeed they claimed Locke and Montesquieu, with good reason, as their own. They are well represented in documents like *Cato’s Letters* (Trenchard and Gordon 1971) and, on the American side of the Atlantic, the *Federalist Papers* (Madison, Hamilton and Jay 1987).

The key notion in the republican tradition, as I have argued in a

number of other places (Pettit 1993, 1997), is the distinctive view of liberty or freedom that republicans maintained. Under this view, freedom does not consist in non-interference, as liberal theorists generally say, nor indeed in the power of participating in popular decision-making with which liberals like to contrast such freedom (Constant 1988). Republican freedom belongs neither with the negative image of liberty nor with the positive (Berlin 1958). It requires an absence of something, as does the liberal or negative ideal, but not the absence of interference. What it requires, rather, is the absence of what I call domination.

One person dominates another, on my account, to the extent that they have the ability to interfere on an arbitrary basis in that person’s choices; they have the ability to interfere in those choices without having to be guided by the victim’s interests or ideas. One person dominates another through standing over them, even if stand is all they do: even if they never strike. One person dominates another through having the other person under their thumb, even if they never press that thumb: even if they always stay their hand. Domination exists wherever there is subjection and vulnerability.

The republican ideal of freedom as non-domination delegitimises asymmetries of power such as those that have characteristically been associated with the relationship of employer to employee, man to wife, lender to debtor, bureaucrat to welfare client, and so on; in such relationships, after all, the stronger often has the capacity to interfere more or less arbitrarily with the weaker, even if that capacity is not likely to be exercised: even if liberals, therefore, would not be concerned about it. That is to say that the republican ideal is socially radical. But the ideal will appeal as an ideal for state activity only so far as we can be sure that in setting up the state we do not set up the sort of Hobbesian Leviathan that would represent the greatest dominator of all: that would dominate us more effectively than any dominators it might seek to inhibit. Can we do anything, then, to guard against the state being a mastering or dominating presence? The state will interfere with everyone to the extent that it employs coercive law: that is why liberals are so wary of it. But can we do anything to make sure that it is at least a non-mastering interferer: to make sure that its interference is forced to track people’s interests and ideas?

The answer is that while there are a variety of things we can do

– republican proposals range from the rule of law to limited tenure in office to the separation of powers – the most crucial requirement is that we institute a contestatory form of democracy. That the government is democratic in the voluntarist sense is not going to ensure that it does not dominate people: the majority can be a more effective tyrant than any one individual. But that it is democratic in the contestatory sense will ensure an absence of political domination. It will mean that people in the society are in a position to contest any public decision – contest it with a reasonable chance of effectiveness – on the grounds that it is inimical to their interests and ideas: that it deals with them in a manner which any citizens in their position would be bound to reject. If people have such a power of contestation – and I am speaking of an ideal – then and only then will they be assured against domination by the state.

I hope that this connection with the republican tradition may add weight to the case for conceiving democracy in the contestatory image and, ultimately, to the proposal for depoliticising criminal justice practice. It should show that that image and that proposal belong with a long and well-tested tradition of thought, even if the tradition has had a bad run in the last century or so. Consider John Locke's (1965) argument that if government has the aspect of a legal contract – this connects with the voluntarist tradition – it also has the aspect of a legal trust. That argument led Locke to hold that the people have a right to challenge and resist a person in public office if the trust is not well discharged: if the person assumes a power, according to Tom Paine's (1989, 168) formulation, 'in the exercise of which, *himself*, and not the *res-publica*, is the object' (cf. Sydney 1996, 199–200). When we defend the contestatory conception of democracy we do no more than resurrect this republican way of thinking and give it a proper place in democratic theory.

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