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Who's afraid of penal populism? Technocracy and 'the people' in the sociology of punishment

Victor L. Shammass 

Department of Sociology and Human Geography, University of Oslo, Oslo, Norway

ABSTRACT

Contemporary sociologists of punishment have criticized the rising incidence of incarceration and punitiveness across the Western world in recent decades. The concepts of *populist punitiveness* and *penal populism* have played a central role in their critiques of the burgeoning penal state. These concepts are frequently sustained by a doctrine of *penal elitism*, which delegates a limited right to politicians and 'the people' to shape institutions of punishment, favoring in their place the dominance of bureaucratic and professional elites. I argue that the technocratic inclinations of penal elitism are misguided on empirical, theoretical, and normative grounds. A commitment to democratic politics should make us wary of sidelining the public and their elected representatives in the politics of punishment. A brief discussion of Norway's legal proceedings against Nazi collaborators in the mid-1940s and the introduction sentencing guidelines commissions in Minnesota in the 1980s shows – *pace* penal elitism – that professional elites may variously raise the banner of rehabilitationism or retributivism. While penal elitism may yield a few victorious battles against punitiveness, it will not win the war.

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What exactly did the people mean to the intellectuals? [...] [T]he people were a mysterious Them, described in terms of everything their discoverers were not (or thought they were not): the people were natural, simple, illiterate, instinctive, irrational [...].

Peter Burke (1978/2009). *Popular Culture in Early Modern Europe*. Surrey: Ashgate, p. 31.

Introduction

Penal elitism is a doctrine that favors granting experts and professionals the authority to shape the politics of punishment. The central proposition of penal elitism is that experts in law, crime, and punishment possess a set of unique technical competencies that grants them the right to devise crime control policies in place of politicians and the public, who are held to be excessively capricious, emotive, or unenlightened.

Penal elitism has grown increasingly prevalent in the sociology of punishment.¹ It has seemed to offer an expedient device for rolling back retributivism, offering hope that penal

modernism might be restored by means other than those of the traditional avenues of democratic politics. If an enlightened elite could be permitted to tinker uninterruptedly with the machinery of the penal state, this position affirms the penal turn might be unwound and hyperincarceration stemmed. But penal elitism promises too much; it is triply flawed: theoretically, empirically, and normatively.

Its conceptual counterparts are 'punitive populism' (Bottoms, 1995; Garland, 2001) and 'penal populism' (Pratt, 2007), both of which were developed and deployed against the backdrop of booming prison populations across much of the world in recent decades, evidenced by US hyperincarceration (Wacquant, 2009b) and a growing 'culture of control' in Anglophone and continental European societies (Garland, 2001). The concept of penal populism has been used to criticize and account for the growth of the penal state over the past half century (e.g. Green, 2008; Jones & Newburn, 2006; Lynch, 2013; Pratt & Clark, 2005; Roberts, Stalans, Indermaur, & Hough, 2003; Turner, 2014), apportioning blame to politicians and the public for the Western turn to punitive penalty. While the concept may appear analytically innocuous, its usage often hinges on normative claims about the rightful role of technocratic elites, elected representatives, and the general public in shaping political outcomes – with undue weight given to the first over the second and third groups, and an excessively flattened vision of these groups' sociological realities.

While used in a range of different ways, the concept of penal populism is frequently meant to entail several or all of the following societal properties (see Pratt, 2007): (1) the increased prominence of crime and punishment as topics of prime importance for public debate in democratic elections; (2) the rising influence of public opinion polls and media reporting on the extent and degree of punishment, characterized by increasingly virulent rhetoric against criminal offenders; (3) the disappearance of 'insulation' or 'buffers' between criminal justice bureaucracies on the one hand and elected politicians and the populace on the other hand; and (4) the introduction of harsh punishment policies by politicians aimed at bolstering public support, including, in the US, determinate and mandatory sentencing laws (e.g. sentencing guidelines and 'three strikes' laws), 'zero tolerance' policing, 'war on drugs'-style legislation, and sex offender registries, and, in Europe, the growing prominence of police surveillance and the detention and deportation of 'irregular immigrants'.

Penal elitism has a long pedigree. Cesare Beccaria, a leading Italian legal philosopher of the eighteenth century, believed criminal justice should be insulated from popular influence; the 'common people' exhibited 'unreasoning veneration' of delivered wisdom, Beccaria (1771/1995b, p. 154) argued, so that,

faced with the choice between veneration, on the one hand, and a laborious investigation of the truth, on the other, most of them would have little hesitation in choosing the former, given their natural inclination to avoid mental effort except where it is unavoidable.

As unthinking captives of staid common sense, the general public was not to be trusted to develop reasonable models of justice. Neither should a benevolent despot be the guarantor of justice; rather, the 'greatest gift a sovereign can give the nation and himself would be to make an enlightened man the repository and the guardian of the sacred laws' (Beccaria, 1764–1995a, p. 107). The general public was to be relegated to a position of submission in the social order because they lacked the finer 'needs and interests' and selfless 'habit of loving truth' found among more thoughtful elites, and law's empire was to be the preserve of philosopher-kings (Beccaria, 1764–1995a, p. 107).² Beccaria remained opposed to democratic influence on the law. More generally, it was a view that fit into the elitist perception of the

world propounded by figures such as Pareto, Mosca, Michels, and Bagehot, who believed that 'the masses' should be shepherded toward a reasonable social order by an empowered minority (see Parry, 1969–2005). Many sociologists of punishment are also of an elitist persuasion.

The fear of untrammelled democracy

Political theorists have argued against a more prominent role for public political participation because of the supposed 'cognitive incompetence' of citizens (see Smith, 2009, pp. 125–126). More specifically, a Habermasian, reason-heavy conception of citizenship and deliberative democracy (Krause, 2008) constitutes the basis of penal elitism, which views 'experts' as the sole bearers of reason, politicians and the public as saddled with unreason, and places the emotions in a relationship of opposition to reason. For Green (2008, p. 131), when public debate on penal policy is 'affectively bound, engagement with it must also begin at the emotional level.' Green argues that this affective framing of penal debates is 'why expert, non-emotional, rationalized discourse has diminished purchase in penal policy debates that are affectively and morally defined.' Arguing for the deployment of bureaucratic councils to determine sentencing guidelines that steer judicial decision-making and trump the influence of politicians over sentencing, Freiberg (2013, p. 161) contends that 'the Council can play a useful role in defusing issues by taking on contentious matters and considering them in a calmer atmosphere and over a longer period when some of the emotion produced by the original event has dissipated.' Morris and Tonry (1990, p. 222) decry the 'mercurial nature of public opinion' and believe that politicians engage in 'pandering' to 'public fears and stereotypes' in matters of criminal justice. Pratt (2007), by way of epigraph to the standard reference work on penal populism, approvingly quotes the novelist Ludwig Lewisohn's warnings against the 'tyranny of majorities' and the 'deadly power' of democratic influence.

What do these diverse scholars have in common? They share a profound pessimism about the prospects of a democratic politics and a belief in a mutually exclusive relationship between emotion and reason, evident in the cleavage between, on the one hand, professionals as bearers of infallible expert knowledge, and, on the other hand, the general population and politicians as bearers of flawed folk knowledge. Penal elitism is built on the ideal of *technocracy*, a doctrine that asserts that 'human problems, like technical ones, have a solution that experts, given sufficient data and authority, can discover and execute' and which finds 'interference from vested interests, ideologies and party politics intolerable' (Kuisel cit. Porter, 1995, p. 146).

In a review of the history of Western penal politics, Garland (2000) alleges that criminal justice professionals in the postwar era successfully established and controlled a largely technocratic system of punishment. In this supposed 'golden age' of expert opinion, Garland contends that crime control consisted of 'essentially technical issues, best governed by expert knowledge and empirical research' (Garland, 2000, p. 352). It is to this hallowed era that penal elitists wish to return. For Pratt (2007, pp. 172–173), penal populism represents a struggle between affect and rationality, so that punishment, 'instead of being driven primarily by concerns about efficiency, economy and humanitarianism, has to incorporate, and is sometimes overwhelmed by, the emotive forces that populism unleashes.' Penal elitism envisions a criminal justice machine operated by neutral, objective, and technically proficient experts or coolly reasoning arbiters who make evidence-based judgments of right and wrong.

As if it were a self-evident disqualifier, Pratt (2007, p. 17) contends that penal populism privileges the 'penal expectations of the public over those of the criminal justice establishment.' Ruefully noting that there has been a 'dramatic reconfiguration' of the 'power to punish that had been characteristic of post-war modern society,' Pratt (2007, p. 24) notes that in those golden postwar years, experts reigned supreme, and, happily, the 'general public were largely excluded from any involvement in penal affairs.' In place of the people, criminal justice matters were handled by a civil service that relied on 'academic experts and similar elites' for rational guidance. Some societies have constructed buffers against the pernicious influence of the people's justice. The punitive turn, on Pratt's account, is in part the result of too much democracy, in part the result of not the right kinds of democratic preferences. Securing rehabilitationism presupposes the removal of the public's influence over the law, courts, and prisons. To the extent that popular influence *has* been impeded, elites should be lauded for their efforts.

Garland (2000, p. 350) expresses a similar lament over the alleged laicization of criminal justice policy-making in recent decades; criminal justice policies have become 'populist and politicized.' On Garland's account,

Policy measures are constructed in a way that privileges public opinion over the views of criminal justice experts and professional elites. The professional groups who until recently formed the policy-making community are now increasingly disenfranchised. Policy is formulated by political action committees and political advisers – not by researchers and civil servants.

The crucial characteristics of penal modernism, a benevolent correctional philosophy that is said to have reigned supreme in the postwar era, included its emphasis on the social causes of crime and the importance of rehabilitating offenders through 'the (expert projection of) the individual offender and his or her needs'; contemporary retributive punitiveness, on the other hand, is said to take the side of the victim of crime through '(a political projection of) the individual victim and his or her feelings.' What should concern us are the items enclosed by parentheses, containing an implicit dichotomous struggle between 'expert projection' and 'political projection.' Casting the conflict between penal modernism and latter-day retributivism as taking place between the 'expert,' on the one hand, and the political, on the other hand, can only be meaningful if one holds the view that experts are not wielders of political power. In so doing, Garland deploys a parochial conception of politics as limited competitions between parties in legislatures – as opposed to the wider conception of politics as struggles over power in general.

Others recommend 'buffering' or 'insulating' criminal justice experts from politics in the narrow sense of the term. After reviewing public opinion on criminal justice issues in five countries, Roberts et al. (2003, p. 180) argue that one should 'create a policy "buffer" between politicians and the criminal justice system'; punishment should be the prerogative of experts because 'the closer that politicians come to directly determining sentencing policies, the more likely it is that these policies will reflect the forces of blind populism.' Their policy recommendations betray a disdain for politicians and the public and an almost limitless faith in bureaucratic expertise. And while bureaucrats and parliamentary committees may well have their say, 'at the end of the day, these committees are composed of elected representatives, who are themselves subject to populist pressures, and who are seldom specialists in criminal justice' (Roberts et al., 2003, p. 181). On their account, then, politicians are inept and the public is unreliable because 'people are not satisfied by what appears to be cold rationalism,' being too easily swayed by emotional posturing and an impatience with slow

deliberation. Ultimately, they believe that the public should be prevented from exercising undue influence on social outcomes:

It would be a simplistic form of democracy that delivered flawed criminal justice policies simply because there was an apparent public demand for them. This would amount to democracy by uninformed plebiscite, quite different from the form of government by elected representatives that our five nations purport to uphold. (Roberts et al., 2003, p. 161)

They recognize rightly that this is an ‘intrinsically conservative’ position (Roberts et al., 2003, p. 161) and pessimistically note that there is only a slim probability of establishing a barrier between democratic influence and the institutions of punishment because doing so would require the consent of elected representatives who are not deemed likely to abdicate power to a body of putatively independent experts (Roberts et al., 2003, p. 181). Finally, in order to prevent the deterioration instigated by pure democracy, the authors envision a brighter, more utopian future where ‘adequate buffers between penal practice and populist policy’ can be erected. Against inconstant populations and politicians should stand an ‘effective alliances between practitioners, academics, and reform groups’ so that reason can outmaneuver emotion, to allow ‘rational penal policy to develop a coherent, audible, and authoritative voice’ (Roberts et al., 2003, p. 185).

Writing on the rise of an elitist normative current among US political theorists, Walker (1966, p. 295) pointed out that democratic elitists place ‘great emphasis on the limitations of the average citizen and are suspicious of schemes which might encourage greater participation in public affairs.’ Consequently, Walker noted, they would rather see an ‘active, responsible elite’ manage the daily business of political governance. In a similar vein, Pratt (2007, pp. 160–166) describes how (and welcomes the fact that) countries like Canada, Germany, and Finland have managed to erect barriers between popular influence and the formation of criminal justice policies. In Germany, the prosecutors and judges form an elite ‘cadre’ who are simultaneously protected from ‘political influence’ and are allowed to exert disproportionate influence on the policy-making process. In Finland, there exists ‘deference to law professors and other members of the criminal justice establishment,’ and a ‘coalition of interest’ has been established between various elites against the public. Each of the three societies shares a powerful and independent criminal justice bureaucracy, an ‘entrenched and authoritative civil service’ that is ‘largely in control of penal events in these countries.’ In Canada, successive governments have been ‘able to successfully give the impression that they are being tough on crime and thereby assuaging any populist ripples when in reality they are doing the opposite.’ (Pratt, 2007, p. 156) Welcoming the deception of the populace by an unelected minority of professionals, Pratt displays an almost boundless faith in the liberal tolerance and progressive character of penal elites.

Wacquant (2009a, p. 214) avoids falling into penal elitism by describing how the removal of one set of experts from criminal justice policy-making is followed by their immediate replacement by another set of experts, noting that while ‘the technical voices of experts, such as psychiatrists and penologists’ has been quashed, another set of ‘experts’ – victims’ rights activists, journalists, and ‘think tank’ members – has filled the vacuum left by the withdrawal and deauthorization of experts proper. On the increasingly heavy-handed treatment of sex offenders, Wacquant (2009b, pp. 225–226) contends that there has been, on the one hand, a ‘*short-circuiting of the expert*,’ and, on the other hand, a ‘promotion of crime victims as authoritative bearers of folk wisdom and popular will.’ On this account, when one set of experts is defrocked, another stands ready to take its place and push its version of

penal common sense. This is a sensible way to analyze the workings of elites because it recognizes that *to be an expert* is simultaneously to take and be handed a position of authority in social space. There are no 'essential' experts. Experts are those who speak with the *skeptron* of authorized language (Bourdieu, 1991, p. 109).³

Interrupting penal elitism

Penal elitism contains three fundamental empirical, theoretical, and normative components. (1) The central *empirical* claim is that the preponderance of penal elites secures low levels of punitiveness, reins in retributivism, and strengthens rehabilitationism. On this view, penal elites have traditionally been rehabilitationists; consequently, as penal elites are weakened, retributivism grows. (2) The core *theoretical* model views advanced societies as a triangular exchange between three groups: politicians, professionals, and 'the people.' (3) The key *normative* claim is that rehabilitationism is a sufficiently desirable end to trump competing ideals like the democratic control of the state's instruments of coercion.

All three are problematic. First, the *empirical* claim incorrectly understands penal elites as homogeneous and universally committed to rehabilitationism. I briefly discuss the legal proceedings against Nazi collaborators in Norway after World War II and the establishment of sentencing guidelines commissions in Minnesota starting in the 1980s. These compact empirical excursions suggest that penal elites are *differentiated* across time and space and *possess conflicting penal philosophies*. Far from being inherent guarantors of rehabilitationism and natural bulwarks against retributivism, elites may at various times raise the banner of either approach.

Second, a more sophisticated *theoretical* model of penal change is required than the People–Politicians–Professionals societal model (dubbed the 'Three-P Triangle'; see Figure 1) implicit in penal elitism. In its place, I propose deploying Bourdieu's concept of the *field of power* (Wacquant, 1993) to show that the politics of punishment always bears the imprimatur of agonistic interactions between differentiated elites, stratified populations, and ideologically divided political groupings (see e.g. Goodman, Page, & Phelps, 2015). Ascribing essential properties to the corners of the Three-P Triangle causes one to lose sight of the fact that each point contains competing groups whose attitudes to punishment cannot be

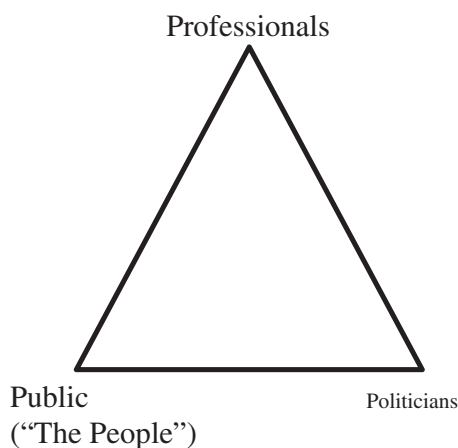


Figure 1. The Three-P Triangle: an implicit model of societal interaction and transformation in penal elitism.

resolved from the repose of armchair speculation. Their preferences must be excavated through empirical investigation.

Third, the *normative* claim should be rejected on the basis of a ‘radical democratic agenda’ (Baert & da Silva, 2010, p. 41) that seeks to revoke the monopoly of experts over legitimate knowledge and strengthen democratic influence on social outcomes. Against *democratic instrumentalism*, which contends that citizens expressly do not have a ‘right to a democratic say’ (Arneson, 2009), one might follow Walker’s (1966) critique of the ‘elitist theory of democracy’ and argue that taking democratic politics seriously requires according citizens the right to shape the world in which they reside through deliberation and contestation. That basic commitment may give rise to a range of institutional preferences, including the Montesquieuan ‘checks and balances’ of the US Constitution and the Weberian affirmation of the necessity of bureaucracy, but it crucially orients one’s worldview to see such arrangements as necessary evils to be minimized, not glorified and exalted, whenever possible. It hinges on the concept of popular sovereignty, which sees the people as the legitimating source of all political authority, as opposed to the elitist vision of social reality that relegates the public to a position of ignorance and contamination, a group to be duped and deceived. To take but one example: some 17 million Americans served on juries over the course of a recent five-year span and fully one-quarter of the American public are expected to serve on juries over the course of their lifetime (Gastil, Deess, Weiser, & Simmons, 2010, p. 215). Juries arguably strengthen the sense of civic duty and political engagement. Despite the problematic processes by which US juries are selected, such as the permanent exclusion of some 13 million felons (including some 30% of black men) from jury service (Kalt, 2003, p. 67), which tends to skew outcomes in favor of dominant socioeconomic and ethnoracial groups, a jury system nevertheless empowers a greater proportion of the population in matters of justice than were such a system not to exist at all. The brute fact that juries exist and operate on a regular basis suggests that the public proves itself able to play an important role in matters of criminal justice (Gastil et al., 2010).

In what follows, four theses on penal elitism are presented. Each section addresses one of the following questions: Which agents or entities constitute the *penal elite*? Who are *the people*? Is it possible to *depoliticize* penal policy? What does it mean to promote *reason* in the sphere of policy-making?

- 1. Penal professionals are not inherently liberal rehabilitationists. On the contrary, the history of punishment demonstrates that penal elites have cycled between retributivism and rehabilitationism – or combined the two in contradictory philosophical packages. Their punitive proclivities (or lack thereof) must be the subject of empirical scrutiny, not armchair speculation.**

The notion of elites as necessarily progressive found its leading sociological proponent in the figure of Elias (1939/2000). Elias saw the royal court as the leading instigator of the ‘civilizing process’ of bodily moderation and coercive constraint, providing a model of trickle-down civilization from dominant strata and to the lower orders of society. But while elites *may* at some points in history be exponents of liberal-humanitarian values, they are not always so. Law and order can be brought about from below – or imposed from above (Tham, 2013). Public sentiments can act as powerful drivers for limiting punitiveness (Matthews, 2005, p. 189). While Roberts and de Keijser (2014) criticize the tendency toward ‘democratizing punishment’ for robbing ‘experienced professionals’ of their positions of power, elites

are first and foremost bearers of concentrated social power. Their preferences toward such things as sentencing practices and the politics of punishment are contingent on a whole host of variables that lie beyond the fact of their elite status.

Norway's postwar penal rampage

Between 1940 and 1945, Norway came under Nazi occupation. Several hundred thousand German soldiers occupied Norway for the duration of World War II, and during this time, Norway was politically administered by Vidkun Quisling's *Nasjonal Samling* (NS) cabinet government for the greater part of the war. Meanwhile, the democratically elected Norwegian Government fled to London and remained in exile. While organizing a partisan movement and coordinating resistance efforts with the Allies, the exiled Norwegian Government turned to the question of what should be done about the thousands of known wartime collaborators after the war. On 12 December 1944, the government-in-exile passed the National Treason Act (*Landssvikloven*), controversially positing in the form of an *ex post facto* law that persons who had joined NS after 1940 would be convicted of treason following the cessation of hostilities (Borge, 1998).

The evacuated Ministry of Justice placed a group of Norwegian legal experts, residing in exile in Stockholm, in charge of manufacturing the postwar 'settlement.' They invoked the notion of 'the people' to justify the planned outpouring of retributive sentiment, channeled through the formalistic tributaries of complex legal arguments and structures, and they noted that once the cannons of war had been lowered, the population would thirst for vengeance (Norwegian Ministry of Justice, 1945). In a key document, the exiled lawyers were visibly torn between the alleged popular demands for a 'harsh and quick' justice as opposed to a postwar settlement that would nevertheless affirm 'those principles of right that our democratic society is built on' (Norwegian Ministry of Justice, 1945, p. 3). Providing a series of convoluted (and later contested) legal arguments, the Stockholm lawyers affirmed the constitutional validity of instituting retroactive laws. Membership in NS was to be considered a treasonous offense, and the death penalty was to be instated for offenses previously eligible for a maximum sentence of life imprisonment. A new category of punishment was rolled out, a 'loss of public trust' (*tap av almen tillit*), entailing permanent disenfranchisement and losing the right to serve in the armed forces, hold public office, pursue licensed professions (including seeking employment as a lawyer, medical doctor, dentist, accountant, and so on), obtain leading positions in private enterprise or charitable organizations, and own property. The intention of this penal sanction, which was used sparingly by recalcitrant judges, was to devastate the lives of convicted collaborators, ensuring that they would possess 'no economic or other influence' (Norwegian Ministry of Justice, 1945, p. 11; emphasis added). The closing sentence of the dense legal tract launched one final volley of punitive sentiment: 'The death penalty is to be carried out by firing squad.'

Comparatively large sections of the population were subjected to harsh punitive reactions after the war. Following the surrender of Axis forces, tens of thousands of suspected Norwegian collaborators were interned in makeshift camps. 'Nowhere else were the proportions so high,' notes Judt (2007, p. 45) in a summary of Western European legal proceedings against Nazi collaborators, who points out that all 55,000 members of NS as well as some 40,000 other citizens were tried, even as the legal basis of the postwar settlement remained precarious, based on retroactive laws and the principle of 'collective indictment.' More than

9000 persons received prison sentences, another 9000 individuals were sentenced to forced labor, 48 persons were subjected to a 'loss of public trust,' and 25 individuals were executed (Central Bureau of Statistics of Norway, 1954). From mid-1945 to mid-1946, nearly 23,000 persons were imprisoned on suspicion of wartime collaboration (Norwegian Correctional Services, 1954, p. 16), a truly remarkable figure for a society that had contained comparatively minuscule prison populations throughout the first half of the twentieth century.⁴

It is difficult to say whether the postwar penal rampage was, indirectly, a bureaucratized response to a popular demand for vengeance. Professionals legitimized the sudden punitive upsurge by referring to its alleged origins in the 'sense of justice that has grown in our people at this time' (Solem, 1945, p. 30). Worried about the specter of informal tribunals – 'courts of honor' – that might seek to punish persons guilty of 'unnational attitudes' were the formal criminal justice system fails to swing in motion, the judge Bjarne Didriksen (1946, p. 6) grudgingly accepted the need for a dramatically expanded prison system to handle the sudden flood of suspected collaborators, but warned: 'On the whole we have entered a period of vengeance and self-righteousness that cannot help but have far-reaching consequences.' What is clear is that the hard work of manufacturing harsh punishment came about at the hands of a group of experts who saw it as essential to ground the turn to postwar punitiveness in a particular representation of the popular will.

Sentencing guidelines commissions and US hyperincarceration

In the early 1970s, a growing number of progressive legal scholars, judges, and politicians in the US expressed concern about judicial discretion and its perceived role in producing ethnoracial and class disparities in sentencing outcomes. Judge Frankel (1972, p. 5) argued that the 'almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable' in a democratic society. Echoing Bentham's (1776/1988, pp. 100–101) critique of assertive judges, Frankel proposed tempering judicial discretion by establishing sentencing councils that would prescribe fixed sentences for 'comparable' offences and offenders. The 'fear of judging' (Stith & Cabranes, 1998) was prevalent among progressive liberals, encapsulated by the Democratic Senator Edward Kennedy in Washington DC and his efforts to implement federal sentencing guidelines, but the desire for uniform sentencing guidelines eventually became an instrument for the imposition of straightforward 'law and order' policies through raised sentencing levels (Stith & Koh, 1993).

The work of the Minnesota Sentencing Guidelines Commission is illustrative of this tendency. Established in 1980, the Commission worked for the next decades to oversee a series of guidelines outlining presumptive sentences that would subvert the power of judges to make autonomous decisions. The majority of the Commission was steeped in the sensibilities of the penal elite, and the Commission consisted largely of members of the state's penal elite, as is evident from the list of commission members in 1989: a Minnesota Supreme Court justice, Court of Appeals judge, County Attorney, public defender, commissioner of corrections, county sheriff, probation officer, two District Court judges, and two 'citizen representatives' (MSGC, 1989). In place of judicial discretion, the Commission proposed a crude sentencing grid with a criminal history score (from 0 to 6 or more past offences) on the horizontal axis, and a ranking of the severity of the crime under consideration (on a scale of 1 through 11) along the vertical axis (Frase, 2013a, p. 123). Judges were permitted to depart

from the grid, but would be required to outline the 'substantial and compelling nature of the circumstance' were they to deviate from the penal norm (MSGC, 1989, p. 17).

What was the effect of the sentencing guidelines commission on penal severity? While the average duration of pronounced prison sentences in Minnesota was around 38 months in 1980, it had grown to 45 months by 2013 (MSGC, 2014, p. 20). Certain offense categories were met with far more severe prison sentences. According to the 1981 Minnesota sentencing guideline grid, an offender with no criminal history who was convicted of second-degree murder was set to receive a prison sentence between 111 and 121 months (MSGC, 1981, p. 27); the 2001 sentencing guidelines stipulated that an equivalent offense committed by an equivalent offender would receive between 144 and 156 months in prison (MSGC, 2001, p. 49). Aggravated robbery committed by a person without a criminal history would in 1981 receive a sentence between 23 and 25 months in prison for the sentence not to be considered a 'departure' from the sentencing grid (MSGC, 1981, p. 27); by 2001, this same offender was set to receive between 44 and 52 months in prison (MSGC, 2001, p. 49).

Notwithstanding, some have argued that the Commission had a moderating effect on penal outcomes. Reviewing a decade of the growing proliferation of sentencing commissions, Alschuler (1991) believed that in states like Washington and Minnesota, commissions 'probably [...] had some moderating effect' (Alschuler, 1991, p. 934). Similarly, Frase argues that the Commission had the effect of 'controlling prison growth' (Frase, 2013b, p. 99). These scholars have asked what the effect of the commission was relative to its counterfactual nonexistence, which is very nearly impossible to ascertain; more plausibly, they are drawing conclusions on the basis of assessments of the penal trajectories of other jurisdictions.

However, such buoyant assessments of the Commission's work should be tempered by the fact that the number of sentenced prisoners under the jurisdiction of state or federal correctional authorities in Minnesota increased by a staggering 440% between 1981 and 2014 (Bureau of Justice Statistics, 2015). While the Commission may have moderated the acceleration in penal severity compared with what might have happened were it not to have existed, the Commission failed to prevent a veritable penal binge. For while Minnesota remained a low-ranking incarcerator relative to the remainder of other US jurisdictions, it nevertheless underwent a dramatic transformation in the direction of growing penal severity with an unprecedented expansion in the correctional population relative to the state's own history. The rate of correctional expansion in Minnesota mimicked our outpaced that of other jurisdictions like California or Texas. While it would be an exaggeration to blame such developments on sentencing practices alone, half-impotent and half-facilitatory role of the Minnesota Sentencing Guidelines Commission in correctional expansionism is suggestive of the role played by 'buffered' penal elites. While it may be true that even more punitive outcomes might have been produced were there to have existed an uninterrupted link between legislatures and sentencing practices, as with California's determinate sentencing law (DSL) which allowed politicians to directly manipulate sentencing practices (see Campbell, 2014), it is sufficient for our purposes here to recognize that a technocratic body, largely populated by elite members of the criminal justice apparatus, failed to significantly impede the state's turn to penal severity by the mid-2010s.

That this is so should perhaps not come as a surprise. Commissions are, as Bourdieu (2014) pointed out, instruments for the creation of the appearance of apolitical neutrality, their creation a result of acts of delegation by political structures that seek to infuse them with definite and predictable schemata of perception and action. A commission, Bourdieu (2014,

p. 28) observed, must 'appear as a commission of wise men, that is, above contingencies, interests, conflicts, [and] ultimately outside the social space.' But this is an only *appearance*, for all commissions remain firmly planted within the perimeters of social space and are, to a significant extent, creatures of their masters' making. Judges, prosecutors, correctional bureaucrats, prison, and parole officers, persons drawn from all of these groups have formed a majority or near-majority in the multiple manifestations of the Commission over the years; according to current statutes, the Committee must include three 'citizen representatives' – those alibis of democratic representation, one of whom must have been the victim of a felony crime – and who have certainly not been drawn at random from the population at large. Under current rules, 8 out of the Commission's 11 members are appointed by the governor. Selective appointments have ensured that the Commission has taken a tough stance on criminality and gravitated toward reigning standards of penal common sense, all the while presenting itself as an organ of technical neutrality.

In short, the Minnesota Sentencing Guidelines Commission failed to prevent the steady and dramatic raising of sentencing levels and expansion of correctional populations to levels not witnessed before in the state's recent past and at rates paralleling or exceeding that of other US states. The Commission, this putatively disinterested instrument of bureaucratic standardization, far from being an impediment to hyperincarceration, as Tonry (2004, pp. 101–102) has claimed, oversaw and partook in the punitive turn of a state that has not escaped the profligate swelling of jails and prisons that has become a routine element of hyperincarceration across the US.

2. Political appeals to public opinion are more like *acts of political construction* than sources of political knowledge, and 'the people' is a *plastic concept* concealing a variegated social universe cross-cut by traditional sociological cleavages (gender, class, religious and ethnoracial properties, age, etc.).

What we understand by 'the people' remains the subject of a continuous process of construction and its definition is one of the stakes in an ongoing symbolic struggle (Bourdieu, 1990b). The people are plastic. Part of the attraction with invoking popular support is that it legitimizes political action in a democratic society. However, 'the people' can often be made to order, adjusted to the speaker's needs and interests at a given moment (Bourdieu, 1991, p. 91).

This is perhaps the core problem with the very concept of populism. It threatens to collapse into a term that is synonymous with *that which is at any given time preferred by a significant proportion of the population*. 'Populism precisely is taking into account the people's opinion,' the French politician Jean-Marie Le Pen once remarked, before continuing, 'Have people the right, in a democracy, to hold an opinion? If that is the case, then yes, I am a populist' (Stanley, 2008, p. 101). Admittedly, that is not what most scholars mean when they use the term. They typically require that there be something more than the mere statistical aggregation of preferences into a majority favoring a position for it to be labeled populist (see Mudde, 2004), usually connoting the faintly disreputable air of *demagoguery*, that is, the manipulation and debasement of the general public.

For sociological purposes, however, the figure of the demagogue is analytically vacuous. Derived from the Greek (*demos* [the people] and *ago* [to carry or manipulate]), the demagogue can literally be defined as a 'people-manipulator.' But when do politicians properly manipulate the people – and when do they merely appeal to them, making their positions

known in a persuasive fashion? Canovan (1984, p. 313) notes that populism is ‘notoriously hard to pin down’ as it relies on various problematic conceptual foundations, including the problem of defining who ‘the people’ are and establishing a definition of when manipulation can be said to have taken place – that make for a vague and ‘unusually intractable’ term. Mudde (2004) has argued that populism entails a rhetorical opposition between ‘the people’ and ‘the elite’; others rightly point out that this fuzzy dichotomy does not make for a particularly ‘thick’ or germane instrument of ideological analysis (Stanley, 2008).

Complicating matters further, the very notion of populism, as Table 2 shows, does not constitute a monolithic concept within the more limited discipline of the sociology of punishment. Instead, its apparent unitary façade conceals a fragmentary pragmatism of notions that are connected only by a relation of family resemblance. Broadly speaking, the concept contains both strong/weak and material/symbolic dimensions. On the one hand, it may serve as a normative (strong) instrument of reprobation or a descriptive (weak) tool of analysis. On the other hand, it may accentuate either material transformations (legislation and institutional practices) or symbolic shifts (rhetoric, tropes, and topics of debate). Zimring, Hawkins, and Kamin (2001) present a strong material-usage, deploying populism mainly as an instrument of censure to emphasize legislative changes. Diametrically opposed to this usage, Fenwick (2013) employs a weak-symbolic usage of populism, largely studying the (symbolic) development of ‘tough on crime’ rhetoric in Japanese public debate and ascribing these changes to shifts in public perceptions of criminal insecurity. Next, Garland’s (2001, p. 13) usage of populism is for the most part strong-symbolic: reproachful of the decline of the expert and oriented toward shifts in the cultural underpinnings of punishment. Finally, Miao’s (2013) use of the term is weak-material, focusing on the continued use of the death penalty in China as the product of popular support for capital punishment. Without paying heed to the polythetic qualities of the notion of populism, penological scholars may risk talking past each other when deploying or critiquing a notion that in actuality dissembles a multitude of malleable meanings.

Table 1. Conceptions of foundational properties in penal populism and penal elitism.

	Penal populism	Penal elitism
Key agent(s)	Politicians and the public (laity)	Professionals (elite)
Dominant form of knowledge	Value-suffused and ideological (subjective)	Scientific knowledge (objective)
Institutional configuration	Untrammelled democracy	Technocracy
Source of legitimacy	Public support	Technical competence
Basis of decision-making	Emotion	Reason
Symbolic dimension	Profanity of the public	Sacrality of the state

Table 2. Four faces of ‘populism’ in the sociology of punishment: strong/weak and material/symbolic dimensions.

	Material	Symbolic
Strong (normative reprobation)	Zimring et al. (2001): California’s ‘Three Strikes’ Law (condemns the decline of the expert, studies material changes in legislation)	Garland (2001): Western culture of control (condemns the punitive turn, describes cultural-symbolic underpinnings of punishment)
Weak (descriptive assessment)	Miao (2013): Chinese capital punishment (explains death penalty sanction with continued elite support, fueled by perceived public backing)	Fenwick (2013): Japanese criminal justice policies (explains ‘tough on crime’ rhetoric with widespread public perception that the criminal justice system has failed)

What do 'the people' want in matters of punishment? In part, the answer to this question is unknowable because to answer it would require an unmediated access to 'pure' knowledge that surveys and opinion polls cannot yield (Bourdieu, 1979). Suspending the radical epistemological doubt entailed by this critique and merely accepting the naïve question at face value, however, suggests that 'public opinion' is always subject to constraint and construction. Beckett (2000) convincingly shows how politicians actively provoke and precipitate public anxieties over crime and calls for severe confinement. Public concern with crime and drugs, Beckett (2000, p. 15) suggests, is disconnected from the real incidence of these behaviors, but is 'strongly associated with the extent to which elites highlight these issues in political discourse.'

3. The technocratic inclinations of penal elitism constitute an attempt to *depoliticize the political*, i.e. to remove the problem of the distribution of social power from the arena of democratic contest (where it rightly belongs).

Penal elitism operates on the basis of a narrow conception of politics, regarded solely as those activities that take place under the ambit of government ministries and parliamentary assemblies. A broader conception of politics is evoked in the title of Harold Lasswell's classic work (*Who Gets What, When, and How?*) and Raymond Geuss' (2008) remarks on a prominent Leninist slogan ('Who, whom?'), that is, politics as the *struggle over the distribution of material symbolic resources and social power*. Operating with this broader conception of politics foregrounds the fact that penal elitists want to *depoliticize the political* (see Bourdieu, 2002) by removing issues that are political (in the broad sense of the term) from the sphere of politics (in the narrow sense of the term).

Case in point: 'If the government of the day chooses to act illiberally and to *politicize criminal justice policy*, there are no competing governmental power centers to stop it' (Tonry, 2007; emphasis added). Only politics narrowly defined could permit one to produce such a statement. With the broader definition of politics in hand it would be patently absurd to propose that one could 'politicize' the institutions of the penal state. Criminal justice policies are inherently political. There is simply no way that politicians can 'politicize' phenomena that per definition revolve around an allocation of power.⁵

One recurring example that is used to justify a technocratic conception of criminal justice policy-making is that of independent central banking (ICB) (e.g. Lacey, 2008, pp. 74–77; Pettit, 2002, pp. 442–445; Zimring et al., 2001, pp. 203–209). ICB serves as a model of economic policy governed by experts that is analogous to warnings against the dangers of unimpeded democratic influence on penal policies. Zimring et al. (2001, p. 181) contend that ICB serves as a model for combating populism, rightly pointing out that economics has a 'rich tradition of antipopulism' and has worked hard to 'provide justification for the insulation of substantive policy from direct democratic control.' They believe politicians cannot be trusted to determine interest rates because they have strong incentives to slash interest rates to fuel economic growth and win elections, even though this might be detrimental to long-term economic welfare; politicians must therefore not be trusted with the capacity to set interest rates. By extension, so Zimring and colleagues' (2001, pp. 203–209) argument goes, the same should hold true for the politics of punishment: locking up more offenders is a cheap and effective means of generating electoral support, even though it is counterproductive to public safety and penal welfare in the long run.

However, penal elitism distorts the notion of ICB and misrepresents ICB as an uncontroversial institutional arrangement. Independent central banks have been contested since their invention. In their early history, it was understood that ICB involved a transfer of power from elected representatives to an unelected elite. US President Andrew Jackson was notably skeptical of the concentration of power in an institution that was to be insulated from the sway of democracy:

Jackson perceived that the bank, by its very design, undermined popular sovereignty and majority rule. As a friend and adviser [wrote] in a key early memorandum to Jackson, the bank had concentrated 'in the hands of a few men, a power over the money of the country.' Unless checked, that power could be 'perverted to the oppression of the people, and in times of public calamity, to the embarrassment of the government.' But even when well administered, the bank was an enormity, which allowed, Jackson wrote, 'a few Monied Capitalists' to trade upon the public revenue 'and enjoy the benefit of it, to the exclusion of the many.' (Wilentz, cited in Harcourt [2011], pp. 211–212)

Present-day economists have increasingly subjected ICB to intense criticism (e.g. Hayo and Hefeker, 2002). Krugman (2014) describes how he formerly subscribed to the conventional view that economics was a value-free and neutral science; consequently, Krugman believed that the economy should be the preserve of technical experts and remain buffered from politicians. Later, Krugman came to see that the US Federal Reserve Board was a battleground for clashing ideologies and class preferences. US central bankers tended toward 'sadamonetarism,' a proclivity for raising interest rates and worry less about rising unemployment, a preference that had 'a lot to do with ideology,' which itself had 'a lot to do with class interests' (Krugman, 2014). Setting interest rates, far from being a neutral exercise in the mechanics of economic adjustment, is suffused with ideologically inspired trade-offs between inflation and unemployment. Similarly, Joseph Stiglitz has argued that central banks make decisions that favor dominant groups in society. Central bankers tend to value the interests of bond holders over 'marginalized workers' largely for ideological reasons (Stiglitz, 1998, pp. 216–217). According to Stiglitz, '[T]he decisions made by the central bank are not just technical decisions; they involve trade-offs, judgments about whether the risks of inflation are worth the benefits of lower unemployment.' And these trade-offs 'involve values.'

Considering social problems to be *technical* problems is itself an ideological exercise in the construction of particular representations of social reality. In the aftermath of the 2008 financial crisis, Chang (2014, pp. 4–5) has noted the subjective, value-suffused nature of economics, vigorously arguing that the field is split into variegated approaches, each 'making different moral and political value judgements and drawing different conclusions.' Chang (2014, p. 5), himself a 'heterodox' economist, argues that 'if there is no right answer in economics, then we cannot leave it to the experts alone.' Others have pointed out that the concept of 'independence' in central banking conceals a crucial difference between 'instrument independence' and 'goal independence' for central bankers (Fischer, 1995). The majority of advanced societies favor goal independence, i.e. setting precise targets for central bankers (typically, maximum annual inflation rates), and therefore politicians to actually delegate very little real authority to the experts. Far from being a neutral instrument of technical regulation of the economy, then, ICB has come to be recognized as a historical artifact, the neoliberal 'augmented Washington consensus' of the 1990s (Rodrik, 2006, p. 978). ICB is an ideologically motivated institutional distribution of democratic influence taking on all the *appearances* of a neutral instrument of scientific management.

Caution should therefore be the order of the day when penal elitists deploy ICB as an institutional analogy in support of technocratic policy-making (see also Dzur, 2010, pp. 360–362), which they perceive as a necessary check on the popular will because of the irresponsible ‘inflationary bias of democratic preferences’ (Zimring et al., 2001, p. 206) in both economic and penal policies. One should in fact draw the opposite lesson: where a distribution of social power is at stake, democratic politics always has a part to play.⁶

4. Emotion is not opposed to reason, and affect is not opposed to democracy. Instead, emotional commitment is a precursor and prerequisite for democratic engagement and vibrant citizenship.

Emotions are sometimes thought of as being anathema to the responsibilities inherent in sound citizenship (Marcus, 2002). This, however, is a misguided view of both the ideal and reality of democratic politics; instead, the *sentimental citizen* is simultaneously a *rational citizen* because ‘in politics, it is conflict and the attention it brings, not virtuous citizens, that make for rationality’ (Marcus, 2002, p. 148). Healthful democracies require engaged activist-citizens, and emotional commitments are a prerequisite for democratic participation; consequently, the emotions should not be vilified but valorized. Robbing democracy of emotion would be to suck the lifeblood and marrow out of participatory governance, vitiating rather than ameliorating its scope and trajectory. The Aristotelian conception of practical reasoning established a prominent role for the emotions in political life (Abizadeh, 2008). Political theorists are again beginning to view an outpouring of emotions as an instrumental component of committed citizenship (e.g. Ferry & Kingston, 2008; Marcus, Neuman, & Mackuen, 2000).

Penal elitism views the emotions with hostility, often contending that there is a necessary link between affective commitments and rising punitiveness and operating with a Manichean vision of the dependable and rational *cogito* against the unreliable and volatile sphere of the senses. To Lord Windlesham, for instance, the US political system is ‘is prone to be swayed by emotion more easily than by reason,’ and this is why, on his account, punitive policies have held gained ground in that country (Windlesham, 1998, p. 216); punitive policies can be explained by dynamic process whereby politicians have ‘sought political advantage from a fearful, sometimes vindictive, public’ (Windlesham, 1998, p. 12). It may of course be entirely uncontroversial to suggest as an empirical observation that the general public has hungered for harsh policies and that this has played some part in generating stricter laws and bloated prisons; it is quite another matter to hold as an axiomatic statement of faith that the public is permanently committed to exacting revenge on criminal offenders for reasons of temperament. Still, it is probably reasonable to suggest that empirical assessments of the former kind have had a tendency to draw strength from axioms of the latter kind. On this view, *vox populi* is expressly not equivalent to *vox Dei*, to invoke Alcuin’s conceptual couplet, because, as the English saint of the eighth century believed, ‘the riotousness of the crowd is always very close to madness’ (Knowles, 2001, p. 10).

But there is a non-necessary link between a passionate public and rising punitiveness: it is possible *first* to feel a visceral horror at the ‘spectacle of suffering’ produced by the incarceration of millions of persons under decrepit conditions of confinement – as in much of the US today – and *second* to begin to reason about the fiscal costs, elevated recidivism rates, and criminogenic qualities of the archipelago of penitentiaries that constitute hyperincarceration, and therefore to oppose it. Not only is this ordering of emotions and reasons

possible; it is highly probable that it is precisely this order of emotional aversion over rational reflection that has motivated and energized many social observers of punishment, perhaps even the very scholars who would decry the role of affect in shaping social outcomes.

Penal elitism professes a dissatisfaction with the emotional qualities of the general public, allegedly desirous of ever-harsher punishment and supposedly lacking a sense of indignity at the state of prisons – and which is consequently criticized, in contradictory fashion, for having *too much* emotion in one sphere and *not enough* of it in another. Scholars who appropriate this position might instead work to shift and transform those very emotions. Wacquant (2012, p. 8) pithily points out that the emotive outpouring implied by ‘zero tolerance’ policies could easily be turned on its head: why not declare a policy of ‘zero tolerance’ on crowded and unsanitary conditions of confinement instead of aggressively pursuing street-level disorders and petty crime? By *inverting the affective*, one might *effectively subvert punitiveness* and thereby reduce the scale and scope of the penal state. As Simon (2014) suggests, the slow and circumscribed turn away from a punitive form of legal ‘common sense’ to another form of penal orthodoxy in the US represents a shift from one combination of emotion and reason to another. If the fear of crime and hatred of criminals produced a form of punitive hypervigilance in the decades since the 1960s, there is now in its infancy a growing fear of burdensome prison systems and a hatred of the crime of the state against its population. And while Simon may strike an exceedingly optimistic note on the trials and tribulations facing US ‘mass incarceration,’ the notion that punishment is ‘inhuman’ is nothing if not an emotional verdict, nourished by and intertwined with rational reason.

Conclusion

In a prominent critique of elitism, Kant (1784/1991, p. 54) argued that the Enlightenment era would see humanity cast off the shackles of ‘immaturity’ through radical doubt and self-emancipatory reasoning; opposed to the labor of self-liberation stood all those ‘guardians’ that would prefer a quiescent and compliant populace. ‘Having first infatuated their domesticated animals, and carefully prevented the docile creatures from daring to take a single step without the leading strings to which they are tied,’ Kant wrote, ‘they next show them the danger which threatens them if they try to walk unaided.’

Writing some two centuries later, Dahl (1985) acknowledged that a persuasive case could be made for overbearing ‘guardianship,’ simply because some problems present technical or moral complexities that only an elite minority might reasonably be expected to be sufficiently equipped to handle. Against this ‘Principle of Guardianship,’ however, Dahl posited a ‘Strong Principle of Equality’ that underscored the *autonomy* and *competence* of all citizens as well as the need for *consent* in the delegation of authority. Relegating even limited domains of social practices to a technocratic minority, Dahl (1985, p. 71) warned, would mean forsaking democracy in the long run: ‘While quasi-guardianship would drift toward full guardianship, quasi-democracy would drift toward non-democracy.’

The doctrine of penal elitism takes up the mantle of the Platonic guardians (Loader, 2006), positing that politicians and the public have only a limited right to be the authors of their own destiny (e.g. Tonry, 2004, pp. 145–146). Commenting on the California ‘three strikes’ law, Zimring et al. (2001, p. 11) are aghast that the ‘provisions of this [policy] package received little or no analytic attention from criminal justice professionals and academic experts prior to enactment’ or that ‘experts were not consulted by anybody in government.’ What they fail

to recognize is that politicians and the public might possess a *right* to be at odds with ‘the experts.’ Indeed, the state legislature, governor, and the public endorsed California’s ‘Three Strikes Initiative,’ with some 5.9 million votes (and 70% of the voters) favoring Proposition 184 in the mid-1990s. Broadly sympathetic to a democratic politics of punishment, Dzur and Mirchandani (2007) nonetheless brush aside the widespread support for habitual offender laws as ‘mere populism,’ a construct they oppose to their ideal of a more refined ‘rational-critical public debate.’ And yet they can provide no solid criteria with which to distinguish the two from each other. Even Rowan (2011, p. 44), who professes a ‘radical’ stance toward the role of democratic influence on the politics of punishment, asserts that the public proves itself at various times too ignorant to be ‘entrusted’ – by whom, one might ask – with the power to shape social outcomes. While it is beyond the scope of this article, it should be stressed that a good part of the trouble with ‘penal populism’ stems from the incoherence of the notion of ‘populism’ itself. The term is inchoate and amorphous, is usually emotive, and often serves as a moral catego^{re}me – a condemnatory instrument drawing on the ‘logic of the trial’ (Bourdieu & Wacquant, 1999, p. 44) – rather than serving as a dynamic and disinterested tool for social analysis.

It is perhaps natural that penal elitism should have grown in popularity in recent decades. Longer sentences, prisons bursting at the seams, and tough public rhetoric on crime and punishment have all been the order of the day. Many, if not most of the leading, sociologists of punishment favor reducing the incidence and severity of punishment (e.g. Braithwaite, 2003, p. 2); combined with a certain resignation and quiet despair about the perceived impossibility of effecting political change through collective action or scholarly interventions in the public sphere, it has come to seem only too attractive, from a purely pragmatic standpoint, to argue for growing technocratic control of the politics of punishment. Striving to realize a series of worthwhile goals, while fatalistically contending that little is to be accomplished through the conventional means of democratic politics, has, however, had turned many scholars into Platonic guardians who would take criminal justice policies off the table of political strife. Despairing that politicians and the public are unable to recognize the value of scholarly insight and policy prescription, many scholars would rather see a strong judiciary and bureaucracy established to see their goals realized than dirty their hands with profane politics. This is a political strategy parading as apolitical discourse. Maintaining the superiority of technocratic competence is simultaneously a strategy to inflate the form of capital specific to academics and make universal the point of view specific to the scholarly class (Bourdieu, 1990a). While penal elitism may be understandable in light of what at times must seem like the slim chances of a reformist agenda, it remains a form of self-aggrandizement, albeit one motivated by noble ends.

One might also pause to consider whether a commitment to penal modernism might not best be served by the removal of technocratic barriers to self-government. Loader (2010) cogently presents the dilemma confronting scholars of punishment as that of choosing between *penal moderation-by-stealth* vs. *penal moderation-by-politics*. Favoring the latter to the former, Loader argues that the duplicitous strategizing of elites may deliver short-term victories for the proponents of rehabilitation and non-punitiveness, but these gains are destined to collapse over the long run without a properly grounded ‘public’ philosophy of restrained punishment to sustain them.

Aside from such pragmatism, however, a commitment to democratic values would seem to require surrendering sovereignty to the populace. It is for this reason that scholars should

attempt to enlighten and influence the citizenry, employing the scientific competencies and resources in their possession (which are, after all, not slight), instead of attempting to establish buffers and barriers between the public and the broad sphere of the political. To do otherwise would be to reinstate a euphemized aristocracy of philosopher kings, an atavistic return to an antiquated method for ordering social life. 'While it is good to know how to use men as they are,' observed Rousseau (1755/1996, pp. 12–13), 'it is much better still to make them what one needs them to be.'

Notes

1. Briefly stated, penal elitism is the belief that the politics of punishment should be the preserve of enlightened elites, excluding allegedly emotive politicians and ignorant populations from decision-making processes and elevating a multitude of putative experts on law, crime, and punishment, including at different times members of professional categories such as judges, criminal justice bureaucrats, penologists, sociologists, and legal theorists. Unlike the concept of *penal populism*, which has generated a veritable cottage industry of penological reflection and analysis, its natural conceptual correlate, *penal elitism*, has rarely been deployed explicitly in the penological literature (but see e.g. Adorjan & Chui, 2013). However, it exists submerged beneath the surface of explicit discourse in most of the relevant works on penal populism. Despite the fact that scholars might not think of their work in such terms, it is possible to discern a series of positions in the literature that are characterized by penal elitism. The hallmark characteristics of penal elitism include a faith in the abilities of technocratic elites to proffer objective knowledge and develop policies of the state unimpeded by emotional attachments through the use of reason (see Table 1).
2. One of Beccaria's contemporaries, Bentham (1776/1988, p. 100), on the other hand, was skeptical of judicial elites. Bentham was particularly scathing of the power of judges to impede or reject legislation: 'Give to the judges a power of annulling its acts and you transfer a portion of the supreme power from an assembly which the people have had *some* share, at least, in choosing, to a set of men in the choice of whom they have not had the least imaginable share.' Bentham viewed the judicial autonomy of a professional, legal elite as the obstruction of democratic politics by an excessively empowered minority. The fact that judges could indirectly temper elected assemblies was a 'great power, too great indeed for judges' (Bentham, 1776–1988, p. 101).
3. In the aftermath of the 2003 US invasion of Iraq, the Coalition Provisional Authority (CPA) hired college graduates in their early 20s to supervise the Iraqi national budget, despite these young graduates' lack of professional experience with national-level economic policy-making. Symptomatic of the chaotic conditions of US colonial governance in Iraq, high-ranking CPA positions were handed out as a reward for their neoconservative inclinations following applications to entry-level jobs with the right-wing Heritage Foundation (Roberts, 2008, pp. 127–128). And yet they were for all practical purposes considered experts because they were *treated as such*, i.e. they were granted positions of real and significant authority. See Wacquant (2009a) for an elucidation of a particular *brand of expertise* that rose to prominence under the turn to 'law and order' politics in the 1990s.
4. To this one might respond that the Norwegian turn to harsh penalty in the immediate years following World War II was itself a response to a remarkable situation: never before in its modern history had such a large contingent of the nation's citizenry been seen to betray the furtherance of national goals and undermine the cause of liberal democracy. What is more, this exceptional scenario represented a brief interlude in an otherwise long century of relatively mild sentencing and punishment practices. What, then, can be learned from examining the limited turn to harsh postwar penalty in Norway? First, it suggests that the perception of penal elites as necessarily bearing liberal values preferences toward punishment is false. Second, it undermines the idea that penal elites will necessarily act as a bulwark against the desires of the population to inflict

harsh punishment; on the contrary, penal elites can manufacture retributive penal policies and do so by mobilizing a particular representation of the public's preferences.

5. One wonders where penal elitists would draw the line: would their preference for expert authority over democratic influence remain the same if the topic of debate were not the police, courts, and prisons, but rather tax levels, foreign military interventions, or spending on public education? One suspects they would balk at the 'insulation' of democratic influence from questions readily recognized as falling within the horizon of democratic politics. If this is so (and it remains a point of speculation), it may be because of a brute logical inconsistency within a broader domain of political preferences or because punishment policies are considered a special case deserving of their own institutional arrangements and norms of democratic accountability. However, good reasons are seldom provided for why crime and punishment should constitute a special case.
6. For an erudite account of the 'indictment of politicization' in the history of political thought, from Plato through Edmund Burke, Max Weber, and Jürgen Habermas to Philip Pettit's neo-republicanism, see Urbinati (2014, pp. 81–127).

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ORCID

Victor L. Shammass  <http://orcid.org/0000-0002-3087-8901>

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