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# Why Public Opinion of the Criminal Justice System is Important

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## Why Public Opinion Is Important

Allusions to public opinion and its influence in a democratic society are common. Media assumptions of what the public wants in a whole host of areas permeate our daily reading. But the question that few seem to give any consideration to is why public opinion is important? The answer lies at the heart of our democratic structure: we elect officials to represent us and as such, we expect them to bear our opinions in mind as they structure policies that guide the way we live. Of course there will be areas that the public take less interest in and areas that interest the public more. The purpose of this chapter is to outline the influence that public opinion seems to have on some of the key areas in the justice system. It also examines the effects of ignoring public opinion, whether public opinion has a justified place in the formation of political policies and does public opinion adequately summarise people's thoughts on criminal justice issues.

In a democracy the public has a central function in the administration of justice and it is crucial to the criminal justice system that the public fulfils this function, otherwise specific parts of the justice system would be unable to operate. For instance, the reporting of crime, providing evidence to the police and attending court as jury members or as witnesses all stem from public cooperation with the justice system. Since the public has this vital role in the administration of justice any lack of confidence they may have in the system could undermine or seriously disrupt the justice process. Consequently, to prevent the public from losing faith in the system it is necessary that there is at least some congruence between public opinion and criminal justice arrangements and procedures (Morgan, 2002).

Few could argue that the public do not hold opinions about the criminal justice system. Indeed, public opinion on criminal justice issues seems to be subject to almost incessant 'temperature taking' by various factions of the media, researchers and government officials all of whom are intent on pinning down our views on broad and specific criminal justice issues. As Green (1996) notes, "...public opinion should be the ultimate basis of the law." (p.116) and "The citizen's voice in the running of the country, and confidence that it will be heard, are what give governments and the state their legitimacy and authority." (Faulkner, 2006, p.63). If the criminal justice system has moral credibility then the people it governs will respect it and abide by its laws (Robinson and Darley, 1998). If people become dissatisfied with the criminal justice

system they may refuse to comply with its laws and resort to vigilante justice (Flanagan, McGarrell and Brown, 1985).

The centrality of public opinion in governance is apparent by the way public opinion penetrates policies. Public opinion regarding a political policy sets the 'boundaries of political permission' (Yankelovich, 1991). That is, the limits or borders within which the public will support or tolerate a policy. In the U.S.A. public opinion has apparently driven a multitude of domestic policies such as term limits, tax cuts and a patient's Bill of Rights (Doble, 2002). In the U.S.A. justice system public opinion instigated laws such as, Megan's law, 'three strikes' laws, the Brady Bill and the assault weapon ban (Doble, 2002). In the U.K. the Labour Government has placed an emphasis on 'evidence-based' policy formation and uses focus groups, the People's Panel, citizens' juries and opinion surveys to gauge public opinion before forming new policies. As a result, in both the U.K. and U.S.A. significant policy changes have been attributed to the influence of public opinion. Public opinion also seems to have influenced the more operational side of the criminal justice system

#### The importance of public opinion in constructing criminal justice policies

##### Policing

In the U.K. there exists an ideal of 'policing by consent' (Carter, 2002). This holds that the police can only achieve their goals if they have the support and cooperation of the public. However, the relationship between the police and the public is more reciprocal than the above statement suggests. The police service provides services to the public that they cannot obtain elsewhere and so the quality of policing is critical to a public that relies on its efficiency (Lipsey, 1980). It also follows that the public's opinion of the service that stands at the interface of society and the criminal justice system, will be strong and potentially influential.

In the U.S.A. the police service needs the support of taxpayers in order to be granted budget requests. The public's confidence in the police is considered the cornerstone for public cooperation and the basis for police legitimacy (Rosenbaum et al, 2005). A communications/public relations sector of the police service was created following the public outcry against police tactics used to manage urban and civil rights protests during the 1960's (Motschall and Cao, 2002). During the 1990's the Los Angeles riots following the death of Rodney King led the then Police Chief Willian Liquori to state,

“Extensive media and citizen attention to recent events in the country has shone a spotlight on all of us. We must protect our cities, our departments and our employees against the erosion of citizen confidence and negative publicity.” (p.22).

Since then the public relations side of policing has expanded and increasing numbers of civilian personnel with journalism/communications backgrounds have been employed as public information officers (PIOs). The PIO’s job is to inform members of the media and the public on the progress/advent of agency operations, events and activities. PIOs also assess public opinion which is then used to inform the formation of internal police policies.

Although police services in the U.K. are not budget-dependent on the public in the same way as they are in the U.S.A., public perceptions of police performance play an important role in police functioning. Between 2000-2003 public confidence in the police deteriorated (e.g. Hough, 2003) despite a fall in crime rates (Simmons, 2002). This lack of confidence was attributed to the public’s fear of crime (Thorpe and Wood, 2004). Public perceptions of the U.K. as a high-crime society conflicted with statistics which suggested a decrease in crime and created a ‘reassurance gap’ between actual crime levels and public opinion. The Association of Chief Police Officers (ACPO) called for reassurance strategies to change this culture of fear of crime (ACPO, 2001) and reassurance was embedded in subsequent policies regarding police services (e.g. the Police Reform Act, 2002, The National Policing Plan, 2002, the National Reassurance Policing Programme, 2003). The 2004 White Paper, ‘Building Communities, Beating Crime’ outlined measures intended to create a closer bond between the police and the public to provide the public with the reassurance they needed (and, of course to enhance the public’s opinion of the police service). In the White Paper the public are considered as *consumers* of police services and factors one might associate with consumerism thread throughout the document. For instance, customer services were to be included in all police forces; police performance would be assessed according to the public’s priorities and views about police services; and local communities would be given the right to trigger action by relevant agencies to deal with acute or persistent problems of crime and anti-social behaviour.

That the Government should reform the police service on the basis of the public’s *fear* of crime rather than *actual* crime levels seems to show that governing bodies do attend to public opinion – even if that opinion is formed according to

perceptions and not hard facts. The rationale for acting on the public's perception of crime is provided in the 'Open All Hours' report (Povey, 2001) which maintains that if the public feels reassured they will have more confidence in the police, be more likely to provide intelligence, act as witnesses and engage with courts. In turn, this would lead to a reduction in crime and thus reassure the public even more. While this is intuitively sensible, some warn that despite its apparent good intentions, reassurance policing, with its focus on public concerns may run into conflict with Home Office targets for policing (Herrington and Millie, 2006). In such cases governmental priorities for policing end up being given more priority than the overall goal of improving neighbourhood security. In this way, despite its worthy aims reassurance policing runs the risk of being seen more as "...a public relations exercise than a way to significantly contribute to the fight against crime and disorder." (Herrington and Millie, 2006, p. 156). As a result, it seems that public opinion may be influential in policing but only up to the point where it conflicts with government objectives.

#### Sentencing and sentencing policy

"In theory sentencing decisions are influenced only by officially approved considerations, whether embodied in stature, practice direction case law or circular. In real life most sentencers admit to having some regard to what they believe to be public opinion." (Walker, 1985, p. 64).

The report of the Sentencing Review in England and Wales (Home Office, 2001) acknowledges that the confidence of the public needs to be considered when sentencing offenders. Also in 2001, the Government commissioned two reports on the penal system both of which addressed the issue of public confidence in the criminal justice system. The Halliday report (Home Office, 2001) concluded that if people are expected to uphold the law and not take it into their own hands then they must feel confident that justice is being achieved in sentencing. Halliday (2001) sees public confidence, together with a reduction in offending, as an important aim in sentencing. In other words, Halliday sees public opinion as something that should be taken into consideration in sentencing practice. However, for Halliday, consideration of public opinion in sentencing is desirable but not *essential* and he cautions against sentencers being ...."driven before the wind" of apparent public mood, regardless of the principles that need to govern sentencing." (p.ii). Although Halliday's report presents

sound reasons why public opinion is important in sentencing it also acknowledges that the public is badly under-informed about sentencing practices because they tend to underestimate the severity of sentences and believe that sentences are more lenient than they actually are. To address this lack of knowledge Halliday proposed that more systematic efforts were needed to explain sentencing practices to the public.

In the second report, Auld (2001), like Halliday, acknowledges the importance of public confidence in the criminal justice system but unlike Halliday who proposed that public opinion should be *considered* in sentencing, Auld recommends that it should be *ignored* on the basis that public opinion is not knowledgeable or consistent enough to warrant a role in sentencing. Like Halliday Auld maintains that the public should be better informed but only of their own ignorance since he states that "...if public ignorance stands in the way of public confidence, take steps adequately to demonstrate to the public that it is so." (p.106).

Even though the public seems to be under- or ill-informed it seems that public opinion still manages to influence sentencing. Evidence from Australia suggests that public opinion believes that community protection is paramount and this has led to community protection being embedded in various sentencing acts and laws (Tomaino, 1997). The Australian Government maintained it was attuned to the heartfelt concerns of public opinion and this gave it a mandate to get tough on crime (Fox, 1987). In Canada it has been suggested that judges impose more punitive sentences if they believe that this is what the public wants (Ouimet and Coyle, 1991). Although sentencers, just like Halliday (2001) and Auld (2001) are aware that public opinion is often formed with little knowledge and may be based on misperceptions, they continue to take public opinion into account. As Walker, (1985) observes,

"...few sentencers regard the public as competent to dictate the choice of sentence; but a substantial number of sentencers and policy-makers regard it as important that sentencers should not strain public tolerance." (p. 72-73).

So, for example, if sentencers think that public tolerance would be strained by a sentence at the lower end of the sentencing tariff they may be inclined to hand down a harsher sentence. If, however, the sentencer believes that public tolerance is not an issue then s/he may be inclined to hand down a sentence at the lower end of the tariff.

In the U.K. both Labour and Conservative governments have favoured mandatory sentences of imprisonment for those offences that seem to evoke strong

feelings among members of the public (Faulkner, 2006). The murder of two year old James Bulger in 1993 by ten year olds Robert Thompson and Jon Venables resulted in the two boys being treated by the media (both tabloid and broadsheet) with the "...kind of outbreak of moral condemnation that is usually reserved for the enemy in times of war." (King, 1995, p. 172). Public outrage was so strong that the vehicle transporting Venables and Thompson to court was attacked as people called for the offenders to be imprisoned for the rest of their lives, or worse (Fionda, 1998, p.86). In the midst of the media's demonisation of children and the public's apparent view that children needed tougher measures to keep them under control, the Conservative Government introduced Secure Training Orders for children aged 12 – 14 leading to a rise in the incarcerated population of young offenders by 30% between 1993 -1997. Other measures introduced to assuage the 'moral panic' associated with child offenders included zero tolerance, boot camps, curfews, electronic monitoring, mandatory minimum sentences, the naming and shaming of young offenders, an increase in the sentencing powers of the Youth Court and an erosion of the right to silence (Mugnai, 2001). The 1997 white paper, "No More Excuses" spelt out how the new Labour Government intended to hold children accountable for their actions and in 1998 Doli Incapax was abolished. Doli Incapax, was the presumption that children aged 10 – 13 could not be held criminally responsible unless the prosecution showed that the defendant(s) fully understood that their behaviour was wrong (as happened in the Bulger case). The abolition of Doli Incapax meant that children from the age of 10 were deemed to fully understand the difference between right and wrong unless the defence could show that they did not i.e. the child had severe learning difficulties etc. In 2001 the Criminal Justice and Police Bill added to this backlash against young offenders when it gave courts the power to remand children who repeatedly committed medium level offences (e.g. assault, theft and criminal damage) to secure accommodation.

These policies and law amendments imply that public outrage/concerns are influential in shaping political mandates. The idea that public opinion has been the cornerstone for the criminal justice policies noted above is supported by statistics that show that there had been little or no increase in criminal activity by young people for the ten years preceding the introduction of the harsher tougher penalties (Ahmed, no date). If there was little change in youth crime it remains that the increase in punitive policies was probably due to the influence of public opinion coupled with an effort by

politicians to appear to be tough on crime to avoid being perceived by the public as weak and voted out of power (Ahmed, no date). That politicians are intent on currying public opinion is evidenced by the fact that they will support public opinion even if it is inaccurate. For example, statistics at the time of the James Bulger case showed a decrease in crime rates yet, in an effort to ‘play to the public gallery’ Tony Blair, the then Shadow Home Secretary, (1993) stated in the popular press that if people believed crime was rising, then, regardless of official statistics, it *was* rising (See Green, 2006).

#### Ignoring public opinion: political consequences

Although the above seems to spell out the political sensitivity to public opinion and the facilitating role that public opinion can play in policy formation, there are exceptions. As noted above, in a democracy the government functions within the ‘boundaries of political permission’ (Yankelovich, 1991). If a government forms policies outside these boundaries of permission it may see the public renounce the policy (Doble, 2002) and run into ‘confrontation politics’ (Moran, 2001). Radical policy changes that are introduced without building public support also run the risk of provoking such ‘confrontation politics’ between public and government.

In 1991 the Conservative government formulated the poll tax in a space of three months (Moran, 2001). When the proposed changes were sent out for public consultation the warnings of imminent disaster were ignored by the government who appeared to dismiss the importance of compromise with public opinion (McConnell, 2000). The result of the government ignoring public opinion led to a ‘climate of objection’ and the largest campaign of civil disobedience in the U.K. in the 20<sup>th</sup> century (Cowley, 1995). As public dissent increased, the U.K. witnessed some of the worst riots since the Second World War and this combination of political protest, together with people’s perceptions of unfairness and the substantial increases in average tax rates undermined people’s willingness to pay the tax. Non-payment rose to well above 50% in some areas, which, in concert with acts of civil disobedience, resulted in government promises to abandon the tax (Besley, Preston and Ridge, 1997). The poll tax protests are also thought to have been so influential that they became an important if not the main, reason why Margaret Thatcher was forced to resign as Prime Minister (e.g. Cowley, 1995). Understandably, those who stood for leadership of the Conservative Party following her departure all promised to abolish the tax (Besley, Preston and Ridge, 1997).

That the public's objections to the poll tax succeeded in changing policy where other expressions of public opinion such as the anti-Iraq war protests did not is odd. One explanation could be the number and type of counteractive measures available for the public to take against government policy. For instance, during the poll tax protests people of all ages resisted the tax by refusing to pay it. The subsequent imprisonment of elderly erstwhile law abiding members of the public for non payment of the tax may have stimulated public opinion further and prompted even more resistance, i.e. more people refusing to pay. In other protests, such as the Iraq war demonstrations, although the number of people who took to the streets was high (in excess of half a million), other courses of action, such as financial withdrawal were not feasible weapons of persuasion. Here it seems, that although public opinion is *deemed* to be important and, as one politician put it, "This country is ruled by consent and we forget that at our peril." (Cowley, 1995, p. 110), if people have only one course of action i.e. protestation open to them, politicians may not always pay attention to public opinion. If, on the other hand, people have additional options for protesting (e.g. refusing payment) that can be used to impede a policy's successful implementation, then the influence of public opinion on policy may be more profound.

Another compelling feature of confrontation politics seems to be which members of the public express an opinion. Socially and economically dominant groups have the power to affect the criminal justice system in their own interests while socially and economically marginalised groups are more likely to be adversely affected by the system (e.g. Liska, 1987). So, we may expect that when the middle classes protest, more attention will be paid to their views. Also, pensioners who express their objections to their members of parliament (M.P.'s) may make more of an impression *because* they are pensioners (Cowley, 1995). During the poll tax protests a lot of pensioners attended their M.P. surgeries to state their objections to, and difficulties with, the tax. That pensioners would protest in this way seemed to impact on M.P.'s leading them to make comments such as, "What was worrying were the amount of old and vulnerable people coming along with their bills who palpably couldn't afford them. That was really distressing." (Cowley, 1995, p.106). Moreover, many members of the public who protested about the poll tax often did so armed with political/financial arguments that explained *why* they objected to the tax. An informed public offering sound arguments as to why the tax was unfair, together with the

impact of street-based protests, instigated the abolition of the poll tax (Cowley, 1995). This suggests that although public opinion is important in policy formation/change, which members of the public protest, how they do so and why they object are important factors that possibly determine whether public opinion has any impact on the formation/amendment of government policies.

One of the problems inherent in examining the role of public opinion in policy formation is identifying a causal relationship. In an instance such as the poll tax protests the influence of public opinion on policy change seems to be reasonably clear. However, such instances are rare. It is generally assumed that policies are formed in response to public preferences because the threat of electoral sanction hangs over governments (Hobolt and Klemmensen, 2005) and a large body of research examining democratic politics does indicate a general congruence between public opinion and policy behaviour (e.g. Stimson, Mackuen and Erikson, 1995; Franklin and Wlezien, 1997). However, some authors contend that public opinion is not formed independent of political influence but results from a politically manipulative process (e.g. Brooks, 1990). Such opinions are, nonetheless in a minority: the majority of authors maintain that public opinion forms first and government policy is formed to be congruent with public views. Nevertheless, even if public opinion is a consequence of an autonomous decision making process and does influence policies it is very difficult to establish this empirically. A correspondence between public opinion and government policy may equally result from: public opinion influencing policy; policy influencing public opinion; a reciprocal process between public opinion and policy; or even some unidentified factor that influences both policy and opinion that leads to a spurious relationship between the two (Hobolt and Klemmensen, 2005). As yet, no empirical methodology has been completely successful in addressing these problems. Consequently definitive documentation of the influence of public opinion on policy remains elusive.

#### Is listening to public opinion justified?

Since, as noted earlier in this chapter, the public are generally under – or ill – informed about the functioning of the criminal justice system is the government justified in taking public opinion into account when forming policies? Some argue that politicians are quite justified in ignoring public opinion since politicians cannot be expected to take public opinion into account if the public pays little attention to what politicians do (Franklin and Wlezien, 1997). However, crime is capable of

generating public passion in a way that is unheard of in other areas (Warr, 1995) and the public pays more attention to policy areas that are salient and important to them. This heightened attention is then used to form opinions that shape party support and voting behaviour ( e.g. Abramovitz, 1994). When an issue is salient and important people are also more likely to pay closer attention to the related actions of politicians and the media will respond by concentrating reports on areas that reflect this level of interest (Brody, 1991). However, media reports rarely disclose all the relevant facts (Green, 1996). For example, when forming opinions regarding appropriate sentencing the public needs to know the facts of a case as it was presented in court and not as they were presented later in television reports or interviews (Green, 1996). Green's argument is that the public's opinion is a vital component of criminal justice policy but the public needs to develop an opinion based on *all* the facts of a case and not just the snippets that are summarised at a later date. Rarely are all the facts disclosed or indeed, reported accurately and all too often the cases that are brought to the public's attention are atypical, which is *why* they are deemed worthy of reporting (Green, 1996). As Green (1996) observes,

“..... the conclusions about sentencing reached by the average member of the public are drawn from inaccurate or inadequate reports of a small and unrepresentative sample of sentencing cases.” (p.116).

Observations such as these fuel arguments such as that proposed by Auld (2001, see above) who maintains that the level of public ignorance rightly gives judges and politicians a free hand to make policies that they consider fair and efficient. In addition to public ignorance it needs to be considered that public opinion, whether developed from an informed or ill-informed perspective is apt to change. This means that if governments take public opinion into account, policies could be formed according to erratic trends. For example, the doctrine of less eligibility dictates that during times of high unemployment, members of the public expect prison conditions to be more austere than the conditions endured by the poorest members of society, whereas in times of economic prosperity the public tends to be more sympathetic towards offenders (Sparks, 2000). So, if governments form policies according to a vacillating public's opinion they run the risk of appearing to be indecisive, which in turn, may undermine public confidence that the country has an effective leadership. If however, public opinion was to be set aside and policies were

to be formed by politicians and judges alone, then the government would avoid being seen as ineffective. Nevertheless, elected politicians also run the risk of being voted out if they appear to ignore the opinion of their constituents (Green, 2006).

Some authors argue that even if the public is not closely conversant with the facts of many public policy arrangements this does not give justice officials carte blanche to form policies or make policy changes which are likely to affect most people (Morgan, 2002). Yankelovich (1991) points out that experts are small in number and although they may not deliberately mislead the public, they exclude public contribution by using inaccessible jargon and tend to dismiss the views of ordinary people who do not command their level of expert knowledge. As such, Yankelovich (1991) maintains that these experts effectively impose their personal values on other people because they “.....fail to distinguish their own value judgements from their technical expertise.”(p. 4). If these experts go too far and commandeer the public’s role in governance, then we will have “.... The formal trappings of democracy without the substance, and everyone will suffer.” (p. 4). On the other hand, we cannot afford for the public to dominate governance because this will result in demagoguery (Yankelovich, 1991).

Yankelovich (1991) insists that what we need is a balance of power and influence where public and experts co-exist in sympathy and support of one another. However, currently, governments all too frequently rely on ‘top of the head’ opinion polls to gauge public opinion. As Green (2006) notes, politicians tend to make use of “inadequate assessments of public opinion for political ends...” and “...respond to the filtered public sentiments offered by the media – the most commanding substitute for the real thing available.” (p.141). The government effectively fails to acknowledge the limits of public knowledge and fails to introduce strategies that will help improve public knowledge (Roberts and Hough, 2002). This can be achieved but it needs to be fostered in a culture where the public is encouraged to contribute to its own governance and where experts do not resist this happening (Yankelovich, 1991).

Yankelovich (1991) considers the issue of public opinion to be even deeper than the mere gleaning of ‘top of the head’ thoughts garnered in opinion polls. Yankelovich makes the distinction between public opinion and public judgement. Public judgement is a specific form of public opinion that shows people have given an issue more thought, have weighed-up the alternatives, and have taken a wide variety of factors into account than the opinions measured by opinion polls.

Green (2006) advocates that using deliberative polls (DPs) governments would obtain more considered public views based on public judgement rather than public opinion. DPs were introduced in the U.K. during the 1990's they involved interviews and questionnaire administration to members of the public on any relevant issue e.g. crime and punishment, a period of deliberation and subsequent interviews some time later (see Hough and Park, 2002). Green (2006) argues that DPs should become part of the consultation process that inform White Paper development. Indeed, the efforts by the current Labour Government to employ focus groups etc (see above) to inform policy seems to support this view. DPs would be expensive but not as expensive as policy u-turns often are (Green, 2006). DPs could be conducted as part of the annual British Crime Survey and whenever a serious issue such as juvenile crime (such as followed the Bulger case) arises. Although Green (2006) acknowledges that some of the points regarding the implementation of DPs are possibly idealistic, DPs also have a democratic utility since "...the importance of public consultation and of building public confidence is recognized by many as self evident." (Green, 2006, p 150) and the value of conducting DPs lies in their ability to provide politicians with more accurate and more considered public opinions. These they can then use or discard when formulating policies, but at least they will know them to be an accurate assessment of public opinion and not ill informed, ill conceived, top of the head opinions.

### Conclusions

Public opinion undoubtedly has some role to play in the development of criminal justice policies. What we cannot know for certain is the magnitude of that role. Certainly successive governments seem to have taken public opinion at least into consideration when forming justice policies relating to policing and sentencing. The exact relationship between policy formation and public opinion remains a matter for speculation as to whether public opinion informs policy or policy informs opinion. What we do know is if a policy transcends the boundaries of political permission public opinion can result in swift retribution that undermines the policy and even calls the legitimacy of a government into question. Yet, the notion that the public is ill-informed permeates public opinion debates and provides some with the ammunition to argue that public opinion should be dismissed in favour of expert opinions. However, to replace public opinion with expert opinions alone would potentially undermine our democracy and invite public wrath. It seems that public opinion and

public consultation are increasingly important features of policy formation. Consequently, whether we use deliberative polls or some other derivative to assess public opinion, it is clear that governments, even if they disregard those opinions, should be presented with people's considered views and not some off-the-cuff opinion formed with little thought. Public opinion lies at the heart of a democratic culture and as such its role is crucial in permitting and censuring the actions that governments take on our behalf.

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