

ACJRD 12th Annual Martin Tansey Memorial Lecture

Criminal Justice Culture(s) in Ireland: *Quo Vadis?*

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Introduction

Ladies and gentlemen, I am delighted and honoured to have been asked to deliver the Annual Martin Tansey Memorial Lecture this year. I didn't have the privilege of knowing Martin but through reading about him he strikes me as a man of great energy, commitment, integrity and vision. Given the impressive range of areas of criminal justice in which he was involved (Sean Aylward in the inaugural lecture notes that you could be forgiven for believing that no inter-departmental committee in the 70s, 80s and 90s was complete without his presence), I am intending this evening to examine Irish criminal justice culture from a broader, wide-lens perspective rather than focussing on one specific aspect of the system. The aim, perhaps fitting on this the 12th Memorial Martin Tansey lecture, is to deploy 'culture' as an analytical device to reflect on where we have come from since his death in 2007 and where we may be headed in the near future.

Part 1: Irish Criminal Justice Culture

I have chosen culture as a lens through which to examine Irish criminal justice because it is my strong view that no serious scholar of criminal justice can afford to ignore culture. The well-known criminologist and comparative legal scholar, David Nelken (2010), has written that culture (less it should be said as a variable *per se* and more as a flow of meaning) is essential to understanding other systems, but also knowing our own. One of the many examples he provides, and which I relay to my students, is that while the USA is still sending people to death in the electric chair, in 2008 a fairground owner in Italy was convicted of an offence against public decency for exhibiting a pretend one (ibid)! For a researcher seeking to grasp the meaning of punishment in these two jurisdictions such information is critical, moving understanding far beyond the standard criminal justice data and their correlates. Culture, or more correctly institutional culture, has also been the focus of sustained attention in Ireland in the last decade and we have witnessed on many occasions in recent years failings of the Irish public service being blamed on organisational culture, several of them the very criminal justice agencies which are the focus of this talk (Molloy, 2011). In criminal justice, culture is of course significant because of the influence it may wield over the exercise of discretion, itself integral to the practice of law. In criminology, a significant body of research testifies to the fact that the constraints imposed by the working cultures of agencies are at least as important, if not more important, than legal constraints in shaping practice (Zedner, 2005).

So how can one demarcate culture from everything else that is going on? An inquiry into criminal justice culture in my view can do no better than adopt the definition of legal culture espoused by David Nelken (2004: 1) who has described legal culture as comprising relatively stable patterns of legally oriented social behaviour and attitudes ranging from, at one end, the behaviour of institutions to, at the other end of the spectrum, the more nebulous aspects of ‘ideas, values, aspirations and mentalities’. An immediate objection may be taken to the assumption that there is *one* criminal justice culture common to all the departments, agencies and bodies working within the system. The reality is of course very different, with agencies not always sharing the same aims and objectives, or even a common understanding of the problem. What is clear, however, is that they share a level of interdependence, so that decisions made in one area have clear implications for others (Nelken, 2010; Zedner, 2005) and, as I will also argue, they share a number of cross-cutting traits common to criminal justice in Ireland, paralleling perhaps cultural patterns in Irish society more broadly.

Moving on to look at Irish criminal justice culture, I should first of all acknowledge my own credentials, or perhaps lack thereof, as a blow in from the North in 1994! Yet, having spent all of my adult life studying, working and researching in the Irish criminal justice system, I feel I have gained an appreciation of the culture of this jurisdiction and its critical role as a factor mediating the effects of criminal justice ‘on the ground’. This is reflected in my own research comparing Irish criminal justice culture with that of Scotland and New Zealand where I was struck by the manner in which local culture and national psyche acted as an important filter in limiting the options available to politicians and other decision makers within the criminal justice system (Hamilton, 2013, 2014a; see also Melossi, 2001). So, for example, Scottish civic culture, with its values of fairness, welfare and community support, was seen by policymakers to militate against the adoption of more exclusionary criminal justice policies, whereas in New Zealand a cultural strain to conformity (as one former Minister for Justice described it ‘New Zealanders are to some degree the Prussians of the South Pacific’) pushed criminal justice in a rather different direction (Hamilton, 2013, 2014a). Returning to Ireland, I want to suggest four aspects of Irish criminal justice culture which I feel impact on the lived experience of Irish criminal justice or how it is ‘done’ in practice, namely, (i) the importance of discretion (ii) the gap between policy and practice (iii) the primacy of individuals (agency) and (iv) humanitarianism. The fourth cultural trait is perhaps the most speculative but worth mentioning I think on account of discussions we will be returning to later this evening.

(i) The importance of discretion

The Irish, and most likely post-colonial preference for informal resolution is neatly summed up by William Duncan in a 1994 article on ‘law and the Irish psyche’: ‘There is still in this country a certain pride attached to the exercise of personal discretion in the face of strict rules’ (Duncan, 1994: 452). My own research found much evidence of this also, with interviewees describing a ‘less black and white’ approach to criminal justice than in the UK

(Hamilton, 2013, 2014a). A quotation from a former policymaker that I particularly enjoyed was one in which he described the use of Key Performance Indicators, which are common in law enforcement in the UK, as ‘repugnant to the Irish psyche...the Irish media would be horrified if they saw a circular saying you are to catch, you are to increase your detection rate for burglars by 18 per cent...they’d say what kind of nut decided that’ (cited in Hamilton, 2013). It’s interesting to note that this approach has important real world effects with Parsons (2016) speculating that the significant disparities between the rate of victimisation in Ireland and the recorded crime rate (as highlighted by Irish participation in the International Crime Victimization Survey) may be accounted for, not only by lower reporting and recording rates, but also a greater use of discretion by the police to avoid criminalising people.

(ii) Gap between policy and practice

A related point concerns the well-known disjuncture or gap between ‘law on the books’ and the ‘law in practice’ in Ireland (O’Donnell, 2005; Hamilton, 2014a). While this exists in all jurisdictions, there is a tendency, observed by Caroline Fennell (1993), O’Donnell and O’Sullivan (2001) and others (O’Mahony, 1998; Hamilton, 2007), to legislate in response to a criminal justice ‘crisis’ in Ireland without a concomitant commitment to implementation. Kilcommins *et al* (2004: 291) may well be correct that this inertia has acted a bulwark against a punitive shift in Ireland (or as one of my interviewees put it, the country’s ‘saving grace’, (Hamilton, 2014a)) but it’s also important to remember the failure to act has had pernicious effects too, as the oftentimes glacial pace of progress we have witnessed in relation to, for example, youth justice, prison conditions and expungement laws will account.

(iii) Primacy of individuals

A third trait of our culture may be attributed to the considerable space which it affords the personality of individual policymakers, namely, Ministers of Justice, within the system. Mary Rogan (2011, 2016) has written in detail about the pragmatism of Irish criminal justice policy and the reversal of seemingly embedded policy directions as a result of decisions taken by Ministers Haughey, Shatter and McDowell. My own research suggests that this is perhaps a function of a smaller jurisdiction in which the role of key actors may be amplified so that, while networks may perhaps be able to display greater coherence in the face of challenges to the *status quo*, change, when it comes, is wrought very quickly (Hamilton, 2014a, 2014b). In 1990s Scotland, for example, the prominent role played by a number of elite policy networks in shielding Scottish penal policy from the radical change experienced south of the border was certainly facilitated by the smaller size of the jurisdiction (McAra, 2005). In New Zealand, on the other hand, dramatic reforms pioneered by victims’ movements, but strongly courted by a hawkish Minister for Justice, took hold very quickly, sending the country’s imprisonment rates soaring in the late 1990s and early 2000s (Pratt and Clark, 2005).

(iv) Humanitarianism?

The fourth and final trait that I think may be pertinent to Irish criminal justice is that of humanitarianism. As I mentioned earlier this is perhaps more speculative than the other cultural features observed above but it has been suggested by several authors. Ian O’Donnell and Yvonne Jewkes (2011) and Kilcommins *et al* (2004), for example, have all pointed to the

release of prisoners at Christmas, or more particularly, the ‘routine and mundane’ approach taken to this, as a potential illustration of ‘the humanity that continues to characterize the Irish system, for all its flaws’ (Kilcommins et al, 2004: 265). Similarly, Louise Brangan (forthcoming), as we will see, has suggested that humanitarianism forms an important plank of the Irish approach to imprisonment in the 1970s, one which sought to reduce the pains of imprisonment, motivated by empathy and a respect for prisoners as people. Irish probation practice, moreover, continues to be strongly motivated by penal welfarist concerns (Healy and Kennefick, 2017), and, at least from what I have observed in my research with adult and youth probation services, appears to be permeated by a strong social work ethos (Hamilton et al, 2016; Fitzgibbon et al, 2010).

The Penal State and Control of the Power to Punish

As observed above, my definition of legal culture is one which includes *institutions* and their behaviour and indeed there is strong evidence that it would be dangerous to ignore infrastructural differences in seeking to understand a given social field such as criminal justice (Blankenberg, 1997; Smulovitz, 2010). In this regard it is interesting that David Garland, one of the world’s foremost criminologists, who previously has advanced a dystopian vision about a growing ‘culture of control’ or punitive turn in the UK and the US and other western societies (Garland, 2001), has now shifted his analytical lens away from changes in penal culture and towards aspects of the ‘penal state’ defined as ‘the governing institutions that direct and control the penal field’ (Garland, 2013: 495). One dimension of the ‘penal state’ identified by Garland and which is particularly relevant to our discussion this evening is ‘the control of the power to punish’ and the significant consequences for the penal field which can result from changes in the balance of power between various agencies over time. The example given by Garland is the shift from judicial to prosecutorial power which occurred in the US in the 1970s and 80s largely as a result of the enactment of mandatory sentencing laws and determinate sentencing policies (shifting the focus from sentencing to charging decisions), and which incidentally has been fiercely resisted by prosecutors in recent times as such laws have been gradually reversed (Tierney, 2013).

In an Irish context this matters because of what I have described in my research as the ‘front-end’ orientation of the criminal justice system in Ireland (Hamilton, 2014a) or perhaps what may be argued to be the position of An Garda Síochána as the ‘fulcrum’ of the Irish criminal justice system. As previous research has suggested, the Gardai were bigger, more powerful and more significant culturally than police forces in other jurisdictions (Conway, 2014; Hamilton, 2014a, 2017a). The organisation has always been one of Ireland’s ‘in-groups’ (Mac Greil, 1996), an embodiment of the cultural nationalism which underpinned the fight for independence and one which has enjoyed, and continues to enjoy, high levels of legitimacy and public support (Mulcahy, 2016; PWC, 2018). This front-end orientation of the system may not be without important implications for criminal justice culture in this jurisdiction. Australian and US criminologists have observed how jurisdictions with higher levels of expenditure on the police tend to have lower imprisonment rates, something which it is interesting to consider from an Irish perspective (Hinds, 2005; Sherman cited in Tierney, 2013). In Ireland, while of course much recent attention has rightly been focussed recently on

the negative effects of the overly deferential approach taken to the Gardai in the past, consideration might also be usefully given to manner in which high levels of public and political trust in the Gardaí in the 1960s and ensuing decades may also have facilitated the development and expansion of some of the most progressive elements of the system such as the Garda Diversion Programme.

Part 2: Policing, Prison and Legal Subcultures

Policing Subculture

Discussion about the front-end bias of the criminal justice system in Ireland leads me to the culture of An Garda Síochána itself. Much academic ink has been spilled on the subject of ‘cop culture’ in criminology since the 1950s and 60s when criminologists first started writing about the worldview or working personality of police officers as pivotal in shaping police practice. Characteristics such as machismo, racism, solidarity/isolation, thirst for action and conservatism among others have identified by policing scholars such as Robert Reiner (2010) and it is interesting that, despite major recent transformations in policing work, researchers have observed a remarkable durability of cultural themes (Loftus, 2010).

While little research has been conducted on police culture in an Irish context the recent ‘avalanche of scandal’ (Mulcahy, 2016: 273) which has gripped the Gardai in recent years has required us to face some uncomfortable facts about the culture of the organisation. The recent Garda Cultural Audit (PWC, 2018), which included a survey undertaken by 6,500 members of the force, identified significant problems with speaking up (in line with the ‘solidarity’ theme in the policing literature) and problems with the promotion/competition process. Cultural insights included: ‘Silence means survival: Generally we have the personal courage to speak up, but fear the consequences of doing so’ and ‘our promotion/competition process isn’t based on meritocracy’. As scholars such as Janet Chan (1997) observe, however, we shouldn’t forget that policing culture is not a free floating idea or concept and connects with the postcolonial context which, as I have already said, exhibits a strong preference for informal resolution. Particularly relevant here I think is the ‘weak rules/strong relationships’ balance that authors such as Niamh Hourigan (2015) argue are a reflection of the Irish value system. Further, as with many other debates in contemporary criminal justice, there is the danger of the pendulum swinging too far in the other direction, and neglecting the important role played by discretion in effective policing. As Reiner (2017: 4) has recently warned, we should avoid at all costs a view of police culture, often present in managerial and political debates about police reform, which conceives of police officers as ‘paranoid, insular, and intolerant’ individuals who ‘intransigently oppose change’ and therefore ‘must be rigidly controlled from the outside, or at least from the top’ (citing Sklansky, 2007: 20).

Department of Justice Culture

Part of the fall-out from the McCabe scandal which has engulfed An Garda Síochána for some years now was the commissioning of a report into the performance and management of the Department of Justice and which was published in 2014 (Toland, 2014). The Report revealed ‘a closed, secretive and silo driven culture’, where ‘secrecy was part of its DNA’

together with an overly ‘deferential relationship with An Garda Síochána’. The origins of this insular and defensive culture can be traced of course to the sensitive nature of its work in dealing with a terrorist threat which has dogged the state since its foundation and the ‘Troubles’ in Northern Ireland. From a criminological perspective the opening up of this Department to closer scrutiny is important given the attention it draws to cultural constraints, not only on those at the coalface of criminal justice, but also those operating in the hinterlands of criminal justice whose decisions hold great importance for criminal justice policy. As Lucia Zedner (2005) has suggested, there is a need for greater research into these more hidden areas of criminal justice and the working cultures of civil servants such as prosecutors. In terms of changing this culture, it is heartening to see the development of a Department Data and Research Strategy and a commitment within this to ‘developing a culture of research... ensuring that research and analysis becomes part of the ‘DNA’ of the policy and decision making process of the organisation’ (Department of Justice, 2018: 6).

Prison Subculture

Like the Gardai, the penal system has been the subject of sustained and unprecedented critique in recent years with a string of reports into its operation dating from the Thornton Hall Review Group in 2011 to the sixth report of the Penal Policy Review Group Implementation Oversight Group (Thornton Hall Project Review Group, 2011; PPRG, 2014; Houses of the Oireachtas, 2013, 2018; PPRG Implementation Oversight Group, 2015, 2016, 2017a, b, 2018a, b). In terms of implementation of these reports, as carefully detailed by the Irish Penal Reform Trust in their recent report on Progress in the Penal System (2018), this has been slow but perhaps we can take heart that unlike with reports from the 1980s and 1990s, such as the ill-fated Whittaker or Management of Offenders reports, there is here a commitment to monitoring and implementation which was not evident in the past.

Commensurate with these reports has been a detailed and excellent report into Culture and Organisation in the Irish Prison Service authored by the former Inspector of Prisons, the late Judge Michael O’Reilly and Prof. Andrew Coyle in 2015 (Office of the Inspector of Prisons, 2015). It is interesting to see that many of the terms used to describe the Irish Prison Service such as ‘closed mindset’ and ‘silo driven culture’ had been used one year previously by Toland to describe the parent department. Some of the problems highlighted in the report in relation to the unprofessional behaviour engaged in by some prison officers and problems with the management of prisons, including the role played by the Prison Officers Association in the ‘co-management’ of some prisons, have again pointed up the need for further criminological research into these issues. As Alison Liebling (2014) has argued ‘Very few studies of the organizational behavior and influence of prison officers’ associations exist—and yet ... they have been, and continue to be, a major inhibitor of reform in many jurisdictions.’ Similarly in Ireland, O’Donnell (2005) identifies the strength of organised labour within the prison, police and probation services as an important factor contributing to inertia within the system.

Legal Subculture

The final subculture I will examine is the Irish legal subculture, an area which I am currently researching. Shane Kilcommins in particular has done some important research in this area, highlighting the liberal ideology of legalism and constitutionalism' in Ireland (Kilcommins, 2015) and the liberal judicial *habitus* or 'assumptions, values and beliefs' which continues to afford important protections for those accused of crime in Ireland (Vaughan and Kilcommins, 2008). This was confirmed in my own research into Irish legal culture, with a number of respondents suggesting this due process orientation could be extended to the legal community more broadly (Hamilton, 2014). Its origins can of course be traced to the desire by the late Brian Walsh and other judges of the 60s, 70s and 80s to forge a body of jurisprudence distinct from that of Britain and more aligned with our neighbours across the Atlantic (Mac Cormaic, 2016). Thus, Brian Walsh, one of the driving forces behind this project, wrote in the foreword to a torts law book published in 1981 'that the man on the Crumlin omnibus was not same as the man on the Clapham omnibus'.¹ This area too has witnessed change, albeit in two apparently contradictory directions. On the one hand, as pointed out by scholars such as Campbell (2008), the 'culture of control' in Ireland has not overlooked procedural rights and more recently we have seen decisions such as *JC v. DPP*,² overturning the previously highly protectionist approach taken to the exclusion of unconstitutionally obtained evidence in *Kenny*.³ On the other, we have experienced a 'levelling-up' of rights protection driven by EU Directives and European Court of Human Rights case law, as best illustrated in the *Gormley and White*⁴ decision on the right of access to a solicitor before questioning.

Part 3: *Quo Vadis?*

So what does all of this tell us about the direction of travel of Irish criminal justice and Irish criminal justice cultures? In order to contemplate where we are headed as a criminal justice system it's important to know where we are coming from. Mary Rogan (2011, 2016), Ian O'Donnell (2008) and others have I think correctly broadly characterised the historical trajectory of criminal justice policy making in Ireland as one of 'Stagnation and Change', namely, one in which long periods of neglect are punctuated by occasional 'crime crises' or periods of hyperactivity. While at least some of the factors identified by O'Donnell (2005) as contributing to this stagnation remain in place (eg strength of organised labour within the prison, police and probation services), given the very significant corpus of critical reports which has accumulated on the Gardai, Prison Service, and the Department of Justice itself in recent years it does seem as if we are living through a time of unprecedented change for the Irish criminal justice system. As someone who has worked in and researched that criminal justice system for nearly 20 years now, I feel optimistic, if not about the circumstances that have triggered some of these investigations, then at least about the fact that these cultural

¹ Foreword to McMahon, B, Binchy, W, Irish Law of Torts (1981) Professional Books, Abingdon.

² [2017] 1 IR 417.

³ [1990] 2 IR 110

⁴ *People (DPP) v. Gormley; People (DPP) v. White* [2014] IESC 17.

traits — in my view so fundamental to the functioning of our criminal justice agencies — are finally being given the acknowledgement they deserve.

One aspect which I think it is useful to focus on in this Concluding Part is the pressure towards convergence and particularly the pressures towards convergence flowing from European standards and norms. Most of the reports referenced above critically analysing various aspects of Irish criminal justice culture have referenced these standards as a roadmap for the future and thus they may become increasingly relevant to the way in which criminal justice is done. I don't want to adopt here what can be described as a Pollyanna approach to the incorporation of human rights standards and indeed I have written elsewhere (Hamilton, 2017b) about the highly inconsistent influence of European human rights norms on the penal field (Ireland as 'not quite' the Good European). However, it is at least certain that the standards promulgated by European institutions provide claims makers in Ireland with the conceptual resources to capitalise on the opportunities presented by recent controversies (ibid). At the more coercive end of the policy transfer spectrum, this pressure towards convergence is only likely to intensify once Britain leaves the EU, given our position as the only common law jurisdiction among the EU 27 and the potential for more rapid and deeper integration in areas where the UK has hitherto been a barrier to progress (Bond et al, 2016).⁵ The impact may be that norms that are currently local, informal, subjective, and relational are increasingly challenged by the turn toward more formality and objectivity.

Writing about the effects of forms of legal, political and indeed economic globalisation on legal cultures Nelken (2007) has argued that with the publication of league tables, etc. they are becoming increasingly 'relational', by which he means the extent to which attitudes and behaviour in one legal culture are influenced by information about what is happening in legal cultures elsewhere. The result is that countries try to come into line, in terms of their imprisonment rates, for example, so as not to be too distant from the norm or average of other countries. Karstedt (2015) has made similar arguments about nation states becoming more relational but in the narrower sense of being influenced by groups of 'cultural peers', including those from whom they have borrowed policies before, which in Ireland's case has historically been Britain.⁶ And yet as Loader and Sparks (2002: 94) correctly observe, 'It is precisely under globalising conditions that people's sense of place and of differences between here/there, inside/outside, us/them – takes on a renewed force as a structuring feature of social relations and culture'. The longing 'for a lost (if mythical) world of secure and settled identities' (Morley, 2000: 152), as witnessed by the recent rise of global nationalism, seems to be at the forefront of contemporary political debate. It is interesting to see some of these

⁵ Though we will perhaps more open to arguments by Germany and other countries on the importance of privacy and other human rights.

⁶ J. M Kelly TD commented in the Dail in relation to the Criminal Justice (Community Service) Act 1983: 'this is simply one more example in the ignominious parade of legislation masquerading under an Irish title... which is a British legislative idea taken over here and given a green outfit with some silver buttons to make it look native.' Dail Debates, 3 May 1983 (cited in Kilcommins et al, 2004).

tensions playing out in an Irish context in the recent Supreme Court decision in *JC* referenced earlier. O'Donnell J. for the majority in favour of reforming the exclusionary rule, seems keen to identify Ireland as an outlier among common law jurisdictions: 'it seems clear that *Kenny* represents a near absolute exclusion which is the most extreme position adopted in the common law world.' McKechnie J., for the minority on the other hand, appears unimpressed with the argument that we should follow in the footsteps of other common law jurisdictions, emphasising the distinctly Irish approach to the exclusion of unconstitutionally obtained evidence: 'This is what I have seen: as great as the show may be, it is not for me and I suspect not for a great number of others whose bedfellow is the 1937 Constitution of Ireland.'

On the subject of difference, a recent and important contribution to this debate has been made by Louise Brangan (forthcoming) who, adopting a post-colonial critique, has argued that the 'recovery' of Ireland's penal culture, including revealing its aims and ambitions, may provide us with new, progressive ways to imagine our future. Arguing against the universalist assumption that all societies are knowable in the same terms, and basing her arguments on her research into Irish penal culture in the 1970s, Brangan points to a distinctively Irish approach whose aims are driven by compassion and community cohesion, not criminal correction as in the UK and US. On her view, this form of 'pastoral penalty' saw experts in the system acting as shepherds seeking to strengthen prisoners' familial and social bonds and their moral connections to 'the flock', rather than treating their individual transgressions or recovering them from criminality. Notably, such 'pastoral penalty' includes a commitment to humanitarianism and the liberal use of discretion which I discussed earlier. Similar sentiments have been expressed by Healy and Kennefick (2017) in their research into probation practice in Ireland across the same period (1960s/70s). These authors also reject the contention that Ireland's 'discovery' of rehabilitation during this period was merely a 'catch up' exercise with England and Wales, arguing instead that it arose from deeply-rooted local contextual factors. Their accounts reveal a 'practice philosophy embedded within Catholic social values and characterized by a deep sense of vocation' (ibid: 14).

To conclude, therefore, given the unprecedented level of scrutiny which has been brought to bear on the key agencies of our criminal justice system in the past 5-7 years, and indeed a growing body of research in a post-colonial vein, it may be fair to say that we have become increasingly self-aware as a criminal justice system. I feel that this can only be to the good for, as Socrates has said, 'To know thyself is the beginning of wisdom'. As discussed earlier, we have become more reflexive also as regards our relationship with other states and our positionality among European states in particular. Whether this will result in convergence, at least in the sense of the elimination of difference, seems to me highly unlikely. Much more probable in my view is a form of cultural hybridity ('glocalisation') formed as a result of complex interaction between the global and local for, as persuasively argued by criminologists such as John Muncie (2011), it is always *local* actors who are responsible for activating and implementing the 'global' 'on the ground', thus bringing the national cultural traits identified at the beginning of this lecture back into focus. Paradoxically, as we have

mentioned, one of the effects of these pressures towards convergence may be to force a deeper understanding of Irish criminal justice culture and the ‘recovery’, as Brangan has argued, of its own assumptions, values and fundamentals. In this, I do not claim to have any easy answers but there is little doubt that as a point of departure we may be well served by the values attributed to Martin Tansey himself: ‘patience, humanity, courage, an understanding that there are competing human rights and the capacity to balance those rights... [and] belief that the rehabilitation of offenders was a supremely rational social objective’ (ACJRD, nd).

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