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What Is The Core Normative Argument for Greater Democracy in Criminal Justice?

Christopher Bennett
Department of Philosophy
University of Sheffield
c.bennett@sheffield.ac.uk

DRAFT ONLY

1. Introduction

'A community has a democratic right, within limits, collectively to organise its affairs as it sees fit. This extends to security and criminal justice. However much the proper organisation of justice, rights and security is determined by standards valid independently of any particular community's attitude towards them, a community has a right to settle its own best collective understanding of these matters, and to set its own priorities as to how they should be respected and pursued. In the case of serious abuse or disorganisation, a community may lose the right to determine these things for itself, and external intervention may be necessary. But a reasonably well-functioning political community should be free to determine its own destiny.'

This is a statement – bland, perhaps – of a reasonably uncontroversial position in political philosophy. Some will argue even with this, of course. But many will find appealing the idea that there is some sort of sovereignty possessed by a group of people working together to set the conditions of its collective existence – that that collective effort is inherently of value and deserves space to succeed, even if that means making its own mistakes – though there are of course various ways of explaining why this should be the case.¹

There is plenty to say about this statement, but in this paper I want to focus on two related aspects of it. One is that it is compatible with the view it puts forward that a political community would be within its rights, if it decided democratically so to do, to implement policies of mass imprisonment such as we have witnessed over the past fifty years in the US and to a lesser degree in the UK.² The other is that it is compatible with this view of democracy that a political community could delegate the determination and execution of criminal justice policy to a technical association that would carry those tasks out on its behalf; the association would carry out its task only on the condition that it had been given the right to do so by the political community, so there is no threat to sovereignty in this conferral of rights.

¹ For a selection of justifications, see e.g. the remarks on democracy in J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972), pp. 195-201; T. Christiano, 'The Authority of Democracy,' *Journal of Political Philosophy* vol. 12 (2004); J. Waldron, 'The Core of the Case Against Judicial Review,' *Yale Law Journal* vol. 115 (2006); D. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2009).

² For related views, see A. Altman, 'Democratic Self-Determination and the Disenfranchisement of Felons,' *Journal of Applied Philosophy* vol. 22 (2005); D. Estlund, 'On Following Orders in an Unjust War,' *Journal of Political Philosophy* vol. 15 (2007).

The crucial thing about the view of democracy expressed in this opening statement is that it is framed entirely in terms of the *rights* a community has by virtue of its democratic status. It looks at these rights as what the Hegelians call abstract, arbitrary rights – liberty rights to do one thing or another, as the possessor of the right sees fit. It says nothing about the *substance* of democracy, or the *obligations* that might come with democratic arrangements.³

Contrary to the limited conception of democracy presented in the opening statement, in this paper I am particularly interested in the idea that democracy means that citizens have an *obligation* to govern themselves – in particular, an obligation to get involved and help to run central institutions of their political community such as the criminal justice system, rather than to allow these institutions to be run by some sort of technical association, however expert in its subject-matter. I will be asking what the nature and ground of these obligations could be, and how central they are to the theory of democracy. This foundational question is pursued in the service of a more urgent practical question: whether there is something more substantial that theorists of democracy should say specifically about democracy and criminal justice than the view that ‘we would be within our rights to decide on mass imprisonment’ canvassed above. I will be looking in particular at the arguments put forward by Albert Dzur in favour of greater citizen participation in criminal justice. I am sympathetic to these arguments, but I want to play devil’s advocate here, pressing them at points where I sense they need some further explanation. In that way I hope that we can better understand the participatory democratic position, its strengths and how to address its weaknesses.

2. Democracy as a solution to the problem of mass imprisonment?

According to a commonly heard narrative, the US, and to some extent the UK following it, has become increasingly punitive over the past 50 years – evidence for which might include significant increases in rates of imprisonment, lengths of sentences, and policies such as ‘three strikes and you’re out,’ which mandate harsh sentences based on previous convictions – and a key reason cited for these developments has been the rise of ‘penal populism.’ In contrast to an era in which ‘the people’ were content to leave criminal justice broadly speaking to experts to engineer rehabilitation or deterrence, a story is told of increasing distrust of government and its experts, resulting in increasing demands that attention should be paid to popular sentiments in favour of harsh punishment.⁴ These demands gain in toxicity because they are made, and satisfied, through the electoral system, meaning that politicians now compete to be ‘tough on crime,’ playing to a perceived gallery of popular retributive sentiment. Interesting questions arise as to why it should be particularly the Anglo-American countries to which this has happened. Depending on the diagnosis, solving the problem might require recognising, working with, or changing structural socio-economic

³ Cf. Corey Brettschneider, *Democratic Rights: The Substance of Self-Government*.

⁴ See e.g. the papers in D. Garland (ed.), *Mass Imprisonment: Social Causes and Consequences* (London: Sage, 2001); I. Loader, ‘The Fall of the Platonic Guardians,’ *British Journal of Criminology* vol. 46 (2006).

conditions of the countries worst affected.⁵ But at least part of the solution, according to this story, involves greater insulation of criminal justice decisions from the pressure of public opinion – greater discretion of experts to base decision on genuinely relevant considerations rather than having to conform to the electoral gambits of their political masters. Thus for instance, Nicola Lacey has proposed, in the UK, a Royal Commission modelled on the Monetary Policy Committee established by Gordon Brown to depoliticise key decisions regarding economic policy.⁶

Against this conclusion, the line of thought I am interested in argues instead that it is greater, not less, democracy in the criminal justice system that we should be pursuing.⁷ The plausibility of this argument depends, firstly, on the particular understanding of democracy that is in play; and secondly, on what we can reasonably expect from democratic processes.

Albert Dzur argues for this position in his recent book, *Punishment, Participatory Democracy and the Jury*.⁸ As the title implies, Dzur's argument is, not just that criminal justice policies should be made in line with some understanding of 'public opinion,' but rather that citizens should actively take responsibility for making key decisions within the criminal justice system. Thus Dzur distinguishes 'plebiscitary,' 'advocacy' and 'load-bearing' models of democracy (p. 163): the first is simply the idea that the public can vote on various options, the results of which are then implemented by a technical association; the second, that experts within institutions should lobby and advocate in favour of views for which there is significant public support (cf. the 'mobilisation' strategy discussed at p. 35); while the third, which Dzur favours, involves active participation by citizens in making key decisions. The central model for lay participation, on Dzur's account, is the jury. He argues that load-bearing lay participation in the criminal justice system has advantages over the model of institutional decision-making by experts favoured by Lacey.

There are various initial reasons for thinking that load-bearing democracy, exemplified in the jury, is worth considering as a candidate solution to the problems of contemporary penalty. The jury is, or can be, a deliberative forum, in which citizens exercise their intelligence to come to a decision, and debate alternative solutions, thus broaching, and learning to deal with, fundamental value disagreements that may characterise their wider society.⁹ Its membership is, or can be made to be, inclusive and representative of the population as a whole. It is an institution that by and large (with the exception of cases of

⁵ N. Lacey, *The Prisoner's Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge: Cambridge University Press, 2008). See also P. Pettit, 'Depoliticizing Democracy,' *Ratio Juris* vol. 17 (2004).

⁶ Lacey, pp. 191-2.

⁷ Though note that Lacey claims that her proposal will enrich rather than dilute democracy (p. 196).

⁸ A. Dzur, *Punishment, Participatory Democracy and the Jury* (Oxford: Oxford University Press, 2012). Page references in the text are to this book.

⁹ Cf. G. Johnstone, 'Penal Policy Making: Elitist, populist or participatory?,' *Punishment and Society* vol. 2 (2000).

nullification) takes its place within an institutional framework recognised as constraining or binding it, rather than exercising unfettered autonomy in its decisions. Lastly, in part as a result of the previous point, its members by and large have to collaborate with experts rather than overriding or ignoring them.

These last two points are central to Dzur's vision, and part of what makes it a distinctive and attractive contribution to the debate. One of the central objections to democracy, and the question an aspect of which I wish to pursue later in the essay, has always been the thought that it involves handing over the reins of government to the ignorant,¹⁰ and that democratic decision-making would never be able to learn from past experience unless the populace as a whole could somehow be brought to understand the complex technical issues. This is not quite Lacey's point, since she does not doubt the authority of public opinion but rather takes it that electoral politics distorts public opinion and hence delivers a criminal justice policy that the public does not want: 'unmediated penal populism leads ... to a world for which few .. would consciously choose to vote.'¹¹ But she takes it that a commission of expert advisors would better bring policy into line with considered public opinion and hence retains what is attractive in democracy. Dzur's thought is rather that laypeople should be given a central role in helping institutions to do their jobs. This allows him to acknowledge the crucial role of institutions as repositories of knowledge that can be laid down in procedures and systems rather than remade afresh by each generation of individual role-occupiers. It also allows that laypeople can and should accept guidance from those with technical knowledge. Further, it allows that giving real decision-making power to citizens might be compatible with (or even necessary for), rather than in conflict with, rule of law values such as publicity, transparency and predictability. But the question between Dzur and Lacey concerns what is of value in public participation: Dzur must be able to point to something important that would be lost if we took Lacey's approach, and which is retained on his.

I will suggest that he defends two different theses in response to this question: the Correction Thesis, and the Common Ownership Thesis. We will look at how one might argue for these two theses. I will then look at an example that puts pressure on the Correction Thesis, raising the question whether there is really an important role left for lay participation if so much is conceded to institutions and expert decision-making. By way of conclusion I will argue that greater consideration needs to be paid to the Common Ownership Thesis.

3. Two ways to argue for greater lay participation in criminal justice

First of all, then, what considerations does Dzur think speak in favour of load-bearing participatory democracy in criminal justice? Here is a key passage:

'My core normative argument in this book links up closely with the idea that lay participation improves institutions because citizens can help

¹⁰ Cf. for instance Rawls's discussion of Mill's objections to equal rights to political participation at *Theory of Justice*, pp. 232-3.

¹¹ Lacey, p. 185. Cf. also pp. 179-181.

produce better decisions than professionals working alone and with the position that participation enhances the legitimacy of institutions by expanding the base of actually consenting citizens. I wish to stress as a matter of priority a different line of thought, however, which seems more fundamental because it is required by the other ideas: Lay participation in criminal justice is needed because it brings otherwise attenuated people into contact with suffering human beings, draws attention to the ways laws and policies and institutional structures prolong that suffering, and makes possible – though does not guarantee – greater awareness among participants of their own responsibility for laws and policies and structures that treat people humanely. I see this as an argument about responsibility and admit that responsibility is not the same thing as legitimacy, proportionality, or other substantive goals we also wish to see reflected in criminal justice institutions.’ (p. 14)

In this passage and elsewhere in the book, Dzur recognises as important but ultimately auxiliary considerations two influential aspects of lay engagement in institutions of government. First of all, that engagement in institutions can make citizens better educated, in this case about criminal justice issues, and that this can have a positive effect in making their demands on those institutions more realistic and more sensitive to the complexities of the issues (the ‘civic schoolhouse’ model).¹² And secondly, that citizen engagement in institutions makes those institutions, and their role in the government of the people more legitimate through democratic authorisation or consent. These are normative features that Dzur can happily acknowledge, but he does not treat them as the core of his case.

How are we to understand the central point that Dzur makes in this passage, the claim he describes as his core normative argument? Although he denies that this is his main argument, it looks as though one reasonable way to interpret what Dzur is after is that citizen engagement in institutions results in better decisions being made than professionals working alone. This is despite the fact that lay involvement may be less efficient, and may lead to disregard for proper procedure (p. 55). Lay participation is necessary to overcome what immediately after the passage quoted he calls “morally significant nonperception,” the evasion of concern for others’ (p. 14).

This suggests that a central aspect of Dzur’s core claim is what we might call the Correction Thesis. This is the idea that lay participation is not inherently antagonistic to institutions and expert decision-making, but is rather required in order to complete decision-making in the performance of those institutions’ proper function. It is the Correction Thesis because the idea is that lay participation is necessary to correct for certain limitations and biases inherent even in the best decision-making that is carried out by people in possession of superior knowledge of an issue when they make those decisions by virtue of their occupying institutional roles.

¹² Cf. Johnstone, ‘Penal Policy Making.’

I think we can identify three main grounds for the Correction Thesis, all of which Dzur alludes to at some point in the book. One of these grounds has to do with the subject-matter of the decisions to be made, which involve substantive moral balances and trade-offs between one desirable value and another. It might be said that institutions have no special expertise in the question of how this trade-offs should be made (we can call this line of argument 'Ethical Pluralism'). A second has to do with the fact that institutional role-occupiers must operate according to procedures that delineate narrow grounds of relevance and responsibility, and will often fail to give officials discretion to take into account all relevant considerations. Officials follow rules laid down by authoritative characterisations of their official responsibilities, and often have little discretion to use their own judgement without violating their terms of office. The result of this is that decisions made according to institutional procedure will often not be as accurate with regard to as freely responsive, individualised assessment of cases (call this theme 'Limitations of Institutional Procedure').¹³ The third has to do with the psychological effects of institutionalisation on decision-makers, whereby they become hardened to the realities of the cases they deal with, treating them as routine, and fall prey to biases of protecting the institution as opposed to giving proper attention to the interests of those the institution serves (Dzur calls this phenomenon 'Moral Calcification': 'routinization, complexity, relationships between insiders that trump close consideration of the needs of outsiders, shared interests in saving time and resources among insiders...' (p. 102)).

The Correction Thesis thus builds on some claims about the limitations and problems of institutions, claims that deserve further discussion, but which I hope it is helpful to set out here. I think that in some respects this is Dzur's main defence of lay participation, and it is crucial for his claim that democracy could solve rather than exacerbating the problem of penal populism.

However, the Correction Thesis does not capture what, in the passage quoted earlier, Dzur describes as his main concern, namely *responsibility*. Thus at times there is evidence of a different line of thought, a line of thought that I will term the Common Ownership Thesis. This is evidenced in the exhortation that lay participation is needed because we need to face up to our responsibilities (for instance in the discussion of Zygmunt Bauman's work, e.g. p. 13). The Common Ownership thesis stresses our mutual responsibility, and the idea that the problems which the criminal justice system seeks to address, and the problems it creates and confronts as it pursues its goals, are *our* problems, issues that we have to take responsibility for, as a collective. The idea of common ownership of these problems stems from the idea that, as members of the democratic project, as people who have taken on the responsibilities of self-government, we are responsible for one another in certain respects: one aspect of which is that we have relinquished the possibility that someone else will take care of our

¹³ For a discussion of the tensions between institutional understandings of role-responsibilities and their moral bases, see K. Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* (Oxford: Oxford University Press, 2012), pp. 88-103.

responsibilities towards one another for us. We have to look after these responsibilities ourselves. Furthermore – and this is the crucial point that links the Common Ownership Thesis to the substantial view of the responsibilities of self-government that I mentioned in the Introduction – these are responsibilities that we cannot simply devolve to a technical association or bureaucracy to sort out for us. They are problems that we have to sort out for ourselves.

The Common Ownership Thesis as I have presented it raises some questions. For instance, as I have presented it, the Common Ownership Thesis is a conditional thesis: it says that *if* we have decided to go for self-government then we take on a responsibility for one another, since no one else is any longer being given the responsibility to do it. But this doesn't explain why we should take on the responsibilities of self-government in the first place. Why not just leave it to some benevolent bureaucracy? Another question concerns why it is necessary to become involved ourselves in helping to run the institutions of our society. In other words, as so far stated, the Common Ownership Thesis does not address the intuition that mutual responsibility might be the reason we have for adopting self-government in the first place, and in particular that it might be the reason for thinking that self-government has to involve actual load-bearing participation. That is a suggestive thought – perhaps the idea might be that the importance of our responsibility for one another is so great that we have to get involved in the running of the institutions by which people in our society are or are not cared for in order to ensure that the task is carried out well enough – that it is never good enough to leave it to others. Although suggestive, though, this thought is as yet unclear. Firstly, it is not entirely clear how to argue for our mutual responsibility in this sense. Secondly, a problem arises because it is not enough to appeal to our responsibility for one another qua fellow human beings: the institutions of a state are fundamentally geared towards serving those living within a certain jurisdiction; those outside it need not be ignored, but the interests of those within will almost certainly be privileged. So the question arises why we are responsible in particular for *that* group of people. Thirdly, it would have to be explained how this strong notion that we ought to take responsibility for one another in such a way as to rule out our devolving responsibility for one another's fate could be made compatible with a division of labour.

4. A closer look at the Correction Thesis

There are problems with the Common Ownership Thesis. But I set them out here mainly because I think more work needs to be done to explain how they are to be overcome: I do think that there is something plausible about this thesis. However, I think that, once the Common Ownership Thesis is fully made out, the dialectical situation is probably going to turn out to be something like the following. In running an argument for participatory democracy, the Common Ownership Thesis, properly explained and defended, is the core argument. But the Common Ownership Thesis is likely to meet the criticism that democratic decision-making will lead to bad decisions. At this point, the Correction Thesis steps in to head off that criticism. This means that the Correction Thesis is not doing the main work in justifying the claims of participatory democracy.

One benefit of seeing the structure of the argument in these terms is that it means that the Correction Thesis is not left bearing more weight than it is capable of bearing. What I mean by this is that, while the Correction Thesis seems to me to have some plausibility, I am not clear how far it can be generalised. We might have to accept that it can be true in some cases, but not others – and I will explore this thought below. On the understanding of the argument that I propose, however, it might be enough that the Correction Thesis holds in at least some cases, because the main justification is given by whatever considerations lie behind a fully defended form of the Common Ownership Thesis. The idea would be that lay participation may fail to correct for biased institutional decision-making in at least some, and perhaps a considerable number of cases, but that this will fail to show that lay participation is unnecessary because sub-optimal decision-making in some cases may be a price worth paying for the good of taking direct responsibility for one another: it may be plausible, in other words, that the attitudes of care shown by direct lay participation in institutional decision-making compensate for the fact that the decisions are not always the best that they could be.

Having set the stall out in this way, let us now turn to an example of the sort that puts pressure on the Correction Thesis. Consider for instance a panel assembled to divide out government money for community groups. Various community groups apply to the panel for funding, and the panel decides which projects should be successful. The panel is made up of lay members – something like the jury as Dzur conceives of it, though not operating in the criminal justice arena.

I think this example is reasonably realistic, and the kind of thing that currently happens under the banner of localism – perhaps because this might be precisely the kind of area where politicians or policy-makers can agree that the public can safely be involved. Even in this case, however, there are serious impacts to be made on the communities in question. However, the use of lay members in a panel like this can draw the criticism – not just from cynical observers, but from those who care that money goes to those groups who most need and deserve it – that it is either tokenistic or downright counter-productive. I want to try to draw out some of the reasons for that kind of criticism by turning to the points we briefly made above in defence of the Correction Thesis.

One reason for allowing public load-bearing participation in a panel like this might be Ethical Pluralism: maybe there are various relevant criteria of assessment when it comes to deciding which group should get funding, and it is an open, contestable question how those are to be ranked. Even allowing for pluralism, however, there really are important and relevant criteria of assessment that any adequate decision would have to pay attention to. It can be common for lay participants in these kinds of decisions to feel at sea in trying to judge which organisation should get the money. They can be quite simply ignorant of the relevant criteria of assessment. This problem could be alleviated by introducing Dzur's idea that experts are there for collaboration. Thus perhaps we could improve our panel's decision-making by stipulating that the panel should be given a briefing by officials before they start their deliberations. Fine – but how far can briefing go? One problem is that decision-makers have to know,

not just what the relevant criteria of assessment are, but how to apply them. For instance, in this case, it might be relevant whether the organisation or project to be funded is financially viable – whether it is likely to be a flash in the pan, or whether it is likely to secure ongoing funding; whether it serves some important social need and is well-conceived in terms of meeting that need. Decision-makers need to know what these criteria involve in actual cases, so as to be able to assess whether some candidate organisation meets the criteria better than another. It requires expertise to understand this. So does the briefing of lay participants extend to something as substantive as this?

This leads to a tension. Without substantial briefing, lay decision-making will be arbitrary. What Dzur calls the ‘rational disorganisation’ effected by lay participation will be, not just a humanising strike against hyper-efficiency, but a failure to make decisions of a quality that those subject to those decisions have a right to expect. It will be, not just Dzur’s ‘slow justice’ but inaccurate justice. But where we try to solve this problem by introducing substantial briefing by officials, there is the worry that the lay decision-making is mere window-dressing, effectively determined in advance by the way in which the officials present the information.

I have focused on the grounding of the Correction Thesis in Ethical Pluralism. Can the Correction Thesis be rescued by appealing instead to the grounds that I have called Limitations of Institutional Procedure or Moral Calcification? With respect to both of these arguments, it might seem that the best we can say is – it depends. Sometimes institutions are dysfunctional, procedure-bound, and blinker their officials rather than training them in relevant virtues. But perhaps not always.¹⁴ Sometimes even good people become corrupted by institutions and come to care more for their own advancement, or the survival of the institution – the closing of ranks in the face of justified criticism – than the interests of those the institution is meant to serve; but perhaps not always. The Correction Thesis as Dzur presents it seems to be a general claim about institutions, and the introduction of lay participation not just a solution to specific problems of failing, corrupt or dysfunctional institutions but a general prescription for how the institutions could work better.

My suggestion is that the Correction Thesis can only do so much work. But I have also suggested that perhaps it has to be recognised that something like the Common Ownership Thesis is the core normative claim, and that the Common Ownership Thesis, though it needs more defence, is a plausible one. So it might be worth very briefly thinking through whether it is plausible that lay participation in the kind of decision-making panel we have just been thinking about could be justified in the terms given by the Common Ownership Thesis. The key claim here would translate into the idea that the problem of deciding how to distribute the limited funding that is available for the community groups in question is a collective problem, and that it is not enough to simply leave it to a professional body to make the decision for us. Now there is at least part of this

¹⁴ Cf. the remarks about the relation between institutions and virtues in A. MacIntyre, *After Virtue*, 2nd ed. (London: Duckworth, 1985), p. 194.

thought that I find compelling. There is some bite to the idea that simply having the professionals make the decision – however well-qualified those professionals are – is a way of passing the buck and not facing up to the fact that it is up to us (collectively) to make the decisions. It might thus be, in Dzur's terms, an evasion of concern for others. In which case, it might indeed be more responsible of us to delegate the task to a randomly selected group of 'us' – the demos – rather than allowing the decision to be made for us by officials. The fact that sometimes sub-optimal decisions will be made in this way might well be compensated for by the fact that, in making these decisions, we are facing up to the normative situation, and treating our responsibilities to those subject to the decisions with due concern. Nevertheless, the plausibility of this view rests on the idea that the collective 'we' has a responsibility to see to these matters ourselves, a responsibility that would be evaded if we let the decision be made for us. It seems to me that, to advance the kind of position that Dzur wants to argue for requires addressing the basis of that responsibility.

5. Conclusion

In this paper I have looked at some arguments for introducing a greater degree of lay participation into decision-making in the criminal justice system and other central institutions. I have been particularly concerned with Albert Dzur's version of this position, and the question whether we can find in his work an account of why load-bearing public participation in criminal justice institutions is a better model than e.g. the insulated expert Policy Committee model suggested by Lacey. I have argued that we can distinguish two types of argument for the conclusion that we should introduce greater lay participation: the Correction Thesis; and the Common Ownership Thesis. I claimed that the Correction Thesis is inadequate to provide a general justification for greater lay participation. Such a general justification might more plausibly be given by the Common Ownership thesis. But the latter needs some work done on it before we can fully understand its scope and plausibility.