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## **Why Greater Public Participation in Criminal Justice?**

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### **ABSTRACT**

This paper addresses the debate over public participation in criminal justice. On one side of this debate are those who argue that criminal justice policy should be removed from direct political – and hence public – control, and delegated to an insulated panel of experts. On the other are those who argue that the public has to have a decisive role in criminal justice policy, even if we should agree that electoral politics is not a meaningful or constructive form of public participation. One important point at issue between the two sides is whether insulating key policy decisions in criminal justice would be undemocratic, and whether it matters if it is. Answering this question will require us to say something about the nature and value of democracy, and about the kinds of decision-making institutions that democracy requires. To this end, this paper to provide a number of reasons we might have for approving of public participation. Once these reasons are articulated, we can use them to inform the question of how we might reform and rebuild criminal justice institutions to give the public a more productive role.

KEYWORDS: CRIMINAL JUSTICE; PUNISHMENT; DEMOCRACY;  
CITIZENSHIP; PENAL POPULISM; PARTICIPATION; ALBERT DZUR;  
NICOLA LACEY

## **1. Introduction**

In this paper I aim to clarify and further the debate over public participation in criminal justice. On one side of this debate are those who argue that the impact of public opinion has distorted criminal justice policy, giving politicians an incentive to introduce harsh policies of dubious effectiveness, and that the solution lies in removing criminal justice policy from direct political – and hence public – control. On the other are those who argue that the public has to have a decisive role in criminal justice policy, and that the problems arising from ‘penal populism’ show, not that public participation is bad as such, but simply that the way that electoral politics engages the public in decision-making can be highly problematic. On this latter view, we should agree that electoral politics is not a meaningful or constructive form of public participation, but we have grounds to be skeptical whether ‘expert’ decision-making, uncoupled from public scrutiny and input, will always lead to optimal outcomes; furthermore, it is an evasion of citizens’ responsibilities towards the ‘dirty business’ of criminal justice if we leave experts to make decisions from which we can then avert our gaze. The lesson, according to this latter view, is that we need to think harder about the way the public are empowered to engage in decision-making.

One important point at issue between the two sides is whether insulating key policy decisions in criminal justice would be undemocratic, and whether it matters if it is.

Answering this question will require us to say something about the nature and value of democracy, as well as saying something about the kinds of decision-making institutions that democracy requires. To this end, I aim in this paper to provide a number of reasons we might have for approving of public participation. Once these reasons are articulated, we can use them to inform the question of how we might reform and rebuild criminal justice institutions to give the public a more productive role. My aim in this paper is mainly to give a clear articulation of the ground on which this debate should proceed, and to show how we can begin to assess the strength of these arguments. While a (critical) friend of the pro-public-participation side,<sup>1</sup> I do not regard the argument as being settled, and I aim to show some of the challenges that lie ahead in making the case for this side of the argument.

The paper proceeds as follows. In section 2 I outline the view that we need a mechanism whereby criminal justice policy can be insulated from certain forms of public input. I look at the concern that this move might be undemocratic, as well as some responses to this concern. In section 3, I move to the other side of the debate, looking at the work of Albert Dzur. Dzur argues that the real solution to penal populism is greater public input. In section 4 I try to clarify the grounds of the debate between Dzur and his opponents, and I put forward eight theses that might be advanced by Dzur in defence of his claims; doing so allows us also to see how Dzur's opponents might respond, and therefore how the debate might be pushed forward. After some evaluative discussion of these claims, section 5 concludes with some further reflections.

## **2. Is the weakening of public control over criminal justice policy undemocratic?**

Reviewing the twelve ‘indices of change’ within contemporary (Anglo-American) criminal justice systems that David Garland lists at the outset of *The Culture of Control*, the reader cannot help but see an overall picture emerge. According to this picture criminal justice policy has altered over the past thirty or forty years (for the worse?) as a result of the increased assertiveness, or at least the increased influence, of a criminologically-unsophisticated public.<sup>2</sup> ‘The decline of the rehabilitative ideal,’ ‘the re-emergence of punitive sanctions and expressive justice,’ the changing ‘emotional tone’ of criminal justice policy and ‘politicisation and the new populism:’ the suggestion, at first glance at least, is of untutored retributive public sentiments usurping the role previously occupied by penological experts, emotion replacing reason. Garland expresses this view of the rise of ‘penal populism’ as follows:

‘There is now a distinctly populist current in penal politics that denigrates expert and professional elites and claims the authority of “the people,” of common sense, of “getting back to basics.” The dominant voice of crime policy is no longer the expert or even the practitioner but that of the long-suffering, ill-served people – especially of “the victim” and the fearful, anxious members of the public. A few decades ago public opinion functioned as an occasional brake on policy initiatives: now it operates as a privileged source. The importance of research and criminological knowledge is downgraded and in its place is a new deference to the voice of “experience,” of “common sense,” of “what everyone knows.”’<sup>3</sup>

Garland is careful to leave it ambiguous whether the group that has usurped the criminal justice agenda is the public itself, or rather some elite group that claims to

speak on behalf of the people – perhaps for its own ends.<sup>4</sup> For instance, does the appropriation of the criminal justice system by ‘the public’ represent genuine popular control, or is the appeal to the ‘public’ simply a device employed by politicians – and those in whose interests they act – to win votes and further specific political ends? Are the public really subject to the ‘fear of crime’ and the retributive passions that appear, on Garland’s picture, to be driving the political agenda?<sup>5</sup> We will come back to these questions later.

However we should understand the deeper significance of what is going on, the phenomena that feed this analysis seem to be reasonably clear. Greater use of imprisonment and longer prison sentences; prison conditions that arguably violate human rights; the widespread denial to prisoners of basics of citizenship such as a right to vote; ‘three strikes and you’re out’ policies that have the effect of bringing more people into the criminal justice system as a result of minor criminality; victim impact statements at sentencing; Megan’s laws; civic and employment restrictions on those with a criminal record ... measures of questionable impact on real public safety are introduced in the apparent hope of satisfying a perceived public appetite, while experts, evidence and experience are neglected or even denigrated and ridiculed.<sup>6</sup> Furthermore, one key driver of this nexus between assertive public punitiveness and political power has been the electoral system.<sup>7</sup> Politicians have found that appealing to simple messages about crime control and individual responsibility – protecting ‘us’ against ‘them’ who would threaten us – has led to electoral success, and whatever the complexities that lie behind this fact, it has prevented the development of a serious and evidence-sensitive debate about crime in countries like the U.S. and the U.K.. Those at the sharp end of mass incarceration – often those who are already the most

vulnerable in our societies – have been the needless victims of this rise in the temperature of the public mood and its political expression.

In the face of this problem, what is to be done? A characteristic liberal response is to try to take criminal justice off the political agenda. For Nicola Lacey, for instance, a way out of the toxic mix of criminal justice and electoral politics

‘... will be possible only if the two main political parties can reach a framework agreement about the removal of criminal justice policy – or at least of key aspects of policy, such as the size of the prison system – from party political debate. This might be done by setting up an initial Royal Commission, or something of yet wider scope, in an effort to generate an expanded debate that takes in not only the widest possible range of social groups but also a broad range of the non-penal policies and institutions on which criminal justice practices bear ... A further important condition would be the re-constitution of some respect for expertise in the field. As such it would be important not only to have the Commission serviced by a substantial expert bureaucracy but also, following implementation of its conclusions, to consign the development of particular aspects of future criminal justice policy to institutions encompassing both wide representation and expertise. In other words, the removal of criminal justice policy from party political competition would open up the possibility of the kind of solution to fiscal policy implemented through the Monetary Policy Committee (MPC) ... By conferring the task of setting interest rates to an independent body of experts located in the Bank of England, making this body’s deliberations transparent,

and setting up robust mechanisms of accountability to parliament, Gordon Brown crafted a strategy which has commanded remarkable public and political support.’ (Lacey, pp. 191-2.)

So should we seek to create a criminal justice version of the U.K. Monetary Policy Committee, into whose hands responsibility for key policy decisions should be placed, rather than having them made by politicians who are more directly accountable to the electorate?<sup>8</sup> The problem that we will be looking at in this paper is that this might look undemocratic. After all, two large, but in principle attractive, principles might suggest that such a move would involve taking decisions away from the public that they have a right to make: first of all, that the rationale of institutions like the criminal justice system is to serve the public, and so the formulation and execution of criminal justice policy has to remain in the end the public’s business; and secondly, that the ultimate source of authority in the state is the people as a whole – so no institution can legitimately act in the public’s name without the public’s say-so. These two claims seem to speak in favour of ultimate control over public policy resting in the hands of the public.

Lacey is careful, however, not to argue that democracy is unimportant. Democracy is important, in her view, but it is simply not the only thing that is important. Also important are values such as inclusivity and respect for rights – values, to be sure, not unrelated to the values of democracy, but which can come into conflict with some of the claims that are made for democratic procedures of transparency, popular choice and accountability of public decisions. Furthermore, given that democracy encompasses a wide and variable set of values and claims, the answer to the question



of which model of democracy is appropriate for a given political community at a given time will depend, not simply on abstract ideal theorizing (although that will also have its place), but on the structural socio-economic conditions faced by a particular polity at a particular moment in history. In other words, the implementation of a set of procedures for popular control that may be perfectly appropriate in one set of political circumstances might lead to intolerable violations of other important values when implemented willy-nilly in a quite different set of circumstances. Democracy, in a nutshell, is a value, but a value representing a weighty responsibility that needs to be used wisely. Where a demos has proven itself unable to exercise it wisely – perhaps for structural reasons as much as any moral or volitional failure – it can be the best thing to do, all things considered, to take some of those responsibilities away. As Lacey has it:

‘While accountability and responsiveness are, in different guises, constants in democratic theory, they are in potential conflict with other values such as the aspiration to foster an inclusionary criminal justice policy. And this conflict may be accentuated by the particular institutional constraints under which different sorts of democratic governments operate.’ (Lacey 2008: 19)

There are, therefore, a number of broad lines of response to the charge that taking criminal justice policy out of direct political control in the way that Lacey suggests is undemocratic. 1) We might reject the importance of democracy outright – on the basis, say, that the demos is lacking in the key expertise necessary to make decisions about criminal justice, and that it is crazy to put the fools in charge of the ship when there is a qualified captain at hand. 2) More sympathetic to democracy, we might

nevertheless argue that it is not the only game in town. For instance, values of democracy might come into conflict with values of inclusion or basic rights and interests. 3) Even more sympathetic to democracy, we might nevertheless say that there are various conceptions of democracy, and that it is not clear that taking some decisions away from the people is undemocratic, at least where the decisions that are made are transparent and there is some manner of accountability. Another example, besides the Monetary Policy Committee, is of course the judiciary, in particular the institution of a constitutional court the authority of which is supreme over legislators. Many would say that democracy has to consist in more than just popular sovereignty, at least if this is construed as the idea that any policy affirmed by a quorate majority vote is legitimate. Democracy is at least in part grounded in a belief in the basic equality of each citizen, and this has led many to think that a political system in which the popular vote is constrained from passing laws that would violate that basic equality (e.g. laws that would deny some citizens a basic standard of treatment, as in an apartheid system), for instance by a constitution containing a bill of fundamental rights, is not undemocratic.

Furthermore, finally, 4) we might argue that there is no incompatibility, in principle, between democracy and the delegation of powers to representative or expert bodies to carry out particular functions – including functions of policy-setting.<sup>9</sup> The MPC would not be illegitimately usurping any functions that should belong to the demos, it might be said, as long as the demos has authorized it to carry out that job. Democratic authorization is a bit like a collective version of consent – a transfer of rights from one party to another, or an endowment of rights on one party by another. Your taking my property without my say-so would be an illegitimate denial of my authority over

it, and hence theft; but once authorized by me to take it, you are within your rights to do so. Similarly, it might be said, there is no conflict with the authority of democracy if an expert body is democratically authorized to make those decisions. There is no incompatibility between delegation and democracy. If there were nothing more to democracy than the importance of collective authorization then this would definitively answer the charge that insulating sentencing policy from popular control is undemocratic.

### **3. A dissenting voice: in favour of greater public participation**

In his book *Punishment, Participatory Democracy and the Jury*, and a series of articles, Albert Dzur has argued for a different view.<sup>10</sup> On Dzur's alternative, it is not public participation in criminal justice as such that is the problem. Rather the problem is a democratic deficit in criminal justice, and it is greater and more meaningful democracy that is required to get us out of it.

‘The criminal justice discourse on the penal state views populism in a negative and monochromatic light, overlooking the constructive tendencies of populist movements historically and neglecting the possibility that public involvement could lead to less rather than more punitive policy in contemporary politics.’<sup>11</sup>

Calling Lacey's suggestion ‘the technocratic response to penal populism’ (p. 29), Dzur claims that it faces a number of practical and normative problems. First of all, he worries that there is a ‘lack of will or political capital to launch such reforms;’ indeed, this practical problem is implicit in the diagnosis of the problems to which this response is meant to be a solution, namely, the decline in public deference to expert

bodies (p. 31). Secondly, even if such a committee could get off the ground, it would be unlikely to be effective in the long-term because it fails to engage the public and hence engender the support and understanding that are necessary for any public body to command allegiance (p. 30). Thirdly, and fundamentally, policies such as that suggested by Lacey ‘imply that the public is unable to self-regulate, unable to own up to a more measured approach to criminal justice, to punish but in a more thoughtful, consistent and humane fashion without strict elite guidance’ (p. 31). Dzur acknowledges that Lacey might respond in the way we have considered above: that there is no incompatibility between democracy and insulating protection of fundamental rights, or between democracy and delegation. But he makes three points: i) that it is not clear that an insulated sentencing committee would be making only technical decisions, and that the political part of their decision-making should in a democracy be the business of the public; ii) that crimes are thought of, in Blackstone’s terms, as ‘public wrongs,’ and hence as acts the nature of which the public is intimately concerned; and iii) it is to treat the public, from whom we can and should expect more, as legitimately ‘careless regarding the lives of others’.<sup>12</sup>

By contrast, Dzur argues that the problems of penal populism have come about, not because of too much democracy or public input, but rather because of insufficient or inappropriate forms of public input. The solution to this problem is not to sacrifice the demands of democracy to the more urgent demands of inclusivity and human rights, but rather to increase or improve the way the public are involved in the formulation and implementation of criminal justice policy. Dzur points out that concerns about penal populism emerge at the same time as social theorists started worrying about the decline of social capital and the ‘hollowing out’ of the public sphere: thus there seems

like a contradictory movement of both too much public control at the same time as not enough public engagement.

‘How to make sense of this paradox of too much popular participation albeit concentrated on a specific set of issues, and too little at the same time? The best way is to see penal populism as a case of democratic deficit not surplus, a popular movement without the kind of social capital that would lead to constructive engagement in criminal justice policymaking. How the public was mobilized and what it was mobilized to accomplish are critical ... [Penal populism] is best understood, then, not as a failure to protect the system from public participation but as a failure to incorporate it in a constructive, dialogical way.’<sup>13</sup>

An important illustration of Dzur’s point here is a distinction that he draws on the basis of work by Harry Boyte between two ways of engaging the public: a mobilization strategy; and an organizing strategy. Quoting from Boyte in this passage, he explains the difference as follows:

‘Mobilization strategies, in the form of signature drives, door-to-door canvassing operations, or protest marches, are potent but toxic. As Boyte points out, “they expect very little of the citizen; they depend upon caricatures of the enemy; and they are forms of citizen participation in which professionals craft both the message and the patterns of involvement.” Organizing strategies, by contrast, stress “patient, sustained work in communities,” “face to face horizontal interactions among people,” and

“respect for the intelligence and talents of ordinary, uncredentialed citizens”

(p. 35).

Unlike mere mobilization, genuine citizen organization gives lay people the opportunity – and indeed requires of them – to engage in making key decisions themselves, bringing their particular skills to bear and hence contributing to a wide-ranging collective pool of experience and knowledge, engaging in debate and thinking things through together, and thereby making both the resultant policy itself and the public support it can command more robust.

On the basis of this distinction between the potentially toxic ‘mobilisation’ strategy and the more participatory, deliberative and robust ‘organisation’ strategy, Dzur’s claims about penal populism can therefore be reconstructed as follows. The ramping-up of criminal justice policy is the result of a particular form of public engagement characterized by a situation in which policy is formulated by political representatives competing for votes. This situation allows for, and even encourages, a lack of care and responsibility on the part of the public who are voting for one policy or another. Rather than having the weight of the fate of particular individuals on one’s hands, one is rather expected to respond to caricatures and broad claims that it becomes impossible to verify. Politicians are adept at finding a ‘message’ that will portray the issues in a particular way, and which will maximize the number of votes they can get. In such a way the public need not be seen as acting stupidly: they may be reacting appropriately given the way the issues are portrayed to them. But that is not the same end as increasing public understanding of complex and many-sided situations and encouraging careful examination of the issues. If the public in these circumstances

ends up voting for policies that reflect simple retributivist stereotypes, this is not because the public are incapable, if put into a situation that requires it, of dealing with many-sided complex problems.

The question is, then, what forms of public ‘organization’ (as opposed to ‘mobilisation’) could work in the realm of criminal justice. While some theorists of participatory democracy are resolutely anti-institutional and anti-government, Dzur is less pessimistic, seeing institutions including government as products of collective endeavor rather than its enemies (p. 34; pp. 52-6). While institutions can become dysfunctional in the absence of public involvement, this does not show them to be fundamentally corrupt and corrupting; participatory democracy properly understood, on Dzur’s view, takes place through public participation in pre-existing institutions. It is therefore not necessary for democracies to constantly reinvent the wheel by dealing with each social problem afresh each generation, since institutions can, at their best, be repositories of collective wisdom that serve the public by laying down procedures, and by training experts, that provide efficient ways to solve or ameliorate such problems – though of course democratic input can be instrumental in stimulating institutions to reinvent themselves to meet the demands of new social conditions. For Dzur, the ideal comes about where institutions are ‘rationally disorganised’ by the introduction of lay members. Rational disorganization is an apt phrase for two reasons: first because lay participation makes institutions operate less efficiently, and thus demands that the make-up of institutions builds in the recognition of procedural values other than efficiency; and secondly, because lay participants are more likely to bend standards of procedural correctness and generalization in favour of substantive justice and attention to the particulars of the individual case. However, to repeat,

Dzur's ideal is, not that lay participation should overwhelm or trump bureaucratic rationality and its formalization of expert knowledge, but rather that lay and professional input should complement one another in a complex harmony or balance; institutions on his view 'are diminished when either professionals or laypeople become dominant.' (p. 58)

Of course, in common law systems there already exists an institution of rational disorganisation in the field of criminal justice, namely the jury, and it is this that Dzur recommends as a model for the kind of lay participation he has in mind to overcome the crisis in criminal justice. 'Institutions like courts need rational disorganisation as an antidote to rigidified, professionalized and remote practice.' (p. 57). As we will see below, there is an argument that both institutions and citizens – and, indeed, the relationship between them – benefit from lay participation. However, what Dzur thinks of as the core importance of the jury lies elsewhere, in an elusive but suggestive thought not often articulated in mainstream Anglo-American political theory (again, we will have more to say about this below). This goes back to his view that 'to be a good citizen is to work together and bear responsibility for the public sphere and for the institutions that shape social life' (p. 34). He quotes from Chesterton's reflections on the trial and draws from this a crucial idea:

'Chesterton's main point, that the jury "allows fresh blood and fresh thoughts from the streets" to infuse courtrooms that otherwise become the mundane "workshops" of court professionals all too accustomed to the job, is well known. Equally important, I think, is its underappreciated flip side, namely, that the jury allows, indeed presses, ordinary citizens to take ownership of the



“terrible business” of criminal justice ... In a democracy, citizens are not ever left off the hook of moral and political responsibility for punishment.’ (p. 40)

#### **4. Some reflections on the debate: what counts in favour of public participation?**

What we have done so far is to set up a debate about the proper response to those indices of change noted by Garland. Either side of the debate has to hand a diagnosis of the problem that these changes represent and a prescription for how to address it. According to one side, the problem lies with the extent of involvement of public opinion, opinion which, given social structural realities, is not particularly tractable at present; this diagnosis leads to the prescription that we should insulate criminal justice policy from public involvement. On the other side, by contrast, the problem lies rather in the disconnect between policy makers and the public, where representatives create policies that can gain public assent on the basis of superficial engagement, and the prescription is, rather than creating a formally insulated but actually inherently fragile panel of experts (fragile because it cannot gain popular support), to increase meaningful public participation.

This debate raises a number of questions that are beyond the remit of the paper. For instance, if it were unrealistic to think that there would be either the political or popular will – or structural space – to undertake the kind of participation that Dzur recommends, his view would be more of a long-term aspiration than a live option. How realistic a proposal it is is not something I will attempt to address here.<sup>14</sup>

However, some aspects of the debate rest on key disagreements in political theory regarding the nature and value of democracy. That is: what does a system have to be

like to deserve the epithet ‘democratic’; what is important about democracy; and what institutional forms are required to put what is important about democracy into action? Of course, insofar as Lacey and Dzur are offering us prescriptions as to how to get out of the crisis, they must be drawing on some view of practical priorities and values; but even their diagnoses of the nature of the problem that we face are underpinned by different conceptions of the apt division of responsibility between citizen and state, conceptions underpinned by some view of the value of different forms of arrangement.

While I will not attempt to settle this debate in this paper, I want to do some work clarifying the ground on which the argument will take place. So in this section I will set out a number of conceptions of the nature and value of democracy, and comment briefly on the strengths and weaknesses of these in relation to the debate we have been discussing. One of these will be the view of participation that Dzur finds in Chesterton, and which I think has been under-represented in recent discussions of democracy.

First of all, let us set the scene by drawing a distinction between what David Held has called ‘protective’ and ‘developmental’ conceptions of democracy.<sup>15</sup> While both of these conceptions accept basic democratic values of 1) equal liberty to live according to one’s own lights, 2) equality of control over the exercise of political power, 3) state power being exercised only for the common good, and 4) authority resting ultimately with the people collectively as a whole – values that can be thought of as implicit in the description of democracy as ‘rule of the people, by the people, for the people’ – the two conceptions give these features importantly different interpretations.

According to the 'protective' conception, democratic procedures are instrumentally justified as the best available means by which the individual rights can be protected from abuse by government and by other fellow citizens. Democracy may not be intrinsically just, on this conception;<sup>16</sup> rather the justification is that a system that accommodates a degree of popular sovereignty, applied by representatives and constrained by a constitution, is a powerful way to create a social scene marked by the stable protection of rights and freedoms. According to the developmental conception, however, democracy can have something of intrinsic value to it: democracy is necessary, not only, as a contingent matter, for the protection of individual rights, but also, non-contingently and constitutively, for something like 'the education of an entire people to the point where their intellectual, emotional and moral capacities have reached their full potential and they are joined, freely and actively in a genuine community.'<sup>17</sup> The developmental conception need not reject constitutionalism, or representative democracy, or the rule of law, or those other elements that serve to constrain the untrammelled exercise of popular will – or at least, it need not reject them entirely; nevertheless, on the developmental conception, some form of active engagement in the political life of one's community is an aspect of the good human life, and life is to some extent impoverished where this is absent.

It may in the end prove too simple to say that Lacey takes the protectionist view in which the key role of the state lies in the establishment and maintenance of a regime of stable protection of the rights of all those individuals who make up the polity; while the conception defended by Dzur sees citizen involvement in the state as a necessary part of a genuinely human life; but that will be a reasonable starting point for our discussion. Furthermore, should Dzur be able to back this developmental

claim up, it will give his position some room for manoeuvre in the following sense. Even if it were the case that democratic institutions with a high degree of public participation were not the best available means to creating a stable regime where the interests of all can be protected – if, for instance, as Lacey suggests, a better route might be to create an insulated expert committee immune to direct public participation and control – there may be some further values that make these otherwise deficient outcomes in some way worth it. In other words, the fact that certain developmental values are served might make it the case that outcomes that are deficient in certain respects or up to a certain degree can and should be tolerated. Of course, this may not be the case, and it may be that public participation will make the system function more accurately than otherwise. We will consider some arguments for this conclusion below. But even if it were to turn out that this is not the case, it would not necessarily follow that Dzur's argument was defeated. Politics is always a function of balancing and of gain and loss – the idea of a perfect state in which all values can be reconciled without moral loss is a figment of Isaiah Berlin's imagination (though of course, he took this as a target to argue against rather than to endorse). The main point, though is that we should wait to see what case can be made for those developmental values before we conclude that the only thing that matters is 'what works' in protecting basic rights and interests.

With this by way of preamble, let us turn now to a review of reasons that favour public participation. I will set out eight claims that might be put forward, separately or, more likely, jointly, and which are relevant to Dzur's case in favour of greater public participation. Having presented each, I will consider some complexities and possible responses. This will in no way amount to a comprehensive discussion, let

alone the establishing of Dzur's case. This review will rather, I hope, serve the purposes of clarifying the nature of the debate and setting out the ground on which the arguments will have to take place. Nevertheless, it will also help to show, I hope, the argumentative resources that Dzur has on his side.

It might also be useful to say something about the organization of the following theses. A-C can be considered as grounds for thinking that at least some of the things that count in favour of Lacey's model will also count in favour of Dzur's: so the lesson from these theses is that Lacey's model has not been proven to be the better one. Theses D and E then point to problems that might arise from Lacey's model, and hence advantages of Dzur's. Then with F, G and H, we get to the heart of Dzur's case – these are the key questions that will need to be worked through in order to decide how compelling his conclusions are. For instance, if F ('The Correction Thesis') is true, or at least partially true, then all the other theses would become immediately more appealing as a package; if it is not true, we face difficult choices.

A. The Defusion Thesis. 'The most urgent need is to take criminal justice off the agenda of electoral politics. But this could be done equally well by having key decisions made by a jury, or a commission on which there would be significant lay membership, as it would by the institution of a commission of experts.'

The question critics would ask is what is meant by 'could be done equally well.' On the one hand, it means merely that the use of the jury is another option for insulating key decisions from electoral politics. That is true. But is it an equally good, or even a better option than a sentencing commission? That, of course, depends on what further

values are served, either by having the jury make the decisions, or having a commission do so. So this thesis cannot be persuasive until we have said some more on that front.

B. The Legitimacy Thesis. ‘The source of ultimate authority is the people, so they should have the final say over the exercise of collective coercive power. Therefore criminal justice policy cannot be legitimate without there having been a prior act of collective authorization by the body with ultimate authority: i.e. the people.

Authorisation via plebiscite is impractical for anything beyond the very basic principles of sentencing policy. Given that more detailed authorization is needed, and that seeking such authorization through electoral politics have proven so damaging in other ways, an alternative source of authorization would be assent from a majority vote amongst a jury of citizens who can, by virtue of random selection, stand for the people.’

The burden of this thesis is to suggest that the decision of a randomly-selected jury can be a source of democratic legitimacy. If successful it would answer those who assume that democratic legitimacy can only come through the decisions of elected officials (or those appointed or endorsed by such officials). However, to answer this question decisively would require a theory of what legitimacy consists in and how it can be gained. Furthermore, it is not clear that this thesis has an answer to one of the initial responses we considered to the charge that insulating criminal justice policy is anti-democratic: the response that says that something like a sentencing commission would be perfectly legitimate and democratic if appointed by a democratically-elected

legislature. To undermine that claim we would need a further argument to show, e.g. that elections do not really confer legitimacy on decisions made by the elected.<sup>18</sup>

C. The Fairness Thesis. ‘Where there is continuing and fundamental disagreement regarding political decisions amongst people who are not obviously incompetent or merely careless, the fairest response to such disagreement is to allow the decision to be made in such a way that each person has exactly the same say as any other – that is, through one person one vote.’

This kind of thesis has been advanced in a different legal context by Jeremy Waldron.<sup>19</sup> It claims that, regardless of the expected quality of the decision, there are grounds for submitting controversial political decisions to a democratic process, for in that way a fair result emerges. This thesis can be used to explain why it can be appropriate to submit issues to democratic decisions even if it were the case that democratic decisions were more likely to get it wrong than other available methods: for democratic decisions have the virtue of fairness, or of treating each person as mattering equally with everyone else when it comes to the issue in question. This is not quite the developmental theory of democracy considered by Held – since there is not the claim that democracy is inherently good by virtue of developing valuable characteristically human capacities – but there is the claim that there is something inherently valuable in a decision procedure that treats each participant equally; and as a result this thesis explains why there might be something important about allowing decision-making by public participation even where it is not an optimal pursuit of the state’s protective functions.

One criticism of the Fairness Thesis might be to ask whether it does not lead to the unpalatable conclusion that even complex empirical matters, if they bear on questions of the exercise of political power, can only fairly be resolved by means of one person one vote. Let me explain this briefly. First of all, the Fairness Thesis has a restricted scope: normally we don't think that all decisions should be made by equal voting – expert decision-making has some role (a doctor should decide which medicine you are to take, for instance). So the question is what its scope is. The most obvious way to distinguish which decisions are subject to the Fairness Thesis and which (like the doctor's) are not is to point to the exercise of collective political power (i.e. the power of the state, seen as an agent of the people). The procedural fairness of a decision becomes important in circumstances where it is the exercise of power that should in principle belong to all of us that is at issue. The issue is then, not just whether that power is exercised wisely, but whether it is exercised fairly. However, the problem arises if there are questions about the exercise of state power that can only be answered with reference to complex evidence that only experts can properly assess. Take for instance the question whether longer prison sentences reduces crime. This bears on the exercise of political power. Is there something to be said for the fairness of opening this question up to public decision? Surely this is a conclusion that should be left to those competent to assess it. If the Fairness Thesis implies otherwise, this suggests that the Fairness Thesis is false.

Nevertheless, the conclusion that we should draw from this criticism is not that the Fairness Thesis fails, but that an argument needs to be provided to tell us which types of decisions considerations of fairness apply to and why. The Fairness Thesis does



seem to succeed in establishing that fairness as well as accuracy counts in the assessment of at least some decisions, in some contexts.

The overall thrust of A-C, then, is that there are some democratic values that could be compatible with Lacey's proposal of democratic delegation, but that could be served just as well, or even better, by public participatory mechanisms. But can we go further in support of Dzur?

D. The Efficacy Thesis. 'Public support is necessary for the effective functioning of the criminal justice system, and is best brought about by having the public participate within that system.'

This thesis makes two controversial claims that would need further support. First of all, that public support is necessary, and secondly that it is best brought about through public participation. In support of the first, one might point to the fact that officials themselves need to some extent to believe in the values of the system; and public input and cooperation is needed at many stages. In support of the second, one might point to the distance that can open up when the system becomes (or is perceived to have become) autonomous. However, it is also true that modern citizens have become quite used to centralized agencies as well as large private companies taking care of much of the business of everyday life. Of course, there is a large debate about whether such a state of affairs allows 'insulated' institutions to have great power without accountability. But at least sometimes, it might be said, autonomy from public opinion is clearly no bad thing, since it enables public institutions to practice moral leadership – which they have done in the U.K. for instance by prohibiting capital

punishment in the face of public opinion. So the argument over the Efficacy Thesis is not settled – though it may be strengthened by combination with some of the further theses below.

E. The Civic Schoolhouse Thesis.<sup>20</sup> ‘Having greater public participation in decision-making in institutions like criminal justice helps to increase civic virtue in two important ways. First of all, it confronts citizens with the genuine difficulties and complexities of decision-making, and hence leads to a greater understanding of the challenges faced by representatives and officials, and helps to reduce disillusionment and disconnection between the two. And secondly, it makes citizens more adept at the kinds of skills of civic political thinking that officials need to employ, skills that are essential for the day-to-day business of (self-) government.’

With this thesis we broach one of the sources of the view that political participation is part of the human good – and hence the source of the developmental conception of democracy canvassed earlier. Political participation enriches human life, in part due to the acquisition of new and important skills, and in part by increasing one’s awareness of the complexity around one. One of the main charges that could be made against this point is naïve optimism about the transformational potential of political engagement. Are citizens really likely to be shaken out of apathy and mutual suspicion by being given serious responsibility? Or is that simply to hand over the fate of those being decided about to people who simply won’t take it seriously? Evaluation of juries is of course controversial.<sup>21</sup> Two things that might count in favour of the Civic Schoolhouse Thesis, but about which we would need more evidence, are a) whether the imposition of responsibility can, in favourable

circumstances, have the effect of encouraging people to deliberate seriously, and b) whether the fact that jury responsibility is one-off (or at any rate occasional or episodic) prevents it from becoming routine, and hence leaves jurors sensitized to the responsibility they bear. Some evidence about this might come from the literature on restorative justice.<sup>22</sup> However, the last word at present might perhaps be given to Lord McCluskey:

‘Now before this discussion began, if the Lord Chancellor will permit me, he said that many people – members of the public – they want to hang and they want to castrate and cut off the hands of thieves and things like that. My experience is that that may be what the people in the street think about crimes they read about in the papers but once they come into court and sit for several days, or even several weeks, they see the accused person, listen to the evidence, they discover the multi-faceted aspects of the case. Then they emerge as rational, judgemental human beings, and not the people who are screaming for the scaffold.’<sup>23</sup>

F. The Correction Thesis. ‘Contrary to the claim that the public lack expertise, there is a clear role for non-technical evaluative decisions at every stage of the criminal process, and there is no reason to think that the public would be less accurate in making such decisions than public officials. Indeed, a group like a jury may be more likely to be able to come up with accurate decisions for a number of reasons having to do with the biases that can affect those who operate within institutions. These may include: i) the fact that expert discretion and judgement are often exercised individually, whereas the jury would benefit from explicit collective deliberation

involving a range of perspectives, and where one person's view can be challenged by others and improved, allowing a decision to be reached in which that range of perspectives are taken into account; ii) the fact that experts may become desensitized to the human reality that they are dealing with, as individuals become 'cases' or 'clients,' assimilated to a short-cut or stereotype that allows for efficient but distorting treatment, whereas a jury of one's peers may be more likely to deal with the case through fresh, untainted eyes; iii) the fact that experts are constrained by institutional procedures that have to meet demands of generality, simplicity, clarity, and may therefore have to artificially leave important elements of the situation out of consideration – e.g. to align the present decision with authoritative decisions in prior cases - whereas a jury could have the freedom and will to ignore such procedural constraints and attend to the essence of the matter in hand.'

This argument says that public input into decision-making can correct for biases that in official-made decisions arising from individual discretion, routine desensitization and procedural distortions. How could this thesis be established? The argument requires a) some criterion of correctness for decision-making; and b) comparative evidence regarding the performance of experts in institutions and the performance of lay people, controlled to ensure that only the relevant variables are being tested. It is probably unlikely that we have such evidence, or could get it.<sup>24</sup> However, the thesis relies on claims about the kinds of distorting forces that are at work on those who fill institutional roles. And it must also rest on a certain assessment – again hard to imagine how we would verify – of the moral competence of the average member of the public. Set against the Correction Thesis, one would have to consider a more positive view of institutions as in principle progressively learning repositories for

good practice regarding social needs and challenges. This might in turn require a wider consideration of professions and their role in a democracy.<sup>25</sup> Dzur does not reject this more positive view entirely – his view is that public input needs to take place under the aegis of institutions, and that juries should not be free to disregard institutional constraints altogether. Even if the thrust of the Correction Thesis is accepted, on the question of exactly where to find the just balance between institution and lay input, the devil will be very much in the detail.

G. *The 'Rule of Men Not Law' Thesis.*<sup>26</sup> 'This thesis reverses the traditional dictum trumpeting the rule of law.'<sup>27</sup> The idea of the rule of law is that the role of individual discretion should be reduced and replaced by the determination of outcomes by general rules that apply to everyone. The 'Rule of Men' thesis holds that if the removal of discretion goes too far then the only rights that can be claimed are those that meet purely institutional criteria of desirability (for instance, that they can be stated in a clear and generalizable rule that is not subject to counter-examples). This can distort the honest and open-minded appreciation of the relevant features of the individual case. The 'Rule of Men' Thesis therefore has an epistemic aspect to it, according to which being free from procedure can make it more likely that an accurate decision will be arrived at. But there is also a normative component, concerning the quality of interaction between the representative of the institution and those with whom they deal. A person who is treated a certain way because the rules so determine may feel that their situation has merely been treated as an instance of a rule, and that their individuality has been undermined. There is some value in a type of authentic human interaction in which the members of a jury are asked to respond directly to the humanity of the other – and asked, not merely to follow the rules, but

also whether the rules do justice to the nature of the case. They are therefore asked to take responsibility for an appreciation of the person's situation in such a way as to put them in a more direct – and more valuable – relation to that person than would be possible for an official whose conduct is mediated by rules and routine.'

The 'Rule of Men' thesis is connected with a theme of pro-democracy theorising that has not been common in recent Anglo-American political theory but which flourished at the time of the New Left: the theme that institutions had become impersonal and bureaucratic, that some of our key relations and decisions are carried out automatically, efficiently, but with a sacrifice of those human characteristics that make them valuable – characteristics to do, not so much with getting the right outcomes as with having the right sorts of interactions.<sup>28</sup> The epistemic aspect of this thesis is connected to E(iii) above and claims that what is wrong with automatic, rule-mediated interactions is that they get the wrong answer. But another part of the thesis claims that, even were it to be the case that merely following the rules would be more likely to get you to the right answer, there would still be independent value in the decision being made by authentic human scrutiny. This is one aspect of the developmental democracy thesis – that there are some specifically political decisions the making of which through genuine scrutiny and care and the exercise of epistemic and moral virtues is inherently valuable.

The 'Rule of Men' thesis argues – to some extent at least – against the rule of law. One advantage of the rule of law is of course that it means that people have rights that can be claimed in a court of law and are not subject to the gift or arbitrary say-so of a party who has power over the individual. The rule of law, it might be said, means that

there is justice and not mere charity. However, the ‘Rule of Men’ Thesis argues that this argument for the rule of law presents a false dichotomy between either domination (in Pettit’s republican terms) or else formalism.<sup>29</sup> Rather what individuals coming before some public tribunal or decision-making body have a right to is an unfettered and honest consideration of their case, guided by all and only those considerations relevant to its just resolution: consideration, in other words, structured by the employment of epistemic and moral virtues such as honesty, conscientiousness, imagination, and so on. Leaving room for this possibility means leaving room for discretion and judgement rather than taking the possibility of such judgement out of the tribunal’s hands.

H. The Special Role Responsibility Thesis. ‘In the context of certain valuable relationships, it is inappropriate to delegate certain activities or tasks to others, even if it is the case that those others will carry it out better. For instance, if paid nurses would care better for my elderly mother than I would myself, it is not enough if I simply leave it to them, or even if I supervise what they are doing. To some extent I have to be there, actively involved. This is partly because of the effect that my being there will have on my mother; but it would still apply even were she comatose or demented or otherwise unable to recognize me. Sometimes you just have a responsibility to do some things yourself rather than passing them off on to other people. Similarly this can happen in the case of democratic politics. Being a good citizen involves sharing the responsibility of maintaining social life. There can therefore be a limit to the extent to which we the people can ask delegated technical experts to do our business for us – rather there are some things that (with the help of experts) we have to do for ourselves. That is part of being a good citizen. This

particularly applies to those most challenging and difficult decisions that a society has to make – its ‘dirty business,’ if you like – such as crime. If as a society we are going to set up rules, enforce them, and punish those who break them, we should be prepared to deal directly with the consequences of doing so. Leaving it to a bureaucracy to deal with would be an abdication of responsibility.’

This thesis and the last attempt together to get at the point Dzur draws from Chesterton’s response to the jury. For Dzur this is a point about responsibility and the need for non-evasion. The thesis rests on a view of citizenship as a role in a valuable relationship, a role that brings responsibilities the fulfillment of which can be part of a viable conception of the human good.<sup>30</sup> To defend this thesis we would need to explain in what way citizenship is indeed an inherently valuable relationship – for instance, by reference to the particular value and achievement of self-government. We would also need to defend the second part of the thesis, namely, that some responsibilities are such that one cannot pass them on but must carry them out oneself. This has the ring of truth in certain cases – but how far does it generalize? Does the thesis show that there should be wide public participation in e.g. the health service, or in other essential public services in the way that Dzur argues there should be in criminal justice? Again, however, this thesis is part of a dissatisfaction we can associate with the New Left regarding the moral quality of our interactions in modern society – that we are misled by the attractions of efficiency and convenience and fail to appreciate the way in which a richer conception of relations and responsibilities is leaching away.

## **5. Concluding Remarks**



We opened this paper with a consideration of the argument over the compatibility with democracy of a concrete policy proposal – the setting up of a sentencing commission staffed by legal and criminological experts. We looked at Lacey’s argument that such a proposal would not be problematically in conflict with democratic values. In opposition to Lacey, we saw that Dzur claims, effectively, that such a response would mis-read the problem of penal populism, and that it would fail to solve the problem and may even exacerbate it. For Dzur, we need greater public engagement rather than less. In section 3 of this paper, I have argued that Dzur’s argument can be read as having something like the following structure: allowing for greater public engagement is more likely to solve the problems termed ‘penal populism’ than would Lacey’s proposal of the commission of experts; however, even if it does not, it will have independent value. I then listed eight claims that Dzur might make in backing up this argument. I do not claim to have defended Dzur’s view – indeed, in some cases I have shown that there are important counter-arguments that would need to be addressed before Dzur’s claims could be established. My main concern has been to clarify the ground on which the arguments have to proceed.

I have also sought to articulate two theses – the ‘Rule of Men not Law’ and ‘Special Role Responsibility’ Theses – that might be used in defence of some kind of participatory democracy, and which have, I think, been overlooked in the recent revival of interest in Anglo-American democratic theory. These are theses associated with the New Left and its concern that the dominance of instrumental, economic or bureaucratic rationality in contemporary society is leading to the decline of other, richer forms of human interaction. This is a theme that I have not developed in any detail in this paper, but which it seems to me would repay further inquiry.

Before concluding, I would briefly like to illustrate this point with reference to what Feeley and Simon have called ‘the New Penology.’<sup>31</sup> The New Penology, Feeley and Simon claim, involves a move away from traditional legalistic forms of criminal justice resting on culpability and sanction – as well as more humanitarian forms of criminal justice based in care for the offender and rehabilitation – and towards a penology based more on a) assessing and managing high-risk offenders, in short quantification, and b) systemic and formal rationality.<sup>32</sup> Without going into detail about Feeley and Simon’s claims, we might ask: if they are correct, what would be wrong with this shift? My thought is that the position Dzur is articulating – in particular the ‘developmental’ theses F and G – can explain why this form of criminal justice represents a kind of degradation of an important form of interaction that we have a responsibility to maintain between our fellow citizens. Rather than being treated as individuals, offenders and potential offenders are treated as risk-factors to be managed and taken account of. It is a long way from being called to answer to a tribunal of one’s peers.

Although this paper has been concerned with the debate over penal populism, then, it is possible to see penal populism as only one of the problems currently facing the development of criminal justice, and perhaps not the most important one. Attempting to solve the problem of penal populism by further removing criminal justice from the ideal of open honest reactions between free individuals may yet turn out to be a step in the wrong direction.<sup>33</sup>

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<sup>1</sup> See C. Bennett, 'Public Opinion and Democratic Control of Sentencing Policy' in J. Ryberg and J. V. Roberts (eds), *Popular Punishment: On the Normative Significance of Public Opinion* (Oxford: Oxford University Press): 146-162; and 'What Is the Core Normative Argument For Greater Democracy in Criminal Justice?' *The Good Society* 23 (2014): 41-54.

<sup>2</sup> D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001). For a different reading of the same phenomenon, which cautiously emphasizes its emancipatory potential, see I. Loader, "'Fall of the Platonic Guardians": Liberalism, Criminology and Political Responses to Crime in England and Wales', *British Journal of Criminology* 46 (2006): 561-586. For a much earlier but still important contribution that again sees both potential danger but also promise in 'popular' control of criminal justice policy – depending on whether it is carried out in the name of 'right-wing' or genuinely popular, socialist criminology – see I. Taylor, *Law and Order: Arguments for Socialism* (London: Macmillan, 1981).

<sup>3</sup> Garland, *Culture*, 13.

<sup>4</sup> On the question of how we should understand 'the public' see Liz Turner, 'Penal Populism, Deliberative Methods and the Production of "Public Opinion" on Crime and Punishment' *The Good Society* 23 (2014): 87-102; and this volume.

<sup>5</sup> See e.g. M. Hough and J. V. Roberts, *Attitudes to Punishment: Findings from the 1996 British Crime Survey* (London: Home Office, 1998).

<sup>6</sup> For figures concerning imprisonment, see The Sentencing Project ([www.sentencingproject.org](http://www.sentencingproject.org)). On prison conditions, see e.g. R. Lippke, 'Against Supermax,' *Journal of Applied Philosophy* 21 (2004): 109-124. On the right to vote, see for instance, M. Mauer, *Voting Behind Bars: An Argument for Voting by Prisoners* *Howard Law Journal* 54 (2011): 549-566; N. Demleitner, 'Continuing Payment on One's Debt to Society: the German Model of Criminal Disenfranchisement as an Alternative,' *Minnesota Law Review* 84 (2000): 753-804. For a careful examination of the evidence surrounding policies like 'three strikes,' see L. Kazemian, 'Assessing the Impact of a Recidivist Sentencing Premium' in J. Roberts and A. von Hirsch (eds), *Previous Convictions at Sentencing: Theoretical and Applied Approaches* (Oxford: Hart, 2010): 227-250. On criminal record restrictions, see Z. Hoskins, 'Ex-Offender Restrictions,' *Journal of Applied Philosophy* 31 (2014): 33-48.

<sup>7</sup> For a good analysis, see P. Pettit, 'Is Criminal Justice Politically Feasible?' *Buffalo Criminal Law Review* 5 (2002): 427-450; and 'Depoliticizing Democracy,' *Ratio Juris* vol. 17 (2004), pp. 52-65.

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<sup>8</sup> For this suggestion, see also Pettit, 'Is Criminal Justice Politically Feasible?' and F. E. Zimring, G. Hawkins and S. Kamin, *Punishment and Democracy: Three Strikes And You're Out in California* (New York: Oxford University Press, 2001). For a related proposal, see also L. Sherman, 'Evidence and Liberty: the Promise of Evidential Criminology,' *Criminology and Criminal Justice* 9 (2009): 5-28. For discussion of Zimring et al, see D. Greenberg, 'Striking Out in Democracy,' *Punishment and Society* 4 (2002): 237-252; and of Sherman, see I. Loader, 'Is it NICE? The Appeal, Limits and Promise of Translating a Health Innovation into Criminal Justice,' *Current Legal Problems* 63 (2010): 72-91.

<sup>9</sup> An example would be the U.K. health policy setting body, the National Institute for Clinical Excellence (NICE). The NICE case introduces complexities in part because it has mixed 'expert' and 'lay' membership, and deserves consideration in a further paper. For some discussion, see Loader, 'Is it NICE?'; A. Weale, 'Democratic Values, Public Consultation and Health Priorities' in A. Oliver (ed.), *Equity in Health and Health Care* (London: The Nuffield Trust, 2004): 41-51; and 'What Is so Good about Citizens' Involvement in Healthcare?' in E. Andersson, J. Tritter and . Wilson (eds), *Health Democracy: The Future of Involvement in Health and Social Care* (London: Involve and NHS National Centre for Involvement, 2007): 37-43; and Annabelle Lever, 'Democracy, Deliberation and Public Service Reform: the Case of NICE' in S. Griffiths, H. Kippin and G. Stoker (eds), *The Public Services: A New Reform Agenda* (London: Bloomsbury, 2010).

<sup>10</sup> A. W. Dzur, *Punishment, Participatory Democracy and the Jury* (Oxford: Oxford University Press, 2014). References in parentheses in the main text are to this work. See also Dzur, 'The Myth of Penal Populism: Democracy, Citizen Participation, and American Hyperincarceration' *Journal of Speculative Philosophy* 24 (2010): 354-379. The spirit of Dzur's arguments can be traced back to Nils Christie, 'Conflicts as Property,' *British Journal of Criminology* 17 (1977): 1-15.

<sup>11</sup> Dzur, *Punishment*, 33.

<sup>12</sup> Dzur, *Punishment*, 31-2.

<sup>13</sup> Dzur, *Punishment*, 33.

<sup>14</sup> Though see Dzur, *Punishment*, 48-51, for some discussion.

<sup>15</sup> D. Held, *Models of Democracy* 2<sup>nd</sup> ed. (Cambridge: Polity Press, 1996).

<sup>16</sup> For this claim, see R. Arneson, 'Democracy is Not Intrinsically Just' in K. Dowding, R. E. Goodin and C. Pateman (eds), *Justice and Democracy: Essays for Brian Barry* (Cambridge: Cambridge University Press, 2004): 40-58.

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<sup>17</sup> L. Davis, 'The Cost of Realism: Contemporary Restatements of Democracy', *Western Political Quarterly* 17 (1964): 37-46; quoted in C. Pateman, *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1970): 21.

<sup>18</sup> Though see J. P. McCormick, *Machiavellian Democracy* (Cambridge: Cambridge University Press, 2011): 91-2: 'election is a magistrate selection method that directly and indirectly favors the wealthy and keeps political offices from being distributed widely among citizens of all socioeconomic backgrounds.' I am grateful to Ian Loader for this reference.

<sup>19</sup> J. Waldron, 'A Rights-Based Critique of Constitutional Rights,' *Oxford Journal of Legal Studies* 13 (1993): 18-51; 'Participation: the Right of Rights,' *Proceedings of the Aristotelian Society* 98 (1998): 307-337; *Law and Disagreement* (Oxford: Oxford University Press, 1999); 'The Core of the Case Against Judicial Review,' *Yale Law Journal* 115 (2006): 1346-1406. For some critical discussion, see C. Fabre, 'The Dignity of Rights,' *Oxford Journal of Legal Studies* 20 (2000): 271-282; A. Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' *Law and Philosophy* 22 (2003): 451-486; and Arneson, 'Democracy is Not Intrinsically Just.'

<sup>20</sup> The names I have given to the 'theses' in this section are generally my own, but I have taken this one from Dzur – see his Ch. 4.

<sup>21</sup> For some discussion, see J. Kleinig and J. Levine (eds), *Jury Ethics: Jury Conduct and Jury Dynamics* (Boulder CO: Paradigm Publishers, 2006).

<sup>22</sup> Studies on the effectiveness of restorative justice often report lower recidivism rates and greater victim satisfaction. These measures can perhaps serve as a proxy for evidence that citizens take their responsibilities in such forums seriously and discharge them competently. For a recent study, see J. Shapland, G. Robinson and A. Sorsby, *Restorative Justice in Practice: Evaluating What Works for Victims and Offenders* (Abingdon: Routledge, 2011).

<sup>23</sup> Lord McCluskey, *Law, Justice and Democracy* (London: Sweet and Maxwell, 1987): 70; quoted in G. Johnstone, 'Penal Policy Making: Elitist, Populist or Participatory?' *Punishment and Society* 2 (2000): 161-180.

<sup>24</sup> Though one way to go here would be to consider arguments regarding the Condorcet Jury Theorem: for a nice recent discussion, see A. Poama, 'Whither Equality? Securing the Lay Citizens' Place Inside the Criminal Justice System,' *Swiss Political Science Review* 19 (2013): 472-491.

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<sup>25</sup> For an interesting recent contribution, see D. Scullli, ‘Democracy, Professions and Societal Constitutionalism’ in K. T. Leicht and J. C. Jenkins (eds), *Handbook of Politics: State and Society in Global Perspective* (Leiden: Springer, 2010): 81-109.

<sup>26</sup> This thesis and the next comprise what I have previously called the ‘Common Ownership Thesis.’ See my ‘Core Normative Argument.’

<sup>27</sup> For this rhetorical reason it seemed acceptable to sacrifice strict gender-neutrality and talk of the ‘rule of men.’

<sup>28</sup> For something like this theme, see C. Taylor, *The Ethics of Authenticity* (Cambridge, Mass.: Harvard University Press, 1992).

<sup>29</sup> Something like this argument is put forward in R. Dworkin, ‘Political Judges and the Rule of Law,’ *Proceedings of the British Academy* 64 (1978). Of course, Dworkin defends the institution of law and has in mind a different conception of the rule of law to the one attacked by the ‘Rule of Men’ thesis, albeit that it is adjudicated largely by judges rather than juries. For criticism of the Dworkin approach – and by extension, even more so, of the ‘Rule of Men’ thesis – see T. Campbell, *The Legal Theory of Ethical Positivism* (Farnham: Ashgate, 1996).

<sup>30</sup> For a classic formulation of this view, see F. H. Bradley, ‘My Station and Its Duties’ in *Ethical Studies*, 2<sup>nd</sup> edition (Oxford: Clarendon Press, 1927).

<sup>31</sup> M. Feeley and J. Simon, ‘The New Penology: Notes on the Emerging Strategy of Corrections and its Implications,’ *Criminology* 30 (1992): 449-474.

<sup>32</sup> Feeley and Simon, ‘Penology’: 454.

<sup>33</sup> This paper has been presented to audiences in Oxford and Sheffield, and to the Association for Social and Political Philosophy Annual conference in Amsterdam, June 2015, and the Society for Applied Philosophy Annual conference in Edinburgh, July 2015. I am grateful, where relevant, to the organisers of these meetings; and to audiences in each of these places for helpful comments and discussion. In particular I would like to thank Antony Bottoms, Tim Chapman, Albert Dzur, Roger Hood, Gerry Johnstone, Ian Loader, Annabelle Lever, Piero Moraro, Andrei Poama, Julian Roberts, Jennifer Sloan, Joanna Shapland, and Bill Wringe.