
Book Section:
Bennett, C. (2014) Public Opinion and Democratic Control of Sentencing Policy. In: Roberts, J. and Ryberg, J., (eds.) Popular Punishment: On the Normative Significance of Public Opinion. Oxford University Press, USA , pp. 146-162. ISBN 9780199941377

https://doi.org/10.1093/acprof:oso/9780199941377.001.0001

Public Opinion and Democratic Control of Sentencing Policy

In this chapter I consider some of the reasons one might have for wishing to introduce public opinion into sentencing.[1] I begin by attempting to say what is wrong with penal populism, and I argue that the reasons against appealing to public opinion leave some scope for a more positive assessment of public input. This raises two questions: on the one hand, what reasons might we have for giving the public some input into sentencing matters; and on the other hand, what form should that input take? The answers to these questions are likely to be connected: perhaps we won't be able to say *what sort* of public input would be valuable until we know *why* it is valuable. I look at three reasons that might be thought to justify public input of some sort into sentencing. First of all, *public confidence* in the justice system is surely important, and public input might be necessary to sustain such confidence. Secondly, public input might be thought, under certain conditions, to lead to *better or fairer sentencing outcomes*. And thirdly, it might be thought independently valuable for there to be genuine *democratic control* over sentencing. I will argue broadly in favour of such reasons, and so will in the end turn to the question of which institutions would be most suitable for public input. I am concerned in particular with the argument one might make for a certain model of public control over sentencing: the determination of sentences by jury rather than judge.[2]

1. What is wrong with penal populism?

First of all, what is wrong with penal populism (Pratt 2007; Roberts et al. 2002)? One thing that might be wrong with it, of course, is that it produces harsher sentences than can be justified. That means both that offenders suffer more than they ought to, but also that they are done an injustice. But there are some other aspects to penal populism that are unsavoury. In the accusation of penal populism, there is also an implication that all parties concerned ought to know better. The politicians ought to know better in that they should be courageous enough to be prepared to be honest with the public. But such courage is required of politicians collectively. When penal populism is regarded as a legitimate tactic by at least one party then the honest politician is vulnerable to a rival who will undercut her, as it were, appealing to a simple, eye-catching, or gut-grabbing, vision of black and white justice (in this there are parallels to the way in which workers who attempt to maintain a dignified refusal to work for less than a decent wage, are vulnerable to being undercut and therefore losing everything: a race to the bottom) rather than a more complex but more adequate picture. Democracy, conceived as a market in votes, might lead, like advertising, to an appeal to and reinforcement of an unthinking or immediate response to crime. Penal populism is problematic not only because of its effects on offenders and the injustice done to them, but also because it involves the cynical (or sometimes idealistic) manipulation of the public by politicians in the pursuit of power, in which the public are kept in partially complicit ignorance.

One question that arises out of this is whether or to what extent these considerations demonstrate that public opinion and sentencing policy do not mix. For instance, it might be said that on any view that gives public opinion a role in determining sentences, there will be a risk that offenders end up being treated more harshly than they ought to be. However, in response, three things might be said. First of all, it is also at least possible that they will be treated *less* harshly. Secondly, even if responsibility for sentencing is given to judges informed by sentencing guidelines, there is still the possibility that offenders will end up being treated more harshly than they ought to, since it is not the case that sentencing judges or guidelines are infallible. Indeed, an argument would need to be given as to why they should be taken to be more accurate than public opinion (I'm not saying that such an argument could not be given; simply that there would need to be such an argument. This issue will be considered below.) Thirdly, we often think that wrong decisions are made through democratic procedures, but that the decisions should nevertheless stand. This has been called the paradox of democracy (Wollheim 1969). Not really a paradox, it is simply the fact that, when one is committed to decisions being made democratically, one might often end up with two conflicting views about "what ought to be done:" on the one hand, the course of action one takes to be supported by the actual reasons; and on the other, the course of action decided by the vote. If one is committed to democracy, therefore, one might believe that the democratic decision made about sentencing is wrong, but nevertheless think that it ought to be followed, even though it will mean that the offender suffers more than he ought to, and is to that extent done an injustice.

On the other hand, giving public opinion a greater role in sentencing decisions might extract some of the other poisons from penal populism. If politicians were not the ones deciding on sentencing policy then there would be no votes in claiming to be tough on crime. And taking responsibility for sentencing might on the other hand force members of the public to become better informed about criminal justice issues.

That might, of course, seem like mere idealism. At any rate readers will need a good deal of argument to convince them that this is an option worth pursuing. The present chapter will not be able to fill that argument out fully, of course. It only aims to provide some reasons to think that further thought on the topic might be worthwhile.

First of all, let me highlight some of the questions that we would have to deal with before we can claim to have a considered answer to the overall question of whether public opinion should have a role in determining sentencing levels:

- What is the justification of punishment, or the purpose of sentencing?
- What are the reasons for giving public opinion a role in sentencing?
- What form will the introduction of public opinion take?

- What is the nature and importance of proportionality in sentencing, and how can that be made compatible with allowing public opinion some influence over sentencing?

It might not be obvious at first glance why the first question is relevant to this list. However, as will become clear, the justification one accepts for punishment and the institution of criminal justice will influence the reasons one thinks might count for giving public opinion some role in sentencing – for instance, what it would be for public opinion to further the aims of punishment, or contribute to its legitimacy. It also influences the reasons one might have for thinking that proportionality matters, what it consists in, and hence how public opinion might be made compatible with proportionality.

The first thing to do, however, is to ask ourselves what the reasons are for giving public opinion a role in sentencing.

2. Why give public opinion a role in sentencing?

In the following sections we can consider a number of reasons that might be put forward for giving public opinion a role in sentencing policy. In thinking about these reasons we will inevitably have to say something about the wider question of the justification of the criminal justice apparatus and the shape that the introduction of public opinion might take.

1) *Increasing public confidence in justice.* Considerations like this have been put forward by Julian Roberts, who claims that "if sentencing practices diverged widely and consistently from public opinion the legitimacy of the judicial system would be compromised" (quoted in Ryberg 2010: 153). There are a number of things to note about this view. First of all, there are various things that can be meant by "legitimacy". Legitimacy, or its lack, in the sense we are interested in here, is a property of the occupier of a hierarchical social position, a property of a person or body in some sort of practical authority. But given that basic idea, legitimacy might be understood in a number of different ways. For instance, it might be thought of as the claim that the person or body's claim to have the right to wield the power they do is a justified one. Or it might be the claim that there is a good justification for the existence of their hierarchical role, with its rights and responsibilities, and their occupation of it. Thus if an authority is legitimate, on this interpretation, the authority's claim to make the decisions it does, to impose duties on its subjects, to wield power over them, is a justified one. On this interpretation of legitimacy, however, it is not (or need not be) a condition of legitimacy that there is any particular relation between the authority and public opinion: thus on Joseph Raz's celebrated justification of political authority, the authority is justified if it makes it more likely that its subjects will comply with the reasons that apply to them (Raz 1986: 53). This condition might be met without the authority having any particular relation to public opinion.

Sometimes, however, the idea of legitimacy is understood specifically as having to do with *being recognised as being legitimate*, or of having the confidence of the public. Here the issue is not so much *justification* as *credibility*. It is this variant of the idea of legitimacy that appears in the quote from Roberts: the legitimacy of the judicial system would be compromised if it were too far out of line with public opinion in the sense that it would no longer be regarded as being legitimate. There are two ways of understanding the idea of legitimacy that Roberts is invoking here. On the first, legitimacy simply is the property the occupier of a hierarchical social position might have of actually being supported by those over whom she rules, or whose lives she affects. On this interpretation, there is no distinction between being legitimate and being judged to be legitimate. On the second interpretation, the perception of whether someone in authority is legitimate might be justified or unjustified, accurate or inaccurate. The first interpretation is problematic since it makes legitimacy simply a matter of gaining acceptance. What matters for legitimacy is surely that there is acceptance for the right reasons. In which case we need to ask what the right reasons are – in which case we are asking whether the claim of the authority to be legitimate is a justified one, something that has to be settled by looking at the rationale for having that position occupied by that person or body, and not simply at the public perception thereof.

The perception of legitimacy might still be very important, of course: for instance, on a social control or deterrence model of criminal justice, for the effectiveness of the sentencing process as part of an apparatus of social control or maintenance of public order: people must believe in the process in the process in a certain way, thinking that it is effective and that it gives them good reason to abide by social order. This might give those designing criminal justice institutions reason to make them responsive to public perceptions. Even on a more retributive view, it might be important, not just for justice to be done, but for it to be seen to be done. However, it might be thought that on a retributive view, the impetus is not so much to make the justice process responsive to public perceptions but to make it clear that the justice embodied in the process is recognised by the public. This raises an important issue about the direction of travel between public opinion and criminal justice: which should be moulded by which? What I called the "second interpretation" in the preceding paragraph insists on the importance of public recognition to legitimacy – rejecting the idea that legitimacy consists simply in nothing more than justified authority. On this view we might say that legitimacy is *justified credibility*.

This is an apt moment to raise another question about what exactly the relation between public opinion and sentencing is supposed to be on this "public confidence/legitimacy" approach. One thing that one might have in mind if one worries about public perceptions of criminal justice is whether the *outcomes* of judicial or sentencing decisions are in line with public opinion. Another thing one might be worrying about is whether there is public

support, not necessarily for the outcomes, but for the *processes* and *procedures* by which those decisions are made: the outcomes may sometimes look strange to the public, but do they have confidence in the officials who make them and the procedures they follow in doing so? If so, then they may be prepared to accept some outcomes that appear to be out of line. A third way to read the aspiration to bring public opinion into sentencing, however, would be to stress the need for public control over sentencing, either in a direct or an indirect way. The first two options rely rather on the idea that public opinion should be in a position to *endorse* either outcomes or procedures; but it is not necessary that the public should be able to exercise *control*. Whereas on the latter view, some sort of control and a particularly direct form of accountability is necessary. Presumably for shoring up public confidence, it may be the case that only the endorsement of outcomes or procedures is necessary. However, it might be the case that, where confidence has got to such a low ebb, the public has to be given greater control over the process in order to restore confidence. If the public takes control of the process then, even if it delegates responsibility for making decisions to representatives in a bureaucracy, it might then become important that the outcomes or procedures be in line with public opinion.

However, the approach to introducing public opinion canvassed at the end of the last paragraph sees any potential accountability of sentencing decisions to public opinion as merely a means to the end of making criminal justice effective. It is not a matter of right. If one could have stable social control without public participation or the alignment of sentencing decisions with public views then, on this view, that is what should happen. However, on a more ambitious view, on which matters of the rights of the public are invoked, it might be said that the reason sentencing decisions should be aligned with public opinion is that it is only then that they come to be truly justifiable – for instance, because it is the public's right in some way to be part of the process. Is there something that might justify that claim that the public has a right to be involved in sentencing decisions?

2) *Better, fairer outcomes?* One argument for paying more attention to public opinion in deciding sentencing outcomes, or even for giving the public greater control over sentencing decisions, might be that this will lead to better quality sentencing decisions being made. There are various ways in which this claim might be made, some perhaps more plausible than others, depending on one's view of the purposes of sentencing. It might be less plausible if one thinks that the purpose that determines sentencing is deterrence or incapacitation of the dangerous. It might seem clear here that what is required to make a good decision is expert knowledge, either of the behavioural tendencies of the offender, or the effect of the offender being punished on the behavioural tendencies of the population as a whole. The reliance on experts might be doubted, of course. We might doubt the purported wisdom of psychological experts. If that could be made plausible then it might open the way for an argument that, if we are attempting to make an intuitive assessment of

a person's likelihood of offending, or of the deterrent effect on others of publicising a certain punishment, a collective decision is likely to be better than an individual one. This argument in turn could be made in two ways. One would appeal to the Condorcet Jury Theorem, which says that simply as a matter of mathematics, the majority decision of a large group is more likely, across a series of decisions, to approximate to the truth than individual decisions across the same series.[3] Another would appeal rather to the possibilities of deliberation that precede a collective decision being made, arguing that such deliberation can correct for obvious mistakes and biases, can pool information, can lead to a number of perspectives being taken into account, etc (Aikin and Clanton 2010). Nevertheless, although this argument might be made, deterrent theorists might be unwilling to accept that this method is more likely to lead to correct outcomes than reliance on expert opinion. In the end, predictions of deterrent effect are complex probabilities relying on hard-to-ascertain matters of empirical fact, and it might plausibly be said that members of the public are simply not competent to make such decisions.

However, matters might be different if we take up instead a non-empirical sentencing rationale such as retributivism. For the retributivist, the severity of punishment should be determined by the seriousness of the wrong. But this simple formula notoriously leads to difficult questions. For a start, there seems no simple way to categorise the seriousness of wrongs. Is "wounding with intent" always a less serious offence than "manslaughter"? Now on one strand of retributive sentencing theory it is taken to be a sine qua non of retributivism that there must be some sort of determinate answer to such questions: an ordinal scale of offences at the very least (von Hirsch and Ashworth 2005: Ch. 9). However, others are sceptical about this possibility.[4] Won't the seriousness of these two actions depend on the precise and detailed nature of the offence and the offending circumstances? Where the wounding is caused maliciously, with the intent to cause serious and prolonged pain, whereas the manslaughter results from a stupid but minor lapse in attention, then although the act of wrongful killing is far more serious than the act of wounding, and its consequences more dreadful, it might be said that the culpability involved in the latter is far greater. How should those elements of the 1) act itself, 2) its intention, motivation or culpability, and 3) its harmful consequences be weighed in assessing "the seriousness of the wrong"?

Even assuming, however, that despite these problems we do have some grasp on ordinal proportionality – that is, which wrongs are more serious than others – if we move on to the question of cardinal proportionality – which wrongs are equivalent to or fitting to which punishments – then again it might seem hard to see a simple answer. How is the ordinal scale to be "anchored" with certain punishments being judged appropriate to certain crimes?

The retributivist might acknowledge these difficulties but deny that they lead to the conclusion that there is no determinate answer to questions about proportionality. She might accept, though, that there is no simple way to determine what these answers are. Rather, as with many complex questions where we find it hard to specify an answer in advance of inquiry, she might say, what we have to do is rather to give an account of what an inquiry would have to be like for an adequate answer to be discovered. Then it might be said that, as an epistemic matter, we have no better grasp of the concept of an adequate e.g. conception of the seriousness of a particular wrong, or of a punishment fitting to a particular crime, than the answer (or, perhaps, range of answers) that might be given at the end of such an inquiry. For instance, one recent, broadly pragmatist approach to epistemology argues that we have no better grasp on the notion of truth than the outcome of a well-conducted inquiry; and that we have no better grasp on the notion of a well-conducted inquiry than one that involves the possession and exercise of an appropriate range of epistemic or intellectual virtues (curiosity, conscientiousness, attentiveness, imaginativeness, etc).[5] The range of virtues that an inquiry would have to display in order to be well-conducted would no doubt differ with the particular domains being inquired into. But the basic thought is that they are virtues that involve the pursuit, appreciation and correct weighing of relevant considerations, and the removal or overcoming of bias. Whether or not one accepts that pragmatist account of truth as such, one might well think that in a domain of inquiry such as that of retributive justice (if one accepts that there is such a thing as legitimate inquiry in this domain) we have no better grasp of a standard of correctness or adequacy for our judgements than that just given. Further, one might argue that it is quite likely that a group is more likely to possess and be able to exercise these virtues than is any individual working in isolation.

If the considerations of the last few paragraphs are plausible then one might argue for a version of the claim that public opinion should have an input into sentencing: on a retributivist view, it might be claimed that sentencing decisions about proportionality are better made by a jury of citizens rather than a sentencing judge or magistrate. (Furthermore, for reasons having to do with the relation, on a plausible retributivist view, between the need for punishment and the need for apology and reparation, it might be that the participants in the jury ought to include the victim and the offender, if they are so willing.[6]) Having said this, however, it seems reasonably clear that a jury would benefit from some guidance or direction from a judge for a number of reasons: a) information about decisions in like cases might be epistemically useful as a starting point to fix standards, or to make clear the need for argument about the relevant differences of the case in hand; b) it is essential that the sentencing be for the wrong as captured in the legally-defined offence rather than the wrong as such, and the jury would need guidance on the difference between those two; and c) a virtue of a sentencing system is parity across like cases, and some guidance would need to be given to the jury to ensure that due

consideration was given to that. But if a jury makes it clear in its judgement that it has taken such direction and guidance into account, and shows evidence that it has given each of these points due consideration, it might be that we have no better epistemic standard of what punishment crime deserves.

3) *Democratic authority.* However, for some people, for all that some of these considerations might be helpful and persuasive in some respects, we have not yet got to the heart of what drives the argument for public control over sentencing. For them, the crucial question is not just about the quality of the outcomes, but rather about who is in charge. It is a question, not simply about how the make the best decisions, but who gets to make the decisions. It is a question, in other words, of authority.

On some views, it follows straightforwardly from the fact that a body is best placed to make decisions that have good outcomes, that that body ought to be in charge. But even on those views, a concern for authority is something different from a concern for outcomes. Authority is a matter of having the right to make decisions, to have those decisions followed and implemented by those who are governed by the decision (those under the jurisdiction of the relevant body), to have those decisions treated as settling the question of what those governed by the decision should, as a group, do. There is a question of what justifies anyone having this hierarchical position. And on the range of views we are considering in this paragraph, this is settled straightforwardly by the fact that a particular body is more likely, on the whole, to make good, well-informed and effective decisions than any other body, and so that being governed by that authority will bring it about that those governed will act more in line with the reasons that apply to them than they would have otherwise.[7]

Now even on this type of view, there must be more than wisdom that qualifies a body to be an authority. There is no point in having wisdom, for instance, unless when one speaks others will actually follow. So another necessary condition of the justification of some authority would have to be efficacy, or the ability actually to coordinate the action of a group by means of one's dictates. But there are some further, more serious problems with this sort of view. We can group these problems into two importantly different types. But addressing these problems might be thought to lead us in the direction of greater democracy, and greater incorporation of public opinion.

First of all, there are concerns about epistemic access to the reasons governing the domain over which the authority rules. If we take the example of an authority setting laws to govern the whole of a political society, it seems clear that decisions will invoke normative matters. Now, while many theorists will reject pure subjectivism about normative matters, assuming that there at least some well-ordered practices of inquiry by which we can make headway in coming to determinate answers about practical questions, many think

nevertheless that the notion of one body having wisdom in a certain area is problematic on the grounds that the considerations involved, and the process of weighing such considerations, are hugely complex. Reasonable humility should, on this view, lead any person or group to be wary of imposing their view on others, just because no one is infallible, and in such a complex area of thought it is very easy to go wrong.[8] Some, indeed, go further, and assert, not just that true claims about normative matters are hard to discern, but that values are plural and incommensurable, and that there simply are always going to be a range of equally satisfactory answers to at least some normative questions (Berlin 2003). In which case it might be important for anyone making authoritative decisions on normative matters to take public opinion into account for the reason that they should accept that there are likely to be a range of epistemically reasonable positions on any one question, and reasonable humility dictates taking the view that there may be no good way of telling for certain whether the view to which one inclines oneself is in the end more adequate than an opposing view.

Of course, even on this view, these considerations do not entail that officials should simply take public opinion on a particular question for granted, that they should translate it uncritically into public policy. Public opinion should be taken as a guide only insofar as the best explanation for the content of the public's views is engagement with the relevant issues. Where the content of the public's view can be convincingly "explained away" as a result of lazy thinking, political rhetoric, manipulation, prejudice and bias (as in the case where "penal populism" inflames and distorts public opinion for certain ends) then on this line it need not be taken seriously. This is because the fact that a person espouses a certain view is not credible as a source of evidence about how things are, normatively speaking, if there is reason to think that they hold that view for non-epistemic reasons. It may be that we should have a certain degree of faith in people's intellectual seriousness, or at least their willingness to be intellectually serious when properly engaged. And we should have a certain degree of willingness to accept a person's assurances that they have thought seriously about a matter when they say that they have. But neither of these points entail that, on the view being discussed in this paragraph, public opinion should be taken uncritically as a guide to public policy-making. Nevertheless, it may be plausible to think that, even after we take away those views that are ill-considered, biased or prejudiced, there will remain a range of serious public opinion and that reasonable answers to many of our pressing practical questions will not point in just one direction. Furthermore, and crucially for the example of the jury, we might think it plausible that we can design ideal deliberative fora in which individuals who might in many circumstances be tempted into lazy thinking are enabled to engage instead with depth and seriousness: for instance where it is clear that something important is at stake, and that they have a serious responsibility over someone's interests, and where the problem they are asked to solve is one that it is within their powers to solve (that it is reasonably focused, not overwhelming, etc.).

On the basis of the considerations of the past two paragraphs, we might think that it would be problematic to allow any particular body or class of individuals (or ruling elite, drawn largely from a particular class, ethnic group and educational background) to be given responsibility for authoritative decision-making in a particular normatively charged domain, and that it would be more satisfactory if we attempted to find some compromise based on the range of serious public opinion, something that a citizen jury might be an attractive mechanism for bringing about. Thus even if one thinks that all that matters in the justification of authority is the quality of the guidance given by a particular authority's directives, one might be inclined towards democratic decision-making.

Secondly, however, the idea that wisdom confers (political) authority might be disputed on the basis of concerns about whether there really is nothing more to the justification of authority than the quality of guidance. For some, as well as concerns about the quality of the outcomes of decision-making, there are also concerns about the fairness of the procedures themselves (e.g. Waldron 1993). In particular, there is a concern that the procedures should be compatible with the equality of each person as a citizen and as a joint author of the actions of the state. On this view, anything the state does ought to be capable of being seen as an act taken on behalf of the people as a whole. But if the people as a whole is in charge then that means that each person should have exactly the same say in determining how the state should act, what its determining principles and policies are. In which case we can say that procedures by which policy decisions are made – including decisions about sentencing policy – have to be such as are compatible with the equality of each citizen, specifically the equal right of each to a say in determining what those policies are.

Now there are two immediately pressing questions. One is about the value of democracy. Why should we think that a form of government is particularly important if it gives each (adult) member an equal say?[9] Of course, there is much to say about this, but the basic intuition, which might be cashed out in various different ways, is that in the context of political life, no one should be treated as being more important than anyone else: that the dignity of each requires that they not be required publicly to accept a second-class status, and that they would have to accept a second-class status if some were given a right to greater say in decision-making than others. The upshot of this is that, regardless of the inevitable variations in epistemic acuity, each person has the same right as any other to determine what the policies of the state ought to be.

Even if that is convincing, however, a second pressing question concerns the practical implications of the value of democracy: what does it actually mean for procedures to be compatible with the freedom and equality of each citizen? On this point, we could return to the distinction we made earlier between, on the one hand, the importance of public endorsement, either of sentencing outcomes or the procedures by which those outcomes

are decided upon, and on the other public control over those outcomes. The importance of public endorsement might be kept in view by a set of benevolent officials who are committed to implementing only publicly endorsed policies, but where the public has no control, direct or indirect, over the way in which these officials act. This benevolent dictatorship is often thought to be problematic on the grounds that it is empirically unlikely that such an insulated group would remain committed to taking public views seriously. So some sort of mechanisms of accountability to the public might have to be introduced, by which the public exercise control and determine for themselves that their will is being followed.

If this is so, however, there is a question of how much control is necessary. A central debate on this point is between those who believe that democracy is compatible with at least some significant decisions being made by representatives and those who believe that true democracy has to be direct. Even on the direct democracy view, however, the democratic input is often taken to be most important in the decision-making, and there can be room for plenty of delegation of powers to those who will implement those decisions. For instance, if there was democratic control of sentencing then at least one possibility would be that, although a group of citizens made the decisions, responsibility was delegated to a group of specialists to implement the decision. Furthermore, there might also be a specialist role for oversight of the implementation of the decision. Ultimately, of course, those who implement the sentence would be accountable to the jury, or to the public as a whole, for their carrying out the task. But the responsibility for day-to-day oversight and accountability might be something that it is compatible with democracy to delegate to a specialist. Of course, this might be denied: it might be argued that democratic control is only genuine when the sentence is implemented in and by the community itself. This might have certain benefits – it might build social solidarity, and encourage victims, offenders and others to engage with one another and develop important character skills by taking responsibility for these tasks rather than leaving it to the experts. On the other hand, it might be argued that democratic authority is not the only important value, and that offenders will be treated better and more effectively when a team gets the opportunity to specialise in that role rather than doing it in their spare time as public service. An argument for the more participatory model could either be made on empirical grounds, claiming that the trade-off between these values favours the punishment-in-the-community model, since the benefits to be gained for individuals and the community as a whole do outweigh the costs. Or it could be made by insisting that the importance of democratic authority does outweigh whatever costs community implementation might have.

If it is accepted, however, that some degree of representation or delegation is compatible with democratic authority, what are the reasons to favour decision-making on sentencing by a citizen jury rather than by a group such as judges who are at least indirectly

accountable to the public (for instance through the control of the legislature over sentencing guidelines)? We have mentioned a number of relevant considerations already: for instance, the epistemic value of a collective deliberative mechanism in tricky evaluative questions; such collective deliberation might be impossible to organise amongst the whole electorate for every sentencing decision, of course, but it would be possible to organise a group of citizens picked more or less at random for each decision (or the day's or week's decisions). Furthermore, it might seem preferable, from what we have been saying, to have a small group of collective deliberators who are able to pay attention to the details of each individual offender's case rather than democratic control over some more abstract sentencing priorities that are then implemented mechanically by those to whom power to set sentences has been delegated. There is also the consideration that any group of representatives comes to have its own vested interests that might bias its decisions and might break the link with democratic control. And it is also very important to acknowledge that the citizen jury has an important symbolic value: it says very directly that the public is in charge.

3. Conclusion: further questions

In this chapter I have attempted to sketch out a route, or a number of routes, by which one might seek to justify introducing public opinion into sentencing policy in a specific way – viz. by having sentencing decisions made by a jury – and to provide some evaluation of those arguments. But there are important questions that I have left unaddressed. For instance, I have suggested that the argument for sentencing by jury would likely be at its most plausible if it is accepted that sentencing has an essentially retributive or desert-based component: given the complexity of situations of criminal wrongdoing that cannot be captured by rigidly applied sentencing guidelines, and given the superiority of group over individual deliberation, there is at least an argument to be made that a jury would be best placed to decide on what that the retributive sentence should be. But what if one thinks that sentencing should be determined either in part or in full by considerations about deterrence or incapacitation? It might be said that in these domains expert knowledge trumps untutored collective deliberation. Even here, however, it might still be said that the final authority to make decisions rests with the people, on the grounds that the most important value for public policy is that it should be an expression of the will of (all) the people. If we find that thought plausible, perhaps the public should be advised by the experts, appearing as it were as witnesses, but the jury should make the final decision.[10]

Another large question, though, is how far we think democratic decision-making in sentencing is of value, and how far we ought to prioritise democratic processes if they come up with decisions that are plainly wrong. Even on the strongest defence, democracy remains only one value amongst others. Therefore it might be said that defence of other values sometimes requires anti-democratic intervention in order to correct gross injustices that would otherwise be inflicted. Furthermore, democracy has certain foundational values

– for instance, respect for the equality of citizens as self-determining beings – but a democratically constituted decision-making body might make a decision that contravenes those values. In these cases there could be a strong argument that democracy itself requires that the democratic decision be constrained (Brettschneider 2007). On the other hand, we need an account of a mechanism by which that constraint could be brought about. We have already suggested that a sentencing jury should have a legal adviser – should a legal official have the power, not just to advise, but in extremis actually to strike down a sentencing decision, or ask the jury to think again? Could the offender herself appeal against the decision? If so, who should the appeal be referred to?

I should also note that sentencing by jury is not the only model of democratic control over sentencing that is worth considering. An alternative would be the model proposed by Paul Robinson,[11] on which psychological experiments are used to make precise assessments of public opinion on questions of ordinal and cardinal proportionality, the results of which are used to formulate sentencing guidelines applied by judges. Proper assessment of this model is not possible here, but it is worth noting a number of advantages of the jury system. First of all, the jury system puts the public in a position, not just to endorse sentencing outcomes but actually to control them. (Whether or not this is important depends on one's views about the extent to which it is legitimate for the public to delegate decisions to representatives.) Secondly, an aspect of my argument for the jury had to do with the epistemic value of decisions made by the public given the irreducible complexity of particular situations. I suggested that a group of deliberators might be better able to come to a view about the significance of the situation of wrongdoing as a whole. This would be lost if it were simply the case that a sentencing judge were required to respond more or less automatically to the presence of a certain feature in the criminal act. Thirdly and relatedly, the jury having control over the sentencing decision is able to respond to the offender as a human being rather than simply categorising her according to the guidelines, and this can be an important factor in reducing the likelihood of disproportionately punitive sentencing decisions. When the jury have the offender in front of them and they realise that they have responsibility for the future direction of that person's life, there is at least a possibility that this situation of human contact should have a transforming effect on those judging – as is quite widely reported in restorative justice "sentencing circles" – an effect that it is hard to see could be brought about if retributive responses are being measured by responses to cases in laboratory conditions. On this last point, however, it is worth noting that my response assumes that the jury would indeed have the offender in front of them as a judge does in passing sentence: a full consideration of these issues would have to consider whether that is more attractive than the alternative that sentencing decisions should be made in anonymous conditions where e.g. the race, appearance, gender and other potential sources of bias surrounding the offender are removed from the jury's ken.

Other questions to be considered in a development of the arguments canvassed here might include: How long-lasting should citizen jury be? Should it be something more like a commission that lasts for six months or a year? Should it have exclusively lay membership? How would its membership be determined? On the latter question, it seems clear that it would be better for the purposes of genuine deliberation that jury members are appointed rather than elected on a platform, so that they have no manifesto commitments to defend, or public perceptions to take into account. However, if appointment is the way to go, is random selection best, or should there be an expert element to each jury (should there be e.g. an ex-offender on each jury?); and if randomisation is chosen, is it nevertheless important to ensure that the make-up of the jury reflects social diversity to a reasonable degree?[12]

These are questions to be dealt with at a later date. I hope, however, to have made at least some headway in thinking constructively about how to improve the relationship between public opinion and criminal justice.

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[1] A version of this paper was discussed at a symposium on punishment and public opinion organised by Julian Roberts and Jesper Ryberg in October 2012. I am very grateful to the organisers for inviting me to be involved, and for the comments I received at the workshop. I would particularly like to thank Paul Robinson, Albert Dzur and Richard Lippke.

[2] For a paper with somewhat similar aims, see Dzur (2012).

[3] "If voters are only a little better than random, and choices are between two alternatives, then majority rule would be nearly infallible" (Estlund 2008: 15).

[4] Cf. Duff (2001: 136): "The cost of [the von Hirsch approach] is a kind of generalisation, of abstraction from the concrete particularities of different kinds of crime, which threatens to separate the law's definitions of crimes from extralegal moral understandings of them as wrongs. These moral understandings are more complex, particularised, and concrete than are the understandings available within such a legal framework. They preclude any unitary ranking of all crimes on a single scale of seriousness, since they connect the wrongfulness of different kinds of crime to different kinds of value that cannot without distortion be rendered rationally commensurable." See also John Gardner's critique of von Hirsch in Gardner (1998).

[5] Because of the central role it gives to virtues in knowledge, this approach has been called "virtue epistemology." See Zagzebski (1996).

[6] See my discussion of the "limited devolution model" in the final chapter of Bennett (2008).

[7] Cf. Raz's "normal justification thesis" (Raz 1986).

[8] See, famously, on the "burdens of judgement": Rawls (1993).

[9] This has been recently denied by Arneson (2004).

[10] Cf the M'Naghten Rules on the use of the insanity defence, where it remains the jury's responsibility to determine whether the defence should be accepted, on the basis of expert testimony.

[11] This volume.

[12] Cf the considerations about democratic control of the police through police commissions in Loader (2000).

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