Public Wrongs and Public Reason:
Criminal Sentencing in a Deliberative Democracy

Jeffrey C. Kennedy

Faculty of Law, McGill University, Montréal
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Abstract

This dissertation explores the implications of democratic ideals for the way that we conceive of criminal sentencing and the justice it seeks. Given its use of state power and distinctive "public" nature, criminal theorists have increasingly recognized the need to ground criminal justice in political theory. Accordingly, the task for criminal scholars is not simply to theorize criminal law in a way that they personally find most compelling, but to do so in a way that takes seriously our shared political commitments and ideals. Taking up this challenge while recognizing sentencing as an instance of public decision-making, this dissertation proposes deliberative democratic theory as a normative framework for criminal sentencing. From this perspective, the dissertation defends the idea that legitimate sentencing should proceed through processes of public reason-giving through which decision-makers justify decisions in a way that those affected can reasonably be expected to accept.

In doing so, the dissertation engages with a variety of problems and controversies within sentencing scholarship—the nature of crime as public wrongs, the consequentialism-retributivism debate, victim input, mandatory minimum sentences, and sentencing guidelines—in order to illustrate its application and significance. By engaging with these issues, the dissertation not only advocates for deliberative democratic values in criminal justice, but makes a number of arguments about the relationship between deliberative democracy and criminal theory. Fundamentally, it demonstrates that deliberative democratic ideals are not only relevant for the ways in which we choose criminal justice systems, but also have implications for shaping the ongoing character of those systems. By engaging with the aforementioned controversies, it also reveals that deliberative democracy provides criminal scholars with valuable conceptual resources that clarify and address a number of sentencing's most contentious issues. Lastly, it argues that deliberative democratic theory provides normative guidance while accounting for, articulating, and often legitimizing scholars' intuitions about the nature of criminal justice. In doing so, it hints at a natural affinity between addressing public wrongs and the normative demands of public reason.

Résumé

Cette thèse explore les implications des idéaux démocratiques sur la façon dont nous concevons la détermination de la peine criminelle et la justice qu'elle vise. Étant donné que la justice pénale utilise le pourvoir de l'État et compte tenu de sa nature « publique » distinctive, les théoriciens du droit pénal ont de plus en plus reconnu la nécessité de l'ancrer dans la théorie politique. Par conséquent, la tâche des spécialistes du droit pénal n'est pas simplement de théoriser le droit pénal d'une manière qu'ils trouvent personnellement convaincante, mais de le faire d'une manière qui prend au sérieux les engagements et idéaux politiques communs d'une société. Relevant ce défi tout en reconnaissant que la détermination de la peine est une instance de prise de décision publique, cette thèse propose d'appliquer la théorie démocratique délibérative comme cadre normatif de la détermination de la peine. De ce point de vue, la thèse défend l'idée que la détermination légitime de la peine devrait passer par des processus de raisonnement public, par lesquels les décideurs justifient leurs décisions d'une manière que l'on peut raisonnablement s'attendre à ce que les personnes concernées acceptent.

Ce faisant, la thèse aborde une variété de problèmes et de controverses dans le cadre de la recherche sur la détermination de la peine – la nature du crime en tant que torts publics, le débat entre conséquentialisme et rétributivisme, la participation des victimes, les peines minimales obligatoires et les lignes directrices en matière de peine – afin d'illustrer son application et son importance. En abordant ces questions, la thèse défend non seulement les valeurs démocratiques délibératives dans le domaine de la justice pénale, mais elle présente également un certain nombre d'arguments sur la relation entre la démocratie délibérative et la théorie criminelle. Fondamentalement, elle démontre que les idéaux démocratiques délibératifs ne sont pas seulement pertinents pour la façon dont les systèmes de justice pénale sont choisis, mais qu'ils ont aussi des répercussions sur le caractère permanent de ces systèmes. En s'engageant dans les controverses susmentionnées, la thèse révèle également que la démocratie délibérative fournit aux spécialistes de la criminologie des ressources conceptuelles précieuses qui clarifient et résolvent un certain nombre des questions les plus litigieuses en matière de détermination de la peine. Enfin, elle soutient que la théorie de la démocratie délibérative fournit une orientation normative tout en expliquant, en articulant et souvent en légitimant les intuitions des spécialistes sur la nature de la justice pénale. Ce faisant, elle laisse entendre qu'il existe une affinité naturelle entre la résolution des torts publics et les exigences normatives de la raison publique.

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Introduction

This dissertation explores the implications of democratic ideals for the way that we conceive of criminal sentencing and the justice it seeks. In doing so, the dissertation forms part of a broader trend in contemporary criminal scholarship in which the need to ground criminal law and theory in political or public theory is increasingly recognized.[1] Historically, scholars have been too willing to approach criminal theory as if the questions it involved were simply moral questions, and to assume, consequently, that the laws and institutions of criminal justice could be a direct manifestation of their answers.[2] Remnants of these views persist,[3] and it was not long ago that George Fletcher wrote that this was "one of the unfortunate banalities of our time."[4]

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[1] See e.g. RA Duff, *Answering for Crime* (London: Hart Publishing, 2007); Malcolm Thorburn, "Criminal Law as Public Law" in RA Duff and Stuart Green, *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011); George Fletcher, *The Grammar of the Criminal Law* (Oxford: Oxford University Press, 2007) [Hereafter, *Grammar*]; Alice Ristroph, "Desert, Democracy, and Sentencing Reform" (2006) 96 *Journal of Criminal Law and Criminology* 1293.

[2] Jeffrie G Murphy, "Does Kant Have a Theory of Punishment?" (1987) 87 *Columbia Law Review* 509 at 510; RA Duff, "Political Retributivism and Legal Moralism" (2012) 1 *Virginia Journal of Criminal Law* 179 at 179 [Hereafter, "Political Retributivism"].

[3] Michael Moore serves as a prominent example. See Cf. Michael Moore, "A Tale of Two Theories" (2009) 28 *Criminal Justice Ethics* 27 [Hereafter, "Two Theories"]. See also Moore, *Placing Blame*, *infra* n42 and accompanying text.

[4] Fletcher, *Grammar*, *supra* n1 at 153. Also noting at 151-152 an "absence of a developed literature on political and criminal theory" and that criminal theorists write little on political theory, while political theorists write little on criminal theory."

This tendency may be unsurprising, as popular discourse around criminal justice rarely echoes in civic terms, perhaps fitting more readily into narratives of good and evil than of policy and governance, and of offenders as monsters or animals rather than citizens.[5] Nonetheless, the significance of political theory to the field should be both obvious and compelling. Responses to crime are, after all, coercive exercises of *state* power, and arguably those which pose the greatest and most targeted threat to individual liberty.[6] Consequently, justifications for how state power is used cannot simply be derived from what theorists themselves find morally desirable but instead must flow from an account of the legitimate uses of that power.[7]

However, the nature of criminal justice and the realities of public life suggest that political theory's contributions can extend beyond delineating what is *permissible* to imbuing criminal practice with political values. Certainly, in how the state exercises its power, the criminal law purports to have a distinctive—if not ambiguous—public character. In contrast with the civil law, for instance, criminal justice is said to address "public wrongs," with pursuit and prosecution managed by public officials.[8] Scholars and practitioners alike jealously guard the supposedly public orientation of criminal justice decision-making at all stages,[9] and ultimately criminal conviction is thought to entail a sort of public censure in which the community as a whole expresses its disapproval.[10] If all of this is to be the case, it is also necessary to articulate some sense of what it means to be implicated, and to act, *as a public,* and so here too must theorists turn to political theory. This is especially the case given the inevitable disagreement and pluralism that characterize this public and complicate any decisions in those respects.

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[5] On a more literal view of offenders as non-citizens, see e.g. Harry David Saunders, "Civil Death: A New Look at an Ancient Doctrine" (1970) 11 *William & Mary Law Review* 988 (discussing the early common law doctrine of *civiliter mortuus* whereby felons underwent a 'civil death', extinguishing civil rights as if they had died a natural death); Gabriel J Chin, "The New Civil Death: Rethinking Punishment in the Era of Mass Conviction" (2012) 160 *University of Pennsylvania Law Review* 1789 (exploring the effective duplication of the doctrine of civil death in contemporary society); see also Mandeep K Dhami, "Prisoner Disenfranchisement Policy: A Threat to Democracy?" (2005) 5 *Analyses of Social Issues and Public Policy* 235 (providing a useful international overview of prisoner and felon voting policies). On the sentiment that offenders are "animals", see e.g. Christine M Englebrecht and Jorge M Chavez "Whose Statement Is It? An Examination of Victim Impact Statements Delivered in Court" (2014) 9 *Victims & Offenders* 386 at 397-399.

[6] Rachel E Barkow, "Separation of Powers and the Criminal Law" (2006) 58 *Stanford Law Review* 989 at 995.

[7] Murphy, *supra* n2 at 511; Ristroph, *supra* n1 at1343.

[8] See below, Chapter 1: Public Wrongs in a Deliberative Democracy.

[9] See below, Chapter 4: The Citizen Victim: Reconciling the Public and Private.

[10] See below, Chapter 1: Public Wrongs in a Deliberative Democracy.

In this dissertation I defend the idea that deliberative democracy provides criminal theorists with a framework that can fulfil these roles in a uniquely capable way. Sentencing, as the fulcrum of public action and the point at which varying perspectives come to bear on that action, is the natural place for such a framework to demonstrate its mettle. By taking sentencing as the crucial instance of public decision-making and illustrating the implications that deliberative ideals have for that decision-making, the dissertation demonstrates that this thick conception of democracy can instil these decisions with political legitimacy while dealing with varying perspectives, participants, and legal and institutional considerations. In doing so, it goes some way toward sketching a democratic theory of public response to crime.

Theory and Method

Since democratic theory took a "deliberative turn" some thirty years ago, deliberative democracy has been a pre-eminent theory in political philosophy. Because of both its persistence and growth over this time, the theory, in fact, reflects a related family of views, with different strands revising aspects over time.[11] Consequently, any view of deliberative democracy will be one among many. All of them, however, share the notion that political decisions ought to flow from processes in which relevant parties exchange and genuinely reflect on the differing views and considerations informing those decisions. It is, in this way, a normative, aspirational theory rather than a necessarily descriptive one.

The version employed throughout this dissertation should in most respects be uncontroversial in its core aspirations, though well-versed deliberative democrats may characterize it as a stricter account than others, characterized by an emphasis on the constraints of deliberative processes rather than more *laissez-faire* views of later scholarship.[12] However, this is one that is well-justified by the uniquely high stakes of criminal sentencing, the risks posed by a less discriminating approach, and the collective nature of criminal law expression.

In short, a view along these lines holds that the legitimacy of public decisions is derived from processes of public reasoning—that is, processes in which citizens and their representatives

[11] For an overview of this diversity and the points on which they differ, see Andre Bächtiger et al, "Deliberative Democracy: An Introduction" in Andre Bächtiger, John S. Dryzek, Jane Mansbridge, and Mark Warren (eds), The Oxford Handbook of Deliberative Democracy (Oxford: Oxford University Press, 2018)

[12] In this respect, it is in many ways closer to "first-generation" deliberative theory, in a Rawlsian tradition: see Bächtiger et al, *ibid* at 3.

provide one another with persuasive reasons as to why a particular decision is the right one. Consequently, such processes are ultimately oriented toward justifying the decisions arrived at to those subject to them. The reasons provided in these respects are public, not only in the sense that they are given publicly, but also because the form and content of those reasons are such that others can understand, engage with, and ultimately be reasonably expected to accept them.[13] The reasons offered to others are not those of mere personal preference and interests, nor those of one's own controversial beliefs, but those based on common values that others themselves can endorse.

Deliberative democracy is often contrasted in these respects with more "aggregative" conceptions of democracy in which decisions are made simply on the majoritarian basis of aggregated personal preferences. Comparatively, because of the ways in which deliberation collects and tests views based on common goods, the theory is in part defended on the basis of its comparative epistemic benefits.[14] Additionally, the participatory and justificatory dimensions that better respect citizens as autonomous equals lead to deliberative conceptions being lauded for their intrinsic value as well.

With this in mind, a deliberative framework seems especially well suited for the task at hand—and criminal theorizing more generally—for at least three reasons. As a primarily procedural or second-order theory, it does not approach criminal controversy with an answer in mind but instead a view as to how a society of equals can find one. It is oriented toward navigating, though not ignoring, the considerable conflict and pluralism that characterizes contemporary political realities. Given that these realities undoubtedly characterize both criminal theory and practice, it shows promise for avoiding the problems that would be invited by a singular substantive or first-order theory.

Second, the theory has both sufficient depth and sufficient breadth to meaningfully speak to a variety of the issues that scholars have to address. Despite its procedural orientation, it does

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[13] Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004) at 3-4.; Joshua Cohen, "Deliberation and Democratic Legitimacy" in Alan Hamlin & Philip Pettit (eds) *The Good Polity: Normative Analysis of the State* (Oxford: Basil Blackwell, 1989 [Hereafter, "Democratic Legitimacy"]; John Rawls, "The Idea of Public Reason Revisited" (1997) 64(3) *University of Chicago Law Review* 765 ["Public Reason Revisited"].

[14] See e.g. José Luis Martí, "The Epistemic Conception of Deliberative Democracy Defended" in Samantha Besson and José Luis Martí (eds) *Deliberative Democracy and Its Discontents* (Burlington: Ashgate Publishing, 2006)

not just defer decision-making to eventual processes, but provides a thick conception of democracy that recognizes and directs debates. Moreover, while often focusing on more discrete deliberative forums, the literature has also developed to take a broader systemic perspective.[15] Consequently, the theory not only addresses the debates within sentencing fora, but also speaks to its inevitable relationships with other bodies—for instance, the legislature, appellate courts, or sentencing councils—and speaks to the distinct problems created thereby.

Third, the theory can withstand criminal scholars' understandable tentativeness about giving democracy real influence. In contrast with mere aggregative standards that legitimize the sort of "penal populism" that has often run amok in criminal justice policy,[16] the deliberative view involves demands that theoretically guard widespread ideals of principled, reasoned decision-making. To the extent that theorists endeavour for their frameworks to manifest themselves in the real world, deliberative approaches have also shown the same promise in practice.[17]

On the back of these strengths, this dissertation proceeds through an applied philosophical approach. To a certain extent, this approach is relatively straightforward. Deliberative theory provides a normative standard against which issues can be assessed and developed. As an instance of public decision-making, criminal sentencing is a viable site for applying these norms. As a consequence of this application, the dissertation demonstrates a view of criminal justice informed by political philosophical standards.

While to say that deliberative demands are applied to sentencing is clear enough, more needs to be said about to what exactly those norms are being applied. The answer to what aspects or features of criminal sentencing these norms are applied, and why, comes in two parts. On one hand, the dissertation applies deliberative ideals to a variety of different points of controversy or uncertainty in criminal sentencing scholarship: namely, the concept of crime, the

[15] Jane Mansbridge et al, "A Systemic Approach to Deliberative Democracy" in John Parkinson & Jane Mansbridge (eds), *Deliberative Systems* (Cambridge: Cambridge University Press, 2012) 1-26

[16] Julian V Roberts, Loretta J Stalans, David Indermaur, Mike Hough, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford: Oxford University Press, 2003).

[17] Paul L Simpson et al. "Assessing the Public's Views on Prison and Prison Alternatives" (2015) 11 *Journal of Public Deliberation* Iss. 2, Art 1; Geraldine Mackenzie et al. "Measuring the Effects of Small Group Deliberation on Public Attitudes towards Sentencing" (2014) 25 *Current Issues in Criminal Justice* 745-761; Robert C Luskin, James S Fishkin, and Roger Jowell, "Considered Opinions: Deliberative Polling in Britain" (2002) 32 *British Journal of Political Science* 455-487 at 463.

consequentialist-retributivist debate, the role and status of victims in sentencing decisions, the constitutionality of mandatory minimum sentences, and sentencing guidelines.

These particular debates are not a natural, objective, comprehensive, or necessarily constitutive set of features of criminal sentencing, though they are illustrative. Choices were made in part because in abstraction they do offer a roughly global view of sentencing. They should help readers by addressing the object of sentencing and how it triggers public decision-making, the constraints on the sort of deliberations that follow, how individual participants relate to these processes, the ultimate aim of sentencing, and how law and institutional relationships can facilitate this. Because the aims of this dissertation are not limited to one jurisdiction, the issues addressed are those that could arise outside of Canadian criminal justice and not necessarily tied to it explicitly. While the Canadian context is the most frequent reference point, some issues are explicitly theoretical while others engage with developments in other common law jurisdictions.

As will be discussed below, the use of problems *per se* as sites of application serves to demonstrate not just the applicability of deliberative democracy but also the utility of its conceptual resources. By addressing a distinct problem in criminal sentencing, each chapter endeavours to make two contributions simultaneously: resolve some question or debate in criminal scholarship by way of applying a deliberative framework, and grounding that scholarship in political theory as a consequence.

Lastly, it is worth noting that, even at a high level, the site of application of deliberative norms—that is, criminal justice—is itself a controversial, normative construct. Deciding what aspects of criminal justice deliberative ideals should be applied to involves subjective value choices. The dissertation makes no attempt to obscure this fact and indeed makes these choices explicit. In this respect, the application of deliberative democracy to criminal sentencing can be understood as an exercise in normative reconstruction—one of choosing what the author believes to be definitive, although not exclusive, features of a justifiable vision of criminal justice, and shaping and explaining this in a way that reflects democratic ideals.

Arguments

The application of deliberative theory in the way described above leads to two sets of arguments in this dissertation. While worth distinguishing, both are significant. First, there are arguments that might be characterized as arguments to sentencing scholars *from* deliberative democracy. The normative influence of deliberative ideals makes certain demands of criminal sentencing. In adopting these demands as its own and applying them to different issues, the dissertation makes a variety of arguments about what criminal sentencing in a deliberative democracy ought to look like.

Generally speaking, these arguments coalesce into a claim that public justification—and the public reasoning processes that give rise to it—ought to be central to criminal sentencing processes: that their object should involve prohibitions that have been so justified, that their forums ought to proceed through public reasoning, with lay participants, as citizens, respecting these requirements as well, and that the legal constraints and institutional relationships that encompass these forums ought to be such that they facilitate this practice. As deliberative standards are applied to various debates and issues in sentencing, each chapter makes individuals substantive arguments along these lines.

In addition to these kinds of arguments *from* deliberative democracy, the dissertation also makes arguments to sentencing scholars *about* deliberative democracy. While the first set of arguments ought to be convincing to those who already accept deliberative democracy as having normative authority, this second set should also speak to those more agnostic about deliberative conceptions of democracy and their relevance to sentencing. This is not to say that they seek to advocate the internal merits of the theory such that the first set of arguments are more compelling. Rather, these arguments involve appealing to the needs of criminal theorists themselves and together make an overarching case for the rich possibilities that exist for the relationship between political and criminal theory. In this respect, there are three interrelated theses, none of which are borne out in any single chapter but instead in aggregate over the course of the work.

First, and most fundamentally, it argues that deliberative democracy has implications for the internal life of criminal sentencing regimes. By internal life, this is to say that democratic ideals are of normative consequence not just for how criminal justice systems are chosen, but

also shape the ongoing character of those systems and the laws that animate them. That deliberative democratic theory *has* implications for criminal sentencing is admittedly assumed by a research question that asks what those implications are, and this may seem something of a non-conclusion to readers. However, that this is the case is in fact an important argument to be made, not least to address implicit and explicit doubts about the relevance of political—and specifically democratic—theory for ground-level doctrinal and procedural issues in criminal justice.

While recognition of political theory's importance is becoming increasingly standard, there is a risk that its relevance will be confined to high-level questions about the role of the state or the sort of society that criminal law is meant to protect. While such presumed constraints are often tacit, some scholars have explicitly doubted the potential for the "abstract" theorizing of political philosophy to meaningfully apply to the more "fine-grained issues" of criminal law.[18] In allaying these doubts, the work should hopefully serve to encourage further research in applied political philosophy along these lines.

More than merely having implications, the dissertation also argues that deliberative democracy provides criminal scholars with valuable conceptual resources that both clarify and address a number of sentencing's most contentious issues. This contention is demonstrated through the application of deliberative theory to a variety of criminal scholarship's issues and debates—for instance, those relating to theories of punishment, victim input, and mandatory minimum sentences. Through this application, the thick conception of democracy that deliberative theory provides is shown to connect to the nuances of scholarly debate and demonstrate ways forward. The theory's depth and breadth, in these respects, is essential. Not only does it offer a detailed standard for legitimate decision-making, but one that addresses decision-making at a variety of levels: the interpersonal, the forum, and the system. Frequently, the theory's comparative utility in these respects is made clear by demonstrating how aggregative conceptions of democracy are either silent on issues or generate unacceptable conclusions.

Lastly, rather than introducing an entirely foreign normative perspective, deliberative democratic theory can be seen to provide normative guidance while accounting for, articulating,

[18] Matt Matravers, "The Victim, the State, and Civil Society" in Anthony Bottoms and Julian V Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (London: Willan, 2010) 1-16 at 3-4.

and often legitimizing scholars' educated instincts about the nature of criminal justice. As demonstrated throughout,[19] scholars' concerns about criminal sentencing issues are often only intuitive and, as a consequence, must appeal to more ambiguous notions of justice or crime's public character in expressing these views. Through the way it captures these intuitions, deliberative democracy provides scholars with a language of public legitimacy that possesses clarity, depth, and force. In all, then, this dissertation reveals what is perhaps an underappreciated natural affinity between deliberative democratic ideals and contemporary criminal justice.

Outline of Chapters

The dissertation proceeds through six chapters. It opens in Chapter 1 with an exploration of the idea that crimes constitute "public wrongs". Focusing on the *object* of sentencing, the chapter lays a foundation for what follows by clarifying what sort of public problem criminal sentencing is concerned with. Despite historical prominence and renewed attention in recent years, scholars have yet to develop a viable account of how crimes can be understood as public wrongs. After surveying prior accounts and clarifying expectations, the chapter vindicates crime's public character by offering a novel account, relying on both key doctrinal features and a deliberative democratic framework through which to interpret their public significance. Ultimately it argues that crimes are public wrongs in that, in a context of heightened disrespect for public values, they signal a prospective public interest in how those wrongs are addressed. In other words, crimes can be understood as public wrongs not because such actions themselves necessarily wrong or harm the public, as many have suggested, but instead because they are the type of wrong that the public has a stake in addressing. Such an account underpins a view of sentencing as public decision-making, within which citizens and their representatives decide how best to use public power to manage public interests.

Chapter 2 picks up on this view of sentencing and examines the need for a framework to govern how these decisions are made. It begins by identifying the substantive and procedural shortcomings of traditional frameworks provided by theories of punishment and accounts of sentencing. Notably, these include an unduly constrained scope and insensitivity to the realities of pluralism, both in terms of competing moral choices and the normative significance of various

[19] Especially in Chapters 4 and 5, *infra,* though also resonating in parts of Chapters 1 and 3.

stakeholders. The need for a democratic theory is proposed, and the relevance of democratic ideals *within* criminal justice systems is defended against concerns that they should be limited to the processes of choice that shape those systems at the outset. The chapter subsequently outlines a deliberative democratic framework for this purpose, characterizing sentencing as a process of public reasoning aimed at a publicly justifiable sentence. This characterization is distinguished from an interpretation that would see deliberative democracy subsumed within an expressive theory of punishment and, despite its normative approach, is illustrated as connecting to the characteristic features of sentencing in practice as well.

Following from this view of sentencing processes, Chapter 3 explores the ways in which the constraints of public reasoning affect the *kinds* of reasons that can be offered in justifying a criminal sentence. In doing so, it outlines the ways in which public reasoning entails both moral and empirical constraints on the sorts of reasons that can drive public action. To illustrate their significance for sentencing, these constraints are applied to the longstanding conflict between retributive and consequentialist perspectives. The chapter does not engage with retributive or consequentialist theories *per se*, but rather the retributive and consequentialist reasons that they offer for action—that is, desert claims and consequence-oriented claims. While a qualified version of the latter is showed to be acceptable, the controversial and opaque nature of retributive reasons is rejected as insufficiently public in nature. Lastly, the chapter closes by defending this strong view of public reason against potential critics in light of the unique nature and context of criminal justice.

Shifting from a primary focus on reasons to a focus on those giving them, Chapter 4 addresses the most controversial of participants in sentencing forums: the victim. While reforms allow victims to provide input—including their own opinions—at sentencing, judges are left without guidance in the face of scholars' concerns about the potentially corrupting influence of victims' private preferences and dispositions on otherwise principled public decision-making. Taking the question as essentially one of how citizens relate to public decision-making, the chapter characterizes victims in these terms and shows that deliberative democratic theory both accounts for scholars' concerns while reconciling in theoretical terms victim input with a public sentencing process. Moreover, it shows how victims can make active contributions to processes of public deliberation by introducing novel perspectives and information, enhancing the quality

of sentencing decisions. Anticipating potential objections regarding the capacity of victims to meet civic standards in practice, the chapter also points to a growing body of empirical research that suggests victims' potential to do so and emphasizes the importance of being attentive to questions of procedural design to realize that potential. While taking victims as the test case, the chapter makes conclusions that implicitly apply to lay participation in sentencing more broadly.

Having explored the nature of public reasoning in sentencing through both substantive and participatory perspectives, Chapter 5 addresses the central aspiration of deliberative sentencing—a justifiable sentence, responsive to persuasive reasons—and demonstrates the potential for the law to preclude this. In doing so, it establishes a close relationship between what is *just* and what is democratically legitimate—that is, publicly *justifiable*. It concludes that to ensure both just and legitimate sentences, the legal frameworks within which sentencing operates must allow for decisions to be responsive to persuasive public reasons and the considerations to which they appeal. The chapter approaches this issue by way of intervening in the debate surrounding mandatory minimum sentences, focusing on the role that section 12 of the Canadian Charter of Rights and Freedoms plays in guarding against the injustice they create. The Supreme Court of Canada's jurisprudence in this respect has exhibited considerable deference to Parliament, and has constructed the issue as one of disproportionality, demarcated by a high threshold. Commentators have consequently argued that the narrow quantitative construction ignores relevant qualitative dimensions; that the high standard leaves untouched problematic sentences that fall below it; and that the Court's conceptual approach has been unreflective and incoherent. While these critiques are compelling, scholars themselves lack a coherent framework that can articulate the problem, bolster calls for reform, and, importantly, defuse the Court's own 'democratic' defence of deference. Emphasizing the necessity of public justification, deliberative democracy is shown to provide the resources for each of these three needs.

Chapter 6 continues the shift away from a singular focus on the sentencing forum to the legal and institutional framework in which it operates. After having emphasized the importance of judicial manoeuvrability in light of the demands of public justifiability, this chapter takes up concerns regarding judicial discretion and the consequent shift toward sentencing guidelines across common law jurisdictions. Noting how both intuitive and highly structured approaches to sentencing are problematic from a deliberative perspective, yet recognizing the value of

enhanced accountability and coordination, the chapter sets out an experimentalist model of institutional relationships based on Joshua Cohen and Charles Sabel's vision of "directly deliberative polyarchy."[20] In adapting this to the sentencing context, the chapter suggests a novel role for sentencing councils in facilitating the availability of good, evidence-based reasons in sentencing, drawn from the experiences of sentencing courts themselves. In doing so, the chapter argues that this model addresses the aforementioned concerns and promotes an institutional environment that enhances democratic accountability and coordination without constraining discretion in a way that hinders the legitimacy of sentencing decisions.

A conclusion summarizing the arguments and contributions of this dissertation, as well as noting future directions for research, follows.

[20] Joshua Cohen and Charles Sabel, "Directly Deliberative Polyarchy" in Joshua Cohen, *Philosophy, Politics, Democracy* (Cambridge, MA: Harvard University Press, 2009).

Chapter 1.
Public Wrongs in a Deliberative Democracy

The notion that crimes can be understood as *public* wrongs is neither new nor uncommonly invoked. Its lineage is readily traceable to at least the 18th century, when William Blackstone's *Commentaries on the Laws of England* stated authoritatively that legal wrongs could be divided into private and public categories.[21] In the late 20th and early 21st centuries, scholars suggested that the idea was "virtually…uncontested,"[22] while others have continued to characterize it as "well-established"[23] and "the most influential approach to understanding the nature of crimes."[24] Yet, despite this history and prominence, it is still far from clear what it actually means to say that crimes are public wrongs, the basis upon which this can be said, and whether and in what ways the concept is a useful one.

Recent years in particular have witnessed renewed attention to this way of conceptualizing crime, yet the emerging body of scholarship demonstrates neither universal

[21] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1774), online: < https://avalon.law.yale.edu/subject_menus/blackstone.asp#intro>. Certainly, this was not always the case. See e.g. David Seipp, "The Distinction Between Crime and Tort in the Early Common Law" (1996) 76 *Boston University Law Review* 59; David D Friedman, "Beyond the Crime/Tort Distinction" (1996) 76 *Boston University Law Review* 111.
[22] Lawrence C Becker, "Criminal Attempts and the Theory of the Law of Crimes" (1974) 3 *Philosophy & Public Affairs* 262 at 269
[23] Ambrose YK Lee, "Public Wrongs and the Criminal Law" (2015) 9 *Criminal Law and Philosophy* 155 at 1.
[24] Grant Lamond, "What is a Crime?" (2007) 27 *Oxford Journal of Legal Studies* 609 at 614.

acceptance of the idea nor agreement as to its meaning and value among proponents.[25] Critics have argued that existing accounts render the notion incoherent or trivial, while doubting that a defensible explanation is forthcoming.[26] Even among proponents, it has been argued that the notion either lacks real explanatory power or is "circular and unhelpful."[27] Leading figures have likewise seemingly reeled back their ambitions for the idea over the last two decades.[28]

Yet, understanding crime in terms of public wrongs should continue to be of great importance. There is growing recognition that criminal theory needs to be grounded in a public framework, and the ambivalence surrounding crime's 'publicness' acts as an impediment to a coherent and compelling vision of criminal justice in these terms. This is particularly the case when the relationship between criminal wrongs and the consequent public response to those wrongs is fully appreciated. Recent debate about public wrongs has often focused on what the notion can contribute to discussions about the nature and limits of criminalization, but its significance for theorizing criminal sentencing should not be overlooked.[29]

This chapter works to vindicate the notion that crimes can meaningfully and usefully be understood as public wrongs. It does so by exploring what a plausible account requires and by outlining a novel account of crime's public nature in a way that avoids the shortcomings of prior attempts. Through this, it not only contributes to freestanding debates on the topic, but also lays the foundation for this dissertation's exploration of criminal sentencing.

Ultimately, this chapter argues that crimes are public wrongs in that, given the way in which they involve a heightened disrespect for public values, they signal a prospective public interest in how those wrongs are addressed. In other words, crimes can be understood as public wrongs not because such actions themselves necessarily wrong or harm the public, but instead because, unlike civil wrongs, they are the type of wrong in which the public has a stake in the response. Such an account gives rise to an understanding of sentencing as public decision-

[25] For the recent growth in scholarship directly on the topic, see especially RA Duff and SE Marshall, "Crimes, Public Wrongs, and Civil Order" (2019) 13 *Criminal Law and Philosophy* 27 [hereafter "Public Wrongs"]; James Edwards and Andrew Simester, "What's Public About Crime?" (2017) 37 *Oxford Journal of Legal Studies* 105; Lee, *supra* n 23; Duff, *Answering for Crime*, *supra* n1; Lamond, *supra* n24; SE Marshall and RA Duff, "Criminalization and Sharing Wrongs" (1998) *The Canadian Journal of Law and Jurisprudence* 7 [hereafter, "Sharing Wrongs"].
[26] Edwards and Simester, *supra* n25.
[27] Lee, *supra* n23 at 170. Despite such conclusions, Lee makes clear at the outset that he has "no intention to argue against this…idea."
[28] Marshall and Duff, "Public Wrongs" *supra* n25, cf. Marshall and Duff, "Sharing Wrongs" *supra* n25
[29] Because of this, the aspirations of the account outlined here and those of others may differ to some extent.

making within which citizens and their representatives decide how best to use public power to manage public interests. This understanding invites, throughout the remainder of the dissertation, the use of deliberative democratic theory as a framework with which to understand and shape that decision-making process and the institutions that facilitate it.

More than just setting the stage for democracy's relevance to criminal sentencing, the chapter argues further that scholars have neglected the significance of democratic ideals for understanding the notion of public wrongs itself. Consequently, in arriving at the above account, the chapter demonstrates that a deliberative democratic vision of public governance provides important conceptual resources that not only helpfully inform the above account of public wrongs, but are likely essential to any plausible defence of the public censure thought to be inherent in criminal justice.

To this end, Part 1 begins by discussing the importance of vindicating the notion that crimes are public wrongs before clarifying what scholars should expect of a viable account. Part 2 subsequently explores prior accounts of the notion while discussing the shortcomings they present. Part 3 notes the political deficiencies of accounts of public wrongs and introduces deliberative democracy as a framework that can help construct a viable account. In Part 4, a novel account along these lines is sketched, which serves as the foundation for subsequent chapters.

1. Crime as Public Wrongs

A. Why Crime as Public Wrongs?

Scholarly attention to the notion of public wrongs is at an all-time high.[30] The body of scholarship on the topic has grown considerably over the last two decades and, given the lack of consensus it demonstrates, will likely continue to do so. Undoubtedly, this growth is partly a testament to the influence of R.A. Duff and Sandra Marshall, whose work has provoked and sustained engagement with the idea throughout this time.[31] Irrespective of their contributions to

[30] See works listed *supra* n25.

[31] Notably, Marshall and Duff, "Sharing Wrongs" supra n25; Duff, *Answering for Crime*, *supra* n1; Duff and Marshall, "Public Wrongs" *supra* n25. Other key works in this debate have been in direct conversation with these works: Lee, *supra* n23; Lamond, *supra* n24; Edwards and Simester, *supra* n25.

this trend, however, there are several reasons why this closer scrutiny—and the continued struggle to address disagreement—is worthwhile.

For one, criminal scholarship has historically neglected conceptualizing crime beyond circular doctrinal understandings as conduct that has been criminalized. Critics have argued accordingly that despite active debates *about* crime, "[t]he issue of what crime *is* is rarely stated, simply assumed."[32] Absent a cohering understanding of the law's diversity of offences, some might still charge the concept as having no "ontological reality."[33] In light of this, and given the great power wielded by the concept in practice, there is considerable value in developing a philosophical understanding of crime. Exploring crime through the lens of public wrongs is a promising approach to working out such an understanding.[34] This is especially the case given that its uniquely public management is often invoked in discussing crime's distinguishing features.

The notion of crimes being public wrongs also takes on particular importance and promise in light of the need to ground criminal theory in political theory. In this respect, scholars have increasingly acknowledged how criminal justice systems are, or ought to be, animated and constrained by public values and commitments, and not freestanding moral views.[35] The interventions of criminal justice, after all—whether punishment, supervision, or other treatments—are exceptionally coercive and targeted exercises of *state* power and must be explained and legitimized as such.[36] This need is still underexplored in criminal theory,[37] and the gap is one that extends to public wrongs scholarship as well.

Accordingly, it would be useful, if not necessary, to vindicate the notion that crimes are indeed "public" wrongs as a means of cohering the *object* of criminal justice with criminal justice's more general public theorizing. For some, this might only mean that crimes are public in the sense of being a permissible subject of state intervention;[38] however, a stronger view

[32] Paddy Hillyard and Steve Tombs, "From 'Crime' to Social Harm?" (2007) 48 *Crime, Law, and Social Change* 9 at 11.
[33] Louk HC Hulsman, "Critical Criminology and the Concept of Crime" (1986) 10 *Contemporary Crises* 63 at 71.
[34] Lamond, *supra* n24.
[35] See sources noted *supra* n1-2.
[36] Fletcher, *Grammar, supra* n1 at 181.
[37] *Ibid* at 151-152, noting an "absence of a developed literature on political and criminal theory" and that criminal theorists write little on political theory, while political theorists write little on criminal theory."
[38] See e.g. Duff and Marshall, "Public Wrongs" *supra* n25; Lee, *supra* n23.

suggests that the public nature of wrongs has logical and normative implications for the way that criminal justice is theorized more broadly. In addition to its importance for criminal theory generally, this view makes the notion of public wrongs particularly relevant in the context of this dissertation, the object of which is criminal sentencing.

In this respect, it should be noted that any given conception of crime has important logical implications for the way that sentencing is understood and what kind of decision-making process it entails. Sentencing is, after all, a process that decides how to respond to crime. If crime is understood as creating an unfair advantage, for instance, sentencing might be conceived of as a process of deciding how best to achieve an equilibrium of burdens and benefits.[39] If crime is understood as an assertion of superiority over the victim, sentencing might be conceived of as a process of deciding how to best humble the offender and reassert the victim's value.[40] If crime is understood as disobedience of a command backed by a threat, then sentencing might simply be a matter of simply following through on that promise.[41] The list could go on, and may overlap.

Importantly, the consequences of how we conceive of crime can also go beyond sentencing's teleological orientation to specify citizens' stake in the issue, their standing in the sentencing process that addresses it, and the resulting citizen-state relationship. Accordingly, insofar as it matters that our vision of criminal justice coheres with a particular political framework—for instance, the democratic vision explored in this dissertation—theorists ought to be attentive to the impacts of theorizing crime itself. In all, then, without adequately theorizing the public nature of crime, scholars not only risk incoherence but also risk undermining public ideals by theorizing the public out of the picture, importing antagonistic conclusions into how we understand the social response to crime.

Consider, as both an illustration and cautionary tale, Michael Moore's moralist-retributivist perspective. On this view, Moore conceives of crime simply as culpable moral wrongdoing, full stop, and as a consequence of his retributive logic, conceives of sentencing

[39] Herbert Morris, *On Guilt and Innocence* (Berkeley: University of California Press, 1976) at 31-58; George Sher, *Desert* (Princeton: Princeton University Press, 1987).
[40] Jean Hampton, "Correcting Harms versus Righting Wrongs: The Goal of Retribution" (1992) 39 *UCLA Law Review* 1659 at 1684; see also Dan Markel, "Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction" (2009) 94 *Cornell Law Review* 239.
[41] See e.g. James Q Wilson and Richard J Herrnstein, *Crime and Human Nature: The Definitive Study of the Causes of Crime* (New York: The Free Press, 1985) at 14.

principally as a process through which an individual's moral desert is determined and assigned.[42] As a result, his account does not assign any distinctively public character to criminal offences, and instead rationalizes the public control over criminal justice by way of institutional and epistemic, rather than political, considerations.[43]

Having the state undertake this role, Moore explains, serves to protect everyday people from the dangers that punishing presents to their virtues. Moreover, in comparison with private persons whose motivations may be corrupted, the state can be more consistent and more accurate in determining what individuals truly deserve.[44] As a result, Moore's conception of crime feeds into a patently paternalistic vision of sentencing and criminal justice—one whose fundamental features arise not out of a recognition of a shared stake or claim of ownership, but out of the need to withdraw a morally and intellectually challenging decision from ill-equipped citizens. Such a view stands in tension with a democratic perspective where, faced with public problems, citizens can be said to be meaningfully governing themselves.

Certainly, for those working toward theorizing the public nature of criminal law, Moore's characterization of punishment and the role of the state in facilitating justice are ready targets.[45] However, critics should be wary of addressing these things directly without appreciating the role that Moore's conception of crime plays in facilitating those ideas. In light of the above, and insofar as scholars are concerned with developing criminal theory that reflects political ideals, there is good reason to build 'from the ground up'. An account of public wrongs, as the object of the state's action and as a concept which itself suggests some *public* stake, is an appropriate place to start, if not a clear prerequisite for other theorizing.

B. Public Wrongs Beyond Ownership

In a legal, institutional, and procedural sense, the notion that crimes are public wrongs is straightforward and compelling. The state invests notable resources in maintaining close control over crime at all stages of its management, and both the law and institutions serve to reinforce its

[42] See e.g. Michael S Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford: Oxford University Press, 2010).
[43] Moore, "Two Theories", *supra* n3 at 40.
[44] *Ibid* at 42; Moore, *Placing Blame*, *supra* n42 at 152.
[45] See e.g. Duff, "Political Retributivism" *supra* n2 at 180 (noting Markel's critique and emphasizing Moore's attention in this respect at footnote 2); Moore, "Two Theories" *supra* n3; Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: Oxford University Press, 2007).

control over both process and outcome. The state seeks out crimes through public police forces tasked with crime detection, investigation, and the physical production of the accused. The decision to pursue the crime, both initially and throughout the proceedings, rests with the prosecutors and not the victim.[46] Indeed, the victim's consent is legally neither sufficient nor necessary for prosecution to proceed.[47]

Public prosecutors not only have the power to decide *whether* to lay charges, but also *what* charges ought to be laid, constructing the issue in terms they deem most appropriate. Police and prosecutors often have discretion over whether to divert criminal matters to extra-judicial resolutions, in effect delegating decision-making power and setting the issue on a path toward responses other than judicial outcomes.[48] Beyond that, public prosecutors are themselves able to dispose of cases in ways that they deem appropriate through plea bargaining.[49] Through all of this, as well as through the judicial decision-making that may ultimately result, the state holds a firm grip over criminal wrongs. All of this, of course, sets the stage for unparalleled, intensive state involvement by way of the custodial or supervisory outcomes characteristic of a criminal sentence.

The unique nature of this relationship is illustrated by contrast with civil wrongs. Torts—crime's extra-contractual cousin—are under private control from the moment they arise. No police force is tasked with detecting or investigating torts, nor would they act on any report of one. The state does not endeavour to prosecute tortfeasors and does not impose liability for these wrongs on its own initiative. Unless brought forward by an individual demanding recourse, it is fair to suggest that the state has no concern whatsoever.[50] As Marshall and Duff summarize,

> "[a] 'civil' model puts the victim in charge. She is the complainant who initiates the proceedings against the person who (allegedly) wronged her; it is for her to carry the

[46] Matravers, *supra* n18 at 6; Marshall and Duff, "Sharing Wrongs" *supra* n25 at 15 ("whether it is brought, and how far it proceeds, is up to the prosecuting authority").
[47] Kenneth W. Simons, "The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives" (2008) 17 *Widener Law Journal* 719 at 719. Victims, of course, may play a practical role as a key witness without whom the case could not proceed.
[48] This is the case with a number of restorative justice initiatives, for instance: see e.g. Mark S Umbreit and Jean Greenwood, National Survey of Victim Offender Programs in the U.S. (St. Paul, Minnesota: Center for Restorative Justice & Peacemaking, University of Minnesota, 1997).
[49] In Canada, see Department of Justice, "Plea Bargaining in Canada", <online: http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02_5/p3_3.html> (writing "there is still no formal process by means of which Canadian courts are required to scrutinize the contents of a plea bargain").
[50] John CP Goldberg & Benjamin C Zipursky, "Torts as Wrongs" (2010) 88 *Texas Law Review* 917.

> case through, or to drop it. … [I]t is for her to decide whether the case is brought and pursued, and whether the decision is enforced; there is no thought that she has a *duty* to bring a case. Moreover, the reasons why she might decide not to bring the case will remain private and could be quite arbitrary."[51]

Consistent with the state's lack of interest, civil parties are also free to address the wrong themselves, independent of state process. In reality, nearly all torts are addressed through extra-judicial means.

Moreover, *how* these wrongs are addressed need not reflect what the courts would have decided had the case been brought to them. The parties' own sense of justice "trumps other arguably applicable norms,"[52] and thus not only are judges generally uninterested in how the parties address the wrong,[53] they generally lack the authority to void a valid settlement even where its substance is contrary to its own views of substantive justice.[54] This is, of course, only even a question when one party makes a request, as the state takes no initiative to determine what the results of tortious wrongdoing end up being.[55] Further, even where courts have awarded their own judgment, parties are free to negotiate an alternative resolution should they deem this to be in their best interests.

In all then, the public displays extremely different positions in relation to criminal and civil wrongs. With torts, the state, while providing access to civil justice, is not invested in seeing to it that wrongs get addressed, or in seeing that they get addressed in any particular way. Where public and private visions of justice conflict, the latter wins out. With crime, however, the opposite is true. The state not only devotes considerable resources to seeing that such wrongs are detected, it maintains clear control over the proceedings, and ensures that they are addressed in a way that it sees fit. Where public and private visions of justice conflict, the former wins out.

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[51] Marshall and Duff, "Sharing Wrongs" *supra* n25 at 15.
[52] Carrie Menkel-Meadow et al, *Dispute Resolution: Beyond the Adversarial Model* (New York, NY: Aspen Publishers, 2005) at 391.
[53] James M Fischer, "Enforcement of Settlements: A Survey" (1992) 27 *Tort & Insurance Law Journal* 82 at 90.
[54] See e.g. *Robertson v Walwyn Stodgell Cochrane Murray Ltd*, [1988] BCJ No 485 (C.A.) at paras 4, 8 ("valid" here meaning according to general contract principles).
[55] Judicial approval of settlements are, however, a normal feature in class action lawsuits given their representative nature; see e.g. Class Proceedings Act, RSO 1992 at s.29 (Ontario).

With these contrasting structures in place, it is fair to conclude that crimes are, legally speaking, firmly under public "ownership."[56]

While this contrast is undoubtedly important to an account of crimes as public wrongs, it should not itself be taken as explanatory in nature. To accept this would involve making the tautological claim that crimes are simply public because the public controls them. The question for scholars looking to vindicate the notion that crimes are public wrongs is the prior question of *why* the public controls them in this way. To redeem the idea, the answer to this question should not rely, as Moore does, on incidental instrumental rationales, but instead on the normative idea that crimes are somehow public in character.

In this light, the strong legal and institutional position that the state takes with respect to crimes should be taken as indicative of some moral claim over them. The public invests so heavily in this position, and guards it so closely, because it is the public who have some stake in such wrongs. Crimes, in this sense, are not public wrongs because they are owned by the public, they are owned by the public because they are public wrongs. With this in mind, what might such an account look like? What expectations ought theorists have of an account, and by what criteria should an account be judged successful?

C. Expectations for Public Wrongs

In pursuit of the above, developing an account of crimes as public wrongs is a task of normative reconstruction. While a purely normative account of public wrongs might be unconstrained in re-imagining what the term could signify, to vindicate the notion that *crimes* are public wrongs it stands to reason that an account should be tied in some recognizable way to descriptive realities of criminal law.[57] This is not to say that theorists must accept and defend every characteristic of current practice,[58] but it is to say that an account of public wrongs needs to reflect, and indeed explain in a normatively convincing way, its central features.

[56] Nils Christie, "Conflicts as Property" (1977) 17 *British Journal of Criminology* [Hereafter, "Conflicts"].
[57] This is not to say that the features of criminal wrongs are not themselves normative, only that certain features have attracted sufficient doctrinal and scholarly acceptance that they can be treated as describing a certain criminal orthodoxy.
[58] Indeed, one can say with confidence that the criminal law has not always developed in a coherent manner: see e.g. Becker, *supra* n22 at 263.

Certainly, the extent to which there needs to be agreement between normative theorizing and descriptive reality is up for debate, requiring choices about which features ought to be considered central. At the same time, there are certain relatively uncontroversial aspects against which an account of public wrongs can be measured. Indeed, while there remain some differences, scholarship—consisting both of positive accounts and the critiques offered against them—has helped make clear certain expectations.[59]

First, any explanation of public wrongs needs to account for the fact that crimes are *wrongs*—that is, that they involve morally wrongful conduct for which offenders are responsible. Given a widespread commitment to restricting the criminal law's application, this could be fairly restricted to seriously wrongful conduct.[60] With respect to responsibility, this is not to say that other contributing factors, including societal responsibility for crime,[61] can be ignored, it is only to say that this wrongdoing involves sufficient personal responsibility as to warrant the individualized focus central to criminal liability and intervention.

Secondly, this account of wrongdoing should offer a compelling explanation of the targeted blame and censure that is central to criminal guilt. It ought to support the fact that, in holding an individual criminally liable, the criminal process fervently expresses a message that the offender ought to have behaved differently. Ideally, it ought to do so in a way that supports the idea that this censure is itself public in nature—that is, it is the public, *as a public*, that expresses this message.[62]

As will be seen, the wrongful nature of the conduct also needs to be explained in a way that does not distort the reasons for that censure. Where the criminal law censures murder, for example, the offender is condemned for the very reasons that murder is wrong, not for breaking a rule *per se*. While this concern is easily avoided in accounts that conceptualize crime simply as moral wrongdoing, the endeavour to explain crime as public introduces a dimension on which some accounts have stumbled.

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[59] Those who address such "criteria" directly include Lamond, *supra* n24; Marshall and Duff, "Sharing Wrongs" *supra* n25.
[60] Lamond, *supra* n24 at 613-614.
[61] Alice Ristroph, "Responsibility for the Criminal Law" in RA Duff & Stuart P Green (eds) *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011).
[62] See e.g. Marshall and Duff, "Sharing Wrongs" *supra* n25 at 13.

Taking censure as a key feature needing to be explained, however, is not to suggest that a successful account must explain that *punishment* is the appropriate response. While some take consequent punishment as an essential feature of crime that an account of public wrongs needs to explain,[63] others have accepted that this is unnecessary.[64] While it is certainly true that the availability of punishment is both largely unique to criminal justice[65] and a frequently employed tool therein, there are several good reasons to avoid conceptualizing punishment as an *essential* feature of criminal justice. More will be said on this with respect to sentencing in the next chapter, but it is worth noting its relevance with respect to the theorizing of crime itself.

For one, it seems entirely flawed to conceptualize a problem in reference to a supposed solution or substantive response, rather than vice versa. To do so on the basis of such a contested and problematic response as punishment is even more inexplicable. Moreover, even in a purely descriptive account of criminal practice, punishment is not seen as a necessary nor desirable response to all criminal convictions. Responses to crime can and do involve a variety of potential interventions which serve criminal justice—a fact which should increasingly be considered by criminal theory in light of interests to theorize a way toward less punishment.[66] Accordingly, an account of public wrongs needs to be able to explain with equally compelling force those instances of wrongs for which punishment is properly *not* employed as well.[67]

This is not to say that we should entirely ignore the way in which crime is responded to in assessing the validity of an account of crime itself. As was explained in the previous section, a viable account of crime as public wrongs should offer an explanation as to why it is appropriate that the state, rather than other actors, is responsible for initiating and pursuing the response to criminal actions.[68] So too must it explain the state's keen interest in holding on to that role. More specifically, it would also be seen as a weakness if an account could not explain the way in which criminal justice regularly involves uniquely targeted and intimate forms of public intervention—that is, a sort of response that can be contrasted with more diffuse public policy

[63] Lamond, *supra* n 24 at 613-614. Ambrose Lee also makes punishment central to the notion of public wrongs: Lee, *supra* n23.
[64] Marshall and Duff, "Sharing Wrongs" *supra* n25 at 15-16.
[65] Punitive damages are an exception.
[66] See e.g. Husak, *supra* n45.
[67] Depending on one's views, this may or may not be a large majority of them.
[68] Lamond, *supra* n24 at 613-614

interventions as well as less involved civil sanctions. These facts go some way to fulfilling the need to explain crime as meaningfully public.

Implicit in an account of public wrongs is also the necessity to distinguish these from private wrongs when doing so. This is necessary for any account of crime. As Douglas Husak writes, "[t]he desire to preserve *some* line between the criminal and civil law is so entrenched that this divide might be taken as a datum for which all theories of criminalization must account."[69] It is also the case specifically for an account of crime as public wrongs, though with the added task of differentiating crime from civil wrongs on the basis of its publicness. In this respect, Richard Dagger describes crimes as "'public' in the twofold sense that they both require the attention of the law and are different from the private wrongs…to which the law also must attend."[70] Since both private and public wrongs are public in the sense of being legitimate targets of state coercion, this distinction between criminal and civil wrongs needs to be explained on the basis of some additional or further public character. Otherwise, it would be no more appropriate to call crime 'public' than it would be to do the same for torts.

2. Existing Accounts of the Public Nature of Crime

While attempted explanations of the public nature of criminal wrongs have come from some of the most prominent criminal scholars and have emerged with increased frequency and depth, the literature to date has nonetheless failed to produce a viable account of crimes as public wrongs. Each of these previous attempts, despite their contributions, have in some way failed to deliver on one or more of the core needs highlighted above, and an exploration of extant accounts not only illustrates this fact but lays further groundwork for the alternative that this chapter offers. In structuring this exploration, the variety of accounts offered to date can usefully be organized around three general claims to publicness: the harms-the-public thesis, the wrongs-the-public thesis, and the demands-public-punishment thesis.[71]

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[69] Husak, *supra* n45 at 137.

[70] Richard Dagger, "Republicanism and the Foundations of Criminal Law" in RA Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011).

[71] The articulation of two of these can be traced to Lamond, *supra* n 24 at 614*ff*, although his categorization and the one provided here are not perfectly aligned; I would place Dan Markel's account as set out in Dan Markel "What Might Retributive Justice Be? An Argument for the Confrontational Conception of Retributivism" in Mark D White (ed), *Retributivism: Essays on Theory and Policy* (Oxford: Oxford University Press, 2011) [Hereafter,

A. Harming the Public?

Early accounts of public wrongs relied on harm-based rationales in explaining crime's distinctive public nature. Certainly, crimes are not inherently more harmful, in the sense of causing more damage, than their civil counterparts. In fact, many mere torts—that is, actions that attract only civil liability—damage the same values to a much greater extent than criminal offences.[72] Contrast, for instance, negligent gas works resulting in the total destruction of a home with a minor act of vandalism on that same home. The former of these, despite the degree of harm, remains a civil wrong while the latter is deemed criminal.

Rather than arguing that crimes were altogether more harmful, scholars in this vein have instead posited that the public nature of crime stems from the fact that, unlike civil wrongs, they harm the public as a community. An early expression of this view, Blackstone's *Commentaries* wrote that crimes strike at the very core of society, being the sort of wrongs whose effects society could not survive if permitted to continue.[73] In support of this, he argued that, in addition to any harm caused to the victim, crimes each have detrimental effects on the community as a whole. Crimes like treason and murder, he explains, harm *society* by undermining peace and order and depriving the whole of a member, respectively. As a result, the king, seen as the embodiment of that community, was himself taken to be injured and thus considered to be the appropriate prosecutor.[74]

Although his chosen examples may be plausible, Blackstone's reasoning is vulnerable to a variety of critiques when considered more generally. For one, a great deal of crime—even paradigmatic offences like common assaults—are hardly the sort of acts that can be seen as harming *the community*. At the same time, if the criterion is simply that the act harms the public

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"Confrontational Conception"] in both of the first two categories. The third captures Lamond's own approach, which aligns with the subsequent writing of Ambrose Lee, *supra* n23. See also Edwards and Simester, *supra* n25 at 108.

[72] See e.g. Marshall and Duff, "Sharing Wrongs" *supra* n25 at 7-8; Husak, *supra* n 45 at 137.

[73] Blackstone, *supra* n21 Book 4 at 5. Blackstone presents a difficult account to articulate, both because of the apparent diversity of rationales he blends together and because he does not go into depth on any of them. In his writings, one could argue that Blackstone distinguishes crime as a public wrong on any or all of the following: (i) that crime is a violation of public rights and duties, (ii) that crime is a violation of a "public law" which commands or prohibits acts to all, as opposed to regulating a subset of actors, (iii) that crime involves wrongs that are particularly fatal to society, (iv) that crime involves additional harms to the public considered as a public, varying according to each crime, and (v) that crimes are those acts that set problematic examples and necessitate deterrence. A similar argument has been offered much more recently by Richard Dagger and seems susceptible to the same critiques which follow: Dagger, *supra* n70.

[74] Blackstone, *supra* n2.

as a public, then why are negligent acts damaging public property, for example, dealt with through tort and not criminal law? Lastly, if certain *harms* are thought particularly fatal to the polity, it remains unclear why those same harms—for instance, depriving the community of one of its members—caused by acts deemed only tortious are not considered to be just as public and thus treated as criminal. After all, the harm is the same: society is wrongfully deprived of one of its members in each case.

Other scholars have taken steps toward redeeming the harm-based view by arguing that the public harm of crime can be linked to a unique doctrinal feature that sets it apart from civil wrongs: the *mens rea* requirement. In contrast with civil wrongs, criminal wrongs typically require a heightened fault element, typified by intention, though also including acting with particular knowledge or beliefs. In fact, this dimension is so central that it is said to differentiate "true crimes" from regulatory offences, and common law jurisdictions generally presume that crimes require such subjective fault elements even where the law is silent on the matter.[75] Others have noted that common law crimes nearly always required this, and deviations have been out of deference to Parliament.[76] Even where criminal liability follows from negligence, Canadian courts have maintained that criminal law necessitates that this fault go beyond the civil standard in being a "*marked* departure" from that standard.[77]

Recognizing the explanatory potential of this fact, Lawrence Becker, for one, suggests that the *way* in which crimes are committed, and the dispositions or traits that such a mode

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[75] In Canada, see *R v. Sault Ste Marie* [1978] 3 SCR 1299, *R v. ADH* [2013] 2 SCR 269. In the United Kingdom, see *B v. DPP* [2000] 2 AC 428, *Sweet v. Parsley* [1970] AC 132. Certainly, criminal law includes offences of negligence, as well as of strict or absolute liability. Nonetheless, I accept, as Lawrence Becker does, that subjective fault crimes represent the "major thrust" of criminality and that strict liability offences are sufficiently controversial as to raise serious questions as to whether they belong as part of the same criminal law phenomenon: see Becker, *supra* n22 at note 18. Consequently, the extent to which the view espoused here regarding the nature of crimes as public wrongs applies to the nature of quasi-criminal regulatory offences would benefit from further exploration; however, it is likely that they would be conceptualized in a distinct way. In this respect, it is perhaps instructive that Dickson J noted in *Sault Ste. Marie* that "[a]lthough enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application." In Canada, at least, any conceptualization may be complicated by the fact that such offences are not internally consistent either, at times involving *mens rea*, mere negligence, and also no fault whatsoever. Further, with respect to negligence-based crimes, it is worth recognizing that those approaching "true crime" status typically require a heightened degree of "criminal" or "gross"—rather than ordinary—negligence: see, in various common law jurisdictions: see e.g. *Criminal Code* s 219(1); *R v. Bateman* [1925] 19 Cr App R 8 , *R v. Adomako* [1994] 3 WLR 288.

[76] Lamond, *supra* n24 at 612. Lamond also notes that these crimes are the standard case from the non-legal, sociological perspective as well.

[77] *R v. Beatty* [2008] 1 SCR 49.

reveals, causes additional, "community-wide" harm.[78] This, he says, results from the way that the community tends to react to such actions. Where wrongs are committed intentionally or with grave negligence, he argues, community members lose assurance that others will act in ways conducive to social cooperation. Consequently, community members abandon their own "socially stable" behaviour, giving rise to the public harm of "social volatility."[79] Accounts from Robert Nozick and George Fletcher have adopted similar explanations, arguing that crimes uniquely harm the public by creating general apprehension or fear within the community.[80]

Despite the value of highlighting the differential fault requirements in distinguishing crime from tort, this version of the harm thesis fails as well for at least two reasons. For one, Becker admits that this argument relies on empirical claims that criminalized acts do in fact produce this volatility, and enough of it to warrant prohibition.[81] However, as Lamond rightly points out, these empirical claims are entirely implausible in relation to a variety of conduct that we rightfully think should be criminalized—for instance, bribery or tax fraud.[82] The same analysis could be extended to Nozick's and Fletcher's versions. Secondly, these accounts have been rejected on the basis that they distort, ignore, or even denigrate the central reason that many acts are deemed criminal: the wrong done to the individual victim.[83] If conduct is public—and therefore criminal—because of public harm and not because of the wrong done to the victim, critics suggest, this presents a distorted and unacceptable view of prohibition and the criminal process that accompanies it.

B. Wronging the Public

The failure of early harm-based explanations facilitated a later wave of accounts in which the public nature of crime could better, though still imperfectly, be expressed through emphasis on the way they *wrong*, rather than harm, the public. While ultimately unsatisfactory, the strengths of these accounts lay in the fact that they engage more explicitly with the political or civic dimensions of public life. Dan Markel, for instance, has argued that criminal acts can be

[78] Becker, *supra* n22 at 273*ff*.
[79] *Ibid*.
[80] Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1974) at 65-71; George Fletcher, *Basic Concepts of Criminal Law* (Oxford: Oxford University Press, 1998) at 35-36.
[81] Becker, *supra* n22 at 275.
[82] Lamond, *supra* n24 at 616.
[83] On this type of critique, see Marshall and Duff, "Sharing Wrongs" *supra* n25at 9; Marshall and Duff, "Public Wrongs" *supra* n25 at 39; Edwards and Simester, *supra* n25 at 115-117.

understood as situations in which the state uniquely needs to reassert its authority.[84] In choosing to break laws enacted within a liberal democracy,[85] Markel suggests, the offender rejects the authority of that body. Instead, the offender can be thought of as "usurping the sovereign will of the people by challenging their decision-making structure" and imposing his own "order".[86] By challenging the very regime by which the polity governs itself, criminal misconduct is "against" the public and the state as its representative, and appropriately considered a public wrong in consequence.

Though those who commit criminal offenses undoubtedly break with state directives, Markel's account of crime's public nature again leaves the reader unsatisfied. Centrally, the claim that in murdering or stealing the murderer or thief is rejecting the authority of the polity or the structure of decision-making seems implausible. While such a wholesale rejection might exist in exceptional cases,[87] it is more likely that individuals offend despite recognizing this authority—thinking instead that they would escape consequences, that the act would be worth the cost, or just simply not thinking about authority one way or the other. At most, one could argue that the offender rejects, at least at the time of the offence, the particular law they are breaking.

Markel himself accepts that "viewing proscribed conduct as a rebellion" seems implausible in speaking of crime in real time, yet suggests it is more plausible in describing crime in *ex ante* discussions, behind a veil of ignorance, on how to secure ideal social conditions.[88] However, even this justification ultimately fails to stand up in light of demands, to be explored later in this chapter and throughout the dissertation, that state action be explained to those subject to it in a way that they could accept.

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[84] Markel, "Retributive Damages" *supra* n40; Markel, "Confrontational Conception" *supra* n71. Like Markel, Malcolm Thorburn adopts a similar view of crime as usurping the jurisdiction of the state and, for the reasons explored below, is vulnerable to the same critiques: see Malcolm Thorburn, "Punishment and Public Authority" in Antje du Bois-Pedain, Magnus Ulvang and Petter Asp (eds) *Criminal Law and the Authority of the State* (Oxford: Hart Publishing, 2017).

[85] Markel specifies this as a necessary condition of the plausibility of his account, suggesting that this entails "reasonable laws fairly passed…that are generally respectful of persons' rights and liberties" rather than laws which "reinforce tyranny or oppression." ("Retributive Damages" at 264).

[86] *Ibid* at 262-263. Thorburn characterizes this similarly.

[87] The "Sovereign Citizens" movement might be such a case: see e.g. Charles E. Loeser, "From Paper Terrorists to Cop Killers: The Sovereign Citizen Threat" (2015) 93 *North Carolina Law Review* 1106.

[88] Markel, "Retributive Damages" *supra* n40 at 263.

Moreover, even if one accepts the notion that the offender is usurping the polity's decision-making structure, it falls victim to the same distortion critique levelled against the public harm perspective. What makes murder criminal—and thus necessitates public intervention—is the wrongfulness of intentional killing, not the challenge to the political order *per se*. As Grant Lamond notes,

> "We do not think, for example, that what makes murder appropriate for criminalization is that it involves the deliberate violation of legal norms protecting life. It is not in terms of the violation of the law that we approach the question of criminalization. ... Fault-based crimes are first and foremost moral wrongs, and their wrongfulness turns primarily (if not exclusively) on their violation of (legally independent) moral norms, not legal norms. What makes them appropriate for this type of legal response is not that they involve the knowing defiance of the law, but that they involve the deliberate violation of moral rights and interests, or other moral values."[89]

Such a critique is stands, therefore, against any account of public wrongs which seeks to downplay the relevance of the *actual* reasons for which conduct is criminalized in the first place.

Relatedly, it could also be suggested that tying criminality to the act of defying authority *per se* would necessarily complicate, if not erode, our intuitive view—reflected in legal practice—that different crimes warrant different responses. Conceiving all crime as rebellion would logically suggest that responses to that rebellion would, at least in terms of qualitative response, be the same.[90]

In an alternative view, an initial exploratory account from Marshall and Duff—one later adopted by others—has argued that criminal wrongs are public in that they are "shared" by the polity.[91] This shared wronging, they claimed, derives from the fact that polities, including the individual victim of a given crime, together "define themselves as a group, in terms of a certain shared identity, shared values, mutual concern."[92] Accordingly, in a way similar to how race- or

[89] Lamond, supra n24 at 619.
[90] One might argue in favour of different quantitative responses in terms of how serious that rebellion was, though this would require development and would likely collapse into relying on qualitative differences between crimes rather than in maintaining a focus on a singular phenomenon of rebellion.
[91] Marshall and Duff, "Sharing Wrongs" *supra* n25. Marshall and Duff characterize this early writing as exploratory in Marshall and Duff, "Public Wrongs" *supra* n25 at 28. See also Husak, *supra* n45.
[92] Marshall and Duff, "Sharing Wrongs", *supra* n25 at 19.

gender-based attacks might be experienced as a *collective* wrong by members of that gender or racial community, criminal wronging of an individual victim, in violation of common values, is viewed as a collective wrong.[93]

The analogy, however, is empirically unconvincing,[94] and recognizing this vulnerability[95] Marshall and Duff have restated an evolved and arguably less ambitious account of public wrongs.[96] In doing so, the authors continue to link the nature of public wrongs to a violation of a given polity's shared values.[97] However, instead of claiming that this fact results in a collective wronging that gives rise to a public character, they argue that it means that these are wrongs which *concern* the public—in other words, wrongs properly considered to be the public's business.[98] Accordingly, criminal wrongs are public in the sense that they satisfy this necessary normative condition for state concern and intervention. Wrongs that are not the public's business are therefore private, and outside the ambit of criminal practice.

While Marshall and Duff are right to reject critiques that this point is "trivial",[99] their account nonetheless falls far short of explaining crime's distinctively public character and why the state is responsible for the process and outcome. If "public" is interpreted as simply meaning a legitimate target of coercive public intervention, this fails to differentiate crimes from torts.[100] Certainly, both pass this *basic threshold* of publicness, contrary to what the "public" and "private" wrong terminology suggests. Though initiated by plaintiffs rather than the state, civil wrongs nonetheless involve coercive intervention—albeit of a different nature than criminal responses—where courts try a case and enforce a judgment against the will of the tortfeasor. Without challenging the legitimacy of this fact, then, adopting Marshall and Duff's view would require scholars to hold that both criminal and tort law are concerned with public wrongs.[101]

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[93] *Ibid* at 19-20.
[94] Lamond, *supra* n24 at 617.
[95] Duff and Marshall, "Public Wrongs" *supra* n25 at 28.
[96] 2019; see also Duff, *Answering for Crime, supra* n1 at 140*ff*.
[97] Duff, *ibid* at 141-143; Marshall and Duff, "Public Wrongs" at 28-35.
[98] *Ibid*.
[99] Marshall and Duff, "Public Wrongs" at 30-31, responding to Edwards and Simester, supra n 25 at 132-133.
[100] Lee, *supra* n23 at 159.
[101] *Ibid*.

Indeed, Marshall and Duff admit that their account of publicness only delineates this lower-level legitimacy threshold in explaining that there is no intrinsic connection between this sense of publicness and criminal justice:

> "That [something] is a public wrong gives us reason to do something, to respond in some way; but that is not yet to say that it gives us reason to criminalise [that thing] rather than, for instance, providing no formal response to it, and instead leaving any response to be an informal social matter, or rather than making it a matter of tort law rather than of criminal law."[102]

However, insofar as the expectation remains that the notion of crime as public wrongs can distinguish crime and its procedural ownership from tort, this account fails to offer anything of the sort. While it is true that crimes and torts are both public in the sense of being a legitimate "candidate"[103] for state intervention, something more is required to explain crime's unique "public wrong" label.

C. Demanding Public Punishment

As Grant Lamond has argued, the orthodoxy in accounts of public wrongs is to "locat[e] the nature of crime in wrongs done *to* the public."[104] Whether this is understood as harming the public or wronging the public, the paradigm remains that through his conduct the criminal actor offends against the public, and it is this fact which accounts for crime's public nature. Husak exemplifies this in arguing that "[u]nless some wrongs are done not only to individual victims but also *to* the community at large, we will be hard pressed to explain why the *state* has a legitimate interest in responding."[105]

However, in response to the failures of the above accounts, a third wave of accounts has suggested that this need not be the case. With particular sensitivity to the need for public wrong theorists to offer more than Marshall and Duff's threshold understanding, both Lamond and Ambrose Lee have sought to explain public wrongs in a way that accounts for the distinction

[102] Marshall and Duff, "Public Wrongs" at 30.
[103] I borrow this framing from Lamond, *supra* n24.
[104] *Ibid*.
[105] Husak, *supra* n45 at 137 (emphasis added).

between crime and tort.[106] To do so, both argue that crimes are wrongs which not only *concern* the state, but beyond that threshold, are wrongs that, uniquely, *ought to be punished by the state*.

While Lee foregoes a detailed rationale for this normative conclusion, Lamond unpacks this by revisiting *mens rea* as an explanatory feature of crime that distinguishes crime in this way. Instead of suggesting it causes additional harm, as Becker did, he notes that acting in such a way—taking into account the nuances of criminal definitions like recklessness requiring "unjustified" risk-taking—"manifests a disrespect for the interest or value that has been violated."[107] Interpreting this fact through a retributive lens, Lamond concludes that such wrongs deserve punishment.[108] Among this broader set of punishable wrongs, he suggests that the state punish those which are not only *permissible* targets of state coercion, but *ought* to be punished by the state on account of their gravity—this being because the nature of *state* punishment and condemnation is such that to impose this response for lesser wrongs would be excessive.[109]

In all, then, Lamond writes that crimes "are public wrongs not because they are wrongs to the public, but because they are wrongs that the public is responsible for punishing. There is a public interest in crimes not because the public's interests are necessarily affected, but because the public is the appropriate body to bring proceedings and punish them."[110] Likewise, Lee concludes that crime's "publicness" derives from "the nature of the punitive response that is owed to them, in which the state (as the public) plays a distinctive role."[111]

These accounts too, however, are subject to a variety of important critiques, not just in terms of the plausibility of the reasoning, but also in terms of to what they reduce the notion of public wrongs. With respect to the former, Lamond's account can certainly be criticized on methodological grounds for delineating crime because of a pre-determined response, and both can be criticized for tying their account to punishment specifically. Not only does this put the proverbial cart before the horse—or, in the language of Maslow, see nails because one's tool is a

[106] Lamond, *supra* n24; Lee, supra n23.
[107] Lamond *supra* n24 at 621-622. Lamond also goes on to demonstrate how negligence can demonstrate the same disrespect and that its criminality should be limited to such cases: see 623*ff*.
[108] He also requires that the value of criminalization outweighs its costs.
[109] *Ibid* at 626-627.
[110] *Ibid* at 629, see also 625.
[111] Lee *supra* n23 at 168-169.

hammer[112]—but they make the account contingent upon the appropriateness of punishment for all crime—a claim rejected earlier and substantiated further in the next chapter.

Even for those who might accept the inherent connection to punishment, these accounts display fundamental flaws. Lee himself admits that this understanding of public wrongs is "circular and unhelpful."[113] The question "What are public wrongs?" collapses into the question of "What should be criminalized?" and the term becomes a mere "placeholder" for that which should be punished by the state.[114] Those who focus on the notion's potential contributions to criminalization debates are left to admit that being grounds for punishment are what account for distinction between criminal and civil wrongs, rather than crime's particular public character.[115]

Accordingly, if "public wrongs" are indeed conceptualized as wrongs which the state should punish, the notion ceases to be the hoped-for explanatory account. Within such an account, crimes become "public" in the sense that, and because, they are handled by the public, and not because they themselves are uniquely public in character. In other words, publicness here does not explain *why* the state handles crime, but is instead a label assigned because the state handles crime—a fact which leaves the reader no better off than the descriptive procedural account noted at the outset. It is this logic that leads James Edwards and Andrew Simester to deride the "publicness" in these accounts as "the conclusion of an argument rather than one of its premises."[116]

Given the failings of earlier accounts, and reflecting on the above critiques in light of Marshall and Duff's account, Lee concludes that the theorist is faced with a dilemma.[117] On the one hand, they can understand public wrongs as merely those that concern the public, in which case the notion is "non-circular and [somewhat] helpful," but which fails to assign criminal law any unique public character beyond that shared with tort. On the other, the theorist can understand public wrongs as those which should be punished by the state, in which case the notion is "circular and unhelpful" and requires the theorist to instead focus on grounds of punishment to advance criminal theory.

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[112] Abraham Harold Maslow, *The Psychology of Science* (New York: Harper & Row, 1966) at 13.
[113] Lee, *supra* n 23 at 169, 170.
[114] *Ibid* at 169.
[115] *Ibid* at 170.
[116] Edwards and Simester, *supra* n 25 at 108.
[117] Lee, *supra* n23.

Faced with these options, both Lee, as well as Edwards and Simester, suggest that theorists leave behind the notion of public wrongs to pursue more fruitful lines of thinking.[118] With respect, abandoning this notion would be premature. While the predicament outlined by Lee is a challenging one, the remainder of this chapter works to demonstrate that it is in fact a false dilemma. By revisiting the notion of public wrongs in light of past critiques, but armed with a rich public framework in deliberative democratic theory, the notion can in fact be vindicated in a way that can advance criminal theory not just with respect to criminalization, but also criminal sentencing.

3. Public Wrongs in a Deliberative Democracy: Sketching a Novel Account

A. The Relevance of Political Theory to Conceptualizing Crime

If crimes are to be understood as public wrongs, both in the sense that they are of legitimate concern to the state—a sense which civil wrongs, too, share—and in the sense that they are especially or additionally public to distinguish them as uniquely public wrongs, it is perhaps obvious to say that political theory would be significant to the construction of an account. What exactly that significance *is*, however, is perhaps less clear. This ambiguity has not been helped by existing scholarship that, while not ignoring the relevance of political theory, has arguably given it too limited or superficial a role in developing an account of public wrongs.

In one view, political theory can be seen simply as a providing a framework delineating what acts might legitimately be criminalized. On this view, political theory says little or nothing about the concept of public wrongs itself—only what behaviours could fall under that category—and thus some scholars have even been willing to proceed without specifying any framework.[119] Though rarely mentioned, democratic commitments have often been given a similarly ineffectual role. Marshall and Duff, for instance, point to democratic deliberation simply as the means by which polities would determine the civic norms that they expect their members to adhere to.[120] Similarly, Lee's brief reference to democracy is only to suppose that liberal democratic decision-

[118] Lee, *supra* n23; Edwards and Simester *supra* n25 at 132-133.
[119] Lamond *supra* n24 at 626-627; Lee, *supra n23.*
[120] Marshall and Duff, "Public Wrongs" *supra* n25 at 35.

making would draw a line between public and private spheres, and thus what would or would not be susceptible to being criminalized.[121]

Within such accounts, democracy is reduced to a placeholder for what substantive decisions citizens and their representatives would make, and what theorists, rightfully, do not want to pre-empt by drawing firm conclusions one way or another. However, democracy itself can and ought to be more influential in developing the very idea of a public wrong. In this respect, Markel's view goes further by incorporating democratic commitments into his concept of public wrongs itself. While doing so in a way that ultimately fails, he recognizes that what offenders are offending against are not freestanding moral dicta, but democratic decisions. This much is right, and with a richer view of democracy, can be incorporated into a viable account of crime as public wrongs.

The following works toward the view that democratic ideals play a more significant role in shaping a conception of crime as public wrongs. As will be shown, these ideals do this, first, by providing an understanding of the prohibitions that offenders disrespect and, second, by favouring certain interpretations of that disrespect's significance. The richer account of democracy required for these purposes is that of deliberative democracy. Despite deliberative democracy's prominence in political theory, its significance for understanding crime as a political and legal phenomenon has yet to be explored.

This framework, as that which will be applied to sentencing throughout this dissertation, will be introduced in earnest in Chapter 2. Moreover, various aspects of that framework will be explored in more detail as they become relevant to specific issues in future chapters. For present purposes, however, it is essential to note, briefly, that within a deliberative democratic framework public decisions are legitimate insofar as they are *justified* to those subject to them in a way that they can accept.[122] This requires that decision-makers give good, public reasons for the decisions they make—including, for present purposes, the conduct they choose to prohibit.

[121] Lee *supra* n23 at 159.
[122] See *supra* n13 and accompanying texts.

B. The Significance of Mens Rea

As it stands, the literature leaves scholars without a viable explanation of how crimes can be meaningfully understood as public wrongs. Accounts to date have failed for a variety of overlapping reasons. For one, some scholars make their explanations contingent upon the truth of certain empirical claims that cannot be accepted, such as asserting particular society-wide impacts or perceptions of crime. Some, in an attempt to give the public some stake in crime, distort the nature of wrongdoing in a way that displace the moral reasons central to that wrongdoing. Some, taking more conservative positions, fail to distinguish crimes from tort's baseline public character. To address this, some turn to explanations that fail to give publicness any significant explanatory power in differentiating crime and tort.

Despite these failings, the literature does provide future scholarship with useful observations and demonstrates certain strengths which should be taken up. Among these strengths is the identification of doctrinal features useful in distinguishing crime and tort,[123] the making of public frameworks central to explaining what offenders are disregarding and how the response should be understood,[124] and the reliance where possible on relative uncontroversial claims for public well-being.[125] Although these aspects were worked into accounts incorrectly, their value is nonetheless noteworthy and forms a useful starting point for a more plausible account that avoids the above shortcomings.

The significance of *mens rea* is central in this respect. While both crime and tort are public in a basic sense, vindication of the notion that crimes are public wrongs requires an explanation of its public character in a way that distinguishes it beyond this common, basic sense. In other words, crime must be shown to be especially or uniquely public in its own way. Some distinction between crime and tort is thus not only a necessary component of such an account but its likely starting point.

As different accounts have suggested, the distinction between criminal and merely tortious wrongs can likely best be explained by reference to the *way* in which those wrongs are committed. The differential fault element exemplified by *mens rea* requirements for crimes has

[123] See especially Becker, *supra* n22, and Lamond, *supra* n 24.
[124] As does Markel, supra n40, 71; Marshall and Duff, "Sharing Wrongs" *supra* n25.
[125] See Becker, *supra* n22; Nozick, *supra* n80; Fletcher, "Basic Concepts" *supra* n80.

strong explanatory power in both descriptive and normative senses. As was noted earlier, despite some inconsistency created by legislative intervention, the requirement is still central to criminal doctrine, especially to views of what constitutes "true" crime, and even disciplines the lower threshold of objective fault elements. Moreover, the fact that something is done intentionally, knowingly, or even with particular inadvertence is intuitively significant, and has been a fact from which scholars have repeatedly drawn moral and practical conclusions.

What ought the scholar make of these modes of offence? Without being caught up in semantics, it is perhaps unrealistic to suggest that they should be understood as demonstrating outright "rejection", as Markel suggests. Such a view depends too heavily on a subjective fault element, makes no room for instances of criminal negligence, and implies a certain decisiveness or finality that may not always be present in criminal offences. Lamond is closer in noting that this disposition in criminal offences manifests a certain "disrespect,"[126] in the sense that criminal actors are failing to have due regard or show adequate consideration for something. Certainly, tortious conduct exemplifies some disrespect as well, and thus distinctively criminal fault should be taken as manifesting a *heightened* disrespect. However, the questions continue: A heightened disrespect for what? And in what way does this make crime public in nature?

While accepting the premise as central to an account of public wrongs, different conclusions can be drawn about these fault requirements' meaning and significance. Importantly, any such conclusions should be informed by a public framework that contextualizes this disrespect. Interpreting this doctrinal feature within a deliberative democratic framework not only infuses doctrine with public significance, but does so in a way that addresses the shortcomings of prior accounts and better fulfils aspirations. A key contribution in this respect can be seen in regard to the issue of interpreting *what* offenders are manifesting heightened disrespect *for*. From this fact, both a need for public censure and an ongoing public stake in how such wrongs are addressed can be seen as logical conclusions.

C. Disrespect for Public Reasons and the Public Nature of Criminal Censure

If criminal fault is taken as signalling heightened disrespect, it remains to clarify what it signals disrespect *for* as a necessary step in appreciating the nature and public significance of

[126] Lamond *supra* n24 at 621.

that disrespect. On one hand, if criminal law is to be adequately theorized in public terms, the significance of political decision-making cannot be ignored in this endeavour. As Markel rightly argues, offenders should not be seen as acting in breach of some supposedly universal moral truth but rather legislated prohibitions, products of political choice. In a democracy, these prohibitions—and that which the offender is acting in spite of—should properly be seen as democratic decisions.

On the other hand, Markel is vulnerable to critiques that to understand crime as disrespect for democratic decision-making is inaccurate and distortive. Lamond is quite right in arguing that offenders are not condemned for rule-breaking *per se*, but because of the interests or values that underpin such decisions. Nonetheless, to understand crime solely as disrespecting moral values *per se* is to ignore the normative significance of public theory and the impacts of the political process.[127] Accordingly, without adequately grounding these values in political theory, the legitimacy with which offenders are condemned risks being eroded.

What is needed, then, is a view which displays the strengths of both approaches—one which accounts for the public and political nature of prohibitions while at the same time remaining sufficiently linked to the values that support the normative nature of criminal condemnation. A deliberative democratic framework meets these needs by illustrating that what is being disrespected by the offender is neither a mere political decision nor freestanding value *per se*, but a directive that has been publicly justified to them—that is, one which has been supported and legitimized by good, public reasons that they themselves could be reasonably expected to accept.

Accordingly, while offending can be understood in political context, the persuasive normative reasons that work to justify the prohibition serve as the very basis upon which offenders are condemned. A prohibition against intentional killing, for instance, is a political decision in contravention of which the murderer is acting. However, condemnation results not from ignoring the public decision itself, but for disrespecting the public reasons (and the values that animate them) that justified that decision in the first place—in this case, presumably, the

[127] Lamond offers a thin explanation in this respect, only noting that the disrespected values should be public in some sense.

value of autonomy and human life. The reasons integral to the political legitimacy of that prohibition are thus the same that give condemnation its normative bite.

It should be clear on this view that criminal prohibitions should not, consequently, be understood as commands backed by threats. Publicly justified prohibitions do not address citizens with "*Do this, or else!*" but rather "*Do this because…*". Consequently, the reasons provided to citizens with criminal legislation are not those "prudential reasons" of avoiding pain,[128] but rather reasons derived from a shared political framework based on respect for mutual self-determination.[129] Accordingly, this view goes a long way toward addressing Hegel's concerns that threat-based conceptions treat "a man like a dog instead of with the freedom and respect due to him as a man,"[130] as each prohibition has been demonstrated as something that we have (our own) good reasons to forego.[131]

Stepping back, it should also be apparent that this deliberative understanding of prohibition—public reasons justifying why citizens ought to refrain from particular conduct—explains censure itself as an intrinsic or natural reaction to criminal offending. Censure, in the sense that it can be understood as expressing that the offender ought to have acted differently, can be seen as the expressive *reassertion* of those public reasons justifying prohibition. Where the polity deliberates and justifies its prohibitions with good reasons and the offender acts against those reasons with especial disrespect, it is a logical consequence that the polity disappointedly reassert those reasons upon finding out.[132] Censure, therefore, can be seen as a natural continuation of the persuasive burden that the state carries in relation to its citizens.

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[128] See e.g. R.A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001) at 86*ff*.

[129] A full account of the sort of authority that criminal law commands over citizens might follow, but is beyond the present scope.

[130] G.W.F. Hegel, *Hegel's Philosophy of Right* (Oxford: Clarendon Press, 1942) at 246.

[131] While a full account of this is beyond the scope of this chapter, it is worth noting that this fact may erode—insofar as there are good moral reasons being invoked to support all such prohibitions—the distinction between so-called *mala in se* and *mala prohibitum* wrongs.

[132] This consequence is supported in part by the fact that crime involves *heightened* disrespect for these reasons. Surely, insofar as would be required for their own legitimacy—as, recall, they too are public in a basic sense—tortious standards of care ought to be supported by public reasons as well. In failing to conduct themselves in line with these standards of care, some disrespect for these reasons might be demonstrated by tortfeasors. Nonetheless, the degree to which this disrespect warrants condemnation is clearly much less, and sufficiently addressed by the implied disapproval of civil liability. Importantly, it should be added that the sense of censure and expression invoked here is a literal one. The logical consequence is a communicative one, through the use of language, and not to be distorted into a symbolic justification for retributive punishment. Censure here, therefore, should not be

In addition to offering a compelling foundation for censure that avoids the distortive effects which have concerned scholars, this account has two further features worth making explicit. For one, the nature of *public* reasons ensures the legitimacy of that censure in the eyes of the censured. The offender is not just given reasons for why he ought not to have acted in the way he did, but persuasive reasons that he himself could reasonably be expected to accept, and is respected as an autonomous citizen accordingly. A deliberative approach to prohibition therefore not only secures legitimacy from a normative perspective, but, if properly actualized, would likely bolster perceptions in practice.

Secondly, this view also gives substance to the claim that offenders are not only subject to censure, but *public* censure. This is not just to claim that the state is the one censuring, but that it is the public—the normative community—with whose voice they speak. Moreover, it is not to make this claim in a symbolic sense. Because the language of public reason is that of shared reasons, a deliberative view bolsters the notion that public decisions, and the actions which give rise to them, are collective in nature.[133] In reasserting these *public* reasons, then, censure is properly understood as *public* censure.

In highlighting the value of a specifically deliberative vision of democracy, it is worth noting that an aggregative view of democracy would offer a much more precarious account of criminal justice. Under an aggregative view, note, a criminal prohibition might represent no more than the bare fact that the majority of citizens preferred that this act not be done. The reassertion of reasons, in such a case, does not follow naturally from the fact of prohibition, and the polity may in fact be reduced to appealing, as Markel did, to the democratic nature of the regime in condemning particular acts.[134] The citizen is thus reprimanded on the basis that he ought to have acted differently because a majority of his fellow citizens thought so. Reasons that incidentally underpin citizens' preferences may not be those acceptable to others, and therefore risk the legitimacy of condemnation even if reasserted. In any case, the absence of public reason as a

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understood as "deserved"—with the risks of importing other moral logics into the analysis—but simply "warranted" or "necessitated".

[133] Joshua Cohen, "Procedure and Substance in Deliberative Democracy" in *Philosophy, Politics, Democracy* (Cambridge, MA: Harvard University Press: 2009) 154-180 at 163 ["Procedure and Substance"]. Albeit seemingly non-committal to this lens, Marshall and Duff approach this idea by discussing the notion of overlapping consensus, but do not take the idea to this conclusion: see Duff and Marshall, *supra* n25. Marshall and Duff might do well to re-imagine their account of sharing of wrongs more strictly in this light.

[134] Markel, *supra* n40, 71.

coalescing constraint, substituted here for a variety of disparate rationales or preferences, deprives condemnation of its public, collective character.

D. The Public Interest in Criminal Wrongdoing: Beyond Censure to Sentencing

Thus, while it could be argued that crimes are public wrongs in that they are wrongs that warrant public censure, this account provides an unnecessarily weak explanation of crime's public character. Such an account, while perhaps going some way to explaining the resources deployed in bringing crimes to trial, cannot do so fully. Moreover, the logical response of public censure inadequately explains the subsequent sentencing process that gives rise to unparalleled state involvement in the lives of offenders. Why, if the state only needs to reassert the public reasons behind prohibition—a reassertion that can be made by the judge at the point of conviction—do institutions of criminal justice function to carry forward (often intimate) public involvement? For this reason, at least, scholars ought to go further in exploring the public significance of the offender's heightened disrespect.

How ought the scholar do so? What additional significance does this heightened disrespect carry? In giving meaning to this facet of the crime-tort distinction, Lamond, for one, interprets disrespect using a retributive rationale—the seemingly dominant perspective in public wrongs scholarship.[135] In this logic, the disrespect manifested by criminal offending—unlike tortious wrongdoing—*deserves punishment*, and it is this desert that explains the continued and involved role of the state following conviction.

There are, however, at least two objections to interpreting this disrespect in a retributive way: one from the standpoint of deliberative democracy and another from the notion of crimes being public wrongs. With respect to the first, there are arguments, to be unpacked in Chapter 3, supporting the idea that retributive reasons fail to satisfy the requirements of public reason.[136] In short, the claim that offenders *deserve* punishment not only falls foul of the moral constraints of public reason on account of its controversial nature, but also falls foul of empirical constraints on account of its opacity.

[135] Each of Lamond, Markel, Marshall and Duff, and Lee—all of whom largely represent the latest scholarship in the area—either explicitly adopt a retributive rationale in giving crime public meaning or suggest that these questions be considered. Lee seems to be relatively non-committal in this respect, but still refers to retributive questions and does not exclude the rationale.
[136] Chapter 3, below.

Chapter 3 thus argues that retributive reasons in sentencing are excluded by the demands of democracy. If this is the case, a deliberative view similarly excludes the use of these reasons in interpreting the significance of the offender's disrespect. The second objection, from the notion of public wrongs itself, has already been surveyed. If disrespect is interpreted as simply those that merit punishment, the account fails to assign crime any distinctively public character, instead leaving crime to be understood as public only insofar as it is—like civil wrongs—a legitimate target of state intervention, and distinguished by retributive logic. A novel interpretation is thus required.

Beginning with the idea that criminal offending signals a heightened disrespect for public values, it is no great step to recognize that, for a community concerned with seeing those values respected, offending equally signals a need to bring the offender back within the normative community. Disrespect for public values, not just internalized but demonstrably acted upon, signals to the polity that the offender is insufficiently governed by the reasons and values it has set out. Naturally, this gives rise to a concern about future behaviour and a potential need to take steps to ensure that such values are respected going forward.

In other words, criminal acts, defined as those acts that demonstrate heightened disrespect for public values, suggest a *prospective public interest*. Because public values—for instance, the safety or well-being of citizens—are seemingly insecure, the public can be seen to have a stake in *how that wrong is addressed*. Crimes, in this sense, are public wrongs not in the sense that such acts themselves harm or wrong the public—and are thus understood as acts "against" the public—but because they are wrongs in the addressing of which the public has a rightful stake.

Private wrongs, in contrast, do not signal this public stake, either because they fail to signal the same level of disrespect, or because the intentionality they evince is not directed at public values. As discussed previously, mere torts, despite involving publicly imposed duties, do not signal the same worrying degree of disrespect for public values that criminal levels of fault do. Where torts *are* committed intentionally, there tend to be parallel criminal offences that capture these acts where they rise above the level of being "mere" torts. While intentionality may be present in contractual breaches, for example, it manifests against privately determined obligations, rather than publicly reasoned ones. When a breach of contract *does* show disrespect for public values—for instance, where those in breach do so knowing that it will endanger life or

cause serious bodily injury, they too may be subject to criminal attention.[137] Criminal wrongs, therefore, uniquely signal a public stake.

Censure, insofar as it is understood as a process of persuading the offender that they ought to have acted differently, goes some way toward addressing these concerns. In certain circumstances, this may itself be sufficient and no further action may be required.[138] At the same time, however, censure by itself may be insufficient in certain cases and more may be needed. The question therefore remains to be asked what the public's stake is specifically, and whether and what intervention may be further required to address it. The process of *sentencing*, in this view, is therefore properly understood as public decision-making aimed at how state power and resources should be used.

The reason the state has control of criminal wrongs and proceedings in the way they do, then, is not merely instrumental. Rather, it is because, as the body through which the public collectively and legitimately manages its interests, the state has a moral or proprietary claim to the problem.[139] Insofar as the wrongdoing signals the public's interests, the problem is rightfully *its* problem.[140] The state ought therefore ensure that these wrongs are detected and managed in a way that is in line with the public's interest. Generally speaking, this necessitates that those

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[137] *Criminal Code*, s 422.

[138] It should be made clear in this respect that while censure and public decision-making follow from the same notion of public wrongs, they are in fact distinct and separable responses that should not be conflated. Stepping back, either of these responses could, in different circumstances, suffice on its own. In addition to the case where censure itself suffices to address any public concern, the distinction between censure and the question of how to manage the public interest is further evidenced in cases where, because of mental illness, offenders are deemed to be "not criminally responsible." In such cases, the condemnation or censure of criminal blame is rightfully thought to be inappropriate and is omitted. Nonetheless, despite the fact that there is no need for censure, there is still evidently a public interest to manage the offender, and thus the basic structures set up in this respect apply. Given an understanding of censure as the reassertion of public reasons for abstention from certain behaviour, this is readily explicable: either because the cause of the offending was not a disrespect for values but instead mental illness (and thus, with the illness addressed, there is no real need to reassert those reasons), or, because of the mental illness, it makes little sense to engage in moral dialogue (as the interlocutor is not in a mental position to appreciate those reasons).

[139] Cf. Christie, "Conflicts" *supra* n56.

[140] It is so "insofar" as this is signalled because there can of course be parallel actions against an offender, and while these actions may overlap, criminal proceedings are concerned with the public's interests while leaving private interests to civil proceedings. Consider, for instance, the emergence of punitive damages in civil proceedings or compensation orders in criminal proceedings. Also, note that the victim's interests can of course be seen as part of the aggregate public interest as well: see Marie Manikis, "Conceptualizing the Victim within Criminal Justice Processes in Common Law Tradition" in D Brown, J Turner-Iontcheva and B Weiber (eds) *The Oxford Handbook of Criminal Process* (Oxford University Press: Oxford 2018) [Hereafter, "Conceptualizing the Victim"].

working in a public capacity make legal decisions in pursuit of and in response to these wrongs, rather than private citizens.[141]

Now, critics might object that this account relies on implausible empirical claims and argue that it is inaccurate to say that the public necessarily fears or is all that concerned about offenders' future behaviour or dispositions. To be sure, it is possible that this is not, or not always, the case. However, it is important to be clear that the account offered here does not rely on the assertion that the public *in fact* feels this way. Fundamentally, the argument offered here is a normative one, not an empirical one: that the nature of crime is such that it gives good reason to be concerned about the public's prospective interests. Because of this, it is a natural response for a vigilant state, having concern for the values it legislates, to facilitate something akin to the criminal process in order to determine the degree to which such concern is warranted in each case and what to do about it. Insofar as political processes give rise to vigilant and competent government, this should also be an empirical fact.

Moreover, the point is not that every crime *requires* a public response beyond the confrontational reassertions of censure, only that the nature of crime is such that it firmly raises the question. Indeed, the open-ended nature of this question adds to the account's defensibility. Certainly, criminal offences—even those pursued and brought through to conviction—are not always felt by the state to require public involvement following conviction. As well, where it is felt necessary, that involvement can take a variety of forms and have a variety of more specific objectives. Accordingly, unlike other accounts the notion of crime here does not *compel* a response, nor compel a particular *type* of response. Instead, this view of public wrongs and the sort of responsiveness it inspires reflects the reality that, first, public involvement may not be justifiable and, second, what sort of response—both qualitatively and quantitatively—varies depending on the person, the details of the offence, and other considerations.

[141] Manikis convincingly demonstrates that victims can further this pursuit of the public good by acting as a motivated check on decision made by public prosecutors, for example: see *ibid*. Nonetheless, as a general policy, public control is appropriate. The same might be said about delegating criminal justice decision-making to victim-offender mediation: it might be the case that in certain circumstances addressing crime through these "private" processes can effectively address public concerns—for instance, by way of the changes they can spark in offenders.

4. Conclusion

Despite its importance to criminal theorizing, and its long and prominent history, a convincing explanation of the notion that crimes are "public wrongs" has been elusive. A variety of attempts have been made, and have proliferated in recent years, yet each has failed on one or more counts. Building on the best aspects of prior accounts, and avoiding their flaws, this chapter provided a novel explanation for crime's public nature inspired by political theory. Rather than arguing that crime is such that it harms or wrongs the public, this chapter has argued that crime's public nature is to be found in the way that the public has a stake in how the wrong is addressed. By virtue of its doctrinal features and the nature of democratic prohibition, criminal law identifies those offences involving a heightened disrespect for public values.

In addition to giving rise to a compelling understanding of public censure tied to the reassertion of public values, the account also gives rise to an understanding of sentencing as public decision-making within which citizens and their representatives decide how best to use public power to manage the public interest at stake. Carving out this space for public decision-making, this understanding invites throughout the remainder of the dissertation the use of deliberative democratic theory as a framework with which to understand and shape that decision-making process and the institutions that facilitate it.

Chapter 2.
Deliberative Sentencing: A Framework for Public Responses to Crime

The previous chapter defended the notion of crime as a set of "public" wrongs signalling a public stake in how those wrongs are addressed. Those who commit criminal offences demonstrate, through a heightened disrespect for public values, that these values are insecure and that the public has a prospective interest in having steps taken to safeguard their realization. The importance of seeing to it that responses to these wrongs meet public needs accounts for the unique way in which the state actively identifies, and closely guards control of, criminal offences. Following from this is the view that the processes that follow criminal conviction ought to be understood as processes through which these public interests are managed. It is in this context that criminal sentencing ought to be understood and, consequently, its public and political nature.[142]

Naturally, the question that then arises for sentencing is how the state ought to do justice in these situations, managing the public's interests in a way that respects the requirements of the legitimate use of public power. It is, in short, a question of how the public should properly respond to crime. Answers to this question will be predictably controversial. These decisions are such that they not only take place in complex social and moral situations, but also involve

[142] Even should the foregoing conception of public wrongs be rejected, the public and political nature of criminal wrongs can still be ascertained in looking at the realities of sentencing: see *"*Deliberative Sentencing: Practical Beginnings and Productive Critique*"* below.

opposing and strongly held views of what a just response would entail, and of the bases on which that response should be determined. As one commentator has written, debate in this area "is as endless as it is intricate over ideas that are as irreconcilable as they are self-limiting."[143] As a result, he suggests, debates "always seem to produce more heat than light."[144]

Despite the attendant controversy, it remains a central task for criminal theorists to work out some framework for how the public should respond to crime, and one that can manage the pluralistic political reality that creates this "heat". Such a framework must clarify how and when public action is legitimate, while accounting for the diversity of views within that public and the relevance of stakeholders, all in a way that serves, rather than undermines, the legitimacy of those decisions. In answering the question of how the state should respond to crime in light of these challenges, the thrust of this dissertation's answer is: democratically. Insofar as public interests are at stake, and with public power being wielded in the public's name, democratic ideals should be operative.

In this respect, this chapter lays the groundwork for the four chapters that follow by taking initial steps to clarify a theoretical framework for public responses to crime rooted in deliberative democratic theory. While later chapters discuss the application of this framework to sentencing issues in more detail, this chapter introduces deliberative democracy in earnest, makes the case that it can capably explain and direct sentencing decision-making, and sketches an initial relationship.

To do so, the chapter starts in Part 1 by identifying the failures of other frameworks in explaining and directing how the state responds to crime. Rather than criticizing each on its internal merits, the analysis focuses more on the structural or formal aspects of these frameworks, notably with respect to their scope and political deficiencies. In Part 2, the chapter discusses deliberative democracy's normative features and their justification. Pre-empting concerns about the theory's application to sentencing, it first explains why democracy should have normative significance at the point of sentencing, rather than only at the earlier point of selecting a criminal justice system generally. Lastly, the chapter argues that the theory succeeds

[143] Robert A Ferguson, *Inferno: An Anatomy of American Punishment* (Cambridge: Harvard University Press, 2014) at 25.
[144] *Ibid* at 50.

where prior frameworks have failed, takes care to distinguish it from the pull of punishment theory, and demonstrates how the theory connects with and directs sentencing practice.

1. Failed Frameworks: Beyond Theories of Punishment and Judicial Solitude

Just as the question of how to respond to crime remains unresolved, so does the need for a satisfactory normative framework. What is needed in this capacity is a theory that can not only assist us in making sense of the endeavour toward distinctly criminal justice but, crucially, provide us with direction for the decision-making inherent in that endeavour. The traditional contribution from criminal theory in this respect has been a variety of competing theories of punishment. In their basic structure, such theories seek to address these needs, each offering a lens through which to understand criminal justice and a normative standard against which to judge potential responses. Although such theories have made significant contributions in elucidating the complex and varying issues that need to be considered, there are a number of ways in which theories of punishment as we find them fall short of what is required.

A. Punishment and the Political

Notably, theories of punishment traditionally appeal directly to moral theory in offering normative frameworks for public intervention. In doing so, these theories, from a particular standpoint, make reference to purportedly objective and universal moral standards. According to a consequentialist view, for example, actions are morally justified if and insofar as they produce desirable outcomes.[145] Putting aside whatever critiques might be levelled at any individual moral philosophy, this traditional approach as a whole is problematic—its key failing being that it neglects the public, political nature of state intervention. The decision as to how the public ought to respond to a criminal offense is, as was demonstrated in the previous chapter, not an isolated, individual moral choice, but rather a collective choice implicating collective interests. As a result, the question of how to respond to crime cannot be a question solely for moral philosophy. Rather, the debate over how crime ought to be responded to—and how public interests are managed—must be reframed in political terms and located within a theory of the state.

[145] David Wood. "Punishment: Consequentialism" (2010) 5(6) *Philosophy Compass* 455.

The most basic form of this requirement manifests itself as the challenge for moral theories to be substantively aligned with political conceptions of proper state action: if imposing one's desert is to form part of a theory of criminal justice, for example, it must also be argued that imposing desert falls within the legitimate scope of state action. This basic condition of political legitimacy seems to be an increasing expectation within criminal theory, and appropriately so.[146] A more robust version of this requirement, however, would see the political challenge as necessitating more than a moral theory that simply falls within the realm of permissible action. Rather, criminal justice requires a political account that goes deeper to address the complexities of political choice involved, incorporating some procedural mechanism for shared self-determination, and consequently manifesting the public values that we recognize as such.

Pablo de Greiff highlights such a need in discussing the inability of a purely moral theory to itself adequately justify legal punishment:

> "Success [in that regard] would entail the subordination of legal to moral, and in this case, punitive, ends. But this subordination is simplistic. It assumes (a) that the moral rules from which an obligation to punish is derived are clear and mutually compatible, and (b) that there are no relevant contextual judgments to be made in the justification of a practice such as punishment. But both assumptions are implausible: frequently, we face competing moral demands with respect to punishment. Similarly, we frequently acknowledge that our moral interests in punishment conflict with ethical and pragmatic interests… To put the point in everyday terms, there is an unavoidably 'political' dimension to the practice of judgment which is underdetermined by morality."[147]

Accordingly, any framework for responding to crime must satisfy a number of political functions. For one, it must account for the necessity of value judgements in choosing *between* competing moral demands. This is so not only with respect to one's own competing values, but more chiefly with respect to the pluralism that persists across the citizenry more widely. A fatal flaw of moral theory is that it fails to meet the challenge of reasonable pluralism—the fact that

[146] See *supra* n1 and accompanying texts.
[147] Pablo de Greiff, "Deliberative Democracy and Punishment" (2002) 5 *Buffalo Criminal Law Review* 373 at 400-401.

any given comprehensive moral theory could and would be reasonably rejected by any number of citizens upon which theorists impose their moral view.[148] In such cases, how could it be said that the citizens governed by such moralities are being respected as autonomous equals engaging in (albeit, shared) self-determination? Moreover, an adequate framework also needs to account for the value judgments that arise in the situational *application* of moral demands in light of other considerations, as even agreed-upon principles become controversial in determining how they apply in practice. Differing visions of context, tolerance for risk, and priorities in relation to resources or other values all invite further controversy.

Certainly, a moral theory of punishment—even one which passes as politically grounded in the basic sense—falls short of the sophistication needed here. The public, political challenge demands deeper, procedural resources to navigate these situations. Failing this, criminal justice frameworks are destined to undermine the autonomy of the citizens subject to them while painting an artificially simplistic view of decision-making. This result not only fails to legitimize the most coercive of decisions the state makes, but to the extent that recognizing and addressing political disagreement can result in better decisions overall, also leads to less satisfactory outputs.

B. Punishment and Scope

Further, it is not just the nature of traditional criminal theorizing that has been problematic, but also its scope. If we understand theories of punishment as attempts to theorize the ways in which—and the reasons for which—punishment can or ought to be used as a response to criminal offenses, theories of punishment should at most comprise a particular vein of a broader theory of criminal decision-making. Absent universal agreement on the fact that punishment—understood here at state-inflicted pain, intended as such[149]—ought to be the natural or default response to all criminal acts, it seems inappropriate to limit the discursive scope of criminal justice to one which assumes such agreement already exists. Despite the regularity with

[148] Rawls, *supra* n13.

[149] The notion of punishment is not without varying interpretations, and moreover, is sometimes invoked unhelpfully as a blanket term for coercive interventions generally. Spoken of here is the term in line with Christie's understanding as the "inflict[ion] of pain, intended as pain," which features in a diversity of mainstream theories of punishment. Nils Christie, *Limits to Pain* (Eugene: Wipf & Stock, 1981) at 5. For a helpful discussion of the varying uses of the term, see Martin Wright, "Is it Time to Question the Concept of Punishment?" in Lode Walgrave (ed), *Repositioning Restorative Justice* (New York: Routledge, 2011) at 5-7.

which we bundle the terms "crime" and "punishment", agreement that the latter is the corollary of the former has not been reached within scholarship, law, or popular discourse.[150]

Consequently, both pragmatic and political reasons mobilize in favour of a framework that offers greater discursive scope and positions punishment as one option amongst others. Certainly, a theoretical framework for how to respond to crime must be sufficiently agile to maintain a rational connection between the response employed and desired outcomes or values in varying circumstances, and it is naïve to think that punishment can best, or even effectively, serve all objectives in all cases. Presuming at least a minimal concern with the effects of public response, then, a more general framework would do much to survive critical criminology's persuasive argument that, given the heterogeneity of criminal acts, their circumstances and motivations, and offenders as individuals, "a standard response in form of…punishment cannot *a priori* be assumed to be effective."[151]

Moreover, moving beyond traditional preoccupations would facilitate public choices in line with what is believed to be most appropriate in varying circumstances, and thus better respect the autonomy of citizens to whom good reasons are owed for the way public power is used, whether against them or in their name. Both of these dimensions—the need for theoretical agility and respect for democratic choice—seem of heightened importance at a time when criminal theorists themselves are looking to theorize their way to *less* punishment in light of its problematic proliferation.[152]

A broader perspective, in contrast, opens up possibilities in both practice and theory, as the subtle agenda-setting of a punishment discourse unnecessarily and unhelpfully constrains thinking. With a narrowed frame limiting decision-makers to its qualitative and quantitative variations, a punishment lens risks becoming Maslow's hammer, viewing every situation as if it

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[150] In addition to the fact that sentencing options include non-punitive strategies, the growth of the restorative justice movement in academic and grassroots circles, for one, highlights a significant rethinking of contemporary approaches to state responses to crime. This is not to say that all proponents of restorative justice approaches reject punishment in all cases nor believe that restorative and punitive approaches are irreconcilable: see Kathleen Daly, "The Punishment Debate in Restorative Justice" in Jonathan Simon and Richard Sparks (eds), *The Sage Handbook of Punishment and Society* (London: Sage Publications, 2013) 356.

[151] Hillyard and Tombs, *supra* n32 at 10 (discussing Louk Hulsman's scholarship).

[152] Douglas Husak's minimalism is a good example of one such effort, though he does this from a front-end position by re-theorizing the principles of criminalization. While that may be both necessary and useful in addressing the problem as he sees it, I would expect that a reconsideration of the back-end of criminal theory is a necessity if the issue is to be fully addressed. See Husak, *supra* n45.

were a nail.[153] The dangers of a precommitment to punishment are evident in more fundamental thinking about criminal justice as well. For instance, Moore's classic retributive thought experiment prods our intuitions in asking rhetorically whether it is still worthwhile punishing crime even if no consequential good would come from it—the implied alternative being that, in such cases, crime would be dismissed with a shrug.[154]

This, however, is a false dilemma. Surely there are other responses or strategies that might result in good outcomes for an interlocutor to consider. Duff has similarly suggested that to not punish is to fail to take seriously both the wrongs done and the values to which we are committed.[155] Again, to do nothing would indeed be to fail to take them seriously, but the choice is not—and should not artificially be framed as being—between doing nothing and punishing. Recognizing the potential for creative, evidence-based alternatives would do much to satisfy intuitions that a community ought to act in the aftermath of crime as Moore and Duff require.

C. Sentencing and Judicial Solitude

While making important contributions, theories of sentencing itself—which focus less on abstract moral theorizing and more on the practical decisions involved in criminal sentencing—evidence similar shortcomings of their own. Beyond the fact that both descriptive and normative accounts of actual decision-making in sentencing are relatively rare, such accounts neglect the political nature of sentencing in key respects. While scholars and judges recognize that sentencing involves significant discretion in choosing amongst objectives and strategies,[156] accounts of sentencing pay little attention to the judicial relationship with other participants and stakeholders in light of this discretion. Fundamentally, then, such accounts, by failing to explain how decisions can be seen as legitimate to those governed by them, share the political deficit outlined above.

Moreover, such accounts neglect the practical and moral standing of the myriad of participants in sentencing processes, as well as the way that inputs of those participants relate to legitimate political decisions. Accounts of sentencing to date are judge-centric in this respect. They characterize the process as an intellectually and morally solitary enterprise for gifted artists

[153] Maslow, *supra* n112.
[154] Moore, *Placing Blame*, *supra* n42 at 163.
[155] Duff, *Answering for Crime*, supra n1 at 143. Cf. Marshall and Duff "Sharing Wrongs" *supra* n25.
[156] See *infra* n207-208 and accompanying text.

or wise moral reasoners.[157] Absent instances of clear external constraints, sentencing has been characterized as a matter of "instinctive"[158] or "intuitive synthesis"[159] of various considerations, or alternatively one of "practical wisdom."[160] Judges themselves offer these accounts in case law, their own academic writing, and as data in the empirical research of which they are the subject.[161] This, however, is not only at odds with procedural reality—and thus fails as a descriptive endeavour—but also offers an unsatisfactory normative vision of public decision-making, neglecting the inherent public character of sentencing.

With all of this in mind, then, we can clarify the sort of framework required to address the question of how the public ought to respond to criminal offenses. While what is needed is a theory with which to frame the endeavour and from which to take direction, such a theory needs to be more deeply public and political in nature and less presumptive in scope than traditional theories of punishment and sentencing. Such a theory needs to be able to account for the fact that sentencing processes involve a variety of inputs, while also clarifying the normative significance of the various participants who offer them. What criminal justice requires, in sum, is a more general theory of how a society ought to go about responding to crime as well as how the potential coercive interference involved in various possible responses can be justified to those subject to them. In all of this, the framework needs to possess the resources to deal with, or better yet capitalize on, the realities of pluralism—of participants and stakeholders, and the values and moral positions they espouse.

2. Toward a Deliberative Democratic Framework

A. Democracy's Place: Democratic Theory and Levels of Application

Proceeding with these needs in mind, the remainder of this chapter works toward developing such a framework by drawing on deliberative democratic theory to interpret and

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[157] On empirical evidence of the widespread characterization of sentencing as an art, see Geraldine Mackenzie, *How Judges Sentence* (Alexandria, AUS: Federation Press, 2005) at 13-16.
[158] *Ibid* at 17-19.
[159] The Hon. Justice Grant Hammond contrasts this with external guidance from appellate courts, sentencing bodies, or legislation of fixed rules: Grant Hammond, "Sentencing: Intuitive Synthesis or Structured Discretion" (2007) *New Zealand Law Review* 211 at 219.
[160] Graeme Brown, *Criminal Sentencing as Practical Wisdom* (Oxford: Hart Publishing, 2017).
[161] Hammond, *supra* n159; Mackenzie, *supra* n157; Brown, *supra* n160.

direct the challenge of a public response to crime. As a practical account of political legitimacy, deliberative democracy offers a great deal toward addressing both the moral and pragmatic dimensions of criminal justice. Before going on to explore this theory and discuss its preliminary application to sentencing, however, it is necessary to defend the view, given the various levels of decision-making within the broader system, that democratic theory should apply to the forum of sentencing decision-making itself.

Even among those who accept the significance of political theory for criminal justice, there may nonetheless be questions as to why democratic standards should have normative bite within the sentencing forum, rather than simply at a prior stage of selecting a desirable criminal justice system. In other words, even fervent democrats might argue that democracy should be found in the legislature but not in the courtroom.[162] Some, sensitive to the effects of penal populist impulses or to the potential effect of victim participation, might be particularly concerned to insulate the sentencing forum from any democratic "threat" to its impartial or proportionate character.

While a partial answer might be implicit within the previous discussion, sceptics might nonetheless benefit from a more direct reply. This might be especially useful given that there exists a tradition within criminal theory of applying different standards at a systemic level than at what might be considered the *internal* point of sentencing decisions. When applying philosophical perspectives to criminal justice, HLA Hart, for one, asked us to distinguish between those applicable to the general justifying aim in constructing the system, and those applicable in deciding specific decisions within that system.[163]

Certainly, deliberative theory ought to apply at this prior systemic level, and scholarship has been clear in pointing to both the need for and benefit of deliberative democracy in policy-making.[164] However, it is insufficient that the theory to stop there, as a deliberative framework is not only applicable but equally important at the actual sentencing stage for a number of interrelated reasons. First and foremost, the values that comprise our democratic commitments

[162] However, it should be clear that the sort of democracy employed in this thesis is equally concerned with the threat that the wrong kind of democracy can have on public decisions. Chapter 5 provides the most direct response to this issue in engaging with the potentially corrupting effects of victim participation.
[163] HLA Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968).
[164] See e.g. Albert Dzur and Rekha Mirchandani, "Punishment and Democracy: The Role of Public Deliberation" (2007) 9 *Punishment & Society* 151.

do not cease to operate once a system is chosen but continue to demand our respect insofar as the internal decision-making of that system retains a public and political character. Drawing an analogy from constitutional scholarship, it is worth noting here the way in which Jeremy Waldron acknowledges a "distinction between a democratic *method* of constitutional choice and the democratic *character* of the constitution that is chosen."[165] On this view, a polity can make decisions about systems democratically but nonetheless choose systems which fail to support, or even undermine, democratic existence thereafter and therethrough.[166] If we are to take democratic ideals seriously, then, it is insufficient to be concerned only with the process of constitutional design, for instance, and not that which the constitution supports. A parallel distinction can be noted with respect to criminal justice systems and serves as a reminder that both the systems and the public decision-making that animates them should be subjected to scrutiny along democratic lines. Indeed, the coercive power wielded by such systems makes this especially important.

To be sure, the rule of law can require *ex ante* constraints on decision-making, and the claim that democratic values ought to permeate the system should not be mistaken for the claim that all matters within that system need be "up for a vote", so to speak. Certainly, while democratic ideals have normative force, they are not necessarily totalizing and can be weighed against competing concerns and practical limitations, including, notably, the need to ensure that justice is meted out consistently in like cases.

At the same time, in a democracy the *ex ante* constraints that operate in this respect should not preclude legitimate "outputs" of criminal justice systems—that is, sentences that respect the demands of legitimate public action. Accordingly, the application of democratic theory to the sentencing forum can reveal what is required for legitimate sentencing decisions and inform the creation of the system's *ex ante* constraints—or absence thereof—accordingly. Exploring what sort of reasons citizens can legitimately offer one another in public deliberation, for instance, can inform the substantive rationales that are subsequently legislated to constrain judicial decision-making, such as those found in section 718 of the Criminal Code.[167] Likewise, understanding the problems of legitimacy caused by excessively strict constraints—as explored

[165] Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) at 256 (emphasis added)
[166] *Ibid*.
[167] RSC 1985, c C-46.

in Chapter 4 with mandatory minimum sentences—is prescriptive for the design of criminal justice systems in terms of allowing sufficient manoeuvrability for judges. Understanding what is required for legitimate sentences thus allows the architects of criminal justice systems to build out from there.

Similarly, democratic applicability also stems from the fact that, distinct from the political decision-making at the policy level, sentencing forums themselves are also spaces of discretionary, political decision-making in practice. Irrespective of the demands of democratic legitimacy *per se*, this discretionary space is largely inevitable given the demands of individualized justice and the nature of sentencing decisions. "Fit" sentences are highly context-dependent, and it is difficult to set out with any precision just sentences, in advance, for the infinite variations of circumstance and individuals that make their way before the court. Because of the resulting discretion, a democratic framework becomes necessary to fill a void of legitimacy which, as noted above, would otherwise appeal to the judge's own wisdom in choosing between competing values and objectives.

Lastly, the relevance of democratic theory for sentencing can be seen on the basis of more instrumental considerations. As the bulk of this thesis illustrates, against some doubts,[168] deliberative democratic theory not only has implications for the way that we ought to understand and shape sentencing but also provides valuable conceptual resources that help clarify and address some of its most controversial issues. The fact that the theory captures and articulates the concerns that courts and scholars have about specific issues that arise *within* sentencing forums—for instance, the impacts of mandatory minimum sentences,[169] the significance of victim input,[170] or the difficulty of subjecting certain rationales to public scrutiny[171]—demonstrates that the questions of sentencing are questions that democratic theory answers. That it does so in a way that should assuage any scholars' concerns about the worst parts of "democracy" in criminal justice is notable.[172] Indeed, taken together one might suggest there is a natural fit or affinity between democracy and criminal justice.

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[168] Matravers, *supra* n 18 at 3-4.
[169] See below, Chapter 5.
[170] See below, Chapter 4.
[171] See below, "Retributive Reasons and Public Reason".
[172] See below, "Deliberative Victims: Prospects for Practice".

All that being said, given the relationship between what occurs within the sentencing forum and that which occurs elsewhere within the system, it is not possible to limit the relevance of deliberative ideals for the former. One also needs to be attentive to the ways in which system-level influences—especially legislative, but also potentially administrative, or appellate decisions—impact sentencing. As is demonstrated in Chapters 5 and 6, deliberative theory also speaks to these relationships. However, this systemic view should be informed by ascertaining first what is required for the ultimate decision—that is, the actual sentence imposed on the offender—to be legitimate. It is from here that theorists can work backward to determine the sort of system that is required to support such a decision. An exploration of that decision as subject to the demands of public reasoning and justification fulfils this need.

B. Deliberative Democracy and Public Decision-Making

As a normative, aspirational theory of public decision-making, deliberative democratic theory addresses the question of how, in democratic societies characterized by a diversity of worldviews, shared decisions ought to be made. Being so oriented, it has as its focus disagreement and conflict, and theorizes the way in which such situations should be overcome. It is in this way a normative theory, offering an idealized vision of the way in which collective decisions should be made. Having been discussed many times in relation to the most controversial issues of contemporary political life,[173] the issue of criminal justice is a natural, though still underexplored, site for application.[174]

Foundationally, deliberative democratic theory maintains that the validity of governing decisions can only be derived from the will and reason of those subject to them.[175] The dependence on the will of the governed is of course the familiar democratic ideal stemming from

[173] The issue of abortion, for instance, is a common topic within deliberative scholarship, as is religious education. See e.g. Kahane et al (eds), *Deliberative Democracy in Practice* (Vancouver: UBC Press, 2010): Chs 2 and 3; Stephen Macedo (ed), *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford: Oxford University Press, 1999): Chs 3, 12, and 13; Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy, supra* n13: Ch 2.

[174] Pablo de Greiff, "Deliberative Democracy and Punishment" (2002) 5 *Buffalo Criminal Law Review* 373 ("Most theorists of deliberative democracy...have remained silent on questions relating to punishment"); See however, Carlos Nino, *The Ethics of Human Rights* (Oxford: Oxford University Press, 1994): Ch 8; see also Roberto Gargarella, "Penal Coercion in Contexts of Unjust Inequality" (2010) *SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers* 81; Jenia Iontcheva, "Jury Sentencing as Democratic Practice" (2003) 89 *Virginia Law Review* 311; Dzur and Mirchandani, *supra* n164..

[175] Ciaran Cronin and Paulo De Greiff, "Introduction" in Jürgen Habermas, *The Inclusion of the Other* (Cambridge, MA: MIT Press, 1998) at ix (describing Habermas' starting assumption).

a commitment to the ideas of self-determination and equality. As a democratic theory, then, deliberative democracy prescribes the involvement of all those affected by a decision in the decision-making process. Naturally, this inclusion might be thought of in either participatory or representative terms, though a number of deliberative theorists have noted the unique place of direct stakeholder deliberation[176] as well as the difficulties associated with traditional notions of political representation.[177]

Sharing the core commitment to public *will* with democratic theory more generally, deliberative democratic theory differentiates itself by way of its emphasis on public *reason*. In arriving at public decisions, deliberative theory holds that citizens owe one another justifications for the coercive norms that will govern them. As a result, deliberative democracy proceeds through a process whereby participants exchange reasoned arguments for or against potential decisions, having as their aim the rational persuasion of others.

Oriented in this way, the arguments drawn upon in deliberation are required to be such that they are not only mutually comprehensible or 'accessible',[178] but draw on justifications that others could reasonably be expected to endorse, thus independent of their own position in society or comprehensive conceptions of the good.[179] Argumentation thus necessarily excludes appeal to 'reasons' of mere personal preference or selfish interest and requires reasons that act as a disinterested justification to others.[180] Marrying both democratic and deliberative ideals, we can say deliberative democracy holds that public decisions are "democratically legitimate if and only if they could be the object of a free and reasoned agreement among equals."[181]

The nature of democratic deliberation is such that the decision-making process itself is formative for the individuals involved. In contrast with aggregative conceptions of democracy that are responsive to citizens' will as formed "pre-politically" and "in abstraction from the

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[176] See e.g. Lyn Carson, "Ignorance and Inclusion, Mr. Jefferson, Might Be Good for Democracy" (November 2009) United States Studies Centre Working Paper, available online: http://www.activedemocracy.net/articles/ignorance_mr_jefferson.pdf.; John Dryzek, *Foundations and Frontiers of Deliberative Governance* (Oxford: Oxford University Press, 2010)

[177] See e.g. Jane Mansbridge, "Should Blacks Represent Blacks and Women Represent Women? A Contingent 'Yes'" (1999) 61 *Journal of Politics* 628 [Hereafter, "Contingent Yes"].

[178] Gutmann & Thompson, *supra* n13 at 3*ff*, 71*ff* (in part this requires a "possibility of publicly assessing or interpreting the content of…claims").

[179] *Ibid* at 72; John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005) 212*ff*.

[180] See e.g. Martí, *supra* n14 at 31 (highlighting the need to show that any particular proposal is "better than any other on fair terms, and not on a self-interested basis").

[181] Cohen, *supra* n13 at 22.

interests of others,"[182] deliberative democratic theory posits a conception of decision-making based on a more active and collective formation of political will. As stakeholders are required to participate through persuasive arguments, so too are they expected to be open to persuasion. Through both of these acts—persuading and in turn being persuaded—the political wills of participants are altered from their 'pre-political' state, assuming a more refined, collective character.

In the most basic sense, participants can be expected to alter their positions in relation to novel inputs from other participants, undergoing a sort of educational change. Through the process of collective argumentation, participants presumably encounter relevant information and arguments of which they were previously unaware This information not only add to their existing understanding of an issue but also serves to correct pre-existing biases or misunderstandings. James Fishkin highlights this distinction by contrasting the notions of "raw" and "refined" opinion, with the latter being one's opinion "after it has been tested by the consideration of competing arguments and information conscientiously offered by others who hold contrasting views."[183]

Equally important, however, is the way in which deliberation reorients participants in relation to the common good. This influence stems not only from the normative ideal of deliberative politics but its function. While individuals might come to the process with their own interests and individual preferences, the process itself is such that these selfish interests and preferences are untenable as such.[184] Rather, the practice of deliberation requires that, even armed with personal perspective, participants search for reasons for their positions that would be acceptable *to others*. The practice of searching for such reasons necessarily turns one's mind to the positions of others and intersubjective thought; conversely, the inability to come up with reasons of that sort would likewise be transformative.[185]

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[182] Daniel Weinstock and David Kahane, "Introduction" in David Kahane et al, Deliberative Democracy in Practice (Vancouver: UBC Press, 2010) at 2.
[183] James S Fishkin, *When the People Speak*, (Oxford: Oxford University Press, 2009) at 14 (borrowing Madison's language in *Federalist No. 10*).
[184] Cohen, *supra* n13 at 23-26; see also Martí, *supra* n14 at 43-44 (describing similar arguments from Elster, Nino and Hurley).
[185]Cohen, *supra* n13 at 23-26.

Through all of the above, the reason-giving requirement of deliberative democracy stands prominently as its central feature. Much else of what concerns deliberative theorists revolves around unpacking its more distal implications or explaining its process or nature in more detail—the results of both of which are important for this chapter's purposes. Prior to this, however, it is useful to explore the underlying justifications for a deliberative democratic model for public decision-making, whatever its context.

Contrasted as it is with more blunt, aggregative conceptions of democratic rule and manifesting the formative dimensions highlighted above, deliberative democrats can first defend their theory on an instrumental or epistemic basis. According this view, the value of democratic deliberation lay in its utility as a means of enabling stakeholders to make superior, more justifiable decisions.[186] Subject to the above process, deliberation not only improves the conditions for inquiry through increasing the pooling and exchange of information, but also consists of mechanisms to reduce distortions or mistakes by facilitating their detection.[187]

Put differently, political deliberation is justified on the basis that it increases the likelihood that a substantively correct decision will be reached. Most obviously, this justification involves what Martí refers to as an epistemological thesis: that deliberative democracy is the most reliable way for determining a correct decision.[188] More subtly, however, it also depends on an ontological thesis: that there is in fact some standard of rightness at least partially independent of both the process as well as the participants' desires.[189] This is an important observation to make, though it is worth noting that the epistemic defense of deliberative democracy is not *in itself* committed to any particular moral theory.[190] Thus for the time being we can understand the epistemic defense of deliberative democracy as a matter of facilitating a substantively correct decision *however one would define specific evaluative criteria for correctness*.

In addition to its *functional* value, a second defence a deliberative model can be found in its *inherent* value as a particular democratic practice.[191] According to this justification, the act of

[186] Gutmann and Thompson, *supra* n13 at 21.
[187] Martí, *supra* n14 at 42
[188] *Ibid* at 35.
[189] *Ibid* at 34.
[190] *Ibid*.
[191] Others refer to this instead as "expressive" (Gutmann and Thompson, *supra* n13 at 21) and "intrinsic" (Martí, *supra* n14 at 36) value.

providing reasons within a context of deliberation manifests the mutual respect that citizens ought to have for one another as free and equal counterparts. At least in part, this respect corresponds to a recognition that when it comes public actions – actions that by definition impact others – individuals cannot reasonably act with unilateral interest or arbitrariness. Ackerman and Fishkin express this idea by differentiating between private acts as consumers and public acts as citizens. Whereas the former acceptably involves choices dictated by one's own personal preferences, the latter is not a matter of private consumption but "a collective act of power" having significant impact on others.[192]

By providing reasons for proposed public actions individuals recognize others' rights to self-determination and engage them in a collective act of governance. Gutmann and Thompson adopt this view in writing that,

> "[p]ersons should be treated not merely as objects of legislation, as passive subjects to be ruled, but as autonomous agents who take part in the governance of their own society… In deliberative democracy an important way these agents take part is by presenting and responding to reasons…with the aim of justifying the laws under which they must live together."[193]

Accordingly, independent of its instrumental benefits, democratic deliberation can justified inherently as a result of the fact that it gives effect to the values of autonomy, respect, and equality.

While these two modes of justifications—justification by way of instrumental value and justification by way of democratic value—might at times be in tension,[194] they are neither incompatible nor do they necessarily reject the claims of the other. Rather, it seems that both are required for political legitimacy and thus both must be acknowledged in any adequate theory.[195] To consider only the instrumental character of deliberation would be a matter of failing to recognize the significance of political equality and democratic self-determination.[196] At the same time, the requirement that we take seriously the impact of proposed actions on others necessitates a concern with the instrumental or epistemic value of deliberative democracy. A decision-

[192] Bruce Ackerman and James S Fishkin, "Deliberation Day" in James Fishkin and Peter Laslett (eds), *Debating Deliberative Democracy* (Oxford: Blackwell Publishing, 2003) at 21.
[193] Gutmann and Thompson, *supra* n13 at 4.
[194] i.e. What is most democratic might not be most epistemically valuable: see Martí, *supra* n14 at 36-37.
[195] Gutmann and Thompson, *supra* n at 22
[196] *Ibid*.

making process that could not be relied on to produce valuable outcomes would hardly manifest mutual respect among citizens.[197]

3. Deliberative Sentencing

It is thus clear in most respects that deliberative democracy provides a framework that avoids the aforementioned shortcomings of extant theories of public response. From this perspective, sentencing should, generally speaking, be conceived of as a process in which relevant stakeholders exchange and scrutinize public reasons as to whether and how the state should respond to the convicted. This process should be aimed at, and produce, a publicly justifiable sentence in light of the relevant particularities of the case.

In this way, the framework avoids the public and political deficiencies of other theories. Geared as they are toward addressing disagreement, deliberative processes ensure that sentences are legitimate. Any moral bases upon which the state intervenes are, on account of the constraints of public reason and the contingencies of persuasion, those that are justifiable in light of the reasonable pluralism among stakeholders. The process of arriving at a sentence in this way is also sufficiently nuanced as to be able to navigate competing values and issues of practical application.

The framework also avoids the problems of legitimacy and inaccuracy associated with accounts of judicial discretion rooted in individualized intuition or wisdom. While not discounting that which is required in being responsible for the ultimate decision, a deliberative account recognizes not only the pluralistic reality of sentencing decision-making, but also the potential value—both epistemic and moral—of others' contributions. It treats participants as equals, not necessarily in role or responsibility, but in terms of giving arguments equal consideration according to their persuasive merits.[198]

Lastly, so too does it address issues of scope associated with punishment theory. Unless circumscribed by political choice, deliberative processes are noncommittal at the outset, and the substantive outcome is that which is best supported, given the facts, and in light of the values and

[197] *Ibid*.
[198] See e.g. Jurgen Habermas, *Theory of Communicative Action* (Boston: Beacon Press, 1984) at 24.

arguments that deliberators find most convincing. While this may seem straightforward, before moving on to discuss the more practical connections between deliberative prescriptions and sentencing, it may be necessary to distinguish the framework from one of its past applications. In this respect, prior theory has arguably distorted deliberative democracy to fit with a prior paradigmatic commitment to punishment. Indeed, the paradigm remains so influential in theorizing responses to crime that even deliberative democratic theory—a process-driven theory that emphasizes the need for participants to be open to whatever outcomes are supported by persuasive arguments, and one which aspires to the absence of coercion in arriving at those outcomes—has been subsumed under punishment theory.

A. Resisting the Draw of Punishment Theory

In a rare consideration of deliberative theory as a framework for responding to crime, Pablo de Greiff has, in this respect, sought to tie deliberative democracy together with expressive theories of punishment.[199] Those theories, as de Greiff points out, are characterized by a focus on communicative dimensions of criminal justice as well as the role of punishment in expressing public condemnation of criminal behaviours. Of particular interest to de Greiff are those that, more than simply characterizing punishment as an expression of public sentiment, are centred on the function of punishment in *persuading* the offender of the wrongfulness of their actions.[200] In aligning these theories with the prescriptions of deliberative politics, he suggests that "[i]f one concentrates not only on this expressive function of punishment, but construes the process that leads to it, and the punishment itself**,** in sufficiently dialogical terms, one could begin to formulate a 'communicative theory of punishment.'"[201]

As was discussed in Chapter 1, this characterization of the process leading to and culminating in the public expression of disapproval in dialogic or deliberative terms is indeed one key feature of criminal justice in a deliberative democracy. Given that prohibitions are supported by persuasive public reasons—which the state has an obligation to offer—public censure, understood as the reassertion of those reasons, is a natural response to criminal offences. This expression is not figurative: just as the state gives actual, verbal reasons regarding prohibition in the first place, so too does the state provide explicit reasons in condemning the

[199] de Greiff, *supra* n147.
[200] *Ibid* at 375.
[201] *Ibid*.

behaviour of the offender. The second and distinct response, recall, was that of determining whether and what public intervention is warranted to secure the public interest.

Drawing on expressionist theories of punishment, however, de Greiff goes further than the view argued in Chapter 1, framing *punishment* itself in dialogic terms.[202] Noting the ways in which persuasion is thought to respect individuals as autonomous citizens, de Greiff identifies the objective, or end, of public intervention as persuasion and suggests that punishment functions to communicate public disapproval, thereby serving as the *means* by which that end of persuasion is achieved. In doing so, he formulates a particular framework for deliberative democratic criminal justice at odds with the one espoused here and with the theory's own tenets. It is necessary, therefore, to distinguish the present account from this view and in doing so clarify the relationship between deliberative democracy and the question of how to respond to crime.

Leaving aside the fact that de Greiff conflates the two distinct responses that stem from Chapter 1's view of public wrongs, it is important to note how a deliberative framework supports neither his view of the end of public intervention—that is, persuasion—nor the means of achieving that end—that is, punishment—even should persuasion be a valid end. The rejection of both, then, clarifies the ways in which deliberative democracy maps onto sentencing decisions.

The latter dismissal can be made briefly. While the claim of using punishment as the means to persuade might be related to the discursive commitments of deliberative democracy thematically, it is nonetheless disconnected from deliberative democratic procedure and ethos. It is essential to the deliberative approach that results are arrived at by means of rational persuasion through argumentation and discussion. It is through this process that the subjects of decisions are respected as equals and authors of the laws that govern them. In comparison, the use of punishment in order to "persuade" is entirely antithetical to this deliberative practice and its rationales. Amidst a variety of revisions to the deliberative ideal over the years, scholars have been consistent in holding that deliberation—and the respect for individuals' autonomy it manifests—can only exist insofar as there is an *absence* of coercion.[203] Indeed, it seems unclear

[202] de Greiff, *supra* n147 at 375, 389 (It is worth noting that while de Greiff's position at the outset of the piece seems clear in this regard, his later discussion regarding the justification of punishment, as opposed to expressions of disapproval, seems unclear, if not inconclusive. See 399-400).
[203] Bachtiger et al, *supra* n11 at 5 (noting how this point has withstood generational revisions).

how punishment *could* persuade, in the sense of causing change by way of reasoning, rather than just expressing the brute fact of disapproval.[204]

Secondly, de Greiff's characterization of the ends of public action being persuasion is also misplaced. There is an important distinction to be made between, on the one hand, public decisions needing to be the product of persuasion and, on the other, persuasion needing to be the product of public decision-making. Only the former is prescribed by a deliberative framework. Accordingly, it is unnecessary—not to mention ineffective—to restrict the aims of state intervention to persuasion.

Certainly, it would be better to persuade than to coerce, but democracy does not require this. While the decision to preclude access to protected land, for instance, is one which ought to be made according to persuasive deliberative democratic processes, there is no reason why the state could not decide through those processes to build a fence rather than post a persuasive sign. In order to respect deliberative democratic principles, a theory of public response need not be limited to the goal of persuasion, but instead merely be arranged so that ends are defensible according to, and legitimized by, democratic deliberation within which rational persuasion plays a definitive role.

The need to more flexibly understand public intervention as allowing for non-persuasive interventions is also suggested by practical considerations. This is not to say that offenders do not possess rational deliberative capacities, nor that the disruptive act of engaging or re-engaging individuals in normative deliberation cannot suffice to sustainably re-align individuals with acceptable norms of behaviour in many or even most cases. Nor is it to say that we must stray from deliberative commitments in these situations. These limitations do, however, suggest that a deliberative democratic theory of public response ought to be structured so as to speak to the spectrum of social situations to which it might apply, including those cases wherein rational persuasion is either unattainable in the foreseeable future or is not a need.

A genuine, justifiable need for incapacitation, for example, may exist alongside other interventions, and the theorist should not resort to distorting these needs by characterizing them as persuasive. There are also cases where persuasion of the offender is not an extant need when

[204] de Greiff acknowledges this issue, *supra* n147 at 397.

assessing whether further intervention is required. Take, for instance, a case where an offender rationally accepts the reasons why certain conduct ought to be avoided; yet, despite this rational acknowledgement, his ability to conduct himself appropriately in reasonably foreseeable circumstances is in doubt. Here the theorist must account for the fact that individuals' abilities to conduct themselves in a reasonable manner may differ, on the one hand in a sobered, formal deliberation about past conduct, and on the other at the point of personal physiological and psychological triggers in daily life.[205] Consequently, at the time of deliberating, there may be a need to anticipate other issues besides persuasion about proper behavioural norms and design intervention accordingly.

These cases do not require an abandonment of deliberative democratic principles, nor do they preclude the offender from being a full participant in deliberative democratic practice concerning public responses to crime. Each of these can still be respected if we focus on the act of deciding whether and what intervention is justified as deliberative practice, rather than simply seeking to imagine the intervention itself in deliberative terms. With such a focus, public response can simply be seen as requiring a deliberative process through which the resulting decision is based on reasons that the offender himself could also be reasonable expected to accept. Provided with strong arguments within such a process, an offender might be reasonably expected to accept, for example, that in spite of the fact that all are, in principle, in agreement about behavioural norms, further intervention may nonetheless be justifiable in light of addiction issues or emotional volatility that create risks of further criminal behaviour, or that the gravity of past behaviour suggests a risk that the community could not reasonably accept without further assurances or measures. The question of how the public might intervene in response to criminal behaviour therefore ought to be more inclusive than de Greiff's communicative theory of punishment suggests.

B. Deliberative Sentencing: Practical Beginnings and Productive Critique

While the task of this dissertation is one of theorizing sentencing in deliberative terms, it is nonetheless worthwhile to highlight the ways in which that endeavour can be grounded in the realities of sentencing practice. In looking at these realities, it is apparent that a deliberative

[205] For instance, individuals with rational capacity yet who at times struggle with emotional management, addiction, etc.

framework connects with the key features of Canadian sentencing, while nonetheless providing a critical view that offers a constructive way forward.

With this in mind, it might first be said that conventional sentencing courts, in their ideal form at least, have already evolved into a forum in which the contestability of decisions is implicitly recognized and grappled with through public reasoning. As such, it is not so challenging to re-imagine them in deliberative terms. Underpinning this function is the fact that sentencing courts are characteristically tasked with actually making decisions rather than simply applying pre-established sentences. Faced with the difficulties of pre-determining appropriate responses given the infinite variations of circumstance and the need for individualized justice, sentencing judges are typically given considerable discretion—a fact considered a central characteristic of sentencing in Canada.[206]

While judges are required to respect established legal constraints, sentencing nonetheless regularly requires decision-makers to make debatable determinations with respect to issues such as the seriousness of the offense, the remorsefulness of the offender, the appropriateness of various possible aims and how to prioritize them, the specific interventions that would best serve those aims, and so on. In this way, sentencing involves "an inescapably difficult set of choices amongst conflicting aims, values and goods",[207] all of which might be viewed differently by different people. In this sense, sentencing is not just public decision-making, but political as well. Indeed, sentencing decisions have been called the *most* political decisions that judges make.[208] Yet, in exercising their discretion, judges are uniquely insulated from the electoral, often non-deliberative political pressures to which other institutional decision-making is subject.[209]

Certainly, some constraints like mandatory minimum sentences all but preclude this discretionary function, but such constraints are the exception rather than the rule, are resisted by scholars and judges alike, and are rebuffed by constitutional limits.[210] The issue will be explored further in Chapter 4, but it suffices at this point to note that this tension is illustrative of the norms that otherwise emphasize the importance of discretion in just sentencing. For the most

[206] Brown, *supra* n160.
[207] *Ibid* at 113
[208] Hammond, *supra* n159 at 219.
[209] See below, Chapter 5, at "The Democratic Quality of an Expanded Section 12 Review".
[210] See section 12, *Canadian Charter of Rights and Freedoms*, *The Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Hereafter, Charter].

part, the constraints that do exist—in their structure, if not necessarily their substance—can be understood as providing a flexible framework of public reasons which can be drawn upon and limit the influence of irrelevant considerations. Accordingly, the objectives set out in section 718 of Canada's Criminal Code, for instance, delineate public rationales that can be offered to justify public intervention.[211]

In navigating the contestability of decisions within this framework, sentencing courts are also forums in which a variety of parties are expected or permitted to introduce information and perspectives that factor into, and may influence, the ultimate decision.[212] Prosecutors are tasked with representing the public interest, bringing all relevant information to the attention of the court and offering a position on what an appropriate sentence would be, typically on the more severe end.[213] The convicted, both directly and through his counsel, also communicates relevant information and offers his own position with an emphasis on representing his own interests.[214] Both are considered crucial to the process by judges.[215]

The sentencing forum, however, is more inclusive than the typical binary adversarial process of Crown against defendant. Through pre-sentence reports, probation officers provide information on the personal characteristics and background of the offender, as well as opinions from family, friends, or employers on his character.[216] Psychiatric assessments from relevant professionals can also report on considerations like the prognosis for possible treatments.[217] Where sentencing concerns individuals with an Indigenous background or who are otherwise subject to systemic overrepresentation in the criminal justice system, Canadian law also provides for caseworkers to write "Gladue Reports" or "cultural impact assessments" to inform the court of relevant cultural and historical considerations.[218]

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[211] *Criminal Code*, s.718
[212] Beyond formally permitted interventions, judges might also discuss cases with their colleagues on an informal basis: David P. Cole and Julian V. Roberts, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 2000) at 13.
[213] Clayton C. Ruby et al, *Sentencing* (9th ed) (Toronto: LexisNexis Canada, 2017) at 107. In the United Kingdom, the Crown highlights relevant information but does not traditionally seek to influence the sentence by urging any particular decision: see Ashworth, *infra* n, at 377-378.
[214] Ruby, *supra* n213 at 107-114; *Criminal Code* ss 723 and 726.
[215] Mackenzie, *supra* n157 at 22-23.
[216] Ruby, *supra* n213 at 144*ff*; Andrew Ashworth, *Sentencing and Criminal Justice* (5th ed) (Cambridge: Cambridge University Press, 2010) at 378ff.
[217] *Ibid*.
[218] *R v Gladue* [1999] 1 S.C.R. 688; *R v Ipeelee* [2012] 1 SCR 433.

Furthermore, all common law jurisdictions allow for victims to provide input into sentencing through Victim Impact Statements.[219] Some jurisdictions, including the United States and Canada, go further than descriptions of impact to allow victims' opinions on what the sentence ought to be—opinions that should not be assumed to line up with that of the prosecutor.[220] A highly controversial issue, victim participation and how it might fit within a deliberative framework will be explored closely in Chapter 5.

Additionally, through an expansive interpretation of who qualifies as a victim as well as through "Community Impact Statements", the lay public has a similar opportunity to give input, both in terms of information and opinion.[221] In certain instances, Canadian law allows the jury to make recommendations for certain aspects of sentence.[222] Exceptionally, the use of "sentencing circles" provides a further, and perhaps more intimate, opportunity for the victim and community to participate in the decision-making process.[223]

Ultimately, decision-makers across common law jurisdictions have obligations to give reasons for the sentences that they select.[224] In Canada, the Criminal Code sets out that "[w]hen imposing a sentence, a court shall state the terms of the sentence imposed, and the reasons for it."[225] This obligation continues to apply as sentences are shaped on the back end as well, with the *Corrections and Conditional Release Act* requiring, as a guiding principle, that the Parole Board provide applicants with reasons for its decisions.[226] In theory at least, reasons should be responsive to the various considerations that arise throughout the process and thereby give life to the public reasons for sentencing decisions set out in the Criminal Code.

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[219] Julian V Roberts, "Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole" (2009) 38 *Crime & Justice* 347 at 348.
[220] See e.g. Christine M Englebrecht, "The Struggle for 'Ownership' of Conflict: An Exploration of Victim Participation and Voice in the Criminal Justice System" (2011) 36 *Criminal Justice Review* 129. See also Jeffrey Kennedy and Marie Manikis, "What weight to give victims' sentencing recommendations?" *Montreal Gazette* (24 April 2018) (noting the issue arising in a recent Canadian case).
[221] *Criminal Code*, s 722.2
[222] See e.g. *Criminal Code*, s 745.2. For one view on how jury sentencing might align with deliberative democracy, see Iontcheva, *supra* n174.
[223] Barry Stuart, "Circle Sentencing in Canada: A Partnership of the Community and the Criminal Justice System" (1996) 20 *International Journal of Comparative and Applied Criminal Justice* 291; *R v. Moses* (1991), 71 C.C.C. (3d) 347 (Y. Terr. Ct.)
[224] *R v Vigon* 2016 ABCA 75-at notes 36-41.
[225] *Criminal Code*, s.726.2
[226] *Corrections and Conditional Release Act*, S.C. 1992, c. 20s 101(e).

The ways in which reason-giving relates to the legitimacy of decision-making has not been lost on Canadian courts. In discussing the practice, they have noted a litany of ways in which it ensures the rationality of sentences and the proper use of discretion, reduces the risks of arbitrariness and improper influences, provides a basis upon which decisions can be scrutinized and challenged, communicates the basis of the decision to the offender, and contributes to public confidence and knowledge of the principles upon which court action depends.[227] Importantly, they have also recognized that, without these reasons, the validity of the decision is supported by nothing more than an appeal to authority.[228] These points would all be at home in any deliberative democracy text.

None of this, however, is to say that courts necessarily realize deliberative ideals as a matter of practice. A deliberative vision of sentencing should therefore not simply descriptively recharacterize current practice but maintain that vision's normative character in providing a lens for critical evaluation and direction. Certainly, judges and other professionals may fail to appreciate deliberative ideals or otherwise stray from such an approach to public decision-making. Despite a potentially inclusive process, scholarship has shown that judges, among other participants, can be resistant to others' input and to being persuaded.[229] Judicial silence on the legal relevance of lay input may be further evidence of this.

Scholars have also noted that, given the realities of overburdened courts, sentencing decisions may be made without sufficient time for reflection.[230] Indeed, despite obligations to give reasons at sentencing and judicial recognition of their importance, both academic commentators and Canadian courts have noted that judges frequently fail to provide anything more than superficial rationales or conclusions, and proceed as if the application of the law to the case at hand is self-evident.[231] Alan Young has written that, following the great investment of time and energy into the question of guilt or innocence, the sentencing decision "appears too

[227] See e.g. *R v Vigon*, *supra* n224 at paras 59-61; *R v Rossi*, 2016 ABCA 43 at paras 47-48.
[228] *Ibid*, at para 63.
[229] See e.g. C. Tata et al, "Assisting and Advising the Sentencing Decision Process: The Pursuit of 'Quality' in Pre-Sentence Reports" (2008) 48 *British Journal of Criminology* 835 (discussing judicial resistance to recommendations or persuasion within pre-sentencing reports); Chapter 4, below (exploring resistance to victim input across the criminal justice system); etc.
[230] Cole and Roberts, *supra* n212 at 13.
[231] *Ibid* at 15; *R. v Vigon*, *supra* n224. Judges may, however, believe that communication is important, even if they fail to realize these values in practice: Mackenzie, *supra* n157 at 27.

often as an afterthought."[232] While limited, empirical work in this area has shown this to frequently be the case.[233]

Even if judges are attuned to the need to give reasons, Canadian law might nonetheless limit their capacity to do so. As Chapter 5 explores in depth, the proliferation of mandatory minimum sentences has often constrained sentencing processes in such a way as to require sentences that cannot be justified in light of relevant factors, although some deliberative relief is provided section 12 of the *Canadian Charter of Rights and Freedoms*.[234] Moreover, if the arguments of Chapter 3 are successful, the retributive rationales that run through Canadian sentencing practice might actually be insufficiently public as ideals of public reasoning.

In light of all of this, it is clear that, while resonating with practice, a deliberative framework does not just provide a descriptive account of sentencing but offers a basis for biting critique of widespread practice. Indeed, to the extent that sentences are being passed without genuine consideration of persuasive reasons, and without being justified to those subject to them, the democratic legitimacy of criminal justice is in question. While highlighting certain failures of the sentencing process, a deliberative perspective can also provide a constructive way forward for institutional design and even professional practice.

To that end, this dissertation does not have the scope to exhaustively canvass the implications of deliberative democratic theory for criminal sentencing, nor can it fully illustrate what these may look like in practice. Rather, the aim is limited to uncovering key dimensions of what, fully unpacked, might constitute a democratic theory of sentencing, and demonstrate the potential value of such a theory to address the challenges faced by criminal scholarship and public policy. By engaging with the conventional sentencing context, it contributes to the development of a broader framework for criminal justice that is amenable to a variety of institutional and cultural manifestations.[235]

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[232] Alan Young, "The Role of an Appellate Court in Developing Sentencing Guidelines" (Research Reports of the Canadian Sentencing Commission, 1988) at 3.
[233] *Ibid* at 4. For empirical work in the Irish context, see Claire Hamilton, "Sentencing in the District Court: 'Here be dragons'" (2005) 15 *Irish Criminal Law Journal* 9 (finding reasons only being given in 32 percent of cases, and 42 percent of custodial cases).
[234] See below, Chapter 5.
[235] For examples that might be most readily be seen in deliberative terms, see Iontcheva, *supra* n174 (jury sentencing); Candace McCoy, Wolf Heydebrand and Rekha Mirchandani, "The Problem with Problem-Solving

4. Conclusion

This chapter took initial steps in clarifying how deliberative democratic theory provides a framework to guide the public decision-making inherent in sentencing. While other frameworks lack the scope and resources necessary to address the political dimensions of this decision-making, deliberative democracy succeeds in these respects. In its application to the sentencing context, deliberative theory has been seen to emphasize the centrality of justifiable sentences, is able to manage challenges of pluralism, and offers an optimistic view about the participation of stakeholders. While this promise is, at this stage, general in nature, subsequent chapters will demonstrate these aspects through sustained engagement with a number of controversies in sentencing.

In the next chapter, the nature and consequences of public reason are explored in the context of sentencing deliberations. To illustrate the sort of arguments that could be advanced in support of public interventions of one kind or another, it engages with classic debate between retributivism and consequentialism. It assesses each of these views in terms of the distinctive forms of reasons that they offer, doing so in light of the moral and empirical demands of public reasoning. In doing so, it both illustrates the implications of deliberative democracy while resolving the retributive-consequentialist debate through a novel, democratic argument against retributivism.

Justice: Coercion vs. Democratic Deliberation" (2015) 3 *Restorative Justice* 159 (problem-solving courts). Sentencing circles might also be a good example.

Chapter 3.
Public Reason(s) in Sentencing:
A Democratic Case against Retributivism

Normative criminal theory has long been coloured by tension between two competing views of what appropriately animates and morally justifies societal responses to criminal offenses. On one side, theorists have espoused a *consequentialist* stance and maintained that the proper justification for such responses is found in their positive consequences.[236] Proponents of this school of thought point to desirable ends such as harm reduction and defend public intervention on such bases that it deters, rehabilitates, or incapacitates the offender in question, or that it deters other would-be offenders from committing offenses.[237] On the other side, theorists have adopted a *retributive* rationale for responses to crime and maintained that crime ought to be punished because, and insofar as, it is deserved.[238] On this view, responses to crime are neither motivated nor justified by way of reference to the consequences of intervention, but instead by reference to the intrinsic moral rightness of punishing blameworthy conduct.

[236] See e.g. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1829).
[237] David Wood, "Punishment: Consequentialism" (2010) 5(6) *Philosophy Compass* 455.
[238] Michael S Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford University Press, 1997) at 87 [*Placing Blame*]; see also Mitchell Berman, "Two Kinds of Retributivism" in RA Duff and Stuart P Green (eds) *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011) at 433.

This is perhaps criminal theory's most prominent and intractable conflict. It is one that theorists have regularly sought to resolve, either by arguing for or against a particular view, or by reconciling the apparent opposition either philosophically[239] or practically.[240] While each view has seen its rise to prominence, with retributivism enjoying a contemporary revival,[241] the conflict between these competing philosophies remains far from resolved. While itself a problem, the challenge takes on new meaning in light of the shift within criminal theory toward recognizing that justifications of criminal interventions must themselves be politically sound.[242] The debate in this respect is no longer just one of freestanding moral theories which scholars find most coherent or compelling, but a question of legitimate use of coercive state power in light of the plurality of moral and philosophical perspectives on criminal justice. In sum, the contemporary challenge for criminal theorists is not just to address the apparent controversy with respect to competing philosophies, but to do so within a broader framework that accounts for both political commitments and realities. This chapter takes up such a task and argues that the demands of deliberative democracy resolve this debate, excluding quintessential retributive reasons—desert claims—from being offered as a rationale for public action while grounding criminal theory in a robust democratic foundation.

By providing these reasons, rather than simply pressing their own preferences, citizens recognize one another as autonomous beings whose own reason is the proper source of their governance. Reason-giving allows for those bound by decisions to engage with the impetus of public action as rational agents, assessing the persuasiveness of reasons and proposing their own in return.[243] Moreover, in formulating and assessing these reasons, citizens introduce relevant considerations and subject proposals to critique by others, allowing public decision-making to become more informed, reflective, and oriented toward the common good. In this light, reason-giving can be seen as the central device by which decisions in a democratic society both achieve legitimacy and quality.

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[239] See e.g. Hart, *supra* n163.
[240] See e.g. Paul H Robinson and John M Darley, "The Utility of Desert" (1997) 91 *Northwestern University Law Review* 453.
[241] Russell L. Christopher, "Deterring Retributivism: The Injustice of 'Just' Punishment" (2002) 96 *Northwestern University Law Review* 843 at 845-847.
[242] See Thorburn, *supra* n1 at 21; Fletcher, *Grammar*, *supra* n1 at 153; Duff, "Political Retributivism" *supra* at 180.
[243] Gutmann and Thompson, *Why Deliberative Democracy?*, *supra* n13 at 3-4.

The form and content of reasons offered within democratic deliberation, however, are of central importance in living up to such lofty expectations. Indeed, the question of what counts as a reason is intimately linked with both the intrinsic and instrumental value of deliberative democracy. With this in mind, deliberative democrats have taken up the task of elaborating formal and substantive constraints for the sorts of reason(s?) available to citizens and their representatives in justifying public decisions.[244] In light of the plurality of conflicting moral and philosophical perspectives in a democratic society, this has meant emphasizing the demands of reciprocity which requires the use of a shared public reason in addressing collective challenges. Ultimately, public decisions within a deliberative democracy ought to be justified in ways those subject to them can be reasonably expected to accept.[245]

While providing constraints more generally, the demands of democratic deliberation also provide a standard against which to assess what reasons for public responses to crime are legitimately available to citizens, their representatives, and—should they wish the rationales they offer to be employed in public debate—scholars. To date, however, the ways in which the reasons invoked by these competing approaches sit in relation to deliberative democracy remain largely underexplored. Only limited consideration has been given to the ways in which deliberative democratic commitments inform and constrain the rationales upon which criminal interventions proceed. Those that have explored the connections between deliberative democracy and criminal justice have taken a broadly inclusive approach to the question of what sorts of reasons we might offer one another in deliberating and subsequently justifying public responses to crime.[246] Writing on the democratic potential of jury sentencing, Jenia Iontcheva argues that democratic deliberation could serve to "mediat[e], through a conversation across rival discourses, among different aims or models of punishment."[247] In doing so, she assumes an open

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[244] See e.g. *Ibid*; Rawls, "Public Reason Revisited" *supra* n13; Joshua Cohen, *Philosophy, Politics, Democracy* (Cambridge, MA: Harvard University Press, 2009); Stephen Macedo, "Why Public Reason? Citizens' Reasons and the Constitution of the Public Sphere" (August 23, 2010) available at http://ssrn.com/abstract=1664085 [Hereafter, "Why Public Reason?"]..

[245] Joshua Cohen, "Democratic Legitimacy" *supra* n13 at 22; Rawls, *Political Liberalism*, *supra* n179 at 217.

[246] But see Candace McCoy, Wolf Heydebrand & Rekha Mirchandani, "The Problem with Problem-Solving Justice: Coercion vs. Democratic Deliberation" (2015) 3 *Restorative Justice* 159 (McCoy and colleagues explore deliberative democracy as it aligns with a restorative justice perspective specifically, which they note as maintaining a consequentialist, problem-solving orientation; however, their presumptive focus impedes clear inferences to be drawn about the way in which they see deliberative democracy itself as constraining reason-giving in this context).

[247] Iontcheva, *supra* n174 at 344.

stance and suggests that the merit of responses based on deterrence, rehabilitation and retributivism could be deliberated on a "case-by-case basis."[248]

Recognizing the role of persuasion in democratic deliberation, Pablo de Greiff has taken an intentionally inclusive approach, acknowledging the range of reasons that are required for public responses to crime to be persuasively justified. In doing so, he argues against one-dimensional, "purely retributivist or purely consequentialist" approaches and suggests that a variety of moral, ethical, and pragmatic considerations will all play a role in persuasively justifying public action.[249] He thus argues against those retributivist approaches which insist on desert to the exclusion of pragmatic or consequentialist considerations; conversely, he argues that for the deliberative democrat, public action should not simply be effective but "persuasive on the basis of considerations of justice as well."[250] In this spirit, his view includes desert as a relevant consideration among others.[251] Within democratic deliberation then, both of these authors hold that consequentialist and retributive reasons could each be offered in shaping and ultimately justifying proposals for public responses to crime.

This chapter argues against this inclusive view, holding that by welcoming retributive desert claims as reasons it fails to take seriously the commitments and aspirations of deliberative democracy. This is not to entirely disagree with each of the points made by the above authors. Theorizing about democratic deliberation in the context of criminal justice indeed requires recognition of the fact that any acceptable justification will involve consideration of both instrumental reasons as well as those of justice; accordingly, the deliberative argument offered here indeed rejects an exclusively consequentialist view of sentencing. Moreover, actual deliberation on a case-by-case basis is of central importance in navigating these reasons, whether for weighing competing values or principles, assessing the appropriateness of particular aims or strategies, and the like.

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[248] *Ibid* at 343-345.
[249] de Greiff, *supra* n147 at 400.
[250] *Ibid* at 387-389; Roberto Gargarella has made a similar point about deliberative democracy and consequentialism in suggesting that deliberative democrats ought to reject consequentialist approaches that do not respect citizens as autonomous persons: Roberto Gargarella, "Tough on Punishment: Criminal Justice, Deliberation, and Legal Alienation" in Samantha Besson and José Luis Martí (eds) *Legal Republicanism* (Oxford: Oxford University Press, 2009), 167-187 at 171-172.
[251] de Greiff, *supra* n147 at 395.

The central issue is, however, that the reasons put forward to justify public responses to public wrongs must respect the constraints of democratic deliberation and themselves be "public" in a meaningful way: they must be such that citizens who are bound by these decisions can both grapple with and ultimately accept them as reasonable and rational citizens. To date, the way in which these public constraints apply to sentencing rationales remains underexplored and thus represents a gap in understanding for both normative criminal theorists as well as deliberative democrats. This chapter addresses this gap and argues that while consequentialist reasons can survive these constraints, retributive reasons fail to do so and should accordingly be excluded from a deliberative democratic view of sentencing.

To elaborate these ideas and develop their importance, this chapter proceeds in three parts. First, it explores the connection between deliberative democracy and public reason then unpacks the demands of the latter on the sorts of reasons that can be offered within democratic deliberation. Public reason will be explored in terms of both its moral and empirical constraints. Second, the implications of public reason for criminal sentencing will be sketched in relation to both consequentialist and retributive reasons. While arguing that the former are largely permissible, the latter are rejected as insufficiently public in both a moral and empirical sense. The point here is not to offer a comprehensive roster of public reasons, however, but rather sketch the ways in which deliberative public reasoning speaks to both consequentialist and retributive sentencing rationales. Finally, the chapter closes by defending the use of public reason against critics who, while agreeing that decisions in a democracy ought to be justifiable to all those bound by them, reject the need to rely on shared public reasons in reaching such justifications. In doing so, it argues against the use of private reasons in sentencing and suggests that responses to criminal offenses ought to be public in a robust way.

1. Deliberative Democracy and Public Reasoning

The question of how the public ought to respond to a criminal offense is, no doubt, a controversial one. As scholarship in the area clearly shows, it is a question whose answer reasonable people—even those who have given it a lifetime of close consideration—continue to disagree about. In this respect, however, it is no different than any number of other public issues. Indeed, as Charles Larmore put it, the fact that reasonable people often disagree about what the

best or right thing to do is "one of the cardinal experiences of modernity."[252] How to make public decisions in light of such controversy is thus one of modernity's basic challenges and one for which deliberative democracy seeks to provide an answer.

In the face of disagreement, citizens and their representatives must reason together with an eye toward finding an outcome that all affected parties could accept.[253] As noted in the previous chapter, this process proceeds by way of the exchange of reasons which seek to persuade others of a particular course of action. In this way, it is the persuasiveness of *reasons* that hold force in deliberation and, by way of the rational capacities of citizens that accept them as such, render the decisions based on those reasons authoritative. Decisions are legitimate insofar as those affected could reasonably be expected to agree to them following a process of reasoned deliberation.[254]

By requiring that citizens justify the way in which they invoke political power, the deliberative ideal is thought to give effect to the fundamental democratic aspiration: joint decision-making among free and equal citizens. In this respect, deliberative democracy "is guided foremost by the idea that for democratic citizens to be politically free they must be governed by laws grounded in reason, not in conflicting interests, which they can legislate and endorse in their capacity as equal citizens."[255] In this way, to wield the coercive power of the state on the basis of one's own self-interest or preferences and not on reasons that others could accept would be to treat fellow citizens that disagree as "instruments of our will" or "objects of coercion" rather than rational persons – as means and not ends.[256] By offering reasons, then, we manifest respect for fellow citizens, allowing them to engage with, challenge, shape and ultimately authorize the driving forces of public action as rational, autonomous beings.[257]

None of this, however, is independent of the *kinds* of reasons that citizens offer one another. Clearly, citizens neither respect one another as equals nor facilitate democratic

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[252] Charles Larmore, *The Morals of Modernity* (Cambridge, MA: Cambridge University Press, 1996) at 122 [*Modernity*].
[253] Cohen, "Democratic Legitimacy" *supra* n13 at 22-23.
[254] See *supra* n14 and accompanying text.
[255] Samuel Freeman, "Deliberative Democracy: A Sympathetic Comment" (2000) 29 *Philosophy & Public Affairs* 371 at 418.
[256] Larmore, *Modernity*, *supra* n252 at 136-137; Simone Chambers, "Theories of Political Justification" (2010) 5 *Philosophy Compass* 893 at 895.
[257] Gutmann and Thompson, *Why Deliberative Democracy?*, *supra* n13 at 3-4.

governance where they offer reasons which are arbitrary, unintelligible, or manifestly selfish. Justifications for a prison sentence based on a roll of dice or nonsensical reasons, for example, would hardly count as such in light of the deliberative ideal. Instead, deliberation requires that citizens offer others reasons that they can engage with and ultimately accept as persuasive. In this way, democratic deliberation—both practically and morally—relies on the sorts of reasons that are in some way common among citizens. Reason-giving in democratic deliberation ought to be *public* reasoning, and it is the nature of this public reason that constitutes a constraint on the way citizens seek to justify public action.[258]

Although this demand for publicness might be characterized in different ways, it is typically characterized in terms of reciprocity, constituting a mutual commitment to seek fair terms of cooperation which underpins democratic deliberation.[259] Through such a commitment, citizens exhibit reciprocity when they offer one another reasons that they can reasonably expect the other to accept as justification for the decisions that bind them. Reasonable expectation of this kind, however, must take into account the fact that others are fully rational persons with moral, religious or philosophical views that may differ from one's own. In this way, reciprocity "regulates" reason-giving by requiring that it be publicly acceptable in both content and form.[260] This can be seen as involving two distinct dimensions which correspond to the forms of argument that are constrained: moral and (quasi-)empirical.[261] The former requires that the *substantive content* of reasons must be such that affected citizens could reasonably be expected to accept it, whereas the latter requires that reasons' *empirical nature* be such that citizens are able to engage with and scrutinize it as rational citizens.

A. The Moral Constraints of Public Reason

The first and most prominent way that reciprocity constrains public deliberation has to do with the sorts of moral claims that might be offered in favour of one or another direction. In this regard, the contemporary idea of public reason traces its beginnings to John Rawls who invoked

[258] Rawls, "Public Reason Revisited", *supra* n13; Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Belknap Press, 1996) at 55 [Hereafter, *Disagreement*].
[259] *Ibid*.
[260] *Ibid*.
[261] I borrow this distinction from Gutmann and Thompson: *Ibid* at 55-56.

it in light of what he called the fact of reasonable pluralism.[262] Fundamental to this idea is the observation that within any democratic society individuals will inevitably hold a plurality of conflicting religious, philosophical, and moral worldviews—what Rawls calls comprehensive doctrines.[263] While some of these will be unreasonable—for instance, those rejecting the notion of free and equal citizenship and insisting on coercively imposing their own view—most could be reasonably held, simply arising out of different ways of perceiving a complex and indeterminate human experience.[264] This pluralism is, without doubt, present and to be grappled with in a country such as Canada, with its diversity of faiths, cultures, and perspectives, including those of both recent and historical migrants, as well as its original peoples.[265]

In light of the demands of deliberative democratic legitimacy, reasonable pluralism thus presents some difficulty for reasoning about public issues in a way that realistically allows citizens to engage with and ultimately accept the reasons put forth. In justifying public action, citizens are not binding only themselves or those that think the way they do; accordingly, justifications cannot legitimately rely on claims that reasonable citizens would inevitably reject. In response to this, Rawls and others have argued that reciprocity and mutual respect requires the exercise of restraint in the public deliberation which precedes decision-making, limiting the bases of justification to those that are mutually acceptable.[266]

Though citizens will hold comprehensive views about what a moral world looks like, these views say too much that would inevitably be rejected by many others. Rather than appealing to their views of the whole truth, then, citizens instead ought to appeal only to those more limited aspects that others might reasonably be expected to endorse.[267] Put differently, they ought to refrain from invoking the controversial or reasonably contested, and instead need to rely

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[262] Rawls, *Political Liberalism*, *supra* n179 at 212; Gerald Gaus traces its core conviction to the social contract theories of Hobbes, Locke, Rousseau and Kant: Gerald Gaus, "Public Reason Liberalism" in Steven Wall (ed), *The Cambridge Companion to Liberalism*, (Cambridge: Cambridge University Press, 2015) 112-140.
[263] Rawls, "Public Reason Revisited" *supra* n9 at 766.
[264] For a helpful look at Rawls' notion of reasonableness as well as the 'burdens of judgement' which contribute to pluralism, see James W Boettcher, "What is Reasonableness?" (2004) 30 *Philosophy & Social Criticism* 597.
[265] For the purposes of this dissertation, I am assuming that all courts will continue to govern a diversity of these peoples, and different expectations or demands might arise if, for instance, separate indigenous courts begin to govern indigenous offences. See e.g. Giuseppe Valiante, "Akwesasne creates first court in Canada for and by Indigenous people", CBC News, (October 2, 2016), online: <https://www.cbc.ca/news/canada/montreal/akwesasne-indigenous-court-canada-1.3787969>.
[266] Rawls, *Political Liberalism*, *supra* n179; Joshua Cohen, "Truth and Public Reason" in *Philosophy, Politics, Democracy* (Cambridge, MA: Harvard University Press: 2009) 348-386.
[267] *Ibid* at 353-354; Rawls, "Public Reason Revisited", *supra* n13.

on the moral values, ideals, and principles that are shared by fellow citizens. Reasons that are public in this way and can legitimately justify coercive political action are thus those that can be presented independently of a particular comprehensive doctrine and affirmed by all reasonable persons.

By employing this substantive restraint, reason-giving gives effect to the values underpinning deliberative democracy, facilitating the exercise of political power in a way that not only respects individual citizens as free and equal, but also gives meaning to the idea that, in a democracy, decisions are made *as a public*. In this way, public reason forms part of the idea of democracy itself.[268] The use of public reason ensures respect for citizens as equals by eliminating the potential for citizens being subjected to moral ideals or principles that they would reasonably reject and thus being treated as means to others' ends. Samuel Freeman thus explains public reason as a condition of political autonomy: absent its use, he writes, "it could not be said that democratic citizens are politically free. Their political power is then being used against their will in ways they cannot endorse as citizens."[269] Similarly, David Estlund describes the moral requirement that reasons be mutually acceptable as an extension of freedom of conscience.[270]

By requiring reasons and limiting them to those that all citizens could reasonably accept, democratic deliberation also gives effect to the idea that democracy entails *collective* decision-making. By relying on shared reasons in public deliberation, Joshua Cohen writes that "the idea of popular authorization is reflected not only in the processes of decision making but also in the form—and…the content—of political reason itself."[271] Similarly, Stephen Macedo writes that only "insofar as we can articulate mutually acceptable principles and approximate their realization in practice" can we sincerely say that political life is "regulated collectively in accordance with our equal moral standing."[272] Indeed, a strong commitment to public reason gives effect to a mode of political community that cannot be found in modes of democracy based simply on majority preference nor deliberation based on disparate comprehensive doctrines. By way of public reason, "[t]he conception of justice by which we live is…a conception we endorse,

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[268] *Ibid*.
[269] Freeman, *supra* n255 at 405 (discussing Rawls).
[270] David M Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2009) at 43.
[271] Joshua Cohen, "Procedure and Substance in Deliberative Democracy" in *Philosophy, Politics, Democracy* (Cambridge, MA: Harvard University Press: 2009) 154-180 at 163 ["Procedure and Substance"].
[272] Macedo, "Why Public Reason?" *supra* n244 at 2-3.

not for the different reasons we may each discover, and not simply for reasons we happen to share, but instead for reasons that count for *us* because *we* can affirm them *together*."[273] As we will see, the moral content of retributive reasons, for instance, is not such that citizens could affirm it together, and thus fails to adequately respect the autonomy of those citizens who reject it.

B. The (Quasi-)Empirical Constraints of Public Reason

The second way in which reciprocity demands public reasoning can be seen in relation to non-moral claims that factor into decision-making. Amy Gutmann and Dennis Thompson speak of these in referring to the "empirical or quasi-empirical claims on which moral reasoning often depends to achieve its practical purposes."[274] Insofar as practical or consequential considerations are relevant to a decision and its implementation, these considerations come by way of empirical or quasi-empirical claims about potential outcomes or strategies. Accordingly, such claims too must be considered in light of the deliberative democratic ideal in which citizens reason with one another as free and equal. This means that empirical claims too must be the sort that citizens can grapple with and accept as rational persons.

Distinct from its demands on the moral content seen above, reciprocity also speaks to the way in which these claims ought to bare their content. Facilitating public deliberation, the notion of reciprocity suggests that in presenting reasons in favour of proposed public action, those reasons and their bases ought to be *accessible* to those to whom they are offered.[275] This requirement of public accessibility of reasons refers not merely to the fact that reasons ought to be comprehensible to others, but that they ought to be open to critical scrutiny—what Gutmann and Thompson refer to as "criticizable."[276] In this way, the empirical claims that shape public decisions ought to be open to evaluation and interpretation by those to whom they are offered; otherwise, these reasons ought to be excluded as insufficiently public.[277]

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[273] Charles Larmore, "Public Reason" in Samuel Freeman (ed) *The Cambridge Companion to Rawls* (Cambridge University Press), 368-393 at 368 (emphasis added).
[274] Gutmann and Thompson, *Disagreement*, *supra* n258 at 55-56.
[275] Gutmann and Thompson, *Why Deliberative Democracy?*, *supra* n13 at 4-5.
[276] *Ibid* at 5, 72-73.
[277] *Ibid* at 72.

This quality seems to be a necessary one for empirical claims to be such that we can reasonably expect others to be able to accept them, having in mind their rational capacities. Setting aside any other potential failings, claims that express information derived from divine revelation or clairvoyance, as clear examples, would fall far short of the demands of reciprocity in this empirical sense. Such claims would be impervious to scrutiny by others, requiring citizens to accept their content on the basis of authority alone and not their own rational capacities. The public cannot engage with the bases of such claims, assess their process of calculation, nor contest the way in which the conclusions were arrived at.

Now, there will undoubtedly be instances where the bases of empirical claims are such that many citizens may not be able to engage with them directly in an especially sophisticated way, as would be the case in introducing many claims of a scientific nature. These claims and their bases would nonetheless be open for scrutiny, just not effectively so for those outside the scientific community. Public reason would not exclude such scientific claims, though it would still insist on reciprocity indirectly, requiring that claims of this sort be rooted in such a way that it would be reasonable for others to accept them. Accordingly, deliberative theorists have suggested that such claims be "consistent with reliable methods of inquiry"[278] and that the methods and conclusions invoked by the scientific community ought themselves not be controversial in such a way that one could not reasonably expect others to accept them as instructive.[279] Of course, even then such claims ought to be presented in a way that citizens can assess their relevance, give them appropriate weight, and understand the reliability of the methods of ascertainment in doing so.

While perhaps receiving less attention than the moral constraints mentioned above, the significance of the assessability of empirical claims should not be downplayed. Indeed, its importance ought to be emphasized in light of both the intrinsic and instrumental justifications of deliberative democracy itself. Regarding the *former*, where reasons are not subject to open challenge, one hardly can be said to manifest respect for fellow citizens while denying them an opportunity to participate, by way of their own reason, in joint self-determination.[280] To deny the

[278] Gutmann and Thompson, *Disagreement*, *supra* n258 at 15.
[279] Rawls, *Political Liberalism*, *supra* n179 at 224.
[280] Gutmann and Thompson, *Disagreement*, *supra* n258 at 56; Gutmann & Thompson, *Why Deliberative Democracy?*, *supra* n13 at 4("[p]ersons should be treated not merely as objects of legislation, as passive subjects to be ruled, but as autonomous agents who take part in the governance of their own society…In deliberative democracy

possibility of engaging with reasons in any meaningful way, citizens fail to respect deliberative democracy's defining feature: public deliberation itself.

Regarding the *latter*, impervious reasons also fail to capitalize on the epistemic benefits of democratic deliberation—that is, its tendency to increase the likelihood of arriving at a substantively correct decision.[281] Indeed, to make claims that are not themselves subject to challenge is to inhibit any corrective or refining effect of deliberation; to take direction from such reasons would be to do so with a certain disregard for the justice of moral application as well as practical consequence. Conversely, adhering to the requirements of reciprocity facilitates, if not necessitates, the critical scrutiny of supposed justifications that leads to better decisions. Of course, such improved democratic decision-making only adds to the respect shown to fellow citizens.[282] It is in both these ways, then, that empirical constraints join the moral constraints of public reason as an integral part of democratic decision-making. As we will see, the empirical dimension of retributive reasons also fails to be such that citizens can adequately engage with them in this way, and thus once again falls short of deliberative standards.

2. Public Reason and Justification in Sentencing

Deliberative democracy requires us to envision the decision-making that informs sentencing as a process within which citizens and their representatives exchange reasons for or against particular proposals in an attempt to determine the most justifiable response to the offense in question. Certainly, the fundamental need to offer reasons that justify public responses is not entirely foreign to sentencing. The previous chapter noted the ways in which this is already the case in practice. In theory too criminal scholars have long been concerned with justifying action within their realm, at least in the sense that might be called justification *simpliciter*.[283] As Simone Chambers explains, "[i]f we understand justification generally to mean the process whereby we seek to ground or defend claims, principles, conclusions (and actions), then all…philosophy to the extent that it engages in arguments, offers reasons, and seeks to defend

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an important way these agents take part is by presenting and responding to reasons…with the aim of justifying the laws under which they must live together.")

[281] Martí, *supra* n14.

[282] Gutmann and Thompson, *Why Deliberative Democracy?*, *supra* n13 at 22.

[283] A John Simmons, "Justification and Legitimacy" (1999) 109 *Ethics* 739 at 759 (contrasting this with the sense employed by Rawls); Chambers, *supra* n256 at 893.

claims is engaged in justification."[284] Normative criminal philosophy certainly fits this description; punishment especially has been the subject of a great variety of principled and rationalized justificatory theories.

Presently, the reason-giving requirements of democratic deliberation *per se* are not at issue, but instead the nature of those reasons in light of deliberative democratic demands. In this regard, the justifications that could be offered in sentencing deliberations are not simply those philosophical arguments that are personally persuasive, but those that can appropriately address others. From a deliberative democratic perspective, criminal justice reasoning lacks a full appreciation of the interpersonal, political nature of justification and its consequences.

To be sure, normative criminal theory has made strides in recognizing the political, and not simply moral, nature of responses such as punishment. A fuller concern with public justification may not be far off. Indeed, Douglas Husak acknowledged the essentially interpersonal nature of justification in developing his own minimalist theory of criminal justice. There, he holds that "justifications...are *relational*. They do not exist in the abstract but are addressed to someone—to those who have standing to demand a justification for what is otherwise objectionable."[285] Even in doing so, however, Husak failed to give sufficient attention to the democratic ideals which govern political relationships and regulate this relational justification. Duff, too, has written about the relational nature of normative reasons within the criminal law, though he limits detailed analysis to reasons for criminalization and obedience. [286] His engagement with the relational nature of the reasons given for public responses is limited and perhaps deceiving: while he argues that the fact that the public ought to respond to crime is fundamentally relational, he does not subject his more specific rationales for that response—namely, that censure is a deserved response, and that it plays a role in reforming the offender—to the scrutiny of public reason.[287] While in a footnote he notes that his thinking "implicitly

[284] Chambers, *supra* n256 at 893 (here she speaks in the context political philosophy specifically, though the description is appropriate to moral philosophy as well).
[285] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: Oxford University Press, 2008) at 120-121 [emphasis added].
[286] R.A. Duff, "Relational Reasons and the Criminal Law" (2012) *Legal Studies Research Paper Series*, No. 12-30.
[287] It might be helpful to think of Duff's claims to be operating at two different levels of generality.

appeal[s]" to a version of public reason, he does not unpack this and recognizes there is "very much more to be said about [it]."[288]

Accordingly, scholarship continues to neglect the implications of reciprocity and the public reason it demands, especially with respect to sentencing. The question of how reciprocity constrains democratic deliberation in relation to sentencing has thus yet to be addressed and represents a gap in understanding for both normative criminal theorists as well as deliberative democrats. By considering the content of public reason in light of the above constraints, we can address this gap and in doing so illustrate the way in which deliberative constraints speak to the longstanding tension between retributivism and consequentialism.

To be sure, identifying the complete roster of public reasons is beyond the current scope, and in any case it is implausible that such a list could be identified in the abstract.[289] Ultimately, public reasons needs to be worked out by engaging with a diversity of perspectives in real interactions. In this respect, emphasis in Canada might be placed on interactions with its Indigenous peoples, given their overrepresentation within the criminal justice system,[290] the historical differences between Indigenous and common law systems of justice,[291] and Truth and Reconciliation Commission calls to action regarding, broadly speaking, the need to reconcile criminal justice with Indigenous needs and perspectives.[292]

Nonetheless, the prescriptions outlined above do offer at least a partial view into what would constitute public reasons in the context of sentencing. Guided by a commitment to reciprocity, the citizen (as well as the theorist) can determine with some confidence that certain values are controversial and some common, some inaccessible and some open for consideration; this is the case in criminal justice as elsewhere. However, the same limitations apply as well, and

[288] Duff, "Relational Reasons" *supra* n286 at note 17.
[289] Jonathan Quong, "The Scope of Public Reason" (2004) 52 *Political Studies* 233 at 244-245.
[290] See e.g. Jamil Malakieh, "Adult and Youth Correctional Statistics in Canada, 2017/2018" Statistics Canada : May 9, 2019, online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00010-eng.htm> (Noting, as one indication, that "In 2017/2018, Aboriginal adults accounted for 30% of admissions to provincial/territorial custody and 29% of admissions to federal custody, while representing approximately 4% of the Canadian adult population").
[291] See e.g. Rupert Ross, "Restorative Justice: Exploring the Aboriginal Paradigm" (1995) 59 *Saskatchewan Law Review* 431; P.A. Monture-Okanee and M.E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992) 26 *UBC Law Review* 239.
[292] Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) (especially recommendations 25-42).

thus the aim of this discussion is not to develop a comprehensive view but instead sketch some key implications of public reason as it pertains to both consequentialist and retributive rationales.

In speaking about the content of public reason, it should be noted again that we are not referring to the nature of the ultimate decision, although these are not unrelated. As Rawls makes clear, "public reason is not a view about specific political institutions or policies. Rather, it is a view about *the kind of reasons* on which citizens are to rest their political cases."[293] The exploration here, then, is not one directed at how the state ought to respond to criminal offenses, but instead a look into the kinds of reasons that citizens and their representatives might invoke in reasoning toward particular outcomes. We might refuse private reasons supporting a particular response while nonetheless arguing for that response on the basis of other, more public, reasons. Our focus is thus squarely on the values, principles, and ideals that comprise public bases for sentencing. In this regard, the following sections assess both consequentialist and retributive reasoning in light of the demands of reciprocity.

A. Consequentialist Reasons and Public Reason

This section explores the way in which consequentialist reasons are regulated by the demands of deliberative public reason. Before turning to the substantive question, however, it serves us well to clarify the nature and components of consequentialist reasoning. Generally speaking, consequentialist approaches in normative criminal theory are based on the idea that the goodness or rightness of an action is dependent on its outcome, or *consequences*. The good response to a criminal offense, then, is one that produces a good result. Adopting this view, decision-makers would justify their decisions on the basis of the ends achieved – in other words, on the basis that a particular response would achieve a particular end. Of course, what that end might be certainly differs among those who espouse this view, as do their means for achieving it. Theorists advocate for various ends such as enhanced happiness, liberty or dominion,[294] and invoke different means of achieving them, though punishment seems to be the most common.

Despite these variations, what consequentialists share is a common structure of reasoning—that is, consequentialist reasons implicitly share a particular form. Unpacking this

[293] Rawls, "Public Reason Revisited" *supra* n9 at 795 (emphasis added).
[294] Bentham, *supra* n1; John Braithwaite & Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990).

will help clarify the analysis to follow. The underlying commonality among consequentialist reasons is certainly the notion that consequences are morally relevant: that good or bad consequences matter, morally speaking. More specifically, however, consequentialist reasons might be said to take the following form: *X* action is the right response because it achieves *Y* consequence. Within such a reason we can thus see two implicit claims, each of which can be subjected to distinct review. First is the claim that *Y consequence is a good to be achieved*; second is the claim that *X strategy is the way to achieve that good*. Each of these claims will be returned to shortly.

In what way do consequentialist approaches lay within or outside the bounds of public reason? As a preliminary note, the political approach underpinning public reason would certainly exclude appeals to comprehensive doctrines which would say too much and in effect assert controversial values or principles. From the outset, then, we can exclude pure consequentialist approaches which would controversially hold that *only* consequences matter or appeal to comprehensive doctrines that citizens might reasonably reject. Rawls has excluded the appeal to utilitarianism as such a doctrine, holding that it speaks too broadly and, given reasonable pluralism, could only be adopted universally by way of oppression.[295] We could, however, acknowledge that consequences do matter without asserting that consequences are the *only* considerations that matter.

But do consequences matter? This, it would seem, is uncontroversial and public reason scholars admit that they do, regularly pointing to the protection and achievement of values as requirements of justice. Rawls, for instance, holds that the content of public reason is characterized by special priority being given to—as well as the adoption of measures that ensure the effective use of—basic rights and liberties.[296] Surely, the realization of values tied up with basic rights and liberties is relevant in democratic decision-making. Even the reasonable retributivist would agree about the relevance of certain ends. Michael Moore, perhaps contemporary scholarship's boldest retributivist, counts certain enforcement "costs" against the value of retribution.[297] With clarity, he writes that "[t]he retributivist like anyone else can admit that there are [non-retributive] intrinsic goods, such as the goods protected by the rights to life,

[295] Rawls, *Political Liberalism*, *supra* n10 at 13, 37, see also 162.
[296] *Ibid* at 450.
[297] Michael S Moore, "A Tale of Two Theories" (2009) 28 *Criminal Justice Ethics* 27 at 32.

liberty, and bodily integrity."[298] To argue that these consequences are not valid considerations could only be held to be unreasonable. Certainly, many retributivists, including Moore, give consequences a less prominent role in their theories and hold those consequences to be insufficient justifications alone.[299] Retributivists typically "welcome" the consequential benefits while holding that they are not criminal justice's central aims.[300] Despite these secondary roles, they nonetheless stand as mutually acknowledged values. It remains, then, to qualify the way in which standards of publicness can be met by consequential reasons and to identify the further impact that public reason would likely have on sentencing deliberations. To do this, I return to the two-part distinction noted above.

The first dimension relates to what could be called the central moral claim of a consequential reason—that *Y consequence is a good to be achieved*. Given the moral constraints of public reason, reciprocity demands that citizens offer reasons the moral content of which others could reasonably be expected to endorse. The ends or consequences that citizens argue in favour of thus need to be public in the sense of being shared, free-standing values that can be endorsed independent of one's own particular comprehensive doctrine.

Citizens could not argue on the basis of sectarian values, mere personal interest, or preference, instead having to argue on the basis of the common good. Proponents of public reason, for instance, point to values such as autonomy, well-being or public health as classic public values.[301] Accordingly, it seems unproblematic for citizens to argue in favour of responses that help secure public safety and freedom from agreed-upon harms. In contrast, controversial non-public ends such as religious repentance would be excluded.

In a developed system of sentencing, the desired public ends of sentencing should be explicitly identified and codified. In Canada, for instance, the *purposes* of sentencing are clearly set out in the Criminal Code.[302] As a result, all sentences must be justified in light of those purposes.

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[298] Michael S Moore, "Justifying Retributivism" (1993) 27 *Israel Law Review* 15 at 34.
[299] David Dolinko, "Some Thoughts About Retributivism" (1991) 101 *Ethics* 537.
[300] Jeffrie G Murphy, "Legal Moralism and Retribution Revisited" (2007) 1 *Criminal Law and Philosophy* 5 at 12.
[301] Rawls, "Public Reason Revisited", *supra* n13 at 779; Quong *supra* n289 at 243-244.
[302] Criminal Code, s. 718. See also Criminal Justice Act 2003, 2003 c.44 s. 142. This is not to endorse these purposes as appropriately public, only to identify an appropriate means of identification.

The second dimension of consequentialist claims is that which can be understood as primarily empirical, holding that *X strategy is the way to achieve that good*. This claim, as noted above, is implicit in any consequentialist reason. Holding, for example, that we ought to punish in order to deter an offender from repeating his illegal behaviour implies a claim that punishing is a valid strategy for preventing recidivism. For reasons to be empirically public, the bases for such claims need to be open for fellow citizens to engage with and critique and thus cannot be inaccessible sources.

The other side of the coin is that reciprocity draws attention to the need for evidence-based interventions in sentencing. The nature of deliberation – exchanging persuasive arguments and sincerely assessing them on their merits – exposes these claims to scrutiny on empirical bases, and thus suggest that empirical content be reasonably expected to withstand that scrutiny. Arguments in favour of one sentence or another would need to rely on those commonly accepted "methods of inquiry" and their conclusions.[303]

Constrained by the demands of public reason, then, consequentialist reasoning in sentencing deliberations would involve accessibly arguing in favour of sentences that are thought to reliably work toward shared public ends, given the particular facts and contexts at hand. Given the varying nature of criminal offenses as well as offenders themselves, deliberation generally would involve any number of considered strategies. Because of this, it makes little sense to characterize deliberative reasoning as involving a particular or characteristic scheme of strategies; rather, the variability of techniques necessitated by deliberative sentencing ought to be recognized. This applies to both punishment as a strategy generally as well as to the particular angles placed thereon—for example, its use for expression or moral education.[304] The effectiveness, relevance or appropriateness—factors which contribute to a decision's justifiability—of any strategy no doubt vary according to the situations in which citizens and their representatives find themselves following particular criminal offenses. Accordingly, so too does the justifiability of deterrence, restoration, reform, rehabilitation, communication, education, or incapacitation, as well as their sub-strategies.

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[303] Gutmann and Thompson, *Disagreement*, *supra* n258 at 15.

[304] For example, de Greiff characterizes his view of deliberative democracy as relating to a particular form of expressionistic punishment and moral education; however, the strategies that may often be best justified may not centre on expressing or educating: de Greiff, *supra* n147.

None of this, however, is to say that empirical evidence is determinative or the sole consideration in deliberating strategies for achieving public ends in sentencing. While the claims supporting particular strategies are certainly empirical in nature, they are at the same time moral, reflecting implicit positions on certain values and principles of justice—this being the case whether through the incorporation of particular considerations or their exclusion. In this regard, the moral dimensions of public reason are also operative. While potential reasons invoked in deliberation vary, the use of public reason might still nonetheless push consequentialist decision-making across the board in particular directions.

As seen above, reciprocity constrains the kinds of reasons that citizens and their representatives can offer by requiring that they not only be accessible to rational scrutiny, but acceptable to fellow citizens given that they may hold a different moral, philosophical or religious perspective. Joshua Cohen thus characterizes public reason as "a terrain of political reflection and judgment that equal persons, drawn to conflicting doctrines, can reasonably be expected to occupy and endorse as a basis for addressing public issues."[305] If, as Cohen puts it, public reason is common territory, then at the centre ground we can expect to find certain values that are core to deliberative democracy itself as reliable considerations in any deliberation. Equality among citizens, for instance, is an ideal which anchors the very notion of democracy and is thus obvious content. Reasons that express otherwise—for example, any rationale implying that some individuals are worth less than others—are clearly excluded.[306]

So too we could include respect for others as rational, autonomous persons—at least those views of autonomy that are not themselves controversial.[307] In this way, the values that lead to the procedural constraints of public reason themselves ought to continue to act as substantive considerations *within* deliberations. Shared notions of liberty, then, are certainly included in considering what strategies to adopt. Indeed, given the fundamental place of autonomy in the democratic view of politics, it would seem that liberty would not simply be available to be drawn on, but a continuous, mandatory consideration in deciding what, if any,

[305] Cohen, *Philosophy, Politics, Democracy, supra* n244 at 353-354.
[306] See e.g. *Ibid* at 162.
[307] Rawls himself excluded controversial views of moral autonomy tied to perfectionism: "Public Reason Revisited", *supra* n13 at 778.

response is justifiable following a criminal offense.[308] Whether or not a *presumption* of liberty is adopted seems to make little difference, and simply having a continuous consideration of the value of liberty in weighing against coercive interventions seems sufficient and less controversial than 'presumptive' framings. Whether a consequence of this fact or a separate but related principle of justice, it seems clear that a notion of proportionality would also be operative.

Relatedly, deliberative democracy's emphasis on respect for citizens as rational persons would operate in a similar way, shaping the sorts of strategies that deliberation might yield as means to public ends. This value is not necessarily unique to deliberative perspectives on criminal justice; however, by tying respect for fellow citizens to public justification, the particular way in which public reason gives effect to this ideal presents a unique perspective on the issue. The first of these is by way of the focus on political influence through persuasion. Deliberative democracy prescribes that in situations of normative conflict, citizens ought to seek influence by way of persuasive argumentation rather than force and it is by doing so that we respect others as free and equal.

This of course applies to the process of deciding how to respond to an offender, but it seems only consistent to suggest that these values have a role in determining the substantive decision as well. On this exact point, de Greiff argues that

> "a broad theory of politics will aim at a certain coherence which in this case leads to the reasonable expectation that the considerations that guide individual choice and those that are expressed in the institutions and laws by which individuals live will be related to one another. In this specific context, this means that the idea of persuasion, which is critical for the institutional account of politics provided by deliberative democracy, has to figure also in whatever account of individual moral choice adopted."[309]

Accordingly, it seems straightforward to suggest that the deliberative values which inevitably occupy public reason would place an emphasis on interventions that engage offenders in their rational capacities. Indeed, an ideal might be dialogic or communicative interventions whose mechanism of influence turns on expression and ultimately persuasion. As a result of this point, de Greiff himself goes on to draw connections between deliberative democracy and an

[308] This is similar to notions of equality, which are not simply able to be drawn upon, but are omnipresent in democratic deliberations.

[309] de Greiff, *supra* n147 at 387 (It is not entirely clear how de Greiff would define or situate such an account, though the functioning of deliberative democracy and the idea of public reason in particular might require that we tread carefully in searching for "an account of moral choice" that is restricted to a particular theory of punishment, for example).

expressionist view of punishment, suggesting that the immediate aim of such a response ought to be the *persuasion of the offender* and the transformation of their understanding of their actions.[310]

de Greiff is correct in emphasizing the importance of deliberative democracy's core commitment of persuasion in criminal justice and holding it as an ideal mechanism of change. Surely, any response ought to involve expressing to the offender what was wrong with his actions and the reasons why that is so. However, de Greiff goes too far in two respects. First, his focus on punishment as the sub-strategy which gives effect to this persuasion is premature, and perhaps even defeating of the value of rational engagement given its nature.[311] Further, deliberative decision-making's options are not—and should not be—limited to initiatives that solely seek to persuade. While these may warrant priority as being the least coercive and most respectful of fellow citizens, there are nonetheless situations in which other strategies are needed and justifiable. Surely, a certain threshold of dangerousness inevitably gives rise to some need for incapacitation, as one example, and could reasonably be justified to those subject to it.

Accordingly, it suffices to note that the impact of respect for fellow citizens as rational persons is that it puts an emphasis on engaging offenders as such, whether as a sole intervention or in conjunction with other initiatives. Importantly, those other initiatives can still respect offenders as free (including rational) and equal citizens through an inclusive deliberative process for deciding upon them, and the fact that interventions that are coercive necessitate justifications that all, including the offender himself, can accept as persuasive. This leaves room for the possibility that interventions which are not dialogic in and of themselves can still be accepted by the public (and the offender) if supported by acceptable public reasons. Because of this, deliberative democracy's unique take on respecting citizens as rational persons through public reason goes beyond communicative strategies and speaks to other consequentialist strategies as well.

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[310] *Ibid* at 375; 395-396 (Notably, de Greiff takes up a Habermasian view of deliberative democracy, which contrasts with the more substantively-minded view I am exploring). I say "immediate" because from a consequentialist perspective, the ultimate aim would be public safety or some variation thereof, not simply persuasion for its own sake.

[311] de Greiff himself expresses some uncertainty about this issue: see *supra* n14 at 396*ff*, 400.

The way in which it does so can be seen in response to a classic point of tension in consequentialist scholarship according to which deterrence is seen as better respecting the autonomy of the offender than reformist or rehabilitative interventions. As RA Duff summarizes,

> "would-be reformative interventions threate[n] to deny the offender's status as a responsible moral agent: they [seek] to mold him into conformity with the polity's values, rather than leaving him free to determine his own values; they [seek] to intrude into his moral personality in a way that denie[s] his freedom and privacy. By contrast, deterrent punishments address potential offenders as rational agents, offering them prudential reasons to obey the law which should appeal to rationally self-interested beings; nor do they impinge upon the inner citadels of [the offender's] soul in the way that reformative or therapeutic punishments aim to impinge."[312]

Such claims regarding the autonomy of offenders in determining their own governing values and utilizing their rational capacities are no doubt of great interest from a deliberative perspective.

Even more, they speak directly to the question at hand regarding the way in which public reason and its core democratic values push consequentialist reasoning in one direction or another. Substantively, Duff's formulation suggests that rehabilitative or reformist initiatives deny the offender's autonomy in utilizing his own rational capacities and in choosing his own values. Further, it claims that deterrence strategies speak to the offender as a rational agent and avoids the use of moral force. If this were true, we could conclude that public reasoning might push consequentialist reasons toward deterrence. By appreciating the requirements of deliberative democracy generally and the public nature of its reason more specifically, however, neither of these claims as they are presented are true. Rather, neither deterrent nor rehabilitative approaches necessarily deny the autonomy of offenders. Public reason ensures that such interventions are justified according to standards that the public, including the offender, could accept.

First, let us consider the claims regarding deterrence. Counter to what the above suggests, from a public justification perspective, mere prudential reasons are not enough to respect potential (re-)offenders as rational, autonomous persons. Although offering prudential reasons through a deterrent threat does make use of potential (re-)offenders' rational capacity, it does not make use of that capacity in the same way that we use ours in justifying the prohibition in the first place. On this point, Larmore insists that to respect an individual 'as an end', coercive

[312] R.A. Duff, "Penance, Punishment and the Limits of Community" (2003) 5 *Punishment & Society* 295 at 297 (internal quotations omitted).

principles need to be justifiable to them as they are to us—that is, persuasive in the same way to those bound as they are to those binding.[313] Accordingly, in a deliberative democracy committed to the notion that political decisions need to be justified to citizens, there is in fact no escaping the idea that societies seek to engage individuals on a moral level.

This occurs in two ways. First, like any other area of law or policy, deliberative democracy ensures that there are good reasons underpinning prohibition, and these continue to be active throughout the process. Deterrents might be able to be justified as an *additional* measure that serves to psychologically assist individuals in not committing an offense if this is required, but this must always be preceded by or at least accompanied by good reasons that justify the initial prohibition by appeal to shared values, ideals or principles of justice. This is implicit in the idea of blame, which constitutes a claim that the offender ought to have done differently—a claim which, in a deliberative democracy at least, requires defense through the appeal to moral reasons. In justifying deterrent interventions as an additional measure, so too is the offender engaged as a rational person, and any such intervention would need to be justifiable in line with public values that the offender himself could accept.

Other additional measures can be justified in a similar way, so long as ends are public, and means are publicly justified. In some cases, deliberations might involve recognizing impediments to individuals being able to exercise their rational and reasonable capacities, and thus mere dialogic engagement might not be enough. The real world, especially that within the realm of criminal justice, is rife with mental illness, emotional problems, psychological trauma, learning difficulties, and so on. Even democrats that place the ideal of the rational, reasonable person at the centre of their theorizing need to recognize that criminal justice will inevitably encounter individuals who may need assistance. The challenge for criminal justice in this regard is to not slip into an either-or mentality and instead recognize the complexity, continuing to acknowledge individuals' autonomous capacities while intruding only insofar as is necessary.

With respect to 'molding the offender to conform to the polity's values', any reformative, educative or rehabilitative interventions that do proceed would—heeding the demands of public reason—be based on values or notions of justice that the offender himself could reasonably be expected to accept. To the extent that individuals are unable to fully participate in those

[313] Larmore, *Modernity*, *supra* n252 at 137.

deliberations, public reason itself should stand as a guide for what the individual could himself accept. Accordingly, controversial views about morality or justice are excluded, and thus even in reformist moments, criminal justice in a deliberative democracy would not impinge upon any 'inner citadels', at least not in any way that could reasonably be resisted.[314]

At the same time, it would be hypocritical of those upholding the rational capacities of offenders to not recognize that offenders themselves could, using their rational capacities, acknowledge the fact that they face unique challenges—an addiction problem, for instance—and that in light of prior behaviour the community needs to take reasonable steps to ensure that they are capable of adhering to the society's terms of cooperation and to promote a common good. In this regard, public reason ensures that both the proposed ends and the means of achieving them are such that the offender himself could reasonably be expected to accept them. In this way, each of these strategies can be consistent with deliberative democracy's commitment to engaging individuals as ends and not means, as rational agents who can participate in deliberations, and who cannot be coerced to abide by moral views that they themselves do not accept. Whether one or the other consequentialist strategy is in fact adopted would be left to informed deliberation in actual cases, depending on what is best justified, all things considered. In this way, they join communicative strategies as options to be weighed in light of public values—for instance, liberty and equality—and empirical reflections which might inform their choices.

B. Retributive Reasons and Public Reason

Given that the nature of public reasoning so far explored is not exclusively consequentialist nor closed to other principles of justice or deontological values, it might remain a possibility for a principle of desert to serve as a basis for reasoning in sentencing. This section turns to that question and is concerned with assessing the appropriateness of retributivism in light of the demands of public reason. Again, rather than exploring retributive *theories* as such, it focuses on what might be considered retributive *reasons* as they can be found across the retributive-consequentialist theoretical divide, occurring as well within mixed theories, and invoked by so-called moralists and liberals alike. Retributivism is not without its variations and

[314] See also on this point: de Greiff, *supra* n147 at 402 ("The sort of moral persuasion that is relevant in the justification of penal law would not involve the attempt to persuade citizens about issues concerning conceptions of the good life, but rather, of what is *just*, in the sense of being equally in the interest of all." I would qualify this with a reminder that not all supposed principles of justice are shared.)

what classifies as such is not uncontroversial;[315] accordingly, retributive reasons might take various forms. To subject each of these to scrutiny would be beyond the scope of this chapter, and the arguments made here may in any case either be directly applicable or give insight into how other versions might be critiqued. The exploration here, however, takes as its object the classic formulation of retributivism which holds an individual's desert as a justification for public intervention. Consequently, the *desert claim* becomes the 'retributive reason' at issue here.[316]

Before assessing desert in light of the demands of public reason, it is important to note what can be considered two distinct aspects of a desert claim. As will be seen, these aspects are interrelated and indeed interdependent. As a result, it follows that if either are proven unsatisfactory, then desert claims would be problematic in their use as reasons within deliberative democratic decision making. Despite this interdependence, they are distinct in their nature and mode of argumentation and, as a result, they can be scrutinized in light of different standards of public reason.

The first of these aspects is what might be referred to as the *basic moral logic* of a desert claim. Fundamentally, it claims that, on account of the moral worthiness of an individual's action, that individual ought to receive an outcome which corresponds in kind, whether positive or negative, to the moral worthiness of the action.[317] The 'ought' which acts as the fulcrum of the claim has been expressed in a variety of ways: with punishment being an "*intrinsically appropriate* response to crime,"[318] that there is an "*intrinsic good"* in the guilty suffering being

[315] Mitchell Berman, "Two Kinds of Retributivism" in RA Duff and Stuart Green, *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011); Dolinko, *supra* n299. On communicative versions, especially, see Zachary Hoskins, "Punishment" (2017) 77 *Analysis* 619.

[316] One interesting alternative line of inquiry would be to be explore consequentialist reasons in support of giving offenders what they are perceived to deserve: see e.g. Robinson & Darley, "Utility of Desert" *supra* n5 who argue that punishment according with widely intuited or "empirical" desert is necessary for the criminal law to be realistically perceived as legitimate, and thereby be effective. Current scope does not permit a full engagement with this argument, however it is worth briefly noting two responses which build on the arguments that follow. First, as a normative matter, it seems fundamentally inconsistent for public deliberation to incorporate what would be, if the arguments below, mere majoritarian arguments (i.e. the argument that it is pragmatically necessary to enforce what the majority intuits despite this falling short of deliberative standards). Second, as an empirical matter, there is interesting social science research demonstrating that under actual deliberative conditions citizens may actually perceive rehabilitative and restorative—rather than retributive—responses as more legitimate: see generally Simpson et al, *supra* n17.

[317] See e.g. George Sher, *Desert* (Princeton: Princeton University Press, 1987).

[318] RA Duff & David Garland, "Introduction" in RA Duff & David Garland (eds), *A Reader on Punishment* (Oxford: Oxford University Press, 1994) at 7 [emphasis added].

punished,[319] and that "the state of affairs in which these individuals receive their just deserts *is preferable to the state of affairs in which they do not*."[320] Common to these variations, however, is a basic moral assertion that, independent of the consequences, there is a moral goodness in the fact that a criminal offense is responded to with pain.

The second aspect of any desert claim is what might be referred to as its factual or *quasi-empirical assertion*. Whereas the basic moral principle outlined above can be understood as making a generic moral claim that individuals ought to receive an outcome that corresponds to the moral worth of their action, the quasi-empirical assertion makes a more specific claim about what exactly is deserved: in a retributive claim, *that an individual ought to suffer X amount*.[321] While still involving moral content, this assertion is empirical given its reliance on a personal evaluative assessment of that which is deserved. Despite the fact that desert is often spoken of in an objective or universal terms – i.e. that an individual ought to get 'what they deserve' rather than 'what they are perceived to deserve' – specific claims of desert are in reality very much a matter of subjective perception, informed not only by the particular weight assigned to relevant factors, but the subjective perception of what factors are deemed relevant.[322] To make the claim that an individual deserves X, then, is to assert a quasi-empirical claim about one's perception of what X outcome ought to be.

Accordingly, in offering an individual's purported desert as a reason to respond to them in a particular way, the individual offers both a moral claim and an empirical claim. As might be obvious by laying out the previous distinctions, desert claims can thereby be critiqued in two ways. The first of these is moral. Deliberative democrats can ask whether or not the normative essence of a desert claim, its core thrust – that is to say that an individual ought to get what they deserve – is acceptable within democratic deliberation. This can be answered in light of the

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[319] Moore, *Placing Blame*, *supra* n42 at 87-88 [emphasis added].
[320] Husak, *supra* n45 at 200-201 [emphasis added].
[321] Despite the fact that some retributivists deny the use of desert as a means of specifying a precise punishment, but rather seek to employ it as a "limiting principle", its use in the mode discussed here is unavoidable in accepting the notion: even if only employing it as a limiting principle, the use of even a negative desert claim suggesting that an individual 'does not deserve' a particular intervention, when pressed, offers a quasi-empirical claim. See Ristroph, *supra* n1 at 1303 ("for desert to limit...consequentialist pursuits at the extremes, it needs some specificity. Otherwise, what will stop the proponents of incapacitation from insisting that life prison terms for all offenders are both socially useful and deserved?").
[322] See e.g. NT Feather. "Judgments of Deservingness: Studies in the Psychology of Justice and Achievement" (1999) 3 *Personality and Social Psychology Review* 86 (exploring the way in which desert assessments take cues from normative social assessments).

moral dimension of public reason. The second is quasi-empirical. Deliberative democrats can ask whether a specific claim that the offender deserves X – a claim which is necessary for desert to have practical application – is of the sort that ought to be available within democratic deliberation. This question can be answered in light of the latter empirical constraints of public reason.

From a deliberative perspective, then, the first and perhaps most prominent issue to address about retributive reasons is the basic moral claim that they embody. In this respect, the idea of public reason holds that in order for such moral claims to be valid, they must be of the sort that can be endorsed by all reasonable persons, recognizing reasonable pluralism. Across the diversity of moral, philosophical and religious doctrines that individuals adhere to, desert must be a shared value. In this way, the standards of public reason differ in some important ways from other modes of assessment of desert and the retributivism they suggest. For one, public reason considers moral values, ideals and principles through a political, not a metaphysical lens.[323] It seeks to determine those reasons that draw support across different worldviews, rather than assessing claims on whether or not they adhere to a given view of moral truth. As public *reason* it is of course attentive to logic and principles of inference,[324] however it does not choose amongst the most convincing of moral arguments (convincing to whom?). Its basic standard of exclusion is one of reasonableness,[325] and from there it requires that the value in question be one which is shared across reasonable views. As a result, the specific arguments offered by proponents and critics of desert are not themselves the landscape upon which public reason proceeds.

Secondly, it should also be pointed out that the mere lack of theoretical incompatibility of desert claims with other views does not go toward granting it public status. Retributive arguments that seek to demonstrate that the principle of desert is compatible with a consequentialist-oriented system of criminal justice – for example, that espoused by HLA Hart[326] – do not necessarily mean that such a principle is not nonetheless reasonably rejected by others.

[323] Rawls, *Political Liberalism*, *supra* n179 at 144.
[324] *Ibid* at 220.
[325] Boettcher, *supra* n264.
[326] *Punishment and Responsibility*, *supra* n163 at 8-13.

There may certainly be conceivable principles that do not necessarily conflict with a crime-prevention focus that are nonetheless readily rejectable.

Given the standards of public reason, the task here in assessing whether retributive reasons are able to be offered in sentencing deliberation is not to undergo in-depth analysis of retributive claims' internal merits and shortcomings. Proponents of public reasons need not do this any more than they need to argue against the moral truth of Christian doctrine in denying it a place in shared public reason. In fact, public reason might require us to avoid making a definitive statement either way to avoid incorporating views that might be reasonably rejected. In any case, it suffices to note that there are indeed those who would not endorse desert as a valid moral claim. This remains the case despite retributivism's revival in the last number of decades within normative criminal scholarship as well as the lay retributivism that persists in much of society's everyday sentiments. Each of these facts might warrant further consideration, though for now we can remind ourselves that deliberative public reasoning differs from aggregative notions of democracy in its particular resistance of majoritarian impulses. Here we are after shared public values, and not simply those of a majority.

Among criminal scholars, there are certainly those who have rejected retributive claims of desert. David Dolinko, as a prominent example, has written that he believes that retributivists have yet to "transform [their] enigmatic utterances into a rationally defensible theory," and thinks they are unlikely to do so.[327] Russell Christopher summarizes similar critiques from others saying that critics "argue that the [retributive] justification, as such, is more intuition than justification, is circular or empty, and constitutes a denial of the need to supply a justification."[328] While it is important not to take scholarship as a mirror for public moral commitments, the thoughtful reflection and rejection of retributive moral core in these cases are perhaps most striking and elaborated; at the very least they are the most well-documented.

[327] Dolinko, *supra* n299 at 539.
[328] Christopher, "Deterring Retributivism" *supra* n241 at 861.

It is perhaps also instructive that in revisiting his idea of public reason, Rawls specifically rejects moral desert, albeit it not in the context of criminal justice.[329] In offering examples to illustrate public reason and its violation, he invites us to

> "consider appeals to desert in discussing the fair distribution of income: people are wont to say that ideally distribution should be in accordance with desert. What sense of desert do they have in mind? Do they mean that persons in various offices should have the requisite qualifications – judges must be qualified to judge – and all should have a fair opportunity to qualify themselves for favored positions? That is indeed a [public] value. But distribution in accordance with moral desert, where this means the moral worth of character, all things considered, and including comprehensive doctrines, is not. It is not a feasible political and social aim."[330]

I think there is much else to take from Rawls' judicial metaphor here, both in terms of the idea of "qualifying" someone for criminal intervention as well as the idea that fair terms of cooperation in society ought to ensure that individuals have an equal opportunity to avoid such situations.[331]

Presently, however, we are limited to considering its significance for the question at hand. In this regard, the moral distinction between desert in the one arena and desert in the other does not seem significant – surely principles of justice are not written with only a particular institution in mind. No doubt it would be controversial to suggest that distributive justice ought to align itself with moral desert, as Rawls points out. With this and the above in mind, it does not seem that, guided by the notion of reciprocity, citizens could plausibly offer retribution and desert as reasons for state action. It seems inevitable that to do so would be to seek to impose controversial principles on those who could reasonably reject them.

The second way in which retributive reasons can be assessed against the demands of deliberative democracy is in relation to the quasi-empirical dimension of public reason. In this regard, the quasi-empirical assertions intrinsic to desert claims – that an individual deserves X – can be assessed for accessible qualities which allow others to engage with, critique and approve of such reasons offered by others. Drawing on Alice Ristroph's observation regarding the "opacity" of desert claims[332] as well as Norman Feather's research into the psychology of desert

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[329] An early Rawls did engage with desert in the context of criminal justice, though he seems to turn on an institutional rather than moral basis for not punishing 'the innocent'. In any case, given subsequent shifts in Rawls' thought it is difficult to say if the contents therein are anything more than of historical interest on the matter. See Rawls, "Two Concepts of Rules" (1955) 64 *Philosophical Review* 3.
[330] Rawls, "Public Reason Revisited", *supra* n13 at 778-779.
[331] See Roberto Gargarella, "Penal Coercion in Contexts of Unjust Inequality" (2010), *Yale Law School SELA Papers* 81, online <http://digitalcommons.law.yale.edu/yls_sela/81>.
[332] Ristroph, *supra* n1.

that lends support to Ristroph's conclusions, [333] the following suggests that the quasi-empirical nature of the desert claim fails to respect the corresponding requirements of public reason and are thus problematic.

The crux of the issue, as Ristroph characterizes it, is that desert is inherently "opaque"[334]—a descriptor which, given the empirical demands of public reason, ought to give the deliberative democrat pause. In this regard, she writes that in considering a participant's desert claim, "it is difficult to know or control which particular details of an offender or offense inform [their] assessment of desert."[335] While it is clear that they find a specified response appropriate, we do not—and indeed they may not either—know the bases relied on in coming to that assessment. Moreover, nor can we examine their mode of calculation – the quantitative, proportionate link between wrongdoing and desert. As the expression of an intuitive reaction to the conduct of others, desert claims thus do not allow others to identify or assess their underpinnings in a way that facilitates deliberative justification nor reflection.

To illustrate this point as well as the troubling consequences of opacity, Ristroph draws upon quantitative and qualitative research regarding U.S. capital sentencing.[336] In doing so, her research points to a variety of extra-legal factors which impact whether or not juries opt for a deserved death penalty. To the democrat's dismay, the list of considerations which operate to sway desert assessments in this regard include factors such as one's race, the social status of the victim, and one's relationship to the community.[337] Tying this to the mechanism of opaque assessments, Ristroph writes that

> "the substitution of desert judgments for racial animus, xenophobia, or other bases of dislike almost certainly operates subconsciously most of the time. This subconscious substitution is one of the perverse consequences of the opacity of desert. We – not just ordinary citizens, but also philosophers, lawyers, judges and legislators – have difficulty explaining what makes one defendant more blameworthy than another. Strong intuitions that moral desert is a meaningful concept coexist with uncertainty about the factors that should determine desert. Since we cannot consciously explain what makes a person more deserving than another, we seem to do so subconsciously. Desert thus serves as a vehicle to give legal effect and moral authority to our subconscious dislikes."[338]

[333] Feather, *supra* n322.
[334] Ristroph, *supra* n1 at 1296
[335] *Ibid*.
[336] Capital sentencing is thought to serve as a useful look into the operation of desert given that it remains jury based (and thus presumably broadly representative) as well as relies heavily on desert-related criteria. See *Ibid*.
[337] *Ibid* at 1329-1331.
[338] *Ibid* at 1331.

Ristroph's point regarding the empirical dimension of desert is bolstered by desert-focused research occurring outside the legal discipline. Norman Feather, the foremost researcher on the psychology of desert, points to similar results in reviewing his own robust body of research.[339] By way of a variety of experiments, Feather demonstrates that assessments of desert go beyond considerations of responsibility to include additional factors such as gender, ethnic identity, social status, group membership, likeability, and even the personality traits of the judge have demonstrable effect.[340] Each of these, of course, occurs under the cloak of opacity pointed to by Ristroph.

While claims arguing the mere *relative* or *ordinal* blameworthiness of crime—that is, which offenses are more serious than others—are perhaps feasible from an empirical perspective,[341] even this is complicated in practice when the comparison is not just abstract offenses but a spectrum of human behaviour in its complexity and context. In any case, the cardinal, quantitative nature of desert assertions remains an intractable problem even if relational claims are available.[342] Claims asserting the absolute quantification of desert seem unavoidably intuitive. While fellow citizens cannot determine or critique the qualitative considerations informing an empirical desert claim, neither can they examine the formula of calculation – that is, the proportional relationship between factors and ultimate quantum of suffering.

In this regard, the fact that discriminatory bases inform desert claims is problematic not simply because of the reprehensible—and undoubtedly antidemocratic—nature of those considerations. Of course, considerations that fail to treat citizens as equals would certainly warrant rejection within a democracy, deliberative or otherwise. However, the primary issue for present purposes is that the presence of such considerations serves as an illustration of desert's opacity and seeming imperviousness to deliberative inquiry. Insofar as desert claims involve an empirical assessment about what exactly is deserved, fellow citizens find themselves unable

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[339] Feather *supra* n322.
[340] *Ibid* at 91-101.
[341] Andrew von Hirsch, *Past of Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Manchester: Manchester University Press, 1986) at 76 (suggesting that reason-giving and debate can guide such a process. Indeed, it seems plausible that citizens could offer one another reasons why one conduct or another is morally more blameworthy, though this would trigger further inquiries into which moral reasons could count in this determination.).
[342] In practice, even the relative or ordinal assessment of desert falls victim to this flaw if one expects anything more than mere ranking. As soon as one asks *how much* more suffering does offense A warrant than offense B, the cardinal, quantitative problem re-emerges.

engage with, scrutinize, or accept such claims on any basis other than their own intuition or the authority of others'. In this way, retributive reasons fail to respect the quasi-empirical demands of public reason.

To be sure, empirical claims within consequentialist reasoning are not immune to subconscious considerations that evade ready detection. The assessment of an individual's dangerousness or suitability for one intervention or another, for instance, might too be affected by subconscious or systematic prejudices or affinities that pull in one direction or another, whether.[343] However, unlike retributivism, consequentialism has greater resources at its disposal to examine and scrutinize empirical claims of this sort. Given the currency with which consequentialism operates—dealing largely with objective fact and causality—empirical claims can be held up against objective measures and documented experience. This fact both reflects and enables the accessibility required for public deliberation. In contrast, when considering empirical claims that form part of retributive reasons, no such objective marker or method of inquiry could in fact confirm that an individual deserves one quantum or another.

3. Against the Critics: Public Responses to Public Wrongs

Unlike the more inclusive approaches taken toward deliberative democracy and sentencing to date,[344] this chapter has presented a view in which deliberative democracy is tied up with a more constrained use of public reason. Where others have been less concerned with excluding reasons that others can reasonably reject, the idea of public reason invoked here requires that citizens and their representatives only utilize reasons that are acceptable across the plurality of reasonable moral, philosophical and religious worldviews that feature in democratic societies. Deliberative democracy of this sort thus involves a process of reasoning in which citizens draw upon *shared reasons* in their attempt to arrive at a decision justifiable to all those implicated.

Certainly, this is but one possible view and there are proponents of public justification that would indeed adopt a more inclusive approach to decision-making as a general policy. Such

[343] See e.g. Kelly Hannah-Moffat & Paula Maurutto, "Re-contextualizing Pre-Sentence Reports: Risk and Race" (2010) 12 *Punishment & Society* 262 at 264.
[344] Iontecheva, *supra* n174; de Greiff, *supra* n147.

critics argue against the moral constraints outlined above and suggest that citizens ought to be able to introduce their own private reasons into deliberations. They do this, however, while nonetheless sharing the commitment of reaching a decision that could be justifiable to all of those bound by it. Underpinning this position then is the idea that an outcome can be legitimate so long as it is justified to all, and this remains the case even when those subject to it accept it on the basis of *different and even incompatible reasons*.[345]

So long as a decision is justifiable to all, it is claimed, there is presumably no reason to require that it also be justified to all for the same reasons. On this view, deliberation could permit the introduction of disparate private rationales and seeks their "convergence" on an agreed outcome.[346] In looking to persuade fellow citizens, individuals could thus offer distinct reasons that are persuasive for the Buddhist, the Catholic, the Utilitarian, and so on, and, through an iterative process, find reasons that would be convincing for all.[347] Proponents thus reject the need to rely on shared public reasons in arriving at decisions and criticize what they view to be an unnecessary constraint on a pluralistic society. So, they might ask the question: why should we insist on using a more limited public reason in arriving at decisions?

Adapted for the present context, some might similarly ask why we should not be content with a variety of moral, religious or philosophical rationales entering into sentencing deliberations and instead present ourselves with the task of finding a sentence upon which such rationales might converge. Why should sentencing decisions proceed on the basis of shared, public reasons?[348] I want to close by responding to this alternative view and in the process offer an account of why relying on shared public—and not disparate private—reasons is of particular importance in the context of sentencing deliberations, perhaps more so than in any other. The scope and focus of this chapter do not permit a full defense of public reason against the convergence view, so while these concluding remarks go toward that end, the general critiques

[345] See Kevin Vallier, "Convergence and Consensus in Public Reason" (2011) 25 *Public Affairs Quarterly* 261.
[346] *Ibid*.
[347] Macedo, *supra* n244 at 17.
[348] In answering this question, I do not engage institutional considerations, but it does seem clear that these sorts of considerations could offer further compelling reasons to proceed on a more singular basis, most obviously the need for codified rationales with which judges are directed to engage.

pointed to here are limited only to those necessary to support the more specific remarks on public reason and sentencing that follow.[349]

To start, it is worth pointing out that while the convergence view also finds legitimacy in decisions that are justifiable to all, its procedural openness to disparate private rationales seems to inhibit the possibility of achieving that end in practice. The possibility of individuals invoking whatever private and controversial doctrines citizens ascribe to—not just in support of proposals, but in rejection of them as well—seems more prone to conflict than to agreement. On this point, Stephen Macedo writes that proponents of the convergence view "seem to downplay the inherent difficulty of forging a working political consensus in modern mass democracies… The idea of public reason [on the other hand] formalizes and gives philosophical expression to the very practical need to get clear about what are our shared aims as a political community. It seems enormously helpful in that regard to arrive at a shared mode of discourse for debating and deliberating on those shared aims."[350] This concern is bolstered by the fact that even the most committed proponents of convergence reasoning are not clear on whether or how it would function in practice. Kevin Vallier admits that it is not clear whether a convergence view will lead to "unmanageable indeterminacy" or "a debilitating inability" to reach consensus.[351]

The key observation to make here, however, is not simply whether or not convergence helps or hinders the ability to achieve such a consensus, but rather the distinct consequences of failure under each model. To be sure, we should not lose sight of that ideal nor disregard the frequency with which competing strategies help achieve it. The diminished possibility for agreement under convergence reasoning is certainly noteworthy, particularly in that it exacerbates the consequences discussed below. However, deliberative democrats have long recognized that, while an admirable ideal to aspire to, it is unrealistic, as a general rule, to expect actual consensus on all public decisions.[352] Accordingly, even where deliberation moves citizens closer to agreement, it can be expected that decision-making in any case would end by some other mechanism: votes are a typical example, though bargaining or third party judgement are

[349] For more general critiques of the convergence view, see Macedo, *supra* n244; Jonathan Quong, *Liberalism Without Perfection* (Oxford: Oxford University Press, 2011).
[350] Macedo, *supra* n244 at 19-20.
[351] Vallier, *supra* n345 at 270, also at 275.
[352] See e.g. Freeman, *supra* n255 at 397-398, and footnote 57.

other possibilities. In these instances, then, on what basis would decision-makers vote, bargain, or judge?

In answering this question, the merits of one or another approach needs to be considered in light of what the consequences would be in the (likely) case where agreement on an outcome is not *actually* achieved. In the case where private rationales are employed in political decision-making, citizens or their representatives continue to take those private bases forward – voting, bargaining or judging accordingly. As a result, individuals subject to those decisions will thus ultimately be governed, in whole or in part, on the basis of reasons that they do not endorse – a result falling short of their standard of legitimacy. (In this way, convergence theorists seem to put all of their legitimacy eggs in one consensus basket.) At this point, it is worth explicitly recalling what is at stake with this sort of decision-making. Coerced on the basis of reasons that they do not accept, citizens—at least a minority of them—are not treated as free and equal, but rather as objects of coercion. What's more, such decisions could not, according to the deliberative standard, be said to be more than thinly democratic and, proceeding as they do from one or more private rationales endorsed by only a segment of the polity, not truly public.

In contrast, a deliberative view that proceeds on the basis of a commitment to shared reasons continues to require that commitment even where a vote or judgement is required to conclude. Citizens simply proceed on the basis of what they view to be the most reasonable conclusions of those public reasons, and not simply their own private philosophies. In this way, the use of shared reasons gives effect to the idea that "whether or not citizens accept or reject particular decisions or laws, it is important that they should be able to understand why the court or the legislature arrived at its conclusion and be able to accept the premises from which deliberation and argument proceed."[353] Accordingly, even where the exact outcome is disagreed with, those bound by the decision can at the very least accept the underlying rationale as those that they endorse, maintaining legitimacy and respect for others even while falling short of the ideal scenario. Similarly, the democratic and public quality of the decision is largely maintained given that the decision is still rooted in a shared public conception of justice.

Problematic in any case, the likely result of proceeding on the basis of private reasoning is especially concerning in the context of sentencing. This is the case for at least two reasons.

[353] *Ibid* at 398.

The first of these has to do with the seriousness of the decision at hand when sentencing. Most obviously, the decision is one of great consequence for the offender, who is most directly affected. While possible responses to criminal offenses no doubt vary greatly, criminal sentencing is also the gateway to the most significant and prolonged interventions into an offender's life, including among other possibilities the potential deprivation of the most basic of liberties through imprisonment. Beyond that, however, the decision is certainly one of importance for society more broadly. By their very nature, sentencing decisions come in the wake of demonstrated problematic behaviour, the sort of which involves disregard for the most essential social norms, including security of persons and property. Sentencing decisions involve an opportunity to address these serious problems, and at the same time involve a risk of exacerbating them.

While the ideals of deliberative democracy and public reason should not be limited only to the most basic or significant public decisions,[354] it is nonetheless in those situations where the freedom and equality of citizens ought to be taken most seriously. Certainly, the disrespect involved in disregarding an individual's autonomy and coercing them on the basis of reasons they can reasonably reject is magnified in light of the nature of the issue at hand. We could likely show no greater disrespect for an individual's political autonomy than to deprive them—by way of incarceration, for example—of their most basic of liberties on the basis of sectarian rationales. Likewise, a heightened disrespect is manifested when such reasons serve as the basis for decisions with potentially pointed impacts on the basic well-being and cohesion of communities. Moreover, these interventions, liberty-depriving and consequential as they are, are being done in the name of—and with the power of—the public, who must endorse it accordingly.

Though private reasoning does not guarantee such outcomes, it falls just shy of doing so given the difficulties of consensus, not to mention the controversial nature of criminal justice. Even with a greater hope for actual agreement, any real risk seems unjustified from a public view. Criminal scholars are of course well acquainted with the idea that the seriousness of potential outcome necessitates closer procedural standards that diminish the possibilities of unjust outcomes. In the current case, to authorize serious interventions into an offender's liberty

[354] For a convincing argument for the broad application of public reason's constraints, see Quong, *supra* n289.

on the basis of reasons that they could not endorse would be one such injustice. Procedural assurances to see to it that such outcomes do not arise are thus warranted.

A second, related reason why we ought to be especially vigilant about the use of public reason in the context of sentencing has to do with perceived legitimacy in light of the individualized nature of sentencing. As Kent Greenawalt notes generally, it can seem unfair and be "a great source of antagonism" when citizens are coerced on the basis of reasons "with which they feel no resonance."[355] While this may be true in the context of any number of public decisions, it seems especially relevant in sentencing. Unlike the adoption of laws or policies that have broader and more diffuse effect, a criminal sentence targets the offender in an especially targeted, individualized way. Accordingly, this fact would likely exaggerate any perceived lack of fairness, legitimacy or respect that would follow from justifying a sentence on the basis of values or principles which are reasonably rejected. Alone a point of concern, the issue becomes greater given sentencing's context. Through acting on reasons that the offender might reasonably reject, a sentence risks both isolating the individual and de-legitimizing public intervention in the same instance where it attempts to assert the legitimacy of public norms and indeed bring the offender back into the normative community.[356]

Thirdly, the use of shared public reasons is especially important given the communicative and educative possibilities for not just public responses, but the process of deciding that response as a normative community. In deciding upon both ends and strategies, the convergence perspective points to the possibility of using different rationales in attempting to come to an agreement and in justifying a decision. This presents difficulties for both communicative or expressive aims as well as normative education.

For instance, the process of blaming entails a communicative act: it suggests to the offender that he should not have behaved in the way that he did. In communicating this, then, what reasons would the community rely on in expressing its disapproval? What normative lesson would it seek to instil? It seems that with disparate reasons*, even in the case where actual consensus was reached*, the community would either have to communicate no rationale, one rationale that was adopted by only a segment of the community, or each rationale that was relied

[355] Kent Greenawalt, "On Public Reason" (1994) 69 *Chicago-Kent Law Review* 669 at 670.
[356] For a related argument on the instrumental benefits of deliberation, see McCoy, Heydebrand and Mirchandani, *supra* n235 at 178.

on. Lost in these options then, is the ability to speak to the offender *as a public*. With this, we can recall Larmore's words in saying that instead, by way of public reason, "[t]he conception of justice by which we live is…a conception we endorse, not for the different reasons we may each discover…but instead for reasons that count for us because we can affirm them together."[357]

Relatedly, any educational or corrective hopes of criminal justice face similar difficulties. Choosing the norms or principles according to which offenders ought to be engaged, for instance, becomes much more difficult. At the same time, convergence reasoning loses the opportunity to require the offender himself to rely on norms which are shared by the community at large. Deliberation has, by a number of accounts, been acknowledged as a transformative process—not just in that participants are involved in hearing from others and having one's opinion refined, but in that having to find reasons that are acceptable to others necessitates an intersubjective focus.[358] By having to rely on reasons that are shared by the broader community in which the offender resides—and whose norms he has violated—the offender would need to turn himself to the values and considerations that are shared by the community as a whole and which he himself could, and should, reasonably accept.

Each of these three points suggests the need for responses to public wrongs be themselves deeply public. From a deliberative democratic perspective, for a response to be public it will not suffice for it to simply be meted by public agents or authorized by public figures. Nor is it sufficiently public for the response to be supported by a majority of the public, which an aggregative understanding on democracy would suggest. In order to be truly public, decisions need to be justified according to norms that all those impacted by the decisions can endorse as free and equal citizens. By proceeding on the basis of shared public reasons, the public can, at this time of striking normative discord, present an especially compelling picture of shared norms and values.

4. Conclusion

It should perhaps go without saying that responses to public wrongs ought to themselves be public. From a deliberative democratic perspective, for a response to be public it will not

[357] Larmore, "Public Reason", *supra* n273 at 368 (emphasis added).
[358] Cohen, "Democratic Legitimacy", *supra* n13 at 23-26.

suffice for it to simply be meted by public agents or authorized by public figures. Nor is it sufficiently public for the response to be supported by a majority of the public, which an aggregative view of democracy would suggest. Rather, for such decisions to be truly public they need to be justified in a way that all those impacted by the decisions could endorse as free and equal citizens. Such a result is only possible following a deliberative process of public reason-giving within which citizens and their representatives offer reasons that others can engage with, scrutinize, and ultimately accept as autonomous individuals.

This political standard for public decision-making offers a novel perspective from which to consider long-standing questions regarding state responses to crime generally, and the retributive-consequentialist debate more specifically. Rather than engage with these substantive theories of criminal justice in terms of their general coherence or persuasiveness, the deliberative democratic lens employed here focuses the inquiry on whether consequentialist or retributive reasons are able to survive the constraints necessary to facilitate a process of public reasoning. For this to be the case, the reciprocal demands of public reason require that reasons suggesting one response or another be not only the sort that reference moral principles and values that can be shared across a diverse public, but also be such that they be open to public comprehension and scrutiny.

Though not without qualification, we have seen above that consequentialist reasons can meet these demands of deliberative democracy and facilitate public reasoning. To do this, these reasons needs to be oriented toward achieving shared public values and ensure that empirical claims relied on in determining which strategies to employ be such that they are open to—and can withstand—critical scrutiny. At the same time however, these consequentialist reasons cannot displace concerns with the intrinsic values that underpin deliberative democracy itself. Retributive reasons, in contrast, fall short of deliberative standards. Not only do they involve controversial moral claims which can reasonably be rejected, but the empirical nature of desert is such that it impedes the reflective, rational scrutiny characteristic of deliberation. To be clear, this chapter does not seek to argue in favour of one substantive response to crime or another; rather, it recognizes that such decisions should be determined by citizens and their representatives in a process of public deliberation. It does suggest, however, that within these deliberations, retributive reasons have no place.

To explore further the role and importance of public reasoning to sentencing processes, the following chapter takes up the fact that the deliberations deciding eventual outcomes do involve citizens and their representatives. It does so by specifically addressing the participation of one particular kind of citizen whose involvement has proven controversial: the victim. As the most concerning of potential participants in processes of pubic reasoning, victims serve as an important test case for the ways in which a deliberative framework can reconcile lay input with public decision-making more generally—for instance, with respect to community impact statements. However, the insights about how participants are bound by public reasoning in processes of deliberative sentencing may also be extended to other interlocutors, including the prosecution and defence counsel. Consequently, while the chapter uses victims as a lens, the chapter nonetheless contributes to a more general illustration of the demands on those who would participate in processes of deliberative sentencing.

Chapter 4.
The Citizen Victim: Reconciling the Public and Private[359]

Over the last several decades, increased attention has been given to the place of the victim within criminal justice systems. Advocates have called for further recognition and participation for victims of crime, and widespread political support throughout common law jurisdictions has resulted in a number of reforms. While some developments have been uncontroversial, the issue of victim input into sentencing decisions has emerged as highly contentious within scholarship. Scholars have been concerned with the potentially corrupting influence of victims' private preferences and dispositions on otherwise principled public decision-making. Exacerbating these concerns has been conceptual and normative ambiguity regarding the relationship of victims to public sentencing processes. Such questions relate to the proper relationship between individuals and public decision-making and are thus usefully dealt with through political theory. Accordingly, this chapter applies to the question of victim input a deliberative democratic framework, which grounds the legitimacy of public decisions in processes of public reasoning among equals. The chapter thus considers victims not as private individuals but as public citizens and delineates their relationship to sentencing decision-making accordingly.

[359] A modified version of this chapter was published as Jeffrey Kennedy, "The Citizen Victim: Reconciling the Public and Private in Criminal Sentencing" (2019) 13 *Criminal Law and Philosophy* 83.

In doing so, the chapter argues that, by establishing normative standards for public participation, deliberative democratic theory provides a framework which accounts for scholars' concerns while also providing direction through conceptual and normative clarity, reconciling in theoretical terms victim input with a public sentencing process. Moreover, it also argues that the framework highlights ways in which victims can make active contributions to processes of public deliberation by introducing novel perspectives and information, thereby enhancing the quality of sentencing decisions. Lastly, the chapter anticipates potential objections regarding the capacity of victims to meet civic standards in practice, pointing to a growing body of empirical research that suggests victims' potential and emphasizes the importance of being attentive to questions of procedural design in order to realize it.

1. Victim Participation at Sentencing: In Search of Coherence

A. Private Input into Public Processes?

While victims may have once had a significant role in pursuing and disposing of criminal wrongs in both early common law[360] and indigenous[361] legal systems, the development of contemporary criminal justice systems proceeded toward their exclusion. By Blackstone's 18th century *Commentaries* there was a clear and widely accepted articulation of criminal law being concerned with "public" wrongs that implicated public interests, whereas private interpersonal disputes were left to its civil cousin.[362] Public police and prosecutors took responsibility for the pursuit and prosecution of criminal offences on behalf of society at large, and sentencing was secured as a matter of meting public justice, objectively determined and applied consistently across like cases. Within this public model perspective, victims have been deemed to have no role beyond serving as sources of evidence for public actors within the system,[363] and their relevance to contemporary criminal justice has been limited accordingly. Erin Ann O'Hara has noted that, for those trained under this view of the system, "it is considered heretical to suggest that direct participation by victims might be warranted," and even indirect participation is

[360] Seipp, *supra* n21.
[361] PA Monture-Okanee and ME Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992) 26 *UBC Law Review* 239.
[362] Blackstone, *supra* n21
[363] Jonathan Doak, "Victims' Rights in Criminal Trials: Prospects for Participation" (2005) 32 *Journal of Law and Society* 294 at 299.

considered problematic.[364] More than a lack of role, however, the public focus has meant that the desires of the individual victim were "considered vital to sideline" in the name of legitimate public justice.[365]

Over the last several decades, however, legal scholars, policy-makers, and victim advocacy groups have claimed that the metaphorical pendulum had swung too far away from a concern with victims of crime and demanded reform. Victims were claimed to be "double losers"—first being victimized by the offenders, and then again through their exclusion from the criminal process.[366] Disregard throughout the process was criticized as leading to feelings of disempowerment and a lack of support from their community.[367] Moreover, advocates for increased attention to victims lamented a supposed imbalance in the treatment of victims and offenders, where it was the latter group who received the lion's share of rights, privileges, and protections.[368] The interests, needs, and desires of victims, they pointed out, failed to be reflected in criminal justice processes and decision-making. At the same time, scholars have pointed to democratic rationales for inclusion, reminding their audiences that participation in public processes is a good in itself and part of an open and fair society.[369]

Driven by the case of victims and their advocates, criminal justice systems across common-law jurisdictions have consequently been the subject of a variety of reforms designed to give victims greater recognition and agency. On one end of the spectrum, victims have been granted relatively benign rights to be notified of developments in their cases—something that Ian Edwards has characterized as passive non-participation.[370] While arguably a requirement that public actors report decisions such as plea deals to victims could impact such decisions, the receipt of information nonetheless provides victims with little direct influence. On the other end of the spectrum, victims have been granted the opportunity to provide direct input into sentencing decisions. The most common form this takes is that of personal impact statements, a

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[364] Erin Ann O'Hara, "Victim Participation in the Criminal Process" (2005) 13 *Journal of Law and Policy* 229 at 229-230.
[365] *Ibid* at 300.
[366] Christie, "Conflicts" *supra* n56 at 3.
[367] O'Hara, supra n364 at 244.
[368] Ian Edwards, "An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making" (2004) 44 *British Journal of Criminology* 967 at 968 ["Ambiguous Participant"].
[369] Ian Edwards, "Victim Participation in Sentencing: The Problems of Incoherence" (2001) 40 *The Howard Journal of Crime and Justice* 39 at 42 ["Victim Participation"].
[370] Ibid. Edwards, "Ambiguous Participant," *supra* n368 at 976.

mechanism by which victims deliver, in written and/or oral form, information to be considered by the court, such as that regarding the context and impact of the criminal offence. As Julian Roberts observes, "[d]espite the diversity of sentencing arrangements across the common-law world, one feature is present everywhere: all jurisdictions now permit crime victims to provide impact evidence at sentencing."[371] While some jurisdictions are more restrictive with respect to the scope of this input, others have gone further to allow for victims to make recommendations with respect to the sentence to be delivered.[372]

To be sure, some would challenge that the pendulum had swung too far away from victims in the first place, or instead question whether it has in some places since swung back too far toward them. While the idea that victims ought to receive better treatment within the criminal justice process or occupy an information-provision role has been relatively uncontroversial, the prospect of them having influence within sentencing decision-making has often been resisted within legal scholarship.[373] As Marie Manikis recently noted, "[v]ictim input remains one of the most contested issues in common law sentencing."[374] Opposition to victim input occurs on a variety of grounds and in different articulations, though it largely shares a concern with introducing their private opinions into public decision-making.

Opponents have argued that victim input would introduce partiality and distort an otherwise impartial process oriented toward a common good.[375] More starkly, Edna Erez notes fears that reforms to allow for victim input might "shift the primary goal of criminal justice administration from meeting the concerns of the state to meeting the concerns of the private individual."[376] Relatedly, others focus on lay ignorance of established sentencing principles and reasoning, suggesting that victims' preferences would detract from their application. Manikis and Roberts "strongly oppose" reforms that would see victims provide their "personal opinion" on sentences on the basis that their ignorance of established ranges of sentencing would result in

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[371] Roberts, "Listening" *supra* n219 at 348.
[372] Edwards, "Victim Participation," *supra* n369 at 47-48 (contrasting the British and South Australian approach with some American jurisdictions).
[373] Edna Erez, "Victim Participation in Sentencing: And the Debate Goes On …" (1994) 3 *International Review of Victimology* 17 at 19-21.
[374] Marie Manikis "Victim Impact Statements at Sentencing: Towards a Clearer Understanding of their Aims" (2015) 65 *University of Toronto Law Journal* 85 at 85 ["Clearer Understanding"].
[375] Paul H Robinson, "Should the Victims' Rights Movement Have Influence Over Criminal Law Formulation and Adjudication?" (2002) 33 *McGeorge Law Review* 749 at 756-757.
[376] Erez, "Debate Goes On," *supra* n373 at 20.

unfair and disproportionate sentences.[377] Manikis later elaborates that "victims are usually not legally trained and therefore their input on the appropriate sentence would not necessarily be relevant information in crafting a fit sentence."[378]

Paul Robinson adds that different victims will want different things and argues this variability of victim preferences will result in disparities across sentences. Greater punishment, he asserts, "is not appropriate simply because one victim is vindictive as compared to another who is forgiving."[379] The forgiving or vindictive nature of victims is considered a matter of chance, which introduces an element of arbitrariness into sentencing factors and thus undermines the rule of law.[380] Others focus more on victims' subjective propensities toward emotional, blindly punitive, or unjustifiably severe responses that undermine reasoned sentencing. Abraham Abramovsky warns of "extremely inflammatory and prejudicial" victim input that "encourages sentences based on passion rather than a well thought-out penalty."[381] Even more dramatically, Elayne Rapping asserts that "beneath the compelling emotion that informs the demands of victims, there is all too often an ugly and irrational cry for blood that smacks of mob violence and vigilante justice."[382]

B. The Need for Clarity, Reconciliation, and Grounding

Evidenced by the above opposition, the issue of victim input into sentencing exhibits a perceived tension between victims as private actors with private preferences and the publicly oriented and publicly governed criminal justice system. This unresolved discord has underpinned a lack of a clear overall understanding of how victim input properly relates to sentencing. Most obviously, this lack of clarity has manifested itself in uncertainty at a practical legal level. While

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[377] Marie Manikis and Julian V Roberts, "Recognizing Ancillary Harm at Sentencing: A Proportionate and Balanced Response," (2015) 15 *Canadian Criminal Law Review* 131 at 134-135 (responding to Chasse).
[378] Manikis, "Clearer Understanding," *supra* n374 at. 117; see also Erez, supra n373 at 19 (citing DR Hellerstein, 1989).
[379] Robinson, supra n375 at 756-757; Roberts, "Listening" *supra* n219, p. 372.
[380] *Ibid*; Donald J Hall, "Victims' Voices in Criminal Court: The Need for Restraint," (1991) 28 *American Criminal Law Review* 233 at 257. It is worth noting that this issue is distinct from that of the potential arbitrariness introduced by variability of victims' resiliency or fragility, which depends on whether the amount of harm caused itself is seen as a valid rationale for more or less punishment, separate from the offender's intent. This moral question is not engaged here and does not affect those put forward in this chapter.
[381] Abraham Abramovsky, "Victim Impact Statements: Adversely Impacting Upon Judicial Fairness," (1992) 8 *St. John's Journal of Legal Commentary* 21 at 23; see also Bruce A Arrigo and Christopher R Williams, "Victim Vices, Victim Voices, and Impact Statements: On the Place of Emotion and the Role of Restorative Justice in Capital Sentencing," (2003) 49 *Crime & Delinquency* 603.
[382] Elayne Rapping, *Law and Justice as Seen on TV* (New York: NYU Press, 2003) at 245.

courts have been instructed to "consider" victim input, they are generally provided little direction as to how to do so, as legislatures leave out instruction on key issues as their purposes and significance.[383]

In Canada, for example, recent reforms under the *Canadian Victims' Bill of Rights* have highlighted uncertainty as to the nature and significance of victim input going forward. In discussing the changes occurring under the then-proposed and now-adopted federal victim impact statement form, Manikis has noted that it "open[s] the door, for the first time in Canadian law, to victim sentencing recommendations or opinions."[384] While as a general rule the form indicates that victims should not include opinions or recommendations for sentences, it does allow for it with the court's approval.[385] However, questions relating to the circumstances in which this is to be approved, the rationales for doing so, and how sentencing judges are to treat these opinions when they are included, are all left unanswered. Accordingly, while questions regarding victim input are timely and of clear importance, its relevance is nonetheless characterized as existing "in a legal no man's land"[386] or in "legal limbo."[387]

More than giving rise to uncertainty for judges, however, victims too remain confused as to the purpose and relevance of their input.[388] Accordingly, victims may have expectations or assumptions that conflict with the way in which their input is ultimately used in practice, leading to frustration or disappointment.[389] Moreover, absent adequate direction, victims are similarly unsure of what content they ought to include, leaving open the possibility that their participation falls short of its potential. In light of this ambiguity, empirical research has demonstrated that what is ultimately included is left to be negotiated by victims against other stakeholders' own particular needs or views as to what is appropriate, such as prosecutors, victims' advocates, and family members.[390]

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[383] Manikis, "Clearer Understanding," *supra* n374 at 85-86.
[384] *Ibid* at 117.
[385] Form 34.2, Victim Impact Statement, Criminal Code (R.S.C., 1985, c. C-46), ss. 722(4), <online: http://laws-lois.justice.gc.ca/eng/acts/C-46/page-280.html#docCont>.
[386] Julian V Roberts and Marie Manikis, "Victim Impact Statements at Sentencing: The Relevance of Ancillary Harm," Canadian Criminal Law Review 15(1) (2010): pp. 1-29, pp. 2-3 ["Ancillary Harm"].
[387] Manikis, "Clearer Understanding," supra n 15, p. 86.
[388] Julian V Roberts and Marie Manikis, "Victim Personal Statements: A Review of Empirical Research," Report for the Commissioner for Victims and Witnesses in England and Wales, 2011 at 28 [Hereafter, "Empirical Review"].
[389] Englebrecht and Chavez, *supra* n5 at 407.
[390] *Ibid* at 406.

However, these legal and practical ambiguities, and the controversy surrounding victim input more generally, are the result of the deeper normative and conceptual uncertainties. On a normative level, there exist unanswered questions of how victim input *ought* to relate to sentencing decisions, including with respect to its significance and proper content. On a conceptual level, there remain questions regarding how this input could be conceived of so as to be consistent with both our understanding of sentencing as a public endeavour as well as widely held criminal justice values, such as fairness and principled reasoning. There are, of course, two sides to this coin: as much as clarity is lacking in illustrating the relevance of victim input, so too is it in directing the rationales for its limitations or exclusions. Absent clear legislative or judicial guidance, such rationales are left to the *ad hoc* perspectives of, and informal pressures exerted by, various parties.

At the same time, legal scholarship has not yet offered sufficient direction either. Scholars have taken steps toward categorizing and clarifying the possible aims and purposes of victim participation, as well as exploring the different legal implications—such as evidentiary standards—that arise from of each.[391] For the most part, however, scholars' resistance to victim influence in sentencing has led them to simply dismiss the possibility as incompatible with public processes and limit victim participation to expressive or information-providing roles.[392] Some have taken specific theories of punishment as a starting point, and gone as far as recognizing the contributions that victims might make by providing evidence that informs, for instance, retributive assessments.[393] Albeit valuable, this work comes in at the midpoint rather than proceeding from a coherent theoretical foundation and thus cannot provide more than contingent guidance as to the relevance of victims in sentencing. Moreover, it leaves untouched the larger issue of the place of the victims' own judgements or preferences. Lastly, insofar as the question of victim influence is one intrinsic to justifying state responses to crime and public decision-making, the answer must be grounded in a political framework.

[391] Edwards, "Ambiguous Participant," *supra* n368; Marie Manikis, "Expanding Participation: Victims as Agents of Accountability in the Criminal Justice Process" (2017) 1 *Public Law* 63-80 ["Expanding Participation"]; Ian Edwards, "The Evidential Quality of Victim Personal Statements and Family Impact Statements" (2009) 13 *The International Journal of Evidence & Proof* 293-320.
[392] Roberts, "Listening" *supra* n219 at 400.
[393] See e.g., Roberts and Manikis, "Ancillary Harm," *supra* n388.

In fact, despite scholars' growing recognition of the public and political nature of criminal justice and the consequent need for criminal law and theory to be grounded within a political framework generally, the literature on victim participation has yet to make significant inroads in this respect.[394] However, such an approach offers potential to address the gaps outlined above by considering victim participation in a new light. In contrast with their perception as private actors, victims can instead be viewed as *citizens* subject to the standards of democratic political theory. This perspective offers new resources to the victim participation debate. Democratic theory by its nature provides a decision-making framework with normative and conceptual consequences for how public decisions ought to be made and how citizens relate to those decisions.

Certainly, some have questioned whether political theory might offer anything of value in this respect. Matt Matravers, for one, has doubted the potential for the "abstract" theorizing of political philosophy to provide useful direction for the more "fine-grained issues" relating to victim participation.[395] Similarly, Edwards has cautioned against the potential ambiguity of appeals to democracy in this context.[396] Certainly, some thinner notions of democracy that simply direct decision-makers to aggregate individuals' preferences certainly do fall short of providing useful direction, and indeed may only worsen the tension between victims' private preferences and a public view of sentencing. However, deliberative democratic theory offers a thicker, procedural ideal that accounts for criminal scholars' concerns while also providing conceptual clarity and normative direction. The following section takes an initial step toward clarifying how a deliberative democratic framework provides both conceptual clarity as well as normative relevance and direction for victim participation in sentencing decisions. In doing so, it first turns to notions of victimhood and citizenship, and then explores the nature of the deliberative citizen as a model and standard for victims.

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[394] For the beginnings of these efforts, see Sandra E Marshall, "Victims of Crime: Their Station and Its Duties" (2004) 7 *Critical Review of International Social and Political Philosophy* 104; Matt Matravers, "The Victim, the State, and Civil Society," in Anthony Bottoms and Julian V Roberts (eds.), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (London: Willan, 2010) 1-16; Manikis, "Expanding Participation," *supra* n391.
[395] Matravers, *supra* n394 at 3-4.
[396] Edwards, "Ambiguous Participant," *supra* n368 973.

2. Re-Imagining Victims of Crime: From Passive Parties to Deliberative Citizens

A. The Social Construction of Victimhood

The legal definition of a victim is unremarkable enough, found in the *Canadian Victims Bill of Rights* as "an individual who has suffered physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of an offence."[397] In imagining a role for victims within legal processes, however, scholars ought to be attentive to the deeper social construction of victimhood and how it might obscure attention to crime victims' civic capacities and responsibilities. In doing so, one can readily note the ways in which views of victimhood, in contrast with those of citizenship, are strongly associated with passive qualities and needs, and tend to cast victims as subjects rather than actors.

Indeed, the nature of the term characterizes individuals accordingly: people are victims *of* some other acting individual or force. George Fletcher has traced the etymological roots of the term to a theological origin associated with temple sacrifices.[398] In deciding a victim's fate, Fletcher interprets, an offender usurps an otherwise divine function of sacrifice: that of choosing who should, for example, live or die.[399] The heritage of the term thus imports a key dimension of our contemporary understanding of victimhood: that of being a subject of human overreach.

Similarly, Sandra Walklate has observed that the term "victim" is both popularly and grammatically associated with femininity—for instance, in French being gendered as *la victime*—reflecting the supposed passive and powerless qualities of each.[400] Feminist scholarship, accordingly, has preferred alternative framing devices—for example, the terminology of "survivors"—that reflect individuals' agency in spite of their misfortune and distance women from these associations of victimhood.[401] Beyond mere connotations, sociologists too have pointed to the ways in which attributions of victimhood depend in part on

[397] S.C. 2015, c. 13, s. 2 (Defining a victim in reference to an "alleged" offence is presumably procedurally significant, providing rights to individuals throughout the process prior to conviction; however, conceptually victimhood would nonetheless exist only where there was in fact an offence.)
[398] Fletcher, supra n 35, pp. 128-129.
[399] *Ibid*. (Fletcher also notes a second dimension which is carried out of this history—that of a victim's innocence).
[400] Sandra Walklate, Imagining the Victim of Crime (New York: Open University Press, 2006) at 27
[401] *Ibid* at 27, 41.

individuals being perceived as being weak, vulnerable, and deserving of care.[402] Some have written of a "hierarchy" of victimization along these lines, while others write of an "ideal" victim—"a person or category of individuals, who—when hit by crime—are most readily given the complete and legitimate status of being a victim."[403] In its social construction, then, the more one exemplifies such qualities, the more one *is* a victim.

Unsurprisingly, legal scholarship frequently appeals to this discourse in asserting victims' relevance. Despite a surge of interest in victim participation within criminal justice, crime victims are frequently characterized by a focus on their needs more so than their contributions. Both mainstream and restorative justice literature have taken up victim needs as motivating rationales for their inclusion.[404] Crime victims are held to be in need of the therapeutic effects of inclusion, healing, closure, and the relief that accompanies self-expression. Criminal justice professionals tend to see the importance and relevance of victim participation in terms of such therapeutic benefits to victims and their (also victimized) families.[405] Further concern is demonstrated with respect to preventing additional harm to victims, used as rationales for both inclusion and exclusion from participation.[406] To be sure, the literature does recognize some contributions; however, even the capacity of victims to effect change by challenging offenders to recognize the harm they have caused often comes by way of articulating their injured states.

Because of this, the classic discourse surrounding victimhood is, whether innocently or underhandedly, readily harnessed as an opportunity for *others*—namely, state actors—to assert power within the void left by the victim's own supposed insecurity.[407] Accordingly, framing disproportionately occupied with needs as a primary focus may detract from the most compelling case for their inclusion as well as obscure conceptual possibilities for the reconciliation of victims with public processes. Certainly, the potential for vulnerability and the unique needs of

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[402] Nils Christie, "The Ideal Victim," in Ezzat A Fattah (ed.), From Crime Policy to Victim Policy (London: Palgrave Macmillan, 1986) 17-30 at 18; Eamonn Carrabine et al., *Criminology: A Sociological Introduction* (London: Routledge, 2004), pp. 115-117.
[403] Christie, *supra* n402 at 18.
[404] Daniela Bolivar, "Conceptualizing Victims' 'Restoration' in Restorative Justice," International Review of Victimology 17(3) (2010): pp. 237-265; Manikis, "Clearer Understanding," supra n 15.
[405] Christine M Englebrecht "Where Do I Stand? An Exploration of the Rules that Regulate Victim Participation in the Criminal Justice System," (2012) 7 *Victims & Offenders* 161 at 175; Engelbrecht and Chavez, "Whose Statement Is It?," *supra* n5 at 401-402.
[406] See e.g., Christie, "Conflicts" *supra* n56 (referring to excluded victims as "double losers"); Judith Lewis Herman, "The Mental Health of Crime Victims: Impact of Legal Intervention" (2003) 16 *Journal of Traumatic Stress* 159.
[407] Walklate, *supra* n400 at 24.

victims are important considerations, but scholarship on the role of victims within public processes ought to be careful not to totalize victims in these terms. Doing so draws attention away from the converse—that is, their responsibilities, capacities, and potential contributions to public decision-making.

B. Victims as Citizens

For the most part, criminal scholarship has recognized that criminal justice theorizing must be grounded in, and indeed be animated by, a political framework. Nonetheless, much work remains to be done in unpacking the implications of such a framework for the various issues with which criminal scholars and practitioners grapple. One such issue is that of victims' place within criminal sentencing and the relevant implications of their citizenship.

Of course, thinking of victims as citizens entails thinking of them as participants within public action, and supposes that sentencing is in fact a matter of public decision-making rather than a particular mode of private conflict resolution. For those concerned with the needs of victims, particularly in light of their historical neglect, this focus might be concerning. In holding a public view of sentencing, this chapter proceeds on the basis that crimes constitute public wrongs not in the sense that they are wrongs "against" the public, but rather that they are wrongs in which the public has an interest in addressing. As public decision-making, sentencing is thus distinguished from civil adjudication in that it is concerned with managing these interests.

This does not preclude a recognition that victims have been wronged in such cases, and the significant overlap of civil and criminal liability is a testament to this. Moreover, this is not to say that sentencing cannot also be concerned with addressing private concerns within the same process. It may be possible to include both with one process, and in fact it might be beneficial for reasons of efficiency, access to justice, or in light of the power of private reparations and victim-offender engagements to serve public ends, such as reducing recidivism. It may not.[408] However, the mere fact that, procedurally and even doctrinally, these lines have been blurred does not, as Jonathan Doak suggests, render the distinction between public and private "artificial."[409] Normatively, the distinction remains an important one given the unique demands governing public and private action. In any case, whatever the practical possibilities may be, a precursor to

[408] Nils Christie, "Victim Movements at a Crossroad" (2010) 12 *Punishment & Society* 115.
[409] Doak, *supra* n363 at 300.

answering the question of whether—and how—public and private aims ought to be kept separate or addressed within some hybridized process is a clarified understanding of what victims may offer to or take away from public processes. Accordingly, this chapter remains focused so far as possible only on victims' relationship to sentencing as public decision-making, and not as a process of interpersonal restitution or restoration.

What does it mean to think of victims as citizens? Often, citizenship is thought of in terms of a descriptive legal status of recognition. Focus in this respect typically turns to qualifications and processes for achieving that status and the civic rights, freedoms, and—usually to a lesser extent—obligations that such a status ensures or triggers under the particular legal or administrative framework in question.[410] Victims, in this perspective, might, for instance, be seen in terms of their legal rights to exercise a vote or run for office, or their eligibility for compensation or social services provided only to citizens.

Alternatively, however, citizenship may also be thought of in more general terms as a normative political conception.[411] Shaped by the broader political framework imagined as the standard for a polity and the public relationships therein, citizenship can be understood in terms of the normative vision of how individuals are conceptualized as public actors and viewed as relating to public processes and matters. Accordingly, while legal conceptions are inherently tied to the *status quo* of a given legal framework, normative conceptions "are expressions of political possibility and imagination that transcend current practices."[412] Thinking of victims as citizens in this way means thinking of them in terms of their agency with respect to public action—that is, as public actors who take part in governing others. At the same time, it means being attentive to the political framework within which they operate, recognizing that their characteristics, roles, relevance, and responsibilities are given meaning and may be constrained by the normative demands of that framework. It is in this way that this chapter proceeds.

To date, very little has been written on victims *as citizens* nor, framed differently, the way in which particular political frameworks shape the role that victims have within public

[410] Geoffrey Stokes, "Democracy and Citizenship," in April Carter and Geoffrey Stokes (eds) *Democratic Theory Today* (Cambridge, UK: Polity Press, 2002) at 24.
[411] *Ibid*.
[412] *Ibid*.

criminal processes.[413] This is perhaps not surprising given that, despite a growing recognition that criminal law need be grounded in a political framework, there remains much work to be done in developing theories of criminal justice that are not just minimally *not inconsistent* with political frameworks, but take seriously those political commitments in working out the very nature of criminal justice. Work specifically exploring the implications of democratic frameworks—a focus which readily triggers direct engagement with the idea of citizenship, rather than just substantive values or principles—for criminal theory is still in its infancy. To be sure, democratic arguments have been invoked in support of victim participation; however, attention to victims' democratic relevance has been inconsistent and, when it has been considered, could be described as indirect or limited.[414]

Sandra Marshall's exploration of the way in which a communitarian understanding of public wrongs and criminal justice shapes victims' place within criminal processes is perhaps the most notable exception in this regard.[415] Importantly, Marshall recognizes, as is argued here, that different political theories offer different accounts of citizens' relationships with both one another and the state, and, as a result, "different ways of characterising the status and role of victims in the criminal process."[416] By explicating a communitarian view of the victim's role in the criminal process, Marshall seeks not only to contribute to tracking the ways in which political theory influences our understanding of victims' roles, but also to demonstrate the importance of being clear about how these considerations should shape the criminal process.[417] Despite the differences between her theoretical position and the one found here, this chapter, too, aims to contribute to this project.

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[413] This should be distinguished from work on the politics of victims' rights or victims' participation movement itself and the forces that have fuelled it. What I am engaging with here is normative political theory that gives a deeper account of victim participation within the criminal process as political in nature.

[414] See e.g., Howard C Rubel, "Victim Participation in Sentencing Proceedings" (1986) 28 Criminal Law Quarterly 226; Edwards, "Ambiguous Participant," *supra* n368.

[415] Marshall, *supra* n394; see also Marie Manikis, "Conceptualizing the Victim" *supra* n140. Manikis goes some way toward this as well in her illustration of how victims can in practice be seen as "part of" or "agents" of the public interest within criminal justice—and particularly prosecutorial—decision making. Here, she draws on a mixed framework in which the public interest is conceived as "aggregate individual or group interests" but which also gives some role to deliberation. Having a descriptive project, however, Manikis stops short of investigating the normative implications of this conception, including both the ways in which an aggregative view exacerbates the tension between victim participation and public decision making, as well as the conciliatory potential of public deliberation.

[416] *Ibid* at 104.

[417] *Ibid* at 105.

In Marshall's account, political theory becomes primarily relevant in determining the nature of criminal wrongs, which goes then to determining victims' status. In her communitarian perspective—which she developed further alongside R.A. Duff—wrongs are public in the sense that, in light of a shared identity, wrongs against victims are themselves "shared" by society more broadly.[418] It is in this way that she sees there being a community or public interest at stake. She writes that "[i]nsofar as individuals are a collective defined in terms of a shared identity, shared values, mutual concern and shared dangers that threaten them, then an attack on one is an attack on all—on their shared values and their common good."[419]

Accordingly, Marshall extends this idea to the role of victims, arguing that victims are not only individuals, but members of a broader community that too was wronged. As a result, she argues that victims have certain responsibilities to their fellow citizens, including both a duty to report crimes, as well as to "bear witness" to the crime in support of the community's collective norms.[420] Victims may similarly have a duty, where permissible, to contribute to sentencing by way of impact statements.[421] In this way, the victim has not just rights but certain duties: "the individual victim stands not just for herself but for all."[422] Claes Lernestedt also takes up Marshall's framework, arguing more clearly that, in light of this understanding of public wrongs as shared wrongs, the victim acts as a representative of the public, the "we" who calls the offender to account.[423]

Certain features of Marshall's account are important to carry forward here, though subject to important caveats. As Marshall notes, a fuller consideration of a political framework may well—and, in the case that follows, does—entail not just bestowing rights upon citizens, but responsibilities as well. In a great deal of the literature that focuses on victim rights, responsibilities are certainly a neglected issue. That being so, it is nonetheless argued here that the positive duty described by Marshall and Lernestedt is untenable. While this may be plausible

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[418] Marshall and Duff, "Sharing Wrongs" *supra* n25. Marshall and Duff's most recent piece on crime's public nature followed Marshall's article on this topic, thus leaving open the possibility that this view would be revised accordingly. See supra n and accompanying text.
[419] Marshall, *supra* n394 at 110.
[420] *Ibid* at 113-114.
[421] *Ibid* at 116 (Marshall qualifies this by seemingly requiring a reasonableness standard, though is unclear as to what degree this should be enforced).
[422] *Ibid* at 110.
[423] Claes Lernestedt, "Victim and Society: Sharing Wrongs, but in Which Roles?" (2014) 8 *Criminal Law and Philosophy* 187 at 191.

from a communitarian perspective, from the liberal democratic position adopted here, this is unlikely to stand. Moreover, it is implausible that victims *could* represent the broader community in any meaningful way. On what basis, even symbolic, could they be said to do so? Victims are not chosen by the community, but by offenders. Moreover, while victims might initially stand as symbols of the community's collective disapproval, this can only stand so long as they remain silent. Beyond this, victims' representation becomes substantive in nature and their ability to represent the community is unsustainable. Indeed, a frequent starting point for deliberative democratic theory is the fact that contemporary democracies are pluralistic in nature, and a single victim could not voice the diversity of views, perspectives, or reasons therein.

Additionally, Marshall is certainly correct in noting that the way that political frameworks shape our conceptualization of public wrongs is also significant in determining the role of the victim. Indeed, the role of the victim, like other criminal justice actors, is inherently tied to the things within which she has a role. However, her analysis does not go far or deep enough. The relevance of political frameworks does not stop after shaping our understanding of public wrongs, but, if sufficient, should carry through to inform the very process of sentencing decision-making itself. This is one of the ways in which a democratic theory can provide a thicker political framework and offer greater clarity as to the actual role of victims in sentencing.

C. The Deliberative Citizen

Deliberative democratic theory grounds the legitimacy of public decisions in processes of public reasoning among equals. In this view, citizens and their representatives are tasked with offering and reflecting on public, mutually acceptable reasons for or against various possibilities in an attempt to arrive at decisions that could be seen as justifiable to all.[424] By providing justifications for public action that others could accept, rather than simply pressing one's own preferences, citizens respect others as equals and allow them to participate in shaping the decisions that will bind them by scrutinizing the reasons offered.[425] Because public action is linked to the persuasiveness of reasons, and because deliberation also facilitates the introduction of additional perspectives and considerations, a deliberative model is also defended on the basis of its epistemic value—that is, its propensity to produce better decisions overall.

[424] Cohen, "Democratic Legitimacy," *supra* n13 at 22 ["Democratic Legitimacy"]; Rawls, *Political Liberalism*, *supra* n179 at 217.
[425] Gutmann and Thompson, *Why Deliberative Democracy*? *supra* n13 at 3-4.

Through this, deliberative democracy not only provides a basis upon which citizen participation is possible, but it provides a deep account of the way in which that participation ought to be governed with respect to public decision-making. This framework extends readily beyond providing mere status to victims and is not simply impactful indirectly by way of illustrating the nature of public wrongs. It is, of course, a theory of democratic decision-making, which provides guidance well-suited to the issue in question: that of the proper participation of citizens in public decision-making. In this way, deliberative theory identifies in a more specific way citizens' relevance to decision-making and offers clarification regarding their conceptual contributions to legitimate public decisions.

Certainly, within any democratic framework, which concerns itself with shared governance, the equality of citizens is paramount. Moreover, deliberative decision-making ties the legitimacy of decision-making to the deliberation of those affected by that decision. Along these lines, a democratic framework provides at least a *presumptive* reason for inclusion. Of course, this is not to say that participation will necessarily be, all things considered, justifiable or desirable in a given situation. Decisions as to whom to involve, when, and how could be determined in light of individuals' stakes in the issues, their contribution to the process, and any number of pragmatic considerations or limitations.

So, who then is the citizen in a deliberative democracy, and how does she relate to this form of public decision-making? In light of the way in which moral and epistemically valuable decision-making is derived from public deliberation, the deliberative citizen can be understood in light of the way in which she contributes to public deliberation and in doing so exemplify the characteristics appropriate to those legitimating processes. Public action is taken through collective reasoning, and thus that reasoning, in form and substance is the primary manifestation of citizenship. Put differently, the constraints on that reasoning delineate citizenship. Citizenship, in this way, is emphatically, though not exclusively, procedural—a *way* of co-governing. As Christian Kock and Lisa Villadsen write in relation to their view of "rhetorical citizenship,"

deliberation is not merely a precursor to public action or decisions that give rise to citizenship such as under the "status" model, but rather itself is "*constitutive* of civic engagement."[426]

Deliberative democracy is a more demanding civic framework than traditional liberal democracy both in the sense that it requires a more active participation of its citizens as well as that, to facilitate their proper participation, citizens require dispositions, aptitudes, traits, and virtues that facilitate public deliberation.[427] With "public deliberation" being understood as the offering of, and reflection on, public reasons or considerations, citizenship too can be understood in terms of both citizens' own outputs as well as their attentive reflexivity which facilitates their engagement with others and in turn informs their own views.

In terms of contributions, the deliberative citizen does not simply press her own self-interest or preferences *per se*, but instead provides reasons for public action that others can be expected to find acceptable and persuasive. Citizens therefore are capable of self-restraint, possess a civic-minded attitude, and contribute to a formulation of a public, rather than private, good in providing input into deliberative processes.[428] Rather than being required to be impartial in the sense that their reasons be entirely altruistic, impersonalized, separated from their own perspectives, and a matter of objective moral truth, citizens are governed by reciprocity, willing to give reasons that can be seen as justifiable to those others bound by them.[429] In doing so, they inevitably bring their own concerns and perspectives to deliberations, and enrich them accordingly; however, they do so in a way that others can accept as justifiable.

At the same time, the deliberative citizen is also a recipient of information and arguments, and one who relates to this input in a considered, deliberative way. Indeed, with justification and reason-giving becoming central political concepts and values, *listening* may be the new "democratic deficit."[430] Citizens consider others' views genuinely, are reflexive, open to revising their positions, and able to distance themselves from their own prejudices.[431] They are

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[426] Christian Kock and Lisa S Villadsen, "Citizenship as a Rhetorical Practice," in Christian Kock and Lisa S Villadsen (eds.) *Rhetorical Citizenship and Public Deliberation* (University Park: Penn State University Press, 2012) at 1 (emphasis added).
[427] Weinstock and Kahane, *supra* n182 at. 6-7; Stokes, *supra* n410 at 41-42.
[428] *Ibid*; Micheline Milot, "Conceptions of the Good: Challenging the Premises of Deliberative Democracy," in Kahane et al. (eds) *Deliberative Democracy In Practice* (Vancouver: UBC Press, 2010) at 30-31.
[429] Gutmann and Thompson, *Disagreement supra* n258 at 53ff.
[430] Andrew Dobson, "Listening: The New Democratic Deficit," *Political Studies* 60(4) (2012): pp. 843-859.
[431] Weinstock and Kahane, supra n182 at 8; Stokes, *supra* n410 at 42-43.

also able to yield the force of the better argument, and have the moral strength to accept that which is so justified even where it differs from their own inclinations.[432] Moreover, this also means that individuals' citizenship should not be thought of simply in terms of their own reason-giving and reflection, but also the way in which they themselves are listened to by others. The citizen, then, is not just someone who acts with all the required dispositions of deliberative democracy, but one who is listened to sincerely and critically, reflective of her equal standing within society.

3. The Contributions of a Deliberative Framework

A. Reconciling Victim Input with Public Concerns

Thinking of victims in the terms elaborated above not only provides a normative standard that can be instructive for both individuals and institutional design, but also provides a conceptual model that can begin to reconcile the victim literature's concerns with the introduction of private input into public processes. As explored above, a key concern in the literature with respect to victim participation is the way in which allowing the input of victims would detract from the rational, principled, and public-oriented nature of decisions. Accordingly, it was felt necessary to exclude the "private" victim's input. It is here where a deliberative democratic theory of decision-making is valuable.

A deliberative framework resolves this tension on two levels: one substantive and one procedural. First, it does so by demanding—and recognizing that it is possible—that victims, as citizens in a process of public decision-making, contribute publicly acceptable information, perspectives, and arguments in any efforts to influence sentencing decisions. In doing so, it shares scholars' concerns regarding the deleterious effects of input of a private nature but recognizes a conceptual distinction between victims' private preferences and their capacity to reason publicly. The second way in which it reconciles victims with public processes is by providing an alternative perspective on the way in which victim input relates to other principles, considerations, or arguments that inform sentencing decision-making.

[432] Stokes *supra* n410 at 42; Weinstock and Kahane *supra* n182 at. 9.

In this respect, it is necessary to contrast deliberative decision-making from aggregative understandings of democracy and individual political standing. In the former, individuals' contributions to democratic deliberation are considered, analyzed, and rationally scrutinized by fellow citizens and their representatives with a mind toward the relevance and merits of those contributions. As a matter of public reasoning, the weight that individual arguments and proposals carry is contingent upon their persuasiveness.[433] Ultimately, decision-makers within a deliberative forum proceed on the basis of the better argument, and the mere fact that an individual desires an outcome does not in itself carry normative weight. Recall also that, as a matter of *public* reasoning, a deliberative framework only accepts as valid publicly relevant reasons for action.

In contrast, under an aggregative model of citizen input, the various competing private preferences or interests of individual citizens are given equal weight and aggregated to produce a decision that reflects the quantitative distribution of those preferences or interests. The camp with a majority will determine the decision, even where its decision is, for instance, based on misinformation, irrational thinking, or mere self-interest. In other situations, such as bargained compromise, aggregative outcomes will reflect something of a middle position, drawn as a matter of degree toward positions according to the number of those in favour. In both these cases, an aggregative perspective accords weight to citizens' positions on the mere basis of them holding those positions—that is, preferences or interests *per se* carry weight.

In a close reading of the scholarly concerns regarding victim input, the implicit framework underpinning their rationales appears to be that of an aggregative model. Noticing this helps explain the tension between victim input and scholars' concerns of justice and the public good. A deliberative model, however, captures and addresses scholars' concerns, demonstrating that victim input can both be a contribution to public decisions without posing the threat they are perceived to represent. As a clear illustration, an aggregative presumption is reflected in Robinson's concern that the different dispositions, opinions, or preferences of victims would result, all other things being equal, in different outcomes for offenders. Offenders would receive unfairly inconsistent responses, he writes, "*simply* because one victim is vindictive

[433] It is worth pointing out here that this speaks to concerns of the ambiguity of the weight of victim input through a contingent rather than universal answer.

as compared to another who is forgiving."[434] This "simply" is only conceptually sustainable within an aggregative model, thus revealing his assumed—consciously or not—model.

While the outcome of deliberations on a given topic may vary based on the participants involved, Robinson's concern regarding variability should be much more muted than within an aggregative model. For one reason, under a deliberative model, any given individual victim's position will only hold weight insofar as it is persuasive on the basis of publicly acceptable reasons. So, even where individuals do attempt to introduce their unique private preferences in practice, a deliberative understanding provides conceptual resources to explain how these should lack influence and thus fail to corrupt public decision-making. This mechanism alone should limit variability compared to a more freestanding influence of private preference, and where variability does exist, it is more likely to be based on relevant public considerations, such as offender characteristics or circumstances, rather than on the moral luck of victim preferences.

For another reason, one could typically expect that, where the overall representative distribution of perspectives remains similar from one deliberative forum to the next, under the same conditions, there would be little change in outcome. In the context of sentencing deliberations in Canada, these perspectives are partially represented by way of consistently present sentencing principles and purposes (which, theoretically, ought to be publicly acceptable) as well as the Canadian judiciary (which, theoretically, ought to approach sentencing in a consistent way). This public framework administered by a public judiciary provides a deliberative base that ought to at least loosely anchor deliberations to prevent significant victim-driven variability. Again, however, where this variability occurs, it does so on the basis of persuasive argumentation.

The above applies for the same reasons to Manikis' concern that individual victims' opinions will diverge unacceptably from publicly relevant information. Victim input should be conceptualized, and institutionally facilitated, in terms of publicly relevant information and arguments; where this fails to be so in practice, a deliberative rather than simply aggregative mechanism filters the problematic influence of private preference, both conceptually and practically. Roberts' conceptual concern with respect to the rule of law should also be addressed through the way in which a deliberative framework constrains and takes up victim input. Roberts

[434] Robinson *supra* n375 at 757 (emphasis added).

writes that "[i]f the [victim's] statement changes the sentence that would otherwise have been imposed, the scheme undermines the rule of law: offenders should not receive different penalties depending upon the reactions of their victims."[435] In contrast, under a public deliberative framework, victims' input would only have impact so far as it is consistent with—and makes a persuasive contribution to the particular application of—the law, seen as a collection of publicly accepted considerations, reasons, objectives, or principles captured within statute or common law.[436]

B. Victims' Epistemic Contributions to Deliberations

One consequence of a shift to thinking of victims as citizens is that it directs us to consider not just the way that political ideals constrain victims' actions but also the potential *contributions* that they might provide to sentencing as public decision-making. In this respect, deliberative democracy provides a framework that not only reconciles victim input with public sentencing decisions but articulates the ways in which that input might contribute to the legitimacy of those decisions through enhancing the deliberation that informs them. In exploring this, this section both accounts for and expands on previously recognized contributions from victims, and places these within a coherent political framework.

Certainly, victim participation might contribute to the overall democratic legitimacy of sentencing decisions in a number of ways. The perceived legitimacy of sentencing processes and the resulting decisions are likely to be enhanced given that, across common law jurisdictions, there is strong public support for allowing victim input,[437] and victims themselves report high levels of satisfaction with their participation.[438] However, in this section, this chapter focuses on the ways in which victims contribute to the legitimacy of sentencing decisions by way of their epistemic contributions—that is, the ways in which victims can enhance the quality or justifiability of decisions. In this respect, victims might be seen as making positive contributions to deliberations with respect to both information and perspective. Before addressing these

[435] Roberts, "Listening" *supra* n219, p. 372.
[436] See also Mark Walters, "Legality as Reason: Dicey, Rand, and the Rule of Law," (2010) 55 *McGill Law Journal* 563 at 572 (describing one perspective on the rule of law as being "instantiated through a form of justificatory interpretation aimed at consistency, coherence, or equality of reason. Within this tradition, the rule of law is … a 'rule of reason,' a dynamic process of reasoned justification.").
[437] Roberts, "Listening" *supra* n219 at 380.
[438] Roberts and Manikis, "Empirical Review," *supra* n388 at 25-27.

contributions, however, it is necessary to consider a representative function that victims may play in a deliberative framework.

While victims, as discussed above, should not be taken to represent the polity generally, they may nonetheless be taken to represent *descriptively* certain classes of perspectives that are typically excluded from sentencing decisions specifically and perhaps public governance more generally.[439] In this respect, Jane Mansbridge ties "descriptive" representation to the way in which individuals "in their own backgrounds mirror some of the more frequent experiences and outward manifestations of belonging to the group."[440] As a result of these shared experiences or socialization, those who are descriptively representative of a group are more likely to—consciously or unconsciously—be guided by the interests of, or manifest the perspectives or dispositions of that group.[441] By representing particular classes in this way, victims may introduce unique contributions to deliberative decision-making in several ways.

The first of these typically excluded classes that victims may be taken to represent in this way is, most obviously, that of victims of crime. In this respect, the experience of being subjected to the consequences of failed crime control—either generally or with respect to a specific crime—may instil a unique perspective worth including within sentencing deliberations. Having experienced it first-hand, victims may, for instance, perceive the consequences of criminal behaviour differently and approach responses in more practical terms rather than as abstract justice.[442] As a point of contrast, sentencing decisions made exclusively by those who have never experienced victimization may represent an inappropriate distortion in a decision-making framework whose primary task is that of crime prevention. Of course, to talk of victims as a class should not be taken to essentialize victimhood—criminal offences differ widely in their nature, and experiences of the same offence differ widely among individuals—but only to say that there may be something of a shared experience and subsequent orientation worth capturing.

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[439] Hannah Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967) (discussing different understandings of representation). Certainly, the self-selection that occurs through choosing to participate may mean that participating victims are not a true reflection of the diversity of victims more generally; however, this should not defeat the core arguments offered in the following, as they nonetheless introduce distinct perspectives and information. Moreover, this should serve as further reason to address the barriers to victim participation. I thank René Provost for raising this issue.

[440] Mansbridge, "A Contingent 'Yes'," *supra* n177 at 628 ["Contingent Yes"].

[441] Jane Mansbridge, "Should Workers Represent Workers?" (2015) 21 *Swiss Political Science Review* 261 at 266.

[442] See e.g., Karen Gelb, "Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing" (2006) Melbourne: Sentencing Advisory Council, at 33-34 (Noting research that demonstrates that victims may be more interested in prevention and rehabilitation than the general public).

The second of these classes is, to the extent that victims of crime tend to reflect a certain demographic profile, the class of individuals within that profile. At least in some jurisdictions, victimization falls disproportionately on particular gender, racial, socio-economic, and age groups, as well as within certain geographical communities.[443] Within categories of offences—sexual assault, for instance—the disproportionality is likely to be even more pronounced.[444] Accordingly, victim participation brings to the forum individuals who are more likely to be descriptively representative of those who tend to be affected. In other words, by virtue of the fact that victims are likely to themselves be poor, female, or racialized, for example, they may introduce perspectives that are driven by the interests of poor, female, or racialized individuals, for example, more generally.

Importantly, the descriptive profiles that victims are likely to represent in this respect are those that likely differ from those classes of individuals who are typically found within the professional roles of criminal justice—judges and prosecutors, for instance. Within the victim participation context, there are indeed indications that in practice victims are conscious of the way that they represent the concerns or interests of the demographics they reflect. Empirical research involving female sexual assault victims in Canada, for instance, has shown that such victims feel a strong sense of responsibility for the safety and well-being of others, and that the protection of other women and potential future victims serve as a central motivation to provide their input through victim impact statements.[445]

By introducing each of these dimensions, victims are able to contribute to sentencing deliberations in a number of ways. Deliberative democrats have long emphasized the epistemic advantages of democratic deliberation, arguing that it results in better, more justifiable decisions overall than other modes of decision-making.[446] This occurs first through the increased pooling and exchange of information and ideas.[447] With respect to the former, studies on both sides of the

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[443] See Samuel Perreault, "Criminal victimization in Canada, 2014," Statistics Canada, available online: https://www.statcan.gc.ca/pub/85-002-x/2015001/article/14241-eng.htm.
[444] See Shana Conroy and Adam Cotter, "Self-reported sexual assault in Canada, 2014," Statistics Canada, available online: https://www.statcan.gc.ca/pub/85-002-x/2017001/article/14842-eng.htm.
[445] Karen-Lee Miller, "Relational Caring: The Use of the Victim Impact Statement by Sexually Assaulted Women," (2014) 29 *Violence and Victims* 797 at 802-804. This is not to say that these victims are seeking to channel the preferences of these women, only that they recognize that their own experiences and perspectives reflect those of a broader group.
[446] Gutmann and Thompson, *Disagreement*, supra n 71, p. 21.
[447] Martí, *supra* n14 at 42.

Atlantic have demonstrated that victim impact statements, for instance, do contribute useful information relevant to sentencing decisions that was not otherwise available.[448] Judicial surveys have indicated that they often believe this to be the case at least most of the time, particularly with respect to assessing harm or loss, and thus informing compensatory and retributive decision-making.[449] Moreover, victims might also speak to issues such as the seriousness with which threats were made, and thus highlight the potential for violence and the need for preventative steps.[450] Accordingly, victim input might thus have an instrumental role to play in grappling with the seriousness of the offence and establishing a proportionate response. Manikis has pointed further to the fact that, having experienced the offending behaviour at issue, victims can also inform interventions such as protective conditions that otherwise would not have been thought of by judges.[451] Victims might extend this insight beyond their own needs to highlight ways in which others too might be vulnerable.

Relatedly, Hélène Landemore has argued that democratic inclusiveness, where it results in greater cognitive diversity, has advantages for public decision-making as well.[452] By cognitive diversity, Landemore references a diversity of ways of seeing the world, interpreting its problems, and finding solutions.[453] On this claim, Landemore points to research demonstrating that, with respect to overall group competence in problem-solving, the cognitive diversity of a group is what matters most, and not the average individual competencies of participants.[454] Accordingly, a diverse group of individuals with average competency possesses superior problem-solving capacities over a group consisting of smarter, but more homogeneous, members. Insofar as victims contribute perspectives and concerns that are not otherwise found within the legal setting, the collective problem-solving capacity would be enhanced.

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[448] Roberts, "Listening" *supra* n219 at 378.
[449] *Ibid*.; see also Manikis, "Clearer Understanding," *supra* n374 at 93.
[450] Paul G Cassell, "In Defense of Victim Impact Statements," (2009) 6 *Ohio State Journal of Criminal Law* 611 at 620.
[451] *Ibid* at 94.
[452] Hélène Landemore, "Deliberation, Cognitive Diversity, and Democratic Inclusiveness: An Epistemic Argument for the Random Selection of Representatives," Synthese 190(7) (2013): pp. 1209-1231.
[453] *Ibid* at 1211. Hong and Page's model which she invokes "denotes more specifically a diversity of perspectives (ways of representing situations and problems), diversity of interpretations (ways of categorizing or partitioning perspectives), diversity of heuristics (ways of generating solutions to problems), and diversity of predictive models (ways of inferring cause and effect)."
[454] *Ibid* at 1212-1217.

In this respect, another beneficial aspect of victims' uniqueness actually corresponds to concerns regarding victims' lack of training or familiarity with sentencing processes and values.[455] While ignorance of the public parameters that constrain just sentencing can be problematic and should be counteracted through education, a victim's lack of familiarity with the *status quo* at the outset of involvement can, however, actually introduce deliberation-*enhancing* influences into sentencing. Lyn Carson has argued in this respect, counterintuitively, that when it comes to deliberation, ignorance may be an asset. She suggests that, if one knows a lot about an issue, "we close our minds to alternative pathways, [and] our creativity is constricted because we think we know what's possible, and dismiss anything which sounds unrealistic."[456] Accordingly, actors without a history of institutional involvement can bring novel perspectives and a deliberative mindset that can enhance problem-solving potential.

Lastly, further epistemic benefits come also by way of rational scrutiny from a variety of perspectives that detects and minimizes distortions or mistakes in reasoning or perception.[457] Again, insofar as victims add a perspective unique from those otherwise found within sentencing processes, they may contribute accordingly. Recent scholarship has begun to explore victims' potential along similar lines. In expanding upon Edwards' typology of victim participation, Manikis has explored the ways in which victims have served as "agents of accountability," particularly in the United States and England and Wales.[458] In triggering review where possible through complaint schemes and administrative and judicial review mechanisms, Manikis has pointed out that victims can serve public ends by monitoring decisions and flagging errors for redress. While primarily active in terms of ensuring adherence to procedural requirements—such as giving victims the opportunity to be heard—Manikis also notes that victims have performed substantive oversight as well, triggering review for erroneous decisions regarding restitution claims.[459]

A deliberative framework expands this function in providing a more dynamic view of accountability. While Manikis focuses on a role that challenges incorrect decisions after they

[455] Manikis, "Clearer Understanding," *supra* n374 at 117.
[456] Carson, *supra* n176.
[457] Martí, *supra* n14 at 42
[458] Manikis, "Expanding Participation," *supra* n391.
[459] *Ibid* at 70.

have been made,[460] an emphasis on reason-giving and deliberation instead suggests that victims can serve a role in calling others to provide a reasoned account for their claims or proposals *within* deliberations, prior to a given decision being made.[461] In the same way that victims are recognized as capable of assessing decisions and acting where appropriate under Manikis' model, so too might they add scrutiny prior to sentencing decisions. As novel participants, victims are critically engaged and thus likely to be especially attentive to stated proposals and their rationales; moreover, as lay outsiders without established expectations or familiarity,[462] victims may be more prone to inquiry. Accordingly, even by simply asking questions or requesting explanations that criminal justice actors might not, victims may foster increased transparency that may give rise to further scrutiny from others as well.

C. Deliberative Victims: Prospects for Practice

As argued above, a deliberative democratic framework captures the concerns of scholars who resist the potentially corrupting effects of victims' private, uninformed, and unreasoned preferences on public decision-making. At the same time, it reconciles victim input with public decision-making and provides normative clarity by approaching victims as citizens and asserting standards for their participation accordingly. In doing so, so too does this framework highlight the ways in which victims might further contribute to sentencing decision-making.

While this provides a much-needed theoretical framework for the issue, critics might nonetheless persist in their objections. Even if in theory victims can legitimately offer up persuasive, publicly acceptable considerations or arguments and thereby reconcile their input with public decision-making norms, that does not demonstrate that they are indeed capable of doing so, or if they were, would in fact do so in most cases. Critics might thus reassert their positions that *in practice* victims are ignorant, concerned more with satisfying their own base preferences than with shared public aims and values, and inevitably guided by vengeance rather than reason. In response to these potential objections, however, it should be noted that a growing body of empirical research suggests that as decision-making processes approach deliberative

[460] *Ibid* at 67.
[461] Glen Staszewski, "Reason-Giving and Accountability" (2009) 93 *Minnesota Law Review* 1253 at 1284 (noting the dynamic nature of deliberative accountability, which occurs throughout deliberations as well as following decisions).
[462] Englebrecht, "Struggle", *supra* n220.

ideals in practice, victims—like lay citizens more generally—should in fact be seen as capable of meeting deliberative standards of participation in this context.[463]

To be sure, baseline assessments can give reason for initial pause. Research shows that the public does indeed know very little about sentencing and criminal justice, having "extensive misperceptions" about elements such as crime and recidivism rates, sentencing norms, the nature of sanctions—for example, the severity of the prison experience—and the use of parole.[464] Victim-specific research shows a similar dearth of knowledge around sentencing, including about the costs of incarceration, the range of options available to sentencing courts, and the nature and purpose of victims' participation.[465] Both victims and the lay public more generally can also be guided by especially punitive impulses. Research has noted that, when asked about sentencing choices in abstract terms, a significant majority of individuals state a desire for harsher responses to crime.[466] Canadian surveys involving more than 3,800 respondents indicated that 74% believed sentencing to be too lenient.[467] Moreover, empirical research into the participation of victims' families in the most serious cases—those involving homicide—records appeals for the most serious punishment possible as well as emotive interventions in which offenders are addressed as "animals" who should be treated accordingly.[468]

However, in the same way that deliberative democratic theory establishes normative standards for citizens' input, it establishes standards for the conditions in which decision-making occurs—that is, processes that themselves facilitate informed reflection on relevant information and the exchange of reasoned arguments. Accordingly, it is a victim's capacity to contribute within more deliberative conditions that ought to be in question. In this respect, the weight of

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[463] While victim-specific research is more limited than that involving the public generally, outcomes regularly overlap and research has shown that the distinction is not likely to preclude shared conclusions: for instance, victims and non-victimized members of the public share levels of punitiveness as well as receptiveness to community-based sentences. See Mike Hough and Julian Roberts, "Sentencing Trends in Britain: Public Knowledge and Public Opinion" (1999) 1 *Punishment & Society* 11 at 21; Julian Roberts and Kent Roach, "Community-Based Sentencing: Perspectives of Crime Victims An Exploratory Study" (2004) Ottawa: Department of Justice at 17.
[464] Gelb, "Myths" *supra* n442 at 23-26.
[465] J Henderson and G Thomas Gitchoff, "Victim and Offender Perceptions of Alternatives to Incarceration: An Exploratory Study" (1983) 7 South African Journal of Criminal Law and Criminology 44 at 49 as cited in Roberts and Roach, *supra* n463 at 15; Roberts, "Listening" *supra* n219 at 400.
[466] Gelb, "Myths" *supra* n442 at 20.
[467] Julian Roberts, Nicole Crutcher, and Paul Verbrugge, "Public Attitudes to Sentencing in Canada: Exploring Recent Findings," (2007) 49 *Canadian Journal of Criminology and Criminal Justice* 75 at 83-84.
[468] Englebrecht and Chavez, "Whose Statement?," *supra* n5 at 397-399; Englebrecht, "Where Do I Stand?," *supra* n405; Arrigo and Williams, *supra* n381.

empirical evidence demonstrates that there is in fact a relationship between individuals' dispositions and the procedural context in which it is solicited—findings that point, first, to victims' potential to meet public standards in practice and, second, the importance of being attentive to questions of institutional design.

To start, research suggests that victims share public concerns, desiring effective prevention of crime rather than vengeance for its own sake.[469] In her study of sexual assault victims, for instance, Karen-Lee Miller notes that victims' preferences for longer periods of incarceration were tied to a belief that these would better protect potential victims.[470] To the extent that such beliefs would be shown to be untrue or that other interventions would better achieve this, there are reasons to believe that victims would revise their positions accordingly. Indeed, empirical research demonstrates an important relationship between individuals' attitudes about sentencing and the information available to them. While it is well-documented that the lay public displays punitive impulses when asked about sentencing in the abstract, research also demonstrates collectively that, in being placed in more engaged, informed positions, individuals revise their positions to become less punitive and more discerning with respect to different possible responses to crime. Early research from Anthony Doob and Julian Roberts has shown accordingly that providing individuals with more detailed information on specific cases, including with respect to both the incident and offender characteristics, decreases their punitiveness dramatically.[471]

With respect to the nature of responses, others have noted that victims' retributive preferences in sentencing outcomes may actually derive from a lack of knowledge of the breadth of possibilities rather than a necessarily punitive nature. Erez thus writes that, frequently, "victims who recommend imprisonment do so because they are not aware of any other options, such as community service, treatment disposition or even restitution."[472] Roberts has also noted that increased "social distance" between victims and offenders is a factor in punitive attitudes,

[469] Gelb, *supra* n442 at 34.
[470] Miller, *supra* n445 at 804.
[471] Anthony Doob and Julian Roberts, "Sentencing: An Analysis of the Public's View of Sentencing" (1983) Ottawa: Department of Justice Canada.
[472] Erez, "Debate Goes On," *supra* n373 at 21; see also Henderson and Gitchoff, *supra* n465.

suggesting that any recommendations be provided in the presence of the offender or at least after having heard the offender's own reasons for requesting their desired outcome.[473]

While these studies point to the importance of individual factors, research into the effects of formal deliberative opportunities show further promise. Several of such studies have involved the creation of experimental, structured processes through which researchers provided everyday citizens with access to balanced information on criminal punishment, opportunities to hear from experts of different views, and forums within which to discuss the issues critically with others.[474] In their results, these processes collectively demonstrate that, within such conditions, individuals are capable of grappling with relevant information, are responsive to the information and arguments they encounter, and are able to formulate principled approaches to responding to crime. Following these processes, participants were less punitive, they wanted to send fewer offenders to prison, were less inclined to assign harsh sentences, and were more willing to support—and indeed even preferred—alternative sanctions. Moreover, in being tasked with determining which principles ought to underpin the treatment of offenders, participants highlighted equity and fairness with respect to the social, economic, and cultural circumstances of offenders, as well as a more holistic approach to crime prevention.[475] Interestingly, participants also asserted the importance of employing other deliberative mechanisms involving the public going forward.

In light of this growing body of research, then, there is reason to believe that deliberative standards are in fact attainable in practice. At the same time, this research also underscores the importance of creating the institutional conditions that foster necessary civic dispositions in victims. While the scope of this chapter does not permit an in-depth exploration of the specific reforms that would make this possible, it is worth highlighting that, where victim input into sentencing *is* permitted, education is paramount. It is crucial that victims be better informed of the public aims of the criminal sentencing process, the breadth of options that may be used toward those ends, and the situations in which certain interventions may be most effective or

[473] Roberts, "Listening" *supra* n219 at 395; William McDonald, "The Victim's Role in the American Administration of Criminal Justice: Some Developments and Findings," in HJ Schneider (ed), *The Victim in International Perspective* (New York: de Gruyter, 1982) at 400-401 (showing that victims who provide sentencing recommendations in the presence of their aggressors are significantly less punitive than those who give recommendations in their absence).
[474] Simpson et al., *supra* n17; Mackenzie et al., *supra* n17 at 745-761; Luskin, Fishkin, and Jowell, *supra* n17 at 463.
[475] Simpson et al., *supra* n17 at 12-14.

appropriate. So too ought they be informed that their input, insofar as it seeks to affect the ultimate decision, should appeal to reasons that their fellow citizens can accept, and not simply their own personal preferences. Consequently, part of the education necessary within the process is one of reminding victims that, insofar as they seek to influence these public decisions, they are acting in their role as a citizen, not simply as a victim. Additionally, procedural arrangements that permit victims to hear and to respond to others' positions and rationales, rather than craft their statements in isolation, would further contribute to a deliberative reality. At the same time, victims ought to be reassured that they themselves may have something to add to the process and be provided with clear direction on their own relevance and its limitations. In this last respect, a deliberative democratic framework is instructive.

4. Conclusion

The re-emergence of victims as participants within the criminal justice process has not been without difficulty. Since their involvement in earlier legal systems, the criminal justice process in Canada and other common law countries has become a distinctly public affair. Crimes, though often affecting their victims deeply, have been conceived of as public wrongs, and public prosecutors and judges, guided by the public interest, have been tasked with their management. It is thus unsurprising that the prospect of victims—conceived of as private parties with their own needs and agendas—having input into sentencing decisions has been met with considerable resistance. Criminal scholarship to date has lacked a framework that could account for victims' place within sentencing, and the resulting conceptual and normative ambiguity has exacerbated apparent tensions.

This chapter has sought to reconcile victims with the public decision-making intrinsic to criminal sentencing by viewing them not as private parties, but as public citizens. In doing so, it has applied a deliberative democratic framework that, as a theory, both accounts for the potential contributions of victims to public decision-making as well as establishes sufficient constraints that guard against the corruption of private interests. In this way, deliberative democracy has been shown to provide victims a carefully delineated place within sentencing, reconciling the two on a theoretical level.

At the same time, this chapter has pointed to empirical evidence that gives reason to believe that victims may indeed possess the capacity to meet these public standards under the right conditions, and thus provides prospects for institutional or procedural reform. Whether these conditions can be sufficiently realized within the constraints of the everyday criminal justice system, and how victims respond within them, may require further empirical study. In any case, this chapter contributes to progress in this area by providing much-needed clarity regarding the proper relationship between victims and public decision-making, and thereby provides a foundation on which to conduct this future research.

What is at stake in all of this is, ultimately, a criminal sentence that is publicly justifiable. The participation of stakeholders, the victim or otherwise, can, in the ways outlined above, either contribute or detract from this central aim. Given its importance, further exploration on how the role of victims can avoid the latter is thus well-warranted. However, it should also be noted that participants within deliberative exchanges are not the sole factor in ensuring a publicly justifiable sentence. In this respect, the law itself has a crucial role to play. In the following chapter, the potential for the law to single-handedly preclude publicly justifiable sentences is elaborated. Using the constraints of mandatory minimum sentences as a lens, it shows how *ex ante* legal constraints can preclude judges from being responsive to relevant considerations in assigning a sentence. In doing so, it identifies a relationship between public *justifiability* and criminal *justice*, while also demonstrating the role that Constitutional rights, and the Courts that enforce them, can play in ensuring a democratically legitimate criminal sentence.

Chapter 5.
Toward Justice as Justifiability:
Mandatory Minimum Sentences and Section 12

"*[W]hether consequences are 'cruel' requires consideration of why they are being imposed*."[476]

As scholarship, jurisprudence and public experience make clear, mandatory minimum sentences present a host of serious issues for the administration of criminal justice in Canada. At a systemic level, mandatory minimums can lead to a variety of problematic consequences that are particularly worrisome for a free and democratic society committed to values such as transparency, equality, and social justice. Foresight of unjust sentences can distort charges and invite creative circumventions by police, prosecutors or judges that are both "willful and subterranean."[477] Removal of judicial discretion heightens the discretionary power of prosecutors in particular, whose decisions lack the same openness and accountability of judicial decision-making.[478] This also adds to an imbalance of power that further problematizes plea bargaining

[476] Justice David Paciocco in *R. v. Michael* 2014 ONCJ 360 at para 89.
[477] Michael Tonry, "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings" (2009) 38 *Crime & Justice* 65 at 67, 100; Lisa Dufraimont, "R. v. Ferguson and the Search for a Coherent Approach to Mandatory Minimum Sentences under Section 12" (2008) 42 *Supreme Court Law Review* (2d) 459 at 465.
[478] Palma Paciocco, "Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing" (2014) 81 *Canadian Criminal Law Review* 241 at 242-243; Debra Parkes, "Ipeelee and the Pursuit of Proportionality in a World of Mandatory Minimum Sentences" (2012) 33 *For the Defence* 22 at 25.

and may result in miscarriages of justice by way of false admissions of guilt.[479] Conversely, the inevitability of an overly severe sentence might foster a reluctance to convict and thus inappropriate acquittals.[480] Disparate effects through any of these mechanism undermine citizens' equal treatment under the law.[481]

More broadly, mandatory minimums can lead to notable increases in incarcerated populations, and typically without a corresponding increase in available resources or support services for those populations.[482] Moreover, the weight of punitive effects are likely to fall heaviest on marginalized groups, including Canada's indigenous communities.[483] When unfittingly punitive sentences are issued, mandatory minimums can also undermine public confidence in the law while creating a crisis of conscience among dispirited judges.[484] All of this comes against a backdrop of empirical evidence demonstrating that mandatory minimum sentences do not make Canada a safer place, despite being defended on that basis.[485] This fact, it should be noted, implies not simply a negation of benefit, but instead that citizens might be incarcerated, and for longer, without good reason—a violence in itself. In all, there are serious questions as to whether mandatory minimums are good policy.

At the heart of these issues, however, is an apparent tension between inflexible *ex ante* sentencing decisions made at the legislative level and those which are later compelled by considerations of individualized justice at the level of sentencing courts. By mandating in advance a minimum sentence for an offence category, Parliament inhibits the ability of judges to later fashion an appropriate sentence in light of relevant considerations which only later become apparent, such as the gravity and circumstances of the particular offence, or the characteristics and culpability of the offender at hand. Accordingly, mandatory minimums may compel judges

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[479] Benjamin L Berger, "A More Lasting Comfort? The Politics of Minimum Sentences, the Rule of Law and R v Ferguson" (2009) 47 *Supreme Court Law Review* (2d) at 110.
[480] *R v Smith* [1987] 1 SCR 1045 [hereafter *Smith*] at para. 73.
[481] Tonry, *supra* n477 at 100.
[482] Berger, *supra* n479 at 109; Kent Roach, "Searching for Smith: The Constitutionality of Mandatory Sentences" (2001) 39 *Osgoode Hall Law Journal* 367 at 399*ff* (speaking of the potential "ratcheting up" of sentences that may be required to maintain proportionality among offences).
[483] Larry N Chartrand, "Aboriginal Peoples and Mandatory Sentencing" (2001) 39 *Osgoode Hall Law Journal* 449.
[484] David M Paciocco, "The Law of Minimum Sentences: Judicial Responses and Responsibility" (2015) 19 *Canadian Criminal Law Review* 174 at 201; Allan Manson, "Arbitrary Disproportionality: A New Charter Standard for Measuring the Constitutionality of Mandatory Minimum Sentences" (2012) 57 *Supreme Court Law Review* (2d) 173 at 202.
[485] Anthony N Doob and Carla Cesaroni, "The Political Attractiveness of Mandatory Minimum Sentences." (2001) 39 *Osgoode Hall Law Journal* 287.

to order unjust sentences which themselves do not 'fit' the crime at hand. Offenders might thus be subjected to indefensible interventions in either kind or quantity at an *individual* level.

The Supreme Court of Canada has grappled with this issue primarily through the lens of offenders' right not to be subject to "cruel and unusual punishment or treatment" under section 12 of the Canadian Charter of Rights and Freedoms.[486] Through the progression of jurisprudence, the Court has conceptualized section 12 as protecting against "gross disproportionality" in sentencing, constructing the Constitutional issue as, first, a matter of proportionality and, second, one demarcated by a high threshold.[487] Each of these dimensions, along with the Court's approach more generally, have been subject to critique by criminal scholars. The narrow quantitative construction of the issue has been criticized for neglecting relevant qualitative dimensions—for instance, the way in which the sentence may not be rationally connected to a valid objective given the facts of the case—and thus failing to capture the full *breadth* of the problem.[488] A chorus of scholars have also argued that the high standard adopted by the Court leaves untouched the still-problematic sentences that nonetheless fall below it, and thus fails to reflect the *depth* of the issue.[489] Overall, critics have also expressed criticism of the Court's approach to conceptualizing the problem, suggesting it has been unreflective and incoherent.[490] All the while, the Court has defended its position out of an ostensibly democratic deference to an elected legislature and a desire to not trivialize the Charter with lesser issues.[491]

While scholars' critiques are compelling, they themselves lack a coherent framework within which they can adequately conceptualize the nature of the section 12 problem and, consequently, bolster their calls for reform. Instead, critiques to date have relied on intuition, rhetoric, and appeals for basic fairness or doctrinal consistency. Arguing from these positions, commentators to date have also lacked the resources to defuse the Court's own defence of deference to Parliament. Accordingly, critics would benefit from a framework that first, provides a clear conceptual articulation of the problem at issue, second, bolsters its importance in relation

[486] Notably, the Court has also engaged the issue through section 1.
[487] *Smith, supra* n480.
[488] Manson, *supra* n484.
[489] Berger, *supra* n479 at 118; Sylvestre, *infra* n548 at 468-469; P. Paciocco, *supra* n478 at 259; D. Paciocco, *supra* n484 at 193.
[490] Manson, *supra* n484, D. Paciocco, *supra* n484, Debra Parkes, "From Smith to Smickle: The Charter's Minimal Impact on Mandatory Minimum Sentences" (2012) 57 *Supreme Court Law Review* 149.
[491] *Smith supra* n480 at 47-49; *Steele v Mountain Institution* [1990] 2 SCR 1385 at 1417.

to the Charter's Constitutional status, and third, replies squarely to the Court's concern with deference to Parliament. In explaining coercive public intervention, this framework should be political in character and account for democratic values.

This chapter argues that a deliberative democratic framework, which gives justification a fundamental role in legitimizing public action, captures scholars' concerns and provides them with the resources for each of these needs. Deliberative democracy demonstrates that the problem at issue is one of legitimacy in that mandatory minimums can require the imposition of *unjustifiable* sentences—a practice which fails to respect the basic democratic requirement that governments provide its citizens with good reasons for the decisions that bind them. Understood as a fundamental requirement of legitimacy, the problem's constitutional importance is also emphasized and supports calls for a lower threshold. Moreover, conceiving of the problem as one of justifiability supports the notion that the problem addressed by section 12 is broader in scope than currently recognized. Demands of justifiability not only includes the quantitative concerns of proportionality, but also incorporate a concern with the qualitative dimensions of sentencing decisions—that is, the rational choice between different forms of response given how they serve the sentencing objectives.

Further, this chapter also argues that a deliberative framework defuses the ostensibly democratic defence of section 12 deference. Drawing on deliberative systems and deliberative constitutionalism perspectives, it demonstrates the way in which this framework can dissipate the supposed tension between constitutional review and democracy. In doing so, it argues that section 12, understood as protecting against unjustifiable sentences, facilitates deliberative democratic ideals, and that the judicial review which gives effect to it is uniquely situated to do so in a political environment otherwise hostile to deliberative approaches to criminal justice decision-making. In all, then, the chapter bolsters calls for a reformulated section 12 right and provides direction on how this can contribute to—rather than detract from—democratic governance within Canada's criminal justice system.

Toward this end, Part Two surveys the historical development of section 12 jurisprudence and its construction of the constitutional problem created by mandatory minimums, the critiques of this construction within scholarship, and the Supreme Court's own defence of its deferential approach. The section closes by setting out the need for a democratic framework to address this

debate. Part Three sets out a deliberative democratic account of the constitutional problem created by mandatory minimum sentences, structuring intuitions while cohering the conceptualization of cruel and unusual punishment more generally. Part Four explores the tension between constitutional review and democracy, demonstrates how a deliberative view defuses it, and illustrates how section 12 and judicial protection of it both uniquely contribute to this end.

1. The Constitutional Problem of Mandatory Minimum Sentences

While attracting a variety of criticisms, the most fundamental of mandatory minimums' shortcomings relates to the way in which they bind judicial decision-making in such a way as to prevent courts from imposing a substantively appropriate sentence. *Ex ante* legislative decisions as to what is an appropriate response for all offences falling within a legal class are inherently made in the abstract, prior to information regarding actual individual offences being available. By mandating a particular response for a class of offence, mandatory minimums capture a variety of situations involving relevant differences, including with respect to the gravity or nature of the behaviour, circumstances, or the offender himself, while not allowing for these distinctions to influence the sentence imposed. As a result, mandatory minimums can generate discord between what is required by law and what is seen as just.

Although mandatory minimum sentences potentially create other Constitutional problems,[492] the Supreme Court has approached their potential necessitation of unjust sentences through section 12 of the Charter, which guarantees the right not to be subjected to any cruel and unusual interventions—whether they be considered treatment or punishment.[493] It is within this context that the Court has characterized the issue and delineated when judicial remedy would be appropriate.[494] The following sections set out, first, the way in which the Supreme Court of Canada has constructed this particular Constitutional problem, second, the critiques which have followed within the literature, and, third, the Court's own democratic defence of its conclusions.

[492] Courts and commentators have also noted the demands of principles of fundamental justice under section 7 and the question of procedural arbitrariness of section 9 as perhaps relevant to the issue: see e.g. Manson, Smith, s9, etc.
[493] *Charter* s. 12.
[494] This is a matter of section 52 *Constitution Act*, 1982 which would render the provision of no force. Note here unavailability of section 24 exemption under *R v Ferguson* [2008] 1 S.C.R. 96.

In doing so, it identifies a gap within academic commentary that necessitates a coherent framework with which scholars can articulate the nature of the problem, bolster its importance, and reply squarely to the Court's own defence.

A. Constructing the Constitutional Problem: Cruel and Unusual Interventions

In working out the meaning of section 12's "cruel and unusual" in relation to mandatory minimum sentences, the Supreme Court has delineated its view of the Constitutional problem that these provisions create. First, in conceptualizing the *nature* of cruel and unusual punishment in terms of how it derogates from an appropriate sentence, the Court has specified the *breadth* of the problem. Here, the Court has grappled with a richer conception of "cruel and unusual" but ultimately interpreted the notion in quantitative terms of severity—a matter of (gross) disproportionality. The problem has thus been constructed as one of degree rather than also one of kind. Second, in identifying a *threshold* below which that issue fails to be a violation, the Court has further specified the *depth* of the problem. Here, the Court has been consistent in asserting a high threshold, suggesting that the Constitutional problem only arises in cases of more extreme derogation from a fit sentence.

i. Its Nature

Dating back to pre-Charter jurisprudence under section 2(b) of the Canadian Bill of Rights, the meaning of "cruel and unusual" punishment has been a point of contention in Canadian law. On the one hand, judges espoused a narrow view that constructed the issue in terms of the severity or excessiveness of state intervention. Early references, for instance, interpreted its meaning as simply involving "excessive or unusual pain."[495] In *R v. Shand*, the Ontario Court of Appeal noted that the concept's core meaning had yet to be fully explicated in Canadian law, but accepted a "disproportionality principle" from American jurisprudence and concluded that cruel and unusual punishment could be that which was obviously and irrationally excessive.[496] A majority of the Supreme Court in *Miller and Cockriell*, while not offering a clear

[495] *Smith, supra* n480
[496] [1976] 30 C.C.C. (2d) 23. The Court also hinted at the possibility that other factors might be considered in other cases.

view in the affirmative, explicitly excluded instrumental or moral considerations from their analysis of whether a mandatory death penalty was cruel and unusual.[497]

On the other hand, judges also incorporated wider concerns not necessarily fitting neatly into a traditional proportionality analysis,[498] and constructed the issue more broadly as one of moral, rational, or instrumental defensibility. McIntyre J.A.'s influential dissent in the British Columbia Court of Appeal's hearing of *R. v. Miller and Cockriell*, for instance, went beyond excessiveness to suggest that a punishment would be cruel and unusual if it did not, in fact, serve a social purpose like the protection of society, if it was unnecessary because of adequate alternatives, if its methods were not publicly acceptable or aligned with the public's sense of decency, or if it could not be applied on a rational basis.[499] Similar dimensions were validated by the minority when the case reached the Supreme Court, being considered in addition to a test of whether the punishment was "so excessive as to outrage standards of decency."[500] The Ontario County Court in *R v. Shand* and the Federal Court of Canada in *McCann v. The Queen*—the first and only finding of cruel and usual punishment under 2(b)—also found McIntyre's interpretation most persuasive and considered both excessiveness as well as arbitrariness, the sentence's service of legitimate public ends, and public morality as component dimensions in their analyses.[501]

Under section 12 of the Charter, contemporary jurisprudence addressing how mandatory minimums might result in cruel and unusual punishment initially grappled with these competing conceptions as well. In the landmark 1987 decision of *R v. Smith,* the Supreme Court settled the

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[497] [1977] 2 S.C.R. 680 at 692.

[498] This is the case regardless of whether one focuses on proportionality in the general sense of referring to an appropriate weighing of cost (e.g. liberty) against the instrumental value gained through the intervention (e.g. reduced risk of future harm) or whether one focuses more narrowly on proportionality in relation to moral desert or blameworthiness. They may, however, fit into the constitutional notion of "proportionality" which is something of a misnomer given the term's quantitative character. These understandings are unpacked below.

[499] *R. v. Miller and Cockriell* (1976), 24 C.C.C. (2d) 401 at paras. 227-269. The majority did not undertake a substantive analysis beyond the ordinary meaning of the words. Additionally, it is worth noting that both the Court of Appeal and the Supreme Court in this case resorted to an exploration of the available empirical evidence in determining whether the sentenced did, in fact, serve a legitimate end.

[500] *Miller and Cockriell v The Queen* [1977] 2 S.C.R. 680. The appellants in this case argued that the death penalty was cruel and unusual on the grounds that (1) its unusual severity was degrading to human dignity, (2) it was arbitrarily imposed, (3) it was unacceptable to a large segment of society, and (4) it did not serve to deter crime. While the minority, led by Chief Justice Laskin, rejected the third ground as a valid test under s.2(b), the first, second and third were ostensibly accepted as valid considerations, despite the fact that the second ground was not found on the facts and the fourth was expanded to incorporate other public purposes beyond deterrence.

[501] *R. v. Shand supra* n476 at para. 21*ff*; *McCann v. The Queen* [1975] 1 F.C. 570, 29 C.C.C. (2d) 337.

basic features of section 12 in asserting its concern with substantive outcomes rather than process,[502] and explaining that violations were to be assessed in relation to a fit and appropriate sentence.[503] In doing so, the court indicated that this baseline appropriateness should be understood in terms of what would be fitting to punish, rehabilitate, deter, or incapacitate the offender himself, and that other penological goals—particularly general deterrence—are not relevant in establishing this point of comparison.[504] In explaining *how* violations derogate from their fit counterparts, Lamer J, in writing for the majority, made clear that it was a question of "gross disproportionality" or excessiveness that would "outrage standards of decency."[505] Accordingly, cruel and unusual punishment was essentially characterized as a quantitative matter of *too much* punishment—not just in terms of length, but overall severity brought about by its nature and or circumstances.[506]

While the Court's test was concerned chiefly with these quantitative concerns, the majority was nonetheless reluctant to completely exclude the breadth of past considerations. Accordingly, it noted that the criteria discussed under section 2(b) were still useful-but-nondeterminative guidelines in assessing whether a punishment was grossly disproportionate,[507] though how exactly these factors could be incorporated as part of a disproportionality analysis was not made clear. Additionally, the Court obfuscated its quantitative focus by explaining that

[502] See paras. 54, 60 (Holding that "s. 12 governs the quality of the punishment and [its] effect" and that an "arbitrarily a preconceived but [coincidentally] appropriate sentence" would not be a violation.)
[503] Paras. 54-55.
[504] *Smith supra* n480 at para 56 (indicating that these broader societal objectives should be assessed under section 1 of the Charter).
[505] *Ibid* at 54-55
[506] *Ibid*, at paras. 54-57
[507] *Ibid* at para. 58. The Court references a list compiled by Walter S Tarnopolsky in "Just Deserts or Cruel and Unusual Treatment or Punishment? Where do We Look for Guidance?" (1978) Ottawa Law Review 1 and referenced nine tests, including: "(1) Is the punishment such that it goes beyond what is necessary to achieve a legitimate penal aim? (2) Is it unnecessary because there are adequate alternatives? (3) Is it unacceptable to a large segment of the population? (4) Is it such that it cannot be applied upon a rational basis in accordance with ascertained or ascertainable standards? (5) Is it arbitrarily imposed? (6) Is it such that it has no value in the sense of some social purpose such as reformation, rehabilitation, deterrence or retribution? (7) Is it in accord with public standards of decency or propriety? (8) Is the punishment of such a character as to shock general conscience or as to be intolerable in fundamental fairness? (9) Is it unusually severe and hence degrading to human dignity and worth?" After doing so, the Court explicitly excluded a seemingly *procedural* view of "arbitrariness" in explaining that the concern of section 12 is the substantive outcome, not the process by which that outcome was arrived at. This should not, however, preclude a substantive understanding of arbitrariness which will be engaged with below.

some punishments—such as the lash—would *always* be considered grossly disproportionate, regardless of its quantity.[508]

McIntyre J., by then a member of the Supreme Court, gave wider criteria much greater prominence in a detailed dissent, supported by Le Dain J, which offered a new three-pronged test. Here, McIntyre indicated that a violation would occur if a punishment's character or duration was such that it outraged public conscience or degraded human dignity, if it went beyond what was necessary to achieve a legitimate purpose, having in mind alternatives, or if, *irrespective of proportionality*, it was imposed arbitrarily, in the sense of being imposed for reasons—or according to standards or principles—not rationally connected to the social purpose of the law.[509] In this view, a morally unacceptable or irrational—yet proportionate—sentence might also be considered cruel and unusual, expanding the problem to including the *wrong kind* of intervention in the sense of being qualitatively indefensible.[510] In this way, intuitions that the notion of cruel and unusual punishment might be richer than disproportionality, and thereby capture more than quantitative derogations from appropriate sentences, remained alive in early Charter jurisprudence.

Following *Smith*, however, the conceptualization of cruel and unusual punishment quickly narrowed and interest in further development faded. Subsequent Supreme Court decisions acknowledged wider past analysis, but reaffirmed *Smith* and doubted the continued relevance of at least some factors—for instance, whether less restrictive alternatives were available—to the clear focus on gross disproportionality.[511] When arbitrariness was considered, it was given minimal relevance and considered in procedural terms as a factor that, while perhaps

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[508] *Ibid* at para 57 (It seems untenable to argue that a single lash would be excessive in lieu of years-long incarceration, and thus this seems to incorporate a distinct moral dimension into the test).
[509] Paras. 93-103. Le Dain J concurred with this test, though disagreed with its application on the facts.
[510] On the moral dimension, see also *ibid* at para 82: "There are conditions…which may become subject to scrutiny, under the provisions of section 12 of the Charter, not only on the basis of disproportionality or excess but also concerning the nature or quality of the treatment." Further, it is worth noting that McIntyre's reasoning is far from clear and may display some contradictions. For instance, he seems firmly committed to the idea, in para. 103, that similarly situated offenders be treated, to the extent possible, alike; however, he seems considerably less committed, in the very next paragraph, to the idea that offenders situated differently should be treated differently. Accordingly, he seems to resist a logical extension of his test. See *infra*.
[511] *R. v. Lyons* [1987] 2 SCR 309 at 56 (While this factor engages quantitative considerations, it embodies a principle that the least restrictive means necessary are those that are most appropriate—a principle not inherent in the notion of proportionality as it exists in Canadian criminal law, though incorporated into a Constitutional notion of proportionality under section 1. It was, however, subsequently incorporated into the Criminal Code at 718.2(d)). See also *R. v. Luxton* [1990] 2 SCR 711 (applying the Smith test matter-of-factly without deeper analysis).

increasing the likelihood that legislation would produce a violation, did not itself comprise the substantive nature of cruel and unusual punishment in assessing individual cases.[512] It was only the point of comparison—that is, the "appropriate" sentence against which a potential violation would be measured, and which would now be ascertained in light of all sentencing objectives, including general deterrence—that would change before engagement with the nature of cruel and unusual punishment would settle completely.[513]

While other questions remained regarding section 12—such as what remedies were available[514] and to whom the test should be applied[515]—by 2008 the substantive nature of the test was readily stated in narrowed terms. *R. v. Ferguson* noted that the question was simply whether the punishment was grossly disproportionate to an appropriate sentence.[516] Further, the Court's decision in *R. v. Nur* indicated clearly that the problem with mandatory minimum sentences is that they, "by their very nature, have the potential to depart from the principle of proportionality" and confirmed that the test was whether the punishment was grossly disproportionate to what would be appropriate.[517] In its more recent decision on mandatory minimums in *R. v. Lloyd*, the Supreme Court stated authoritatively that "[t]he question, put simply, is this: In view of the fit and proportionate sentence, is the mandatory minimum sentence grossly disproportionate to the offence and its circumstances?"[518] With that, the notion of cruel and unusual as entailing *too much* punishment was seemingly cemented.

However, while that central question has remained the test in the Court's recent decision in *R. v. Boudreault*, the majority nonetheless returned to explicit consideration of qualitative matters and gives reason to doubt the essentially quantitative nature of cruel and unusual

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[512] *R. v. Goltz* [1991] 3 SCR 485. While a statute which assigns punishment without discrimination based on relevant factors is seen here as likely to result in grossly disproportionate sentences, the arbitrariness of a sentence itself—that is, it not reflecting relevant considerations and therefore being reasonable overall, is not part of the test for cruel and unusual punishment.
[513] *R. v. Morrisey* [2000] 2 SCR 90 at para. 44-46. This was ostensibly confirmed in *R. v. Ferguson, supra* n494 and was made explicit in *R. v. Nur* 1 SCR 773.
[514] *R. v. Ferguson supra* n494.
[515] The question of whether, and to what extent, the test should be applied to hypothetical cases was a live issue which arose continued from *Smith* through to *Nur*.
[516] Ferguson at para. 14. *R. v. Smickle* [2012] O.J. No. 612, 280 C.C.C. (3d) 365 (Ont. S.C.J.) and *R. v. Nur* 2013 ONCA 677, 2013 CarswellOnt 15898 represent occasions where a richer analysis was applied, although in lower courts and subsequently overturned.
[517] *R. v. Nur supra* n513 at paras. 39, 44.
[518] *Lloyd* [2016] 1 SCR 130 at para 23.

punishment.[519] Indeed, the court explored considerations such whether the punishment served a valid penal purpose in the instant case with an emphasis not seen since the Court's earlier decision in *Smith*.

ii. Its Threshold

While the nature of the cruel and unusual problem has been subject to some dispute, the threshold at which the issue has become of Constitutional concern has remained relatively consistent. With the nature of the issue being characterized as too much punishment, the latter serves to indicate more precisely how much is too much.[520]

As a baseline, proportionality *tout court* has been legislated by Parliament as the fundamental principle of sentencing within Canada's *Criminal Code*.[521] Accordingly, the balancing of all relevant considerations, objectives, and principles is constrained by the requirement that the sentence must ultimately be proportionate to the gravity of the offence and the offender's responsibility. Moreover, Canadian courts have flirted with recognizing proportionality as a principle of fundamental justice under section 7 of the Charter*,* have referred to it as the *sine qua non* of a just sanction, and have stated clearly that a disproportionate sentence is an unjust sentence.[522]

To be sure, the question of what constitutes a proportionate sentence is a subjective one which leaves some room for reasonable disagreement. Accordingly, standards of appellate review give sentencing judges considerable latitude in light of this fact, and reflect deference to the trial judge's experience with both the case at hand and the local environment.[523] Even while eschewing an "interventionist" approach in favour of deference, however, the Supreme Court has

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[519] *R. v. Boudreault* [2018] SCC 58.

[520] While other dimensions were put forward as part of the debate around the nature of cruel and unusual punishment, their lack of application meant that a threshold of arbitrariness was not developed. However, the degree to which a sentence would need to be unreasonable, irrational, or arbitrary to constitute a violation would also fall under this more general question of threshold.

[521] Criminal Code s. 718.1

[522] Lebel J, writing for the majority in *R v Ipeelee* [2012] 1 SCR 433 wrote that "proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the Charter"; however, in *R v Lloyd* [2016] the Court held that this was not the case, in part because of its incoherence with the standard of gross disproportionality found in section 12: see paras. 38*ff*. *R v Arcand* [2010] ABCA 363

[523] *R v Shropeshire* [1995] 4 SCR 227; *R v Lacasse* [2015] 3 S.C.R. 1089

indicated that it is nonetheless appropriate to appeal and have corrected sentences in cases where they are "clearly unreasonable"[524] and—in present parlance—"demonstrably unfit."[525]

In the case of cruel and unusual punishment or treatment, however, the established standard for intervention is notably higher, and has been so since under the Canadian Bill of Rights.[526] In contrast with the ordinary standard of proportionality, the Charter's section 12 establishes a requirement of *gross* disproportionality. To constitute a "cruel and unusual" intervention, the sentence imposed must thus be "more than merely excessive," and instead "so excessive as to outrage standards of decency."[527] It must derogate to such a degree that it would be found "abhorrent or intolerable" to Canadians, or "shock [their] conscience."[528]

Notably, even significant derogations that would otherwise be correctable on appeal do not meet this threshold, and therefore remain unchecked by section 12. In considering section 12 violations, courts have held that mandatory sentences which were "manifestly unfit" [529] and "demonstrably unfit"[530] nonetheless failed to meet the gross disproportionality standard. In *R. v. McDonald*, a young, impoverished man with a mental illness robbed a store of $300, showing, but not brandishing, an unloaded BB gun and otherwise communicating politely.[531] He subsequently pleaded guilty, took responsibility, and showed remorse. Faced with a four-year mandatory minimum sentence, Rosenberg JA indicated that he had serious concerns about the sentence—particularly given the mental illness—and about putting McDonald into a penitentiary setting. He also expressed that a sentence of even three years would go beyond what was necessary and was demonstrably unfit. Nonetheless, he distinguished this from gross disproportionality and held that the sentence was not such that it would shock the conscience, and thus not a violation of section 12.

[524] *Shropeshire*, *supra* n523.
[525] *R. v. M(CA)* [1996] 1 SCR 500; *R v Nasogaluak* [2010] 1 SCR 206.
[526] See e.g. *R v Shand* 2011 ONCA 5.
[527] *Smith*, affirmed in *Nur*, *Lloyd, supra.*
[528] *Lloyd supra* n at paras. 24, 33; see also *R. v. Hainnu* (1998) N.W.T.J 101 (indicating that "severe" or "harsh" sentences are not sufficient to meet this standard).
[529] *R v Meszaros* [2013] ONCA 682 at para 79.
[530] *R v McDonald* [1998] 40 O.R. (3d) 641 at para 72.
[531] *Ibid*.

In this way, the Supreme Court has acknowledged that the threshold is a "high bar" to reach.[532] Indeed, as Cory J wrote on behalf of a unanimous court in *Steele*, the standard is such that "[i]t will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of section 12 of the Charter. The test for determining whether a sentence is disproportionately long is very properly stringent and demanding."[533]

B. Constitutional Tensions: Criticisms of Section 12 and the Court's "Democratic" Defence

i. Scholarly Critiques of Section 12 Jurisprudence

Despite the Supreme Court's seemingly progressive certainty regarding their interpretation of section 12, scholars have nonetheless continued to level critiques at the results of Court's interpretation—that is, both the nature and threshold of its standard—and the thinking that led them there. Motivating this criticism is a sense that the conceptualization of section 12 falls short of what is necessary to meaningfully engage the full mandatory minimum problem at issue and deliver on intuitions as to what is just. These critiques thus form part of a broader call among scholars for courts to play a more active role in policing mandatory minimum sentences through Charter scrutiny, whether through section 12 or otherwise.[534] Among those concerned with the conceptual deficiencies of section 12, what is needed in this respect is a test that incorporates a wider concern with the rationality of sentences and engages them more readily at a lower threshold.

With respect to the *nature* of the test, Allan Manson, for one, has argued that the discourse surrounding the "cruel and unusual" concept, once rich and full of potential for further development, has been distilled to the point of being "arid."[535] Accordingly, he laments the neglect of "more intriguing, albeit complex, alternatives" and writes that if "section 12 jurisprudence remains stuck in [its] narrow analytical mold, there is little reason to think that it will provide a useful tool for scrutinizing mandatory minimum sentences."[536] In its present

[532] *R v Nur supra* n513 at para 39
[533] *Steele, supra* n491 at 1417
[534] See e.g. Roach, "Searching for Smith" *supra* n482; Parkes, "Smickle" *supra* n490. Both authors consider section 7 a possibility in this respect.
[535] Manson, *supra* n484 at 181.
[536] *Ibid* at 175, 173. Following the decisions in *Nur* and *Lloyd* that cemented the section 12 test, Manson's prognosis would now seem even less hopeful than at the time of his writing.

formulation, he notes, section 12 fails to address sentences that are seriously inconsistent with established purposes and values. Consequently, it enables sentencing practice that betrays judicial conscience, erodes public confidence, and is unreflective of the basic fairness inherent within the common law tradition.[537]

Specifically, Manson attributes these shortcomings to the shift away from engagement with the notion of arbitrariness within section 12 analyses and asserts the necessity of renewed attention to the rational connection between the ends and means of sentencing.[538] Ultimately, he proposes a test of "arbitrary disproportionality" that explores whether the offender would "be subjected to a sentence that cannot be justified by any sentencing principle or objective."[539] Such assessments, he writes, would need to go beyond theoretical assertions and be grounded in fact, even to the extent of requiring expert evidence pertaining to "the scope and relevance of various sentencing and penological objectives."[540] Debra Parkes too has lamented the Charter's "minimal impact" on mandatory minimums and called for more searching review of their arbitrary effects, although thinking that this could come by way of section 7.[541]

Moreover, David Paciocco has pointed out that the Court's conceptualization and application of proportionality under section 12 is inconsistent with how the concept has otherwise been understood and applied throughout Canadian criminal law. In this respect, Paciocco highlights that the former is assessed in relation to the overall value of a sentence—including general deterrence and denunciation—rather than being anchored to an assessment of moral blameworthiness.[542] Accordingly, he cautions that the section 12 conception compromises proportionality's otherwise-central individualizing and limiting function.[543] Yet, the conception

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[537] Manson, *supra* n484 at 202.
[538] Manson asserts that if the changes he proposes cannot come by way of section 12 jurisprudence, they might instead fall under section 7: at 174. However, this seems to be a pragmatic choice and he is clear in identifying the issue as a shortcoming of section 12 development, as well as in celebrating the way in which *R. v. Smickle* returned to richer section 12 analysis. Debra Parkes has also called for similar scrutiny along these lines, though is clearer in assigning this to section 7 and seems more concerned with the systemic or policy level arbitrariness than arbitrariness at an individual or "penological" level: see Parkes, "Smickle", *supra* n490.
[539] *Ibid* at 201.
[540] Manson *supra* n484 at 201-202.
[541] Parkes, "Ipeelee" *supra* n478.
[542] D Paciocco *supra* n484 at 195-196. Paciocco refers to this as a "watering down" of proportionality, but it may also be thought of as elevating the point against which proportionality is assessed.
[543] In spite of this apparent inconsistency, the Supreme Court in reaffirmed this role that proportionality is supposed to play in citing Lebel J. in *R. v. Ipeelee* [2012] *supra*: "the principle of proportionality ensures that a sentence does

doesn't share the features of a broader concept of proportionality like that under the *Oakes* framework either.[544] The intervention's rational connection to a valid aim has seemingly been excluded as a concern—and in any case was not considered determinative in earlier decisions—and so has the concern with minimal impairment.[545] Accordingly, the issue as constructed seems to be both a matter of doctrinal inconsistency and conceptual ambiguity.

With respect to the *threshold* that the Court has established for section 12, a multitude of scholars have expressed serious discomfort with the evident Constitutionality of sentences that, while disproportionate, fail to meet the demanding standard of gross disproportionality. Benjamin Berger has characterized the test as both "open to criticism and ripe for reconsideration" while questioning whether we are "really satisfied with a law that would create consistently excessive sentences so long as this unfitness does not outrage our standards of decency."[546]

Others have suggested that the insistence on a "gross" standard is hard to defend given the centrality of proportionality *tout court* in Canadian sentencing law.[547] Similarly, Marie-Eve Sylvestre has questioned the logic of establishing a higher level of disproportionality, arguing that the distinction between different degrees disproportionality misses the essential point. Accordingly, she asks: "[h]ow can a sentence be 'merely' excessive? The expression itself is an oxymoron. Excessive, by definition, describes a degree that exceeds what is normal, reasonable or tolerable."[548]

As the above reactions might also suggest, it is not just the specific conclusions that scholars have found wanting. In addition to their critiques of the nature and threshold of section 12, the clarity and depth of judicial thinking has also been subject to criticism. Assessing progress after *Smith*, Manson has argued that "we have not arrived at this place by thoughtful

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not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender." See Nur, supra at para 43.

[544] *R. v. Oakes* [1986] 1 S.C.R. 103

[545] *Lyons supra* n511 at 56; *Smith* at para 58.

[546] Berger, *supra* n479 at 118.

[547] P Paciocco *supra* n478 at 259; see also D Paciocco, *supra* n484 at 193 (Writing in 2015 that "[d]octrinally, there appears to be a stronger case for a proportionality standard than a gross proportionality test.")

[548] Marie-Eve Sylvestre, "The (Re)Discovery of the Proportionality Principle in Sentencing in Ipeelee: Constitutionalization and the Emergence of Collective Responsibility" (2013) 63 *Supreme Court Law Review* 461 at 468-469.

reflection on the purposes and scope of section 12 and the 'cruel and unusual' concept."[549] Instead, he has argued that courts became distracted by secondary issues of application and rarely went beyond "platitudes" to meaningfully explore the deeper possibilities within extant jurisprudence.[550]

Interestingly, dissatisfaction with the Supreme Court's reasoning dates back to jurisprudence under the Canadian Bill of Rights and may reveal a broader tendency in cruel and unusual jurisprudence. On the eve of patriation, Walter Tarnopolsky—whose writing the Supreme Court relied on in *Smith*—also lamented the Court's depth of reasoning in *Miller and Cockriell*. At that time, Tarnopolsky wrote of his disappointment and surprise that most justices gave little indication that they had "arrived at [their] conclusion by careful analysis and cogent reasoning rather than by brief summation or imperious assertion."[551]

ii. The Contours of Cruel and Unusual: A Democratic Defence?

While critiques of their reasoning and its conclusions are compelling, the Supreme Court has nonetheless sought to defend its approach to the contours of its section 12 test. Predominant among the forces which have shaped the contemporary interpretation of section 12 has been attention to the unique institutional roles of, and relationship between, the courts and the legislature. It is through this engagement that the Court has most directly spoken of the rationale for distinguishing its test from possible alternatives for which scholars might advocate. As Kent Roach notes, in "being asked to engage in judicial review of a democratically enacted law…[t]he court's view of its relationship with the legislature is bound to enter into the equation."[552]

Here, deference to the elected Parliament has been the driving force and suggests an ostensibly democratic rationale for the state of section 12, including both its nature and threshold. A more limited test offers an elected Parliament, seen to represent the will of the citizenry, greater control over what a sentence should be. Likewise, it decreases the possibility that unelected judges will strike down mandatory minimum provisions and themselves decide sentences that may differ from what Parliament otherwise would have prescribed.

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[549] Manson *supra* n484 at 174.
[550] *Ibid* at 181, 197.
[551] Walter S. Tarnopolsky, "Just Deserts or Cruel and Unusual Treatment or Punishment? Where Do We Look for Guidance?" (1978) 10(1) *Ottawa Law Review* 1 at 1.
[552] Roach, "Searching", *supra* n482 at 368.

Early in Charter jurisprudence, the Supreme Court was clear in identifying an historical "tradition of deference" dating back to decisions under the Canadian Bill of Rights, as well as a "lingering reluctance" to interfere with Parliament's legislative decisions even following its *Charter* mandate.[553] In *Smith*, the Supreme Court recognized Parliament's power to make policy choices with respect to sentencing, and indicated that it saw no reason to depart from the deferential trend.[554] Nearly three decades later in *Lloyd*, the Court opened its decision by affirming the respective roles of the legislature and courts, and, while recognizing its Constitutional role, went on to re-assert the deference that courts owe in performing this role by citing the very same passage from Borins Dist. Ct. as it did in *Smith*:

> "It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the Charter is properly a judicial function, the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency."[555]

Accordingly, the Court's approach to "cruel and unusual" interventions, with respect to both the nature and threshold, has been guided by this disposition throughout its development.

With respect to the nature of the test, the narrowing of dimensions to be considered by courts has limited the scope of scrutiny and provides greater room for Parliament's authority. Even while not asserting a view as to what the test for cruel and unusual punishment was or ought to be, the Supreme Court in *Miller and Cockriell* sought to exclude considerations related to morality and effectiveness on the basis that these were more obviously questions of policy and properly dealt with by Parliament.[556]

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[553] *Smith supra* n480 at paras. 47-49.
[554] *Ibid*.
[555] *Lloyd supra* n518 at para. 45 (citing *R v Guiller* (1985) 48 C.R. (3d) 226 (Ont.), at p. 238); see also *R. v. Latimer* [2001] 1 SCR 3 at para. 88 ("The choice is Parliament's on the use of minimum sentences, though considerable difference of opinion continues on the wisdom of employing minimum sentences from a criminal law policy or penological point of view.")
[556] *Supra* at para. 19

Even among those who ventured an expanded conception of section 12, perceptions of institutional roles and competencies have been influential in tempering that expansion. For instance, even while advocating for incorporating arbitrariness as a component of section 12 analysis in *Smith*, McIntyre warned against using this to "constitutionally entrench the power of judges to determine the appropriate sentence in their absolute discretion," adding that this would "unduly limit the power of Parliament to determine the general policy regarding the imposition of punishment."[557]

Moreover, with respect to assessing sentences in light of the adequacy of alternatives, which he himself advocated for, McIntyre also stressed giving Parliament latitude.[558] In doing so, he not only spoke to the scope of Parliament's authority—noting it includes both the aims of public policy and the means by which they are accomplished—but also their institutional competence.[559] Here, he notes that in contrast with courts, Parliament has the means to assess public opinion, review and debate options, and make decision based on a comparatively greater amount of considerations and evidence.[560]

With respect to the test's threshold, the Court in both *Smith* and *Lloyd* emphasized that Parliament's decisions should only be interfered with in the clearest of cases, and the high standard is instrumental to that effect. Accordingly, the Supreme Court explained in *Goltz* that the high standard "reflects this Court's concern not to hold Parliament to a standard so exacting…as to require punishments to be perfectly suited to accommodate the moral nuances of every crime and every offender."[561] The high threshold is thus thought to reflect the judiciary's respect for Parliament's authority while recognizing that sentencing—and proportionality for specifically—is not an exact science.[562] In this way, where a range of sentences might be appropriate, or where there might be reasonable disagreement as to what is appropriate, Parliament's view will not be interfered with.[563]

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[557] *Smith supra* n480 at 104.
[558] *Ibid* at 98
[559] See also *Goltz supra* n512 ("[t]he test is not one which is quick to invalidate sentences crafted by legislators. The means and purposes of legislative bodies are not to be easily upset in a challenge under s. 12")
[560] *Smith supra* n480 at 98
[561] *R v Goltz supra* n512 at (citing with approval La Forest J in *Lyons*).
[562] *Smith supra* n480 at para. 97; see also *R v Nur* [2013] ONCA 677 at para. 72.
[563] D. Paciocco, *supra* n484 at 193; see also *Lloyd supra* n518 at para. 46

To be sure, the threshold has not been defended solely on this basis, but also on the perception that the Charter polices the "outer limit" of sentencing and should therefore be exceptional.[564] In this way, the Court has also invoked a further defense of the threshold in suggesting that sentences which are excessive, but not grossly so, do not rise to the level that warrant the seriousness of being viewed as a Charter violation. In *Smith*, it was held that the law "should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation."[565] Elsewhere it has been put differently in noting the exceptionally high standard of gross disproportionality and asserting that "[a] lesser test would tend to trivialize the Charter."[566]

iii. Scholarship in Search of a Framework

A review of the critical scholarship surrounding the courts' Constitutional engagement with mandatory minimum sentences reveals a number of salient critiques. The Supreme Court's delineation of "cruel and unusual" interventions has been critiqued as neglecting wider, qualitative dimensions of the issue, while also only engaging the issue at an extremely high threshold. Scholars have thereby claimed that the Constitutional problem that the courts are engaging with through section 12 is wider and deeper than the Supreme Court is recognizing or allowing for. A review of past tensions in the development of section 2(b) and early section 12 jurisprudence shows that courts themselves toyed with this possibility historically. More fundamentally, scholars have critiqued the Court's reasoning for a lack of care, clarity and depth that has led to these deficiencies in addition to incoherent results.

However, while scholars' critiques are compelling, they nonetheless exhibit a number of shortcomings. Firstly, critics themselves have not adequately conceptualized the nature of the section 12 problem. To date, scholars have failed to provide a clear, grounded account of what the constitutional problem with mandatory minimum sentences actually is. Insofar as their critiques suggest an account of the issue, it has been more or less intuitive and reliant on rhetoric or *ad hoc* appeals to conscience, fairness, or doctrinal incoherence for support. Such bases leave scholars' views vulnerable to critique and, at minimum, less persuasive than they otherwise might be. Importantly, scholars have likewise failed to fully acknowledge the political dimension

[564] *Smith*, *supra* n480 at para 86.
[565] *Smith,* cited with approval in *Nur supra* n513 at para39
[566] *Steele, supra* n491 at 1417.

of the issue—being one not just pertaining to sentencing, but also Constitutional norms—and explain it in a way that accounts for the demands of the citizen-state relationship.[567]

To be sure, the absence of a grounded account is not necessarily a comparative deficiency, as courts themselves have ultimately failed to point to any philosophical underpinning of their own thinking. In unpacking the rationale underlying the prohibition against cruel and unusual punishment, courts have, at various times, referenced community standards of decency, the public's confidence in the fairness and rationality of sentencing, and respect for the dignity and autonomy of the sentenced.[568] However, these references have been fleeting and not explored at any level of depth. Moreover, the court has also at times been drawn in by loose rhetoric in delineating the issue as that which would be abhorrent, shocking, intolerable, and so on. Nonetheless, insofar as critics wish to push the courts in more coherent and thoughtful directions, it is incumbent upon them to prioritize provide a defensible account of the issue that offers clarity and guidance.

Secondly, the ungrounded position from which scholars' critiques have emerged leaves scholars without the resources necessary to appropriately respond to the Court's defence of its section 12 approach. Here, scholars must overcome two objections which they have largely avoided. First, to address the Court's ostensibly democratic defence of section 12's limits, scholars must overcome the objection that wider or more readily triggered judicial scrutiny of the legislature's sentencing constraints would be inappropriately undemocratic. Without doing so, scholars must resign themselves, as Paciocco did, to the fact that outside the present test, and in such cases where Parliament believes mandatory minimums reflect "a democratic conception of what is fit," it is simply free to enact them.[569]

Faced with this alternative, there are at least two ways in which scholars can respond to the Court's democratic defence. The weak version of these would see scholars admit that their proposal is in fact anti-democratic in nature yet insist that it is in their view a just limitation on democracy. Necessarily, this strategy would require an especially well-defined and compelling

[567] David Paciocco may be a partial exception, hinting at, but not exploring, this dimension in a footnote, at 201: "Theorists advocating a liberal constitutional democracy, concerned about the inherent value in all individuals, tend to hold that punishment can only be justified by ensuring that an offender deserves punishment, identifying the goals of punishment, and showing that punishment is the only effective way to actually achieve these goals."
[568] *Smith, supra* n480; *Nur supra* n513 at para 43; *Shand, supra* n526 at para 36.
[569] D. Paciocco, supra n484 at 178. Paciocco acknowledges this despite his own doubts as to their "utility or justice".

account of the good that would justify opposition to fundamental democratic values. However, given the public nature of criminal law, it is not for scholars to resolve the law's controversies in a way that they simply see as personally most compelling but rather in a way that accounts for both democratic commitments and the diversity of views in contemporary society. In light of this, such an approach is less than ideal, even while admitting that democracy may have its limits.

A stronger form of response would instead be to *defuse* the Court's defence by demonstrating that wider and readier scrutiny is not in fact counter to democratic values. Such a response would entail offering a view of institutional roles and relationships wherein judicial action through Constitutional review is in some way supportive of, rather than in tension with, democratic governance. Scholars could do so independent of whatever account of section 12 they espouse; however, the best means of defusing the Court's democratic defence would be to offer a conception of a section 12 right which itself constitutes a requirement of democracy. Judicial intervention in service of section 12, then, could be judicial intervention in service of the democracy they are seeking to respect. All of this suggests once again that the grounding needed in this instance is a democratic one.

Lastly, it stands for scholars to counter the Supreme Court's arguments that to intervene at a lower threshold would trivialize the Charter and unduly stigmatize unfit sentences as Constitutional violations. In other words, critics of the Court's approach need to demonstrate that "merely" unfit sentences, or at least sentences which fall short of the presently high standard, are in fact serious enough to warrant Constitutional condemnation. Clearly, despite reactions from critics, the Supreme Court does not think so. Again, this response requires a clear account of what the problem underlying section 12 engagement is, and one whose importance is sufficiently expressed.

In sum, all of this points to a pressing need within scholarship on the Constitutionality of mandatory minimum sentences for a framework that moves section 12 discourse beyond intuition and provides it with the clarity and resources required to address the questions at hand. Such a framework needs to provide a clear conceptual articulation of the problem at issue, bolster its importance in relation to the Charter's Constitutional status, and reply squarely to the Court's concern with deference to Parliament. Given both the object of concern and the nature of

the questions, this framework will need to lean on political philosophy and its insights into the citizen-state relationship and account for democratic values.

In the coming sections, this chapter will demonstrate how a deliberative democratic framework meets each of these needs. With this framework, the chapter will conceptualize the section 12 problem as one of the public justifiability of sentences and, by identifying this as the crux of legitimate public decisions, elevate its importance in a way that intuition cannot. Further, conceptualizing it in such a way will capture not only the concern with disproportionality, but also the qualitative dimensions that are present in scholarly critiques and past jurisprudence.

Rooting the issue within this democratic framework, the chapter will also provide scholars with the resources to defuse the court's ostensibly democratic defense and therefore defend against objections to expanded section 12 review. Here, the chapter will draw on insights from deliberative systems and deliberative constitutionalism literature to dissipate the perceived tension between democracy and constitutional review. In doing so, it will demonstrate the way in which an expanded section 12 and the judicial review which would secure it facilitates deliberative ideals and can thereby be seen as contributing to, rather than detracting from, democratic governance.

Through the above, a deliberative democratic framework will be seen to both bolster and give further direction to scholars' critiques of the Court's approach to the Constitutionality of mandatory minimum sentences. Equally, the account will also benefit courts. Given the historical tensions and ambiguities within the Supreme Court's own jurisprudence, this chapter will provide clarity that the Court itself can draw on, and an exploration of mandatory minimums in terms of the relationship between institutions will provide courts with a greater appreciation of the democratic role that section 12 activism can achieve.

2. Toward a Deliberative Account of the Constitutional Problem

Deliberative democratic theory promises a novel perspective that offers a number of important contributions to section 12 scholarship and jurisprudence. While scholars have offered persuasive critiques of the Supreme Court's construction of section 12—suggesting it neglects important dimensions of the problem, that it leaves problematic cases unaddressed, and is

incompletely conceptualized—they have done so on seemingly intuitive bases and themselves lack a clear coherent conceptualization of the section 12 problem. As a result, their accounts lack the resources necessary to counter the Court's own rationale for the present contours of section 12.

Armed with a sufficiently rich vision of a legitimate citizen-state relationship, however, scholars would be equipped with a standard against which constitutional shortcomings could be assessed and through which a clearer account of the problem underlying section 12 can be given. Of its several contributions, a deliberative democratic framework offers such an account, and does so in a way which grounds scholars' intuitions, elevates their collective significance, and offers clarity in propelling section 12 forward. Moreover, it does this in a way that aggregative understandings of democracy cannot. Below, this section sets out this framework in terms of its standard of legitimacy and unpacks the way in which a clarified, bolstered conception of the section 12 problem follows from it.

A. Section 12 Violations as a Problem of Legitimacy

As a second-order theory, deliberative accounts are primarily procedural. Accordingly, legitimate substantive outcomes are those determined by participants within these democratic processes. Deliberative democrats have thus often been concerned to limit the ways in which the theory might pre-determine the content of certain laws or decisions, though with others arguing that this is to a certain extent unsustainable.[570] Regardless of where one sits in relation to this debate, deliberative democracy can still be offer a standard of legitimacy that, while formal in nature, can be usefully employed to assess substantive outcomes. Although mandatory minimums can and do raise concerns of arbitrariness in procedural terms, what is needed with respect to section 12 is a standard against which to assess sentences themselves.[571]

As we have seen previously, a deliberative conception of democracy grounds legitimacy in processes of deliberation. Deliberative democracy requires decision-makers to take stock of competing positions and offer good, mutually-acceptable reasons for or against various

[570] Amy Gutmann and Dennis Thompson, "Deliberative Democracy Beyond Process" (2002) 10 *The Journal of Political Philosophy* 153.
[571] While a deliberative framework could usefully provide insights here as well, the present concern is that of the outcome reached through mandatory minimums, and not the process by which it was reached.

possibilities in arguing that a particular proposal is the right or superior one.[572] In doing so, decision-makers must not only reference moral principles, values, and objectives that can be accepted by others—that is, offering *public* reasons—but also empirical facts and evidence that lend support to particular means of achieving desired ends.

The value of informed reasoning and scrutiny is highlighted in contrasts being made between "raw" and "refined" political will,[573] or between freestanding public opinion and deliberative judgment.[574] Political will based on misinformation is likewise thought to be in some way "defective,"[575] and deliberative procedures by design work to identify and include relevant inputs accordingly. All of this points to the ultimate aim of publicly justifying the decisions that are arrived at. It is by giving good, mutually-acceptable reasons for decisions that the autonomy of those affected is respected; it is through being able to endorse the reasons for these decisions that citizens can see themselves as authors and not just subjects of the law.[576]

With all of this in mind, decisions can be said to be legitimate insofar as those subject to them could reasonably be expected to endorse them, had they themselves participated in a process of informed deliberation.[577] Without speaking to the content of decisions, a deliberative democratic framework establishes the public justifiability of decisions as the basic standard of legitimacy. In all, a decision might be said to be justifiable if it is appropriately responsive to—and thus defensible in light of—available publicly-relevant information, values, and perspectives. Justifiable decisions are thus "reasons-responsive."[578]

Having this standard in mind, the fundamental problem with mandatory minimums is that the legislature's advance specification of sentences can result in public decisions that are ultimately unjustifiable to those subject to them. At the heart of the issue is the fact that, when formulated with a certain generality, such provisions mandate the same sentence for cases that

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[572] Martí, *supra* n14 at 28.
[573] Fishkin, *When the People Speak*, *supra* n183 at 6.
[574] E.g. Daniel Yankelovich, *Coming to Public Judgment* (Syracuse: Syracuse University Press, 1991).
[575] James Fishkin, "Reviving Deliberative Democracy" European Consortium for Political Research, Bordeaux, France, September 2013 at 182.
[576] Joshua Cohen, "Procedure and Substance" *supra* n133 at 163.
[577] Cohen, "Democratic Legitimacy" *supra* n13 at 22 (Writing that "outcomes are democratically legitimate if and only if they could be the object of a free and reasoned agreement among equals."); Rawls, *Political Liberalism*, *supra* n179 at 217 (in accordance with that which "all citizens may reasonably be expected to endorse in light of principles and ideals acceptable to them as reasonable and rational.").
[578] Christopher F Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (New York: Cambridge University Press, 2007).

have relevant moral and empirical differences.[579] A certain number of years of incarceration, for instance, is required regardless of the seriousness of the offence, the circumstances in which it was committed, the needs or characteristics of the offender, and so on. Accordingly, in many cases the sentence is not likely to reflect what would be justified in light of case-specific considerations. Put differently, it would not be aligned with what could reasonably be expected to emerge from a process of informed deliberation about how to respond to the crime. In at least some cases, then, mandatory minimums preclude judges from being able to provide good, public reasons for how offenders are sentenced. Such decisions are not reasons-responsive and thus run afoul of democratic legitimacy requirements.

By precluding decisions that those subject to them could reasonably accept, they can be seen as failing to respect the autonomy and equality of those sentenced. Those subject to such a sentence—as well as those members of the public who fund and live with the consequences of them—cannot see themselves as authors of these decisions.[580] Dissatisfaction with the test for a section 12 violation can therefore be understood as dissatisfaction with the degree of public accountability required by an overly deferential and incomplete burden of justification.[581]

Certainly, not all visions of citizen-state relationships are capable of providing scholars with the conceptual resources necessary to understand problems of this sort. In being able to capture the intuitive injustice at issue, deliberative notions of democracy display a noteworthy superiority to their aggregative cousins, which lack the nuance necessary to capture this issue. Within the latter model, such sentencing constraints would be seen as legitimate so long as they reflected majority preferences or interests. In other words, from an aggregative perspective, there is nothing democratically or constitutionally problematic about Parliament enacting laws which preclude judges from delivering sentences that appear to be unfit in light of information which arises in individual cases, so long as they are preferred by a majority.

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[579] McLachlin CJ, as she then was, explained in *Lloyd*, *supra* n518 at para 3 that "mandatory minimum sentences for *offences that can be committed in many ways* and *under many different circumstances* by *a wide range of people* are constitutionally vulnerable" (emphasis mine).

[580] Larmore, *Modernity*, *supra* n at 136-137; Chambers, "Theories of Political Justification" *supra* n256 at 895.

[581] On the relationship between standards of review and public accountability, see e.g. JL Pretorius, "Deliberative Democracy and Constitutionalism: The Limits of Rationality Review" (2014) 29 *Southern-African Public Law* 408, and "Accountability, Contextualisation and the Standard of Judicial Review of Affirmative Action: Solidarity obo Barnard v South African Police Services" (2013) 130 The South African Law Journal 31.

For instance, one might consider the scenario leaned on in *Smith*, which involved a mandatory minimum of a seven-year custodial sentence for importing narcotics. This provision, the court noted, would compel seven years' imprisonment for a young person who, in returning from vacation, crosses the border with their very first "joint of grass."[582] While seemingly inappropriate, from an aggregative perspective this sentence would respect democratic demands so long as the seven-year minimum for drug importation reflected the mere preferences of a majority. Certainly, whether this is in fact the case would be an empirical question, but an aggregative standard, especially in contexts of penal populism, nonetheless readily legitimizes such a sentence. Even in cases where it was not empirically accepted, the standard of legitimacy lacks the conceptual resources to explain what the fundamental problem is.

In contrast, from a deliberative view, a sentence of seven years' incarceration in such a case is not one that would be reasonably justifiable in light of public values or objectives and the methods known to realize them. Not only is such an intervention a questionable means of addressing this young offender's behaviour and securing the public interest, but in any case, the severity of the intervention could not be justified in light of the seriousness of the offence.

As part of past critiques of mandatory minimums, scholars have at times briefly appealed to the notion of justifiability. Manson's concern with arbitrary disproportionality expressed concern an individual being "subjected to a sentence that *cannot be justified by any sentencing principle or objective*."[583] Palma Paciocco, too, noted that "disproportionate sentences are…both unjust and *unjustifiable*."[584] Such appeals are perhaps telling about the intuitive justice of justifying sentences. Indeed, the shared etymological origins of "justice" and "justification" are perhaps indicative of an inherent moral connection.[585]

Nonetheless, these appeals are incomplete. For one, these appeals can be understood as being to justification "simpliciter" rather than to *public* justification.[586] As a result, they fail to import the political significance and implications of justifying public decisions *to those affected*

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[582] *Smith supra* n480 at para 2.
[583] *Ibid* at 201.
[584] P. Paciocco, *supra* n478 at 262.
[585] Justify: "c. 1300, 'to administer justice'; late 14c., 'to show (something) to be just or right,' from Old French justifiier 'submit to court proceedings' (12c.), from Late Latin iustificare 'act justly toward; make just,' from Latin iustificus 'dealing justly, righteous,' from iustus 'just' (see just (adj.)) + combining form of facere 'to make, to do'"; Justifiable: "'capable of being proved just or true, morally defensible,' 1520s.": Online Etymology Dictionary.
[586] Chambers, *supra* n256 at 895.

as compared to justifying decisions in a subjectively rational or academic sense. The former deprives them of a stronger—and as will be seen later, a democratic—case for redrawing the contours of section 12. Moreover, these critiques fail to give public justifiability a central place in their critiques and thus fail to inquire sufficiently into the demands of justification. Doing so would reveal further the clarifying and cohering potential of a deliberative account—one which captures critical intuitions about section 12 while contributing to a deeper, more defensible understanding.

B. Contours of Cruel and Unusual: Structuring Past Intuitions and Cohering a Concept

More than merely providing a clear conceptualization of the constitutional problem of mandatory minimum sentences, a deliberative framework does so in a way that validates both scholars'—and, historically, some judges'—intuitions about the contours of that problem and the legal test which should capture it. In this way, a deliberative account offers an explanation for an expanded section 12 that reflects calls for both a lower threshold as well as wider scope.

With respect to the threshold, it is important to note the way in which the above account elevates the standing of the problem. In doing so, it both bolsters critiques of judicial hesitance to interfere as well as responds squarely to the Supreme Court's suggestion that interference at a lower threshold than "gross" derogation from a fit sentence would inappropriately stigmatize sentences and "trivialize" the Charter. In this respect, the importance of public justification to democratic governance offers at least a partial reply to the Supreme Court's rationales of a high threshold and the deference that plays a role in upholding it.[587]

This elevated standing is not to say that the notion of excessiveness, for example, fails to express importance. As Sylvestre points out, its definition captures an important point regarding the way in which a sentence exceeds that which is seen as necessary or proper. In doing so, it, like unjustifiability, performs a delineating function. However, an account of the problem of mandatory minimums tied to public justification names the issue as one of a neglect of the central feature of a *legitimate* relationship between the state and citizens. Where interventions—and especially those carrying the weight of criminal sanctions—fail to be justifiable, those interventions are illegitimate and fail to respect those affected as authors of the laws they live

[587] The other aspect of this reply—that of defusing the ostensibly democratic defense of this deferential threshold—will be explored below.

under. Consequently, such interventions undermine the fundamental values of a democratic society and the rule of law.[588] Interventions of this sort—and not only those that do so to an extreme degree—are rightfully stigmatized as unconstitutional and cannot be said to trivialize the Charter. This is equally true for the last year of a sentence as it is for the only year in cases where neither is justifiable.

Bolstering scholars' calls, a deliberative account makes a particularly strong case for a lower threshold for the section 12 test than the courts currently recognize. Certainly, this clashes with the courts' own rationales for a higher standard, including both the need for flexibility in sentencing given its inherent imprecision and subjective differences, and those based on its view of an appropriate relationship with Parliament. The way in which a deliberative account defuses the latter argument will be explored in the following section. However, with respect to the former, it is worth noting briefly that a deliberative account would not require that a decision be seen as necessarily the *most* justifiable by each individual affected, but one which those affected could *reasonably* be expected to accept. In this respect, reasonable citizens themselves must respect the fact of disagreement regarding the precise application of public reasons.[589] Accordingly, a standard that decisions be *reasonably justifiable* both respects a deliberative standard of legitimacy while allowing necessary flexibility in light of differential opinions within society.

The above account also captures and grounds intuitions that the section 12 problem is wider in scope than disproportionality suggests. Here, it is necessary to recognize that justifying a decision inevitably involves a defense of both its qualitative and quantitative dimensions. Accordingly, the above account also points to a scope of the problem that captures intuitions that the potential injustice of mandatory minimums is more than a matter of criminal disproportionality. In one respect, to be justifiable decisions would need to serve an appropriate public end. This both entails appealing to an accepted public value or objective in light of the circumstances, as well as demonstrating that the decision in fact serves or realizes it. Reasons speaking to what the appropriate end or objective should be, and what strategy is most defensible in achieving it, can be understood as the *qualitative* dimension of a decision.

[588] See e.g. Walters, *supra* n436.
[589] Boettcher, *supra* n264 at 605

In another respect, one would have to justify the cost of such a decision in light of its benefits—for instance, how strong of a rationale there is for infringing a right. Put differently, Moshe Cohen-Eliya and Iddo Porat point out that substantive justification of public action inevitably involves a defense first in terms of its "rationality and reasonableness," but secondly in terms of "the trade-offs" involved.[590] It is the latter of these requirements that they identify as a matter of proportionality, and involves reasons speaking to the appropriate weighting of considerations.[591] It is this that can be understood as the *quantitative* dimension of a decision.

This general conception of proportionality stands even when expressed in different ways. In the Canadian criminal context, proportionality is understood most readily in terms of desert, being linked to the blameworthiness of an offense, as determined by its seriousness and the responsibility and intentionality of the offender.[592] Depending on its exact form, retributivist logic would suggest that the moral good produced by punishment outweighs, balances, or eliminates the moral costs punishment insofar as it is deserved.[593] Alternatively, proportionality can also be understood more straightforwardly in consequentialist terms where, for instance, the value of preventing or reducing risk of a given offense is considered against the cost of liberty or other values. Regardless of how effective it may be, the liberty costs associated with a ten-year prison sentence would be disproportionate to the good of preventing a comparatively minor parking offense.

The label of "proportionality" can in some way be confused when conceived of as encompassing both qualitative and quantitative aspects—for instance, where both rational connections and a balancing exercise is collectively termed as such as in section 1 of the Charter and its international relatives.[594] Certainly, a rational connection to a valid objective is necessary for there to exist any "good" against which to weigh the costs of an intervention, and is thus a necessary component of a proportionality analysis. However, the analytical distinction is best preserved by speaking to proportionality in a quantitative sense, as ordinary usage of the word

[590] Moshe Cohen-Eliya and Iddo Porat, "Proportionality and the Culture of Justification" (2011) 59 *American Journal of Comparative Law* 463 at 466-467.
[591] See also Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 *Columbia Journal of Transnational Law* 72 at 75 (describing proportionality as "a decision-making procedure and an 'analytical structure' that judges employ to deal with tensions between two pleaded constitutional 'values' or 'interests'.")
[592] *R v Nasogaluak* [2010] 1 SCR 206; *R v Arcand* 2010 ABCA 363.
[593] Berman, *supra* n315.
[594] *R v Oakes* [1986]; Pretorius, *supra* n581 (South Africa).

suggests. Separating these two dimensions can highlight potential neglect of the qualitative dimension of decisions. For instance, the Supreme Court in *Smith* seems to have done so in indicating that whether a sentence served a social purpose was not "determinative" in assessing gross disproportionality.[595] Highlighting qualitative dimensions is especially useful in the criminal justice environment where decision-making is all too easily seduced by the idea that "punishment" can effectively serve not only widely disparate sentencing aims, but with respect to different people committing various criminal acts for various reasons.[596]

In all, then, a legitimate, justifiable decision is one which is defensible along both of these lines. Mandatory minimums, however, can cause problems in both respects. This is because, despite, the way in which their name—mandatory *minimums*—focuses on quantitative impact, they also bind in qualitative ways as well. They prescribe not just a minimal amount, which can necessitate disproportionate interventions, but the nature of that response as well. In such cases, mandatory minimums can not only require particular interventions, but also preclude others.[597] With respect to mandating particular forms of intervention, mandatory sentences are most readily thought of as requiring incarceration, or at least correctional mandate when their subject is released on parole. However, they can constrain the nature of responses in other ways: for instance, the victim surcharge, a mandatory fee levied against anyone convicted of a criminal offence, requires at minimum a financial penalty.[598] Accordingly, part of the problem with mandatory minimums is that they can require the wrong form of intervention, not just the wrong amount thereof.

In conceiving of the section 12 test, courts have also consistently referenced societal standards of decency, conscience, or toleration as the benchmark against which violations should be assessed.[599] Such standards implicitly incorporate a democratic dimension into the issue, but are, however, consistently neglected or even resisted in analyses, and are undertheorized as a result. For instance, Laskin CJ in *Miller and Cockriell* rejected the notion that the court should engage with this aspect of the test because it "appeared to be asking the Court to define cruel and

[595] *Smith supra* n480 at 58. Certainly an absence of good created by a sentence would render any intervention disproportionate.
[596] Hillyard and Tombs, *supra* n32 at 10 (discussing Louk Hulsman's scholarship).
[597] Incarceration precludes most community initiatives; also See *Michael supra* n476 at 114.
[598] See e.g. *R. v. Boudreault*, *supra* n519.
[599] See e.g. *Smith, supra* n480; *Lloyd supra* n518.

unusual punishment by a *statistical measure of approval or disapproval.*"[600] Elsewhere, in a rare engagement with this aspect of the test, Molloy J in *R v Smickle* grappled with whether it should be understood as requiring a subjective test of the public's actual standards or something more "objective."[601] In response to this, a deliberative framework offers clarity that captures both historical concerns and emerging ideas while reinforcing the internal coherence of section 12.

In doing so, a deliberative account explains that this community should be understood as one which has engaged in an informed process of deliberation involving publicly relevant information and arguments. This view should reassure those concerned about a majoritarian approach which would be both practically unmanageable and normatively problematic. This view also captures Molloy J's own instincts in *Smickle*, where she offers a counterfactual objective standard in writing that "[t]o the extent that community tolerance is part of that test, it can only be with reference to a community fully informed about the philosophy, principles and purposes of sentencing as set out in the Criminal Code, the rights enshrined in the Charter, and the particular circumstances of the case before the court."[602]

At the same time, however, a deliberative view takes steps toward the subjective in cautioning against leaving a judge to simply imagine what a reasonable community would think. Deliberative ideals suggest that the question of what the community would find justifiable can and should be probed by actually subjecting arguments and information to scrutiny within sentencing deliberations with relevant parties. Such an approach should work to mitigate concerns about a detached or paternalistic judiciary.[603]

Lastly, to the extent that the judiciary has speculated about the philosophical underpinnings of section 12, this deliberative account captures these embryonic ideas and grounds them in a broader theory that more fully realizes them. In this respect, jurisprudential references to the public's confidence in the fairness and rationality of sentencing, and to respect for the dignity and autonomy of the sentenced are reinvigorated by a deliberative democratic

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[600] *Smith supra* n480 at para 92 (internal quotations omitted; emphasis added).
[601] 2012 ONSC 602 at para. 42*ff*. See Manson, *supra* n484 at 197-198.
[602] *Ibid* at para 47; see also *R v Michael*, *supra* n476, at para 57 (Indicating an obligation to "judge this, as with all constitutional evaluations, by striving to identify the standards of reasonable members of the community, properly informed.")
[603] See also below.

framework that emphasizes these aspects of governance, and in which public justification ties these ideals together.[604]

Unpacked in this way, a deliberative account of section 12 captures intuitions, however inchoate, within scholarship and jurisprudence, while cohering the conceptualization more generally. Going beyond quantitative concerns with disproportionality, this account gives structure to abovementioned concerns regarding the arbitrariness of outcomes, whether provisions are applied a rational basis, and whether the sentence serves public aims or employs methods that are acceptable to the public. So too does it give life to the historical attention to the existence of alternatives, as the justifiability of decisions is often a comparative assessment.[605] All of this, then, points to the potential of the above account to provide both a grounded and a richer understanding of cruel and unusual punishment.

C. Clarifying the Distinct Relevance of Qualitative Assessments

More than structuring intuitions, the above account can also provide the clarity that results from proceeding from a grounded framework. Manson's advocacy for a Charter test of "arbitrary disproportionality" has been innovative, but his thinking could nonetheless benefit from approaching section 12 in this way. On one hand, Manson pushes for greater scrutiny of mandatory minimums through a test that is attentive to the qualitative dimensions of sentencing decisions. Through the issue of arbitrariness, he emphasizes the need for a rational or principled connection between the sentences given to particular offenders and recognized sentencing objectives.[606] Certainly, this takes us closer to a fuller understanding of the cruel and unusual punishment that can result from mandatory minimums.

On the other hand, however, Manson's proposal begs further clarification or reformulation. He is explicit that his test targets disproportionality short of the "gross" threshold,

[604] See *supra* n568 and accompanying text.
[605] For instance, if an alternative was known to better serve the desired objectives at no additional cost, or if an alternative clearly served the desired objective equally well but at a much lower cost, it would be difficult to claim that, in light of this, that original sentence is justifiable. On how this might relate to the notion of reasonableness in constitutional review, see Max Du Plessis and Stuart Scott, "The Variable Standard of Rationality Review: Suggestions for Improved Legality" (2013) 130 *South African Law Journal* 597 at 601.
[606] Manson, *supra* n484 at 200-202.

and it is toward this end that he employs arbitrariness.[607] However, it remains unclear what these concepts—arbitrariness and disproportionality—accomplish together what they do not do individually.[608] Indeed, in starting out seeking to address disproportionate sentences, Manson himself might have gotten "distracted"[609] and overlooked the broader application of arbitrariness to mandatory minimum sentences—that is, the arbitrary or irrational consequences of mandatory minimums that are not necessarily disproportionate but nonetheless unjustifiable.

Accordingly, Manson also opens himself up to "the objection that arbitrariness arguments are, in substance, proportionality arguments, since… the complaint is that it is arbitrary to impose minimum sentences on individuals who do not deserve the specified level of punishment."[610] Regardless of Manson's own characterization, an account tied to justifiability should make clear that concerns with the qualitative dimensions do not necessarily collapse into concerns with disproportionality. Rather, it should highlight that a test solely engaged in cases of disproportionality, gross or otherwise, overlooks serious legitimacy concerns in sentencing. This comes through the way in which mandatory sentencing binds not just the quantity or degree of intervention, but the type as well.

For instance, one might imagine a case where an appropriate sentence—in that it would effectively serve the relevant objective(s) given the circumstances and offender at issue—is a yearlong community-based treatment and supervision plan, such as those employed by drug treatment courts; yet, legislation establishes a minimum sentence of three months in prison where programming is lacking and the environment counterproductive to mental health or substance abuse issues. For the sake of argument, one could posit these as involving the same level of deprivation, pain, or hard treatment of punishment one might employ, and in this way produce no concerns about disproportionality. In such a scenario, the mandatory minimum would be left untouched by a proportionality analysis, but captured by one with qualitative concerns in that there is no good rationale for a three-month custodial sentence.

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[607] *Ibid* at 201-201 ("the argument I am trying to make is not simply about excessive or disproportionate punishments. It is about excessive or disproportionate punishments compelled by arbitrary statutory provisions.").
[608] Perhaps his thinking was that if proportionality itself is not enough to be considered unconstitutional, then the fact that these disproportionate sentences are also arbitrary could bolster the case that they are. Alternatively, the thrust of his argument might solely rely on arbitrariness, and he is just demonstrating its applicability to these disproportionate sentences.
[609] Manson *supra* n484 at 174.
[610] D. Paciocco, *supra* n484 at 199.

One might also consider the case of *R. v. Michael*, where Justice David Paciocco found that the mandatory "victim surcharge"—instituted to raise funds for victim support and to increase "accountability"—violated section 12.[611] In this case, a financial penalty of $900—resulting from nine separate and relatively minor offences committed while intoxicated—was being applied to a homeless indigenous man who had an unfortunate history of alcoholism, familial abuse, and racist treatment, and received only $250 per month in a social assistance street allowance. The court's reasoning not only illustrates the relevance of qualitative dimensions of justifiability, but also the risks of neglecting them in favour of maintaining a singular focus on the disproportionate or excessive effect that the sentence would have for Mr. Michael.

Certainly, some of the arguments for the unconstitutionality of the victim surcharge can be properly understood in terms of disproportionate effect: the fact that, unlike for those who could afford it, any sum extracted from him would cause considerable hardship, and that his inability to pay would result in a threat of incarceration looming over him and precluding applications for record suspensions.[612] Such things increase the punitive impact on Mr. Michael to a degree that would be unwarranted. Other parts of Paciocco J's reasoning point instead to the irrational, counterproductive nature of the mandatory surcharge in view of the aims and principles of sentencing. Staying within a quantitative proportionality assessment, however, these considerations are awkwardly articulated in terms of the cumulative hard treatment that the sentence imposes; they become part of "counting up" the negative impact in order to assess whether this cumulative effect is "so excessive" compared to a fit sentence.

For one, the decision describes Mr. Michael's inability to pay as "depriving" him of his ability to be restored and restore others as if this is part of the sentence's hard treatment, rather than simply pointing out that this penalty is an ineffective or irrational means of achieving the legislated objectives of restorative justice. Elsewhere, Paciocco J speaks directly to the fact that this response is counterproductive to other aims of sentencing, but again does so as part of evaluating the cumulative impact on the sentenced. He writes that

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[611] *R. v. Michael supra* n476. The reasoning in this case is complicated by a number of issues, including the use of a reasonable hypothetical, reliance on the Court of Appeal decision in Nur, and the (in)ability to adjust the amount of the fine. None of this, however, impacts the court's reasoning with respect to the disproportionate impact explored here nor the general conclusion regarding the application of section 12.
[612] *Ibid*.

> "expecting someone as poor as he is to retire a $900 debt while he is recovering is more likely to inhibit than enhance the principles of sentencing that are rationally to be featured in his case. He will be beginning his rehabilitation in a deep financial hole. If he is forced to begin to make payments before he is financially secure it will cause stress and economic pressure. Enforcing this sentence while he gains his feet is more apt, in my view, to contribute to the kind of despondency and frustration that feeds this aboriginal offender's addiction and his misbehaviour than it is to aid in his rehabilitation or promote in him a sense of responsibility. Simply put, an impact of the imposition of the victim surcharge on Mr. Michael is that it is apt actually to impede both his ability to reintegrate and his achievement of a sense of accountability."

While compelling points, analyses of this sort fit logically within a qualitative, rather than quantitative, framing. To forego the former for the latter not only muddles reasoning and risks inconsistent application, it also constrains thinking at the expense of concerns about what actually works in addressing crime. It privileges a crude tool of "punishment" tailored only in amount—an approach long since rejected by criminologists as ineffective.[613]

Importantly, this framing also fails to address the fact that, even if the court found that the mandatory surcharge would not have been disproportionate to an otherwise fit sentence, it still would have produced an unjustifiable sentence. In the present case, the court found Mr. Michael's moral responsibility to be "significantly attenuated" in light of his background and the context of the offenses.[614] However, one could imagine a similar case where the same offender committed the same, or other, offenses in a more morally blameworthy way, and thereby elevated the "fit" sentence to a point that the weight of the surcharge would not be disproportionate. Regardless, for the reasons Justice Paciocco stated above, the surcharge is still unable to be justified with good, publicly acceptable reasons. In some cases, then, the narrow scope of the present section 12 test forces judges to attempt to put square injustices into round holes, whereas in others it may preclude their ability to impose rational, evidence-based, and effective sentences.

Certainly, to address this wider problem and to do so more readily at a lower threshold, courts would have to adopt a more active role in scrutinizing Parliamentary decisions. While a clear articulation of the issue and its importance goes some of the way toward pushing

[613] Hillyard and Tombs, *supra* n122.
[614] *Supra* n476 at 46.

the judiciary to see the legitimacy of doing so, it remains to reply to the Supreme Court's own deference-based defence of present contours.

3. Deliberative Constitutionalism: Defusing the Court's "Democratic" Defence

A. The Legitimacy Dilemma and Its Underpinnings

As we saw previously, a central concern of the Supreme Court in developing the contours of cruel and unusual punishment under section 12 was its proper relationship with the legislature. In defending a narrow scope and high threshold for a section 12 violation, the Court referenced an historical relationship of deference to Parliament which they viewed as respecting the competencies and appropriate roles of each institution. While the Court did not use explicit language along these lines, this preoccupation was interpreted as signalling an ostensibly "democratic" defence of their limited section 12 construction. Underpinning its explanation was an implicit view that judicial intervention operates in tension with Parliament's democratic mandate to enact law, and therefore requires a significant degree of deference in delineating when and how frequently that intervention is appropriate.

Views of the sort espoused by the Supreme Court are not limited to section 12 case law but extend into constitutional scholarship more generally. Christopher Zurn points to a broader trend in arguing that resistance to judicial review is frequently rooted in perceptions of a "deep tension in our professed political ideals: namely, the tension between democracy and constitution."[615] Traditional accounts of that tension point to a "counter-majoritarian difficulty" in constitutionalism that renders judicial review undemocratic, and therefore creates a "constitutional legitimacy dilemma."[616] When an unelected court strikes down legislation on the basis of an entrenched constitution, so the account goes, "it thwarts the will of representatives of the actual people of the here and now; it exercises control, not [on] behalf of the prevailing

[615] Christopher F Zurn, "Deliberative Democracy and Constitutional Review" (2002) 21 *Law and Philosophy* 467 at 467.

[616] Hoi Kong and Ron Levy, "Deliberative Constitutionalism" in Andre Bachtiger, John S. Dryzek, Jane Mansbridge, and Mark E. Warren (eds) *Oxford Handbook of Deliberative Democracy* (Oxford: Oxford University Press, forthcoming); Zurn, *Institutions of Judicial Review, supra* n578; Pretorius, "The Limits of Rationality Review" *supra* n581

majority, but against it."[617] The issue is only exacerbated to the extent that unelected judges engage in interpretation to do so.

Seen in these terms, this legitimacy dilemma stands as an apparent obstacle to critics' calls for a more active judiciary through an expanded section 12 right. However, in evaluating the relationship between the courts and legislature, and its implications for Charter review, closer attention needs to be paid to the notions of democracy and constitutionalism that are relied on by those who perceive this tension. Despite the fact that these choices have important consequences for perspectives on judicial review, they are often implicit and may escape scrutiny. As Zurn writes,

> "jurisprudential debates often move too quickly to questions concerning the proper methods that a specific supreme court should adopt in interpreting a nation-state's constitution, even though much of each theory's characteristic work is really being carried by its underlying conception of the relationship between constitutionalism and democracy, and its resulting position on the proper institutionalization of constitutional review."[618]

Insufficient attention in this regard consequently obscures the conciliatory potential of alternative perspectives.

Insofar as they incorporate particular conceptions into their appraisals, constitutional scholars and judges alike have typically assumed an aggregative view of democracy.[619] Such a view juxtaposes judicial review with a vision of democracy wherein the legitimacy of public decisions derives from the preferences of citizens (or at least a majority thereof) being expressed through an elected legislature. In doing so, an aggregative view "conceptually invites [an] opposition."[620] However, recent work in democratic and constitutional theory has given greater attention to the implications of a *deliberative* democratic view for the relationship between these institutions and the role of constitutions and constitutional review in facilitating systemic

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[617] Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986) at 16-17.
[618] Zurn, "Constitutional Review", *supra* n615 at 537.
[619] Ron Levy and Hoi Kong, "Fusion and Creation" in Ron Levy, Hoi L Kong, Graeme Orr and Jeff King, *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press, 2018) at 2; Zurn, "Constitutional Review", *supra* n at 471.
[620] Pretorius, "Limits of Rationality Review" *supra* n581 at 409.

democracy.[621] In doing so, this work has pointed to its potential to resolve the tension between constitutionalism—including the judicial review through which it is secured—and democratic ideals.

Criminal scholarship on section 12 is similarly placed to benefit from these developments. Zurn's admonition that underlying conceptions are neglected in favour of more superficial issues finds resonance in Manson's concern that, in the case of section 12 jurisprudence, the Supreme Court has prioritized methodological issues over deeper conceptual thinking.[622] Occasional references to democracy within mandatory minimums scholarship are also ambiguous: while at times scholars obliquely reference deliberative ideals,[623] at others "democratic" seems to be accepted as simply whatever the legislature enacts, even despite obvious deliberative shortcomings.[624] All of this contributes, in the section 12 context, to the perceived tension between judicial review and democratic commitments at issue here.

Accordingly, the following turns to work in democratic and constitutional scholarship that give deliberative democratic views a central place in assessing the relationship between courts and the legislature—namely, that relating to deliberative systems thinking and deliberative constitutionalism. As a response to section 12 scholarship's ambiguities, this scholarship attends specifically to a deliberative conception of democracy and provides a standard of legitimacy which gives constitutional review a clear democratic role. In doing so, it demonstrates that a deliberative democratic framework further contributes to section 12 scholarship by defusing the Court's ostensibly democratic defence and thereby bolstering scholars' calls for more active review through a wider scope and lower threshold.

B. Deliberative Democracy and Constitutionalism in Systemic Perspective

Even while the deliberative standard of legitimacy remains the aspiration for public decisions, the realities of contemporary governance have challenged deliberative democrats to

[621] In this respect, see the emerging schools of thought associated with deliberative systems perspectives as well as deliberative constitutionalism: e.g. Dryzek, supra n176; Zurn, *Institutions of Judicial Review, supra* n578; Ron Levy, Hoi L Kong, Graeme Orr and Jeff King, *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press, 2018)
[622] Manson, *supra* n484 and accompanying text.
[623] For instance, both Kent Roach and Benjamin Berger speak to dimensions of dialogue between the courts and Parliament, which may connect to deliberative aspirations, but are not identified in this way. See also D. Paciocco, *supra* n484.
[624] See Paciocco, *supra* n484; Roach, *supra* n482.

account for the broader institutional and legal landscape. Whereas earlier writing tended to focus on conceptualizing and assessing deliberative decision-making in terms of discrete individual forums, more recent scholarship has evidenced a "systemic turn" following which scholars have explored how deliberative ideals can be achieved in political systems comprised of varied, interacting institutions and fora.[625] This broader systemic perspective complicates expectations of individual institutions and the relationships between them, as well as challenges conventional ascriptions of democratic credentials.[626] In doing so, it takes steps toward characterizing the democratic role which courts can play in relation to their legislative counterparts.

As John Dryzek points out, an interactive set of institutions is necessary for a variety of reasons: "constitutional checks and balances, coordination across the layers of multilevel governance, the variable capacity of different kinds of actors to participate in different venues, and coordination of policies across multiple jurisdictions."[627] In light of the dynamism of contemporary governance, a systemic perspective highlights that a single institution or forum is not likely to possess all of the capacities or characteristics necessary to reliably or effectively satisfy deliberative democratic aspirations on its own, but rather, will only serve a more limited function within a broader system.[628]

As a result, systemic thinking directs attention to a division of labour—distinct roles or functions that different institutions perform—and ascribes democratic credentials based on how these institutions contribute to the aims of a deliberative democratic system.[629] Beyond a descriptive project, however, a systemic perspective entails advocating for institutional arrangements that serve deliberative aims.[630] In doing so, the characteristics, strengths, and weaknesses of institutions become important considerations in determining which arrangements

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[625] Dryzek, *supra* n176 at 7-14; Jane Mansbridge et al, *supra* n15; see also David Owen & Graham Smith "Deliberation, Democracy, and the Systemic Turn" (2015) 23 *Political Philosophy* 213; Andrew Knops, "Deliberative networks" (2016) 10 *Critical Policy Studies* 305.
[626] Mansbridge et al, *supra* n15 at 12.
[627] Dryzek, *supra* n176 at 7.
[628] Mansbridge et al, *supra* n15 at 1, 2, 10, 25.
[629] Dryzek, *supra* n176 at 7; Mansbridge et al, *supra* n15 at 6, 10-15. Amongst deliberative democrats this end might be articulated differently, though at a general level Mansbridge et al identify non-controversial functions as entailing the epistemic, ethical, and democratic. Here our substantive framing continues to identify publicly justifiable decisions as the output of a properly functioning deliberative system—that is, decisions which we could reasonably expect others to accept as such following deliberation.
[630] John Parkinson, "Ideas of Constitutions and Deliberative Democracy and How They Interact" in Levy et al, *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press, 2018) at 249.

best do so. Moreover, appropriate relationships between parts of systems become of paramount importance in facilitating legitimate democratic decisions.

Systems can be self-correcting, for instance, when arguments from one institution are tested in another, or where poor deliberation in one venue is "compensated by, or even inspire[s], higher deliberative quality in another."[631] However, so too are there potential pathologies that can inhibit otherwise constructive relationships.[632] Relationships might suffer from disconnect such that relevant considerations generated in one part of the system fail to reach—or are actively resisted by—decision makers in another.[633] Legislators preoccupied with re-election might, for example, disregard available input offered by independent commissions, courts, or research communities and instead act to satisfy a particular base. Conversely, relationships might instead be such that insufficient independence—resulting, for instance, in groupthink or inappropriate influence or deference—negates the compensatory or cooperative potential of the relationship.[634]

The emergence of "deliberative constitutionalism" falls within this broader systemic tradition and focuses on the role of *constitutions* in contributing to systemic democracy as well as the institutional arrangements they necessitate. In doing so, it addresses the apparent tension between constitutionalism and democracy directly and works to dissipate that tension by demonstrating that the former facilitates the latter.[635] While aggregative views juxtapose majority preference with constitutional rights, deliberative constitutionalism sees constitutions—and the constitutional review which helps operationalize them—as having a fundamental role in upholding and giving effect to the legitimating processes of deliberation and public justification.

In this view, constitutions can be understood as structuring the democratic process by granting a broad set of rights necessary for its realization.[636] These rights include not only those necessary for public autonomy, but also those safeguarding the private dimensions of life that allow for will-formation, as well as those living conditions which make other rights realizable in

[631] Mansbridge et al, supra n15 at 6-7; Dryzek, *supra* n176 at 13-14
[632] Mansbridge et al, supra n15 at 22*ff*.
[633] *Ibid* at 23-24 (Referencing "decoupling" but also ideological divisions).
[634] *Ibid* at 22-24 (Referencing "tight-coupling" as well as institutional domination).
[635] Zurn, *Institutions* supra n578 at 2; Kong and Levy, *supra* n616.
[636] Zurn, *Institutions, supra* n578 (following Habermas).

practice.[637] Constitutional review, then, is vindicated as a mechanism for securing the legitimizing procedures and conditions of democracy, understood in deliberative terms.[638]

To do so capably, that mechanism entails more than simply policing electoral and other processes necessary for aggregating citizens' preferences, but

> "keeping open the channels of political change, guaranteeing that individuals' civil, membership, legal, political, and social rights are respected, scrutinizing the constitutional quality and propriety of the reasons justifying governmental action, and ensuring that the channels of influence from independent civil society public spheres to the strong public sphere remain unobstructed and undistorted by administrative, economic, and social powers."[639]

Taking a systemic perspective, rights can thus be seen as enabling rather than constraining democracy, and the relationship between democracy and constitutionalism seen as "mutually presuppositional rather than antithetical."[640]

In a less descriptive terms, constitutional review can be seen as democratically legitimate *insofar as* it catalyzes or facilitates democratic deliberation and public justification.[641] The normative thrust of this framing pushes us to privilege constitutional arrangements that best accomplish this and draws attention to the ways in which other features of constitutional review can bolster its democratic credentials.

With respect to the former, the leap from accepting the democratic value of constitutional review—detached from any particular institutionalization—to acceptance of *judicial* review by unelected officials can be defended in light of the deliberation-enhancing characteristics of the judiciary. For one, Zurn notes that the judiciary's institutional *independence* puts it in a unique position to secure democratic conditions, being both impartial between interested parties and free more generally from electoral pressures.[642] By relying on the reasoned arguments of parties,

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[637] *Ibid* at 231*ff*.
[638] *Ibid* at 236-242.
[639] *Ibid* at 242.
[640] Zurn, "Constitutional Review", *supra* n615 at 531; Zurn, *Institutions* supra n578 at 235 (In explaining this further, Zurn writes that "The outcomes of democratic decisions processes cannot be considered legitimate unless those processes have adhered to stringent procedural conditions, conditions established by and regulated through constitutional entrenchment.")
[641] See Kong and Levy, *supra* n616; Pretorius, *supra* n581.
[642] Zurn, *Institutions*, supra n at 251.

courts themselves can be sites of deliberation.[643] The skills and norms of the judiciary in dealing with "adjudicative complexities" can also be expected to result in more rational outcomes.[644] While Zurn might caution those in search of public reason to resist the "seducements of juristic reasoning,"[645] Hoi Kong and Ron Levy point to the fact that the rationalism of judicial scrutiny in practice often turns on public reasons while catalyzing political deliberation within the broader polity.[646]

With respect to the former, it is also worth briefly highlighting that the legitimizing ideals of deliberative democracy can and should animate the internal process of constitutional review itself. This could, for instance, be noted with respect to both constitutional rights and the nature of review. Rights themselves might be "deliberative" in that they are conceived not as having a fixed substantive content, but open to evolving normative content.[647] Insofar as the indeterminate content of rights can be interpreted to further deliberative democratic ideals, this also works to dissipate tensions between democracy and judicial review.[648] Moreover, the substantive standards of review themselves should warrant consideration, and be tailored in type and timing so as to institutionalize public justification and deliberation in appropriate breadth.[649] Judges should provide reasons for their decisions, and ideally with sufficient analysis to prompt further deliberation by other parties, such as the legislature.[650] While these points are not meant to be comprehensive, they do emphasize that the democratic legitimacy of constitutional review is not only tied up with the general function of constitutional review, but also its internal components and dynamics.

C. The Democratic Quality of an Expanded Section 12 Review

In view of the above, scholars are equipped to demonstrate that a more active judiciary through an expanded section 12 does not operate in tension with democratic ideals, consequently defusing the Supreme Court's ostensibly democratic defence for its approach. To the extent that

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[643] Alison L Young, "Dialogue, Deliberation, and Human Rights" in Levy et al, *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press, 2018) at 132 (citing Fredman).
[644] Zurn, *Institutions*, *supra* n578 at 251.
[645] *Ibid* at 163-220.
[646] Kong and Levy, *supra* n616.
[647] *Ibid.*
[648] Zurn, *Institutions supra* n578 at 250.
[649] Pretorius, supra n581; Kong and Levy, *supra* n616.
[650] Young, *supra* n643 at 133.

an expanded mandate of constitutional review catalyzes and is animated by democratic deliberation geared toward public justification, it should be understood as democratic. Undue deference which undermines this function by narrowing focus to overlook failures of public justification, on the other hand, might instead be seen as a pathology of a broader democratic system.[651]

Recalling the deliberative account of the problem underlying mandatory minimums, the way in which a richer, reformulated section 12 would foster deliberative democratic ideals should in some ways be clear. Whereas other rights may facilitate democratic governance indirectly—for instance supporting free speech—section 12 serves this end directly by requiring the justification of coercive criminal justice interventions. The extent to which it does so is linked to its particular formulation, however, and this fact mobilizes in favour of a section 12 test that captures the breadth of the problem elaborated previously. In this regard, deliberative constitutionalists have highlighted the ways in which different standards of review facilitate public justification differently.

Constitutional review has been characterized in part as "institutionali[zing] the degree of public accountability through the imposition of a particular burden of justification" on the state.[652] A high threshold for violation thus requires a lower degree of justification. Similarly, standards of review determine the factors that create the scope of review and therefore determine the inclusivity of these deliberations and the range of dimensions to be accounted for.[653] A narrowed scope thus limits the aspects of a decision which require justification. On one hand, a "mere" rationality review, focused only on basic qualitative dimensions, "relieves the state of the vital justificatory exercise of demonstrating, by means of a reasoned assessment of the competing considerations at stake, that a right is outweighed by a public good in the particular circumstances of the case."[654] On the other, a focus only on proportionality neglects accountability for the qualitative choices which laws might require in seeking to achieve those public goods.

[651] Pretorius, *supra* n581 at 32.
[652] Pretorius, *supra* n581 at 31.
[653] *Ibid*.
[654] Pretorius, *supra* n581 at 22.

Adding nuance, Levy and Graeme Orr further highlight the value of proportionality analyses that go beyond zero-sum approaches that treat the values at stake as inherently conflicting and always in need of "balancing."[655] Instead, they suggest that analyses can be deliberatively thicker through "accommodative" approaches to differing values—those which ask how alternatives could better realize the spectrum of values at issue. Applied to the sentencing context, for instance, it might be asked how alternatives might better realize both public safety and the liberty or dignity of the offender, either through attention to less-restrictive means or equally-effective alternatives.[656]

In all then, scholarship highlights that the ideals of public justification are served through attending to both qualitative and quantitative dimension, with sufficient expectation, and through attention to alternatives. Accordingly, a reformulation of section 12 along these lines can be seen as furthering the right's democratic credentials and dissipating rather than amplifying the presumed tension. It captures both scholarly and jurisprudential intuitions about the underlying issue of mandatory minimums and how section 12 might address it.

Certainly, described in this way section 12 approaches the analysis typically reserved in Canadian constitutional law for the reasonableness standard under section 1.[657] Noting this similarity, two points ought to be made before continuing. The first and perhaps more obvious point is simply that short of a reformulated section 12, one could not rely on section 1 to catch qualitative deficiencies, as the latter is only triggered following a violation. These currently only arise in relation to quantitative issues. The second point addresses whether duplicating a wider test at the initial stage renders section 1 redundant.

Arguably, this is already a potential criticism of the current section 12 test. Currently, the baseline of section 12's gross disproportionality analysis includes the full breadth of sentencing objectives, including those not typically included within an "individualized" notion of proportionate sentencing, such as general deterrence. This "all things considered" assessment seemingly leaves no additional rationales with which any disproportionality could subsequently

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[655] Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Abingdon: Routledge, 2018) at 77, 99.
[656] *Ibid* at 99.
[657] *Charter* at s.1 ("The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.").

be justified as a proportionate infringement under section 1. It is seemingly for this reason that the Supreme Court has noted that a section 12 violation is unlikely to be found proportionate under section 1.[658] Would a broadening of section 12 only spread this redundancy to include qualitative dimensions as well?

In contrast, reformulating section 12 provides at least some reason—and, at the very least, an opportunity—to redistribute considerations between section 12 and section 1 analyses so as to avoid further redundancy and eliminating that which already exists. This process also involves addressing the question of the kind of proportionality justification section 12 secures—a point which has been approached differently in past jurisprudence[659] and whose current state has been criticized for derogating from the individualized sentencing considered a fundamental ideal of just sentencing.[660] In doing so, one might consider the kinds of reasons that a deliberative democracy should provide its citizens, given its fundamental respect for autonomy, for treating them ends rather than means.[661]

This would at least give primacy to, if not limit the discourse to, sentencing rationales that treated them as such, rather than those that involve using them as means to instrumentally deter others.[662] Accordingly, a deliberative account would lean toward an individualized understanding of section 12, ensuring that the offender in question is sentenced in a reasonably justifiable manner given, for instance, needs to prevent their reoffending, reaffirm to them values which they themselves should accept, or ensure appropriate restoration. Should the state want to intervene otherwise and punish them for benefits not necessitated by their own behaviour, then this would subsequently have to be demonstrated as sufficiently important and defensible under section 1.

With respect to this right's democratic credentials, a number of additional points should be highlighted. Importantly, while this standard is consistent with the established understanding of section 12 being "substantive" in nature—that is, in the sense of being concerned with the

[658] *Nur*, *supra* n513 at para 111, 118.
[659] Compare *Smith supra* n480 at para 56 (indicating that general deterrence should be assessed under section 1 of the Charter), with *R. v. Morrisey*, *supra* n513 at para. 44-46 (indicating that general deterrence should be considered in determining the initial fit sentence against which section 12 violations are assessed.
[660] See D. Paciocco, *supra* n484.
[661] See Larmore, *supra* n252.
[662] See above.

outcome in question rather than the process which led to it—the precise content of the right is unspecified. Accordingly, section 12 does not presume in any way *what* is justifiable, but rather requires that to be determined through contextual deliberation, considering the specific facts related to the offense and offender as well as the relevance of sentencing principles and objectives. Section 12 is, in this way, a "deliberative right" in the sense that its operationalization requires deliberation, not just in the sense of being revised over time, but in each and every case.

In establishing a demand for justifiable sentences and by requiring this case-specific approach, section 12 works to ensure that laws do not preclude, and institutional arrangements allow for, this democratic end. By striking down provisions which result in unjustifiable sentences, courts not only protect the right to public justification in the instant case but work toward establishing a broader system which facilitates it more generally. The inter-institutional dialogue triggered through this process serves to help delineate the ways in which sentencing laws can respect the need for public justification and catalyzes deliberation in Parliament on how this need can be respected.[663] As Benjamin Berger has expressed it, striking down legislation that results in unjustifiable outcomes "injects the realities of sentencing—the real violence and potential harshness of punishment—into the matrix of parliamentary decision-making."[664]

In practice, the judiciary has frequently specified ways that such provisions can be narrowed so as to avoid section 12 violations—for instance, by limiting the applicability of laws to more specific scenarios or by making provisions presumptive but not mandatory. Others have suggested that this dialogue might also encourage parliamentary reflection on such issues like the need for greater specificity in offense definitions.[665] An expanded section 12 would likely require a more assertive stance than has been taken in the past with respect to avoiding gross disproportionality, but the general dynamic has nonetheless demonstrated potential in this respect.

For the deliberative democratic nature of section 12 to be realized, however, not only does the right need to be effectively defended against legislative developments, but a system which facilitates sufficiently individualized sentences needs to be established to avoid violations. These needs suggest the reliance of section 12's deliberative contributions on the institutional

[663] Roach *supra* n482; Berger *supra* n479.
[664] *Ibid* at 121.
[665] Roach *supra* n482 at 410.

arrangements which will facilitate them. Given the inherent difficulties in prescribing specific sentences on an *ex ante* basis, a sufficiently flexible, principle-based system is likely to be privileged. Focusing on institutional arrangements highlights the ways in which courts themselves are particularly suited to realizing section 12's aspirations, and how their particular institutional characteristics only contribute to the deliberative democratic nature of expanded section 12 review. Recognizing this only further defuses the Supreme Court's ostensibly democratic rationale for its minimalist or deferential approach.

D. The Deliberative Democratic Quality of Sentencing Courts

For a number of reasons, courts' institutional characteristics make them particularly well-suited for realizing section 12 rights, not just in assessing the impacts of legislation but in themselves delivering publicly justifiable sentencing decisions that respect section 12 as a matter of practice. These reasons reflect the characteristic independence and rationalism noted above but assign additional value to them in light of the particular context of criminal sentencing. Moreover, requirements of individualized sentences under section 12 highlights further value in terms of courts' institutional location within the broader decision-making process.

Whatever the persuasiveness of these judicial features regarding the protection of rights generally, courts' independence and rationalism is particularly compelling in the context of criminal justice. Here, the emotive dimensions of sentencing policy and decision-making render it particularly susceptible to non-deliberative influences through electoral pressures or even exploitation.[666] Indeed, the growth of mandatory minimums is often thought to derive from the political, rather than penal, utility of these laws. Across jurisdictions, mandatory minimums are pointed to as exemplary of penal populism—that is, the pursuit of policies for electoral advantage despite their being unfair and ineffective.[667] In the Canadian context, Benjamin Berger has thus referred to mandatory minimums as a useful-yet-reckless "political siren song" for "tough on crime" governments.[668]

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[666] See Kennedy, *supra* n359.
[667] Julian V Roberts et al *supra* n16 at 4-5.
[668] Berger, *supra* n479 at 108-109; Gerry Ferguson and Benjamin L Berger, "Recent Developments in Canadian Criminal Law" (2013) 37 *Criminal Law Journal* 315 at 315 (Suggesting boldly that "[t]he government's reckless use of mandatory minimums in the name of being 'tough on crime' and 'creating safer communities' is nothing short of a crass political lie.")

Even through a more generous lens, a comparison of the institutional incentives at play demonstrate that the judiciary is much better placed to ensure public justification in sentencing. With respect to legislatures, Michael Tonry has suggested that

> "[a]ny honest politician will concede two points—that it is often difficult to resist political pressures to vote for tough penalties and that it is always difficult to vote to make penalties more 'lenient.' … If a charged political climate or campaign or a series of notorious crimes makes it difficult to resist 'tough-on-crime' proposals, such laws will continue to be enacted. Statute books are cluttered with provisions passed on the passions of moments. Often, however, passions subside with time, and competing values and calmer consideration make the wisdom of such laws less clear."[669]

Indeed, in a more detailed case study, Albert Dzur and Rekha Mirchandani assessed the deliberative quality of the political process which led to the enactment of California's mandatory minimum "three strikes law;" in contrast with democratic ideals, the process was found to be emotional, hasty, exclusive, of narrow focus, and minimally deliberative.[670] Moreover, other research points to important differences in outcomes under deliberative conditions.[671]

In contrast with the legislature, an unelected[672] judiciary does not have the same institutional incentives to sacrifice deliberation in favour of crude popular preference. In the Canadian context, Roach has thus written that "only the independent judiciary can withstand the political allure of mandatory sentences. The courts are uniquely situated to draw the attention of Parliament and the public to the adverse effects of mandatory sentences in particular cases and to defend the need for continuing judicial discretion in tailoring punishment to particular crimes and particular offenders."[673] The independence of the judiciary thus enables its characteristic rationalism. To be sure, the legislature may indeed, as the Court stated, have more time and resources to examine issues; however, absent the conditions which permit these features to be

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[669] Tonry, *supra* n477 at 104
[670] *Supra* n164.
[671] See e.g. Simpson et al, *supra* n17; Kennedy, *supra* n359 at 192.
[672] In jurisdictions with elected judges, electoral pressures have also been shown to be influential in making sentences more punitive as re-election approaches, emphasizing the importance of an independent judiciary and not simply a judiciary *per se*. This might be seen as re-affirming the *institutional* strengths of an independent judiciary as opposed to the inherent characteristics of judges *as individuals*. See e.g. Gregory A Huber and Sanford C Gordon, "Accountability and Coercion: Is Justice Blind when It Runs for Office?" (2004) 48 *American Journal of Political Science* 247; Carlos Berdejó and Noam Yuchtman, "Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing" (2013) 95 *Review of Economics and Statistics* 741.
[673] Roach, *supra* n482 at 371.

capitalized on, such advantages are merely theoretical. As well, the ability of courts to capably scrutinize policy choices and the law's impact should not be underestimated.[674]

The particular institutional location of courts—that is, the point within the decision-making process at which they become engaged—further contributes to their capacities to defend section 12 and to produce sentencing decisions that are publicly justifiable. In prescribing responses to criminal offenses, *ex ante* decisions made at the *legislative* stage are necessarily general and abstract. Such decisions are made absent the information available at the time of sentencing—including the characteristics and history of the offender, or the nature and circumstances of the offense—and which speaks to the proportionality or strategic value of particular approaches. Accordingly, while well-placed to establish guiding principles, objectives, and values, Parliament is, even at its best, limited with respect to knowing the final conditions within which specific sentences will or will not be perceived as justifiable. In contrast, being engaged following an offense, courts are well-placed to assess the impact of provisions on individuals and thus whether section 12 is violated.[675] So too can they tailor decisions to the specific facts at hand so as to be reasons-responsive.

Certainly, a defence of an expanded section 12 and the greater role for courts at the point of the ultimate decision might give some democrats pause. Even if critics are willing to admit that this would enhance the *deliberative* character of sentencing decisions, they may nonetheless initially persist that the Court remains disconnected from the views of the general public and that this argument pays insufficient attention to the *democratic* dimension of deliberative democracy. Certainly, even deliberative constitutionalists themselves admit that judges "are often insulated from the broader public sphere, and are accustomed to deploying distinctively legal norms."[676]

It is worth noting that within the broader constitutional framework, courts, even in finding a violation, do not make the ultimate determination on sentencing law. As part of the inter-institutional dialogue, Parliament has the opportunity to rework its provisions so as to avoid

[674] See e.g. Parkes, "Smickle" *supra* n490 at 169-170.
[675] Roach, *supra* n482 at 410.
[676] Kong and Levy in Oxford *supra* n616; see also Dryzek, *supra* n176 at 7 ("Constitutional courts…may feature skillful application of argument in public interest terms to legal and policy issues – but rarely do justices (at least on the U.S. Supreme Court) actually talk to each other, still less subject themselves to public accountability.") See also Zurn, *Institutions supra* n578 at 184*ff*.

future violations.[677] Moreover, with sufficient reason, section 12 violations can themselves be found justifiable on a societal—if not individual—level under section 1 of the Charter. Moreover, it remains ever possible for Parliament to invoke the notwithstanding clause under section 33 should they believe the law warrants it. However, advocates of an expanded section 12 need not resort to these in defending the democratic nature of judicial intervention.

Regarding the above objection, it is important to note that in elaborating section 12, the Supreme Court is not simply expanding its power to strike down legislation and in doing so substituting its own view for that of a democratically elected legislature. Principally, it should be seen as effectively carving out a space for courts more generally to proceed with sentencing without improper constraints and in light of the information which only becomes available at that time. In doing so, the court is facilitating *democratic* deliberation by importing the wider views of stakeholders in at least two ways.

First, Canadian sentencing courts do not operate unfettered, but rather within a robust, codified legal framework set out by Parliament. The Criminal Code specifies various objectives, principles, and considerations relevant to sentencing decisions. Through this, Parliament articulates values according to which citizens are to be sentenced, and in doing so makes explicit the substantive public reasons with which sentencing courts justify their decisions. Insofar as one believes that Parliament's decisions reflect the public will, this process would see the legislature funnel it into the framework that guides the decisions that follow.

Judges, while bringing their own institutional competencies, decide on the basis of this codified public reason, and therefore undertake a process of public reasoning which ensures that sentencing is an act of collective decision-making.[678] Indeed, Canadian jurisprudence reveals that courts view the problematic nature of mandatory minimums in terms of how they interfere with the ordinary operation of these specified legal principles—and thus publicly-identified rationales for sentencing—and not the ability of judges to sentence according to their private views.[679]

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[677] Roach, *supra* n482 at 410.
[678] Joshua Cohen, "Procedure and Substance" *supra* n133 at 163.
[679] See e.g. *R. v. Wust* [2000] 1 SCR 455 at para. 18 ("Mandatory minimum sentences...depart from the general principles of sentencing expressed in the Code, in the case law, and in the literature on sentencing. In particular, they often detract from what Parliament has expressed as the fundamental principle of sentencing in s. 718.1 of the Code: the principle of proportionality."); see also *R. v. Nur*, *supra* n513, at para. 44.

Second, by carving out this space for deliberative sentencing, section 12 establishes space for present input from a wider array of stakeholders—and specifically those who are likely to be closest to the offense in question—in determining what a just sentence is under the circumstances. Kennedy, for instance, demonstrates the ways in which deliberative democratic theory can both clarify the potential propriety of, as well as highlight the potential value of, victim input into sentencing.[680] In doing so, he points out that within this framework victims can plausibly introduce novel public perspectives, arguments, and information into deliberations, and not necessarily to a more punitive effect. While focusing specifically on victims as the most frequently resisted participants, these insights could apply more broadly to the participation of other stakeholders.

Accordingly, mandatory minimums can be seen to not only inhibit the ability of judges to offer good reasons for a sentence, but by the same mechanism also inhibit the possibility for sentencing decisions to be responsive to other stakeholders' contributions to sentencing deliberations. Accordingly, they work to limit possibilities for meaningful participation, input, and ultimately democratic accountability. Where such provisions specify a qualitative response as well as a minimum quantity, any input from participants—the offender, the victim, community members, even the crown—which argues for a different or lesser response, even very persuasively, is rendered of no effect. Accordingly, section 12 also combats the disempowering effects that mandatory minimums would have on more participatory innovations like problem-solving courts, sentencing circles, or other restorative justice measures that specifically seek to include those with the *most* at stake in addressing a particular offense.[681] In this way, a more robust section 12 right effectively protects a more participatory vision of sentencing as well.

4. Conclusion

While ultimately concerned with section 12's role in policing the boundaries of just criminal sentencing, some scholars have turned to section 7 in advocating for greater scrutiny of mandatory minimum sentences.[682] While this might suggest a loss of faith in the potential of section 12, this chapter demonstrates that this potential is reinvigorated through attention to core

[680] Kennedy, *supra* n359. See also Chapter 4 above.
[681] See e.g. McCoy, Heydebrand, and Mirchandani, *supra* n246.
[682] Manson *supra* n484; Parkes, "Smickle" *supra* n490.

deliberative democratic commitments. Attending to the central demand for public justifiability of decisions, a deliberative democratic framework offers a compelling, coherent account of the injustice at the core of mandatory minimums and the right which should serve to protect against it—an account which captures scholars intuitions regarding a wider scope and lower threshold, and one which bolsters its constitutional importance and supports calls for reform. Moreover, this framework clarifies that the Supreme Court of Canada's ostensibly "democratic" defence of a deferential approach that limits its scrutiny is misconceived. Given the fundamentally democratic role that section 12 performs, and the unique institutional competency that courts have in facilitating it, a more active, scrutinizing role for the judiciary through section 12 only contributes to—rather than detracts from—the democratic character of Canada's criminal justice system.

In all then, a deliberative democratic framework demonstrates a promising path forward for the development of the notion of cruel and unusual punishment in Canadian constitutional law. To the extent that legitimate law or the notion of legality itself are reliant on adequate reason-giving, this might even return cruel and unusual punishment to its original meaning under the *English Bill of Rights*.[683] Regardless, a reformulation of section 12 to address a deliberative account of the problem underlying mandatory minimums would bring criminal decision-making in line with the democratic values which, while not pervasive at that time, should guide public decision-making today.

[683] Anthony F Granucci, "'Nor Cruel and Unusual Punishments Inflicted:' The Original Meaning" (1969) 57 *California Law Review* 839; B. Welling and L.A. Hipfner, "Cruel and Unusual: Capital Punishment in Canada" (1976) 26 *University of Toronto Law Journal* 55 (Supporting Granucci's conclusion that "the clause was an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court.")

Chapter 6.
Guided Deliberation:
Sentencing Guidelines, Judicial Discretion, and Experimentalism

From the perspective of deliberative democracy, just and legitimate sentencing requires a sufficient degree of decision-making flexibility to ensure that sentences are justifiable in light of the specific facts of each case. Through the lens of the constitutionality of mandatory minimum sentences, the previous chapter demonstrated the ways in which *ex ante* legislative constraints upon judicial discretion can preclude this flexibility and result in unjustifiable sentencing decisions that raise questions of their justness and, fundamentally, their legitimacy.

Yet, an emphasis on judicial discretion may inspire concerns about both democratic accountability and coordination across a variety of decision-making instances. Indeed, the latter part of the 20th century witnessed growing discomfort with judicial discretion in the context of criminal sentencing, and common law jurisdictions across the globe have since taken steps to restrict or reduce the discretion wielded by judges.[684] Prominent among these efforts has been the emergence of guidelines developed by independent sentencing bodies, which a number of countries, including Canada, continue to consider.[685]

[684] See below, "Sentencing Guidelines and the Shift Away from Discretion".
[685] The Canadian government continues to stay abreast of public opinion on this issue in a variety of consultations: see e.g. Department of Justice, "Research at a Glance: Sentencing Commissions and Guidelines" (2018) online: <https://www.justice.gc.ca/eng/rp-pr/jr/rg-rco/2018/mar05.html>.

While the deliberative democratic perspective urged in this dissertation should, at least in theory, respond to the perceived conflict between judicial discretion and democratic accountability, there remains further opportunity to enhance the deliberative democratic legitimacy of sentencing courts. Concerns might remain about discrepancies amongst siloed discretionary decision-making regarding similar problems in different jurisdictions. Nonetheless, while avoiding the extreme constraints of mandatory sentencing, sentencing guidelines can also present deliberative shortcomings and this raises further questions about proper institutional relationships in service of just, legitimate sentencing. This chapter further takes up this ostensible tension between judicial discretion and accountability in light of sentencing guidelines and the institutional relationships they invoke.

While critiquing present mechanisms of guided discretion, the chapter defends the idea that further institutional engagement through guidelines may present an opportunity for different institutions to play to their strengths in bolstering deliberative decision-making, while also serving to better address concerns about coordination and the accountability of judges in a more flexible, individualized sentencing environment. In doing so, it argues in favour of greater attention to the deliberative consequences of, and potential for, sentencing guidelines. It subsequently presents an alternative framework for envisioning the relationship between the legislature, sentencing councils, and sentencing courts, one that better realizes this potential.

The chapter first provides context by discussing the central role that judicial discretion plays within a deliberative sentencing framework and the way in which sentencing guidelines represent a shift away from that discretion. After acknowledging concerns regarding accountability and coordination, and the potential contributions of external inputs into sentencing decisions in addressing these concerns, the following part discusses the historical development of sentencing guidelines and outlines their application in both the United States and England and Wales. Having done so, the chapter subsequently outlines their deliberative shortcomings, highlighting the ways in which they can inhibit reason-giving while distorting deliberations through their incomplete framing of the sentencing task.

Lastly, the chapter introduces an experimentalist deliberative model based on Joshua Cohen, Michael Dorf, and Charles Sabel's vision of 'directly deliberative polyarchy'[686] and Andrew Knops' 'networks' view of deliberative systems, which provides a model of decentralized institutional relationships and cooperation to address coordination and accountability concerns.[687] The model's suitability for sentencing and application in the context of American drug courts is then explored before discussing the features of a more general experimentalist architecture for sentencing. The section does not seek to elaborate the finer details of alternative guidelines, but rather take exploratory steps toward demonstrating the ways in which these institutional arrangements and the sentencing inputs they can produce might serve to further mitigate concerns regarding discretion while avoiding the deliberative flaws of sentencing guidelines.

1. Sentencing Guidelines: Context, Origins, and Questions

A. Judicial Discretion in Deliberative Context

The emphasis on public deliberation and justification so far in this dissertation contributes to a normative vision of sentencing which is itself internally deliberative—that is, the sentencing forum involving a process of exchanging and reflecting on reasons, culminating in the justification of the decision—rather than being something that is deliberated *about* at a legislative or policy level.

As a starting point, the very nature of public wrongs was seen to be such that such wrongs raise concerns of public interest, necessitating public decision-making about whether and how that public interest ought to be addressed. In contrast with views that would conceptualize crime as a disregarded threat—and which, by way of the logic of threats, simply demands follow-through on that stated threat—a prospective interest is suggestive of an open, context-sensitive question. Deliberative legitimacy in such a context requires that decisions be justifiable in light of the particular relevant considerations and reasons. Consequently, insofar as it is not

[686] Cohen and Sabel, *supra* n20; Michael C Dorf and Charles F Sabel, "A Constitution of Democratic Experimentalism" (1998) 98 *Columbia Law Review* 267 [Hereafter, "Constitution"].
[687] Knops, *supra* n625.

possible to specify in advance what the specific interest is and how it can be best addressed, sentencing necessitates a more dynamic decision-making process.

Indeed, in light of the variety of considerations that factor into the justifiability of decisions, it is extremely difficult to specify appropriate criminal justice responses in advance. In the previous chapter, mandated responses were shown to result in unjust—and, from a deliberative perspective, illegitimate—sentences that, once seen in full context, were unjustifiable. In this respect, sentencing may share a challenge with contemporary public decision-making more generally. Reflecting this, Michael Dorf and Charles Sabel write that while detailed statutes are a reliable way to establish accountability, "[i]n a complex and rapidly changing world it is manifestly impossible to write rules that cover the particulars of current circumstances in any sphere of activity."[688]

Given deliberative ideals and the injustice that can result from too-firm legal constraints, the legal framework within which sentencing operates therefore ought to be sufficiently flexible to allow for justifiable decisions. Procedurally, sentencing decision-making ought to approximate deliberative procedure within which participants are—subject to constraints necessary for public reasoning—free to exchange competing arguments, reflect on them, and proceed on the basis of "the force of the better argument."[689] In this light, judicial discretion can be seen as a mechanism that allows judges to be responsive to the persuasive public reasons that may arise in each case, and thus an important condition of legitimacy.

Accordingly, if a spectrum of contemplated sentencing arrangements could theoretically be seen as involving, at one end, judges having absolute discretion and, at the other, having none,[690] a deliberative vision of sentencing would sit toward the more discretionary end of the spectrum. The absolutes of this spectrum are only hypothetical, and in more realistic terms the spectrum has been suggested to comprise three possible approaches.[691] At one end, decisions are made on the basis of an "intuitive synthesis," where judges themselves intuit the most

[688] Dorf and Sabel , *supra* n686 at 837.
[689] Habermas, *supra* n198. at 24.
[690] Tom O'Malley, "Living Without Guidelines" in Andrew Ashworth and Julian V Roberts, *Sentencing Guidelines: Exploring the English Model* (Oxford: Oxford University Press, 2013); Kevin R Reitz, "The Enforceability of Sentencing Guidelines" (2005) 58 *Stanford Law Review* 155 at 156-160.
[691] Hammond, *supra* n159 at 219; Austin Lovegrove, "Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments" (2002) 14 *Current Issues in Criminal Justice* 182.

appropriate objectives and how to balance and achieve them. Moving along that spectrum would see more structured guidance, where the law provides greater prescription as to what would be appropriate in that case. Lastly, the far end entails fixed, determinative rules that indicate more precisely what the sentence ought to be.[692]

However, while deliberative sentencing seemingly demands sufficient judicial flexibility, readers should be careful not to conflate such an approach with an "intuitive" model, which in many respects flaunts deliberative ideals. Importantly, intuitive views of sentencing are susceptible to attitudes that legitimize judgment through unarticulated rationales. Along these lines, some accept that justice can be found on bases that "we cannot quite name."[693] Others even express comfort with the idea that the reasons underpinning decisions are not important if the actual sentence is right.[694] This is not far from the troubling, superficial notion that all sentencing rationales ultimately produce the same outcome anyway.[695]

As should be clear by this point, democratic legitimacy does, in fact, require us to "name" and scrutinize the public reasons that shape the use of public power. The justification of sentences does not rely on individual intuition, but persuasion on the basis of articulated reasons. With this in mind, sufficient discretion should be understood as a necessary *condition* for either an intuitive approach or a deliberative one, but should not be equated with either. It remains a challenge for the deliberative model, then, to create the institutional conditions and culture to maintain deliberative standards despite the fact that discretion may be put to other uses.

B. Sentencing Guidelines and the Shift Away from Discretion

Traditionally, legislators have appreciated the need for judicial discretion to ensure appropriate and effective sentencing. The foundational structure of Canadian sentencing outlined in Chapter 2, for instance, reflects this—having a variety of options available and with various stakeholders being given the opportunity to persuade as to what is most appropriate. Historically, sentencing processes within common law jurisdictions have afforded decision-makers

[692] *Ibid.*
[693] Albert W. Alschuler, "The Failure of Sentencing Guidelines: A Plea for Less Aggregation" (1991) 58 *University of Chicago Law Review* 901 at 915.
[694] Nicola Padfield, "Exploring the Success of Sentencing Guidelines" in Andrew Ashworth and Julian V Roberts (eds) *Sentencing Guidelines: Exploring the English Model* (Oxford: Oxford University Press, 2013) at 50.
[695] Kate Stith and Jose A. Cabranes, Fear of Judging (Chicago: Chicago University Press, 1998) (citing US commission).

considerable discretion and flexibility in determining appropriate sentences for criminal offences. Legislative frameworks have been traditionally minimalist, often offering little more than upper limits on punishment, while appellate review has typically been rare and deferential.[696]

Toward the end of the 20th century, however, this common law model and the discretion it entailed came under increased scrutiny and critique. Judicial discretion, particularly within powerful institutions of criminal justice, was increasingly associated with tyranny than with democracy and the rule of law.[697] Indeed, critiques of judicial discretion have often taken the form of democratic arguments. Along these lines, discretionary sentencing has been critiqued as involving a lack of transparency as well as public, legislative input.[698] Alternatively, concerns have been expressed in terms of accountability, such that judges are free to make decisions without being accountable to the public they serve.[699]

So too has discretion been criticized in terms of the coordination problems to which it gives rise. While also noting that judicial discretion is more unpredictable and inhibits broader policy choices, the key critique in this respect has been of inconsistency and disparity in sentencing—that is, of the different results for similar criminal behaviour—that can result.[700] Indeed, some have referred to sentencing disparity as the 'battle cry' of sentencing reform efforts.[701] In light of both these issues—taken generally, democratic accountability and coordination—more discretionary sentencing schemes have been thought to suffer from a lack of public confidence.[702]

In response to these issues, the latter part of the 20th century saw a shift toward the restriction of judicial discretion, with legislatures seeking to "reclaim" sentencing practice for

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[696] See e.g. Stith and Cabranes, *supra* n695 at 9-11.
[697] Carl F Pinkele, "Discretion Fits Democracy: An Advocate's Argument" in Carl F Pinkele and William C Louthan (eds) *Discretion, Justice, and Democracy: A Public Policy Perspective* (Ames: Iowa State University Press, 1985) at 3-5.
[698] Warren Young and Andrea King, "Sentencing Practice and Guidance in New Zealand" (2010) 22 *Federal Sentencing Reporter* 254 at 256-257.
[699] See e.g. Michael C Dorf and Charles Sabel, "Drug Treatment Courts and Emergent Experimentalist Government" (2000) 53 *Vanderbilt Law Review* 829 at 837 [Hereafter, "Drug Courts"].
[700] *Ibid*.
[701] Stith and Cabranes, *supra* n695 at 104*ff*.
[702] Young and King, *supra* n698 at 257.

themselves.[703] Grant Hammond has noted that legislative intervention to curtail discretion is now commonplace, and while recognizing it as part of a broader trend for discretionary decision-making, he notes that "[t]he accelerating tendency towards a narrowing of discretion is nowhere better illustrated than in the field of sentencing."[704]

The shift away from discretion has occurred in a number of ways and has been comprised of both piecemeal and more comprehensive efforts. The proliferation of mandatory minimum sentences for various offences is one clear example of this trend occurring on a non-comprehensive basis.[705] Given the American experience with a more encompassing system of rigid prescriptions, some suggest that the present debate realistically remains between more discretionary approaches and structured guidance.[706] Indeed, the appropriate balance to be struck between discretionary approaches and structured guidance seems to be the focus of reform efforts.

A centrepiece of the shift away from freer discretion has been the emergence and proliferation of sentencing guidelines. Guidelines, in this context, refer to "a set of prescriptive rules or standards that aim to *predetermine*, to some appreciable degree, the punishments that must be judicially imposed for certain offences."[707] More specifically, guidelines of the sort referred to here are not those established through appellate judgments but instead devised and circulated by independent statutory bodies such as sentencing councils or commissions. The diversity of their methods prevents further generalization, though each implicitly or explicitly share the ambition of responding to the perceived shortcomings of discretionary sentencing systems and adopt particular approaches and perspectives toward that end.

In response to concerns regarding a closed, removed, and unaccountable system of judicial discretion, sentencing guidelines are thought to address the "democratic deficit" by directing the relevant political choices regarding sentencing into more publicly-accessible and

[703] Hammond, *supra* n159 at 218; David Kalinich, "Discretion in the Sentencing and Parole Processes" in Carl F Pinkele and William C Louthan (eds) *Discretion, Justice, and Democracy: A Public Policy Perspective* (Ames: The Iowa State University Press, 1985).
[704] Hammond, *supra* n159 at 211-212.
[705] In Canada, see D. Paciocco, *supra* n484 at 201.
[706] Hammond, *supra* n159.
[707] O'Malley, *supra* n690 (emphasis added) at 219.

transparent institutions.[708] In addition to the more obvious democratic credentials of legislatures, sentencing councils and the like are also thought to democratize sentencing in several ways, including through a diversity of membership that can include representatives of various stakeholder groups, broader consultation efforts, and the open publication of directives.[709] The choices made by these groups are then given effect through law that constrains judicial decision-making —constraints which by their nature are thought to underpin a democratic polity.[710]

So too are they aimed at responding to the coordination problem. In response to concerns about sentencing disparities, guidelines seek to systematize decision-making in such a way that regularizes the treatment of cases that are deemed alike in relevant, specified ways. On this basis, Kate Stith and Jose Cabranes trace the intellectual origins of the United States' own Federal Sentencing Guidelines to Enlightenment ambitions and its project to rationalize and systematize the criminal justice system.[711] With their attempt at constituting a more "scientific" system, sentencing guidelines are thought to "reveal an intellectual affinity...to a continuous tradition of Enlightenment and post-Enlightenment thinkers who have carried into the 20th century Beccaria's dream of establishing a self-contained calculus of penology."[712]

C. Deliberative Tensions and Promise

The use of sentencing guidelines to address the apparent tension between judicial discretion and the need for both accountability and coordination raises important issues for a deliberative model of sentencing without clear conclusions.

In one respect, the role guidelines play in increasing the inputs from more openly political institutions promises to further democratize sentencing. Guidelines have the potential to inject court deliberations with perspectives, information, or influences from more bodies with ostensibly greater democratic credentials. Yet, the previous chapter illustrated that ostensibly "democratic" constraints can sometimes interfere with, rather than enhance, *deliberative*

[708] Warren Young and Andrea King, "The Origins and Evolution of Sentencing Guidelines: A Comparison of England and Wales and New Zealand" in Andrew Ashworth and Julian V. Roberts, *Sentencing Guidelines: Exploring the English Model* (Oxford: Oxford University Press, 2013) [Hereafter, "Origins"] at 203-204.
[709] See e.g. David Indermaur, "Dealing the Public In: Challenges for a Transparent and Accountable Sentencing Policy" in Arie Freiberg and Karen Gelb (eds) *Penal Populism, Sentencing Councils and Sentencing Policy* (Annandale: Hawkins Press, 2008).
[710] Pinkele, *supra* n697 at 5.
[711] Stith and Cabranes, *supra* n695 at 11-13.
[712] *Ibid* at 13.

democracy. Moreover, it demonstrated that the premise that sentencing discretion and democracy exist in tension is, at least in theory, unfounded. Due to their independence, and participatory and reason-giving qualities, courts were demonstrated to have comparatively strong deliberative democratic credentials in their own right.[713] From this perspective, the shift away from judicial discretion—even to a midpoint of guided discretion—may be unnecessary.

At the same time, some of those credentials stemmed from the ways in which sentencing courts deliberated within a framework of public objectives, principles, and information. To the extent that commentators are doubtful that judges can themselves ascertain these considerations within their forums and restrict themselves to them, a guiding framework may do well to address residual concerns regarding democratic accountability in practice. Part of this may come from codified objectives and principles that the legislator identifies, but more may be required. Public inputs that further enhance rather than inhibit processes of public reasoning and justification would, moreover, be a welcome contribution to a deliberative sentencing environment.

As well, deliberative democratic decision-making encounters coordination concerns in sentencing contexts that it may not in others. Unlike singular decisions made on a policy issue in Parliament, for instance, sentencing decisions are such that a great number of individual decisions are made on similar problems in separate fora, relating to different individuals. Consequently, the ways in which those public objectives, considerations, and information are best understood or ascertained will vary. Nonetheless, some consistency in treatment across this number of discrete, comparable decisions is a desirable, albeit unique challenge for deliberative democracy. Indeed, unwarranted disparity would suggest that some of those cases are unjustified and could undermine the fundamental democratic value of equality accordingly.

Yet, consistency should not be understood as requiring uniformity in outcome or consistency in too broad a set of categories.[714] Justifiability demands treating people differently given both their own differences and those of the situations in which they have found and currently find themselves. Consequently, equality is not to be equated with "sameness" and we should instead be concerned with a consistent application of considerations, rationales, and

[713] See Chapter 5, above, "D. The Deliberative Democratic Quality of Sentencing Courts".
[714] Alschuler, *supra* n693.

principles to varying individuals and situations.[715] Indeed, to treat differing cases alike would also violate equality.[716] The aspiration then is to avoid unwarranted disparity, where "unwarranted" can be understood as meaning "unjustifiable". Ultimately, the aim of a system that guides sentencing deliberations ought to not simply be consistency in sentencing, but sentences that are consistently the most justifiable in the circumstances. In this way, the task of guiding sentencing is to do so in a way that allows deliberative and justificatory ideals to be consistently realized.

On its face, then, the middle ground between absolute discretion and firm constraints presents both promise and challenge for a deliberative model of sentencing. Sentencing guidelines, as one approach to this middle ground, thus warrant further evaluation and response in deliberative terms. With this in mind, the following section sets out the development of guidelines, illustrates their practice further, and evaluates them in deliberative terms. The subsequent section will then turn to a deliberative framework as a means of re-imagining the sentencing environment in a way that avoids the shortcomings of guidelines while maintaining democratic and coordinating benefits.

2. Sentencing Guidelines: Development, Illustration, and Deliberative Critique

A. Historical Development

With respect to the trend toward such guidelines, the United States was the early leader, with guideline implementation at both the state and federal levels.[717] State-level guidelines began in 1980, with Minnesota being the first jurisdiction to implement guidelines from a permanent sentencing commission, while federal sentencing guidelines were introduced in 1987 following the *Sentencing Reform Act*.[718] England and Wales has had an active history in this respect since 1998 when it created its first statutory guidelines authority, the Sentencing Advisory Panel, to advise the Court of Appeal's guideline judgments.[719] A Sentencing Guidelines Council, which

[715] *Ibid* at 916.
[716] *Ibid*.
[717] Richard S Frase, "State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues" (2005) 105 *Columbia Law Review* 1190 [Hereafter, "Diversity"].
[718] *Ibid* at 1194; Stith and Cabranes, *supra* n695.
[719] Julian V Roberts, "Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues" (2013) 76 *Law and Contemporary Problems* 1 at 2-3 [Hereafter, "Sentencing Guidelines].

devised and issued its own guidelines, was also created in 2003, and subsequently both were replaced by the Sentencing Council in 2009.[720] In 2007, New Zealand took significant steps toward incorporating sentencing guidelines into its practice with the passing of the *Sentencing Council Act*, which came into force in 2008 though has yet to be implemented.[721]

Despite the overall trend toward restricted discretion and the prominence of American and English examples, sentencing guidelines have yet to be adopted in a number of other in common law jurisdictions. Australia, Canada, South Africa, Scotland, Northern Ireland, and the Republic of Ireland are all without guidelines.[722] This is not to say, however, that they have not been, or are not currently, under consideration. The South African Law Reform Commission had recommended the establishment of a sentencing guidelines commission in 2000, but its proposal was not implemented.[723] In 1987, the Canadian Sentencing Commission recommended a sentencing guidelines package following a three-year independent exploration of reform opportunities, and in 1988 a report from the House of Commons Justice Committee made similar recommendations.[724] Neither were adopted, although public consultations inquiring into public views of sentencing guidelines in the summer of 2017 may indicate that the possibility of Canadian guidelines remains a live one.[725] Julian Roberts notes that numerous jurisdictions "are actively contemplating adopting more structured sentencing regimes, including some form of guidelines."[726] In the American context, Richard Frase predicted a decade ago that guidelines would continue to spread at the state level, and has been proven right so far.[727]

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[720] *Ibid*.
[721] Warren Young and Andrea King, "Sentencing Practice and Guidance in New Zealand" (2010) 22 *Federal Sentencing Reporter* 254; Young and King, "Origins", *supra* n708.
[722] O'Malley, *supra* n690 at 219-220.
[723] Stephan Terblanche, "A Sentencing Council in South Africa" in Arie Freiberg and Karen Gelb (eds) *Penal Populism, Sentencing Councils and Sentencing Policy* (Cullompton: Willan, 2008) at 191.
[724] Julian V Roberts, "Structuring Sentencing in Canada, England and Wales: A Tale of Two Jurisdictions" (2012) 23 *Criminal Law Forum* 319
[725] See *supra* n685.
[726] Roberts, "Sentencing Guidelines" *supra* n719 at 23.
[727] Frase, "Diversity" *supra* n717 at 1232; Rachel E Barkow, "Sentencing Guidelines at the Crossroads of Politics and Expertise" (2012) 160 *University of Pennsylvania Law Review* 1599.

B. Guidelines Illustrated

i. United States of America

Under the American Federal Sentencing Guidelines, sentencing determinations proceed largely through the use of a sentencing table or grid that offers direction in light of the seriousness of the crime and the offender's own criminal history.[728] Along the vertical axis are forty-three different offence levels, each denoting a different level of seriousness. In determining the level to be applied in the instant case, sentencing judges determine the base offence level and then apply quantified increases or decreases based on possible adjustments that are either specific to that offence or available more generally. For instance, the crime of robbery has a base level of 20, but if a firearm is brandished or discharged, there will be a 5- or 7-level increase respectively. If the offender was a minimal participant in the offence, a generally-available 4-level decrease would be applied.

Along the horizontal axis are six graded categories of criminal history seriousness, each consisting of a range of "criminal history points" that are calculated according to factors such as the number and length of prior sentences or whether the present offence was committed while on parole. At the intersection of each row and column lies a relatively narrow range of punishment in months of imprisonment.[729] The result is a 258-box grid that increases in corresponding severity of crime and punishment as one moves from its top to bottom and from its left to right. At the top left, for instance, at the intersection of Offense Level 1 and Criminal History Category I is a range of zero to six months. If one follows Offense Level 21 to its intersection with Criminal History Category III, the result is forty-six to fifty-seven months. The grid is further divided into four 'zones' that provide further specifications, such as whether and under what conditions probation or parole are permitted.

For the first two decades of their operation, these guidelines were binding, and judges could only depart from the specified range in cases where the offender had provided significant assistance to law enforcement or where the judge could demonstrate the relevance of factors or circumstances that were not sufficiently incorporated into the Guidelines.[730] However, in 2005,

[728] United States Sentencing Commission, *Guidelines Manual*, §3E1.1 (Nov 2016).
[729] With the exception of the smallest ranges, for example, 0-6 months, the highest point of each range is approximately 25 percent more than the lowest.
[730] Stith and Cabranes *supra* n695 696 at 4.

the Supreme Court of the United States held in *United States v. Booker* that courts were no longer bound to apply the Guidelines, but must consult and take them into account, subject to appellate review of unreasonableness.[731] They nonetheless remain an influential starting point and decisions are presumed to be reasonable when within the guideline range.[732] At the state level, similar grid structures are also employed, as are a number of other structures.[733]

ii. England and Wales

Sentencing guidelines in England and Wales emerged amid a climate that firmly rejected a United States-style scheme felt to be too restrictive and contrary to English sentencing traditions.[734] Accordingly, English guidelines differ from their American counterparts in part by allowing for greater discretion. The current format of the guideline scheme took effect following the establishment of the most recent iteration of the guidelines body in 2009, and specifies a sequential nine-step process to guide decision-makers in determining an appropriate sentence.[735] While some emphasize the step-by-step nature of the system as a distinctive feature of the guidelines, beyond this more user-friendly presentation, in practice both the American and English schemes employ sequential steps and sentencing tables.

Among the steps that the guidelines direct decision-makers to take, the first two are the most crucial.[736] The first of these involves locating the crime in question within an "offence category" using an exhaustive list of considerations that point to one of three levels of harm and, separately, culpability. In the offence of robbery, for instance, use of a weapon to inflict violence would demonstrate an "A – High culpability" offence whereas a mere threat would point to a "C – Lesser culpability".[737] Moreover, serious harm caused to the victim would point to a "Category 1" harm level, whereas minimal harm would point to a "Category 3" level. The offence category would thus fall at the intersection of the respective categories as they are positioned along separate axes, for instance 1C or 3A. Within each of these categories is both a category range

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[731] *United States v. Booker*, (2005) 543 US 220.
[732] See e.g. *Gall v. United States*, (2007) 128 S Ct 586; *Rita v. United States*, (2007) 551 US 338.
[733] See e.g. Frase, "Diversity" *supra* n717 at 1201.
[734] Julian V. Roberts, "Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales" (2011) 51 *British Journal of Criminology* 997 at 998; Roberts, "Sentencing Guidelines" *supra* n719 at 3.
[735] Roberts, *ibid* at 5.
[736] *Ibid*.
[737] Sentencing Council, *Robbery: Definitive Guideline*, 2016, online: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Robbery-offences-definitive-guideline-web.pdf>.

and a 'starting point'—for instance, one of four years' custody within a range of three to six years' custody—and the second step involves locating the appropriate sentence within that range with the assistance of a non-exhaustive list of aggravating and mitigating factors. The remainder of the steps include other more singular considerations such as reduction for guilty pleas.

In terms of compliance measures, the trajectory of England and Wales contrasts slightly with that of the United States' federal guidelines, which have relaxed following *Booker*. Prior to 2010, decision-makers in England and Wales were required to have regard to the relevant guidelines and provide reasons for deciding differently; however, the *Coroner's and Justice Act 2009* now suggests a strong presumption, stating that courts "must…follow" the guidelines, unless they are "satisfied that it would be contrary to the interests of justice to do so."[738]

C. Guidelines and their Deliberative Shortcomings

From a deliberative democratic perspective, sentencing guidelines as practiced and formulated exhibit a number of characteristic shortcomings to be avoided in preserving a sentencing's deliberative character. In exploring these shortcomings, this section lays the foundation for the subsequent clarification of a framework that gives effect to deliberative democratic ideals while also addressing stated concerns underpinning the shift toward restricting judicial discretion. Primarily, guideline shortcomings relate to two dimensions: first, the way in which they may impede ultimate justification of sentences in the sense of providing good reasons for the decision, and second, the way in which their adopted form and content can impede deliberation and corrupt the ultimate judgment which results.

i. Inhibited Reason-Giving

The first of these shortcomings relate to the impact that guidelines—both generally and the "tick box" approach[739] that they often adopt specifically—can have on the tendency or ability of decision-makers to provide adequate reasons justifying their ultimate decision. The use of sentencing guidelines can inhibit reason-giving in relation to assigned sentences where the immediate justifications for certain features of that sentence, for example its nature or length, are

[738] *Coroners and Justice Act*, 2009, c 25, § 125.
[739] John Cooper, "Nothing Personal: The Impact of Personal Mitigation at Sentencing since Creation of the Council" in in Andrew Ashworth and Julian V Roberts (eds) Sentencing Guidelines: Exploring the English Model (Oxford: Oxford University Press, 2013) at 159.

derived from a specified calculation rather than clearly articulated normative rationales. Put differently, where a judge is assigning a sentence because she is directed to do so by the guidance and not because of clear normative rationale, justifications for sentences risk collapsing into buck-passing—that is, justifying a sentence because that is what is the guidelines indicate rather than a persuasive first-order reason. Thus, guidelines may discourage adequate reason-giving because, to a greater extent than would otherwise be the case, the answer is already 'there' and, in delivering that answer, the judge is taking less ownership over the outcome.

The means of arriving at the appropriate sentence through guidelines is central to this contention. To the extent that decision-makers are put through a more standardized process which focuses on abstractions like general categories and which eases judges' analytical burden, attention may be drawn away from the normative work that goes into justifying why a sentence is going up, down, left, or right. This is especially the case where the process is reduced to what some refer to as "calculus",[740] and to the extent that online sentencing "calculators" are available which allow users to calculate sentences through ticking applicable boxes.[741] Moreover, the adequacy of available justification is further diminished where the normative underpinnings of guidance are themselves absent or ambiguous.

Even where rules or considerations are clearly identified, their rationales may not be. Indeed, it seems that the absence of articulated rationales is not unusual and occurs with some regularity in guidelines.[742] Young and King write that the most recent format of English guidelines identify "criminal history as a factor that might increase seriousness (or decrease seriousness if it is absent) without identifying why or to what extent."[743] Similar vagueness is noted with respect to the issue of remorse.[744] In the American context, Stith and Cabranes note that the exclusion of a variety of factors, especially those pertaining to defendants' own personal histories, has been left unexplained and thus leave readers in the dark about underlying

[740] Stith and Cabranes, *supra* n695 at 13.
[741] See e.g. "Sentencing.US: A Free U.S. Federal Sentencing Guidelines Calculator", <online: http://www.sentencing.us/>.
[742] Hannah Maslen and Julian Roberts, "Remorse and Sentencing: An Analysis of Sentencing Guidelines and Sentencing Practice" in Andrew Ashworth and Julian V Roberts (eds) *Sentencing Guidelines: Exploring the English Model* (Oxford: Oxford University Press, 2013); Young and King, "Origins", *supra* n721 at 215; Stith and Cabranes, *supra* n695 at 56; Padfield, *supra* n694 at 39.
[743] Young and King, "Origins" *supra* n721.
[744] Maslen and Roberts *supra* n742.

rationales.[745] Rationales regarding the links between harm and culpability were similarly left unexplained.[746] Lastly, it is possible that in cases where the underlying rationales are omitted, judges' attempts to fill in these blanks in justifying sentences may stray from the actual reasoning.

ii. Selective Considerations

The second notable shortcoming from a deliberative perspective relates to the ways in which selective, imbalanced gravitation toward certain considerations occurs to the exclusion of other considerations. This is in part attributable to the very nature of the sort of regulation to which guidelines typically aspire and is something which impacts the deliberative quality of decision-making in a marked way. Efforts to generalize at a higher level of abstraction and provide clear direction on sentencing through simplicity and quantification—all of which seek to coordinate sentencing decisions[747]—leads to particular substantive results, even as an unintentional consequence.

For instance, under the U.S. model, the emphasis on objective, measurable criteria that could reduce reliance on judicial discretion and exhibit a more 'scientific' approach encouraged the Commission to rely on the quantification of harm as an indicator of appropriate sentencing. Stith and Cabranes directly link this to the exclusion of other considerations, saying that "[b]ecause of their reliance on quantifiable offense characteristics, the Guidelines give relatively short shrift to more subjective, less easily measured aggravating factors relating to both harm and culpability."[748]

Albert Alschuler similarly notes that "form dictates function" and that guidelines have ignored "difficult-to-describe sentencing considerations",[749] perhaps because guideline commissions "can quantify harms more easily than they can quantify circumstances."[750] This tendency is not, however, limited to the American approach, as in the English context, John Cooper similarly notes that "[i]n the Council's quest for consistency, the complex and

[745] Stith & Cabranes, *supra* n 696 at 56.
[746] *Ibid.*
[747] *Ibid*.
[748] *Ibid* at 70.
[749] Alschuler, *supra* n693 at 902-903.
[750] *Ibid* at 915.

idiosyncratic nature of offenders has been shelved in place of a process which, it is argued, can be easily understood by the public."[751]

Accordingly, mitigating factors, which are less amenable to clear, objective processing, tend to be excluded. Consider, as illustration, the sheer imbalance between mitigating and aggravating factors in the English guidelines—there being eight of the former, but twenty of the latter.[752] It is worth noting as well that this is not the result of a natural imbalance, as in one study public participants identified forty-five mitigating factors.[753] To the extent they are included, mitigating factors are required to compete with their more substantial counterparts. Cooper writes that "[t]he lack of guidance within the Sentencing Council guidelines in relation to personal mitigation is juxtaposed with the detailed matrix of criteria linked to aggravating factors and seriousness. In itself, this presentation puts personal mitigation into a *subordinate position and to a significant extent, reliant upon judicial inclination.*"[754]

More than just neglecting mitigating factors—linked in their logic to a 'vertical' shift in severity or quantitative dimensions of the response—guidelines similarly have a tendency to neglect considerations and inferences that affect the *qualitative* dimensions of responses. In their effect on what qualitative response results, irrespective of its subsequent quantity, these factors might be understood as propelling more 'horizontal' shifts in decision-making. In fact, one might extend this criticism to say that present efforts at addressing the coordination problem are problematic in that they understand the issue itself as one of quantitative consistency and neglect the fundamental need to ensure *effective* sentencing.

This tendency reflects a likely quantitative bias in sentencing ideology more generally—as demonstrated in the previous chapter—and, in their design, guidelines can implicitly restrict qualitative choices. Richard Frase, for instance, recognizes that most sentencing guidelines de-emphasize rehabilitative goals.[755] Beyond presumptively requiring carceral responses of a specified quantity, qualitative choices might be restricted in at least two ways. For one,

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[751] Cooper, *supra* n739 at 164.
[752] *Ibid* at 160-161
[753] Ibid citing Austin Lovegrove, "The Sentencing Council, the Public's Sense of Justice and Personal Mitigation" (2010) 12 *Criminal Law Review* 906.
[754] Cooper, *supra* n739 at 163
[755] Richard S Frase, "Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective" (1999) 12 *Federal Sentencing Reporter* 69 at 74 (although Frase maintains that Minnesota has allowed for this as an important objective).

guidelines can fail to address considerations that would direct judges to consider what type of interventions would be most effective at achieving public objectives. Secondly, guidelines may implicitly limit the significance of the considerations included. Consider the partial significance assigned to a number of factors already acknowledged. For one, a "failure to respond to previous sentences" is included as an aggravating factor under the guidelines in England and Wales and thus interpreted in a way that increases the severity of the subsequent sentence to be imposed.[756] Framed as an aggravating factor, the significance given to that fact imports a quantitative logic to the exclusion of equally relevant qualitative possibilities. Rather than a consideration meaning that a *harsher* response is needed—more of the same—it might also be interpreted as meaning that a *different type* of intervention is needed, one that better responds to the rehabilitative needs of the offender. Yet, this logic is not captured in guidelines.

English guidelines also list both involvement in gangs and hostility towards minority groups as aggravating factors.[757] However, such considerations undoubtedly have more significance than the quantitative significance bestowed on them by the aggravation-mitigation framing. Insofar as the effective achievement of public ends is taken seriously, these factors might also suggest that specialized interventions to address the factors surrounding gang membership or racism should be employed. However, guidelines do not point judges to such interventions or consolidate any existing knowledge on which ones or under what circumstances those might be effective.

Approaching these observations,[758] Cooper points to the possibility of guidelines highlighting considerations that could be used to both "assist the court in deciding *whether* a defendant can meaningfully benefit from community-based sentencing and contribute to *targeting specific activities* which not only benefit rehabilitation but also effectively contribute to the community."[759] Toward these ends, he suggests that guidelines include illustrative examples of defendants' possible past positive contributions to the community, and refer to factors such as

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[756] Sentencing Council, "Overarching Principles: Seriousness", (2004), online: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Seriousness-guideline.pdf>.
[757] See e.g. Sentencing Council, "Assault: Definitive Guideline" (2011) online: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault-definitive-guideline-Web.pdf>.
[758] Cooper goes some way towards including qualitative concerns, though frames this in terms of mitigation. Although it may be true that alternatives he discusses are less severe, framing this only in quantitative terms obscures the full issue.
[759] Cooper, *supra* n739 at 161-162 (emphasis mine).

a willingness to participate in restorative approaches, past demonstrated engagement, and positive work records.[760] Certainly, these would go some way to addressing the quantitative bias of guidelines, though it would also be necessary to identify which characteristics or circumstances would make *individual* initiatives or interventions appropriate.

iii. Framing Effects

From a deliberative perspective, the above partial and biased nature of factors is problematic in light of their framing effects. An important issue in the context of political psychology and communication research, "framing" refers to "the process by which people develop a particular conceptualization of an issue or reorient their thinking about an issue" based on the particularized presentation of relevant information.[761] Through framing, small changes in the presentation of an issue sometimes produce large changes in individuals' judgments.[762] Framing effects thus occur where "in the course of describing an issue or event, a speaker's emphasis on a subset of potentially relevant considerations causes individuals to focus on these considerations when constructing their opinions" and neglect others.[763]

As a basic example of framing in action, one study demonstrated that when asking whether an individual opposes or supports the ability of a hate group to hold a rally, prefacing the question with "Given the importance of free speech" or "Given the risk of violence" will have considerable implications for the number of respondents who would support the rally.[764] Importantly, framing differs from persuasion in that while persuasion "effectively revises the content of one's beliefs about the attitude object", framing simply alters the prominence or weight of particular considerations in that context.[765]

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[760] *Ibid* at 161-162.
[761] Dennis Chong and James N Druckman, "Framing Theory" (2007) 10 *Annual Review of Political Science* 103 at 104.
[762] *Ibid* at 104.
[763] James N Druckman, "On the Limits of Framing Effects: Who Can Frame?" (2001) 63 *Journal of Politics* 1041 at 1042; James N Druckman,and Kjersten R Nelson "Framing and Deliberation: How Citizens' Conversations Limit Elite Influence" (2003) 47 *American Journal of Political Science* 729.
[764] Chong and Druckman, "Framing Theory", *supra* n761761 at 104 (in this case, 85% of respondents were in favour with the first preface, compared with 45% otherwise).
[765] Druckman, *supra* n763 at 1044.

Aubin Calvert and Mark Warren warn that these effects can undermine deliberative aspirations by operating prior to deliberative influence to subsequently limit one's reflection.[766] Accordingly, they warn that "[f]rames organize cognition by bundling claims into a framework, such that any particular claim brings with it unreflective judgments about other claims. Insofar as they are pre-reflective, frames undermine the autonomy of individual judgment."[767]

While recognizing that framing might be inevitable, they point to the particularly problematic nature of "dominant" frames that undermine reflective deliberation. Such frames, they write, limit "the availability, accessibility or weight of contravening reasons" and consequently provide claims with more influence than they otherwise would have in open deliberation.[768] Moreover, they commit individuals to "a range of associated claims," excluding others and "defining a problem as being solely of one type, or admitting only one possible solution."[769] Indeed, some scholars have hinted that this may already occur even where guidelines include considerations, but do not do so consistently. Maslen and Roberts thus caution that flagging considerations for some offences and not others, where they would be applicable to both, can lead to inconsistent application.[770]

Partial considerations can result in unjustifiable sentences in two ways. Where guidelines are followed uncritically, they may direct judges to impose sentences that cannot be justified based on all of the relevant considerations. Secondly, even while contemporary guidelines typically allow for departures from specific recommended ranges where these are thought to be inappropriate—for instance, by stating that this is permitted 'in the interests of justice' or where there are 'substantial and compelling reasons' to believe the range does not reflect a particular consideration—framing effects suggest that these departures may be less likely to arise than they otherwise would. Even where judges would be given considerable latitude, their deliberations and subsequent judgments can be distorted by these effects and result in unjustifiable—or less

[766] Aubin Calvert and Mark E Warren, "Deliberative Democracy and Framing Effects: Why Frames are a Problem and How Deliberative Minipublics Might Overcome Them" in in Kimmo Grönlund; André Bächtiger; Maija Setälä (eds) *Deliberative Mini-Publics: Involving Citizens in the Democratic Process* (Colchester: ECPR Press, 2014) at 203-206.
[767] *Ibid* at 1.
[768] *Ibid* at 9.
[769] *Ibid* at 8.
[770] Hannah Maslen and Julian Roberts, "Remorse and Sentencing: An Analysis of Sentencing Guidelines and Sentencing Practice" in Andrew Ashworth and Julian V Roberts (eds) *Sentencing Guidelines: Exploring the English Model* (Oxford: Oxford University Press, 2013).

justifiable—sentences. Accordingly, selective considerations and the framing effects which result can inhibit persuasive reason-giving as well, at least in the sense that the decisions arrived at are not able to be justified by good reasons, all things considered.

3. Sentencing and Democratic Experimentalism: A Framework for Sentencing Guidelines

While a middle ground approach to sentencing may address concerns regarding coordination and accountability, the current approach provided by sentencing can hinder the deliberative and justificatory requirements of legitimate sentencing. This section explores an alternative model of institutional relationships and cooperation. Derived from Joshua Cohen, Michael Dorf, and Charles Sabel's vision of "directly deliberative polyarchy"[771] and Andrew Knops' "networks" view of deliberative systems,[772] this 'experimentalist' model can go some way to addressing the above concerns while maintaining the necessary flexibility to facilitate legitimate decisions.

A. Democratic Experimentalism: Directly Deliberative Polyarchy and Deliberative Networks

In a joint essay[773] later expanded upon through other collaborations,[774] Joshua Cohen and Charles Sabel outlined a vision for a framework of public governance intended not only to be responsive to democratic ideals, but effective in light of the structural shortcomings of other models and consequent failure to adequately address social problems. In particular, Cohen and Sabel were concerned with the effective democratic management of complex or dynamic social problems which, in light of their contextual, dynamic nature, are not effectively addressed through more removed, centralized, top-down governance.

Such problems, if too distant from centralized governance, often become the subject of accountability concerns. It is this apparent dilemma between the flexibility needed for effective governance and an ostensible lack of accountability that the model has sought to address.[775] Given the felt need to exercise democratic control and in light of its highly contextual nature and

[771] Cohen and Charles, *supra* n20.
[772] Knops, *supra* n625.
[773] Joshua Cohen and Charles Sabel, "Directly-Deliberative Polyarchy" (1997) 3 *European Law Journal* 313.
[774] See e.g. Dorf and Sabel, "Constitution" *supra* n686; Dorf and Sabel, "Drug Courts", *supra* n699.
[775] *Ibid* at 837.

requirement of individualization for both effectiveness and justice, sentencing is a worthwhile subject for this model.

Directly deliberative polyarchy is an "experimentalist" model of governance in which public problem-solving occurs through interconnected and mutually-enriching institutions. Within this model, institutions adopt differing roles appropriate to their particular situation. At the local level, there are various individual forums tasked with problem-solving and collective decision-making in regard to a particular social problem of local importance. Such decision-making occurs through public deliberation that is open to the direct engagement of affected individuals. This deliberation, however, does not occur in local isolation, and individual deliberative units are to consider problems in light of standards and successes of other units "facing similar problems in comparable jurisdictions."[776] At the same time, such units are themselves a source of information for others. Deliberation is thus *coordinated* through institutionalized links that direct units to learn jointly from others' experiences while providing ways of improving this institutional learning itself.

To facilitate this coordinated deliberation and joint learning, a centralized body is tasked with pooling and processing information and experience from the individual units engaging in localized problem-solving. Under this model, the role of the centralized body thus changes from being an institution which itself seeks to solve public problems into one that seeks to "empower and facilitate problem-solving through directly deliberative arenas operating in closer proximity than the legislature to the problem."[777] In this role, such bodies undertake tasks such as stating general goals, providing organizational assistance in achieving those goals, and provide resources to deliberative bodies at this unit level.[778] National, uniform solutions are available, but only insofar as they are preferable or necessary.

Administrative bodies take on the role of providing the 'infrastructure' for information exchange amongst units. Such bodies process information collected from individual deliberative units, clarifying individual initiatives and formulating recommendations for practical change.[779] The role of judicial oversight is to ensure the deliberative nature of decision-making. In doing so,

[776] Cohen and Sabel *supra* n771 at181; Dorf and Sabel, "Constitution", *supra* n686 at 314
[777] Cohen and Sabel, *supra* n771 at 201, 211-212.
[778] *Ibid* at 212.
[779] *Ibid*; Dorf and Sabel, "Constitution" *supra* n686 at 346.

the court ensures that localized units proceed by way of relevant constitutional and policy reasons, giving these considerations suitable weight.[780]

Andrew Knops' 'deliberative networks' approach maps onto this model and emphasizes the deliberative demands for both the role of each institution and the nature of the relationship between them. Writing from a systems perspective, Knops seeks to outline the ways in which deliberative ideals can be achieved in complex governance arrangements,[781] Knops emphasizes that although institutions can differ in their particular roles, in decision-making they are nonetheless each subject to deliberative ideals and interactions between institutions are understood in terms of a relationship between distinct deliberative exchanges.[782]

Accordingly, not only ought each forum proceed by way of public deliberation, it should also assess the outputs from other forums in a deliberative way. In incorporating or giving effect to prior deliberations, subsequent institutions should assess the earlier exchange on the basis of the scope and strength of its deliberations.[783] In Cohen and Sabel's polyarchical model, centralized bodies, in assessing various inputs from localized sites and providing guidance for further action at that level, should do so in a deliberative manner while recognizing the shortcomings of the deliberative position each forum is in.[784]

In all, then, experimentalism decentralizes decision-making power to localized sites while facilitating a centralized process of assessment and distribution of normatively significant information, all of which is governed by deliberative constraints. In doing so, the model "combines the advantages of local learning and self-government with the advantages (and discipline) of wider social learning and heightened political accountability that result when outcomes of many concurrent experiments are pooled to permit public scrutiny of the effectiveness of strategies and leaders."[785]

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[780] Cohen and Sabel, *supra* n20 at 212-213.
[781] Knops, *supra* n625; John Parkinson and Jane J Mansbridge, *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge: Cambridge University Press, 2012).
[782] Andrew Knops, *supra* n625.
[783] Knops *supra* n625 ~~310~~.
[784] Cohen and Sabel, *supra* n20.
[785] *Ibid* at 181.

B. Suitability for Sentencing

Fundamentally, directly deliberative polyarchy is "animated by a recognition of the limits on the capacity of legislatures to solve problems."[786] In light of the fact that legislatures are centralized, removed from local contexts, and are less dynamic institutions, limits on this capacity are particularly evident with respect to certain governance contexts and issues and suggest the appropriateness of directly deliberative arrangements. This is especially the case where the diversity and volatility of sites of application require non-uniform approaches and more continuous reflection on the means of achieving goals in light of evolving information.[787]

So too is it the case where the intent of the legislature cannot itself be known because that intent "depends on facts or circumstances that are not yet known" at the time of legislating responses.[788] Moreover, it is also the case where the nature and complexity of problems and their causes themselves require particularized responses and coordination across different domains. Effective governance in such cases is more localized governance.[789] Experimentalism thus has the distinct advantage of precision and adaptability where centralized, top-down governance falls short.[790] Focused on localized, direct participation, the model recognizes and values the fact that, with respect to certain types of social problems, direct participants possess relevant knowledge of "the local contours of the problem" and the merits of possible solutions.[791]

The conditions highlighted here also reflect the realities of the task and context of sentencing. In previous chapters, we noted the difficulties for centralized and removed legislatures in seeking to specify *ex ante* public responses with any precision, in light of the variability of criminal offenses, circumstances, and offenders, and the need for flexibility to ensure both just and effective individualized responses. The rise of problem-solving courts further emphasizes the necessary attention to context by focusing on the complex causes of criminal behaviour, the benefits of including a variety of stakeholders, and the need to mobilize

[786] Cohen and Sabel, *supra* n20 at 211.
[787] *Ibid* at 207-208.
[788] Charles F Sabel and William H Simon in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge and New York, Cambridge University Press, 2017) at 487.
[789] Dorf and Sabel, "Constitution" *supra* n686.
[790] *Ibid* at 315
[791] Cohen and Sabel, *supra* n20 at 199.

public resources and initiatives other than those of the traditional punitive criminal justice apparatus.[792]

This comes as part of a broader recognition that standardized responses, both in terms of punishment as a singular paradigm as well as uniform responses within and outside that paradigm, are insufficient to respond to the variations of criminal behaviour, correctional needs, and social contexts.[793] Judges themselves have agreed that a problem-solving orientation and increased integration of social services into courts are valuable and feasible innovations in sentencing practice within traditional courts as well.[794] Accordingly, effective sentencing requires responsive coordination across a variety of service domains, including correctional, supervisory, health, economic, and social services. The varying availability of resources, programming, and social infrastructure further suggests that governance in these contexts would benefit from a contextual, locally-responsive approach.

C. Experimentalism and Drug Courts

Given its apparent applicability to sentencing, it is perhaps unsurprising that the potential for experimentalist arrangements has been at least partially realized in the context of specialized drug treatment courts in the United States.[795] Dorf and Sabel have suggested that the institutional relationships and structure of governance within this context reflect the experimentalist model, even while not designed with it in mind. Arising out of grassroots initiatives and spreading across the country, these specialized courts engage specifically with offenders where the underlying criminal behaviour involves substance abuse issues and is typically low-level and non-violent.[796]

In contrast with conventional courts, drug courts approach offenders' criminal behaviour less as a moral choice and more as a complex social problem—one whose effective management

[792] Arie Frieberg, "Problem-Oriented Courts: Innovative Solutions to Intractable Problems" (2001) *Journal of Judicial Administration* 8
[793] See e.g. Hulsman, *supra* n33.
[794] See e.g. Donald J Farole, et al "Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts" (2005) 26 *The Justice System Journal* 57.
[795] Dorf and Sabel, "Drug Courts" *supra* n699.
[796] *Ibid* at 832-833.

requires the involvement of a variety of services or stakeholders.[797] Based on their assessment of offenders' needs, judges—acting in collaboration with defense counsel and prosecutors—divert offenders to a chosen program run by one of a number of different treatment providers. Uniquely, courts then play a more continuous role in monitoring adherence and progress as well.

Although the orientation of these courts is geared toward addressing substance abuse issues specifically, the distinct roles of, and relationships between, institutions serves as a useful illustration of the framework. The courts themselves are given sufficient discretion to assign offenders to those interventions that parties agree are most appropriate, based on both knowledge of the offender and their past experience with treatment providers.[798] In making these decisions, the courts themselves continuously assess the success and failures of different interventions against others, as well as the processes of the courts themselves, and share these experiences more widely.[799]

Reports on both processes and outcomes, in addition to other systematic studies, are subsequently pooled and analysed at the federal level, and the resulting conclusions are distributed to those involved through publications and training.[800] As part of this distribution, federal bodies provide standards, benchmarks, and best practice standards to help guide individual courts while leaving them room to elaborate as local circumstances require.[801] The specific guidance provided by these best practices is limited to those for which sufficient research is available.[802]

Decision-makers are provided with general principles—for instance, that "[d]rug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services"—which are further accompanied by explanations of *why* those principles are

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[797] *Ibid* at 839; National Association of Drug Court Professionals, *Defining Drug Courts: The Key Components* (Washington: Department of Justice, 1997, 2004).
[798] Dorf and Sabel, "Drug Courts" *supra* at 847
[799] *Ibid* at 844-845, 849, 866 (Treatment providers are involved in this process by furnishing reports on individual offenders.)
[800] Beyond obvious stakeholders like judges, defense counsel and prosecution, this can also include those involved in running and evaluating the project—for instance, project directors and evaluators: *ibid* at 844-845.
[801] Dorf and Sabel, "Drug Courts" *supra* at 844-845. See National Association of Drug Court Professionals, *supra* n797; National Association of Drug Court Professionals, "Adult Drug Court Best Practice Standards: Volumes I and II" (2018), online: <https://www.nadcp.org/standards/> [Hereafter, "Best Practice"].
[802] *Ibid* at 2.

important.[803] With respect to the above, the guidance notes, among other things, that substance abuse issues are complex and unique to each individual, and that co-occurring problems such as mental illness, poverty, educational deficits, and unemployment can influence the success of interventions and should be addressed as well.[804] Insofar as judges in these contexts seek to justify the holistic approach taken in sentencing, such rationales are essential in enabling them to explain it.

This is also followed by performance benchmarks asking courts to ensure that interventions, for example, are comprehensive, individualized in identified ways, and subject to quality controls.[805] While examples of treatment options are provided, the decisions judges should make are not specified by these publications. Instead, best practice standards indicate that while judges are the ultimate arbiter of facts and decision-makers, they should make these decisions only upon taking into consideration others' inputs, including that from experts[806]—this being justified by research showing that these inputs allow judges to make rational and informed decisions.[807]

Despite the framework's flexibility—aimed at facilitating the most effective responses—concerns about accountability and legitimacy should be muted. Legitimacy in such courts derives in part from the fact that, through a more inclusive approach, such institutions maintain meaningful connections with the local community and proceed through "directly" deliberative decision-making that is context-sensitive yet informed by broader inputs.[808] The fact that the knowledge created by these interacting institutions, regarding both successes and failures, is explicit, open, and subject to external scrutiny—by the public, but also by research communities—facilitates accountability throughout.[809]

While judges maintain discretion, the problem of coordination is addressed through research-supported benchmarking and best practices, allowing various courts to alter their practice in light of pooled information derived from other sites dealing with similar tasks. Dorf

[803] Key component #4, *supra* n797 at 7*ff*.
[804] *Ibid*.
[805] *Ibid*.
[806] "Best Practice", *supra* n801 at 21.
[807] *Ibid* at 23. PF Hora and T Stalcup, "Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts" (2008) 42 *Georgia Law Review* 717.
[808] Dorf and Sabel, *supra* n699 at 840.
[809] *Ibid* at 862, 875.

and Sabel note that this practice further defuses the apparent tension between efficacy and accountability. Courts, they write, are "becoming more effective precisely by improving the quality of the very information that also makes them more accountable."[810] Accordingly, under this drug court model, "efficacy and accountability can augment, rather than be traded off against, each other."[811]

Certainly, drug courts may be unique within the sentencing landscape, and the particular application of a deliberative, experimentalist framework to other sentencing contexts need not reproduce its particularities and problems that may come with it. While the proliferation of other specialized courts[812] is perhaps evidence of the common issues underlying different criminal behaviours and the utility of specialized problem-solving approaches in sentencing, the directly deliberative, experimentalist model offers a promising framework for criminal sentencing generally, even while being amenable to specialization.

D. Toward a More General Experimentalist Architecture for Sentencing

The above suggests that an experimentalist framework for sentencing has the potential to address concerns regarding accountability and coordination, while also focusing on better, not just more consistent, sentencing. Moreover, while attentive to specific concerns regarding the deliberative shortcomings of sentencing guidelines, the model also promises to do the above in a way that facilitates the realization of the ideals of public reason and justification within sentencing forums.

With this in mind, the following sets out general experimentalist institutional arrangements within the broader sentencing environment in a way that plays to the strengths of each of the constituent institutions. Within this architecture, courts sit as directly deliberative forums, engaging in processes of public reasoning in close proximity to the specifics of the offender, offence, and the local realities in which responses occur. The legislature, acknowledging its limitations, sets out a broad framework of public reasons within which courts

[810] *Ibid* at 858-859.
[811] *Ibid* at 875.
[812] For instance, specialized courts dealing with domestic violence, mental health courts, sex offending, and other issues can be found within Canada and the United States. See e.g. Sherry L. Van de Veen, "Some Canadian Problem Solving Court Processes" (2004) 83 *Canadian Bar Review* 91; National Institute for Justice, "Specialized Courts" (2018) online: < https://www.nij.gov/topics/courts/pages/specialized-courts.aspx >.

operate. The legislature could also establish an independent sentencing council, which plays a coordinating role not through unilateral standardization, but through dialogical relationships with the variety of sentencing courts, facilitating mutual learning and the injection of informed, evidence-based guidance into court deliberations.

i. Legislated Frameworks for Deliberations

It has been noted that legislatures may be poorly suited to manage the specifics of sentencing decisions in line with deliberative ideals, this being due to their distance and *ex ante* positioning, the limitations of centralized regulation for dynamic problems, the fact that the scope of their mandate extends far beyond sentencing, and the electoral pressures to which they are uniquely subject. Yet, legislatures do maintain primacy among institutions in terms of democratic credentials[813] and are thus best placed to set the contours of sentencing policy and the institutional arrangements that facilitate it.

Chief among these tasks is setting the public objectives for sentencing decision-making—objectives that form the central public reasons for sentencing responses and create the framework for the more sophisticated public reasoning that can occur in courts. The core reasons given for sentences, generally speaking, is that the intervention achieves one or another public objectives.[814] It is in this way that Chapter 2 spoke of the Canadian sentencing objectives set out in s. 718 of the Criminal Code as being akin to a framework of public reasons that judges invoke.[815]

Other constraining principles that safely operate in all deliberations might appropriately be set at a legislative level—for instance, the principle of proportionality, or requirements that interventions be no more burdensome than necessary.[816] These substantive constraints may very well be crucial in anchoring the procedural focus of deliberation. So too should procedural

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[813] Yet, this does not necessarily equate to perceived legitimacy or public confidence: Russell J. Dalton, *Democratic Challenges, Democratic Choices: The Erosion of Political Support in Advanced Industrial Democracies* (Oxford: Oxford University Press, 2004) (United States); William Cross, "Constructing the Canadian Democratic Audit" in William Cross (ed), *Auditing Canadian Democracy* (Vancouver: UBC Press, 2010) (Canada). See also, indications that public confidence in criminal justice courts is lacking: Julian Roberts, *Public Confidence in Criminal Justice: A Review of Recent Trends 2004-05* (Public Safety and Emergency Preparedness Canada, 2005), online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/pblc-cnfdnc-crmnl/index-en.aspx>.

[814] As discussed in Chapter 3, this need not be understood in a purely consequentialist way.

[815] *Criminal Code*, s 718

[816] See e.g. *ibid* at s 718.1, 718.2(d)-(e).

requirements that facilitate public reasoning along these lines be established. Obligations for courts to give reasons for their sentences and consider the inputs of others, at least insofar as they speak to public objectives and principles, likely form the core of such requirements.[817]

Certainly, other, supportive public reasons will be necessary for persuasive justification as well. For one, decision-makers will need to invoke reasons why that particular objective is necessary in light of the circumstances and other values—for instance, why incapacitation is necessary in light of a danger posed. Importantly, decision-makers will also need to give reasons why the particular intervention chosen can reliably or best achieve that objective.[818] These reasons would be highly context-dependent. For those reasons to be persuasive, empirical evidence is also likely necessary to support all but the most obvious interventions.

Unlike those which set the core framework for public reasoning, the legislature's capacity to specify these supportive reasons in advance is limited. To be sure, the legislature may be in a position to specify at a general level what kinds of interventions can or cannot be employed by courts. For instance, parliamentary deliberations can certainly determine whether incarceration and the death penalty are morally acceptable or effective means of achieving public objectives, such as serving as a specific deterrent or rehabilitative tool, and thus whether they should be available.[819] However, once one moves beyond the most general and controversial means, it becomes apparent that each of the various punishments, programs, treatments, or initiatives available cannot be specified. Even clearer are legislature's limited ability to identify the circumstances in which various strategies may be appropriate.

Consequently, while the legislature ought to take leadership in establishing a general framework, the tasks of providing fuller resources for persuasive reasons, and determining and articulating those reasons in the specific circumstances, should fall to other institutions. The latter of these tasks should fall to courts as deliberative forums directly engaged with individual cases. As discussed in Chapter 2 and throughout, sentencing courts may be natural, yet

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[817] *Criminal Code*, s.726.2. Courts are presently required to consider victim input, for instance, though it would be a valuable amendment for the legislature to clarify that its relevance be tied to established sentencing principles: see above, Chapter 4; *Criminal Code* s.722(1).

[818] Cf. *R v. Hamlyn* 2016 ABCA 127 at 28; *R v. Song* 2009 ONCA 896 (where "[d]iscounting the deterrent effect of imprisonment because of [the judge's] subjective doubts about its general efficacy was a material legal error.")

[819] See e.g. Paul Gendreau, Claire Goggin, and Francis T. Cullen, "The Effects of Prison Sentences on Recidivism" (Public Safety Canada, 1999), online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ffcts-prsn-sntncs-rcdvsm/index-en.aspx#exe>.

imperfect, deliberative forums. They possess an institutional culture, driven by legal requirements, of reason-giving for their decisions, and are also adept at engaging with the rationales of other courts.[820] In their operation, they have the flexibility and proximity to assess cases in a contextual, informed way. Moreover, they also facilitate access for direct participation of relevant stakeholders through direct and indirect submissions.

Through this, individual courts can and should undertake processes of inclusive deliberation and public reasoning within the general frameworks set out by the legislature. Sentences should be chosen which best address the public interest in line with the objectives and principles set out by the legislature. In doing so, courts ought to remain attentive to the need to effectively achieve these ends and approach both qualitative and quantitative aspects of their decisions critically. In making these decisions, courts should draw on the best resources and most persuasive public reasons available in an effort to justify them. The task of providing resources to courts—resources which facilitate not only accountable, coordinated decisions, but better decisions—is, however, best placed with independent councils or commissions, as neither courts nor the legislature are in a position to perform this role effectively.

ii. An Experimentalist Role for Sentencing Councils

While sentencing literature and reforms point to concerns regarding accountability and coordination, experimentalist models point to the ways in which centralized bodies can facilitate the realization of each of these in a way that not only permits but facilitates greater effectiveness. Centralized bodies should do so not through top-down instruction but by pooling, evaluating, refining and redistributing the shared learning that goes on within and across the directly deliberative forums themselves. Although this has not necessarily been their mode of operation to date—for instance, by taking more initiative in driving guideline development—sentencing councils nonetheless possess the qualities that support these capacities and can perhaps do so in a more inclusive manner than other experimentalist structures.

At minimum, both the diversity of forms that councils and commissions take as well as the broad variety of functions that individual councils perform[821] suggest that they may be tailor-made to meet experimentalist needs. Even so, these institutions' essential characteristics support

[820] See Cohen and Sabel, *supra* n20 at 204-206
[821] See e.g. Gelb, *supra* n442 especially at 8 (discussing the Sentencing Council in England and Wales).

their role within a deliberative framework. Councils are adept at evaluating sentencing data as a means of providing guidance to courts. Unlike legislatures, councils are specialized in focusing specifically on sentencing issues.[822] Unlike appellate courts, they also have the time and resources for wider review and research, and also tend to be more transparent in doing so.[823] Indeed, conducting research and providing expert advice is a core competency across the diversity of councils and commissions.[824] It is thus no stretch for councils to take on the role of pooling and evaluating the experience of deliberative courts.

The evaluated experience should include a variety of interventions, not just in a quantitative sense, but qualitative as well. A central role for councils within an experimentalist regime should, therefore, include researching how well, and in what circumstances, the variety of imposed interventions effectively achieve stated objectives. Such research should go beyond assessing custodial versus non-custodial interventions and include the variations that can exist within these categories. Indeed, facilitating research on these variations may iteratively lead to creativity and innovation within sentencing practices and, in turn, better quality findings and guidance.

Drug courts demonstrate the potential for court-based coordinators or researchers to play an important role in facilitating this research through reporting, though independent research projects could be organized as well.[825] In this respect, the Canadian federal government already has a record of attaching both direct reporting and independent research requirements to funding of some community-based correctional initiatives,[826] and establishing links with sentencing councils rather than government departments would be a progressive step.

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[822] Nancy Gertner, "The United States Sentencing Commission" in Arie Freiberg and Karen Gelb (eds) *Penal Populism, Sentencing Councils and Sentencing Policy* (Annandale: Hawkins Press, 2008) at 105.
[823] Young and King, *supra* n721.
[824] Gelb, "Myths" *supra* n442.
[825] Dorf and Sabel, *supra* n699.
[826] For instance, research funded by the Canadian federal government has been—and is continuing to be—undertaken into Circles of Support and Accountability through the CoSA National Demonstration Project and CoSA National Capacity Project (this initiative occurring post-release, but including during sentence): see e.g. Church Council on Justice and Corrections, "Evaluation of CoSA National Demonstration Project" (February 4, 2015) online: <https://ccjc.ca/evaluation-of-cosa-national-demonstration-project/> and Public Safety Canada, "News Release: Funding announced for expansion of Circles of Support and Accountability model across Canada" (May 5, 2017) online: <https://www.canada.ca/en/public-safety-canada/news/2017/05/funding_announcedforexpansionofcirclesofsupportandaccountability.html>.

Individual initiatives employed by courts should be assessed so as to provide useful guidance to courts in their deliberations. Experimentalist guidance should reflect both best practices across sentencing options as well as information on individual interventions. Regarding the former, guidance may specify, for instance, that sentencing is more effective where a more holistic approach is taken rather than one focusing only on sanction.[827]

Regarding the latter, more than simply providing for the fact that non-custodial interventions should be available or imposed, guidance to courts should include evidence-based information on what specific interventions have been shown to be effective where certain issues and offender characteristics are present. Guidance could, therefore, outline a variety of community service, treatment, program, and supervisory options, and restorative or social initiatives. So too could it highlight the variety of factors or considerations related to both offenders and offending that should warrant attention in determining what interventions would be appropriate.

Rather than guidance indicating that racist motivation, for instance, should simply make the sentence harsher, guidance with respect to prejudicially-motivated offences ought to include qualitative direction on possible interventions that are rationally and—in light of research into the prior experiences of past sentencing practices—empirically connected to addressing this component of criminal behaviour. Prior practice or other initiatives in certain courts may have found success in addressing prejudices through particular interventions or programming. The lessons learned through these practices can thus be gathered through the sentencing council's research and subsequently distributed.

Guidance should go beyond listing best practices and options to providing explanatory information and data. Unlike existing approaches to guidelines, including information on how and when these options have been proven to be effective in practice would avoid putting judges in a position where they could not articulate the reasons for qualitative or quantitative adjustments in the sentence. Rather, providing judges with such resources would empower them to deliver more detailed and persuasive reasons.

[827] See *supra* n745 and accompanying text.

Open, public research into the relative merits of different responses captured within guidance would facilitate public reasoning in a number of ways. In addition to giving judges information on what sorts of interventions are at their disposal and which might be most effective, this would also serve an important role in educating other participants—for instance, crime victims—and contribute to their ability to offer and critique arguments. As was noted in Chapter 4, crime victims may advocate for harsh imprisonment because they are unaware of other sentencing options.[828] In such a case, they would also be unaware of the relative merits of other options, and their potential to reason publicly would seemingly be bolstered by providing this information.

Indeed, more than injecting court deliberations with empirical evidence, this guidance should facilitate more active and involved deliberation among all forum participants, by increasing the points of consideration and by providing judges a focal point around which to engage participants—for instance, around specific questions about the application of specific principles or interventions, or the relevance of certain factors.[829] Other inputs into sentencing such as pre-sentencing reports would also have further points of consideration with which to engage. A legislated obligation that courts consider the guidance issued by the council would also play an important role in ensuring that these inputs be taken seriously.

All of this can, moreover, avoid the deliberative distortions of present approaches to guidelines. For one, by explicitly supporting guidance with research, the basis on which guidance would support one or another intervention should be clear to judges. Judges can, with support of this guidance, then offer good, evidence-based reasons for one or another intervention. With respect to framing, an experimentalist model would better account for the qualitative dimensions of sentencing decisions and the considerations that factor into it. Insofar as any guidance has a framing effect, that which is offered to forum participants within an experimentalist framework should not only be broader in nature,[830] but also rooted in the best evidence available. For a system whose legitimacy depends on good reasons, any privileging in this respect is acceptable, if not advantageous.

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[828] Erez, "Debate Goes On" *supra* n373 at 21; see also Henderson and Gitchoff, *supra* n465.
[829] Padfield, *supra* n694 at 46-47.
[830] Avoiding the dominance of selective framing is an important means of addressing deliberative constraints: see Calvert and Warren, *supra* n766.

Of course, the process of developing guidance for courts should itself be deliberative insofar as it goes beyond mere research. In this respect, one of the key strengths of councils is their independence from active electoral politics, allowing for a more deliberative space buffered from top-of-the-head public opinion.[831] Moreover, they possess considerable flexibility in terms of membership, allowing for representation from a variety of stakeholder groups, while also typically having the tools and mandate to consult the wider public on issues in deliberative forums.[832] While those with sufficient expertise should take the lead in evidence-based evaluations of interventions, the participation of the public, including victims and offenders, may nonetheless be of considerable value where, for instance, guidance incorporates assessments of risk versus values such as liberty.

4. Conclusion

Driven by both democratic and functional concerns, common law jurisdictions have sought to constrain the discretion wielded by judges, prominently through the use of sentencing guidelines. In addition to their usage in prominent common law jurisdictions including the United States and England and Wales, countries including Canada continue to consider their implementation. While a deliberative framework would support a middle ground between intuitive synthesis and firm constraints, guidelines were noted as having shortcomings that hindered the deliberative legitimacy of sentences. As a response, this chapter has set out a framework within which to understand both the role of guidance specifically, as well as how it might tie together a sentencing ecosystem more generally.

Under this framework, sentencing guidelines respond to concerns regarding the democratic accountability of sentencing and offer a means of realizing deliberative democratic ideals. Rather than acting as a direct legal constraint, experimentalist guidance is able to foster greater democratic accountability by facilitating more and better public reason-giving at the

[831] Arie Freiberg and Karen Gelb, "Penal Populism, Sentencing Councils and Sentencing Policy" in Arie Freiberg and Karen Gelb (eds) *Penal Populism, Sentencing Councils and Sentencing Policy* (Annandale: Hawkins Press, 2008); cf. Karen Gelb, "Sentencing Councils and Commissions: Exploring the Role of Advisory Bodies in the Contemporary Punishment Environment" (2015) *Oxford Handbooks Online*. Online: <https://doi.org/10.1093/oxfordhb/9780199935383.013.102> at 6 (noting the lack of political insulation of the Federal United States Sentencing Commission).
[832] *Ibid*.

sentencing level. At the same time, the framework can promote consistency while maintaining a focus on better, not just more uniform, sentencing. Insofar as countries continue to consider the use of external guidance for sentencing judges and the value of deliberative democratic ideals, an experimentalist approach warrants strong consideration.

Conclusion

This dissertation opened with reference to the public character of criminal justice. Criminal justice is said to deal with *public* wrongs, be attended to by *public* officials and institutions, warrant *public* censure, and be subject to unique *public* intervention decided on in *public*-oriented decision-making. Despite the ubiquity of these ideas, the public nature of criminal justice has been both incompletely understood and insufficiently accounted for in theory. What has been needed in this respect is a political framework that can not only explain this public character in its various dimensions but also clarify how state involvement can legitimately proceed in light of the indeterminacy and pluralism that characterize public life.

As a response to these pressing needs, this dissertation turned to deliberative democratic theory and explored its application to criminal sentencing. As a result, it has argued that the thick account of democracy provided by deliberative theory not only has implications for the way that the public nature of criminal justice is understood but provides valuable conceptual resources that articulate and address a number of central issues in criminal scholarship. Accordingly, in addition to its own intrinsic merits and the consequences these have for any forum of public decision-making, the theory has been shown to be one that should be particularly compelling for *criminal* scholars.

The implications and contributions of deliberative theory were first seen in Chapter 1 where its standards informed a defensible account of the idea that crimes constitute public wrongs. Despite the importance of such an account for understanding the nature of crime and the sentencing process of which it is the object, this had previously been elusive. In relying on deliberative ideals, the chapter demonstrated the relevance of political frameworks for both understanding that which offenders deviate from as well as for interpreting the public significance of its doctrinal features. In doing so, it showed that crimes are public wrongs in the sense that, due to the heightened disrespect for the public reasons underpinning prohibitions, they signal a prospective public interest. So too did this view of crime underpin a legitimate account of public censure, understood as the reassertion of those public reasons.

These conclusions affirmed the view that criminal sentencing is public decision-making and consequently the need for a political framework to legitimize it. This baton was taken up in

each of the five chapters that followed, showing how deliberative democracy should and can inform the state's response to crime. Chapter 2 introduced this theory in earnest and sketched its implications. After noting the political deficiencies of theories of punishment and accounts of sentencing, deliberative democracy was distinguished and shown to be capable of managing the pluralism inherent in public decision-making. The chapter established that sentencing proceed by way of inclusive, deliberative processes of public reasoning aimed at justifying the sentence arrived at. This was noted as a standard connected to the procedural ideals of conventional sentencing, though one capable of critiquing and progressing its practice.

The requirement that the reasons provided within this process be public reasons was emphasized and unpacked in Chapter 3. This was done by way of engaging with—and offering a novel resolution to—the ever-contentious debate between retributivism and consequentialism in light of the moral and empirical constraints required by public reason. Rather than assessing these theories each *en masse*, the chapter focused on the kinds of reasons that these perspectives produce and would inject into processes of deliberations and justification. Consequentialist reasons, at least limited to those geared toward realizing public ends and with sufficient empirical clarity, were deemed to suffice in this respect. In contrast, classic retributive reasons—desert claims—were insufficiently public, shown to be both morally controversial as well as empirically opaque. Consequently, the chapter concluded that retributive reasons ought to be excluded from processes of sentencing deliberation and justification.

Deliberative democracy's promise for managing political pluralism in sentencing was also shown with respect to participants. Chapter 4 explored the framework's expectations of its citizens, though focusing on one especially controversial citizen's participation: the victim. Here it was noted that the notion that crime victims should be able to provide input into sentencing decisions was rejected by scholars on the basis that the public decision-making would be corrupted by private interests. At the same time, scholars lacked any normative standard against which to assess whether and how they could legitimately contribute. In response, the chapter demonstrated that deliberative theory could clarify this standard and, viewing victims as citizens, reconcile their participation with sentencing's public orientation. More than this, it showed that victims could, in fact, contribute to the epistemic quality of these decisions. While accepting that this reconciliation was only theoretical, the chapter pointed to empirical research which

suggested that, with the right institutional configurations, these contributions might also be realized in practice.

Building on its analysis of processes of public reasoning, Chapter 5 argued the centrality of public justification. The importance of this fact to the legitimate criminal sentence was noted throughout the dissertation but demonstrated forcefully in Chapter 5. This was achieved through engagement with the issue of mandatory minimum sentences and the way they preclude justifiable sentences both quantitatively and qualitatively. Democratic legitimacy was, in this context, reflected in the intuitions of justice and individual rights protected by the Charter's section 12 right not to be subject to cruel and unusual punishment. While deference to Parliament has shaped the Supreme Court's construction of the issue in narrower terms than democratic legitimacy required, a fuller appreciation of both the essential constitutional problem caused by mandatory minimums, as well as the Court's role in light of deliberative democratic standards, offered a constructive path forward for jurisprudence in this area.

The problematic influence that mandatory minimums have on the ability of judges to give justifiable sentences drew attention to the deliberative significance of *ex ante* constraints. This theme was continued into Chapter 6 by exploring the role of sentencing guidelines in shaping deliberation and the ability to give good reasons for sentences. Here, highly structured sentencing guidelines in the American and English models were also shown to have deliberative shortcomings. Yet, recognizing the potential of external inputs to address both accountability and coordination concerns, the chapter elaborated an alternative, experimentalist model of governance. Here, the chapter outlined a novel role for sentencing councils as a means of enhancing the ongoing learning from and between sentencing courts—one that fostered exchange of best practices and relevant considerations while leaving sufficient room to ensure justifiable sentences on a case-by-case basis.

Through these explorations, this dissertation makes original contributions to criminal justice scholarship on a number of levels. On one, it demonstrates that deliberative democracy offers a political framework that fulfils the needs of criminal theory at a general level, simultaneously substantiating criminal justice's public character and legitimizing its public power. In this respect, this dissertation has shown that, in theorizing criminal justice, the role for political theory—and democratic theory in particular—is much more than delineating limits of

permissible state action. Instead, a sufficiently rich political framework can inform our conceptualization of crime itself, our views of the sentencing process, the proper relationship between citizens and sentencing, the meaning and significance of constitutional rights and adjudication, and so on.

In making this case for deliberative democracy in the sentencing context, however, this dissertation has also contributed by way of addressing individual issues and debates in criminal scholarship at ground level. Methodologically, rather than theorize deliberative sentencing in the abstract, the relationship between criminal and democratic theory has been drawn out by intervening in multiple, specific conversations. Contributions in these respects are therefore multiple and each largely independent of the conclusions of other chapters. Consequently, those of more limited interests—for instance, those interested only in structuring victim participation, or only in the development of Constitutional jurisprudence—may benefit from individual chapters without necessarily digesting or acting upon the entire text.

In addition to these contributions that focus on the *needs* of criminal scholars and theory, this dissertation has also contributed to sentencing literature in a more explicitly normative way. By applying deliberative theory to sentencing, it has injected imperatives into scholarly debates and asks scholars to account for these democratic ideals in their own thinking. Fundamentally, the dissertation argues that scholars need to take deliberation and public justification seriously. Arguably, these demands are not especially radical. The fact that these ideals are reflected in conventional procedural ideals of sentencing and articulate the thrust of scholarly intuitions on issues like victim participation and mandatory minimum sentences, suggests that a deliberative theory might be latent in sentencing. Nonetheless, the full import and operation of these ideals have yet to be realized, and in this respect the dissertation calls attention to this fact.

Future Directions

To the extent that this dissertation has shown that there is reason to be optimistic about the role that deliberative democracy can play in framing criminal sentencing, and to the extent that the normative ideals of deliberative democracy are themselves compelling, further work in this area should follow. On one hand, while this work contributes to theorizing sentencing in deliberative terms, any such theory developed here is exploratory and incomplete. Consequently, a fuller philosophical account of deliberative democratic sentencing should be forthcoming. For

instance, while this work offers some insight in this respect, a deliberative theory of judging and its ethics, and how this relates to and differs from judging in other contexts, might be of particular value.

The promise of deliberative democratic theory, demonstrated in the context of sentencing, also suggests inquiries into its appropriateness as a framework for theorizing public decision-making in other parts of the criminal process. For one, initial decisions to prosecute also go toward addressing alleged public wrongs by exposing them to the very sentencing decisions explored in this dissertation. In Canada, and throughout the common law world, such decisions are explicitly made on the basis of the public interest.[833] Moreover, here too do decision-makers need to navigate a variety of considerations and perspectives in making that decision.[834] Accordingly, a deliberative perspective may have normative and practical significance for decision-making prior to conviction as well and warrants investigation.

Beyond filling theoretical gaps, there is also a need for development of this dissertation's focus along practical lines. While some of the arguments in this work—for instance those regarding the development of section 12 rights—do not require empirical investigation, others—such as those regarding the potential for victim participation—explicitly identified outstanding empirical questions. So too might empirical research be needed to monitor how a procedural focus on deliberation affects the substantive results of sentencing. Beyond these, there are perhaps more fundamental questions that might take priority.

In this respect, judges' legal obligations to give reasons for their sentences is a natural starting point for exploring how reason-giving is understood and given effect in Canada.[835] From a doctrinal perspective, there has yet to be any scholarly study setting out and examining legal interpretations of this duty under Canadian law. Consequently, there remain a variety of unanswered questions related to how Canadian judges understand the nature, purpose, and scope of this duty. The contours of this legal obligation would, once delineated, be an important site for critical analysis in light of democratic understandings and offer direction for change.

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[833] Public Prosecution Service of Canada, "Decision to Prosecute" in *Public Prosecution Service of Canada Deskbook* (May 14, 2019), online: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf>.
[834] *Ibid* (for instance, the victim, the police, and so on).
[835] With respect to front end sentencing: *Criminal Code* s. 726.2; on back-end parole decisions, *Corrections and Conditional Release Act,* s.101(e).

There is also empirical work, on both sides of the bench, that would complement and expand on any doctrinal analysis. Independent of legal perspectives on the duty to provide reasons, questions persist regarding how and how often judges, in practice, do give reasons. Answers might be sought in regard to frequency, depth, subject matter, and intended audience, among other issues. Though some Canadian courts have lamented their collective failure in giving substantive reasons,[836] the empirical analysis used in support of their observations is now more than three decades old.[837] International literature on like obligations in other jurisdictions is also thin,[838] and suggests any contributions in the Canadian context might be of significance beyond its borders.

Given the importance of reason-giving for those on the receiving end, empirical explorations should also lead to study of how stakeholders, and offenders in particular, experience this feature of sentencing. While perceptions of legitimacy are essential among the public generally, they are particularly crucial for those who experience the brunt of the sentence. As was noted in Chapter 3, this is not only the case for moral reasons, but practical as well. If criminal sentencing is to have any role in effectively bringing offenders back within the normative community, it is crucial that state interventions are not only justified but perceived to be as well.

[836] See e.g. *R v Vigon, supra* n224 at para 60.
[837] Young, *supra* n232.
[838] Hamilton, *supra* n223.

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