

Examining the case for more Jury Participation in Sentencing

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I acknowledge the Ngunnawal people as the traditional custodians of this land, and would like to add that I think that when we are talking about juries' role in sentencing one of the most exciting and innovative Australian solutions is Koori courts and other indigenous courts in different parts of Australia, ways of incorporating members of the community into, at least, recommendations about sentencing. So, even though I've been invited along here as the 'dangerous radical' to suggest ideas from elsewhere that ought to be thought about, I think there's a lot of very interesting work that's already taking place in Australia.

I'm going to be examining what I think is the very valuable contribution that Chief Justice Spigelman made when he started talking about increasing the role of juries in sentencing and, without commenting on the specific suggestion he came up with, deal with the more fundamental issues that lay behind it. That's really to do with the democratic deficit in justice, and secondly the role of judges in relation to juries.

Let's have a look at an image of the democratic deficit. You can see there the U.S., at least for State courts and general, France, and then Australia. Red means popular; purple is somewhere in between, but certainly in many cases elected, and blue means professionals. You could think of the last couple of hundred years, in relation to juries, as being a battle between professionals and democrats, trying to tussle for control over different elements of the criminal justice system.

If we look at the U.S. – and, you know, I should say that there's a lot of arguments against democracy, it's not always a good thing – the prosecutors are frequently elected, although, with federal prosecutors there were many sacked, because they didn't support the republicans. There are grand juries, rather than committal hearings, that tend to deal with felony cases, and then a jury makes the decision about verdict, and then sentence; well, it's actually six states that have felony sentencing for non-capital cases. Most states have jury sentencing for capital cases, and then other cases have elected or appointed judges, so there's a bit of a mixture there; finally, at the appeal stage, it's judges.

So, if you were giving it a score out of five, of the stages that had democratic participation, you'd give the U.S. four out of five.

Let's turn to France. There's a relatively secret process before anything gets near a court, with the prosecutor, the investigating magistrate, and then a little process not many people know about where a senior panel of judges just vet the papers to make sure the evidence is appropriate. Then it goes to a jury, which is a mixed panel of three judges and nine lay jurors, and that jury also passes sentence. If somebody objects to that, if there's an appeal, it goes to another jury, this time having twelve lay people and three judges. So, if you were giving France a score out of five you would say that three of the five stages involve some sort of democratic participation.

Let's look at Australia. We have professional prosecutors, for the most part professional magistrates who hear committals, juries for verdict, and then the sentence and appeal are heard by judges. So, if you're giving Australia a score out of five, you would say One.

So, U.S. four, France three, Australia one. It's an interesting issue. Is there really a democratic deficit? We don't have grand juries; there were some at the early stage but they weren't used very much. There were military tribunals, of course. It was actually quite a long period before trial juries got going in Australia. There aren't any sentencing juries or appeal juries in Australia, but there is a range of other lay participation practices in Australia, which in some ways lead the world. The use of lay people on tribunals, particularly mental health, guardianship and a whole range of administrative appeal ones involve lay participation.

They're not exactly juries, because they're standing groups and we know, from all the jury research, that people who go on juries more than once start to become more punitive; so, in terms of criminal justice, you want 'oncours' as much as you can; you don't want people coming back too often.

There are also indigenous sentencing courts and restorative justice conferences, which do have a role in the outcome, in which there is open discussion and people participate and contribute to the outcome. While it's not technically sentencing, it's certainly indicates a form of increasing democratic participation.

In brief, the second issue which is a relatively minor point about the judges –there are many ways in which judges in the U.S. – but I've seen it in Australia too – get closer to juries, and get to understand them more. Jury orientation visits, where judges sometimes give the jury information about the process are highly valued when they are done. In the U.S. the voir dire, which we tend to think of as a complete waste of time, is actually a bonding experience in which judges get to know juries. Usually they'll get to know their football teams, and their newspaper preferences, and some of their attitudes to things, but it's a way of building up trust, which is a key to the success of the criminal justice system. The voir dire, even though it's very time-consuming, tends to do that.

Then, a debrief with jurors after verdict; some of the judges I talked to in Chicago routinely invite jurors back to their chambers for a coffee, and to ask them any questions they want. The judges said they learn a lot from that, and they never get inappropriate questions. It's an idea whose time has come.

The fourth and most important initiative is putting judges on juries. I know the Law Reform Commission New South Wales is a little bit reluctant to suggest this, but the U.S. experience is while it may not improve the quality of the decisions, it improves the quality of the experience for jurors. The New York study by Vera said that having judges on juries made an enormous difference to the quality of the jury experience for everybody else. So, it's something that's certainly worth thinking about; it may also improve judges' respect for, and understanding of, juries.

It's pretty unlikely that judges will act in any kind of bullying way; there's no evidence at all that judges, or lawyers, have behaved inappropriately in the juries that they've sat on.

Let's look at why juries developed, and then go on to some other more practical issues because I think we need to go back and have a deeper look at what juries are all about.

When juries were first developed there were two ways to go. Up to the 10th, 11th, 12th Century, they'd used ordeal as a way of extracting the truth, and that was completely ridiculous. The Pope finally told them that, so there were two different ways that our traditions went. One was to have an inquiry, and that was the continental way, and occasionally that involved torture. The other way was just to get a group of citizens together to vote on what they thought really happened, and maybe do some research on the ground, something that current jurors are not supposed to do.

That was a good reason for asking the views of ordinary people – it is probably that you'll get just as good a response as if you get a professional to do an enquiry. The common law system put that faith in group of people deliberating, even though at that stage they weren't ordinary people, they were important people.

The second reason, and this is fundamental to American ways of thinking about juries, is that they are a protection against state tyranny. If the state is trying to charge one of your newspaper editors with seditious libel, and this was the most famous case, then the jury will say, 'No'. Regardless of what the prosecutor said, regardless of what the evidence is, we're protecting liberty, here; we're protecting freedom of speech'. In a sense, the jury ignores the law in favour of justice.

That view has disappeared a little bit, and the whole idea of a jury nullification, as it's called, has largely fallen out of favour, but nevertheless it is an important part of the tradition, the reason why juries got going, that they act as a counterforce against state authority and, more recently, overweening prosecutors; Justice Byron White of the U.S. Supreme Court, I think, argued that it's still an important counterbalance.

The third reason, which is particularly the case in Eastern Europe, Latin America and countries that experienced fascism, is that sometimes the old judges weren't particularly respected by the new democratic regime, and so bringing juries in was a way of increasing the legitimacy of the system.

So, there are many historical reasons why juries make a lot of sense; there are also some contemporary practical reasons, and one of them is that they're particularly good at fact finding, particularly in relation to trial juries. The reason is not because they're, individually, all that smart – you know, they're no smarter than you or I – but as a group, it's that diversity of viewpoint *plus* deliberation that produces the outcome. If you only get people to vote on sentence, which is what the Tasmanian study did, that's very valuable. There's a long tradition of that; that's how the Greeks and Romans did it so it's perfectly respectable; the theory about juries is that it's the deliberation – doesn't matter how they start off – listening to and respecting each other in a diverse setting that produces an appropriate outcome.

Secondly, jurors learn a lot about society, democracy, through participation and the experience, and participation becomes a school for citizenship. De Tocqueville was one of the main French visitors to America who extolled this point of view, and said, 'even if the decision is no better than that which a judge would make', (a view endorsed by some), 'nevertheless, participating in the experience of democratic practice ennobles people, gives them more respect for democracy, and it trains them in how to treat each other respectfully'. Of course, it doesn't always, as some of your cases show.

Thirdly, this is a point that John Dryzec at ANU has made – and there are quite a few people who talk about jury sentencing who say that it’s particularly suitable for dealing with moral and political dilemmas – why would a judge know more about a moral issue that’s tearing society apart than a group of diverse citizens? So, when there are major political and moral dilemmas involved, and no simple answers, then getting a group of representative citizens together is probably the best way to do it.

Finally – just as a cheap aside – being on jury duty increases people’s satisfaction with the justice system. Now, I don’t really believe much in those opinion polls; they are probably just getting at deep-seated anxieties about social order and so on; they’re not actually very useful, but nevertheless if you want to increase people’s stated confidence in the justice system, give them jury experience. That’s the only thing that works; you can have propaganda campaigns all you like; you can put stuff into schools; there’s lots of different ways you can try to encourage people to have more faith in the system, but the only one that works is jury participation

Let’s move on to juries and sentencing, and then I’ll come to some practical suggestions.

The first one that I’ve alluded to is that sentencing is really about balancing moral principles. They’re not legal principles – deterrence, rehabilitation, retribution – they’re moral principles, and so you could argue that a jury is probably the best type of institution to grapple with those types of moral dilemmas.

Secondly, as Justice Harrison said last night, there’s no evidence that anything judges do, in terms of sentence, makes any difference to the crime rate. In fact, you could cut the prison population in half and it would have no real effect on the crime rate. That’s what the criminology evidence supports; that’s not just a judges’ claim. We tell our students, ‘don’t believe anything judges say; look at the evidence behind it’. Well, the evidence behind this is solid; it basically doesn’t make any difference. So, if it’s not a matter of trying to work out the most appropriate penalty in order to have an outcome, why do you need a professional doing it? Why not have lay members of society?

Thirdly, if even my punishment has no real effect, treatment does. There’s lots of successful treatments, and they all cost money. Now, if you have a jury asking for resources then they’ve got more democratic credentials to complain about it, and stir up the Government to provide the funding.

And then fourthly, a point that prosecutors don’t agree with me [on], but where prosecutors are responsible for sentence, as they are in Belgium and in several other European countries, they’re actually much better at maintaining consistencies than any individual judge because they have the complete data about all of the sentences, and their office can bring it all together when they’re making recommendations for sentence. While we can argue about that, I would say there’s a strong case that prosecutors are better at making recommendations for sentence than any individual judge.

Let’s look at principles for extending jury use. I’m going to be somewhat conservative here, so disappointing you if you thought I was going to have something too radical, but basically what I think we should do is introduce juries in particular areas where there is a very strong case – probably in a minority of issues – where there are strong reasons for doing so, and particularly where there are moral or political dilemmas involved, where the

community is divided, and the issues might be new, and maybe when the Government or its offices are on trial.

So, my two suggestions are – and this is not sentencing – to have a grand jury, convened by the prosecutor when either the prosecutor or the defence believe that there are major matters of public interest, and where they feel like a jury of citizens is in a better position to determine that public interest than the prosecutor, or when the politicians are involved and it's better to have some sort of citizen participation than [for] the prosecutor to make a political call, also for credibility reasons. But, unlike [in] the US, it would be critical that the defence has a full participation in this grand jury. Most American grand juries, according to lawyers who have looked at them, are a complete 'rubber stamp'.

Secondly, in the very few cases where there are dangerous offenders or people who are kept in prison beyond the term of their imprisonment, there are major public issues involved in that. There's a strong case for having a citizen jury to make that decision, rather than a professional judge. They would of course take evidence from the experts, but they would be weighing up liberty issues against public safety issues, which are fundamental to any democratic process, and therefore it would be appropriate, in that case, to have juries.

There are other sorts of possibilities as well, particularly when politicians are on trial. Think of the way in which Nick Greiner got a bum rap, basically. It seemed to be an unfair process, and in retrospect that's what a lot of people felt, whereas if there was an appropriate citizen jury, that heard all the evidence, then it's likely that that would have been considered a much more credible process. Impeachments, completely discredited after the Clinton impeachment in the US. Bills of Attainder, well, puritans like them but nobody else does.

And so, finally, my conclusions are that we should look at possible opportunities for extending democratic participation in court processes. I've given a couple of very modest suggestions but I'm sure that you will be able to come up with a lot better ones. I think, initially we should limit it just to high public interest issues. Any innovation should be introduced with a view to evaluation, so that we know how it works, who it works for, and we can develop it thoroughly.