Democracy and Punishment: An Account of Legitimacy of the Criminal Process

Laura C. Roth

TESI DOCTORAL UPF / 2014

DIRECTOR DE LA TESI

Josep Luis Martí / R. Antony Duff University of Stirling

DEPARTAMENT DE DRET

Universitat Pompeu Fabra Barcelona

To those who are subjected to arbitrary power

Acknowledgements

I was fortunate to enjoy the time and support from many people along this journey. First of all, I want to thank the members of the Legal Philosophy Area at Pompeu Fabra University for sharing all these years with me. If I see legal and political philosophy different today, it is to a great extent because of their influence. I must also thank the members of the Philosophy Department at Stirling University, the Democracy Fellows (2012-2013) of the Ash Center at Harvard University, and the members and visitors working at the Normative Orders Excellence Cluster at Goethe University Frankfurt. Spending several months in with these people not only improved my work, but also allowed me to make great friends. Thanks to thank Archon Fung and Rainer Forst for receiving me and for the support.

During these years many people commented on earlier versions of different parts of this thesis. I am especially grateful to Andrew Ashworth, Juan Carlos Bayón, Richard Frase, Marisa Iglesias, Roberto Gargarella, Jane Mansbridge, Sandra Marshall, Jose Juan Moreso, and Andrew Von Hirsch for their time and their stimulating comments. Also to Elena Larrauri for helping me in the early stages. In addition, I must thank the participants in several conferences where I had the opportunity to present my work: ALSP Conference at University of Warwick (2011), IVR Conference at Goethe University Frankfurt (2011), ALSP Conference at Queen's University Belfast (2012), IV Meetings on Ethics and Political Philosophy at Universidade do Minho in Braga (2013), Workshop "The Future of Criminal Law" at the Robina Institute of the University of Minnesota (2014), and also the regular seminars at Pompeu Fabra University (2012 and 2014), Universidad de Chile (2013), and the University of Girona (2012).

I cannot omit the fact that all of this would not have been possible without the financial support from the Catalan government (AGAUR) through the "FI" scholarship for PhD students. I must mention the "BE" grant, also from the Catalan government, for the stay at Harvard University, the "European Doctor" (*Mención Europea*) grant from the Spanish Ministry of Education for my stay at Stirling University, and the DAAD scholarship for my stay at Goethe University in Frankfurt.

I am especially grateful to my two supervisors, Antony Duff and José Luis Martí, for the endless discussions, the numerous critiques, the great suggestions, and for pushing me to reconsider several arguments along these years. I did not follow many of their advices, which means that, if some ideas are wrong or unclear, it is in most cases in spite of their warnings. I thank Antony especially, for correcting my clumsy English; the mistakes that remain are the product of my later intervention. On the personal side, I must thank them both for their support, their patience, and their humour. Writing this dissertation would have been much more boring if I did not had the luck to work with them.

Finally, I want to thank Ursula and Beto, my parents, for being the strongest support, even from such a long distance; and also Gaby, for being the best sister in the world. Thanks to all my old and new friends, for staying by me in spite of my thesis. In particular, I am most grateful to Carina and Tania, for being such loving friends, and specially for making survival possible (and fun) in these last few months. Finally, my deepest gratitude goes to Oscar, who is the most wonderful partner I could ask for: for such an immense patience and for teaching me to be happier every day.

Abstract

Justifying the use of criminal punishment is a difficult task in plural societies where people disagree about what is right and wrong. Nevertheless, they need to decide together. I argue that punishment is only justified when people have moral reasons not to commit crimes, and when those deciding about public responses to crime make decisions that are non-arbitrary. When legislation is legitimate (based on the principles of participation, equality, and deliberation), these conditions are satisfied. However, against what a *naïve view* of adjudication assumes, adjudicative decisions are made in a context of discretion and disagreement. As a consequence, these decisions need to be legitimate as well, and institutions designed accordingly. I suggest the creation of juries and *super-juries* as a way of legitimizing the criminal process through citizens' participation.

Resumen

Justificar del uso del castigo penal es una tarea difícil en sociedades plurales donde la gente está en desacuerdo acerca de qué es correcto y qué no. No obstante, necesitan decidir conjuntamente. Argumento que el castigo solo puede ser justificado cuando las personas tienen razones morales para no cometer delitos y aquellos que deciden sobre las respuestas públicas al delito deciden de manera no-arbitraria. Cuando la legislación es legítima (porque se basa en los principios de participación, igualdad y deliberación), estas condiciones se ven satisfechas. Sin embargo, en contra de lo que asume una *visión naïve* de la tarea adjudicativa, las decisiones adjudicativas son tomadas en un contexto de discreción y desacuerdos. Como consecuencia, estas decisiones también deben ser legítimas, y las instituciones deben ser diseñadas de manera acorde. Propongo la creación de jurados y super-jurados como una manera de legitimizar los procesos penales a través de la participación ciudadana.

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…

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…

"…it's not easy to raise my hand and send a boy off to die without talking about it first"

12 Angry Men (1957)[1]

Probably thanks to the influence of liberalism, the criminal justice system is normally seen as a necessary element of any State, but also as a potential threat: as an inevitable but dangerous companion to life in society. Many efforts have been done to limit, control and humanize the institutions that administer punishment, and in fact a great deal has been achieved in the last few centuries. There has been a tendency to decriminalize conducts that were innocuous; the use of torture is not as common as it was before, death penalty only remains as an exceptional form of punishment, and even alternatives to prison have been introduced in many legal systems; there is more control over the police and the public officials, they are better trained, and procedures are more transparent than they were in the 15th century.

Nevertheless, some of the dangers remain active, and some of them actually appear to be growing in the last few decades[2]. These changes have been traced back to the growing influence of politicians and the irrational views of citizens in a domain that had been dominated by experts for some time. People want more safety, and more criminalization,

[1] The dialogue corresponds to the film.

[2] Maybe the most salient study of this phenomenon is Garland, 2001.

swifter procedures, and more people in prison. This phenomenon has been described as penal populism, and it seems to be a growing tendency around the world[3].

Criminal law experts have considered these tendencies and a considerable amount of literature has been produced regarding the limits of what ought to be politically decided, with the aim to make punishment more rational and more just[4]. However, most of the work has been done as a critique to the content of the law, and when it has referred to the way the law is created, it has advocated for a restoration of the role of experts in political decision-making[5].

On the contrary, the pages that follow offer an argument that points to the opposite direction: the criminal justice system should be a highly participatory and deliberative domain, and this goes for legislative institutions[6], but also for adjudicative ones. Regarding the latter, I will argue for a structural change in the system and the replacement of judges, prosecutors and courts for different types of juries, and defend a greater role for the accused and the victim in adjudicative decision-making[7].

This argument can be situated amongst a broader tendency in political philosophy to defend the democratization of political institutions with a stress on deliberation, and is inspired by the recent experiences in different kinds of domain. Some examples are participatory budgeting, citizens jury, deliberative polling, consensus conferences, 21th century town meetings, community auditing, but there are many others[8]. Nevertheless, in the case of the criminal law this trend is very marginal, although in recent years there have been some attempts to *rediscover the jury*, with those by Burns[9] and Dzur[10] at the top of the

[3] Chevigny, 2003; Pratt, 2007; Roberts, Stalans, Indermaur, & Hough, 2003; Zimring, 1996. However, there are also studies showing that public opinion is not as punitive as a superficial view of penal populism describes, and that the views of public officials are not that different in terms of punitiveness: see, e.g., Roberts, 1992; Varona, 2011.

[4] Ashworth, 2003; Díez Ripollés, 2004; Dolovich, 2004; Husak, 2008; Von Hirsch, 1998

[5] E.g., Ashworth, 1998; Ferrajoli, 2008; Pettit, 2001b

[6] This view has also been defended by other authors like Gargarella (2009), Johnstone (2000), and Martí (2009).

[7] The interest for the role and interests of victims is already a growing phenomenon in many legal systems, and in the literature about criminal law and criminology (See, e.g., Bergelson, 2009; Braithwaite & Pettit, 1994; Duff & Marshall, 2004; Fletcher, 1999; Marshall, 2004; Pizzi, 1999; Roach, 1999; Zedner, 2002). However, the political dimension of the phenomenon is actually connected to penal populism, where victims are seen as a voice that deserves special attention, no matter how irrational their demands. The kind of approach that I will defend has nothing to do with the latter kind of approach.

[8] For an interesting analysis of some of these methods see Gastil & Levine, 2005. An immense crowd-source database of democratic innovations all over the world see *Participedia* (www.participedia.net)

[9] Burns, 1999

list. In addition, some fundamental empirical research has showed the positive impact of the participation in juries on the quality of democracy[11], pointing to the fact that there are reasons why the criminal justice system should be analysed as a piece in the broader democratic machinery, and showing that there are reasons to promote citizens' participation in this domain as well.

These are not, however, the kinds of argument that I will defend in the following chapters. First of all, the claim will be stronger than the ones one can find in the studies about the jury. I will argue that participation in conditions of equality and through deliberation are necessary elements of the criminal justice system's *legitimacy*, and also essential for the justification of the use of criminal punishment. The ground of this connection will be found in the relationship between, on the one hand, *the law* and, on the other hand, the reasons for action that citizens have not to commit crimes, and the reasons that should be offered by those who decide to use punishment as a response to those crimes. I will argue that legitimacy is necessary because these decisions are made in plural societies where there are disagreements amongst citizens about what is good/bad and right/wrong, but they need to decide together about what to do.

Second, I will focus on participation and deliberation in the determination of what *the law* is, and how it should be applied. I will not be paying attention to other benefits or effects of citizens engaging in participatory practices, either from the point of view of democracy understood more broadly, or from the perspective of improving the performance of the criminal justice system regarding the phenomenon of crime: I will not be asking whether this is good for crime control, efficiency, transparency, victim satisfaction, public satisfaction, etc.[12] In addition, I will not be focusing on further conditions that could make the criminal justice system more legitimate, if they are not connected to the decisions about *the law*.

Moreover, this paper aims to contribute to filling a gap in the political philosophy literature about legitimacy. With some exceptions, there has been a general lack of attention to what happens with the application of legislation once it was created, in spite of the fact that this

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[10] Dzur, 2012

[11] Gastil, Black, Deess, & Leighter, 2008; Gastil, Dees, Weiser, & Simmons, 2012; Gastil, Fukurai, Anderson, & Nolan, 2012; Hickerson & Gastil, 2008

[12] Although I will mention some of these problems as they appear.

stage of political decision-making also raises serious questions of legitimacy, especially in the case of criminal punishments. I believe there is a tendency to hold a *naïve view* of adjudication – according to which legitimate law is *mechanically* applied to particular cases – or at least to assume this kind of view for the sake of the arguments about the legitimacy of legislation. But this view is certainly flawed. Although focusing merely on legislative decisions is a defensible strategy, the application of the law should be taken into account because it might require rethinking, not only the procedures through which legislation is enacted, but also its content: in many cases it includes an explicit and/or implicit delegation of authority to adjudicators to decide about many issues that are a matter of disagreement.

In any case, more important than this critique is the point that criminal procedures are not just instrumentally connected to the application of legitimate criminal law, and the differences between legal systems cannot be understood merely as different ways of doing the same thing. Actually, they are more compatible with certain accounts of legitimacy than with others, and these accounts are not compatible with every institutional design of adjudication. Basically, the kind of account of legitimacy one defends for legislative decisions and institutions has enormous implications for the legitimacy of adjudication.

Before entering these discussions, I will start building an argument by looking at what has already been said about criminal procedures. In chapter 1 I will offer a brief review of the literature about the subject, both from a descriptive and a normative point of view. I will first describe the existing literature about models of criminal procedure, and then some normative accounts that have been offered in different legal traditions. I will argue that both bodies of literature are insufficient to guide institutional design, the main reason being that they ignore the question of disagreements and legitimacy.

In chapter 2 I will introduce the discussion about political legitimacy by starting from the very abstract. I will take a stand in the discussion about the concept and elements of legitimacy, including both an analysis of what it is and what it is not. The most important points will be, first, that any account of legitimacy needs to offer an argument both about particular *decisions* and about the value of political *institutions*, and that these two dimensions need to be interconnected; second, that legitimacy generates reasons for action of different types, even if it is not connected to a general obligation to obey the law. I will also present

the main types of account of legitimacy, and analyse how they justify the relationship between the two dimensions.

As I mentioned before, the discussion about political legitimacy cannot be confined to the legislative domain and in chapter 3 I will argue that, because there is discretion and disagreement in the application of the law to particular cases (the *naïve view* is mistaken), adjudication also needs to be legitimate. In order to develop this claim, I will offer an analysis of the different types, objects, sources, and amounts of discretion, and show that it is actually quite hard to determine how much discretion there is when applying the law to a particular case, together with a discussion of why discretion can be both desirable and problematic. Then I will discuss the connections and disconnections that exist between discretion and disagreement, followed by a review of the different kinds of disagreements that can be found when making an adjudicative decision. This chapter shows that discretion is not only interesting from a theoretical point of view, but sets the ground for a fundamental practical problem: how can we justify adjudicative decisions in circumstances of discretion and disagreement?

Different legal systems do not only reflect different kinds of aims in the design of their adjudicative institutions but, as I will show in chapter 4, these designs are also more compatible with certain accounts of legitimacy than with others, because they deal with discretion and disagreements in different ways. I will construct three models of criminal procedure as ideal types based on different views of what makes adjudicative institutions and decisions legitimate, and illustrate them by referring to the features of some existing legal systems. The purpose of this kind of exercise is to stress the close connections that exist between what makes legislation legitimate, and what makes adjudication legitimate in each of them.

The rest of the dissertation is a defence of a particular account of legitimacy connected to the justification of punishment in three steps. First, in chapter 5 I will argue against three alternative accounts of legitimacy of criminal legislation, and defend one based participation, equality and deliberation. I will argue that these elements make legislative institutions non-instrumentally valuable and their decisions legitimate for procedural reasons. Then I will argue that there are two conditions for the justification of criminal punishment: citizens ought to have a reason to act according to the content of the law

about *public wrongs* (the prohibitions, permissions, and obligations that, if violated, constitute crimes), and the *public responses* given by adjudicators (the use of coercion, both during the process and in the final decision about conviction and sentencing) should be *non-arbitrary*. I will explain how legislation based on participation, equality and deliberation can satisfy these two conditions, and justify punishment, at least in the legislative dimension.

But – and this is the second step – criminal punishment also needs to be justified in each of the particular instances where it is applied. This means that having legitimate legislation is not enough. In chapter 6 I will explain why adjudicative decisions also need to be legitimate if the two conditions for the justification of the use of punishment I just mentioned are going to be satisfied. I will argue that legitimate legislation marks what is *legally reasonable*, but since it often leaves space for more than one possible interpretation (discretion), both of public wrongs and of public responses, further sub-conditions will need to be satisfied in order to justify the adjudicative decision to punish. Some of the discussions I will open in this chapter are referred to the decision about public wrongs (When can one say that norms are action-guiding? When is the application indeterminate law non-retroactive?), and some to the one about public responses and the requirement of non-arbitrariness (When is the decision based on adequate and sufficient reasons? What does it mean to follow legislation? What can make a decision non-arbitrary in a context of discretion and disagreement?)

Thirdly, adjudicative institutions ought to be designed in a way that is compatible with the production of legitimate decisions, including mechanisms to deal with decisions that are illegitimate. I will discuss the problems derived from having public officials making these kinds of decisions, and how to deal with some of them. Then I will also suggest the alternative of having juries as the central piece of the adjudicative system, but that in order to perform their task in a legitimate way they will need to be quite different from the ones that we know. However, because the considerations based on legitimacy come both from legislation and from adjudication in particular cases, there is a need to design institutions in a way that allows for the *adjustment* of what is decided in these two levels. I will suggest the creation of an intermediate institution (which I call the *super-jury*) that is responsible for controlling that particular decisions are legitimate, that punishment is not based on illegitimate legislation, and also for making proposals regarding legislative modification.

Although there are only a few explicit references along the chapters, the arguments are clearly inspired by republican political philosophy, especially on the ideas of self-government and of freedom as non-domination (which can only be achieved living with others as citizens under the rule of law). More precisely, the arguments about coercion (as a serious form of interference) are based on the idea that it can only be justified when it tracks the interests of those affected by the decision, according to their views. Since the discussions I will engage in are about political legitimacy, I will not be starting with a defence of the republican position, but introducing it only to take a stand when it becomes necessary, within those discussions about legitimacy.

Chapter 1 – Models and accounts of the criminal process

Introduction

Let us imagine that in our community we want to design a new criminal process and that we are discussing which features it should have[13]. We will be asking questions like the following: who should decide? How? What should they decide about? And all of this in relation about what to do after a crime has allegedly been committed. Let us also suppose that we want the norms of the new criminal process to be coherent in relation to our general ideas about how the legal and political systems should work. The possibilities of institutional design are immense, and if we looked at how things are done in other (real) places we can find a great number of tools that we can borrow and use. But we would also immediately realize that these tools are more useful for certain tasks than for others. Therefore, we should first decide which specific aims we would like to achieve with our institutions.

Probably the most common answer would be that the criminal process should serve the aim of applying substantive criminal law to particular cases: the realization of the rule of law through the determination of what happened in a particular case, and the adjudication of certain consequences that are prescribed by that same law. Usually, legislative institutions are the ones in charge of determining the content of the substantive criminal law through democratic procedures: they decide which conducts will be considered criminal and which punishment should follow from the verification that these crimes were actually committed in particular cases. However, another immediate response would be that the process should also aim at protecting alleged offenders' rights that are also part of the legal system (usually enumerated in a Constitution). The criminal process would merely be an instrument to the achievement of these aims. Based on this view, the differences between legal systems could be described as just different ways of doing the same thing.

[13] The usefulness of such an exercise can be criticized by saying that it is impossible to be in such a situation. I believe that most of the arguments presented in this chapter are also relevant to the discussion about institutional reform, and the strategy responds to the decision to simplify the argument by not thinking about the features of existing legal systems, and the special difficulties there might be in changing them.

But the criminal process can also serve other kinds of aims: satisfying victims, reconciling them with criminals, raising awareness about the phenomenon of crime, calling people to account, etc. At this point we could ask ourselves why not decide what the best ends are, and then use our creativity in order to imagine institutions that would serve those aims? In doing this we would be going from theory to practice. But this would be complicated, because we would not really know what the effects of institutions would be until we used them. Of course, we could insist in that it is the best way to proceed. However, it might be preferable to consider another possibility first. As I mentioned at the beginning, we can look at how things are done in the real world and try to learn some lessons from it. I think that this second strategy could be useful because we can benefit from the experiences and the creativity of other communities and other legal systems. Maybe in the end we will find out that we do not want to borrow any of their tools, either because we do not agree with the ends they serve, because we found better tools to achieve those same ends, or because these systems are incoherent or defective. But this does not mean that the strategy is useless. After all, there is much knowledge that has been acquired through practice and that we should not simply ignore.

When looking at how criminal procedures[14] work in different legal systems, if we only paid attention to particular norms or practices we would miss something important: the fact that they work in a certain way depends on the interactions between the different pieces of the system where most of the rules do not make complete sense without the others. Therefore, I believe that looking at *models* of criminal procedure is much more productive than analysing specific features in isolation. In the literature about the criminal process one can find many examples of models that try to make sense of the institutional design in different legal systems.

Quite probably, if one asks most lawyers about which are the main models of criminal procedure, they will refer to the basic distinction between "adversarial" (or "accusatorial") and "inquisitorial" systems[15]. However, the dichotomy has been presented in several ways in the literature, and it is not always clear what they refer to, or whether the reference is

[14] I will use the terms process and procedures synonyms.

[15] The names given to these categories are sometimes different, and in fact the idea of an inquisitorial system has sometimes a negative connotation, referring to authoritarian conceptions of criminal procedure (Langer, 2004, p. 19). There is also a third category, the "mixed" model, but it is either a result of the combination of elements of the other two (and therefore it is not considered in many accounts), or a category that can be subsumed into one of the models (the inquisitorial system), as I will explain below.

even useful. In some cases the intention is to offer a description of different systems, and in others to offer a normative argument about what the process should aim to do and how. As we shall see, it is sometimes quite difficult to distinguish between these two strategies: authors who intend to present normative models can be in fact describing the practices of a particular legal system without questioning them, and sometimes those who purport to describe legal systems are in fact taking many normative considerations into account, even when they do not openly adhere to any of them.

My aim here is to present some of the most relevant literature that has been produced about this subject to offer a brief description of the context in which discussions about institutional design usually take place. Then I will explain why this literature is found wanting as a guide for institutional design.

1. Descriptive models of criminal procedure

1.a. As a description of historical categories

The adversarial system is the one that can be found in common law countries, especially in the US and England and the inquisitorial system is characteristic of Continental Europe (also called the "Romano-Germanic tradition"[16]). These two models developed as a result of the fall of the Western Roman Empire around the thirteenth century[17]. Before that, "criminal procedure throughout the whole of Western Europe seems to have been more or less homogeneous. For those caught in the act, or whilst running away, there was a barbarous summary procedure"[18]. If the guilt was disputed, the accused could either take an oath, "together with a group of oath-helpers" (she should find a sufficient number of neighbours who would swear with her), or she should undergo an *ordeal* (torture, basically), administered by priests[19].

16 Spencer, 2002, p. 3
17 Langer, 2004, p. 18
18 Spencer, 2002, p. 5
19 Spencer, 2002, pp. 6–7

In 1215 the Church condemned the ordeals and "the resulting gap was filled in different ways in different parts" of Europe[20]. In continental Europe the kings and princes took over the investigation that was carried on by the Church and "this would take the form of questioning the suspect and the witnesses, recording their statements in writing, and eventually deciding the matter […] on the basis of the file"[21]. This is the *inquisitorial system*. On the other hand, in England the solution was "to summon a group of citizens […] and to force them to answer under oath the same question as God was formerly asked to answer through the ordeal: namely, is he guilty or not guilty?"[22]. Here "the enforcement of the criminal law was largely a matter of private enterprise"[23] until the nineteenth century, when a professional police force was created[24]. This is what we usually refer to as the *adversarial system*[25].

At first the procedure used in continental Europe was more rational and civilized than the English one, where a person could be convicted for any reason, but then the continental procedure deteriorated "by adopting the systematic use of torture" [26]. In general, the inquisitorial procedure was secret, based on a written dossier[27], with no division of functions between prosecuting and judging, and "the only 'legal proof' was often the defendant's confession"[28].

But after the French revolution another fundamental change took place[29]: a new *Code d'instruction criminelle* was created by Napoleon and the inquisitorial procedure adopted some of the features of the English one (like the incorporation of juries deciding serious cases with the judges, or the division of functions between an investigating judge and a sentencing judge or court), becoming a *mixed* or *reformed* model[30]. This code was very influential in the rest of Europe as a consequence of the French occupation. In any case,

[20] Spencer, 2002, p. 7
[21] Spencer, 2002, p. 7
[22] Spencer, 2002, p. 7
[23] Spencer, 2002, pp. 13–14
[24] And a centralized public prosecution was not created until 1985.
[25] There is, however, another use of the term that refers to the procedure that prevailed in Europe during the Dark Ages until the beginning of the thirteenth century (Damaska, 1972, p. 556). I am not considering this use here.
[26] Spencer, 2002, pp. 7–8. However, there is some discussion about whether the use of torture was in fact a feature of the inquisitorial system. See Damaska, 1972, p. 558.
[27] Damaska, 1972, p. 557; Spencer, 2002, p. 9
[28] Damaska, 1972, p. 557
[29] Damaska, 1972, p. 558
[30] Damaska, 1972, p. 558; Spencer, 2002, p. 9

continental European procedures in the 20th century resembled more or less this *reformed inquisitorial model.*

During the same century in England – and also in the US, where the English model of the process was adopted[31] – the procedure remained *adversarial* in the sense that it was still a contest in front of an arbiter, with an independent jury that made the final decision. However, the introduction and rise of plea-bargaining as the fundamental piece of the criminal procedure reduced the role of public trials in front of a jury to an exception of the system, where the normal way of dealing with cases is through a private negotiation between prosecution and defence counsel[32].

What I presented so far are the two historical models that gave origin to the adversarial/inquisitorial dichotomy. But this might not be what people refer to when they talk about these two traditions in this sense. In fact, in more recent times, it became obvious that the term "inquisitorial" no longer represented the features of existing legal practices in continental Europe where the process was a *mixed* one, and the names of the categories that are part of the dichotomy have sometimes been modified. Maybe it would be more accurate, for instance, to talk about *adversarial* and *non-adversarial*[33] procedures. But leaving this terminological issue aside, today the identification of the two models in historical terms is a difficult task for many additional reasons.

First, it is quite hard to determine which features are necessary characteristics of each model. Some of them disappeared with time, and not all of them even existed in every country belonging to the same tradition. Second, it is difficult to determine which characteristics are central and which are merely secondary. Third, and related to the first two problems, even in a shorter and more recent period of time, there have been many reforms and it is quite hard to determine whether certain legal systems even remain as part of each model or not. Fourth, there is some disagreement about whether certain features belong to one model or the other, like the jury (present both in common law countries and

31 Hatchard, Huber, & Vogler, 1996, p. 10

32 According to the U.S. Sentencing Commission, in 2009 96,3% of the defendants in the federal system pleaded guilty (Sourcebook of Federal Sentencing Statistics 2009). In the case of the United Kingdom, according to the Crown Prosecution Service, in 2010-2011 5,73% of the convictions where decided after trial. The rest of them where are result of a guilty plea (Annual Report 2010). About the history of plea bargaining in the case of the United States, see Alschuler, 1979; Dervan, 2012; Langbein, 1979. About the United Kingdom, see Baldwin & McConville, 1979; Feeley, 1997.

33 Damaska, 1972, p. 562

in France, and adopted in countries like Spain only recently). Fifth, there are not only differences between the countries that supposedly belong to the same tradition, but also differences between procedures in the same legal system (for instance, they use a more inquisitorial procedure for minor offences and a more adversarial one for serious crimes). It would be plausible to say that the result of using these two models is that there are no countries that belong to any of them anymore. In fact, as Damaska explained in the 70's,

> "the historic orientation of the classificatory scheme coupled with the fact that contemporary continental criminal procedures are somewhat in the middle of the range between the two extremes makes that scheme unsuitable for the purpose of studying the contrast between modern continental and common law systems"[34].

In addition to these difficulties, there has been some discussion in the last decades amongst comparativists regarding the processes of convergence and divergence between criminal procedures. Some claim that there is a process of *americanization* (other countries reform their systems in order to resemble the US[35]); some argue that both traditions borrow elements from each other[36]; others that there is a "translation" of features from the US to Europe, but that this only created more divergence between European systems[37]; and others simply claim that "the two-model system has broken down"[38] (including some who argue that the reason in the case of Europe has to do with the influences of European Convention of Human Rights and the European Union[39]). In any case, it does not seem to be possible to speak about two historical *models* anymore.

Finally, even if the differences between models still existed, one can wonder whether they are of any use for any other purpose beside description. It might be the case that these legal systems are completely incoherent, and that seeing them as models does not even allow us to explain how they work and why. If this was true, there is not much we could learn from them. Models that are based exclusively on historical characteristics are not useful as an argument for choosing one institutional design instead of another.

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[34] Damaska, 1972, p. 560
[35] For a discussion – and critique – of the *Americanization* thesis see Langer, 2004.
[36] Jörg, Field, & Brants, 1995, p. 54; Spencer, 2002, p. 3
[37] Langer, 2004
[38] Bradley, 2007a, p. xxiv
[39] Jörg et al., 1995, pp. 54–56; Spencer, 2002, pp. 37–65

This conclusion might sound too obvious, and not be very useful for the purposes of the thought experiment I presented at the beginning of this chapter. But it does make a difference for the analysis of institutional reforms in the case of existing legal systems that supposedly belong to one of these traditions. Sometimes it is argued that the mere fact that some institutional design does (or does not) belong to a certain historical model is a reason for (or for not) adopting it. The only ground I can think of in order for this argument to work is the claim that those who work within a system might resist change if it does not *fit* the way things were traditionally done. However, this just means that change might sometimes be difficult and it is not a reason for or against it.

1.b. As ideal types

One way of introducing at least some explanatory value into the construction of descriptive models is to use ideal types of criminal procedure. They are representations of reality that allow us to understand the internal relationships and logics of existing legal systems[40]. Although they are – like any ideal type – only a "mental construct (*Gedankenbild*) [that] cannot be found empirically anywhere in reality"[41], one can argue that the criminal processes of different countries, and even certain particular features of them, are more or less compatible with these types. Their usefulness lies, not in their descriptive power, but in their heuristic value[42]: they are not true or false, but more or less useful[43]. Furthermore, these ideal types match the two main traditions presented in the past section, but they are more than that: they are also structures of interpretation and meaning[44].

One account of criminal procedures as ideal types is the one offered by Langer. Instead of understanding "adversarial" and "non-adversarial" procedures as historical categories, he argues that it is more useful to classify criminal procedures according to their form. He calls them the "model of the dispute" and the "model of the official investigation"[45]. According to the first one:

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[40] Langer, 2000, p. 9
[41] Weber, 1949, p. 90
[42] See the disagreement, specific to the case of ideal types of criminal procedure, between Damaska (1972) and Fuller (1961).
[43] Langer, 2000, p. 9
[44] Langer, 2004, pp. 9–13.
[45] Langer, 2000, pp. 18–19. These two models are inspired by Damaska's models of criminal process that I will describe later (Damaska, 1986), but aim to reflect only the form of the procedure and not the way they

> "the criminal procedure is understood as a dispute or a contest between two parties, prosecution and defence, before a passive decision-maker. The dispute centres around the prosecution's attempt to prove beyond a reasonable doubt that the defendant committed the offense of which he or she has been accused. If the prosecution succeeds, then the prosecution wins; if it fails, the defendant wins"[46].

Some of the characteristic features of this model are a broad prosecutorial discretion, plea bargains, the existence of two separate cases (one of the defence and one of the prosecution), two separate pre-trial investigations, the fact that witnesses belong to the prosecution or the defence, and the questioning of witnesses through cross-examination[47].

On the contrary, in the model of the official investigation, "[the] criminal procedure is conceptualized as an inquiry made by one or more officials of the state in order to determine whether a crime was committed and whether the defendant committed it"[48]. Some of the elements of this model are compulsory prosecution (necessary, because the process seeks to determine the truth and a case can only be dismissed when there is no evidence), the absence of plea bargain (a guilty plea is considered an element of proof and nothing else), the existence of a unitary investigation and only one case (the case of the court) based on evidence that is produced and presented on the basis of the decisions made by the judge, the fact that witnesses belong to the court and that the court is the one who examines them[49].

As we can see, some elements of these models do not coincide with their historical descriptions, although they *fit* the internal logic of the model. For instance, plea bargains fit[50] into to the model of the dispute, where the contest is mostly in the hands of the private parties. But in fact, the idea of a guilty plea and a sentencing discount were not introduced in the English system until the nineteenth century[51]. And many inquisitorial systems included some version of the mechanism in their procedure during the twentieth

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are related to the general aims of the State. These models also coincide with those presented by Damaska in 1972 as the "analytic approach" of the two models of criminal procedure (Damaska, 1972, pp. 561–65).

[46] Langer, 2004, p. 21

[47] Langer, 2000, pp. 19–23, 2004, pp. 21–22

[48] Langer, 2004, p. 22

[49] Langer, 2000, pp. 20–24, 2004, pp. 21–22

[50] Langer, 2004, p. 21

[51] Alschuler, 1979; Spencer, 2002, p. 17

century with different degrees of success[52]. Although Langer's models provide a useful explanation of some of the differences between the systems that belong to the two main legal traditions, he only treats them as "features"[53] of adversarial and non-adversarial systems (some of them might not have them, and some of them might have features from both models).

These two models as ideal types can be used to see the connection between certain institutional mechanisms and the form the procedure has. However, that is not enough reason to choose either of them. Why would we want to organize the criminal process as a dispute or as an official investigation? What is missing in this kind of description is more information about the aims these institutions can achieve.

This kind of account is offered by Damaska[54], probably the most influential author in the comparativist literature about criminal procedures[55]. He rejected the idea that the differences between the designs of legal processes in different countries (or traditions) were simply different solutions to the same problem, or "structural alternatives to achieving the same end"[56]. He explained that the aims of the two models were in fact different, and that they were related to the different institutional choices. Furthermore, in his famous book *The Faces of Justice and State Authority* he aimed to show that it is possible to identify some connections between the design of the legal proceedings (not only in the criminal case, but in general) and the dominant views about the role of government in society. He identifies two contrary inclinations:

> "One is to have government manage the lives of people and steer society; the other is to have government maintain the social equilibrium and merely provide a framework for social self-management and individual self-definition […]. Where government is conceived as a manager, the administration of justice appears to be devoted to fulfilment of state programs and implementation of state policies. In

[52] However, they "translated" the institution into the local "language". For an illuminating analysis of plea bargain as a "legal translation" in some European countries see Langer, 2004.
[53] Langer, 2004, p. 20
[54] In saying that Damaska offers information that is missing in Langer's account I do not mean to say that he wrote as a response to Langer. Actually, his account came out several years before.
[55] See Hatchard et al., 1996, pp. 6–7, although they criticize Damaska's typology for considering it too "naïve".
[56] Damaska, 1986, p. 11. See also Damaska, 1972, p. 562.

> contrast, where government merely maintains the social equilibrium, the administration of justice tends to be associated with conflict resolution"[57].

According to Damaska, this allows us to identify two types of legal process, based on "arrangements that are either implicit in the animating purposes or suitable to their realization, while compatible with the ideologies that lie at their base"[58]. But this does not mean that actual legal proceedings are designed as pure manifestations of one of these aims: usually, they "exhibit both conflict-solving and policy-implementing forms, often in complex and ambiguous combinations"[59]. Therefore, governments "occupy a wide range on a continuum stretching from one theoretical end point to the other[60].

The author calls these two models "the reactive state" and "the activist state"[61] and the kind of process that can be found in each of them are the "conflict-solving"[62] and the "policy-implementing"[63] type of procedure. The names indicate the kind of aim that guides the institutional design in each of them.

In the case of the criminal process in particular, Damaska described two models[64] that are very similar to those described by Langer and which he calls the "official enquiry" and the "party contest"[65]. But he adds that these two models are based on two distinct aims, and Damaska illustrates their influence by comparing the strength of evidentiary barriers for conviction. The first one is more "truth oriented", giving less weight to values unrelated to truth discovery, while the second is less so, and more open to the erection of evidentiary barriers for the sake of other values that are independent of the concern for fact-finding reliability[66]. These values are connected to the solution of conflicts between the parties.

Furthermore, Damaska explains that there is another dimension in which legal systems differ, and therefore also the criminal process. This other dimension is the structure of government (the model of authority), in which one can observe that some States follow

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[57] Damaska, 1986, p. 11
[58] Damaska, 1986, p. 11
[59] Damaska, 1986, p. 12
[60] Damaska, 1986, p. 71
[61] Damaska, 1986, p. 72
[62] Damaska, 1986, pp. 97–146
[63] Damaska, 1986, pp. 147–180
[64] He did this, both in the book already mentioned and in a previous paper: Damaska, 1972.
[65] Damaska, 1972, p. 577
[66] Damaska, 1972, p. 579

what he calls the "coordination model"[67], while others are organized according to a "hierarchical model"[68]. Damaska warns us that the structure of government is not *necessarily* linked to the function of the State, but he recognizes that "some combinations are harmonious while others create dissonance, stress and tension"[69]. In the case of the criminal process, this harmony can be found, on the one hand, between the "official enquiry" model and the *hierarchical* organization of the State, and on the other, between the "party contest" model and the *coordination* model of authority. The affinity derives from the fact that if the aim is finding the truth, the best ones should make the decisions, and review the decisions of others. On the contrary, if there are only conflicts between parties to be resolved, but no truth to be found, there is no need to have experts wielding power. There would actually be no criterion to choose them, besides their neutrality.

Damaska's interpretation of the aims was criticized by Grande. She argued that the difference between the two models is not the fact that one aims at discovering the truth more than the other, but that these two models are based on two different ways of understanding truth and justice: in the case of the adversarial system, the aim is to establish "interpretive truth" and to achieve "justice as fairness"; in the civil law tradition, the process purports to discover the "ontological truth" and justice is understood as a "thicker concept"[70]. These two different frameworks have an impact on institutional design. In the adversarial system, there is a confrontation between the parties in front of a neutral decision-maker, and the guiding idea is that "only a fair contest can bring about just results"[71]. Moreover,

> "the narrowing of judicial functions was indeed germane to the ambition of classic English liberalism to limit state intervention. The government was to be kept out of the citizen's life as much as possible and the role of the judge was to be limited in the criminal process. […] In the classic liberal framework, any intervention of the judge in shaping the proceeding […] was perceived as an unacceptable invasion of individual freedom by the State"[72].

[67] Damaska, 1986, pp. 23–28
[68] Damaska, 1986, pp. 18–23
[69] Damaska, 1986, p. 13
[70] Grande, 2008, p. 148
[71] Grande, 2008, p. 148
[72] Grande, 2008, pp. 151–52

On the contrary, in the European systems, the criminal process is a sort of collective enterprise to which all the parties (judge, prosecutor, witnesses and defence) contribute, and even the fragmentation of the official authority aims at enhancing the plurality of perspectives[73], thus contributing to the search for substantive truth.

The accounts presented by Langer, Damaska and Grande solve many difficulties of the models as historical categories. These models, constructed as ideal types, allow us to understand the internal logics behind the two main legal traditions, and to compare them. As I mentioned earlier, their value does not reside in their capacity to describe reality accurately, but in their usefulness for explaining why things can be done differently in different places. The fact that these models (in the case of Damaska and Grande) are constructed on the basis of the aims of the process allows us to understand some institutional designs in terms of their instrumental value.

Now, going back to our thought experiment of deciding which features our criminal procedure should have, ideal types are useful when it comes to deciding which institutional designs are more compatible with certain ends. It seems that, if we want to achieve justice as fairness, then we could do better by adopting an institutional design closer to the *party-contest* than to the *official enquiry* model. And the opposite seems to follow if we would want to promote substantive justice. However, two kinds of remark must be made about them.

First, constructing ideal types is not a merely descriptive exercise, because selecting the features one is going to focus on requires some normative considerations, although one does not end up providing a unitary normative argument. One identifies certain elements that would be desirable, and then constructs the each model around them. In order to see how this works it could be useful to compare it with the construction of a model where the aim of the process was the incarceration of poor and disadvantaged people, or the maintenance of the privileges and power in the hands of public officials. One could describe everything in the process in connection to those aims, but these aims are not selected, probably because they have no value, although we could construct explanatory models around them. The problem is that, if the ideal types are not merely descriptive, then there is a risk that the simplification introduced is actually distorting reality.

[73] Grande, 2008, pp. 154–55

A second remark would be that, looked from the opposite angle, ideal types are still idealized *descriptions*. They just give us information about what would it be *natural* to do if we wanted to achieve a certain end (instrumental rationality), but they do not offer a justification, either of the ends or of the means themselves, since there might be other (normative) reasons for not using some of them (e.g., that they are incompatible with other values that we defend, or that there are better means for achieving those ends). In order to find that sort of justification, we need a normative account.

2. Normative accounts

There have been several proposals of normative accounts of the criminal process. In this section I do not aim to present a review of the whole literature about the subject, but only to illustrate how reasoning about the aims and features of the criminal process has sometimes been done from a normative point of view, in order to explain why it is unsatisfactory, or at least incomplete.

I will refer to the accounts of Packer (US), Roxin (Germany), and Ashworth and Redmayne (England). In these three cases, the authors discuss which ends the process should have and then derive some consequences from them in terms of institutional design. My choice could be criticized as arbitrary, and in a certain way it is. There are other theories that I am intentionally leaving out, such as the ones defended by Duff[74] or Pettit[75]. But I have two kinds of answer. First, I want to present some accounts that are recognized as *classical* in the traditions they belong to. I have no way of demonstrating that this is the case, and in fact I think I am probably wrong in the case of Ashworth and Redmayne. But this would not render my argument completely useless: if some other author presents her or his account in similar terms, then my conclusions would also apply. Even if this answer is not convincing enough, there is an additional reason. Maybe a better way of qualifying my task in this section is to say that I will refer to some examples of what I think is the "usual way of thinking" about the aims of the criminal process in order to explain why it is problematic, and the accounts defended by people like Pettit and Duff do not face these kinds of difficulty[76].

[74] Duff, Farmer, Marshall, & Tadros, 2007; Duff, 2001
[75] Braithwaite & Pettit, 1990; Pettit, 1997b
[76] I will say something about the reasons why this is the case in this (Pettit) and the following (Duff) section.

One of the classical accounts in the US is the one developed by Packer in his book *The Limits of the Criminal Sanction*. He explains that there are two normative models[77] *inside* the criminal process, and that they reflect two conflicting aims: *Due Process* and *Crime Control*[78]. However, these "two competing systems of values"[79] are in fact two *tendencies* that work together in the criminal process[80], and both have an impact on the decisions that are made by the participants of the system (lawmakers, judges, police, prosecutors, defence lawyers, etc.[81]). In the case of Crime Control, the main value is efficiency in the repression of criminal conduct, because the latter affects social freedom[82], while in Due Process, based on a strong distrust of fact-finding processes, there is not a demand for finality but only a prevention of mistakes[83] based on "the primacy of the individual and the complementary concept of limitation on official power"[84]. What Packer explains in his book is how different features of the criminal procedure are related to these two systems of values. In the case of Crime Control, he explains that, amongst other things, "the process must not be cluttered up with ceremonious rituals that do not advance the progress of a case"[85] and that "the focal device is […] the plea of guilty; through its use, adjudicative fact-finding is reduced to a minimum"[86]. On the contrary, Due Process insists on "formal, adjudicative, adversary fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him"[87].

In the German context, Roxin explains in his book *Strafverfahrensrecht* that the substantive criminal law establishes which actions are criminal, and that we need a legal procedure that

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[77] Packer refers to "models", while the others do not. I will respect his terminological choice, but the reader will soon discover that he is not referring to the same object as the authors mentioned in the past section. In the three cases analysed here the authors will be referring to the ends that the process should have (it is in this sense that their accounts are normative) and to how the criminal process should be designed in order to achieve them. Whether these means-ends combinations should be called models or not will remain open for now.

[78] Packer, 1968, p. 153

[79] Packer, 1968, p. 154

[80] According to Damaska, "what Packer is in fact offering us are not two models of the criminal process. Rather he is presenting […] a stimulating depiction […] of two clashing inner tendencies: the tendency toward efficiency and the tendency toward protecting rights of the defendant. But […] this inner tension is part and parcel of the dialectics of any criminal process" (Damaska, 1972, p. 576). For the same kind of critique see D. Smith, 1997.

[81] Packer, 1968, p. 154

[82] Packer, 1968, p. 154

[83] Packer, 1968, p. 164

[84] Packer, 1968, p. 165

[85] Packer, 1968, p. 159

[86] Packer, 1968, p. 162

[87] Packer, 1968, pp. 163–64

can be used to verify the occurrence of such an action in order to apply legal punishment. The reason is that "in order for these norms to be able to fulfil their function of assuring the fundamental basis for human pacific coexistence, it becomes necessary that they are not just laws in the books when a crime is committed"[88]. This seems to imply that the basic function of the criminal process is instrumental to the implementation of the substantive criminal law. But Roxin also explains that the end of the criminal process has a "complex nature"[89]: the goals should be a) the material correctness of the decision (the conviction of the guilty and the protection of the innocent), b) respect for the formality of the procedure (avoidance of arbitrary decisions by State officials) and c) the "legal peace" achieved by the decision. He adds that "all these requirements are equally significant for a community that is organized under the rule of law"[90].

In the case of England one of the most salient normative accounts of the criminal process is the one defended by Ashworth and Redmayne. They argue that the criminal process should be based on two aims: accurate decision-making and the limitation of coercive power[91]. They explain that "this is in fact one of the central problems of criminal procedure: the need to reconcile a process which will bring cases to effective trial with the protection of human rights and the fundamental requirement of a fair trial"[92]. As for making accurate decisions, this aim is related to the implementation of the substantive criminal law (which has, according to this theory, a retributive purpose). The function of the trial[93] is then to determine whether or not a person has committed a particular criminal offence, and to protect the fundamental rights of the offender in the process[94].

According to these three accounts, the criminal process should aim at more than one end, and – surprisingly or not – these ends are more or less similar in all cases, regardless of the names they receive. One has to do with the social interest in dealing with crime (implementation of the substantive criminal law, and the accuracy of decisions[95]) and the

88 Roxin, 1998, p. 1 (my translation)
89 Roxin, 1998, p. 4 (my translation)
90 Roxin, 1998, p. 4 (my translation)
91 Ashworth & Redmayne, 2010, p. 23
92 Ashworth & Redmayne, 2010, p. 23
93 This account is centred in the trial, but it does take other phases of the process into account.
94 Ashworth & Redmayne, 2010, p. 23
95 Roxin also mentions social peace as an aim of the process, and this aim can conflict both with the determination of the truth and with the protection of rights. I will leave this consideration aside and suppose that the way in which social peace is achieved is by the implementation of the substantive criminal law and not by ignoring it.

other with limiting the power of public officials and protecting individual rights against the State[96].

There are many ways of explaining (or justifying) these similarities. First, it could be claimed that the mere concept of *criminal pr*ocess presupposes these specific ends that make it possible to distinguish it from, e.g., the *civil process*. When there is a substantive criminal law (whatever its purposes), there needs to be a procedure through which it ought to be applied, if it is going to be, as Roxin says, more than just laws in the books. Of course, we could leave it up to any citizen to enforce the substantive criminal law as she sees fit, but that would not give us any assurance that the facts are adequately identified. As to the control of State power and the protection of rights, things are more complicated. One can, of course, imagine a criminal procedure without any such an aim. However, nowadays this would be unthinkable, and any normative account includes this element. In fact, the mere idea of criminal procedure seems to imply the claim that it is the application of the substantive criminal law, but also to guarantee that this is not done through any means.

A second explanation for this coincidence (and closely connected to the point just presented) could be that nowadays liberalism seems to be the only game in town (at least in western democracies), in either of its two versions: libertarianism and egalitarianism. While there are enormous differences regarding the justification of other kinds of activity performed by the State, (typically, distribution of economic resources), there seems to be a coincidence in the view that dealing with crime is an activity that even the most minimalistic accounts would defend. And obviously, protecting individual rights against the actions of public officials is the central aim of liberal States. The three accounts seem to be defending normative arguments that can be classified as liberal. Moreover, it could be still argued that today the same concept of criminal process is full of liberal assumptions.

[96] One could claim at this point that we should not talk about two ends of the procedure, but just about one end (punishing criminals) and its limitations (the protection of rights). It could be argued that the protection of rights is not an *end* of the criminal procedure, but just a negative constraint. If this were the case, there would not be two aims but only one. I do not think that this observation is accurate. In the case of Ashworth and Redmayne, they specifically argue that in the protection of rights the State is actually performing a positive task: "respect for rights should be seen as a concomitant aim of criminal process – not merely a side-constraint on the pursuit of accuracy" (Ashworth & Redmayne, 2010, p. 48). In the case of Packer, some of his critics have pointed out that, although he presented the Due Process Model as a negative model (which does not make sense), it could be reinterpreted as a positive model where the aim of controlling public power needs to be promoted (Arenella, 1983). In the case of Roxin, the protection of rights is included in the idea of respecting the formality of the procedure, and it is also understood as a value that can be weighed with others (and a limit cannot be weighed with a value).

The fact that authors belonging to different legal traditions defend the same two kinds of end seems to question the desirability of adopting just one of the models as ideal types. However, in spite of these similarities in the ends these three authors identify for the criminal process, there are differences between the three accounts in terms of institutional design, and this should raise some questions about the possibility of justifying them merely in terms of these two ends. First, one should recognize that even if there is some similarity amongst the goals that appear in the accounts presented by Packer, Roxin, and Ashworth/Redmayne, there are differences regarding the considerations that are given priority when they conflict with each other. For instance, Ashworth and Redmayne say that, because fact-finding is fallible, there is a preference for acquitting a guilty person rather than convicting an innocent[97], and therefore a preference for individual rights instead of applying substantive law. From a different perspective, Roxin explains that "the aim of the material correctness of the sentence has priority [in certain cases], regardless of its violation of the formal rules of the procedure"[98]. In the case of Packer, his whole account is based on the idea that the two aims of the procedure can be accommodated in different ways and he does not really give an argument for one or the other. Probably, the way these accounts accommodate the different ends of the criminal procedure is what actually distinguishes one normative account from another, and this could be the reason why the kinds of procedure that are defended are different. Then, the fact that there are these two normative ends does not provide sufficient guidance to think about institutional design (and this would happen every time one purports to defend a normative account including more than one end).

An obvious candidate for determining which kind of consideration should prevail is another normative argument. However, some of the considerations they mention seem to respond more to historical developments than to normative grounds. It seems plausible to claim that these three authors aim to offer a normative account of the criminal process, but they are at the same time describing some features of their own legal tradition. Let us see how this could be the case in each example.

In the case of Ashworth and Redmayne, there is further explicit argument about other values that help to justify the choice for a certain combination instead of another: liberalism and retributivism, and they do provide some justification about what we should

[97] Ashworth & Redmayne, 2010, p. 25
[98] Roxin, 1998, p. 3

do when the two aims conflict[99]. They explain that there are some "internal" values of the criminal process (those mentioned before: accuracy and protection of rights), but that there are other "external" values as well, and that they also have an impact on institutional design. According to these authors, some of these values are jurisdictionally specific and are based partly on historical and political reasons, like the use of lay fact-finders, and others, like adversarialism, are a result of a certain political philosophy[100]. They also add that even when the respect of rights is an internal value of the criminal process, "the content of the rights […] is often best seen as being set externally to the criminal process"[101]. Although they criticize prosecutorial discretion for violating equality of treatment and the principle that "criminal justice should be dispensed in open court" for the sake of efficiency and simplification[102], it is possible to argue that they also take some features of English criminal procedure for granted. They considers that plea bargaining runs against the pursuit of the truth, but they only proposes to reform it, instead of eliminating it altogether[103]. Moreover, there are some other features of the adversarial system – like the fact that the parties decide what information to bring to the court, or the fact that lay magistrates decide some cases – that can also run against the pursuit of the truth and they do not say anything against them.

Packers' account has been criticized for different reasons[104], but maybe the most relevant for my purposes here is that his account is in fact based on how the criminal procedure works in the US. In fact, in his book he described some features that are characteristic of that country, such as the adversary system, the existence of judge and jury, or the possibility for the offender to choose the kind of procedure to which she wants to be subjected[105]. According to one of his critics, "his two poles represent rather well the conflicting strains

99 See Ashworth & Redmayne, 2010, Chapter 2
100 Ashworth & Redmayne, 2010, p. 27
101 Ashworth & Redmayne, 2010, p. 28
102 Ashworth & Redmayne, 2010, pp. 184, 184
103 Ashworth & Redmayne, 2010, pp. 312–17
104 Damaska has argued that the Due Process Model is just a negative model and "it is conceptually impossible to imagine a criminal process whose dominant concern is a desire to protect the individual from public officials" (Damaska, 1972, p. 575). Arenella has argued that Packer sustains a mistaken idea of what kind of guilt the criminal process aims to discover: he thinks that the truth that the Crime Control Model aims to discover is "factual guilt", while the Due Process aims at determining "substantive guilt" ("e.g. engaging in the proscribed conduct with the requisite intent under circumstances that do not justify or excuse the conduct") (Arenella, 1983, pp. 213–215). Roach argued that Packer's models did not take victims into account (Roach, 1999). For further critical comments about Packer's models see Ashworth & Redmayne, 2010, pp. 39–41; Macdonald, 2008, pp. 263–69.
105 Packer, 1968, pp. 156–57. Regarding this issue, Macdonald has remarked that "a sharp distinction must be drawn between, on the one hand, prioritizing the values associated with one of Packer's models at the expense of the values associated with the other model, and, on the other hand, a challenge to the assumptions that the framework is constructed upon" (Macdonald, 2008, pp. 260–62). In fact, the values that Packer identifies at the base of the US system are "rooted in the liberal values which Packer attributed to the due process model" (Macdonald, 2008, p. 262).

within the basic ideology of American criminal procedure"[106]. This "battle model" is based on the assumption that the relationship between the State and the individual is one of "two contending forces whose interests are implacably hostile"[107]. But there is another possible way of understanding the criminal process if we start from an "assumption of reconcilable – even mutually supportive – interests"[108]. Packer does not provide any normative argument for keeping the adversarial model instead of another one.

One could argue that Roxin's proposal is also biased by the tradition he belongs to. One example could be the fact that, although he considers the danger of public officers making arbitrary decisions, he does not claim that this is a reason for taking the decision out of their hands and having a jury, instead of a court dominated by professional judges. He just claims that officials should follow procedural rules. It seems that the ground for this kind of choice could be justified by the aim of finding the truth, but he provides no reason why this kind of aim should prevail.

One way of describing what happens with these three accounts is that they are in fact basing part of their accounts on normative arguments (the two ends that the process should follow, and some other values) and part of them on descriptive arguments that refer to the characteristics of their legal system, because the authors do not really question some features of these systems. But there are some problems in this kind of strategy. First, if some of these historical features are not defended by explicit normative arguments, it is difficult to justify their relative weight when they conflict with those features that are normatively justified. Second, the normative ground of some of these features is sometimes taken for granted, but to defend "principles"[109], "external values"[110] or a "common ground"[111] and to give them content is a task that must involve normative justification[112].

This is precisely the reason why I did not consider Pettit's account amongst those facing these kinds of difficulty: he and Braithwaite construct an account of the criminal law and criminal justice based on normative reasons that are defended independently of the

[106] Griffiths, 1970, p. 362
[107] Griffiths, 1970, p. 367
[108] Griffiths, 1970, p. 371. He calls this alternative "The family model".
[109] Roxin, 1998, pp. 9–13
[110] Ashworth & Redmayne, 2010, pp. 26–28
[111] Packer, 1968, pp. 154–58
[112] One caveat must be introduced in the case of Ashworth and Redmayne, and is that he is constructing an account within the framework of the European Convention of Human Rights. However, the problem about the usefulness of such an account for another legal system outside that framework remains.

historical context: the republican idea of freedom as non-domination[113]. They argue that implementing restorative procedures is the best way to maximize this kind of value in dealing with criminal conducts[114].

3. Further difficulties and conclusion

Both the construction of models (as a description of historical categories and as ideal types) and the defence of these kinds of normative account present some difficulties when it comes to guiding the decision about which features our criminal process should have, and I have stressed some of them in the previous sections. Here I will refer to some further problems that affect both lines of thought, and that are connected to my work in the following chapters.

First, and most importantly, it is not true that, even within one legal system, people agree about which kinds of value should guide institutional design. They can argue that the process should have other aims that are not directly connected to the application of substantive criminal law or the protection of offenders' rights: to satisfy victims' demands and care for their interests, to process cases efficiently, to increase transparency in public decision-making, to call offenders to account in front of the community, to restore the community's sense of safety, to solve a conflict that arose between the parties as a consequence of the crime, to promote citizens' participation in the criminal justice system, etc. The fact that these aims are characterized as *external* or *internal* to the criminal process does not eliminate the fact that they can (and should) have a central role in the decision about how institutions should be designed. This fact affects the usefulness of ideal types and of these kinds of normative account, because they offer no sufficient guidance to solve the disagreements with those who defend these other kinds of aim.

Moreover, even if that agreement could be found (and would be reflected, for instance, in the content of Constitutions), one will probably still find a great amount of disagreement about different elements. First, about how those aims should be prioritized when they conflict with each other: even people defending the same aims could disagree about how to

[113] Braithwaite & Pettit, 1990; Pettit, 1997a, pp. 75–76

[114] Although they also consider formal criminal procedures (and actually this is what they focus on in the 1990 book).

make them compatible. Second, there will be disagreement about what their content is. For instance, if the ground of the substantive criminal law is retribution, the design of the process might be different from the situation where the end is to deter offenders from committing new crimes (e.g., the process can be seen as a performative act of censure, or it can be a tool of deterrence itself). And the same happens in the case of individual rights: the kind of procedure will depend on the views one holds about the content of those rights, and there is disagreement about this point as well. Third, people usually disagree about what the implications should be when it comes to designing institutions: even people defending the same kind of aim could disagree about which is the best to promote it in terms of institutional design.

In each of these cases, the historical context does not offer any help besides, first, the fact that legal traditions have an impact on the views of people and on the characteristics of disagreements, and second, the difficulties for introducing changes that are seen as incompatible with the tradition (as mentioned before).

In the case of normative accounts, even if the broader normative arguments could be provided in order to justify the choices between different designs (and I am sure they can), at most, a normative account could be presented *within* the political discussion where people have the three sorts of disagreements just mentioned (about the aims, about how to prioritize them, and about how to apply them), and where even experts like Packer, Ashworth/Redmayne or Roxin will disagree with other experts. The plausibility of designing a criminal procedure just on the basis of an account such as these depends on the fact that there is agreement around it. This is usually not the case in pluralist societies such as ours.

Finally, there is the difficulty that values not only set ends for the criminal procedure – ends to which institutional design is instrumentally connected, and which should be weighed against each other: some of them can also make the process *intrinsically* valuable. For instance, it could be argued that in endorsing a criterion of justice as fairness, the adversarial model is not giving the process instrumental value regarding the solution of conflicts, but is introducing an element that is intrinsically valuable: the fact that the parties can decide themselves how to deal with the case, whether to bring it to court, etc. because this is a way of showing respect for their autonomy. One could claim that this kind of value

is non-negotiable, regardless of the aims of the process. And there can be other kinds of value that also work in this way. For instance, Duff argues that the trial is a ceremony where people are called to account, and that this is not instrumental to any aim, but has a performative role that makes the process (actually, the trial) intrinsically valuable[115].

In the following chapters I will propose an alternative way to think about the criminal process in normative terms. The existence of these and other types of disagreement in the political community about what would make decisions and institutions just requires the use of a different criterion to determine their acceptability, also from a normative point of view. This criterion is political legitimacy, and there are different accounts of what makes decisions and institutions legitimate (chapter 2). Moreover, the disagreements do not only apply to the general political decisions (like substantive or procedural criminal legislation, both ordinary and constitutional), but also appear when those decisions (laws) are already made, and need to be applied to particular cases, because there is discretion in that context (chapter 3). Accordingly, I believe that it is possible to classify the legal systems discussed before under three models, according to how they deal with these disagreements, based on different accounts of legitimacy, and I will explain this in chapter 4. After that, in the remaining chapters I will defend an account of the legitimacy of legislative and adjudicative decisions (chapters 5 and 6) that will allow me to argue for a new model of criminal procedure (chapter 7). Of course, this model will also be subjected to the kinds of criticism I mentioned in this chapter, mainly that the choices in terms of institutional design will be partially determined by the specific values on which a system is based. However, it will be a model that allows us to process disagreements about values in a legitimate way.

[115] Duff et al., 2007

Chapter 2 – Concept and accounts of political legitimacy

1. The concept of legitimacy

There is a great amount of discussion around the notion of political legitimacy, both about what it refers to and about what it is supposed to require. Some argue that it is a descriptive notion, some say it is normative; some assume that it equals justice, some say it does not; some argue that it refers to particular political decisions, some say that it refers to institutions, and some to the State; some claim that it is the same as authority, some disagree; some say it entails an obligation to obey, some say it does not; etc. In this chapter I will analyse some of the issues that are most relevant (at least to the discussions in the following chapters) when it comes to understanding the idea of political legitimacy, and propose an answer to these questions.

One of the difficulties with this kind of task is the fact that there are different competing accounts of legitimacy, and sometimes the endorsement of one of them seems to have an impact on how authors understand the concept itself. I think that it is most important to find a concept that can be useful for analysing and comparing these different accounts, and when discussing each of the issues I will suggest a way of understanding them with this aim in mind.

I will, first, analyse the concept of legitimacy and its different dimensions in order to explain what it is, what it is not, and what it includes. Then (section 2) I will describe the basic kinds of account of political legitimacy offered in the literature with the aim of understanding how their arguments work in two dimensions: political institutions and political decisions. Finally, in section 3 I will argue that legitimacy generates reasons for action (and not merely for belief), although not necessarily political obligation.

1.a. Definition

Legitimacy in its most basic sense is normally associated with the idea of the *acceptability* or *defensibility* of something. Although we usually talk about the legitimacy of different kinds of

things, here I am interested in the legitimacy of decisions and of institutions, from a moral point of view[116]. According to this idea, we could qualify as legitimate or illegitimate any kind of decision, collective or individual, political or non-political, public or private, although the sources and conditions of legitimacy could be different in each of these cases. More specifically, I will be concerned with political legitimacy, which generally refers to the *moral acceptability* or *defensibility* of political/public decisions: the ones that people make and/or affect them as citizens[117]. As to institutions, political legitimacy refers to those of a political kind: those in charge of making political decisions. Legitimate institutions are, again, those that are *morally acceptable* or *defensible*[118].

There have been other definitions of legitimacy[119], but I prefer to talk about *acceptability* and *defensibility*, because I believe these notions capture an important component of the idea that the others do not, which is the *relationship* between decisions/institutions, and those who are affected by them[120]. The distinction between these two notions has to do with the point of view that is adopted: they are acceptable for citizens and defensible by those deciding [121] (although sometimes the decisions are made by citizens themselves). Furthermore, as I will try to show, legitimacy is something different from the justification *all things considered* of a decision or institution. For instance, the legitimacy of a decision might be different from its justice and does not necessarily imply that people have a *conclusive* reason to act according to the decision. I will explain how each of these distinctions works in the following sections.

What makes a decision or institution morally acceptable or defensible in the political context depends on the account of legitimacy that one defends. I will describe the most important accounts in section 2 of this chapter, but since I will refer to them in the following sections, let me briefly mention the main types of account. As to the legitimacy

[116] We could also talk about, e.g., the acceptability of a decision from a logical point of view, or even from a mere legal perspective (see section 1.f. below).
[117] I will assume that the distinctions between political and non-political are clear enough to let the argument proceed.
[118] In the case of political institutions, legitimacy has been defined as some kind of *right to rule*. However, I prefer to talk about defensible institutions, and not to enter the discussion about the complexity of the notion of rights.
[119] E.g., as the "justification" of political authority and political decisions (Rawls, 1996), as the "moral validity" of political decisions (Martí, 2006), or as the "normative conditions" that should apply to (democratic) decision-making (Peter, 2009).
[120] See also Pettit, 2012a, p. 77.
[121] It is also common to talk about legitimacy as the normative justification of political power. See, e.g., Buchanan, 2002.

of political decisions, the literature has distinguished between *substantivist* and *proceduralist* accounts. In the former case, the moral acceptability of a decision depends on its outcome/content while in the latter it depends on whether the decision is the product of certain kinds of procedure (and in both cases, the kind of content or procedure depends, in turn, on the account). On the other hand, the legitimacy of political institutions can be connected to their instrumental or their non-instrumental value, and this is what distinguishes *instrumentalist* from *non-instrumentalist* accounts. I will come back to the relationship between decisions and institutions in section 1.d. below, but let me just mention that there is no necessary coincidence between the kind of account defended in each of these two dimensions[122], and I believe that, in order to be complete and useful, any account should take a stand in both of them[123].

1.b. Legitimacy as a normative idea

The notion of legitimacy has been used both in a descriptive and in a normative sense. We could either say that legitimacy refers to the actual beliefs of those who are supposed to be bound by a decision or institution, or claim that legitimacy is what makes a certain decision or institution morally acceptable, no matter what participants think. Whether a decision is legitimate or not in the first sense is an empirical issue, while the second is a normative one[124].

The descriptive notion of legitimacy has been famously discussed by Max Weber, when he referred to the belief in legitimacy (*Legitimitätsglaube*) that people have about authority[125]. This is what he presented in his famous three types of authority (three sources of legitimacy): charismatic, traditional and legal-rational[126]. Those who participate in the political system believe that decisions or institutions are legitimate, and in fact they believe – as a consequence – that these decisions or institutions are normatively relevant for their

[122] See section 2.
[123] See section 1.d.
[124] This distinction is important, because if legitimacy were connected to some reasons for action, then descriptive legitimacy would only explain people's actions, while normative legitimacy could justify them. For the discussion about the relationship between legitimacy and reasons for action see section 3 below.
[125] See also Hyde, 1983.
[126] Weber, 1978

behaviour (they believe that they are *morally acceptable*). But we cannot derive any normative (moral) consequences from these beliefs[127] without falling into a naturalistic fallacy[128].

Obviously, this does not mean that the beliefs of the participants cannot be true. But there could be cases where participants believe that certain decisions or institutions are legitimate when in fact they are not. The reason might be that they misinterpret the information they have (e.g., they believe that the decision has been made in a certain way, when it was not) or they defend an account of legitimacy that has no actual moral value (for instance, we could think that in the case of the Nazi regime in Germany some people thought that decisions made by the government were legitimate, because they were made by the Nazis. And we could also say that they were wrong). I will discuss political legitimacy as a normative concept and not a description of people's beliefs. Accordingly, the legitimacy of a decision does not require that people in fact believe in it, because it only means they have (normative) reasons to do so. Of course, it would be better if they were aware of these reasons and they acted accordingly[129].

In the same line of thought, the descriptive sense of legitimacy I mentioned should not be confused with the claim that a particular decision or institution is *in fact* legitimate, according to a certain normative account of legitimacy. This would obviously depend on meeting some empirical conditions, but it would still be something different from people's *beliefs* about the decision or the institution.

In addition, legitimacy is an ideal that should guide institutional design and political decision-making in the real world, but it could be the case that no political institution or decision was or will ever be completely legitimate[130]. However, this would not mean that all decisions and institutions are totally illegitimate either, because legitimacy is not an all-or-nothing feature: it is a matter of degree.

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[127] Except for, maybe, certain prudential considerations that would be morally relevant when bad consequences could follow from ignoring those decisions.
[128] Garzón Valdés, 1989
[129] A different question is whether it is possible to sustain institutions (legitimate or not) without at least some people believing that they are legitimate. A normative account could include the fact that at least some people must believe that there is legitimacy in order for normative legitimacy to exist. Here I am not arguing that descriptive legitimacy is irrelevant, but dealing with this kind of concern goes beyond the aim of this chapter.
[130] Actually, the possibility of reaching the ideal depends on the account.

1.c. Legitimacy and justice

Justice is a fundamental normative criterion that we use to evaluate political decisions, but it would be a problem if it were the only one because, as Waldron put it several years ago, "there are many of us, and we disagree about justice"[131]. This is why legitimacy becomes especially relevant. Most authors believe that legitimacy is something different from (and weaker than) the justice of the decision or institution, and, in fact, it is now widely accepted that the issue of legitimacy usually arises because there is disagreement about justice. The fact that a decision is legitimate means it is morally acceptable, even when we think it is unjust. For instance, I can disagree with the tax rates that have been enacted in my country, but I can think of them as morally acceptable because they were democratically decided. I can reach the same conclusion by observing that the decision was made by experts (and that they know better than me), or I can argue that, even when it is not what I consider a just tax system I think it is not too bad either. The criterion depends on the account that I defend, but it is not difficult to think of reasons why one could say that a decision is acceptable, even if one disagrees with it. Moreover, the decision made by public officials to tax me can be defensible (from their point of view) for the same kind of reason.

The distinction between justice and legitimacy can also be observed in the opposite case: we can agree with a certain decision (because we believe it is just) and argue that it is illegitimate at the same time (e.g., just policy decided by a dictator). This is very obvious in the case of procedural accounts of legitimacy, because the criteria of justice and legitimacy are different, but it could also happen in the case of some substantivist accounts. Most substantivists would agree that, at least in some cases, it can be illegitimate, for instance when a decision is just but it is not the role of the institution to make it.

Even if one believes that the legitimacy of decisions depends on the justice of their content, this does not mean that there is no conceptual difference between legitimacy and justice. A decision is a social fact that takes place in the world, while the content of the decision is something different. While justice refers to the latter, legitimacy refers to the former: to something about the decision itself. A similar view is insinuated by Bellamy, when he says that "the test […] is not so much that it generates outcomes we agree *with* as

[131] Waldron, 1999

that it produces outcomes that all can agree *to*, on the grounds that they are legitimate"[132]. The reason why we would agree *to* the outcomes is that the decision generating those outcomes is legitimate. Even if the legitimacy of the decision depends on its content, they are still two different things[133].

Once we accept that legitimacy and justice are two different concepts, we should concede that legitimacy is relevant not only in cases of disagreement about justice, but also in cases when there is none. Of course, one could argue that legitimacy would be superfluous if all people agreed about what was the right thing to do, or where we had an infallible way of knowing the right answer to every possible issue. However, in our world agreements and disagreements vary between different issues and people. Although we sometimes agree and we are certain that the right decision is being made, sometimes we do not. The question of legitimacy, being something different from justice, makes sense in all these cases, even if it seems to become superfluous in some of them, or at least for some participants (those who agree).

A different claim is that even just decisions need to be made by some institution, and that the harmony between both of them cannot always be taken for granted. We could have unjust decisions made by legitimate institutions, and the other way around. Although the criteria of legitimacy in these two contexts need to work together, the possibility of this dissonance also illuminates the possibility of distinguishing between justice and legitimacy.

1.d. The objects of legitimacy

Legitimacy refers to particular decisions, but we also usually talk about legitimate institutions, governments, etc. In fact, the relevant question in political theory is not merely whether a certain decision is legitimate after it has been made (although that is important for other purposes, like individual action-guiding and the justification of coercion), but mainly which institutions are able to produce legitimate decisions. It is also frequent to talk about legitimate authorities or governments, and there is a certain level of diversity in the literature regarding what is supposed to be the object of political legitimacy. This

[132] Bellamy, 2008, p. 167
[133] I will explain how this works for different kinds of account in section 2.

sometimes leads to misunderstandings about the concept of legitimacy, and also about the way in which different accounts can be compared or classified[134].

I will not refer to the legitimacy of authorities or governments in particular, but only as elements of a broader category: *political institutions*. I understand political institutions as a set (or system) of rules and/or principles that regulate *how* decisions are to be made in the political domain and *by whom*. I will refer to the *authority* as the person we name when we answer the question of "*who* makes the decision?" and the answer can go from one individual to the whole community. This question is different from the one about *procedure*: "*how* does he/she make a decision?" Both authorities and procedures are part of what we call institutions, and some accounts put emphasis on one, while others emphasize the other, or both. I will pay attention to formal institutions[135] (those whose functioning is usually regulated by Constitutions and legislation), especially to legislative and adjudicative ones, but there are, of course, many others (both formal and informal).

This use of the idea of *authority* might surprise the reader as not being the same that can sometimes be found in the literature. In some cases the term is given the same meaning as the word legitimacy, and people talk about, e.g., the authority of the law (which in my own terms would mean "the legitimacy of legislative decisions") or the authority of democracy[136] (which in my own terms would mean "the legitimacy of democratic institutions"). I prefer to talk about the legitimacy of decisions and institutions in these cases in order to distinguish between the different factors that might contribute to the legitimacy of a decision/institution, amongst which the authority (the *who*) is just one element. Some have even explicitly criticized the link between *authority* and *authorship* in order to argue that other decision-making devices (like, e.g., a machine processing information about people's preferences) can also have authority[137]. In this case I would refer to the same thing as a legitimate institution, regardless of whether it is a person (authority) or a procedure (like the machine).

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[134] This problem in distinguishing between the concepts of authority and legitimacy is also stressed by Buchanan (2002).
[135] Informal institutions would be the ones working under informal rules.
[136] Christiano, 2004
[137] Waldron, 1999, Chapter 6

In some other cases, the term authority is used as a reference to legitimate authority[138], and the question to which it answers would be something like "*who is entitled* or *who has the right* to make the decision?" I prefer not to talk about authority in this sense and use legitimacy instead, in order to distinguish the normative and the descriptive authorities. I will refer to them as legitimate or illegitimate institutions.

The other object of political legitimacy is, as I said, the *political decisions* that are produced by political institutions[139]. They are particular instances in which institutions make a resolution about a certain issue. But, as stressed before, a particular decision should not be confused with its content. The former is an action of the institution (a social fact), while the latter is the answer to the question of "*what* is decided?" This is an important remark since – at least for some accounts of legitimacy – a decision can be legitimate independently of its content.

In the following chapters I will focus on two kinds of political decision: legislative and adjudicative. Legislative decisions are those that create (or repeal) general norms that regulate certain aspects of the political/social life. They are general in character in the sense that they are supposed to cover many individual cases, without considering which those cases are, and before those cases arise. When I mention a particular legislative decision I will be referring to one decision amongst others that are made by the same institution[140]. I am thinking here about each prohibition, permission or obligation as a particular decision (although one piece of legislation can include several decisions). On the other hand, adjudicative decisions are those in which a legislative decision (the general norm) is applied to an individual case, e.g., by putting an end to a dispute between the parties as to how the law should be implemented[141].

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138 Another way to present the distinction is to talk about a normative and a descriptive sense of authority, where the normative sense refers to legitimate authority and the descriptive sense to *power*. See Christiano, 2013. However, others have said that legitimate authority is normative power (Raz, 2009, p. 19). But I do not think that the terminological discussion is of much interest here.

139 This does not mean that there cannot be political decisions made outside political institutions. However, I will not focus on those kinds of decision here.

140 When I say that a decision is made by an institution, it is actually a simplification of the fact that "the decision is made a) by the people and b) according to the procedures, indicated in the rules that regulate its activity".

141 Legislative decisions are supposed to be the ones made by legislative institutions, and the same happens in the case of adjudication. However, we cannot trust this criterion in order to distinguish between them, because it could be the case that institutions of one kind make decisions of the other kind, and also because sometimes the distinction is not very clear (e.g., is a legislative decision that can be applied to only one case an example of legislation or adjudication? Is a judicial precedent offering a particular interpretation of a norm legislation or adjudication?). Let us assume that there is a difference, at least theoretically. I will problematize it in chapter 3.

The relationship between decisions and institutions

I believe that any account of political legitimacy a) should pay attention to the two kinds of object and also b), in order to be coherent and useful, ought to connect the legitimacy of political decisions to the legitimacy of institutions in some way.

About claim a), it seems that one way of presenting the distinction between the different accounts of legitimacy has been to relate substantivism to decisions and proceduralism to institutions, and to forget about the other object. This presentation is misleading because both decisions and institutions are relevant in the discussion about legitimacy, although for different reasons, and both types of account usually have something to say about the other object as well. As I mentioned before, I think that the important question in political theory is about the kind of political institutions we should have, and to suggest ways to do things right in the future, e.g., by modifying those institutions, emphasizing their instrumental or non-instrumental value. An account that only allows us to verify that a decision made in the past was legitimate might be theoretically interesting, but is not very useful in practical terms for a political community trying to deal with disagreements in a legitimate way[142].

But this does not mean that we should only worry about institutional design, because the fact that a particular decision is illegitimate may be of great relevance when citizens have to decide how to act (e.g., whether to obey it or not, whether to resist it, etc.), or when authorities have to decide whether to apply it or not (e.g., adjudicative institutions). Moreover, this question is especially important if coercion (e.g., criminal punishment) is going to follow from the decision, which is the case I will be analysing later, because the use of punishment needs to be justified[143]. This does not mean that we will necessarily worry about the content, but only that, for certain purposes, we will need to look at decisions on a case-by-case basis. The difficulty is that having legitimate institutions in place might not be a guarantee of always producing legitimate decisions.

About the relationship between the legitimacy of decisions and the legitimacy of institutions (claim b)), it must be said that the kind of connection will depend on the

[142] I will come back to the distinction in section 2.
[143] See chapters 5 and 6.

account. For some of them the legitimacy of institutions is the ground for the legitimacy of decisions, and for others the connection works in the opposite direction. But any of them should be able to provide a coherent argument about how these two dimensions could work together. Political institutions are created with the specific role of making many political decisions of a similar kind (e.g., legislative or adjudicative)[144]. If they end up producing decisions that are always illegitimate, we would have a problem. And the opposite is also the case: if we have a criterion for identifying legitimate decisions, but no proposal about how to produce them, our account is deficient. Therefore, at least ideally, any account should explain how legitimate institutions would normally legitimate decisions.

Of course, in non-ideal conditions, things are not that easy. First, it is possible to have institutions with a high degree of legitimacy producing some decisions that are legitimate, and some that are not. This could happen in the case of any type of account[145], and they should be able to respond to this kind of problem. Second, political institutions are also created by previous political decisions. This seems to imply that the legitimacy of an institution should not only be connected to its ability to produce legitimate decisions, but also that it could be tainted by the illegitimacy of the decision to create it. This could generate an infinite regression in the search for a source of legitimacy. Although this is a serious issue for any account of legitimacy that purports to connect (as I believe they should) the two dimensions, it is important for an account to distinguish between the source of institutions and their design, and also to explain how they can be compatible.

As I mentioned before, substantivism and proceduralism are types of account of political decisions, while instrumentalism and non-instrumentalism are the ones that refer to political institutions. If any account of political legitimacy should take a stand in both dimensions, it means that there are four possible combinations (without considering mixed accounts[146]):

[144] Although it is possible to imagine an institution that never makes any decision, not because it is not supposed to, but because, e.g., it is not necessary (as in the case where an institution is created to make decisions just in case something happens, and it does not happen).
[145] I will explain how this works in section 3.b. below after presenting the different accounts in section 2.
[146] See section 2.

	Proceduralism	Substantivism
Instrumentalism	1) Instrumentalist proceduralism	2) Instrumentalist substantivism
Non-instrumentalism	3) Non-instrumentalist proceduralism	4) Non-instrumentalist substantivism

1.e. Legitimacy and the justification of the State

It could be claimed that to justify the existence of the State (as the monopoly of coercion) is all we need in order to explain why its institutions are morally acceptable. The argument would be that, even if the State uses coercion, in the absence of the State things would go much worse. The opposite argument would be the one defended by anarchism[147], which is a position that can be caricatured as follows:

1) Coercion is always bad
2) States are based on coercion
3) States are always bad

An anti-anarchist position would accept 2), but add that coercion by the State can be better than its absence (e.g., better than the state of nature). This is what I mean when I say that the State is justified. But this question must be distinguished from the issue of the legitimacy of political institutions. If one describes the normative conditions under which State's decisions and institutions are legitimate (offering an account of legitimacy), this necessarily implies assuming that the existence of the State *can* be justified. However, it also implies that the justification alone is not a sufficient condition for legitimacy: we can justify the existence of States by claiming that State coercion is not always a bad thing, and at the same time say that they are illegitimate if certain conditions are not met[148]. For instance,

[147] This would surely only represent one version of anarchism, the one Simmons calls "*a priori* anarchism". See Simmons, 2001 (this is the relevant version for the point discussed here).

[148] One famous distinction between justification and legitimacy is the one defended by Simmons. However, the sense in which I am using the terms here is different. Simmons argued that "Showing a state to be legitimate involves showing that it actually has (or has had) certain kinds of morally unobjectionable relation with those it controls; justifying the state only involves showing that it is possible for the state to have such relations and that having states at all is advantageous" (Simmons, 1999, n. 15). As we can see, he is in fact

one could say, from a consequentialist point of view, that the bad consequences of State's absence outweigh the cost of accepting State coercion. There is also the Kantian argument saying that the avoidance of injustice is only possible within institutions, and that therefore that there are moral reason to establish them. Or one could argue, from a republican point of view, that non-domination is only possible under the rule of law. These are all examples of how one could justify the existence of States, and which kind of argument one uses is not the issue here. The point is that the discussion about legitimacy does not make sense if one does not accept at least one argument about how States can be justified (either these or a different one). But endorsing one of these arguments does not say anything yet about when institutions will be legitimate: e.g., when they are democratic, when they have epistemic value, etc.

1.f. Legitimacy and (legal) validity

Talking about *the law* is, in the terms used here, to talk about political decisions. In the legal discussion, positivists have been repeating for a long time that the validity of a legal norm is different from its justice[149]. A certain law is valid (and therefore it can be identified as law) if it is a product of the social sources of law, something like what Hart famously called *secondary rules of recognition*[150]. According to several versions of positivism, these sources of law can be found in social facts like the making of a Constitution, customs, a judicial precedent, the enactment of a piece of legislation, etc., all of them political decisions. They argue that an unjust law would be immoral, but it would still be a valid law[151].

Although this is not the discussion they engage in, it must be stressed that the same happens with validity and legitimacy: the law can be valid and illegitimate at the same time, depending on whether the rules of recognition are acceptable/defensible from a moral point of view. Moreover, although legal positivism has emphasized the importance of

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using the term *legitimacy* in reference to the justification of the State in a particular case, and the term *justification* to refer to the general/potential justification. But the existence of a particular State can sometimes be justified even if it is not legitimate in the sense I am using the term here. The answer to the question about whether that particular State is legitimate depends on the account of legitimacy that one is defending.

[149] Hart, 1961; Marmor, 2001b; Moreso & Vilajosana, 2004; Nino, 1985; Raz, 2009, Chapter 8; Waluchow, 2009.

[150] Hart, 1961

[151] This does not mean that a law does not sometimes include moral concepts, and/or that we might need to use justice as a criterion to identify the law in some cases. Positivists argue that the identification of the law does not *necessarily* depend on its morality (Marmor, 2001b; Moreso & Vilajosana, 2004).

legitimacy in the descriptive sense for the stability of the legal system, it is not the kind of problem I am focusing on here either[152]. What makes a law (as a political decision) legitimate depends on the account of legitimacy (in the normative sense) one defends. Consequently, as in the case of justice, an illegitimate law could still be a valid law.

Another difference between the two concepts is that validity is supposed to be an all-or-nothing feature of legal norms (although people might disagree on what the application of a certain valid norm requires, in some cases[153]), while legitimacy is a matter of degree.

Finally, a difference between legitimate and justice is that, while the latter attacks the content of the law, the former also questions its sources: decisions and institutions through which the law is created.

1.g. Legitimacy and political obligation

One of the discussions in political philosophy, and specifically amongst those who defend different accounts of political legitimacy, is the one about whether legitimacy is *conceptually* connected to a duty to obey the law or not[154]. More precisely, the question is whether is connected to a general duty: whether it applies to all decisions (political obligation), and whether it could be described as a duty to obey institutions[155]. Those who think that legitimacy is conceptually tied to such a general duty are known as *correlativists*, and those who think that it does not are *non-correlativists*.

I think that it is not possible to link legitimacy and political obligation conceptually, because what makes institutions legitimate depends on the account of legitimacy one defends. Each of these accounts pays attention to certain elements of the institution, and therefore the moral consequences that follow from the presence of those elements can be different: some might think they give people reasons to obey, some might argue they only

[152] As explained in section 1.b.
[153] See chapter 3.
[154] In fact, many authors discuss the correlation between political *authority* and the duty to obey the law. However, as I explained before in section 1.d., I will use the term legitimacy when referring to what they call (legitimate) authority.
[155] Edmundson, 2004, pp. 215–16

generate reasons for belief[156], while, some just think they merely give people reasons not to start a revolution. Sometimes, when someone claims that legitimacy is (or is not) conceptually related to a general duty to obey the law, she might actually be talking about the consequences in terms of reasons for action that derive from a particular account of legitimacy. Put in a more negative way, she might be begging the question of what the concept of legitimacy is, based on what her account includes or implies.

It must be pointed out that this claim does not say anything about the existence of such a duty. Perhaps political obligation exists, but it is not connected to the legitimacy of the law. Nevertheless, one could still argue that legitimacy generates reasons for action, even a duty to obey *in some cases* (this is in fact what non-correlativists think), without accepting that this duty equals political obligation: one could claim that there is a normative (not conceptual) connection between and a duty to obey (actually, this is the kind of argument that I will offer in section 3).

As I mentioned at the beginning of this chapter, because I will distinguish different accounts of legitimacy throughout this work, and I will contrast their implications for legislative and adjudicative decisions, I favour the use of a concept of political legitimacy that can cover at least several accounts. In order to do this, the duty to obey the law as it has been understood by *correlativism* will be left out of the concept of legitimacy. This does not mean that that legitimacy does not give people reasons for action. But this claim is not about the concept of legitimacy anymore. I will come back to the broader discussion about reasons for action/belief and legitimate decisions/institutions in section 3 below, and there I will also provide a deeper critique of the discussion between correlativism and non-correlativism, after presenting (in the following section) the different accounts of legitimacy.

2. Accounts of political legitimacy

As mentioned in the introduction to this chapter, *substantivist* accounts of political legitimacy are those that claim that decisions should be evaluated by looking to the quality

[156] Either in the legitimacy of institutions/decisions, or in the justice of the outcomes produced by those decisions.

of their outcomes or contents, typically the justice of the decision. On the contrary, *proceduralist* accounts evaluate decisions according to the procedure through which they were made. But these are only extreme versions of what legitimacy requires, and they can be classified as *monist accounts*. Many authors (actually, most of them) are, on the contrary, *dualists*, and defend accounts that include both sorts of consideration[157]. They give different relevance to each of them, and this is what makes them more substantivist or more proceduralist[158].

Although substantivists agree with each other in the fact that what makes decisions legitimate is connected to their content, they can still hold different views about what it is that makes the content just. This depends on the theory of justice they defend. The same happens with proceduralism: all of them think that political decisions are legitimate if the procedures through which they are made have certain characteristics that make them valuable, but the criterion might vary between different accounts. For instance, some of them defend voting, some negotiation, some deliberation, and some combinations of these different mechanisms.

I also mentioned that decisions are not the only object of legitimacy, and that when it comes to institutions the accounts can be classified as *instrumentalist* or *non-instrumentalist*, depending on the kind of value they have. As in the case of decisions, accounts can defend only one kind of value or both: they can also be *monist* or *dualist* in the dimension of institutions.

Finally, the instrumental value of institutions can be related to different ends. It can be connected to the content/outcomes of political decisions, or to other sorts of aim, like the symbolic or educative effects on participants themselves[159]. Furthermore, the instrumental value connected to the content/outcomes can, in turn, be epistemic or merely instrumental (in the latter case what makes the procedure legitimate is simply that it tends to produce decisions with certain contents; in the former case, it must also give people reasons to believe that it actually produces such decisions[160]).

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157 Christiano, 2004
158 I will explain how this works in section 2.d.
159 See, e.g., Dworkin, 2000, pp. 186–87
160 Bayón, 2009, pp. 193–96

In section 1.d. I distinguished four main kinds of account:

1) Instrumentalist proceduralism
2) Instrumentalist substantivism
3) Non-instrumentalist proceduralism
4) Non-instrumentalist substantivism

Of course, there can be many more combinations once mixed accounts are given consideration. However, in order to understand the main discussions around the notion of political legitimacy, it becomes useful to understand the differences between these four basic options. As I explained in section 1.d. above, both institutions and decisions are relevant for a coherent and useful account of legitimacy, and therefore I will discuss the two dimensions together (separating them between substantivist and proceduralist accounts just for practical purposes, and then distinguish between the different versions of each).

In the following chapters, these distinctions will be fundamental for the presentation of different sorts of argument. For instance, the instrumentalist/non-instrumentalist defences of institutional design are the ones that I will use in order to distinguish between different models of criminal procedure in chapter 4. I will also refer to substantivism and proceduralism, because they are relevant for the discussion about reasons for action in connection to the justification of criminal punishment (see chapters 5 and 6).

In addition to distinguishing between different accounts of legitimacy, one could also argue that different types of legitimacy can be more suitable for different contexts. Most of the authors have been focusing on legislative decision-making at the national level, but maybe the kind of legitimacy needed at the international level or in adjudication are different. I will not analyse the former, but will discuss the latter in the following chapters.

2.a. Substantivist accounts

The two versions of substantivism are, according to the classification, instrumentalism and non-instrumentalism. However, one of them does not meet the condition mentioned in section 1.d. for the practical usefulness of an account of legitimacy: that there is a

connection between legitimate decisions and legitimate institutions able to guide the resolution of practical problems in the political domain. This is the case of non-instrumentalist substantivism (option 4)).

According to this position, political decisions are morally acceptable when certain conditions *x* are met, and political institutions are morally acceptable when certain conditions *y* are met, but there is no connection between *x* and *y*. This view is either problematic, or it cannot remain merely non-instrumentalist; an example can illustrate this point. One could claim that decisions are legitimate if they are just, and institutions are legitimate if it they give each citizen an equal vote (because this has non-instrumental value). But this would be problematic because, first, political institutions are created with the function of producing political decisions (even if they serve additional purposes), and probably giving each person an equal vote would not produce decisions with contents that are also just (not even in ideal conditions, assuming that these conditions include the fact of disagreements). In fact, it might have the opposite effect. If one wants to claim that it is possible to have legitimate decisions and institutions, one would need to explain how this would be something more than a coincidence, or explain which consideration will be more important in case of conflict. Once this element is introduced, then if just outcomes are given priority (in order to remain a substantivist position), institutions will need to have some instrumental value. It would be implausible to say that we have a criterion that allows us to evaluate the moral acceptability of political decisions, but that this should not affect our criteria for the design of (legitimate) institutions.

On the other hand, it would also be implausible to claim that we have institutions that are legitimate in virtue of their non-instrumental value, but that this has no effect on the moral acceptability of the political decisions they make (since decisions are legitimate only when they are just), because we create institutions precisely to make those decisions. If this strategy were followed, then the account would no longer be purely substantivist, because one would need to accept that legitimate decisions could, at least sometimes, be unjust.

A more natural view is the one defended by a substantivist who argues that institutions should have instrumental value (option 2) above) because the central element of legitimacy is that the quality of the outcomes or contents of the political decisions made by the institution are just. If the criterion for evaluating political decisions is the justice of their

content, then substantivists will evaluate political decisions from the point of view of a certain theory of justice. When it comes to institutions, instrumentalists will defend institutional designs that are suitable for making "good" decisions (if they want to remain purely substantivist). They would suggest that political institutions should comprise persons (authorities) and procedures that are *the best* for (or at least will perform relatively well in) producing the expected kinds of decision.

Probably the most famous instrumentalist account of legitimate institutions (of authority) is Raz's *normal justification thesis*:

> "the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons that apply to him directly"[161].

According to this account, the legitimacy of a decision depends on its content and the legitimate institution is just the one that will do better in identifying those right contents[162]. This position assumes that, at least in some circumstances, or regarding certain issues, disagreement is just a proof that someone is wrong, that it is possible to identify the right decision. The central element is that, in order for some institution (the authority) to be legitimate, it must be in a better epistemic position than those who are supposed to follow its decisions.

As for democratic theory, examples of strong substantivism can be found in the purely instrumentalist accounts of democracy defended by Arneson[163] or Van Parijs[164]. In these cases it is argued that democracy should be defended because it is the best procedure available, considering its instrumental value. But if it were demonstrated that democracy does not have this kind of value, these authors would have to say that it should be

[161] Raz, 1986, p. 53
[162] See also Raz, 1998, where he discusses the instrumental value of institutions.
[163] Arneson, 2009
[164] According to Van Parijs, "democratic engineering can be viewed as a search for optimal tradeoffs […]. In that search, however, we should not be guided by an autonomous democratic ideal (equality of power between all citizens, the realization of the general will or whatever). Instead, we should be guided by an ideal of justice, in relation to which any democratic 'ideal' which one might formulate constitutes at best a sheer instrument" (Van Parijs, 1996, n. 111).

abandoned. This is precisely what Raz says about democracy in defending a positive version of substantivism[165].

2.b. Proceduralist accounts

Regarding proceduralist accounts, legitimacy is based on the idea that what makes a decision morally acceptable is not its content but the process through which it was made. They are usually based on the observation that the fact of disagreement about what constitutes a good outcome of political decisions makes it necessary to find a different criterion for distinguishing acceptable decisions from the ones that are not. And this criterion can be found in procedures (or, in the terms used here, in institutions).

Some claim that procedures are legitimate because of their instrumental value (option 1) above)[166]. Nino's account of deliberative democracy can be seen as an example of this position, since he claimed that inclusive deliberation has epistemic value and that there should be no substantive limits to democratic decision-making[167]. Other instrumentalist accounts of procedures are the ones defended by Estlund[168] and Landemore[169]. People hold different views about what is objectively just, and for that reason the only procedure that will be acceptable is one that has epistemic value. The reason why procedures are fundamental is precisely the worry about making just decisions, but unlike in instrumentalist substantivism the criterion of legitimacy is here the procedure. The other version of proceduralism (option 3) above) is the one held by those who claim that procedures have an intrinsic or non-instrumental value[170]. In democratic theory, such an account has been famously defended by Waldron[171].

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165 Raz says that "[he does] not believe that democracy is the only regime that can be legitimate, nor that all democratic governments are legitimate" (Raz, 2006, n. 20).

166 According to another close version of proceduralism, the good decision is *constituted* by following the ideal procedure in ideal conditions. This kind of account was defended by Habermas (1996) and the early writings of Nino (1991), although Habermas' account has been criticized for not being procedural at all (Estlund, 2008, pp. 88–89), and Nino changed his view to an epistemic account of democracy.

167 Nino, 1996

168 Estlund, 2008

169 Landemore, 2012

170 There is a sense in which non-instrumentalist accounts have an instrumental dimension, since the aim of the procedure should be to "solve" a conflict, to reach an agreement, to make the parties accept the final decision, etc. However, even when this capacity can be seen as a necessary condition, it is not sufficient for legitimacy.

171 Waldron, 1999

Proceduralism differs from substantivism in its account of the significance of disagreement. The former kind of account is defended by those who think either that there is no right answer to moral questions, that it is not possible to know for sure what that answer is, or at least that societies are pluralistic. Therefore, it is not possible to view disagreement as a consequence of someone necessarily being wrong (although it does not deny the possibility of excluding certain kinds of position for being unreasonable), because either there is no such thing as being right, we cannot tell when this is the case, or different answers can count as being right.

There are different kinds of procedure that can be considered as valuable and therefore different procedural accounts of legitimacy. In democratic theory some of them are negotiation, voting, deliberation, or even confrontation in front of an arbiter. However, it could be argued that the decision as to which procedure is better can depend on the context and the type of decision[172]. One does not need to pick one and reject all the others (although one can still argue that they have different value).

2.c. Is there a distinction?

It could be argued that there is no difference between substantivism and proceduralism. One could say that there is no such thing as proceduralism, because what we are actually doing when we say that a procedure has, e.g., non-instrumental value is to honour some substantive value (like autonomy, equality, etc.) *within* the procedure. Then, the account is based on substantive values, and is therefore a substantivist account. The difference is just in the kind of value that is considered relevant (e.g., equality in decision-making instead of equality in the content of decisions). In addition, it seems that for proceduralism to be coherent, the content of political decisions would need to be limited if it affects the value of the procedure itself (e.g., in decisions about the institutional design, or decisions that affect the possibility of making other legitimate decisions in the future).

And something similar happens with substantivism: if we agree that, as I argued before, substantivism also needs to design institutions (which include procedures) in order to produce good decisions, maybe it would be better to accept the production of a few bad

[172] Mansbridge, 1983

decisions when the result is overall better, and to keep these legitimate institutions running without questioning them. If this happens, then the procedure seems to start becoming valuable on its own, even if it is only because of its instrumental value.

These two observations highlight the possibility that the whole distinction between the two types of account is a blurry one. They both seem to collapse into one account that has to pay attention both to procedures and to substantive values, depending on how one looks at it. However, probably this observation is too strong and in fact many proceduralists and substantivists would not agree with it. What both kinds of account usually do is to distinguish between A) the substantive values that are at the basis of a procedure (and therefore they can be respected or promoted *within* the decision-making process) and B) those values that are promoted or respected in the *outcomes* of the procedure.

Proceduralists argue that legitimacy should focus on A), and not on B) by offering different sorts of argument. Some claim that it is much easier to achieve consensus about A) than about B)[173]. Others argue that focusing on A) respects individuals as rational agents and/or treats them as equals[174], while, when there is disagreement about the justice of outcomes, focusing on B) does not. A third kind of argument says that even when procedures have an instrumental value connected to the content of political decisions, there is no independent criterion to *verify* when the content is the right one[175], and therefore it is not possible to focus on B). Some others argue that criterion B) should not be used, because this is what people disagree about[176]. Furthermore, this does not mean that proceduralists do not have a theory about B), i.e. what the content of political decisions should be. They just recognize that their theory is *one amongst many*, and that it should be defended *within* the legitimate procedure, because they do not think that the legitimacy of the decision depends on whether its content accords with their theory.

As for substantivists, they would also disagree with the claim that there is no distinction. At most, they would agree that A) is important, but it is dependent on B)[177]. The value of procedure will be respected as long as it does not interfere with the production of decisions

[173] See, e.g., Gavison, 2006.
[174] Examples of these sorts of argument can be found in Christiano, 2004, 2008; Pettit, 2012b; Richardson, 2002; Singer, 1973; Waldron, 1999.
[175] Nino, 1996
[176] Estlund, 2008, p. 85
[177] See, e.g., Dworkin, 2000, p. 188.

whose content is required by justice. This is why it is more natural for substantivism to defend the instrumental value of institutions: institutional design should be guided by the aim of producing good decisions and it should also anticipate the possibility of obtaining bad outcomes, and maximizing the chances of remedying mistakes.

2.d. Dualism

The fact that substantivist and proceduralist accounts can be distinguished from each other does not mean that everyone defends pure accounts such as those presented so far. In fact, many people think that we should care *both* about valuable procedures, *and* about the quality of the content of our political decisions. And the same happens with the instrumental and non-instrumental value of political institutions.

Mixed accounts argue that different kinds of consideration are important (in either of the two dimensions) and what is distinctive of each of them are the criteria that they provide to decide which consideration is going to prevail in case of conflict. It could be the case that institutions that are non-instrumentally valuable produce bad decisions (they do not have instrumental value), and also the contrary. In addition, procedures that are (either instrumentally or non-instrumentally) valuable can produce decisions whose content is substantively poor, and the opposite could also be the case.

One of the most common mixed accounts can be found in what I will call *negative* substantivism. The *positive* version is the monist account described before, while the negative version argues that decisions are legitimate according to procedure *as long as* they do not violate certain values or principles[178], or as long as they produce *reasonable* decisions[179]. Procedures do have a role in negative substantivism because they produce decisions that are legitimate (because institutions have an instrumental and/or a non-instrumental value) *as long as* their content does not violate certain substantive minima. But substantive considerations prevail in case of conflict, and therefore this type of account can be classified as substantivist.

[178] See Dworkin, 2000, pp. 203–05 .
[179] See, e.g., Rawls, 1993.

If we turn now to theories of democracy, we can see that negative substantivism can be associated with what is usually called *constitutional democracy*: there is a great space for democratic decision-making, but within certain limits, that can be found in the Constitution (especially in the fundamental rights and certain constitutional values). For instance, Dworkin's conception of democracy can be seen as an example of this idea. He thinks that democratic institutions should have an instrumental value[180]: legislators should be in charge of deciding about certain issues (what he calls policies[181] or choice-sensitive issues[182]), but institutions like judicial review are justified as a means of protecting certain basic substantive principles (principles[183] or choice insensitive issues[184]). The same can be said about Rawls' overlapping consensus and the idea of reasonableness as a limit to democratic decision-making[185].

On the other side we can find accounts of democracy that also take both procedures and substance into account, but give more weight to procedure, or at least claim that procedure should be decisive when there is disagreement about substance. Examples of this can be found in the writings of Christiano[186] and Martí[187].

3. Legitimacy and reasons for action

The discussion about the practical relevance of legitimacy is actually more complex and broader than the one about political obligation and it can be restated in different ways. We could distinguish, for instance, between those who claim that legitimacy generates reasons for action, and those who think that it merely generates reasons for belief. And we can also distinguish between those who discuss the reasons for action or for belief in relation to legitimate institutions (together with all their decisions) and those who relate those reasons

[180] Dworkin, 2000, p. 186. In his latest book (discussing Waldron's defence of majority rule) he argues that "majority rule is not an intrinsically fair decision procedure, and there is nothing about politics that makes it intrinsically fair there. It does not necessarily have more instrumental value than other political arrangements. If the legitimacy of a political arrangement can be improved by constitutional arrangements that create some inequality of impact but carry no taint or danger of indignity, then it would be perverse to rule these measures out" (Dworkin, 2011, p. 392).
[181] Dworkin, 1977
[182] Dworkin, 2000, Chapter 4
[183] Dworkin, 1977
[184] Dworkin, 2000, Chapter 4
[185] Rawls, 1993
[186] Christiano, 2004, 2008
[187] Martí, 2006a

to legitimate decisions. Furthermore, amongst those who think that legitimacy generates reasons for action, there is disagreement regarding the type of action that people have reasons to perform (e.g., obedience, compliance, non-interference, etc.).

In general, I will assume that people can have different kinds of reasons to act according to (or against) a political decision (e.g., a piece of legislation) or to obey political institutions[188]. Those reasons can be of different kinds (e.g., prudential reasons, general or special duties/obligations, etc.) and I will only be asking whether there is some moral reason for action, instead of a mere reason for belief derived from legitimacy. In the following sections I will, first, offer some further analysis of the correlativist and non-correlativist positions. Then I will argue that legitimacy generates reasons for action, in the case both of substantivist and of proceduralist accounts, and that those reasons are *prima facie* reasons in the case of institutions, and *pro-tanto* reasons in the case of decisions. Then I will discuss which kinds of actions people have a reason to perform when confronted with legitimate decisions/institutions, and say something about how this is connected to the defensibility of coercion and the reasons for action of those acting in the name of the State.

3.a. Correlativism and non-correlativism (again)

One of the arguments in favour of the existence of reasons for action connected to legitimacy is, as mentioned in section 1.g. the *correlativity thesis*. It has been presented as the one according to which "political authority is legitimate only if it imposes a general moral duty of obedience on those subject to it"[189]. This duty is supposed to be a *pro tanto*, content-independent duty[190]. The thesis states that legitimate institutions (and therefore all their decisions) give people reasons for action, that the institution has a *right to rule*[191], and that the kind of action that people have a duty to perform is obedience, which means that they have a reason to act according to the decision made by the legitimate institution, *because* it was made by it (even when this duty can be owed not to the authority but to their fellow citizens[192]).

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188 Raz, 2009, p. 233
189 Edmundson, 1998, 2004
190 Edmundson, 2004
191 According to this thesis, the right the authority has is – in *hohfeldian* terms – a *claim-right*.
192 Edmundson, 2004

One of the problems with this thesis is, as several authors have pointed out, that there is no such general duty to obey the law, and, in fact, some say that this critique has become "the currently fashionable view"[193]. If this position were right, one would have either to accept that there are no legitimate institutions, or to follow one of the following strategies: a) to insist in demonstrating that there is in fact such a general duty, or b) to become a *non-correlativist*.

In recent years there have been some efforts to follow strategy a), and to defend the existence of a general duty to obey the law. Some of the most famous are the accounts based on fair play[194], associative obligations[195], consent[196] and natural duties[197]. If any of those accounts were successful, then it would be possible, according to the *correlativity thesis*, to have legitimate political authorities[198]. But all these accounts have been criticized with various arguments[199], and if these critics were right, then we would be back at the beginning.

I will not enter into this discussion here, and the reason is that I do not think that we need to determine whether people have a general duty to obey the law or not in order to identify legitimate institutions. I believe that this way of understanding the concept of legitimacy puts the cart before the horse. According to the view presented here, legitimacy does not *depend* on people having a general duty of obedience, while correlativists believe this is the case because they argue that the presence of that duty *means* that there is legitimacy. But I believe that legitimacy depends on certain characteristics of the institution that makes decisions and of the decision that is to be followed/applied. These characteristics make institutions and decisions morally acceptable and defensible, and what makes them valuable varies according to the account one is defending. Then, the interesting question is whether legitimacy *generates* reasons for action, which kinds of reasons and which kinds of actions. But then different accounts of legitimacy might provide different answers.

193 Edmundson, 2004, p. 218
194 Dagger, 1997, Chapter 5; Hart, 1955; Rawls, 1964
195 Dworkin, 1998
196 Consent can either be actual, hypothetical, or normative. See, e.g., Estlund, 2008; Pitkin, 1965, 1966; Simmons, 2001.
197 E.g., Rawls, 1971; Waldron, 1993; Wellman, 1996
198 Edmundson, 2004
199 See, e.g., Edmundson, 1998, 2004; Raz, 2009; Simmons, 1996, 2013; Wellman, 1997

But something must be said about *non-correlativism* as well. They claim that there can be legitimate authorities (institutions) without any correlative duties to obey them. The two main arguments provided by them in order to deny that legitimacy creates any duties are illustrated by the examples of the traffic light in the middle of the desert and the denial of a duty to *obey* laws that prohibit certain conducts that are obviously wrong, like murder[200]. In the first example, they claim that there is no duty to stop at a red light if no harm results from the action, even when the traffic light is a product of a decision made by a legitimate institution. Therefore, the institution can still be legitimate, even if there is no duty to obey it. In the second example they argue that people's duty to refrain from conducts like murder is based on the wrongfulness of the action and not on the fact that there is a law (enacted by a legitimate institution) that prohibits it. They claim that the institution is legitimate, but that this fact is superfluous with regard to the existence of a reason for action.

The trickiness of the traffic light argument comes from the fact that we are actually looking at is a case of *over-inclusion*, and the consequences in terms of reasons for action depend on one's view about rule-following[201]. A norm like "stop at any traffic light" is over-inclusive in those cases that are covered by the rule, but not by its background reason[202]; in this case it would be something like "to solve a coordination problem in traffic in order to prevent physical harm to people". The background reasons would not justify stopping at the traffic light, because there can't be any harm following from not stopping. Over-inclusiveness is a characteristic of almost every rule, and it is not a very strong argument against the existence of reasons to obey legitimate decisions, and even weaker against obeying legitimate institutions. One could claim that there is a duty to obey all the decisions made by a legitimate institution (a correlativist view) and still argue that this duty disappears in cases of over-inclusion, because following the rule in that case would not actually count as obeying the institution[203]. Therefore, I do not think it can be relied on as an as an argument against the general duty to obey[204].

[200] Edmundson, 1998; Sartorius, 1981; M. B. E. Smith, 1972
[201] Actually, one could challenge the intuition more directly and say that people have a duty to obey, and that this duty includes stopping at the traffic light, but it is not necessary to challenge the argument.
[202] For a detailed description of the phenomena of under and over-inclusion and its causes see Schauer, 2004.
[203] For such an argument in the case of following legislation see Marmor, 1995, 2001a; Soames, 2011a, 2011c.
[204] In addition, one could argue that, if the institution and the decision are legitimate, one actually has a duty to follow the rule, even if one believes that it is over-inclusive.

Second, I suspect that the conclusion to which *non-correlativists* arrive in the second example (murder) can only be defended from the point of view of a substantivist account of legitimacy[205]. There can be different versions of substantivism, but, as I said, this view basically makes legitimacy depend on the content of the decision, e.g., on its justice[206]. People have reasons for action that derive from the morality of the action (and maybe also prudential reasons related to the avoidance of punishment), and legitimacy does not seem to add anything to their practical reasoning. They have a reason to comply with just decisions, and no reason for action in the case of unjust decisions. This seems to lead to the conclusion that legitimacy entails just a reason for belief, but not a reason for action, because if a legitimate institution makes an immoral decision, they do not have a reason to obey it. This can only happen in the case of substantivism, since proceduralists claim that the way decisions are made is also morally relevant, because when there is disagreement, the fact that the decision is the product of a legitimate procedure can create reasons for action (maybe not in the central case of murder, but certainly in some borderline examples, or in other cases such as paying a certain amount of taxes that one does not agree with). In any case, whether the reasons to obey offered by legitimacy are superfluous or not depends on the account.

Moreover, if one of the arguments defended by non-correlativism is based on substantivism, and, as I explained in section 2.a., they need to offer an instrumentalist account of institutions, one would start wondering what this kind of view would say about the reasons for action in the case of institutions that generally produce legitimate decisions, but sometimes do not. As I mentioned before, a substantivist could accept that there are reasons to obey certain decisions she sees as unjust if legitimate institutions made them.

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[205] There seems to be an exception to this connection between substantivism and non-correlativism in the case of Waldron (1993). He defends a proceduralist view of legitimacy and also a non-correlativist view about the duty to obey, and he claims that people have a natural duty of justice, and that this is the ground for the duty to obey (and not legitimacy as such). But since, according to his view, our natural duties of justice require us to obey democratic decisions (Waldron, 1993, p. 27), one could claim that he is actually referring to a proceduralist account of legitimacy (which is actually defends in Waldron, 1999), and that it gives people a reason to obey. Therefore, Waldron's non-correlativism is only apparent, because he believes that people have a reason to obey decisions that are made democratically (and therefore, legitimate in the terms used here).

[206] This does not mean that, from proceduralist point of view, one could not argue that legitimacy gives people reasons to X, but that they can have even stronger reasons not to X, derived from the content of the decision (for instance, if they are terribly unjust).

3.b. Why legitimacy generates reasons for action

Although legitimacy is not conceptually associated to a duty to obey, it can still generate certain reasons for action. Moreover, even when there is no political obligation, there might still be a normative connection between legitimacy and reasons for action. Let me be clear about this point: I am not denying that there can be a general duty to obey the law. Maybe if it existed, one could even deny the correlativity thesis and still claim that people have a reason to obey legitimate (*and also* certain illegitimate) decisions. Nevertheless, since my focus is on legitimacy, analysing this kind of possibility is beyond the scope of the discussion. The argument is that, with or without political obligation, it is still be possible to talk about reasons for action as a consequence of legitimate decisions/institutions[207].

In this section I will analyse why the distinction between institutions and decisions is important, and which kinds of reasons for action are derived from the fact that they are legitimate. I will also argue that this is the case for different types of account of legitimacy. But then I will need to reject the claim that legitimacy only gives people reasons for belief, even in the case of decisions, but not a reason for action. Finally, I will discuss the issue of which kinds of actions people have a reason to perform in connection with legitimate institutions and legitimate decisions.

Institutions and decisions

From an instrumentalist point of view (whether substantivist or proceduralist), people have a reason for action derived from the legitimacy of the institution. Typically, the institution is legitimate if it is situated in a better epistemic position, or has more instrumental value, compared to individuals who are supposed to follow its decisions. Ideally, legitimate institutions produce legitimate decisions. However, in non-ideal conditions, there might be cases where a relatively legitimate institution makes some legitimate decisions, but some others that are illegitimate. Political institutions make decisions about many different topics, and their instrumental/epistemic value can be unequal amongst different fields, and

[207] This could be described as a different version of the correlativity thesis, one that does not observe a conceptual connection, but a normative one. However, since the idea of correlation seems to show that there is a special kind or relationship between two things, but not that one causes or generates the other, I will not use this terminology.

with respect to different people. As a consequence, whether the institution is legitimate or not (and to which degree) should be verified on a case-by-case basis, and this means that people do not have a general duty to obey the institution, but only those decisions that are legitimate[208]. In addition, the same decision can be legitimate for one person (someone is, in that case, in a lower epistemic position than the institution) and not for another (who is in a higher position), and then only some people have a reason to obey[209].

Something similar can happen in the case of non-instrumentalism. In non-ideal conditions, what gives intrinsic value to the procedure can be absent in the case of some specific decisions, even when the institutions are more or less legitimate overall. This can happen either because the procedure was not respected in a particular case, because the decision is incompatible with the values that make the institution valuable[210], or because, even when the procedure was respected, what makes it intrinsically valuable is simply not present in the case of some people (e.g., if some people can participate, but some others are excluded or have a more difficult access to the institutions). Maybe not all non-instrumentalist account would give space to all of these considerations, but the possibility remains.

One way to describe what happens in both instrumentalist and non-instrumentalist accounts is to say that, in non-ideal conditions, legitimate institutions generate reasons for action, but that these are only *prima facie* reasons[211]: it could be the case that, after careful analysis, one finds out that there was actually no reason for action, either because the epistemic/instrumental value of the institution was not superior to individual reasoning, or because the non-instrumental value was not present in a certain topic or regarding a certain person[212].

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[208] Although in principle it is possible to claim that some people are always in a better epistemic position, compared to institutions.

[209] This does not mean that those who are in a better epistemic position cannot have another reason to comply with the law (to act according to the law for other reasons, such as the fact that they think it is the right thing to do, relational reasons, a duty of fair play, etc.). The point is that the reason does not come from legitimacy.

[210] See, e.g., Christiano, 2004, pp. 287–88.

[211] Against this view see Raz, 2009, pp. 235–36. Against his position, it is possible to argue that if there were a general duty to obey all the decisions made by an institution, this would imply a surrender of judgement that would be incompatible with the exercise of individual autonomy.

[212] There might be some accounts according to which legitimate institutions can never produce illegitimate decisions. However, this is no problem for the claim that people only have reasons for action that derive from legitimate decisions. It is just that every decision made by the legitimate institution happens to be legitimate.

In addition, in all of these cases, when the particular *decision* is legitimate, people have reasons for action. It happens in the case of proceduralist accounts (both instrumentalist and non-instrumentalist), because the legitimacy of institutions needs to be verified on a case-by-case basis, and this actually means verifying that each particular decision is legitimate. More complicated is the case of instrumentalist substantivism. Here, when the decision is just, it generates reasons for action, and some of these decisions are also legitimate because they are the product of an institution with instrumental value in that particular case. Every time a decision is legitimate (for any of the two reasons), people have a reason to act according to it. However, those defending this account could still claim that the legitimacy of institutions merely generates reasons for belief. I will discuss this possibility in the next section.

Now, it must be stressed that, even when people have a reason for action in the case of legitimate decisions, they could have other kinds of reasons against performing that action. However, legitimacy offers a *second-order reason* for action. They are, in Raz's words, "reasons for action, the actions concerned being acting for a reason and not acting for a reason"[213]. For instance, a law that prohibits hunting or requires people to pay a certain amount of taxes not only determines which kinds of consequences will follow if people fail to do these things, but also marks these conducts as what is the right and the wrong thing to do in the particular community. Even if people disagree with the desirability of these contents in the law, they have a reason to act according to them, if the decision is legitimate: legitimacy offers a (second-order) reason to act according to the (first-order) reason that is part of the content of the law. If the content of these decisions are manifestly unjust, people could have further reasons against obeying them. However, this does not eliminate the existence of a reason for action derived from the legitimacy of the decision.

Reasons for action and reasons for belief

Assuming that legitimacy is the moral acceptability and defensibility of decisions and institutions, it seems natural to think that it should be taken in to account by people in their practical reasoning: that it generates reason for action. The only ways to deny this is either to claim that people do not have reasons to behave morally (which I am assuming is not

[213] Raz, 2009, p. 17. For a deeper analysis of the structure and types of reasons see Raz, 1975.

true), or that legitimacy merely gives them a reason for belief (but not for action). The latter appears to be true, at least in three kinds of cases.

The first case would be the one where the person is not bound by the decision. She only has a reason for belief (a reason to believe that the decision is legitimate), and not a reason for action, in those cases where the decision does not apply to her situation. Examples of this can be found in laws enacted in another State, domestic law that regulates conducts that she cannot/will not perform (e.g., those laws that regulate the conduct of public officials, if she is not one), or domestic laws that do not purport to regulate conduct, but only to express something (like declarations). However, what is special about these cases is that those decisions do not even aim to give the person a reason for action in the first place. The case under discussion here is, on the contrary, the one where the decision aims to generate those reasons, and the question is whether it actually does. Moreover, even in those examples the person would have a reason in favour of some kind of action, e.g., reasons not to interfere with the implementation of legitimate decisions on others.

The second case would be the one where, although a decision is directed to the person and to her actions, its legitimacy just gives her a reason to adjust her beliefs[214]. This happens when the institution is in a better epistemic position compared to the person and she has a reason to adjust her views about what is the right thing to do, according to the content of decisions made by the institution. In order to understand what is at stake here, I think it is useful to distinguish between two kinds of situations. In one of them the person agrees with the decision and in the other one there is disagreement[215]. In the latter case the person has a reason to believe that, because of certain epistemic qualities, there is a higher probability of conforming to the reasons that already apply to her by following the decision than by figuring out by herself what is the right thing to do. However, this does not mean that she *only* has reasons for belief. Actually, it does not really matter whether she changes her minds or not: if the person has a reason to behave morally, and the decisions made by

[214] Those who make the decision would be considered to have what has been called a *theoretical authority*, as something different from a *practical authority*. See Raz, 2009, pp. 7–8. Raz argues that legitimate legal systems generate reasons for belief in Raz, 2009, p. 245.

[215] A third element to consider here is the fact that the disagreement is reasonable or unreasonable. This seems to be a very important element for *negative substantivism* (see section 2.d.), and the consequences in terms of reasons for obedience would be different.

an institution apply to her, she has a reason to act according to those decisions when the institution has epistemic value, even if she still disagrees with their content[216].

Both in the case of proceduralist and substantivist defences of (epistemic) instrumentalism people only have this kind reason for action in those cases where they are in a worse epistemic position than the institution, but not if they are in a better epistemic position. This merely means that the institution is not legitimate regarding the latter, and it is no problem for the argument I am defending here: legitimacy gives people a reason for action, but the same decision can be legitimate for some people in some cases, and illegitimate for others (depending on their epistemic position). Nevertheless, I do not think that disagreement is really a condition, because epistemic superiority gives everyone (both those who agree and those who do not) a reason for action, even if they have other reasons to act in the same way. As in the case of disagreement, it does not really matter whether the person agrees with the content of decisions, whether she changes her mind, etc.

The third kind of case where one could argue that legitimacy merely generates reasons for belief appears if one defends a substantivist account. This position could insist on the fact that people would only have these reasons for action when the decision is just, and that in this case its legitimacy is superfluous. However, first, saying that a decision is just means, in most circumstances, that one agrees with its content. As I said before, these cannot be the relevant criterion when there is an institution with epistemic value. Second, substantivists believe that decisions that are just are also legitimate, and people have a reason to act according to them. The fact that it is not legitimacy itself what generates the reasons for action is, then, not of any practical relevance.

In any case, the general point is that if legitimacy is morally relevant, and it applies to certain people, it is very difficult to claim that they do not have reasons to act according to it. Notwithstanding, a different question is the one about the strength of reasons and the kinds of actions that are required. This is the subject of the next section.

[216] See, e.g., Nino, 1996, p. 181.

Types of action

The legitimacy of a decision or institution has consequences in terms of reasons for action that irradiate different aspects of the political life and have different implications depending on the position where each person is situated. Some examples have already been given. It is not the same if the legitimate decision/institution does not apply to a person, than if it does. Moreover, it is not the same if one is the addressee of the decision, than if one is supposed to apply it on other people, or to collaborate in this task.

Additionally, I also mentioned that the legitimacy of a decision gives people a second-order reason for action (a reason to act for a reason). People have a reason to act according to the decision, because of something in the decision itself, and not because of its content. This does not necessarily mean that the reason for action is content-independent, but it certainly means that it is independent of whether the person agrees with it. It does not mean that it is the only reason for action that they have either: they can have other additional reasons both in favour and against the same action. But it is a *pro-tanto* reason: it should make a difference if there are no other relevant considerations. In addition, it excludes *some* kinds of reasons derived from the views of the person about what should be done in the particular situation (if she disagrees).

In the case of those who are supposed to act according to the content of the decision (citizens to which the decision applies), they have a reason to *obey* the decision, because what generates the reason is precisely the fact that it is legitimate. However, the way to *obey* the decision (to act according to the second-order reason) is merely to *comply* with its content (to act according to the first-order reasons that can be implicitly or explicitly expressed in the law). This is the case because it does not matter whether the person agrees with the content of the decision or not. The reasons why the person acts are actually irrelevant in most cases[217], as long as she complies with the content of the decision.

But the legitimacy of decisions also give those who are in charge of applying them a reason for action. This is typically the case of those acting in the name of the State who have the role of deciding whether the law should be applied to particular cases or not. I am most

[217] There can be exceptions to this remark if the law explicitly allows or requires for the motives to be taken into account in order to evaluate the action. This sometimes happens in the criminal law.

interested in the case of adjudicators, but it is also the case with other kinds of public officials. All of them have a reason to apply legitimate decisions, even when they disagree with their content.

One of the difficult questions is whether, amongst the actions that those in charge of applying decisions have a reason to perform, we can find coercive actions. Typically, whether legitimacy can justify punishment, but also other kinds of coercion. I believe it can, but I will only be able to offer a full argument after developing it in the following chapters[218]. Let us accept for now that, if the decision is one that requires an adjudicator to use coercion, then she has a reason to do it (even if further conditions will need to be satisfied).

Some people believe, however, that the legitimacy of a decision only gives citizens a reason not to interfere with those in charge of applying it, and to accept coercion when it follows from non-compliance[219]. But things cannot be as simple as this, because in many cases there is no real distinction between non-compliance and interference in many cases[220]. For instance, if the law creates a prohibition on hunting with the aim of reducing the harms done to animals, a citizen does not only interfere with this decision if she resists the imposition of punishment that follows from her conduct. Every time she kills an animal she is interfering with the aim of reducing animal killings. If every animal was dead, and every hunter in prison, the aims of the decision would not have been achieved.

These are probably the central cases in which legitimacy generates reasons for action, or at least the most discussed. However, there are many others. For instance, the legitimacy of an institution also (but, as I explained, not only) generates reasons not to interfere with those in charge of applying its decisions, reasons to collaborate in the application of the law regarding others (e.g., to bear as witness in the justice system), etc. Moreover, people also have other reasons for action that are connected to legitimate institutions: to contribute to the sustainment of those institutions, to create them if they do not exist, and to reform them in order to make them more legitimate, if this is possible.

[218] See chapters 5 and 6.
[219] Edmundson, 1998
[220] Christiano, 1999

Furthermore, all these statements about there being reasons for action clearly apply to ideal situations. But, as I mentioned before, legitimacy is a matter of degree. This means that the stronger the legitimacy of the decision or institution, the stronger the reasons for action. But maybe people have reasons to perform different kinds of action when they are confronted with different degrees of legitimacy[221]. Perhaps people have a reason to *obey* a decision that is legitimate to a high degree, but only a reason to *accept coercion* following from disobedience when the decision is less legitimate. In extreme circumstances (where decisions and institutions are extremely illegitimate) people might actually not only have a reason to disobey, not to apply, or not to collaborate, but also to *act against* decisions and institutions, and even to start a revolution.

In sum, I do not believe that it is possible to determine which kind of action people have reasons to perform in the abstract, but it is still possible, as explained, to draw certain generalizations. First, that different people can have reasons for different kinds of action derived from legitimacy, fundamentally, reasons to obey and apply decisions, and to collaborate in the creation and maintenance of institutions, depending on their position regarding institutions and decisions. Second, that both the strength of the reason and the kind of action might depend on the degree of legitimacy.

[221] Christiano, 2013

Chapter 3 – Discretion and the case for political legitimacy in adjudication

> *The choice of methods, the appraisement of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law […]. None the less, within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom.*
>
> *Cardozo 1921*

Introduction

The notion of political legitimacy has usually been used for analysing and discussing legislative decisions, especially in democracies. The basic argument is that, because people hold different views about what justice requires and there is disagreement amongst them about what the content of the law should be, there must be some kind of criterion for making the decisions morally acceptable, in spite of that disagreement. When members of a community hold different views about what is to be done (e.g., what is just or desirable), there is a need of a second order reason to follow one view instead of another. As I mentioned in chapter 2, like justice, legitimacy is a normative concept, since it tells us how we ought to make political decisions and design our political institutions. But justice and legitimacy are two different notions, even when some accounts make one depend on the other.

During the past decades, one of the main discussions related to political legitimacy has revolved around the question of whether judicial review is justified in a democratic political system[222]. The question was and still is: are judges the best suited to decide whether ordinary legislation is compatible with the values and principles that can be found in

[222] E.g., Bellamy, 2007; Ely, 1980; Honohan, 2009; Waldron, 2006.

Constitutions, or should legislators be the ones in charge of this task? More specifically should judges be the ones who have the final word about those issues? The main focus of this discussion has been on what to do when a piece of legislation violates individual rights. In this framework, judicial review can be characterized as a *legislative* decision, because when constitutional judges decide that there is a violation of a right, they are in fact *making* law. They are creating (at least) exceptions to the legal rule that was enacted by legislative institutions, based on principles that appear in the Constitution, therefore acting as *negative legislators*. Although rights appear on a legal text like the Constitution, moral judgement is required to decide how they should be interpreted, and in plural societies there is usually disagreement about the right answer.

The two main parties in the debate have been, on the one side, those who argue that democracy ought to be limited by those rights, and that this should be implemented through judicial review (concentrated in the hands of a Constitutional Court or not), and, on the other, those who claim that, in the face of (moral) disagreement about rights, democratic institutions should decide about their best interpretation[223]. These two sides of the debate normally assume different accounts of political legitimacy: the former defends an account that includes some substantive elements (some version of instrumentalist substantivism or a mixed account like negative substantivism), while the latter is grounded on a proceduralist view (either instrumentalist or not).

In this chapter I will argue that, although this is an important issue in the discussions about the legitimacy of the decisions made by judges in a democracy, it is only part of the picture. The story that is presented by political philosophers – with certain exceptions[224] – does not usually say much about the *application* of (legitimate) legislative decisions to particular cases, or *adjudication*. I believe that adjudicative decisions can also be evaluated in terms of legitimacy: we can ask what makes them morally acceptable/defensible, adjudicative institutions can also be more or less legitimate, depending on how they are designed. Although at least some of these arguments apply to any institution in charge of applying

[223] Of course, the debate about judicial review is much more complex and these are just the two extreme positions. Others argue, for instance, that there should be judicial review of the legislative decisions about the procedure, in order to verify that legislative decisions are truly democratic. Others claim that there should be judicial review in the case of some rights, but not of others. Since the discussion about judicial review is not the topic of this chapter I will not refer to the broader debate.

[224] The most obvious exceptions to this are, of course, Waldron (see, e.g., 1995) and Dworkin (1977). See also Campbell, 1998; MacCormick, 1989; Marmor, 2005; Richardson, 2002. We could add Raz to this list, but his account of legitimacy is not necessarily connected to democratic decision-making.

legislation, I will focus on adjudication in the case of the criminal law, this means, decisions and institutions about criminal punishment.

I believe that, in the debate about democratic legitimacy, political philosophers (especially proceduralists) have sometimes assumed a *naïve view* of adjudication, at least in the defence of their accounts[225]. According to this view, once legislative institutions produce legitimate decisions, judges will simply identify the instances in which the legislative decision is to be implemented, and apply it more or less mechanically (and when it is not, it is not seen as problematic). The question of legitimacy is confined to the domain of legislation, and either the question of the legitimacy of adjudicative decisions does not make sense, and it is ignored, or these decisions derive their legitimacy from legislation: they are legitimate if legislation is legitimate (and institutions are legitimate if instrumentally suitable for the application of legitimate legislation)[226], and all the normative consequences of legitimate legislation apply: e.g., there is a duty to obey, and/or coercion is justified.

The problem with this view is that, on many occasions, adjudicators have discretion and adjudicative decisions generate new disagreements of different types. Some legal theorists have claimed that in these cases there is a sense in which judges *make* the law, at least for the case. According to this position, the presence of discretion can be understood as a delegation of authority (that can be implicit or explicit, and intentional or non-intentional), to decide what the law is in the specific circumstances of a case. However, not all legal theorists accept the description of decisions in circumstances of discretion as one where judges make a *legislative* decision, and in any case the situation is different, because adjudication takes place *within* the space determined by the law.

The aim of this chapter is to show that legal theory has something to add to the discussion about political legitimacy. Some debates in the legal domain can teach us how complex the identification of the law that is going to be applied to a case can be, not only in relation to the violation of individual rights (judicial review), but also in other cases where there is more than one answer available, at least *prima facie*. Although this discussion will be

[225] An exception to this can be found in Richardson, 2002. However, his aim is different since, first, he is interested in discussing bureaucratic domination and not judicial decision-making, and second, he discusses the problem of giving public officials the power to determine the means to achieve the ends set by legislators, but there are other kinds of views about what adjudicators should do.

[226] An example of this view can be found in Christiano. According to him, "bureaucratic, judicial, and executive authority are essentially kinds of instrumental authority that are grounded in the fact that they are implementing democratically chosen purposes" (Christiano, 2008, p. 243).

presented in an oversimplified manner according to legal theory standards, it is still much deeper than the analysis of the law and adjudication that many political philosophers usually offer. I will only describe the dimensions of the discussion that are necessary in order to defend my case for legitimacy in adjudication: discretion and disagreement.

As I mentioned in chapter 2, the question of legitimacy makes especial sense in situations where there is discretion and disagreement, although the question of legitimacy can also arise when there is no disagreement. Nevertheless, the case I have in mind here is the one where someone claims that the solution of the criminal case should be x and someone claims that it should be y (and for the sake of the argument let us assume that the people in question are competent in legal reasoning) and the law does not rule out any of the two, at least *prima facie*[227]. The question is: what makes the decision to impose coercion – criminal punishment – legitimate? And also, what makes the institution that makes the decision legitimate? Like in democratic theory, different accounts of legitimacy will provide different answers.

In this chapter I will merely explain with more detail why it is possible and necessary to discuss about the legitimacy of adjudicative decisions in the case of the criminal process, and why it is not enough to focus on legitimate law. Of course, what counts as legitimate law depends on the account of legitimacy one is defending. I will connect different accounts of legislative legitimacy with different accounts of legitimate adjudication in chapter 4, and discuss different accounts of legitimate legislation in chapter 5. I hope the reader allows me to proceed with this chapter without taking a stand in these discussions yet, and I ask her to assume that the legitimacy of legislation can in principle derive from different sources, but to forget about them, like legal theorists do. I ask her to see the law as given, and to look at the moment of implementing (legitimate) legislation.

In the following sections I will first describe what it means to have discretion in adjudicative decision-making and distinguish between different senses of discretion. Then I will mention some types of disagreement that can arise in the criminal process, their sources, and why their presence makes raises the question of the political legitimacy of

[227] I will come back to the analysis of this central case in chapter 6, section 2.b., where I will make a proposal about how to deal with it if criminal punishment is going to be justified, from the point of view of legitimacy. Here I will merely present the broader discussion about what it means to have discretion in adjudication.

adjudication. But before that, let me first explain a few things about the field in which the argument will be presented.

1. Adjudication in the criminal process

In this chapter I will be concerned with the task of legal adjudication as is usually performed by judges and courts (but also juries and other actors), in the particular domain of the criminal justice system. Adjudication is commonly understood as the application of *the law* to a particular case, or the resolution of a dispute between the parties of a case regarding whether *the law* should be applied or not[228]. In the case of the criminal law the task of adjudication takes place in the criminal process and it has some features that distinguish it from other areas of judicial activity and also from bureaucratic activities in other branches of government, mainly the fact that it deals with conducts that are *wrongful* and that the response can be criminal punishment. I am assuming that the distinction between criminal law and those other areas of the law is clear, and although many of the questions I will deal with here are also relevant in those other cases they will not be the focus of my concern.

The fact that adjudication takes place in the criminal process does not imply that the latter is only about the application of the law. As explained in chapter 1, it could be the case that the process were also about calling people to account, expressing censure, or giving victims some kind of closure. However, the application of the law is one of the aims of the criminal process, and these other aims should also be part of *the law* in order to have any role in adjudicative decisions. In every case that is decided through the criminal process there must be a (at least logically) distinguishable decision about whether the substantive and procedural criminal law covers the case or not, and a determination of what it prescribes as a response. This is the dimension I will focus on.

Regarding the term *adjudication*, I will understand it in a broad sense: not to refer only to the final decision about conviction or acquittal that follows from the application of a

[228] The emphasis on one or the other depends on the legal tradition (as explained in chapter 1) and also on the area of the legal system one is referring to. Regarding the latter, criminal and civil procedures are sometimes distinguished by the law-implementing character of the first and the conflict-solving nature of the latter.

substantive criminal norm to the facts of a case once they have been proved, but also to include other partial decisions that are made along the criminal process, and that affect the final decision, like rules of evidence, the interpretation of substantive and procedural legislation, etc.

Although this can also be said about other areas of the legal system, the criminal law represents the most coercive face of the State, at least in relation to its own citizens. One could, of course, claim that criminal punishment should be abolished, or that dealing with the conducts that are considered criminal by existing legal systems should not be the business of the State. One could also claim that what should follow from a criminal process is not punishment, but some kind of restoration. I personally tend to believe that this is the right way to go, and that we should deal with crime in less coercive ways, but I will not defend this kind of argument here. I will assume that criminal punishment is a legitimate policy in a democracy and in this chapter I will discuss the problems that arise when there is discretion and disagreement at the time of applying this kind of law to particular cases.

Finally, when I refer to the law, or to legislation, in this chapter I will understand it in a broad sense as well. When I refer to *the law*, in principle I mean to include different kinds of sources, like constitutional and ordinary legislation, judicial precedents, and any other element one might include.

2. Discretion

When an adjudicator has to make a decision about how to apply the law to a particular case, she will sometimes find herself in a situation where more than one solution or course of action is available (at least *prima facie*), without trespassing the limits of the law. "Discretion, like a hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction", and it makes sense only in the context "when someone is in general charged with making decisions subject to standards set by a particular authority"[229]. In other words, "the power the law gives the [adjudicator] to choose among several alternatives, each of them being lawful"[230]. It makes sense to talk about discretion

[229] Dworkin, 1977, p. 31
[230] Barak, 1989, p. 7

every time the decision cannot be made mechanically or deductively, because more than one solution can be derived from the legal sources, at least prima facie.

Evidence of the existence of discretion can sometimes be found in the fact that people who are competent in the interpretation of the law disagree about which is the right decision[231]. They disagree because the legal answer is not univocal, at least not *prima facie*, and this disagreement is not a consequence of their lack of capacity or legal knowledge, nor is it a consequence of the fact that some of them are proposing answers that are *outside* of the law. It is just that *the law* seems to allow for two or more solutions.

But identifying situations of discretion is not always easy because adjudicators do not need to be aware that they have discretion in order to actually have it. Discretion must be distinguished from the belief that there is more than one course of action allowed by the law, but a *legal condition*[232]. They might think that there is only one answer to the case, but merely because they have not thought about other solutions[233]. This introduces a disconnection between the existence of disagreement and discretion. Since disagreement is contingent (it depends on the beliefs of people) sometimes it will be absent, even though there is discretion. This is relevant for the discussion about legitimacy because, as I explained in the previous chapter, although sometimes there might not be disagreements, the question of legitimacy still makes sense,

The identification of a situation of discretion is further complicated by the fact that it depends, amongst other factors, on the legal theory that one defends, and therefore people do not only disagree about whether there is discretion or not, but also about how wide it is[234]. One can identify a situation where there is *prima facie* more than one possible legal solution, but also claim that there is a *right answer* to the question about which one should be chosen. Or one could argue that the fact that there is discretion reveals that the

231 Dworkin, 1977, p. xiv. According to Dworkin, when this happens, the case is also a hard one.
232 Barak, 1989, p. 8
233 One could actually argue that when this happens, there is less discretion, because adjudicators' beliefs restrict the number of available options. Moreover, it has been argued that when adjudicators *know* they have discretion, they will *tend* to act as legislators, and it is better to require them to decide as if cases were easy (there is only one right answer) in order to preserve their institutional role as adjudicators Sartorius, 1976. Against this view see Greenawalt, 1975.
234 Iglesias, 2001, p. 37

adjudicator will actually make a *choice*. In other words, some could describe situations of discretion as cases of uncertainty, or of indeterminacy[235].

In addition, regardless of what legal theorists say, one could claim that, in practice, adjudicators have discretion to determine whether there is discretion or not in a particular case, and how wide it is. And they might also disagree about whether there is discretion in certain cases or not[236].

Finally, the discussion about the existence and meaning of discretion must be distinguished from the question about how judges ought to decide when confronted with more than one legal answer. It must also be distinguished from the question about whether the decision in a context of discretion can be justified or not. These two kinds of question will be the main focus of the following chapters, and here I will only present the main elements of the discussion about discretion and disagreements.

1.a. Types of discretion

Dworkin famously distinguished between two senses of discretion[237]. A judge (or other individual in charge of making a decision) has discretion in a *weak sense* when "the standards [he] must apply cannot be applied mechanically but demand the use of judgement"[238]. Discretion in a *strong sense* means that "on some issue [the official] is simply not bound by standards set by the authority in question"[239].

According to this classification, adjudicators can be in three different sorts of situation when making a decision about the application of the law:

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[235] The ground for defending one or the other option can depend, for instance, on whether one believes, like positivists, that the law can be identified by referring to their social sources and linguistic conventions (Hart, 1961), or whether one denies this thesis by arguing, like Dworkin, that identifying the law is always an interpretive enterprise (Dworkin, 1998). And a third possibility would be the one defended by legal scepticism, according to which the law is what judges say it is. See, e.g., Kelman, 1981; Kennedy, 1997.

[236] Barak, 1989, p. 117

[237] He actually distinguishes between three senses, but the third one is not relevant for this discussion. This third (also weak) sense refers to the final authority someone has to make a decision that cannot be reviewed (Dworkin, 1977, p. 32).

[238] Dworkin, 1977, p. 31

[239] Dworkin, 1977, p. 32. However, according to Dworkin, in these cases the person is bound by other standards such as rationality, fairness and effectiveness, and therefore there is room for criticism if she does not meet them (Dworkin, 1977, p. 33).

a) Strong discretion: the person can choose the standards and the course of action that derives from those standards.
b) Weak discretion: standards are given, but more than one course of action is available, at least *prima facie*.
c) No discretion: standards are given and they determine the course of action. The person has no choice, because the decision is made "mechanically".

Although this classification is useful in analytic terms, it has been argued that the distinction between applying and creating a standard (between strong and weak discretion) can be difficult to determine in practice:

> "At one end of the spectrum this task requires the interpretation of given standards in order to apply them, at the other end it is directed to creating standards where none are given. Between the two poles there is endless variation in the degree to which the official's decision may be constrained by a given standard"[240].

Some authors (like Dworkin) believe that what distinguishes strong from weak discretion is the fact that there is a right legal answer in the latter. However, many others believe that there can be cases with more than one *reasonable* answer, but without strong discretion. I will leave these questions open for now, because the focus in this chapter will be on the fact of disagreements when there is discretion, and not on how to deal with them. Moreover, the possibility of finding instances where there is no discretion and decisions are made deductively has been one of the claims of legal positivism[241].

1.b. The sources of discretion

The most obvious cause of discretion can be found in the explicit and intentional delegation of a decision to adjudicators by marking the kind of decision that she has to make, but leaving a range of alternatives for her to choose from. For instance, if legislative institutions enact a law that requires judges to determine the sentence of imprisonment for

[240] Galligan, 1986, p. 11. See also 1986, p. 16.
[241] See especially MacCormick, 1978.

murder between 10 and 20 years, they are delegating the decision on the judge. Another example would be prosecutorial discretion: prosecutors can decide whether to bring charges or not. The same can be said about the delegation of a decision to the jury: they need to determine whether the person should be convicted or not, and the verdict is up to them.

If this delegation of a decision comes with a standard that ought to guide it, it is a case of weak discretion. For instance, if the sentencing decision ought to be based on the seriousness of the criminal conduct or if the charging decision needs to be connected to the strength of the evidence. If, on the other hand, legislation only said that those who commit murder should be punished, but gave the judge no guidance as to which kind and amount of punishment, the case would be one of strong discretion. The same goes for the unregulated prosecutorial decision. In any case, what these kinds of case have in common is the fact that the legislative institution intentionally and explicitly leaves it up to the judge to decide.

A second cause of discretion can be found in the connection that it has with the way legal norms are formulated: they can be more or less vague, depending on whether they are enacted as rules or principles. This kind of discretion can also be intentionally established by the legislative institution, but not necessarily. The claim is that, ideally, when the standard is enacted as a rule, those who apply it will have no discretion, because rules have to be applied in an all-or-nothing fashion[242]. Adjudicators would apply the rule *mechanically* by verifying that the facts either fit the description of the rule or do not. On the other hand, if standards are enacted as principles, their situation will probably resemble more the one described in b). The reason is that principles are typically enacted through the use of vague concepts, and they work like reasons for or against a decision, but do not determine it when there are other principles at stake.

However, the distinction between these two situations (and also with situation a)) is not as clear as it appears in this classification. First, vagueness is a matter of degree, and also the difference between rules and principles[243]. In addition, some principles can be so vague that

[242] Dworkin, 1977, p. 24

[243] This view has been called the *weak demarcation thesis*, in contrast to the view according to which rules and principles are qualitative different (Aarnio, 2000).

they provide almost no guidance to decision-makers, blurring the distinction between a) and b).

A third cause of discretion is that, at least sometimes, there is more than one standard applying, not only to a case, but also to the same specific fact in a case. Adjudicators might find themselves in a situation where they have to decide which one is going to prevail, or at least how they ought to be accommodated. Moreover, the formulation of each of these standards can have different degrees of vagueness.

Finally (and a further complication for the classification presented above between the three situations) is that, although discretion depends on whether legislative institutions decide to give it to adjudicators or not, and on how they enact the standards, it can also depend on other factors. For instance, the fact that judges have to offer reasons for their decisions and that they have to follow precedents set by other judges or courts tend to restrict the number of available courses of action. The cause is not to be found in the legislative decision or in the way the law is enacted, but in the institutional framework and the way the adjudicative function is exercised. Furthermore, the fact that judges see themselves as bound by certain practices or part of a certain type of legal culture can make them more or less predisposed to choose certain courses of action instead of others, a fact that further restricts or increases the number of available options in practice[244]. However, as I mentioned above, the fact that adjudicators do not believe they have discretion does not necessarily mean they do not actually have it.

1.c. The objects (and amount) of discretion

I have been referring to discretion and the courses of action they enable/require as people normally present them in legal philosophy, i.e. as something judges have when they apply substantive legislation to the facts of the case (in the case of the criminal law, in order to determine whether the person should end up being convicted or not). But since adjudication involves different kinds of decisions, adjudicators have discretion regarding different kinds of objects that need to be distinguished from each other, at least logically (although they are connected with each other).

[244] Galligan, 1986

When adjudicators are confronted with a case, their decision requires several kinds of steps or sub-decisions. The simple version of the structure is the following[245]:

- Identification of the legal standard (IS)
- Identification of the facts (IF)
- Application of the standard to the facts (ASF)

The *naïve view* of adjudication tells us that in IS, the judge will have to consider the substantive legislation that applies to the case and determine the particular norm that is to be applied. For instance, to identify whether there is legislation prohibiting hunting, and which are the exceptions for this norm. Then she will look at the facts of the case in order to determine whether the conduct actually happened or not, according to the evidence (IF). Finally she will apply the standard to the facts (ASF) and decide whether the person should be convicted or not, and which punishment she will receive.

But adjudication in a broad sense (like the one mentioned above) is a much more complex task, and the story just offered is full of problems. First of all, there can be numerous substantive standards to be applied (mainly about offences, defence and sentencing). Adjudicators (either judges, prosecutors, or even someone else, depending on the legal system) might have a weaker or stronger discretion in each of these cases in order to determine what *the law* says for a particular case (IS).

In addition, there are also procedural norms to be identified, and to be applied to the relevant facts. There are rules about how to conduce plea-bargaining, about how to obtain evidence, how to handle it or disclose it, how to behave in court, how to evaluate evidence at different stages of the process, when to exclude it, etc. Adjudicators also have discretion in the identification of those procedural rules, and also in determining whether the interpretation made by other agents (prosecutors, police, defence) is the right one. Moreover, procedural and substantive norms do not usually work as separate systems, but as considerations that can interact and conflict with each other. Making a final adjudicative decision is a sequence of different sub-decisions where different standards are identified, and adjudicators can have different degrees of discretion in each of them. This means that

[245] Barak, 1989; Galligan, 1986. See also MacCormick, 1978b.

the possible combinations of solutions are quite numerous, depending on how they decide in each of these steps.

Regarding IF, adjudicators have discretion when it comes to determining whether each fact has been proved or not, because there are epistemic difficulties, and there can be more or less discretion when it comes to deciding whether the facts actually took place. Sometimes the discretion can be weak, because a specific standard is given, like in the case of *proof beyond reasonable doubt*. However, in some legal systems where the requirement is that a certain fact has been proved according to *thorough conviction of the judge*, the discretion is much stronger.

However, one would be wrong in thinking that the only facts that need to be proved are the ones regarding the criminal conduct of the accused (e.g., was it the accused who killed the victim? Was the victim even murdered or did she die from other causes? Did the accused act with a racist motivation?). Each of the numerous substantive and procedural norms has to be applied to different kinds of facts, and there can be different kinds of standards for their identification, or even none at all, generating situations with different amounts of discretion. Adjudicators must determine, for instance, whether the elements of the defence actually took place (e.g., was the person actually defending herself?), whether the police did or did not follow the procedure while obtaining evidence (did the police inform the person about her rights? Did the police have a reasonable suspicion about the fact that a crime was taking place inside the house when they decided to enter without warrant?), whether the prosecutor did or did not have enough evidence to accuse (did she decide not to prosecute for other kinds of reasons?), whether the plea bargaining was coercive or not (was the defendant really able to reject the offer?), whether the prosecutor did or did not follow a certain procedure (did she disclose the evidence to the defence in the right moment?), whether the person will destroy evidence if left free during the process, etc. In all these cases, the identification of the relevant facts and the determination of whether they satisfy the standard of proof (if there is one) is made in contexts where there are different degrees of discretion.

Finally, adjudicators may also have discretion when applying the standards to the facts. A useful way to see the point is to think about a situation where the standard has been identified, and also the facts, but there is still the question about whether they are covered

by the standard or not, or about which would be the best way to apply it. Common examples of this kind of discretion can be found when the norm refers to concepts like *reasonableness*, *public order*, *proportionality*, *due care*, *excess* (like in the use of police force), *leading* (like in the case of leading questions), etc. The standard has penumbra areas where it is not clear whether it covers the facts or not. Another kind of example is the one where the adjudicator is given the standard, but she has to decide which would be the best application of them, e.g., an adjudicator is told to decide the sentence according to the seriousness of the offence, but she still has discretion to give her a sentence of 5 or 6 years in prison.

It can be argued that these three kinds of decisions cannot really be distinguished from each other. For instance, because determining the scope of a norm (ASF) is also a way of determining what the norm is (IS), or because determining the facts (IF) is also intimately connected to the legal definition of those facts (IS). One implication of this would be that the amount of discretion that one adjudicators have when deciding whether to convict one particular offender is a combination of different degrees of discretion in different stages of the process, and that it is actually quite difficult to determine how much discretion they have, because these three kinds of decisions are interconnected. Moreover, how much discretion there is also depends on the characteristics of the specific facts and of the standards that have to be applied. Thus, in many cases, not only the naive view is mistaken, but it is also quite difficult to determine how far from reality it is (because we cannot really determine how much discretion there is).

1.d. Discretion is good and bad

Discretion can be seen both as a positive and a negative feature of adjudication, depending on how we look at it. On the one hand, it can be desirable since it is not possible for legislators to make decisions about, or even to foresee, every particular situation in a certain domain that they intend to regulate. They can point at certain properties, but leave some margin for adjudicators to make further distinctions between those cases sharing those properties. Seen from this perspective, discretion can be a tool to achieve *real equality between cases*, because it requires not only to treat equal cases alike, but also to distinguish between cases that are different, when not all those differences could be captured by general legislation.

Connected to the argument just presented, the existence of discretion can also be a useful tool that allows the adaptation of the law to social changes: "to obtain just results in particular cases as well as to get around the rigidity of law and its inability to adapt promptly to changing social practices in the community"[246].

Another positive element in having discretion is that it can be a tool to avoid the application of over/under-inclusive rules[247], and unjust results. If discretion is a consequence of the existence of a vague norm or of the authorization to interpret the rule according to its background reasons, then adjudicators have the possibility not to apply it on cases that are not supported by those reasons.

But discretion also has a negative side. First, if the law is partially configured at the time of application, it can loose part of its ability to guide people's conduct (since they do not know how the adjudicator is going to decide), and therefore it can lose effectiveness (because people could end up doing something different from what legislators intended)[248].

Second, and connected to the previous argument, if people try to accommodate their conduct to the law, but they cannot predict how it is going to be interpreted by judges, because they have more than one option available, the rule of law is weakened, because adjudication becomes a retro-active determination of the content of the law. There is a danger for judicial decision-making to become unpredictable, and this would violate people's autonomy[249].

A third problem with discretion is that if judges are the ones in charge of deciding what the law is in the domain where they have discretion, the separation of powers seems to be affected: they are not strictly *applying* the law, but legislating instead[250]. When this is the case, problems of legitimacy could arise if there is no justification for the activity of judges acting as legislators, especially – but not only – if there is disagreement[251].

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246 Iglesias, 2001, p. 2
247 See section 3.b. below.
248 Against this view, and connecting discretion to vagueness see Waldron, 2011.
249 Iglesias, 2001, p. 2; Moreso, 2001
250 Iglesias, 1999
251 "Courts, however, perform their law-making function non-transparently – under cover of a pretense that the law is being discovered, not made or changed – and through processes that are not organized as legitimate law-making processes" (Waldron, 2008, p. 29).

Fourthly, when there is discretion, there is the possibility of different adjudicators reaching different solutions, because they made different interpretations of the law. This is a potential problem in terms of equality, since people that are affected by adjudicative decisions could be treated differently, depending on who is the adjudicator deciding their case.

Finally, the presence of discretion opens the door to making arbitrary decisions, if they are not adequately and sufficiently justified. For instance, if the adjudicator decides within the domain of discretion, but merely according to her own preferences or prejudices, then her decision will be arbitrary. Actually, there seems to be evidence about the fact that, when judges have discretion, they can be influenced by factors that are beyond their control, because of cognitive biases[252]. And even if they decide according to what they see as the best possible answer, someone could argue that it is just their views that are being implemented, and that this is arbitrary, if the decision is not justified. The point is, however, not that decisions in a context of discretion *cannot* be justified, but that the justification does not come from the mechanical application of the law, and it needs to come from a different kind of source. The important question is, then, which kind of justification will make the decision non-arbitrary (if this is possible), especially in a context of disagreement.

3. Disagreements in adjudication

If adjudicators had no discretion, one might say that, when someone disagrees with the implementation of a legitimate legislative decision to a case, she should try to change legislation instead of asking the adjudicator not to apply it (e.g., by making a legislative proposal, by bringing the case to a constitutional court, etc.). Once we observe that there is discretion, this response is not available, because the solution the person defends is amongst the possible courses of action offered by the law, at least *prima facie*. The space to argue about what to do in the specific case can, and usually is, the criminal process (although the person could also promote a change in legislation in order to limit judge's

[252] Two interesting studies about the anchoring effect in judicial decision-making can be found in Danziger, Levav, & Avnaim-Pesso, 2011; Englich, Mussweiler, & Strack, 2006.

discretion regarding this type of decision). These are the kinds of disagreements I will discuss in this chapter. Not the ones between people who hold opinions that can be located *outside* the law, but the ones that exist *within* the possible reasons and solutions, whatever the limit between these two spheres means. I will assume that the law is legitimate, but there are still many issues about which people hold different views, and they appear when deciding particular cases.

Contrary to what someone who ignores the real practices of the law might believe, these disagreements not only arise between the parties of a case, and it is not a mere strategy that lawyers use to bend the law in order to defend their clients (or prosecutors, in order to convict more criminals). The same can happen amongst those who have to make the adjudicative decision (between members of the jury, judges of a court, or judges that belong to different courts and decide other similar cases), between lawyers, between citizens and even between legal theorists. Moreover, these disagreements can be honest, in the sense that people might actually believe that a certain position is the correct one, and not only that it would be the best way to serve her own interests.

I will distinguish between three types of disagreement that arise in criminal adjudication: about the law, about the facts, and about morality (the justice of the decision). Of course, this distinction is artificial, and the three of them have close connections with each other. But it seems useful to analyse them separately, because sometimes the implications are different in each case.

Furthermore, one could claim that, even when we can find the three kinds of disagreements in the criminal process, they should not be relevant for the adjudicative decision (e.g., that we do not have to evaluate the morality of an action when it is covered by a legal norm), or that they should be dealt with by different people (that it is not the job of the judge to evaluate the facts because the jury should do it, etc.). Let us assume for now that the three are possible and keep in mind that the answer might depend on the legal theory one defends, on the characteristics of the legal system, and on the view one holds about the role of adjudicators.

Moreover, the meaning of the different kinds of disagreement might be different. Perhaps regarding one of them one could say that there is a right answer, while there is none in the case of another (although different accounts could disagree about this as well).

3.a. Disagreements about facts

The kind of disagreement that takes place in the criminal process is typically viewed as one about the facts, between prosecution and defence. This is the version of the criminal process that we receive from TV: the prosecutor says she killed him, the defence says she did not. In this context, the basic assumption is that these factual statements are either true or false and ideally two people looking at the same evidence should arrive at the same conclusion about what happened: normally we believe that the disagreement just means that one of the parties is wrong, because it is not possible to claim that something happened and also that it didn't happen.

Since some types of fact-finding can require special knowledge, at least in the case of some facts (e.g., ballistic or medical analysis, accounting, etc.), it would be plausible to argue that part of the enquiry is actually *scientific*: it purports to gain knowledge about the physical world through empirical method. As a consequence, this part of the job should be left to experts, and the views of those who disagree with them could sometimes be catalogued simply as wrong.

However, the real question in the criminal process is not whether something happened or not, but if there is enough legal proof to decide against the defendant. In order to establish the factual basis for conviction, and because complete certainty is unachievable in the real world, legal systems usually set a certain standard of proof and the parties can discuss (and disagree on) whether the proof satisfies that standard or not. But this standard is not merely epistemic, according to the scientific method. It is a standard established in the law, like I mentioned in section 1.c. above.

As I also mentioned in that section, although the main part most of the discussion about evidence and factual disagreements refers to the verification of the occurrence of the criminal conduct, it must be stressed that there are other types of fact that also have to be

determined in the criminal process: facts that have to do with the conduct of the parties and the police, and that are governed by procedural norms. This means that there can also be factual disagreements about whether someone violated a procedural rule or not, and whether it has been proved. For instance, adjudicators have discretion in the evaluation of whether the police actually did something that would count as a violation of the procedures or not. Different adjudicators may hold different views about this issue, and the parties might disagree as well.

Additionally, the evidence regarding the facts about the criminal conducts must not only be assessed at the time of deciding conviction. For instance, judges and prosecutors usually evaluate the reliability of evidence when they decide whether to incorporate it to the process or not. And they have discretion in this domain as well. There can be different standards to make this decision and different adjudicators might disagree about what should be done, even applying the same standards.

Moreover, it is not possible to have a discussion about facts without determining what the factual premise for the particular case is in the first place, and this is intimately related to the decision about identification of the legal standards and about their application to the facts. Public officials do not collect facts in the world in order to evaluate them and to see whether they can find some crimes amongst them. They start the factual inquest under the guide of a hypothesis about the commission of a crime that has to be previously defined in legal terms. In addition, the fact-finding activities and the definition of the factual premise are interrelated, because one has to adjust the focus on one according to what is observed in the other. And this applies both to the facts regarding criminal conducts, and to the facts about other kinds of conduct (like the case of police conduct mentioned before).

I will not pay much attention to these kinds of factual disagreements in the discussion about legitimacy in the criminal process, although the discussion about how to assess facts and evidence is of great relevance[253]. The reason is not that I ignore their importance, but that the point is rather that, even when factual disagreements do arise in the criminal process, at least some of them depend on disagreements about the identification of the legal standards and their application to the facts. As I will explain below, legal and moral disagreements around these questions are more problematic in terms of legitimacy.

[253] And there is a big amount of literature about what has been called *legal epistemology*. See Ferrer, 2007; Laudan, 2006; Taruffo, 1992; Twinning, 2006.

3.b. Legal disagreements

When I refer to disagreements about the law I mean about the individuation of the particular norm (IS) but also to its application to the facts of an individual case (ASF). There are several kinds of reasons why disagreements like these usually arise in the criminal process. I will mention some of them in very general terms, and I hope this is enough to convince the reader that these disagreements appear because identifying and applying the law is not necessarily a mechanical or deductive task: there is discretion.

Vagueness

I am not saying anything new if I remark that in the criminal law, as it happens in other areas of the law, legal texts can be ambiguous or, more importantly, vague. As *hats-in-churches* and *vehicles-in-the-park* cases famously show, sometimes the enunciation of general rules allows for certain cases to fall into what has been called *penumbra cases* as opposed to *core cases*[254]. In the domain of the criminal law this means, e.g., that it might be difficult to establish whether a certain type of conduct falls into the description of a crime or not, or whether a certain police conduct is a violation of a procedural rule or not, because concepts in the law are vague. The source of this difficulty can be found in some features of ordinary language, and is not specific to the law: it is only capable of capturing the world in an imperfect way. "Problems of vagueness will arise whenever we confront a continuum with terminology that has, or aspires to have, a bivalent logic"[255]. For instance, the concept of *child* certainly includes 5-year olds, but it is less clear whether it also includes 15-year olds. *Childhood* is supposed to be an all-or-nothing thing, but age is a property that varies in degree.

It is also quite accepted in the literature that, even if a legal text is not vague today, there is a chance for it to be vague in the future because of the open texture of language[256]. We – humans – have a limited capacity to predict the future and all the possible cases that will have the same general properties that were set as conditions in a legal text.

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254 Hart, 1961; Schauer, 2004, 2008a
255 Waldron, 1994, p. 516
256 Hart, 1961

The fact that a case falls in the penumbra zone can generate disagreements about whether it is covered by the norm or not. Moreover, there can also be disagreement about whether a case is a penumbra case or not: someone could argue that a 15-year old is clearly a child, and that the penumbra zone starts around 17 years of age.

In addition, people can disagree about what should be done when a penumbra case appears. One could argue that when the case is not *clearly* covered by a norm, it is simply not covered by it. Others could say that, in order to decide whether a case is covered by the norm or not, people will need to analyse the aims of the norm. In the case of children, if the norm says that children must go accompanied by their parents to a swimming pool, and the aim is to protect them from physical harm, then a 15-year old that is a proficient swimmer would not be covered by the norm. The problem is that in many cases these aims are not made explicit in the law, and even if they are, there could be disagreement as to how to interpret them.

But not only rules can be vague. In fact, this type of disagreements are supposed to arise more frequently when the standard that is to be interpreted is enacted as a principle, because, as I mentioned in section 1.b., one of their characteristics is that they do not set out (or even purport to set out) the conditions that make their application necessary[257]. Therefore it is possible (and also quite probable) that different people disagree about how to apply them to a particular case. For instance, if the norm is that the decision of police officers to stop a person on the street should not be *discriminatory*, or that the means used in self-defence should be *reasonable*, the law is explicitly referring to principles whose scope is unclear. This does not necessarily mean that there will be disagreement in every case. There can be core and penumbra cases as well. But the chances of disagreement are probably higher than in the case of rules, because in order to identify and apply the standard people will probably include moral considerations in the decision.

[257] Dworkin, 1977

Over and under-inclusion

Connected to the problem of vagueness, we can find another one: the potential conflict between the literal meaning of the text of a rule and its purpose or background reasons[258]. As mentioned already, the fact that laws are enacted as general rules normally produces cases of over and under-inclusion: cases where the rule applies to instances not covered by its background reasons, or instances that, although they are covered by the background reasons, are not reached by the meaning of the rule[259]. In the case of norms about criminal offences, this is problematic because, especially in the first case, there is a risk of punishing people for conducts that do not justify punishment (according to the background reasons), just because their conduct falls into the general rule. The exceptions to these rules are usually called "the negative elements of the offence", and an example could be consent in the case of rape. Another problematic example would be the one where a procedural rule that aims to protect the rights of the defendant is under-inclusive, and in some instances it does not achieve its purpose of protecting her against unfair treatment.

In these kinds of cases people can disagree about whether to follow the rule or the background reasons. Sometimes the fact that judges, prosecutors, or even juries can decide to restrict or extend the scope of the rule when confronted with these kinds of cases depends on the existence of another standard that enables[260] or restricts this kind of discretion[261] (and there are normative arguments both for and against this possibility[262]). The problem is that when they are allowed to do so, new disagreements can arise: like in the case of vagueness, the answers will depend on which are the background reasons of the rule and these reasons, even if they are explicit, they will probably be vague and generate further disagreements.

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[258] Schauer, 2004, 2008

[259] Schauer mentions three types of case where this can happen. The first one happens when a general rule is only probabilistically connected to the properties of the cases it is supposed to cover. The second takes place where a generalization that is supposed to be universal, turns out not to be universal. The second happens when a certain property that was considered irrelevant is now considered relevant (Schauer, 2004).

[260] See, for instance, Model Penal Code of the United States (1962), section 2.12.: "The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offence and the nature of the attendant circumstances, it finds that the defendant's conduct: (1) was within a customary license or tolerance, neither expressly negative by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offence; or (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offence or did so only to an extent to trivial to warrant the condemnation of conviction; or (3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offence".

[261] For instance, the fact that juries do not offer reasons allows them to do this in practice. For a defence of this role see S. Kadish & Kadish, 1971.

[262] I will discuss the pros and cons in chapter 6, section 2.a.

For instance, in the case of the criminal law there is a great deal of disagreement about what those reasons are, and involves discussions about the grounds for criminalization (Harm principle? Promotion of certain lifestyles? Victims' rights?), the justification of punishment (Deterrence? Retribution? Restoration? Vindication of victims?), the aims of some procedural rules (Police deterrence? A *clean hands* rationale? Protecting individual rights?). Moreover, the fact that legislation is enacted as rules sometimes actually responds to the lack of agreement about the background reasons.

Conflicts between standards

In order to make decisions in the criminal process the adjudicator will need to consider several kinds of standards. She will need to review all the pieces of legislation that might have an impact on whether the conduct will be considered criminal or not. She will also have to determine whether the specific standards that regulate the procedure where followed or not, and if not she will need to decide about the consequences. Moreover, both substantive and procedural criminal law can be regulated through legislation (both ordinary and constitutional) but also by judicial precedents (depending on whether courts must follow them or not)[263]. This means that, in order to make partial and final decisions, the adjudicator will sometimes need to take several sources into account and she will need to decide how to accommodate the different standards. The mere activity of evaluating the relationship between all these laws and precedents can be a quite complex task.

It should not be difficult to imagine that making decisions in a context of such complexity will generate many disagreements, and in fact this is what actually happens. But things can get even messier if we consider the fact that the standards expressed in these legal texts (both in the case of legislation and precedents) are sometimes expressed as principles, and sometimes as rules. Moreover, they are vague, and rules are over/under-inclusive.

[263] In my analysis I intentionally ignore those norms that come from international conventions and decisions from international courts of justice, since they can create specific problems in terms of political legitimacy (they rarely have any democratic legitimacy) but the responses to these problems might be different from the ones that are acceptable in the domestic domain.

In this kind of context, sometimes norms will conflict with each other, or at least more than one will be applicable to the same facts suggesting the possibility of different solutions. In the case of the criminal law we can find many examples of conflicts between different considerations, and some of them occur within the substantive criminal law, while in others there is a confrontation between substance and procedure.

One of the typical examples of conflicts in the domain of the substantive criminal law is the one that we find between offences and defences. These are sometimes conflicts between rules, and sometimes conflicts between rules and principles[264], depending on how each norm is formulated. E.g., the conduct that falls under the rule that describes the offence is at the same time justified (e.g., protected by the exercise of a right by the offender[265]), required by another norm, or excused in certain circumstances[266]. People can disagree about when the reason for punishment should prevail against the reason against it.

And things get even messier if we consider that the criminal process typically represents a conflict between the implementation of substantive criminal laws and following the procedural norms. The typical example is the one where there is a conflict between investigating the commission of a crime and the protection of individual rights of the offender or third parties, e.g., while obtaining evidence[267].

One way of analysing the phenomenon of conflicts between standards in the law is reflected in the discussion about the *defeasibility* of legal rules. According to this reading, rules are only *prima facie* applicable to a particular case because they cannot set all the sufficient conditions that should be met in all cases[268]. Some authors say that all legal rules are *defeasible*[269] while others say that there are some legal rules that are not, and that defeasibility is merely a contingent fact[270]. Others describe this kind of circumstance as one

[264] We might also find conflicts between principles, but in existing legal systems offences are never enacted as principles, as far as I know.
[265] See, e.g., article 20 section 7° of the Spanish Criminal Code.
[266] There is a deep discussion about the plausibility and desirability of the distinction between negative elements of the offence and defences. I will assume that the difference exists and that it should be maintained. For a defence of the distinction see Gardner, 2007.
[267] For examples of how different legal systems deal with these conflicts see chapter 4 (the three sections called "the role of truth".
[268] For a brief description of the discussion about the idea of defeasibility in the law see Bayón, 2000, 2001.
[269] Basically, because if the legal system is formed both by rules and principles, principles are always defeasible (Dworkin, 1977), and principles can justify exceptions to rules, then all legal propositions are defeasible.
[270] Bayón, 2000, 2001

where the different values that ground each norm must be weighed against each other[271], while others believe that the values need to be specified[272].

Regardless of how one describes these conflicts (and in fact the occurrence of conflicts between norms is a source of disagreement in itself), the important point is that when more than one norm is applicable, this can generate disagreements about what the decision in the particular case should be.

Hard cases

Legal theory has referred to some of these cases of discretion and disagreement as *hard cases*, and these kinds of cases also appear in the criminal law. There is not only one single definition of what hard cases, as opposed to *easy cases*, are[273], but I will understand them as those cases in which – at least *prima facie* – the adjudicator has more than one course of action available (they have discretion), and there is disagreement (amongst people who are competent in the use of the concepts) about which course of action the law requires[274].

A case would not be hard if there was disagreement but there was only one possible solution available to the adjudicator: if it was a context of no discretion and the decision was made deductively. That kind of disagreement would already have been settled at the legislative level and the judge would have no choice but to apply the law in a certain way (although some authors claim that this never occurs, or that the judge must not only follow the legislative decision, but also judicial precedents).

What makes hard cases problematic is that, in order to resolve the disagreement, the adjudicator will need to make a decision that calls for justification, and in order to offer it she needs to refer to moral concepts. According to some authors these values are part of the law, even implicitly, while some others believe they are not. Whether one or the other is the case depends on the conception of the law one holds, and the relevant issue is that they have a moral character. Different authors disagree about which kinds of considerations

271 Alexy, 2002; Roxin, 1998
272 Ashworth & Redmayne, 2010; Moreso, 2001, 2006
273 For a simplified description of some versions about what *hard cases* are see Lucy, 2004.
274 Dworkin, 1977; Hart, 1961; MacCormick, 1978

should be determinant in dealing with hard cases. For instance, some believe that the decision should be based on the effects of decisions on society, based on their consequences[275], while others believe that in those cases judges should base their decisions on grounds of principle[276].

Interpretation standards

I have been referring to legal standards that have to be applied to facts, but the law also includes standards that are supposed to regulate the way in which norms should be interpreted, and the criminal law is not an exception. Some of these interpretation standards are implicit while some others are explicitly enacted in legal texts, and they come from different sources, like ordinary or constitutional legislation, judicial precedents, legal doctrine, etc. Some other times, like in the case of rationality, they are just recognized by the participants, and are seen as part of the legal practice.

In the case of the criminal law, there are some specific standards, like the prohibition of using analogical arguments in order to extend scope of substantive criminal laws, the *in dubio pro reo* standard, etc. But general interpretation rules also apply, like those who say that a specific law should prevail over a general one, or that rules of a higher hierarchy prevail over those of a lower rank. Furthermore, the law can also determine which kind of interpretation *technique* adjudicators must use in case of uncertainty: teleological, originalist, and textualist interpretation are just some examples. And, as mentioned already, sometimes adjudicators are required to weigh or to specify the different values that are at stake when making a decision. In addition, there can be standards that tell the judges how flexible the rules can be and how they will need to deal with cases of over and under-inclusion.

Although these standards can help making the adjudicative decision, they neither make discretion disappear, nor eliminate disagreements. Even when they are part of the law, how these standards should be interpreted and applied is not obvious, and sometimes these same standards can conflict with each other. Moreover, these circumstances can even multiply disagreements instead of helping to deal with them: there can be, not only

[275] MacCormick, 1978
[276] Dworkin, 1977, 1998

disagreement about the solution of the case, but also about the prevalence for one interpretation standard over another, or about their implications in a particular case. For instance, some could argue that teleological interpretation should prevail over textualism, but even those who agree in the defence of the former can identify different aims, and/or different interpretations of what would better satisfy those aims.

The meaning of disagreement

The fact that there is disagreement in all of these cases does not necessarily mean that all those who disagree can be *right*: that all answers are equally good. However, in order to avoid considering disagreements that are not relevant for the discussion that I am presenting here, I beg the reader to assume that the participants are all competent in the use of legal concepts, and that they are offering solutions that are *within* the law[277].

The meaning of these disagreements for the decision depends on the legal theory one defends. There are different positions as to whether there can be a right answer to legal questions and also as to whether we can know it or not. Some people are sceptic about the possibility of determining what the right legal solution for a case is, and they claim that the law is always *indeterminate*. Others claim that although judges ground their decisions on legal arguments, they are merely covering their own opinions, ideology or preferences. From the point of view of these accounts, the solution to a case is actually a choice, and the disagreement means that the positions defended are all candidates to the final solution.

On the other side, we find those who think that there is always a right answer. If this is true, and there is disagreement between two people, it merely means that at least one of them is wrong. Disagreement is understood as a reflection of *uncertainty*, not indeterminacy, and it can be dissolved by the use of judgement.

Finally, some legal theorists think that the law is sometimes determinate, but sometimes it is not: in some cases there is a clear answer, while in other cases this does not happen[278].

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[277] An exception in the case of the criminal law is the one of jury nullification. In practice, when juries decide that a person should not be punished because they think it would be unjust, regardless of what the law says, they are actually disagreeing with the content of the law, or at least to its application to the particular case.
[278] See, e.g., Kress, 1989; Leiter, 1995.

In any case, if at least sometimes the law includes moral concepts (like aims or principles, but also standards that are vague), then the description of disagreements in adjudication cannot be complete without a reference to moral disagreements.

3.c. Moral disagreements

It would be implausible to deny that all areas of the law are of *moral relevance*, but people usually tend to recognize the criminal law as the one in which this connection between law and morality is more obvious: it deals with conducts that are seen as wrongful, like rape, murder, theft and political corruption. Moreover, the content of procedural norms is also full of moral concerns (in addition to the epistemic ones), because, since punishment is a quite serious response, the State has to be very careful in how it is decided, and the rights of offenders have here a central role. In addition, there are deep disagreements about many moral questions that are related to the criminal law and punishment: about the admissibility of certain kinds of evidence, the content of rights, the criminalization of certain conducts, the justification punishment (both in general and in particular cases), the reason for criminalizing certain conducts, the justification of the amount of punishment, etc. Some think that criminal punishment should not exist, while others believe its scope should be extended and its strength intensified.

The way in which moral disagreements appear in adjudication that I want to address here is not the kind of disagreements that people have about whether a certain conduct (like, e.g., abortion, consuming drugs or rape within marriage) should be a crime or not, or whether the police could torture a suspect in order to obtain a confession. Here, for the sake of the argument, I am assuming that the law (both procedural and substantive) is legitimate in the sense described in chapter 2: it is acceptable in spite of those disagreements.

Moral concepts can appear in different ways in the criminal law, and some of them were already mentioned. Here I will mere summarize them in order to organize the subject. First, sometimes the law makes an explicit reference to morality. Examples have already been mentioned: *reasonableness*, *due care*, *excess*, *fairness*, *cruelty*, *proportionality*, *necessity*, but also the content of fundamental rights like privacy, freedom of movement, etc. In these cases the

person that is in charge of making the decision has to evaluate certain facts and laws, but according to a moral standard[279], and people might disagree about what these notions amount to, and about their implications in particular cases.

A second kind of case would be the one in which there is no express reference to moral concepts in the (procedural or substantive) standard that is to be applied, but the norm can be seen as incompatible with some principle that is also part of the legal system: there is a conflict between norms. Usually principles, in addition to having a legal character, have a moral content. Typically, these principles will be found in Constitutions. For instance, they can include social goals (e.g., re-socialization of criminal offenders), values (e.g., fairness), fundamental rights (e.g., the right to privacy), or other principles (e.g., the principle of legality)[280]. Some other times we can find these principles in judicial precedents or in ordinary legislation.

A third type of case would be the one where the moral evaluation points in one direction and the criminal law points in the opposite direction, not in the case of the law in general, but in the particular case where it is to be applied. This sometimes happens in cases of over-inclusionary rules mentioned before. E.g., people sometimes claim that, because of the particular characteristics of the case, the background reasons for the rule that criminalizes the conduct do not support a conviction, or that the expected sanction for a certain conduct would be too high. Sometimes adjudicators have the discretion to apply these rules in the way they see fit. For instance, prosecutors can sometimes decide not to bring charges when this is the case, and juries can decide to acquit through jury nullification. In other legal systems judges have a similar power to decide whether exceptions can be made to the application of rules to individual cases.

In these three types of case there might be disagreement as to the correct interpretation of the moral standards. Moreover, it is possible (and it actually happens all the time) that in the same case there is more than one moral principle at stake, and that they point in different directions. Here, even when people consider the same moral principles, they can

[279] Among legal positivists, the account that allows for this kind of reference by the law is usually known as inclusive legal positivism. The contrary view (exclusive positivism) claims that the law can be identified only by looking at social facts (the directives of authorities) and not at moral reasons. See Raz, 1994.
[280] A third kind of moral content can be added to this list, and it is political values, such as democracy, federalism, etc. They also appear sometimes in Constitutions.

disagree about the right balance between them. This is typically the case with procedural and substantive considerations in the criminal law.

Now, several observations must be made about the issue of morality in the law. First, the description of what these moral disagreements *mean* depends on certain meta-ethical issues that generate lots of debate amongst philosophers. Whether we can *know* what is right and wrong, whether that content it is subjective or objective, whether it merely reflects emotional states or there are moral facts are just examples of these discussions. The way in which sceptics, realists, relativists, expressivist and so on would describe these disagreements is very different.

Second, they also depend on whether we think that morality includes general principles that can be balanced, or that each particular situation deserves a special answer (particularism). Moreover, it depends on whether we think that in case of conflict between different values, they can be accommodated, or that they are incommensurable.

Third, there are moral reasons for (or against) even considering these kinds of moral disagreements in adjudication, and they depend on the normative account one defends about the criminal process, adjudication, and the relationship between the legal and the political system. For instance, someone could say that the moral disagreement should be irrelevant when it comes to applying the law, and that legal texts should be as precise as possible in order to prevent these disagreements from taking place. Or one could argue that the law should be vague in order to allow adjudicators to find the best balance between moral principles in each particular case and/or to find the right moral answer. But how systems handle these disagreements is a different question from what they are about or if they exist at all (and it is actually the subject of the following chapter).

Conclusion

In this chapter I argued that, unlike what the naïve view assumes, adjudicators have discretion and that this discretion can be weaker or stronger, depending on several factors. Moreover, the adjudicative decision is, in fact, a sequence of different sub-decisions made by different people, and in each of them there can be discretion. In addition, these

decisions are interconnected and as a consequence it is actually quite difficult to determine how much discretion there is when a particular case is decided, and it certainly depends on the characteristics of the case.

The identification of situations of discretion, the determination of its size and the proposal about what to do in those cases depends on the legal theory one defends. However, the real problem is that there are disagreements about what should be done in these cases, not only amongst legal theorists, but, more importantly, amongst adjudicators and participants of the criminal procedure.

These disagreements can be of different kinds: factual, legal or moral, and although they can have different meanings and implications, the possibility of distinguishing between them is challenged by the fact that there are intimate relations between the three dimensions.

The discussion of these circumstances of discretion and disagreement is not only interesting from a theoretical point of view, but also relevant in practical terms. The main question that arises is the following: given the need to make a decision, and the disagreements about which one is the right one, what will count as an adequate and sufficient justification for that decision? This question is not about the description of the adjudicative context anymore, but also one about the role of adjudicators in that context.

One possible response would be to go back to one's legal theory complemented with one's conception of morality and to offer a theoretical argument complemented with another one about justice. However, other people will probably hold different views about these two issues, and therefore the criterion to determine whether the adjudicative decision (e.g., to punish) is justified or not needs to come from another normative argument. Like in the case of legislation, this criterion is legitimacy.

Those defending different accounts of legitimacy will defend different criteria in order to determine when adjudicative decisions are acceptable and defensible, and when they are not. These criteria can be substantive or procedural: they can either depend on the content of the decision, or on how the decision was made. In addition, from different accounts of legitimacy people will defend different arguments about what makes adjudicative

institutions valuable, and, like in the domain of legislation, this value can be instrumental or non-instrumental.

However, an account of legitimacy in the adjudicative domain cannot be constructed in isolation. Unlike legislators, adjudicators have a reason to apply legitimate law (understood in a broad sense) to particular cases (as explained in chapter 2). This means that an account of legitimacy of adjudication is dependent, or at least connected to an account of legislative legitimacy. As I will show in the next chapter, this can work in different ways, depending on the kind of account one is defending.

Chapter 4 - Political legitimacy and three models of criminal procedure

Introduction

The literature about comparative criminal procedure has traditionally distinguished between two models. The first one is the model historically associated with the Romano-Germanic tradition and the criminal systems of continental Europe, widely known as the non-adversarial process. As an ideal type, authors have referred to it as the "official-enquiry model" [281], the "policy-implementing model" [282], or the "model of the official investigation"[283]. The aims of this model are supposed to be finding the "ontological truth", and achieving "substantive justice"[284].

The other family is the one that people usually link to the common law tradition, and it is known as the adversarial process. As an ideal type, it has been called the "party contest model"[285] the "conflict-solving model"[286], the "model of the dispute"[287], and its aims are supposed to be finding an "interpretive truth" and achieving "justice as fairness"[288].

These two models have been roughly described and compared in chapter 1. The aim of this chapter is to distinguish between three different models of criminal procedure (also as ideal types), but on a different dimension: the accounts of political legitimacy on which they are based. As explained in chapter 2, political legitimacy (as a normative concept) refers to the moral acceptability and defensibility of decisions and institutions, especially (but not only) in situations of disagreement. I also described the main accounts of political legitimacy: on the one hand, substantivism and proceduralism in the case of decisions, and, on the other hand, instrumentalist and non-instrumentalist accounts of political institutions.

In chapter 3 I argued that we must pay attention to the legitimacy of adjudication and not only of legislation (which is what accounts of legitimacy have usually focused on), because

[281] Damaska, 1972
[282] Damaska, 1986
[283] Langer, 2000
[284] Grande, 2008
[285] Damaska, 1972
[286] Damaska, 1986
[287] Langer, 2000
[288] Grande, 2008

these decisions are made in a context of discretion (which means that there is more than one possible solution to a case, at least prima facie, according to the law), and that there are disagreements about what should be done. This circumstance asks for an account of legitimacy in this domain. Moreover, I believe the account of adjudication one offers should be compatible with the one that is defended at the legislative level.

In this chapter I will discuss some of the possible implications of that claim for the institutional design of the criminal process, in connection to the legislative dimension. Based on the elements of the ideal types as described by the comparative literature about criminal procedure, and on certain features of some existing legal systems, the argument here is that certain institutional designs are more compatible with some accounts of legitimacy than with others, and that different systems can be analysed from the point of view of models on the basis of that criterion. In addition, when there is disagreement in the adjudicative stage, what could be an acceptable/defensible decision in one model might not be acceptable/defensible in another one.

It has already been argued by the comparativist literature that the aims behind models of criminal procedure are different, and that this is what explains the differences between institutional designs[289]. I believe it is possible to do the same kind of exercise, but paying attention to the role of political legitimacy. Some of the conclusions will not be very different from the ones observed in the two original models as ideal types, but here I will present three models of legitimacy in the criminal process, each of them connected to an account of legitimate decisions and legitimate institutions. I will use them to interpret certain features of existing institutions in different legal systems in order to illustrate how these features are *closer to* or *fit more naturally in* one model.

I am not trying to prove a causal relationship between participants of those systems endorsing these accounts of legitimacy and the features of their institutions. In fact, I will not be paying much attention the actual beliefs of participants, whether they think that their practices are defensible or completely absurd. Moreover, it is very plausible to argue that beliefs and institutions have a reciprocal impact that would be very difficult to disentangle. Nevertheless, I think it makes sense to connect accounts of legitimacy with existing practices, and the reason is twofold. First, because most of those who defend

[289] Damaska, 1972, 1986; Grande, 2008; Griffiths, 1970; Luna, 1998

different accounts of political legitimacy have so far ignored both the adjudicative dimension of their theories and also the relevance of the institutional design of adjudicative institutions[290]. And I do not believe that any institutional design of adjudicative institutions is compatible with any account of political legitimacy (the naïve view is mistaken). Second, because, as mentioned, the institutions of existing legal systems function closer to one of the three ideal types than to others, even when the accounts of political legitimacy on which they are based are not explicitly defended. I think it is an interesting task to look at adjudicative institutions and to analyse the differences between them through the lenses of different accounts of legitimacy, in order to see which ones can make better sense of them.

As to why three models instead of two, I think that the non-adversarial family includes at least two kinds of *logics* that are closer to different normative accounts of political legitimacy. They are both based on instrumentalist and substantivist accounts of adjudication, but connected to different criteria to determine which should be the content of decisions.

The first model is *moral instrumentalism* and here the legitimacy of decisions depends on its moral content, more specifically, on its substantive justice (considering elements such as the aims of punishment, the respect for individual rights, the rule of law, etc.). The institutions of the criminal process are legitimate as long as they are instrumentally suitable for producing these kinds of decisions. The German system is the one that better reflects these concerns.

The second model is *legal instrumentalism* and the legitimacy of decisions made in the criminal process depends on how well they reflect the content of the law, as enacted by legislative institutions. On the one hand, this model is based on a substantivist account of adjudicative decisions, but these decisions are legitimate if their content reflects the content of legislation, and not of justice directly, as in moral instrumentalism. The reason is that legislative institutions are the ones with the legitimacy to make these decisions[291], while adjudicative institutions are not. On the other hand, the legitimacy of adjudicative institutions depends on how well they perform when it comes to identifying and applying

[290] Maybe some counterexamples are Dworkin, 1977, 2011; Raz, 2006, 2009; Waldron, 1995, 1999.
[291] And the account of legislative decisions/institutions can, as I will explain, be different from the one defended by moral instrumentalism.

legislation to particular cases: it is also an instrumentalist account. This model is going to be illustrated by the French system.

As I mentioned, these two first models can both be associated with non-adversarial systems, and in fact they share several features, especially when it comes to institutional design, but also the fact that they are substantivist. However, the claim that will be defended here is that they are based on different accounts of political legitimacy, and therefore some elements are different: they make sense in one system but not in the other.

The distinction between the two models could be criticized by claiming that there is no real difference between *legal* and *moral* issues in constitutional democracies, where moral issues contained in the constitution (such as rights) are also part of *the law*. However, the kind of stress that the two distinct accounts of legitimacy put on ordinary legislation and the space they are willing to concede to justice or moral concepts in the law makes the distinction an important one, as I will explain in the following sections.

The third model I will discuss is *battle proceduralism* and here the link with the adversarial model will be quite obvious. The legitimacy of the decision does not depend on its substantive content, but on the features of the decision-making process (or, as suggested by Grande, on achieving *justice as fairness*). The main concern is that the rules of the procedure are respected, even if they are an obstruction to the implementation of substantive legislation (against legal instrumentalism) or to achieving substantive justice (against moral instrumentalism). Quite obviously, the system that better reflects these values is the United States, but I will also make some references to the English system.

Although these models will be designed on the basis of three normative accounts of legitimacy, I will present them as ideal types. This means that I will offer simplified versions of them. I will not describe three *complete* normative accounts, because if they were presented as such the result would need to be much more complex than the models that can be described here. Actually, one could even argue that any plausible account of legitimacy should give some space to elements of the three models. My aim here is more modest: I want stress the differences between different accounts of legitimacy and illustrate their implications for the criminal process by referring to existing practices and institutions. Even if this exercise merely allows me to draw a caricature of the different models, the task

will be successful, the reason being that the aim is to show the relevance of the distinctions and not to offer a deep analysis of accounts[292]. The comparison will offer a response to a question such as the following: if we defend one of these three accounts of legitimacy, which of the existing institutional designs would we prefer?

As in any case of ideal types, the institutions of existing legal systems that will be used to illustrate the models do not reflect any of them perfectly. One can always find elements of the other models. In fact, as I mentioned in chapter 1, it has been argued that there is a tendency for criminal procedures in the two main traditions to converge. But there are still significant differences, especially when considerations of the three different kinds (justice, legality and fairness) conflict with each other. Even today, in a context of homogenization of legal systems thanks to globalization and the role of international or supranational institutions, it is still possible to see how different legal systems tend to prioritize some of these considerations over others. I believe this shows, in the end, that they are closer to one of these accounts of legitimacy.

Finally, I must say that these three models are not the only possible alternatives, when analysed from a normative point of view. In fact, I will criticize them and defend a different version of proceduralism (based on other assumptions and values) in chapters 5 and 6, and offer some suggestions about institutional design in chapter 7. But perhaps I should say something about what is probably the strangest absence in this typology: the model that would derive from what I described as *negative substantivism* in the past chapter. This account of political legitimacy gives an important role to substance, but does not consider values as maximization requirements (like *positive substantivism*, the account that provides the basis for *moral instrumentalism*), but only as a limit to procedures, and it can be described as a mixed account of legitimacy. This could probably be the ground of a very plausible model of adjudication, and is also reflected in several institutions of different legal systems (especially those who authorize judicial review of legislation). But since this alternative can be seen as a combination of the other models (because it gives an important role to the procedure and also to substantive justice), I will not describe it as a separate type here. The aim in this chapter is just to illustrate how different accounts of legitimacy have an impact on the criminal process, and not to describe how this would occur in the case of all possible accounts.

[292] I will go back to this kind of task in chapter 5, where I start discussing accounts of legitimacy and defending one of them, both there and in the following chapters.

The chapter is divided in four sections. In the first three I will describe each of the models. In each section I will present the general account of legitimacy on which the model rests and refer to issues such as the meaning of disagreements, and the amount of discretion in the hands of adjudicators. Then I will describe the relationship between legislative and adjudicative decisions and the normative proposals about the form of the law and the theory of adjudication, closely connected to the account of legitimacy of decisions. I will also analyse the relationship between procedures and substance and the role of factual truth, paying especial attention to exclusionary rules of evidence in order to show how the considerations derived from legitimacy play a role in these decisions. Then I will describe the way in which each account deals with the conflicts between substantive values. Finally, I refer to the institutional design, focusing on certain features of adjudicative institutions like how hierarchical and professionalized they are, the dynamics of the process and trial, the justification of decisions and the possibility of appeal and review. The fourth and last section of the chapter is a summary of the arguments presented in a comparative table.

1. Moral instrumentalism

This model of criminal procedure is based on a substantivist account of political legitimacy. The legitimacy of adjudicative decisions depends on the justice of its content, and institutions are legitimate insofar as they have instrumental value connected to these kinds of outcome. The decisions that are supposed to be legitimate (because they are just) are the final sentence, but also other partial decisions that are made in the criminal process.

The values that should be considered for a decision to be just, and therefore legitimate, are of different kinds. First, the aims of punishment should be justified and some of the most famous theories can be classified in two categories: those who have a deontological basis (retributivism) and those who are consequentialist, although we can also find some "mixed" theories. These theories determine when punishment should be imposed and when it should not: a decision is unjust if it does not satisfy this criterion. Second, decisions should achieve justice in terms of the protection of the rights of the offender, and also of other people (like victims, witnesses, or other citizens). These rights can be affected by the procedures (e.g., by invading someone's privacy in order to gather evidence) but also by

making decisions whose content is unjust (e.g., by punishing someone for doing something that she had a right to do).

In this model, legitimate institutions are those who tend to produce the best decisions. This means that decision-makers should be experts: those who are in a good epistemic position. In order for this model to be defensible, there must be a certain degree of optimism about the possibility of achieving justice. It needs to be presupposed that there is a right answer to questions about justice, that it is possible to know what the answer is, and that there are some people who are better suited for this task.

This does not mean that it is an easy task: disagreements in the adjudicative process arise because sometimes there is *uncertainty* about what the correct decision is. But there is an expectation that, after careful analysis, the right answer will be determined. These disagreements can refer either to the final sentence or to the partial decisions that are made in different stages of the process, and the expectation applies to both cases.

Finally, according to this account, people have a reason to obey decisions when they are just. When institutions are legitimate because decision-makers are those in the best epistemic position, then people have a reason to believe that their decision is the right one, to obey it even if they disagree, and to collaborate in its production (depending on what is required of them)[293].

1.a. Legislation and adjudication

Since justice is the ultimate aim of this model, both legislative and adjudicative institutions should have instrumental value. Moreover, legislators and adjudicators could be described as *collaborators* whose tasks are at least partially the same: achieving justice. The fact that their jobs sometimes overlap is not a problem, and it can actually be a good thing, if it maximizes the chances of making the right decisions. Even assuming that those who are in charge of making decisions at the legislative level are in a good epistemic position (including a Constitutional Court acting as a *negative legislator*), adjudicators should be able to make adjustments in the law before applying it, if it would produce injustice in a particular

[293] I offered an argument about how this works in the case of substantivist accounts in chapter 2 section 3.b.

case. Furthermore, in those cases where there is disagreement about what the law requires adjudicators should be able to decide according to what they think would be the most just decision.

If the aim is to achieve justice in each particular case, adjudicators should have a sufficient amount of discretion to take all the relevant circumstances and values into account. Because justice cannot mean mere uniformity adjudicators should not be bound too tightly by the law, if this fact could produce injustices. It seems desirable to enact legislation in abstract terms, with a preference for principles over rules. If this is the case, the adjudicator can take legislation as a guide but interpret the different principles and find the right decision for the case. However, even inside this model there is an argument against this suggestion, since one of the features of a just system is that it treats like cases alike and that it is predictable. The *rule of law* is one of the values that should be promoted. This might require the enactment of (some) legislation as rules in order to allow citizens to know what the law is asking of them before they act.

But none of these two extreme options can provide the definite solution. Some laws should be enacted as rules, but it should be possible for the decision-maker not to apply them when the outcomes would be unjust (and this is probable, because rules are generalizations that can be *over* and *under-inclusive* and because the values that are the background reasons for the rules can conflict with each other). As a result, legislation should include both rules and principles in order to accommodate these considerations. And adjudicators should have enough discretion to decide what the correct decision is on a case-by-case basis.

This seems to be the way things work in Germany, where substantive criminal laws are enacted in more abstract terms than in other legal systems such as the US or France, and judicial institutions have shaped its content in order to deal with cases of over and under-inclusion[294]. E.g., Germans refer to the notion of *Rechtsgut*, a concept whose meaning is connected to the kinds of public values or interests that the law is supposed to protect, and they check whether these values are promoted in the particular case (even when it implies a departure from the literal meaning of a legal rule).

[294] Herrman, 1973, pp. 471–73

As to the interpretation techniques that adjudicators should follow, they are expected to subsume the case into the general rules, but also consider whether their application would violate any principle. If they think it might, they should consider the different principles at stake and use the method of *balancing*. How much each of the elements will *weigh* depends on the characteristics of the case: they will consider if applying the rule affects the core of other values at stake or not, how important the case is (e.g., how serious the crime is), etc. This kind of reasoning is very familiar in the German legal system, and also defended as a normative theory by German scholars like Alexy[295] or Roxin[296].

1.b. Procedure vs. substance

If there is a conflict between the procedure and the decision that is substantively good, in general substance should prevail, because in principle procedures have an instrumental value. In this model, procedures should be flexible enough for judges to evaluate the particular circumstances of the case, since they are a means to an end: achieving substantive justice.

However, things are not that simple. The system aims to maximize several kinds of values. In some cases the procedure is instrumental to the aim of achieving justice through the application of substantive criminal law: rules designed with the aim of collecting reliable evidence in order to convict those who are guilty, or of finding the right amount of punishment. But in other cases, the procedure is instrumental to other aims, like the respect individual rights or the dignity of people. And if these things are serious enough, they could actually defeat the considerations derived from the application of substantive law. Both kinds of values need to be balanced.

Because the balancing between competing values requires adjudicators to take the seriousness of the effects of decisions according to those values into account, it could be the case that a) ignoring the procedural norms is considered acceptable for the sake of achieving the aims of substantive legislation, but also that b) other aims of procedure defeat the application of the substantive aims. These two possibilities will be illustrated by how

[295] E.g., Alexy, 2002
[296] Roxin, 1998

the exclusionary rule works in Germany, after briefly commenting on the general role of the factual truth.

1.c. The role of factual truth

In this context, finding the factual truth is very important, because the justice of the decision depends on the accurate description of each situation that is evaluated. But the search for the factual truth might sometimes conflict with following procedural rules and respecting the rights of offenders, victims and other parties (e.g., their right to privacy). If these rules were absolutely strict, then the truth would be compromised and injustices would appear. As mentioned before, in this model decision-makers should be able to balance the different values that are at stake.

The way the exclusionary rule works in Germany is a very accurate illustration of the elements described so far. First of all, judges have an important amount of discretion to decide about the admissibility of all evidence on a case-by-case basis, taking the particular circumstances of the case into account. The judge has to decide about the admissibility of evidence by following a three-step reasoning. The first step is the verification of a violation of one of the values of the system: the *Rechtstaatsprinzip*[297] (e.g., if the police obtained the evidence by using coercion on the defendant). This principle is grounded on the protection of the *purity* of the judicial process. However, whether the violation affects that value or not is in itself decided by the judge. If this basic test is passed, the second step is based on the constitutional doctrine of *Verhältnismässigkeit* (principle of proportionality): German judges balance, on a case-by-case basis, the defendant's interests in privacy against the importance of the evidence and the seriousness of the offense charged[298]. As a result, evidence obtained after the violation of procedural rules can be admitted in some cases. The third step is the verification of whether the evidence violates the individual's private sphere (thus violating her dignity). In these cases the evidence can be excluded, even when it was obtained by legal means (when the public official followed the procedure, or the person voluntarily offered the evidence) if it violates the core of the individual right to privacy[299].

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297 Bradley, 1982, p. 1044

298 Bradley, 1982, p. 1034; Weigend, 2007, p. 251

299 The most famous case where this test was implemented is the *Diary Case*. (Judgment of Feb. 21, 1964, BGH, 19 BGHSt 325.). See Weigend, 2007, p. 252.

Another element that illustrates how the system is oriented to finding the truth and achieving justice is the existence of evidence rules based on the reliability of the information and not on the legality of its production. This is why the German system excludes declarations obtained by "brutality or deceit"[300], but not other kinds of evidence obtained through police misconduct[301]. Even in the case of coerced confessions, the evidence will be admitted if the offender repeats its content in a non-coercive context.

Also, the inadmissibility of illegally obtained evidence does not extend to derivative evidence: there is no *fruit of the poisonous tree* doctrine. Furthermore, "German courts […] sometimes rely on the 'hypothetical clean path' doctrine, arguing that relevant evidence should not be excluded when there was a 'technical fault' in securing it but the item could have been obtained by legal means"[302].

Finally, even in those cases where evidence is excluded, this does not mean that its content is completely eliminated from the process. Professional judges are usually aware of the facts before the trial[303], and this means that even when they cannot use the excluded evidence as an argument for the final decision, there is no way to ensure that it does not have an impact on their beliefs about the culpability of the offender, and on the decision about conviction.

1.d. Substance vs. substance

As it was mentioned before, different values can conflict and the adjudicative decision should be based on finding a balance between them in order to achieve justice in the particular case. The conflict can take place, as I explained, between procedural and substantive values, but also between different substantive values. Typically, the aims of punishment or the criminalization criteria can conflict with individual rights of the defendant.

300 Bradley, 1982
301 Damaska, 1972
302 Weigend, 2007, p. 253
303 Weigend, 2007, p. 254. Courts also include lay judges who do not have access to the excluded evidence, but they have less decision-making power in the procedures.

Moral instrumentalism should give adjudicators the possibility of balancing the different substantive values that have an impact on the decision. One of the typical ways in which this is done is by analysing the reasons for and against conviction (e.g., what in the common law tradition is known as the distinction between offences and defences), and, more generally, for and against criminalization.

As to the first type of case, in this model judges must decide their cases taking several kinds of consideration into account, which leads to sophisticated theories of the principles of the criminal law. Germany is the perfect example of a system where the theory of the criminal law has a long tradition of providing very precise accounts of how the different kinds of considerations should be analysed before someone is convicted of a crime. It is not only a two-step analysis of offences and defences, like in the common law tradition, but a three or four-step reasoning, and each stage is a very complex construction of arguments, distinctions, values, etc. That determine the responsibility of the person and the kind of response that the State should give to her actions. The kinds of considerations that judges use in order to make decisions cannot be found in legislation, but come precisely from these theories that are supposed to be based on *rationality* (although they include several moral values)[304].

About the second kind of case, German courts do not have the formal role of reviewing the constitutionality of substantive criminal laws before they apply them. However, they do not have a duty to apply the substantive criminal law automatically when it conflicts with other values, such as the individual rights contained by German Basic Law. First, they have to follow the case law produced by the Constitutional Court on the subject. This means that the system includes two different institutions that have the role of finding a balance between criminalization and the protection of individual rights. Second, if during the procedures a court observes that (or has a doubt on whether) a certain substantive criminal law violates a right contained in the Basic Law, she must ask the Constitutional Court about how to solve the conflict[305]. It is true that judges do not have the discretion to make this decision themselves, like in other countries where there is a diffuse system of judicial review like the US. But the mere possibility of identifying the conflict is already a source of discretion, because they can choose whether to apply the law according to their interpretation, or to ask the Constitutional Court.

[304] Fletcher, 1978, p. 406
[305] Article 100 of the German Basic Law.

It is not unusual for the German Constitutional Court to review the constitutionality of substantive criminal laws in order to verify if their ends are defensible under the Basic Law. As in many other cases, there is a test for this: first, judges identify the State action; second, they identify the right that can be violated; third they identify the aim or purpose of State action[306]; fourth they look at the suitability of the action for achieving its purpose; fifth they evaluate the necessity of that action; and finally they test the proportionality of the action[307].

1.e. Institutions and dynamic of the process

Since institutions are instrumental to making just decisions, those in charge of the adjudicative procedures should be in a good epistemic position, or at least better than the position of the ones on which decisions are going to be applied. Officials will need to be trained for the kind of activities that their roles require, making the system a highly professionalized one.

This can be clearly observed in the German system where those who occupy positions as judges or have to own a degree in law, they have to pass a first State exam, then receive a two-year training, then pass another State exam, to be finally appointed to their position. In both cases, they are career public officials (although judges have a different status from other civil servants) and normally appointed for life after a period of probation[308]. Although there are some lay judges, they also receive special training and do not appear in court just to decide one case, like jurors in other legal systems.

Moreover, the system is organized in a hierarchical way, where decisions made by prosecutors are controlled by judges, decisions made by courts are controlled by higher courts, and in the end all their decisions can be reviewed by the Constitutional Court.

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[306] One interesting feature is that the aims of the criminal law can be of different kinds (according to different theories of punishment) and the Constitutional Court only rejects those who cannot be justified by any of them Lagodny, 2011, p. 769.
[307] Lagodny, 2011
[308] See German Judiciary Act for the regulation concerning judges and sections 141-152 of the Courts Constitution Act for the dispositions concerning public prosecutors.

The dynamic of the process is one where everyone contributes in the task of determining the truth and achieving justice but those with the highest epistemic position determine what other participants can and cannot do. One of the implications is that public officials must have an important amount of power to direct the procedure in search of the factual truth, because they cannot rely on the parties for the production of all the evidence or arguments, since the goal of achieving substantive justice is too important to leave it in their hands.

In Germany the trial is presided by a professional judge, and she is the one that raises the questions, requires the production of evidence, etc. The court includes other professional judges and some lay judges, but the latter have no control over the procedure. The prosecutor, who is also a professional, is expected to contribute to the aims of the trial, and not to defend a partial interest. She needs to maintain objectivity and to investigate not only incriminating but also exonerating circumstances[309].

Moreover, prosecutors must always bring charges when cases come to their knowledge, unless there is no sufficient evidence. This means that they cannot refuse to do so for strategic or other kinds of reasons. They can only refuse to file the accusation for epistemic reasons. The German Code of Criminal Procedure includes a principle of mandatory prosecution[310] that is regarded as a constitutional requirement under the equal rights clause[311].

As mentioned before, in this model, all the participants are expected to contribute to the goal of making the best decisions. Thus, there are no restrictions regarding the possibility of including more evidence or arguments when they could serve that aim, or to include more participants to the process, if it contributes to the goal of finding the truth and achieving justice. An example of this can be observed in the fact the private prosecution (the victim or other person/organization) and the public prosecution can work side by side in the accusation, but this *double* prosecution is not seen as a source of unfairness. In Germany he victim of certain offences can join the prosecution as a "subsidiary prosecutor". When she does, she can participate in the trial and even has the right to appeal

[309] German Code of Criminal Procedure, section 160 (2)
[310] German Code of Criminal Procedure, section 152
[311] Herrman, 1973, p. 470

an acquittal[312]. Furthermore, if the prosecutor refuses to bring charges, the victim can insist. First, there is an intra-office review, and then the victim can resort to the State Court of appeals, which can direct the prosecutor's office to file an accusation. Even if this does not usually happen, it works as a supplementary check on prosecutorial discretion[313].

Finally, when there is an issue that requires expert knowledge in order to be investigated, the court appoints an expert witness. These witnesses respond to the court, not to the parties, and are supposed to be neutral[314].

1.f. Justification of decisions and review

Those who make the adjudicative decision have to offer reasons, both in cases of conviction and acquittal[315]. This is because the decision, in order to be just, should be supported by the right reasons, but also because there must be a possibility of review, since the possibility of control is supposed to increase the chances of making the right decision.

Having courts that can review the decisions made by other courts is a typical example. This is the case both with partial and final decisions, and the members of higher courts are supposed to be people who are in an even better epistemic position, compared to those in the lower ones. These different courts are not only functionally different, but they are hierarchically organized.

In the case of Germany the decisions made by lower courts can be review by appeal courts. They are not formally bound by their past decisions, since every judge is independent when deciding the case in front of her, but in practice they do follow their judgements, because otherwise their decisions will be rejected on appeal.

The defendant can appeal a conviction on legal grounds (*Revision*) or in general (*Berufung*). In the case of a general appeal (available in the case of all but petty crimes), a new trial will take place, without the defendant having to offer any grounds for the request. The appeal

312 German Code of Criminal Procedure, sections 395, 397, 400.
313 Weigend, 2007, p. 262
314 Weigend, 2007, p. 257
315 German Code of Criminal Procedure, section 167.

court can introduce new evidence in order to make the decision[316]. This practice allows the defendant to have two trials without having to demonstrate that there have been any defects in the first one. This is consistent with the aim of minimizing mistaken convictions.

As to appeals based on legal grounds, the defendant must describe the arguments why she alleges a violation of the law[317]. "An appeal on legal grounds leads to reversal of the judgment if the appeals court determines that a) the trial court failed to apply or misapplied a relevant rule or substantive or procedural law and b) that the trial court's judgment is based […] on that error"[318].

In order for appeal and review to be possible, courts have to produce a written document where they provide a careful and usually long motivation of the decision[319], including detail of which facts were found to be true, how the law was applied, and on what grounds the sentence was based[320].

Finally, the prosecution can also appeal both convictions and acquittals. And not only final decisions can be reviewed: important partial decisions that are made during the process should be subjected to control by other courts in order to avoid mistakes. In Germany there is the possibility of presenting a complaint for decisions such as arrest, seizure, the opening or termination of procedures, the inspection of files, and other reasons[321]. In these cases, not only the parties can present a complaint, but also witnesses, experts, and other persons.

2. Legal instrumentalism

Legal instrumentalism shares several features with moral instrumentalism, since in both cases the legitimacy of decisions is evaluated according to their content, and institutions are evaluated in terms of how well they perform in the production of those kinds of decisions. Unsurprisingly, the legal systems that resemble one or the other are usually catalogued as

316 Weigend, 2007
317 German Code of Criminal Procedure, section 337.
318 Weigend, 2007, p. 269
319 Weigend, 2007, p. 264
320 German Code of Criminal Procedure, section 267.
321 German Code of Criminal Procedure, section 304.

part of the same model of criminal procedure, as described by the comparative literature analysed in chapter 1. However, the aims to which adjudication is oriented are different: in the first case it is justice, while in the second it is the implementation of the law[322], and the content that makes adjudicative decisions legitimate is also different.

In this model the disagreements that arise at the level of adjudication (both in the case of the final sentence and the partial decisions of the process) are not directly connected to the uncertainty about justice, or at least this should not be the kind of discussion that takes place in the process. The moral disagreements that exist regarding the solution of cases are supposed to be settled – at least ideally – at the legislative level, and these decisions then merely applied by adjudicators. In the criminal process the parties can still disagree and there is room for discussion, but it is because sometimes it is not clear what the law requires in a particular case. In spite of that disagreement, ideally it should be possible to make true and false statements about the content of the law, because legislation can (and should) provide a determinate answer to each case.

The reasons for obedience in this system are connected to the legitimacy of legislation in the first place and only derivatively connected to adjudicative decisions and institutions, to the extent that they are good tools for the application of legislation.

2.a. Legislation and adjudication

In this model legitimacy derives from legislation, and it is *transmitted* to the adjudicative decision by a sort of deductive reasoning: if the law that establishes punishment x for conduct y is legitimate, and adjudicators are confronted with a case of y, then punishment x is legitimate in this case. Therefore, what ultimately makes punishment legitimate and what gives people a reason to obey/respect adjudicative decisions is the legitimacy of legislation. However, it also makes sense to pay attention to the characteristics of adjudication if these decisions are to be obeyed/respected: they should be made as *mechanically* as possible, and introduce no distortion to the original legislative decision. And the adjudicative institution

[322] I would say that the name "policy-implementing model" (Damaska, 1986) fits legal instrumentalism better than moral instrumentalism for that reason.

is legitimate as long as it has instrumental value connected to the production of these kinds of decisions.

The legitimacy of the content of substantive criminal law is independent (and previous) to the decisions that are made in the criminal process. While in moral instrumentalism legislators and adjudicators both contribute to the same aim, here their roles are very different. There is a strict division of labour: the former are the ones who make decisions about justice settling moral disagreements, and the latter are supposed to follow those decisions. There is not only a division of power between the legislative branch and the judiciary, but also a sort of *hierarchy* between them: judges have to follow the will of the legislative assembly.

As to the account of legitimacy of legislative institutions, it can be either instrumentalist or non-instrumentalist: one can argue that democratic institutions are epistemically superior to judges, or that democratic procedures are intrinsically valuable. In both cases, there is something that distinguishes legislators from adjudicators and that justifies a hierarchical relationship between them: adjudicative institutions do not, and cannot, have that kind of legitimacy. Regarding decisions, one could also defend a substantivist or proceduralist account of legitimate legislation. However, probably substantivism fits less naturally in this kind of view. They might be ready to accept that, even when legislative institutions do usually get it right (because they have instrumental value), there should be a way of correcting these decisions in the case they make unjust decisions. If in a particular case the law produces unjust outcomes, and the adjudicator makes an unjust adjudicative decision by applying the law mechanically, the substantivist would at least feel uncomfortable. This is not the case with procedural accounts of legitimacy, since they argue that there is something intrinsically or instrumentally valuable in democracy, and that judges cannot have that kind of legitimacy. The possibility of the adjudicator departing from what the law says on grounds of justice should be rejected, because she has a reason to apply legitimate law to particular cases.

In this model, in order for the law to bind the adjudicator to the will of the legislator, it needs to be determinate, and discretion should be as little as possible. The use of vague concepts should be minimized and the law has to be expressed as rules and not as principles, both in the case of procedural and substantive criminal legislation. The French

legal system reflects this concern for detailed legislation: both the substantive and the procedural criminal legislation are heavily codified and with a high level of detail. The French Code of Criminal Procedure has 934 articles, and many of them have several sections, and the French Penal code has 727 articles, also with several sections each.

If adjudicators had discretion to decide in particular cases, the worry is that they would be acting as legislators and thus violating the hierarchy between the two institutions. This is why this model can be associated with legal formalism[323] and probably also with exclusive legal positivism[324], which is the view according to which the law can be identified without reference to moral concepts.

However, this model can also be associated to a normative theory of adjudication: normative or ethical positivism. According to this view, it is not only true that the law *can* be identified by looking at its social sources (the act of enacting legislation) but they also argue that this *should* be the practice[325]. Normative positivists claim that there are moral reasons to *de-moralize the law*, because moral disagreements should be settled by democratic institutions, and not by judges. They argue that legislators and adjudicators have different tasks: the former should enact laws that can be applied without recourse to moral judgment, and the latter should enforce only positive law[326].

As I mentioned, in deciding particular cases, the ideal method is deduction. One of the problems this model has to face is that, if the law is enacted as rules, there will be cases over or under-inclusion[327], but if adjudicators were authorized to review the background reasons of a rule in order to verify if it is over or under-inclusive in a particular case, they would have to make a moral judgment[328]. In this model, over and under-inclusiveness will generally be accepted as necessary sacrifices for the sake of legitimacy. One can even say that making the *wrong* decision in particular cases might an acceptable sacrifice for the sake of the legitimacy of the system as a whole.

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323 Schauer, 1988
324 See Marmor, 2002; Raz, 1986.
325 Some also offer a conceptual argument about why legal positivism is a normative theory.
326 Campbell, 1998, 2004; MacCormick, 1989; Waldron, 1995, 2001
327 See chapter 3, section 2.b.
328 This kind of view has been criticized and it has been argued that it is not the only way to follow rules. I will discuss this possibility in chapter 6, section 2.a.

Ideally, once this sort of problem is identified, there is no reason why exceptions cannot be introduced if there are rules that produce many cases of over or under-inclusion when they are implemented. However, these exceptions should be enacted by legislative institutions, and not by adjudicators. If the law needs to be more complex in order to accommodate more circumstances, then they should change it.

One of the most interesting features of this model is that adjudicative decisions cannot be based on judicial precedents, in contrast with what happens in the other two models. This is clearly the case in France, where, if case law is mentioned on an adjudicative decision, it is used as a mere illustration of how the norms can be applied[329]. Precedents are not formally binding, and in fact "one might even argue that there is an opposite rule: that it is forbidden to follow a precedent only because it is a precedent"[330]. This is consistent with the idea that the legitimacy of adjudicative decisions derives from the legitimacy of legislation, and the fact that other adjudicative institutions have decided similar cases does not have any kind of authority over future cases.

2.b. Procedure vs. substance

The conflicts between procedural and substantive criminal law are supposed to be settled *before* adjudicative decisions are made. Judges cannot have the discretion to weigh principles or values in order to determine what is best in terms of justice. Since the solution to these conflicts is a matter of disagreement, it has to be settled by democratic institutions.

In France, the solution that has been implemented can be seen as a second best in terms of this strategy, but it is still closer to this model than the solution found in Germany or the United States. For instance, if there are any doubts about the compatibility of a law with the principles that are part of the French Constitution, the *Conseil Constitutionnel* is the institution in charge of evaluating this. However, it the mechanism is quite different to the one that exists in other places. First, this decision is made before legislation is promulgated. Once this happened, judges must apply it, even if they believe there is still a conflict. Second, the members of this court are not professional judges, but former politicians.

[329] Frase, 2007, p. 206
[330] Troper & Grzegorczyk, 1997, p. 115

There is no hope to find any legal expertise in their designation, but to help solving a political disagreement.

Regarding how these conflicts between procedural and substantive considerations are dealt with in adjudication once the laws are in place, if a procedural rule is not respected by one of the parties, her action is subjected to a *nullity* (and I will explain how this works in the following section). However, the reason is different than in the two other models. Unlike battle proceduralism, the issue is not that procedural values should always prevail over substantive justice, and that judges can interpret whether procedural values were violated (like in battle proceduralism), but that adjudicators have no authority to evaluate these considerations. Moreover, the procedural rules that they apply come from a legislative source, and not from judicial precedents, and if these rules exist, they should be applied to every case. The difference between this model and moral instrumentalism is that judges do not have discretion to evaluate when procedure should prevail over substance, or the opposite. They need to apply the rules about both of them.

2.c. The role of factual truth

In legal instrumentalism, the role of the factual truth is important, since discovering the facts is necessary in order to achieve the aim of adjudicative institutions. Being able to correctly apply the law to each particular case depends on discovering what actually happened. However, like any other decision in this model, it should be made according to what legislation says about it, and not according to what the judge believes would be a better solution.

Although the exclusionary rule in France is stricter than in Germany (since adjudicators should not be able to balance procedural and substantive values when deciding whether to admit evidence or not), it is also less strict than in the United States. Moreover, it has been used with far less frequency than in any of those two countries[331].

In France, the exclusion of evidence is understood as a means to *fix* a mistaken application of the (legitimate) procedural rules, and what the adjudicator does is to *nullify* the act of the

[331] Pakter, 1985

police or the prosecution. There are two kinds of *nullity*: the first one is "textual nullity", and it requires the exclusion of the evidence when a procedural rule was violated. The second type is "substantial nullity", and it requires the court to evaluate whether the violation of the evidence rule harmed the party[332]. This second kind of nullity could be interpreted as a way of giving more importance to the application of substantive criminal laws than to the respect for the procedure, since evidence could be accepted when a rule was violated but it did not harm the accused[333]. However, unlike Germany, the opposite (the exclusion of evidence for substantive reasons, even when the procedure was followed) is not possible.

2.d. Substance vs. substance

In this model the conflicts between different substantive values can arise, but, again, they have to be settled by legislative institutions. Unlike in moral instrumentalism, judges should not be able to review the compatibility of the substantive criminal law with other values, such as individual right, neither in general nor in particular cases.

The French legal system is a good illustration of these considerations. No court can declare that a law is unconstitutional and, like in the case of procedural legislation, the *Conseil Constitutionnel* can review the constitutionality of statues enacted by the legislative assembly, but only before they are promulgated. This feature, combined with the fact that courts do not have to follow judicial precedents (like in Germany), is consistent with the general idea that the judiciary should follow the decisions made by legislators instead of reviewing the rules according to other substantive moral principles[334].

[332] French Code of Criminal Procedure, articles 171 and 802.
[333] Actually, this could be read as a means for avoiding the application of the rule against the intentions of legislators. As I will discuss in chapter 6, that is another possible interpretation of what counts as following legislation.
[334] It must be said that this is has been changing in the last years since the European Convention of Human Rights has become part of the French law.

2.e. Institutions and dynamic of the process

Like in the case of moral instrumentalism, institutions in this model are designed in order to produce the right kind of outcomes. This means that those in charge of making decisions should be experts.

Like in Germany, in France this concern is reflected in the fact that both prosecutors and judges are part of a highly hierarchical civil service structure. These functions are understood as a life career that starts after obtaining the law degree. They are trained for two and a half years before they are examined, and then chose whether they want to work for the judiciary or the prosecution at the end of this stage. Since the system is highly centralized, candidates from all over the nation take the same competitive exam. Promotions inside each institution are based on merit and the positions are held for life (until the age of mandatory retirement)[335].

As to the dynamic of the trial, it is organized as an enquiry where the court and the prosecution collaborate in the task of finding the truth. In addition, there is, like in Germany, the possibility of the victim or another interested party to act as a private prosecution together with the public one.

However, unlike in Germany, in France the process is divided in two stages: a preliminary investigation and a trial. In the preliminary investigation all the evidence is gathered, the nullities are decided and a written dossier is produced. The *juge d'instruction* is the one in charge of this stage of the proceedings and she decides when the case is ready to go to trial. Then the trial takes place in different kinds of courts depending on the type of crime, but in general almost all the activities of this stage are under the control of a presiding judge. She is the one who calls the witnesses, interrogates them and authorizes questions from the prosecution and the defence[336]. Cross-examination of witnesses is permitted, but rare in practice[337].

In the case of some kinds of crimes the French system leaves the decision in the hands of a *Cour d'assises*, that includes lay jurors and professional judges, and both decide together

335 Frase, 2007, pp. 204–05
336 Frase, 2007, p. 233
337 Frase, 2007, p. 234

about culpability and sentence. These courts decide in the cases of serious crimes and can hear some kinds of appeal. The reason why this kind of institution, and not merely professional judges make this kind of decision can be seen as an answer to the central problem this model aims to deal with: that judges can have too much power. Having a court that allows the participation of lay members introduces an element of popular sovereignty in the system. However, the solution was not to leave this kind of decision merely in the hands of juries, like in the battle model, but to keep professional judges as member of the court.

Finally, until very recently there was no such thing as a plea bargain, and even the new dispositions allows the conviction of a defendant after a confession, the judge is the one who can authorize it, and she has to evaluate the factual and legal basis for the decision[338].

2.f. Justification of decisions and review

In a hierarchical, professionalized, and formalistic system such as this one, it should not be surprising that upper courts have the power to review the decisions made by the lower ones in order to avoid mistakes and to apply the law as accurately as possible.

In France, both convictions and acquittals can be appealed, either by the defendant, the prosecution, the attorney general, or certain administrative authorities. In addition, the private prosecution can appeal the decision regarding civil liability. Appeals can ask for the revision of the whole case (a retrial) or only of the legal issues. The first option could be read as an attempt to minimize mistakes, like in the case of Germany, while the second can be interpreted as a feature that has a special relevance in the French system: the function of the Court of Cassation illustrates the fundamental role of legislation in the system. Its members are in charge of verifying that the law has been correctly applied to particular cases. When this is not the case, the court can nullify the decision and send the case back to a different court of the same rank as the one that made the original decision[339]. The Court does not have the power to evaluate the background reasons of legislation or to engage in

[338] Frase, 2007, p. 227
[339] Frase, 2007, p. 237

judicial review like the Constitutional and Supreme Courts in Germany and the United States, but only to verify that the lower courts apply the law uniformly across cases.

3. Battle proceduralism

According to this model the legitimacy of the adjudicative decision depends on the procedure through which it was made, and not on its content or outcomes. This derives not from a fetishist attitude towards mere *rule-following* but from the moral justification of those procedural rules. Institutions are legitimate as long as they reflect the elements that make the procedures valuable, and to the extent that they ensure that these procedures are strictly followed. These institutions have non-instrumental value, because it is not connected to the content of the decisions they make.

This model can be characterized as proceduralist, but there can be others, since there can be other values that make procedures legitimate. I call it *battle proceduralism*, because it is based on the assumptions that the parties have conflicting interests and that what will make the resulting decision legitimate will be the fairness of the *battle* between them[340]. The value that lies at the basis of these procedures is a *laissez faire* version of individual freedom[341].

It can be argued that there is a sense in which this model is also instrumental, because the aim is to solve the conflict that arises between the parties, and in fact it has received the name of the "conflict-solving" type of procedure[342]. However, this feature should not be stressed too strongly, because, first, the conflict cannot be solved by any means available. The assumption is that there are certain values that justify the features of the procedure and that they should be respected, at least as long as the conflict is active[343]. Second, there could be other models also aiming at solving conflicts, but based on other assumptions about the interests of individuals or the role of substantive truth (for instance, restorative justice). Finally, the fact that the procedure is legitimate gives the participants a normative reason to

[340] This is also close to how Griffiths refers to the model of the United States. See Griffiths, 1970.
[341] Damaska, 1986, p. 97
[342] Damaska, 1986
[343] As I mentioned in chapter 2, section 2.c., this is a common feature of proceduralist models of legitimacy: the fact that, like substantivist accounts, they are also based on moral values. However, the difference is that these values do not have an effect on the content of decisions but on the way these decisions are made.

accept its results, even if they disagree with the final decision, meaning that sometimes the conflict is not really *solved*, but only settled against the will of one of the parties.

The reason why the legitimacy of decisions cannot depend on its content is the assumption that either there is no such thing as a just decision, or at least that it is not possible to know what justice requires[344]. There is no moral truth to be discovered, neither through legislative procedures, nor in the adjudicative process, but only interests to be defended[345]. If someone was allowed impose a certain view about substantive justice on another individual, this would be considered a violation of her autonomy, even if it were done in the name of her interest. The resistance against this possibility is especially strong if the one who is imposing a particular view is the State, or its public officials.

In these circumstances, disagreement is neither a consequence of uncertainty about how to accommodate different conflicting values in order to achieve justice, nor a discussion about what the law *really* says. It is an unavoidable feature of decision-making involving moral questions. Therefore, once we have conflicting views about how to solve cases, the legitimacy of the decision has to be based on *rules of the game* that everyone could accept. If these disagreements cannot be dissolved, then the solution of the conflict has to be either negotiated (in fair conditions) or reached after the parties present their best arguments (and try to destroy the arguments of the other party) in front of a neutral arbiter.

Institutions will be legitimate as long as they are based on procedures that can be considered fair in the sense that they treat the parties as equals and respect their autonomy. Moreover, if any of the adjudicators imposes or favours a particular view about substantive justice, favouring one of the parties, this will affect the legitimacy of the institution, and of the decision. It is assumed that no one has more epistemic authority than anyone else when it comes to making decisions about justice.

Finally, obedience is, in this model, either based on consent, or on the fairness of the battle, even if no reason is offered for the content of decisions, and even if one disagrees with that content.

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[344] Grande, 2008

[345] According to Grande, this scepticism also extends to factual truth (Grande, 2008).

3.a. Legislation and adjudication

Like adjudicative decisions, the legitimacy of substantive criminal laws depends on the procedure by which they are enacted, since the scepticism about justice pervades the whole system. Democratic legislative institutions are understood as a battlefield for conflicting interests, where there is negotiation about the content of the law. However, in contrast to legal instrumentalism, this decision cannot justify the imposition of a definitive answer to the conflicts that might arise in society, because doing so would represent an invasion of people's autonomy. Ideally, if they can solve them by other means there is no reason for the State to intervene. Legislation only defines the preconditions for a battle between private parties to be of interest for the State and the result in particular cases of adjudication will depend on who wins the battle.

In contrast to what happens with substantive criminal laws, the values that lie at the basis of the procedural arrangements of adjudication are not subjected to political bargain. Therefore, they are not enacted as legislation, but developed by experts over time. The rules of the criminal process are derived from the principles of the legal system (especially individual rights connected to autonomy) and they must be interpreted in a way that secures fairness.

This can be clearly observed in the United States, where the rules of the criminal procedure can be found in the case law of the Supreme Court. The court has derived very precise rules from constitutional dispositions (especially the fourth, fifth, and sixth amendments), but also from principles that are assumed to be implicit in the system (e.g., the standard of proof beyond reasonable doubt) or that derive from the common law, while the Congress has been reluctant to legislate about the subject[346]. Something similar happens in the case of the United Kingdom, where procedural criminal law has historically been developed through case law[347].

[346] Bradley, 1993

[347] Although these rules are nowadays revised and consolidated by the Criminal Procedure Rule Committee (integrated by experts) and published each year by a statutory instrument (delegated legislation). Source: Ministry of Justice of the United Kingdom (http://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu#trial). In addition, substantive criminal law was also developed through common law, but this practice has gradually been abandoned.

In this model procedural rules acquire a high level of detail and they aim to restrict the discretion in the hands of those who must follow them, because if they could bend the rules they would probably use them in order to advance their own interests or impose their views about justice. A neutral judge will verify that the parties (and also the police) follow the rules before they can introduce an argument or evidence to the process. The degree of discretion that judges have when they have to apply these rules goes from none in the United States to a high one in the United Kingdom[348], but in both cases fairness is the main concern.

But things are very different when it comes to the degree of discretion participants have regarding the substantive criminal law. As to the adjudicator, she has no role to play in the determination of the law applicable to the case beyond the arguments that are offered by the parties. But the parties can decide on which legal arguments they want to build their case. For instance, they can decide whether to present the facts about one person killing another as a case of murder or manslaughter, maybe for strategic reasons[349].

Another example is that the prosecutor can decide whether to bring charges or not, a power that is precisely called *prosecutorial discretion*. And the analogous element in the case of the defendant is the possibility of offering a guilty plea at any stage of the process, thus having the discretion to accept punishment for one crime, even if she committed another one instead (perhaps because the prosecution offered a lesser sentence). All these examples illustrate the fact that as long as the procedure is fair, the substantive criminal law can be negotiated in the particular cases.

3.b. Procedure vs. substance

As I mentioned before, there is not only a difference between models regarding the importance that is given to procedure and substance and the discretion that adjudicators have when applying these considerations, but also regarding the relation of prevalence in case of conflict. In battle proceduralism, when there is disagreement about which substantive solutions are just, the content of decisions cannot be the criterion to decide

[348]For instance, in the case of the exclusionary rule judges have discretion to decide whether the fairness of the procedure has been affected. See Section 78 of the Police and Criminal Evidence Act.
[349] Damaska, 1986, p. 115

whether a decision is legitimate. Nevertheless, if following the procedure leads to unjust results, this will be accepted. The reason why this must be the case is not that justice can be sacrificed for the sake of fairness, but that it is not possible to know what justice requires, and that therefore it makes no sense to affect the freedom of the parties for the sake of such a weak aim (except in order to avoid extreme injustice).

In the following section will explain how judges give more priority to procedures than to the content of decision in particular cases. Nevertheless, this also occurs in a more general level. As I mentioned in the past section, one of the manifestations of the different consideration that is given to procedure and substance can be observed in the intervention of the Supreme Court. In the United States, judicial review has focused much more on procedural law than in the verifying the constitutionality of substantive criminal laws.

3.c. The role of factual truth

As it was mentioned already, the general idea in battle proceduralism is that there is no ontological truth to be discovered, but only *versions* of it, offered by the parties. This claim seems plausible for moral, legal and also for factual truth[350].

There seems to be a general agreement about the lack of concern for the truth in this model. According to one commentator of the criminal process in the United States, "since the parties control the course of both the investigation and the trial, 'truth-discovery' is only the incidental by-product of a system that views dispute-resolution as its primary objective"[351]. It has also been argued that "the adversarial system […] does not lead to the discovery of "true" truth but of an artificially generated set of facts euphemistically called 'procedural truth'"[352].

This does not mean, however, that the adversarial style of procedure is not in fact better to find the truth than the non-adversarial alternatives. Maybe the incentives that the parties have to present better evidence are stronger than in the other models, since the success of

[350] Grande, 2008
[351] Arenella, 1983, p. 206
[352] Weigend, 2003, p. 160. It is interesting to notice that this observation is made by someone who is looking at the procedures of the United States from a German point of view.

their claim completely depends on this. Perhaps it has more instrumental (but no epistemic) value in practice, although it has been claimed that neither model has been particularly successful in this domain, for different reasons[353]. Nevertheless, this is not the aim of the process, and the legitimacy of the adjudicative decision is not affected if it is not achieved.

This particular view about the importance of factual truth is intimately connected to the role of the other kinds of truth, i.e. moral and legal truths. The possibility of determining what is the moral truth in the case in order to achieve justice depends on knowing what actually happened. And the same happens with legal truth (whether the conduct was actually a case of crime x or not): even if the parties are not completely free to determine what the legal answer to the case should be (e.g., they cannot say that a case of murder is a case of fraud), the facts alone do not have any meaning and they must be connected to a legal definition. The lack of concern for the facts has an impact on the lack of concern for the legal truth, and the same in the opposite direction[354].

Several practices in the criminal system of the United States illustrate this. First of all, when the procedures begin, the parties might agree to immediately put an end to the battle by negotiating an agreement, on the basis of very little evidence. Then, at any time during the process the defendant can plead guilty and interrupt the procedures. A widely spread use of plea bargain can be observed in the United States (and also in England) as a way of solving criminal cases. In fact, the enormous majority of cases end with a plea bargain[355]. This practice illustrates the fact that the concern for the factual truth is almost absent. It is possible for the defendant to offer a guilty plea for several kinds of reasons (and there is not an investigation about them as part of the process). This is the case especially in the case of defendants who lack the economic capacity to pay for strong private defence. The incentives to accept a lower sentence in exchange for a confession (especially if it is a non-custodial one) are enormous[356].

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353 Weigend, 2003, p. 158

354 Damaska, 1986, p. 114

355 The percentages are above 90 in the case of both countries. For precise data see footnote 32 in chapter 1.

356 It must be said that in some cases the guilty plea does not imply a confession, but only the decision not to challenge the prosecution's charges. In these cases, the prosecutor has to present the factual basis for the conviction, but the case does not need to be as strong as in the case of a jury trial. See *Alford vs. North Carolina* (1970).

Although the practice in the United State has its origins in the ninetieth century[357], the Supreme Court declared that plea bargain was constitutional in 1970[358]. The court argued that the only limit was to be found in the voluntariness of the agreement, and that the criterion would be that the incentives offered by the prosecution should not be as strong as to make the offer coercive by eliminating the free-will of the defendant. This is consistent with the idea that the parties should have control of the procedures as an expression of their autonomy, and that the State should not impose a particular moral view on them. The defendant has a right to jury trial, and to confront witnesses, but she can waive that right if she thinks it is for her best interest[359].

In 1970 the Supreme Court added a *safety-valve* plea bargains: the practice would be considered unconstitutional if it was proven to produce a high number of false positives (conviction of innocent people). This could be interpreted as an attempt to moderate the lack of concern for truth and justice. However, there is no way to prove this in practice without engaging in the kind of investigation that a plea bargain is precisely aiming to avoid, and some have argued that the practice in the United States does not actually pass the test[360].

A second example of an institutional feature that shows lack of concern for the discovery of the factual truth is prosecutorial discretion, and the institution of the grand jury does not counterbalance this discretion in practice[361]. Prosecutors can decide whether to bring charges or not for strategic reasons, or for grounds connected to criminal policy. This contrasts with the rule in other countries where they can only fail to bring charges when they do not have sufficient evidence.

Third, in this model the parties have control over the facts and pieces of evidence, and can agree to leave some outside of the battle. This is the case both in the United States and in the United Kingdom where the parties can negotiate not only a plea bargain, but also a fact bargain. They also decide whether, when and how to present pieces of evidence to the trial,

357 Alschuler, 1979
358 *Brady vs. United States* (1970).
359 Bradley, 2007b, p. 543
360 Dervan, 2012
361 Even when the constitution requires that people will only be charged after the decision of a grand jury, in practice this only applies to the federal system and about half of the States. Even in those cases grand juries rarely oppose the prosecutor's will, and if they do the prosecutor can try again with another jury. Moreover, in those cases where the grand jury wants the defendant to be charged against the prosecutor's opinion, the latter can dismiss the case afterwards (Bradley, 2007b, p. 540).

although there are some limits to this for reasons connected to fairness, like the duty of the prosecutor to disclose evidence that would benefit the defence (on the assumption that usually the prosecution has better resources to obtain evidence).

Fourth, the way the exclusionary rule works in the United States is a clear manifestation of the lack of concern for the factual truth. Here is the description a commentator offers of the rule:

> "[there], unlike other countries, the exclusionary rule is mandatory, not subject to the discretion of the trial judge. That is, once it has been determined that the police conduct in question broke the 'rules' […], then the evidence that was obtained as a result of that violation (including 'fruits of the poisonous tree') may not be used in court, at least in the prosecution's case-in-chief. […] The reason for the mandatory rule stems from the fact that the 'rules' the police are to follow come, via the Supreme Court, from the Constitution, rather tan from a legislative body, and the court has found it difficult to say that certain constitutional violations are less important than others"[362].

One of the interesting elements in the way the exclusionary rule works here is that in order for the evidence to be excluded in a trial, the defendant must have *standing* to present the claim. This means that the evidence can be used in other trials, against other defendants[363]. This is consistent with the idea that each party in a case cannot benefit from the violation of the rules when it affects the counterpart, because the battle would be unfair, but this does not happen when rights of others are affected.

Finally, in spite of the general reluctance to base the institutional design in the epistemic capacity of participants, when there is a controverted fact that can only be investigated by people with a specific knowledge (like a scientific, a medical doctor, etc.), then some experts should be allowed. But even then both parties present their own expert witnesses, and the latter are expected to provide evidence that benefits the party they work for. There is a clear contrast between this feature of the process and how it works in France and Germany, where the judge usually appoints expert witnesses and they are expected to be neutral.

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[362] Bradley, 2007b, p. 530
[363] Bradley, 2007b, p. 531

3.d. Substance vs. substance

In a system where there is no hope in finding right moral answers, and all the legitimacy is connected to the procedures through which decisions are made, the conflict between different substantive values needs to be dealt with by institutions with non-instrumental value like the legislative assembly or a fair adjudicative procedure where the parties can even negotiate the substantive content of the norm that will be applied (e.g., through plea/fact bargaining). There is no ground for the defence of expertise regarding which are the right contents for the substantive criminal law, even if they conflict with values that are part of the system. Therefore, a mechanism like judicial review of substantive criminal laws is in principle out of the picture, both in general and in particular cases.

Although there are several famous cases of this kind of judicial review in the United States[364], "the idea of judges striking down overbroad crimes is usually seen as unacceptably 'activist'"[365]. And the Supreme Court has even been reluctant to rule out death penalty (although it has certainly limited its application over time[366], most of the decisions refer to the procedural conditions for the decision to use such a punishment). As explained before, this is a system that gives a preponderant role to the fairness of procedures, and its legitimacy depends on the restraint of institutions regarding the imposition of particular substantive views about what should be considered a crime and which punishments should follow. The relative lack of intervention of courts in deciding about the content of substantive criminal laws is striking in a system where procedural law is exclusively produced by judges[367].

Furthermore, this lack of concern for the right balance between substantive values is also a feature of the legal tradition, where the theory of the principles of criminal law is much less sophisticated and more chaotic than in Germany[368].

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364 Some of the typical examples are *Lawrence vs. Texas*; *Bowers vs. Hardwick*; *Griswold vs. Connecticut*; and *Roe vs. Wade*.

365 Stuntz, 1996

366 Some recent cases are, e.g., *Roper vs. Simmons* and *Kennedy vs. Louisiana*.

367 However, a surprising feature of this system is that judges have been quite interventionist regarding criminal procedures, but the same has not happened in the case of civil law, where it has been little judicial review even when procedures lead to the decisions that are coercive. See, for instance, Steiker, 1996.

368 For a very detailed comparison between the theory of the criminal law in the common law tradition and in Germany see Fletcher, 1978.

3.e. Institutions and dynamic of the process

In this model institutions will be legitimate as long as they are designed to generate a fair battle between the parties. In order to achieve this, the respect for the rules of the procedure is a fundamental requirement.

In contrast with substantivist accounts, the legitimacy of institutions does not depend on the epistemic capacity of decision-makers, and therefore these individuals are not selected according to their knowledge or qualifications. Because it is assumed that there are no clear criteria of justice or truth, there are no people better qualified for discovering or implementing them. In fact, ideally those who decide the solution of the contest should be common citizens. Both in the United Kingdom and the United States the jury is a central piece of the adjudicative process (at least in contested cases and for serious offences). Jurors are typically common citizens that are called to service as a public duty.

One interesting difference between the institutional design of the legal systems closer to battle proceduralism and the other two models is the separation between the person who is in charge of verifying that the rules are followed (generally a judge), and those who make the final judgement about the solution of the case (typically, the jury). One of the reasons why this separation is important is that those who verify that no unlawfully obtained evidence enters the process should not be the same ones that make the final judgement: the final decision about substance is not tainted by those pieces of truth that have been excluded for procedural reasons, and it can be made by an arbiter that is neutral.

In the United States, even judges, who are supposed to be able to interpret and apply the sophisticated rules of the process are not career officials, like in France or Germany, but generally practitioners with an extensive legal career[369]. The judicial branch is not organized under a hierarchy like in Germany or France, but under a "coordinate" form[370], and many judges and prosecutors are actually elected by citizens.

As to who are the parties that are in conflict in this type of procedure, ideally it should be private individuals (the victim and the offender), and the ideal type of procedure should

[369] Bradley, 2007b, p. 546
[370] Damaska, 1986

look much like a mediation process. This is not the case in neither of the two countries that are supposed to illustrate this model, but things were not very far from that until very recently in England, where there was a private prosecution until 1985[371]. As we know, nowadays the public prosecutor is the one against who engages the offender in a *battle*, both in England and the United States. However, the prosecutor is not considered a public official in the same sense as in moral and legal instrumentalist systems. First, the structures of the institutions they belong to are much more autonomous, and less hierarchical. Second, in most cases United States prosecutors are locally elected, reflecting the relative importance of her being in touch with the common citizens compared to the relevance of expertise.

Regarding the dynamic of the process, the whole engine is started up, kept moving and eventually stopped by the parties themselves. The whole process is started, kept moving and eventually finished by the parties. As it has been mentioned before, at the beginning of the procedure the parties typically negotiate a guilty plea. If the defendant accepts the offer made by the prosecution, there is no need to go any further, because there is no conflict anymore. She has certain rights, but

> "because citizens are sovereign in determining their own interests, including their chances of success in litigation, they are in principle free to renounce rights accorded to them in the legal process. Rights can thus be used as bargaining chips in negotiations"[372]

In addition, they can decide to stop the process by reaching an agreement before the final decision is made.

Both judges and jury are passive observers of the trial. They wait for the parties to bring the arguments and the evidence, and normally they do not participate actively in the procedure. This is clearly the case in the United States where witnesses are questioned by the parties and judges usually do not intervene.

[371] The Crown Prosecution Service was not created in the United Kingdom until 1985 (Prosecution of Offences Act of 1985).
[372] Damaska, 1986, p. 99

> "Judges participate in the interrogation of witnesses much less than do their Continental colleagues, not only because procedural rules give them less power to do so, but also because the role of the judge is understood differently in the common law system. [She] is understood as a passive umpire who is not supposed to participate actively in the interrogation of witnesses"[373].

3.f. Justification of decisions and review

Battle proceduralism is a model where there is in general no motivation or review of adjudicative decisions, and these two features are obviously connected: in a system where decisions are not motivated, there is no possibility of review. The lack of review is also compatible with the idea that the decision should be made by those who were present when the battle took place: it would not make any sense to consider the opinion of someone who was not there.

In the United States the final decision about the conviction is made by a jury after secret deliberations and voting. This decision is supposed to be final and jurors do not have to offer reasons for their verdict. They just have to say who won the battle. However, it is true that the decision must not only declare as the winner the party that provided the stronger arguments, but there is a preference for mistaken acquittals, reflected in the standard of proof beyond reasonable doubt. However, although jurors are instructed that this is the criterion they must use, in practice they do not have to explain how their decision fits the standard.

Another interesting feature is the (practical) possibility of jury nullification. If the jury thinks that, even when the evidence shows that the person is guilty, punishing her would be immoral, they can decide an acquittal without offering any reasons.

However, there are exceptions to the possibility of reviewing decisions. First, and most importantly, the defendant can appeal the conviction in the case of certain circumstances that affect the fairness of the process, and if she is right, she will be retried[374]. Second, and

[373] Langer, 2004, p. 9
[374] Bradley, 2007b, p. 547

more exceptionally, if new evidence is discovered as to the innocence of the accused, she can present a *collateral attack* to the final decision. Third, the defendant can go to the federal system and claim that the conviction violates the Constitution, normally for procedural reasons (violation of the fourth, fifth or sixth amendments).

Summary

In this chapter I illustrated with examples of different legal systems how they can be interpreted as being closer to one of three models of political legitimacy in adjudication. The following table offers a summary of the main differences between the three models.

	Moral Instrumentalism	**Legal Instrumentalism**	**Battle Proceduralism**
Legit. legislative institutions	Instrumentalism	Instrumentalism or Non-instrumentalism	Non-instrumentalism
Legit. legislative decisions	Substantivism	Proceduralism	Proceduralism
Aim of the process	Achieving justice	Applying the law	Fairness
Legit. adjudicative institutions	Instrumentalism	Instrumentalism	Non-instrumentalism
Legit. adjudicative decisions	Substantivism	Substantivism	Proceduralism
Disagreements	Uncertainty about justice	Uncertainty about legality	Scepticism about right answer
Discretion	Desirable for substance and procedure	Undesirable	Desirable for substance
Adjudication technique	Balancing	Deduction	Mediation (if no successful negotiation)
Ideal form of legislation	Principles and rules	Rules	-
Legislators	Experts	Democratic representatives	Interest groups
Source of substantive criminal laws	Legislation and case law	Legislation	Legislation
Source of procedural criminal laws	Legislation and case law	Legislation	Case law
Relationship between legislators and adjudicators	Collaborators	Hierarchy	Relatively independent
Procedure vs. substance	Discretion and balancing	Formalism	Procedure wins
Substance vs. subs.	Discretion and balancing	Formalism	Negotiation

Judicial precedent	Yes in practice	No	About procedures
Role of factual truth	Important	Important	Dependent on the will of the parties
Exclusionary rules	Discretion	No discretion	No discretion
Adjudicative institutions	Hierarchical and professionalized	Hierarchical and professionalized	Lay and elected adjudicators. Some professionals.
Control over the process	Judge	Judge	Parties
Prosecutorial discretion	No	No	Yes
Plea bargain	No	No	Yes
Dynamic of the process	Collective enquiry	Collective enquiry	Negotiation or battle in front of a neutral arbiter
Motivation	Yes	Yes	No
Judicial review	Of substance and procedure (Constitutional Court)	No	Of procedure (federal system)
Appeals	- Convictions and acquittals - On factual and legal grounds	- Convictions and acquittals - On factual grounds - On legal grounds (centralized)	- Only of convictions - On fairness grounds - Collateral attack

Chapter 5 – The political legitimacy of the criminal law

Introduction

I would like to start again with the kind of thought experiment that I suggested in chapter 1, when I asked the reader to imagine that we want to design a criminal process for our community and we are thinking about the features it should have. Back then the idea was to compare existing models of criminal procedure in order to think about the alternative institutional designs and their aims. Now I want to change the question in the same kind of setting. If we have not enacted any *criminal legislation* yet, what kind of law should we have? Which conducts should we criminalize and which kinds of coercive responses should we define for each of them?

These questions raise a set of different issues and open discussions that have occupied scholars for centuries. First, assuming that punishment is the usual response given to the commission of crimes, the immediate question would be one about its justification: e.g., if we should activate the punitive devices of the state in order to respond to crimes with proportionate censure (retributivism), to prevent future crimes (deterrence and incapacitation), to restore the previous situation (restorative justice), etc. or if, on the contrary, it would never be justified[375]. Once we have a general justification of punishment, a second question would be the one about the content of the law: which kinds of conducts should be considered as crimes? This is a question about criminalization and should be answered on the basis of an account of criminal legislation. It is related to the previous one, but it does not necessarily produce the same kinds of answers, although this depends on the account. In addition, and also in connection to the justification of punishment, there is the question about the appropriate kind and amount of punishment for each crime. In fact, this is usually the content of criminal legislation: there is a warning about the consequences that will follow if people are caught doing certain things that are implicitly criminalized[376]. Moreover, there is the question about the content of legislation about procedures through which coercion can be used in order to apply substantive criminal laws and their limits (e.g.,

[375] See, e.g., Boonin, 2008.
[376] Although this does not necessarily need to be the case.

the powers the state can use, and the rights of offenders). The latter is the kind of question I raised in chapter 1, but now the issue is how we should legislate about it[377].

Now, an additional consideration must be added: our imaginary community is plural, by which I mean that there are different conceptions of the good life and of justice. Amongst other things, members disagree about the justification of punishment, they hold different views about criminalization, and also about the rights of individuals and the kinds of coercion that the State can use against them. In spite of these disagreements, we need to enact legitimate criminal laws and design legitimate legislative institutions to make those decisions. How is it possible to justify State punishment in this context of disagreement? What is it that authorizes institutions to use coercion on people when they fail to act according to what is prescribed in the law or when they act in ways that are prohibited? Do people have reasons to accept this kind of restriction to freedom if they disagree with the content of the law? The response to these questions cannot be merely derived from a theory of punishment or a theory of criminalization. Although one can hold a particular view about these subjects (as I do), the decisions about punishment and about which procedures should be used should be acceptable to those who hold different views. I believe that this is possible by having legitimate criminal laws, and this will be the central argument of this chapter.

Unfortunately, people hold different views about legitimacy as well, and one's position about it in the case of the criminal law is probably connected to a broader account of the legitimacy of legislation in general. The latter is the discussion I introduced in chapter 2, and here I want to link it to the ones that take place amongst (some) criminal law theorists who hold different accounts of legitimacy. The reasons are, first, that it is important to draw the connections between legitimacy and the criminal law in order to contribute to criminal law theory: articulating an account of legitimacy of criminal legislation has consequences in terms of institutional design and also for the justification of punishment. Second, there are certain particularities of the criminal law that make it different from other areas of the law: basically, it authorizes the use of coercion, and more specifically punishment, and this is done as a response to wrongful conducts. I believe the analysis of this case can enrich the discussions about political legitimacy.

[377] See chapter 2, section 1.d. about the difference between defending an institutional design and arguing about the legitimacy of the decision to create an institution.

Regardless of the views one can have about the justification of punishment, I will argue that there are two conditions that should be met if its use is going to be justified: I will present the discussion in terms of reasons for action. The two conditions are the following:

1) *Reason-for-action condition*: citizens must have a normative reason to act in the ways indicated in the law
2) *Reason-for-coercion condition*: those who apply the law must have a reason to use coercion in particular cases.

Although the names might suggest otherwise[378], both conditions refer to reasons for action that different people (or people in different roles) have. The satisfaction of these conditions will clearly depend on what is done in the adjudicative stage. However, in this chapter I will argue that having legitimate legislation is a first step for the generation of these two kinds of reasons.

Before I continue, some brief clarifications. First, the terms *criminal law* or *criminal legislation* do not only refer to ordinary legislation, but also to constitutional legislation, the decisions of constitutional courts and judicial precedents (in those legal systems where they are part of the law). I am thinking about the legislative activity in a broad sense[379].

Second, the discussion in this chapter will mainly refer to the making of substantive criminal legislation, but also to legislation about criminal procedures, since I believe that procedural criminal law should be legitimate, like any other type of law, and that this is closely related to the justification of coercion. I mention that because what I offer in chapters 6 and 7 has some implications about the *content* of procedural criminal law: there I will defend some guidelines for the institutional design of adjudication. This does not mean that legislative decisions through which these institutions are created should not be legitimate as well, because there are disagreements about which is the best procedure. The arguments of the following chapters should be taken as mere proposals for the content of the legislative decision about criminal procedure; in fact they are compatible with different institutional designs that depend on further considerations. The aim in this chapter is to

[378] Other way to call them would be *reasons-for-citizens'-action* and *reason-for-adjudicators'-action* conditions. I haven't chosen these options for the sake simplicity. In addition, I prefer *reason-for-coercion* rather than *reason-for-punishment* condition because although it ultimately refers to punishment, it also refers to the coercive actions that can be performed before the person is actually punished.
[379] See the same kind of use in chapter 3.

discuss why it is necessary to have legitimate legislation, both procedural and substantive, in the domain of the criminal law, and what it requires.

Third, in the case of substantive criminal law, I will mainly refer to the *special part*, concerned with the conducts that are considered criminal, and I will not discuss the legitimacy of the *general part* (the principles of criminal law and criminal responsibility). I will focus on the latter because it refers to the conducts that citizens ought to avoid or are obliged to perform if they do not want to be punished, and to the responses to those conducts, but not enter the discussion as what counts as a conduct. I assume that people also disagree about the general part and that the decisions about its content need to be legitimate as well.

In addition, I will focus on the kinds of conditions that must be met to justify punishment through legitimacy in the domain of the criminal law. I will not be discussing things like whether the State has the *standing* to punish those who are economically deprived, because of a structural injustice of the system. However, I must say that this fact will have a direct impact on legitimacy if those who are victims of systemic injustices face difficulties to participate in the decision-making procedures[380].

I will neither present the account of legitimacy I advocate by starting from the very abstract and then going to the details, nor defend a full account of legitimacy. This would require an enormous amount of space and would require me to engage in broad discussions that go from political philosophy to moral philosophy and meta-ethics. Instead, I will go straight to the discussion in the domain of criminal law theory and contrast my own position with the ones presented by other authors. I will only refer to the broader discussions when I find that the specific debate requires it. The reason why I believe this kind of presentation is sufficient is that the main focus of this work is not on legislative legitimacy, but on the legitimacy of adjudication. Therefore, this chapter should be understood in terms of what I will do in chapters 6 and 7.

The story I want to tell in this and the following two chapters starts by asking the question of what (if anything) justifies the imposition of State coercion in circumstances of disagreement. My short response to this question is "the political legitimacy of legislation

[380] Gargarella, 2009. See also Duff, 2010.

and adjudication". In this chapter I will refer to the legitimacy of legislative decisions and defend a particular account of them, based on the two conditions for the justification of the use of criminal punishment and on how they can be achieved at this level (further elements of these conditions will need to be satisfied in adjudication, as I will argue in the following chapter).

First of all, I will present the three accounts I take to be alternatives to my own. Then I will divide the rest of the chapter into two sections, one referred to legislative decisions about criminalization and the other one to decisions about the uses of coercion. Overall I will be defending a particular account of legitimacy that I believe can justify the imposition of State punishment.

1. Accounts of legitimacy of criminal legislation

The three accounts that I will discuss can be classified according to the criteria that I mentioned in chapter 2. Accounts of political legitimacy can be substantivist or proceduralist when they refer to the legitimacy of political decisions, and instrumentalist or non-instrumentalist when they refer to institutions. They can combine these two dimensions producing three main types of (monist) accounts: *substantivist instrumentalism*, *proceduralist instrumentalism* and *proceduralist non-instrumentalism*[381]. In addition, there can be mixed accounts that combine proceduralist and substantivist elements, and also instrumentalist and non-instrumentalist ones. The result is a great variety of views; a fact that is further complicated by the existence of different positions regarding what gives each element their value (e.g., what makes procedures valuable, what makes institutions instrumentally valuable, when is the content of a decision valuable, etc.).

For reasons that are evident, I cannot deal with all these possible combinations here, and it would not be of interest. As I mentioned, I will discuss three accounts of the legitimacy of the criminal law that are well known in the literature and that, in being different from each

[381] The fourth option would be non-instrumentalist substantivism where legislative decisions are evaluated according to their content and institutions do not need to have instrumental value in order to be legitimate. As I explained in chapter 2, such an account has the problem of not being useful as a guide to institutional change, since institutions with non-instrumental value do not necessarily produce legitimate decisions.

other, illuminate central questions one has to face while thinking about the subject. I will use these three accounts to present the one I advocate in contrast to them.

The first account that is the one offered by Michael Moore, who can be considered a *substantivist instrumentalist*. He is a substantivist because of his belief that criminal legislation (as a political decision) is legitimate only when its content reflects the content of morality, and he defends this from a retributivist point of view. When it comes to political institutions, he believes that their legitimacy is instrumental to the production of the decisions with the right contents.

The second type of account is the one defended by Carlos Nino. His position can be catalogued as *proceduralist instrumentalism*, where deliberative procedures have epistemic value and there are no substantive limits to the content of legislation (except – perhaps – for the one that comes from privacy, where democratic procedures have no epistemic value).

The third type of account is the one offered by Antony Duff. Unlike Moore, he believes that the views of the community do have a role to play when deciding the content of the criminal law, and this fact seems to have intrinsic value. He defends a democratic procedure close to deliberative democracy, but in contrast to Nino, reasonableness presents a substantive limit to the content of political decisions and therefore his account can be considered as a mixed one: what I called in chapter 2 *negative substantivism*. In addition, he believes that institutions should have instrumental and non-instrumental value.

In each of the three accounts, the author believes that people have reasons to obey legitimate legislative decisions and that legitimate laws can justify punishment. I agree with them in these two points, but not with their views about what makes legislation legitimate. I will be defending a position that can be catalogued as *proceduralist non-instrumentalism*, at least regarding what is necessary and sufficient to justify punishment[382].

[382] I also believe that institutions should have instrumental value, and that this is connected to their legitimacy, but, as I will argue, that is not a necessary condition for the justification of punishment.

1.a. Moore

Michael Moore is a substantivist because he believes that criminal legislation (as a political decision) is legitimate only when its content reflects the content of morality. As other *substantivists*, he derives his theory of criminal legislation from a theory about the justification of punishment, because he argues that the legitimacy of a law depends on its content (its justice). In the discussion about criminal legislation this position is known as legal moralism: "the theory that all and only moral wrongs should be prohibited by the criminal law"[383]. Amongst legal moralists, he belongs to those defending retributivism as a theory of punishment, but there can be others, mainly consequentialist positions, such as utilitarianism[384] and also mixed theories that include both retributive and consequentialist considerations.

According to Moore, morality sets the limits to legislative activity in the domain of the criminal law, because people have a right not to be subjected to punishment for morally innocuous conduct or as a result of improperly motivated legislation (even if it prohibits conduct that is in fact wrongful)[385]. Moreover, he believes that there is a substantive right to be free of State coercion, and that this right includes the right to commit some wrongful acts[386]. These rights to liberty should be constitutionalized and serve as limits to criminal legislation. In addition, relevant considerations should be balanced by taking into account the particularities of the crime[387], but they all come from morality.

Moore believes that people have reasons to obey legitimate legislation, meaning that people have to obey those laws whose content is just. He excludes any procedural element from the legitimacy of these laws: it does not matter if they were enacted democratically or by a dictator. Furthermore, he argues that the law *as such* does not give people any reasons for obedience, not even prima facie:

> "The legislative enactment of a legal prohibition cannot make (morally) wrong an act not morally wrong before. The upshot is that citizens do no wrong in violating

383 Moore, 2011, p. 12. He believes this is the case with *mala in se*, but also with *mala prohibita*, because we have pre-legal obligations to cooperate and coordinate with others (Moore, 2011, p. 18).
384 Moore himself explains with some detail that there are several similarities between these two accounts' understanding of the criminal law. See Moore, 2011, p. 13.
385 Moore, 2011, pp. 16–17
386 Moore, 2011, p. 23
387 Moore, 2011, pp. 24–29

> the criminal law, unless that law is reflective of an antecedently existing moral wrong"[388].
>
> "[Enacting a criminal law before punishing someone for a crime merely] side-constrains the attainment of retributive justice, allowing punishments giving such justice to be given only if the morally wrong act was legally prohibited before-hand. Such an assumption thus requires that, prima facie, *all* moral wrongs be prohibited by the criminal law"[389].

Moreover, he explains that "retributivism […] enforces real morality, not conventional moral beliefs"[390]. This means that the fact that the law has certain content does not give people reasons for obedience if it is unjust, according to real morality. It could be the case that all the citizens of a country believed that some conduct is a crime, but none of them had a reason to obey the law, if it was unjust and therefore illegitimate[391]. It also means that when there is disagreement, someone must be wrong.

As to legislative institutions, he defends a purely *instrumentalist* account, where the aim is the protection of natural rights, including the rights to liberty mentioned before. He defends judicial review based on the observation that judges do a better job than legislators in deciding what the content of those natural rights is[392]. He strongly criticizes democracy, because he understands it as a procedure according to which "criminal law is and ought to regulate whatever the majority chooses it to regulate"[393], although, of course, this is just one particular view of democracy.

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388 Moore, 2011, p. 13

389 Moore, 2011, p. 13. One could argue that he is also a proceduralist in the sense that, in order for punishment to be justified, it should be legislated. However, since there is a duty to legislate in order to punish *all* crimes, what should and should not be part of the criminal law comes entirely from his moral theory.

390 Moore, 2011, p. 15

391 In fact this is how he criticizes Duff for his idea of public wrongs (an idea that I will explain later). "No self-respecting retributivist should find there to be any justice achieved by prohibiting and then punishing behaviours that are only conventionally regarded as wrong, even wen those conventional moral beliefs are so deeply held that they are (and are conventionally regarded as being) essential to the society's moral sense of itself" (Moore, 2011, p. 22).

392 Moore, 2001, p. 2105

393 Moore, 2011, p. 3

1.b. Nino

The main problem with an account like the one defended by Moore seems to be that, even if one believes that there is such a "real morality", people disagree about its content. Even Moore recognizes that there are other views about the justification of punishment, like utilitarianism. However, one does not need to reject the existence of objective moral principles to see that there is the difficulty of obtaining knowledge about their content and about how to apply them correctly when facing real practical problems. This is the kind of problem that Carlos Nino aims at solving, and he defends an account that can be catalogued as *proceduralist instrumentalism*. He wants to find a reason that justifies the use of the criminal law on people who do not agree with the moral principles on which it is based:

> "If the answer to the question is that this right [to use coercion] is based on the fact that our principles are true and theirs are false, the question now is not only how do we know, but also if the fact that a moral principle is "true" is sufficient to impose it on others, or if, on the other hand, "believing" in a moral principle is sufficient for one to be subjectively justified to impose it on others"[394].

He explains that, in order for the use of punishment to be justified[395], one of the conditions seems to be that the law is just, and also that people have reasons to obey it. Moreover, if the law is unjust, even only slightly, it seems that there is a moral authorization to disobey it[396]. The problem is – Nino says – that there is disagreement, caused by moral uncertainty. And this disagreement has to be taken seriously even if there are, as he believes, principles of justice that are objectively correct. His suggestion is that

> "some epistemic criteria must be brought to scene so that our actions or reactions about legislation are not directly tied to what is morally correct or incorrect, but to what we can reasonably believe to be correct or incorrect"[397].

> "If we have reasons to believe that the solutions of the democratic process are correct, then we have reasons to act according to them. The democratic origin of

[394] Nino, 2008, p. 14 (my translation).
[395] Other conditions have to do with his theory of punishment, but from the point of view of criminal responsibility and his theory of consent. See Nino, 1980, 1983, 1986.
[396] Nino, 2008, pp. 18–19
[397] Nino, 2008, p. 19 (my translation)

> certain rules, like criminal laws, grounds a revocable presumption about the justice of its content"[398].

The achievement of these epistemic conditions makes legislation legitimate and gives people reasons for action: reasons to obey the decision. According to Nino, the origins of legitimacy can only be found in the procedure, without any substantive constraints. What gives democratic institutions this epistemic superiority is the fact that decisions are made not by simple majority (the kind of view that Moore criticized), but by deliberation, because political deliberation is an imperfect substitute for moral deliberation and it helps to produce impartial decisions[399]. The reason why people ought to obey it is that collective decision-making has more epistemic value than individual reasoning.

Although there are no substantive limits to the content of criminal legislation deriving from a theory of substantive justice (like in Moore), there are two limits that have to do with the character of the procedure itself: first, there is a prohibition on enacting legislation that affects people's ability to participate in the democratic process, because this would affect the epistemic quality of future decision-making; second, the criminal law cannot refer to personal ideals of the good life, because collective deliberation does not have any epistemic value in this domain[400]. The first is a condition for the epistemic value of procedures, and it cannot be considered as a substantive limit to the content of decisions. In the second case, the restriction seems to present a real substantive restriction on what can be decided democratically. However, it is directly derived from the fact that in the case of private conducts, democracy has no epistemic value, and therefore it can be reconstructed as a procedural limitation[401].

As to the legitimacy of institutions, the position defended by Nino is obviously *instrumental*, since the value of democracy is basically epistemic. Moreover, contrary to Moore, he strongly rejects judicial review, because he does not believe that judicial reasoning has any epistemic superiority compared to representative bodies. Judges can only intervene in order to verify that these representatives do not make decisions that affect the democratic

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398 Nino, 2008, p. 21 (my translation)
399 Nino, 2008, p. 20
400 Nino, 2008, p. 22
401 Nino, 1996, p. 182 (my translation). The problem with this kind of argument is that the distinction between what is private and public can itself be described as a political question, and there is no way of drawing the distinction a priori.

character of institutions, and that they do not make decisions about things that are private[402].

Even if in ideal conditions (of impartiality, rationality and knowledge) decisions made with the participation of everyone would produce valid moral principles, real democracies are, according to Nino, only imperfect substitutes for that practice. Legitimacy is, therefore, a matter of degree[403].

1.c. Duff

Like Nino, Duff observes that "the criminal law must sometimes take a controversial moral stand"[404], and gives an important place to the problem of disagreements. Moreover, he too aims to find reasons for obedience in spite of these disagreements[405]. However, their views differ in several aspects.

In terms of the categories used so far, Duff's account can be considered a mixed account, both regarding the legitimacy of decisions and in the case of institutions. As to the former, he believes that decisions are legitimate when they result from a democratic procedure, as long as the content of these decisions is not unreasonable (*negative substantivism*). These two facts – he believes – affect people's reasons for action regarding criminal legislation, and the justification of punishment.

Duff's position seems to resemble the one defended by Moore when he says the following

> "the law […] presupposes that we already had good, normally conclusive moral reasons to refrain from such wrongs – reasons to which it does not purport to add. Its definitions of such wrongs as crimes constitute not prohibitions, but declarations"[406].

[402] Nino, 1996, pp. 292–93
[403] Nino, 1996, p. 180
[404] Duff, 2012, p. 5
[405] For other similarities between Duff and Nino see de Greiff, 2001.
[406] Duff, 2012, p. 5

According to him, the substantive criminal law merely "marks" these conducts as *public wrongs*[407], but wrongfulness is pre-legal, at least in the case of *mala in se* crimes. However, he adds two conditions: first, criminal legislation should be the result of a democratic process (the procedural element), and second, it should be reasonable (the substantive element).

The fact that decisions have to satisfy these two conditions has an impact on the kind of reasons for obedience people have regarding criminal legislation, and here he starts disagreeing with Moore:

> "The normative reasons we have for obeying the criminal law are, typically or paradigmatically, relational and civic […] grounded in our relationship not to the law or the state as such, but to our fellow citizens as members of the polity whose law it is; we should obey the criminal law because that is what we owe to our fellow citizens – and because it is our law. […] We do not *typically* have such relational reasons for obeying the substantive criminal law […] nor does it seek our obedience. […] The criminal law's authority does not consist in a power to make wrongful conduct that was not already wrong"[408].

He does, however, give careful consideration to disagreements and distinguishes between two kinds of cases. Sometimes, when the dissenter is unreasonable, the law should simply say that she is wrong. The reasons for obedience are connected to the content of the law. This means that the unreasonable dissenter and the person who agrees have the same kind of reason to obey. Although he does not explain the precise meaning of *reasonableness* in his account, he does refer to "a liberal republic", to "a tolerably just society" [409], and to interpretations of shared values[410].

Some other times – when "the dissent is not unreasonable"[411] – the person will have *relational reasons* for obedience. In the latter type of case, "even if she can see no sufficient pre-criminal reason to refrain [from the conduct], she ought to see the fact that the

[407] Duff, 2012, p. 10. He argues that this is the case both with *mala prohibita* and with *mala in se*, the only difference is to be found in the fact that *mala prohibita* are created by the law (though not criminal law). See also Duff, 2012, p. 11.
[408] Duff, 2012, p. 3 (emphasis added)
[409] Duff, 2012, p. 3
[410] Duff, 2012, p. 7
[411] Duff, 2012, p. 5

conduct has been criminalized as *a reason to refrain from it*"[412], and seek for legislative modification through the legislative process. The strength of these reasons depends on the degree to which the process is truly democratic[413].

Now, what gives the democratic procedure this special value? The author argues that decisions about the content of the criminal law should reflect the views of the community, and that they are valuable to the extent that they do so. Two communities can have different criminal legislation because what counts as a public wrong in one place is not considered as such in the other. However, by democracy he does not mean simple majoritarianism, and defends a conception that includes a deliberative element.

> "The legitimacy of the law can then be grounded not merely in its majoritarian credentials, but in the process of public deliberation and debate from which it emerged – a process that can itself be legitimate (and thus can ground the law's legitimacy) only if it is structured by a due respect for the standing of all the citizens who are to be participants in it"[414].

According to this statement, democratic institutions seem to be intrinsically valuable. But, in addition, he believes that these institutions have instrumental value as well:

> "[Democracy] will constraint the possible content of the criminal law […] since a collective and mutually respectful deliberation must generate laws that themselves express that respect and protect the rights that it recognizes"[415].

2. The proposal

In the following sections I will argue that the legitimacy of legislative decisions is necessary for the justification of coercion in circumstances of disagreement. I will argue that there are two necessary conditions for punishment to be justified, and I will call them the *reason-for-*

412 Duff, 2012, p. 7 (emphasis added)
413 Duff, 2012, n. 15. He believes that in those cases where people have relational reasons for obedience, the reasons they provide against the law should be considered and should be reflected, at least in the amount of the sentence (for instance, a person who commits euthanasia because she believes that she has a moral duty to do so).
414 Duff & Marshall, 2007, p. 238
415 Duff & Marshall, 2007, p. 238

action and the *reason-for-coercion* conditions. Moreover, the decisions that should be legitimate are of two kinds: one about the conducts that are criminalized (*public wrongs*), and the other one about the institutional response (*public responses*). I will compare my own account with the ones presented by Moore, Nino, and especially Duff in order to defend a specific view about legitimate decisions that can satisfy the two conditions.

2.a. Two conditions for the justification of punishment

As I mentioned in the introduction to this chapter, the reason why I believe the criminal law raises special questions for the discussion about political legitimacy is that it seems difficult to justify the use of coercion on those who disagree. Traditional justifications like retributivism and deterrence-based accounts have usually argued about its use from the perspective of justice, and they have either ignored the fact of disagreements, or they have begged the question about which is the correct account of legitimacy (namely, substantivism). Typically, one of the questions to which one needs to respond is the one about the compatibility between coercion/punishment[416] and individual autonomy. How can it be possible to claim that people should decide for themselves and at the same time claim that they will be punished if they do, especially if they hold different views about what is right and wrong?

The first condition for the justification of criminal punishment is this: that people must have a normative reason to act in the way indicated by the content of the law (to avoid committing crimes) if they are going to be punished. Neither the threat nor the actual use of punishment on them can be defended when they fail to act in a way that they had no reason to act in the first place (or when they act in a way that they have no reason to refrain from acting), and those reasons cannot be merely prudential (merely derived from the existence of those threats of punishment). I will call this the *reason-for-action* condition. If this condition is not satisfied, and a person is punished, she could claim that she is being used merely as a means for achieving certain aims, or at least not given the kind of treatment she expects as a moral agent. Even if this kind of coercion might be justified in

[416] Coercion can take different forms. One could say, for instance, that the mere enactment of a law implies coercion, because it changes people's options and therefore restricts their freedom. Here I will pay attention to a specific form of coercion (criminal punishment), but maybe the conclusions also apply to the other forms.

certain exceptional conditions (e.g., during war) this is not how States ought to treat citizens on a regular basis. It should not merely give them fair warnings, but also engage with them as moral agents. Of course, the State can issue threats (like threats of criminal punishment), but the claim here is that it ought to do so only after offering reasons for action that the recipient should accept (normative reasons), even if she disagrees with the content of those decisions. When this condition is satisfied, the person is treated as a moral agent because she is given the option to act according to reasons before she is coerced. Now the problem is to determine which kinds of reasons are acceptable (and I will come back to this point in section 2.c.). The only claim I want to present here is that, if a person has *no normative reason* to do X (or to avoid Xing), punishment cannot be justified and what we have is brute coercion.

The second condition is that the decision about the use of punishment *as a response* to criminal conduct must be non-arbitrary, and this will happen only if it is based on reasons that are adequate and sufficient. Although necessary, the satisfaction of the first condition is not enough, because the mere verification that someone has a reason not to do something, and that she actually did is not sufficient for the State to punish her[417]. Other responses could be advice or warning, punishment by someone else, another kind of punishment, or even nothing. The choice should not depend, for instance, on the mere opinion or prejudices of the person who acts in the name of the State, and this applies to all the decisions that are made through. If no reasons are provided, or if they are insufficient or inadequate, then the decision will be *arbitrary*[418], even if it happens to be *just/correct*. I will call this requirement the *reason-for-coercion* condition.

One could claim that what is necessary for the justification the use of punishment is only that the State offers adequate and sufficient reasons for the *use of coercion* (that the decision is non-arbitrary), but not that people must have a previous reason for action. They only have a reason to accept punishment and not to interfere with the activity of the State when applying it. But several things must be said about this position.

[417] In Dolovich's words: "a crime no more dictates the appropriate punishment for its commission than a particular act of misbehaviour by a child dictates the necessary parental response to that misbehaviour" (Dolovich, 2004, p. 312).
[418] I say more about the concept of arbitrariness in section 2.d.

First, if the claim is that a person can be punished even if she disagrees with the law, this is not the same as saying that she does not have a normative reason to act according to the law. She can either be wrong, or have other types of normative reason to comply with the law (as I aim to show in the following sections). Second, it is implausible to argue that the State has reasons to punish people for doing things (condition two), but that these reasons do not affect these same people. In fact, in most cases in the criminal law the commission of the crime is a form of interference with the activity of regulating that conduct through legislation[419]. Third, the fact that people have a reason not to commit the crime does not mean that they could not have stronger reasons to do it, e.g., in cases of emergency or as conscientious objectors. What the first condition requires is just that they have a *pro-tanto* reason to act according to the law.

In any case, the main point here is that punishment is not a price people pay for doing certain things that are perfectly *alright* for them to do. Criminal punishment is used as a response to conducts that are marked as wrong and that should be avoided, and it can only be justified in these cases. But this is not a conceptual argument about the meaning of punishment. It marks a difference between punishment in States that treat people as moral agents and States that do not. If a person has no reason whatsoever not to commit what is considered as a crime, the response of the State cannot be justified and she might have a reason to resist it (and this is compatible with different theories of the justification of punishment).

The problem to which I aim to provide a solution to is that in the case of both conditions there are disagreements about what would satisfy them, regarding the content of decisions. People disagree about which conducts should be criminalized, and sometimes they will claim that there is no reason for action, because the conduct is not wrongful. In addition, since there is also disagreement about the justification of punishment, and about its use as a response to certain conducts, the reasons that are offered for the use of coercion cannot merely refer to one theory of punishment (e.g., retributivism or consequentialism), or one particular view about the use of coercive measures during the process, because those who disagree could claim that these decisions are arbitrary. Does this mean that it is not possible to justify the use of criminal punishment in circumstances of disagreement?

[419] See chapter 2, section 3.b.

I believe that the legitimacy of the decisions about which conducts should be considered criminal and about when coercion can follow can generate, in the first case, a reason for action to the individual, and in the second, a reason for the use of coercion that makes the decision non-arbitrary. Obviously, I still need to explain what it is that makes each of these decisions legitimate, but first let me say a bit more about each of them.

2.b. Two kinds of decision

The legislative decision to enact a criminal law includes two kinds of decision that are distinguishable, at least logically[420]. The first one is about the sets of prohibitions, duties or permissions included in the criminal law that is directed to people as citizens. The content of this decision refers to *individual conducts* that are considered as crimes. For instance, the decision that conducts such as rape, abortion, driving over 80 km/h in a certain area, tax evasion or hunting are prohibited and therefore they should be avoided. Here I will follow Duff in calling them *public wrongs*, because they are wrongs, not in the abstract, but for a particular community (or at least a particular legal system), and wrongs that the community (or at least the State) will take seriously if committed[421].

The second is the decision about whether the criminal justice system should use coercion if people commit public wrongs, instead of offering another kind of response, including inaction. These decisions are about the use of coercive measures (such as procedures), about the use of punishment, and also about what kind of punishment should follow. Its content refers to *public responses* to individual conducts. Most clearly, these responses can be seen as a conclusion of the criminal process, where adjudicators decide that a person ought to go to prison for 10 years, go to prison for 11 years, to do community service, etc. But public responses also include the procedures that must be followed in order for the person to end up being punished, and all of these sub-decisions need to be justified, because people disagree about them. Legislation about these procedures is what provides the legal tools to bring charges, obtain evidence, but also to decide about other number of things like remand, compulsory production of evidence, etc.

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[420] The distinction between these two kinds of decision can also be found in many authors. See, e.g., Dan-Cohen, 1984; Kadish & Kadish, 1971.
[421] Duff, 2001, pp. 60–66; Marshall & Duff, 1998

Sometimes these two kinds of decisions are not easily distinguishable in the law, as in the case of several criminal laws about so-called *mala in se*, where the public wrongfulness of the conduct is implicit in the threat of punishment that the criminal law expresses. The law does not say "murder is prohibited", but only that "those who murder someone will go to prison for x years". In other instances the two decisions are distinguishable, typically in the case of some *mala prohibita*, where there is a (non-criminal) law that regulates some area of social life telling people what they have to do – e.g., customs/tax/health regulations – and there is another law that requires the use of punishment if people fail to comply[422] (*public response)*. However, even in these cases the decision about *public wrongs* is not that non-criminal piece of legislation, but the implicit decision to mark it as the business of the criminal law. The fact that decisions about public wrongs are sometimes implicit does not change the fact that its enactment is usually a positive decision about the prohibition, obligation or permission to do certain things. Evidence of this can be observed when a new crime is created: legislative debates not only refer to the kinds of punishments that should follow, but also to whether the conduct should be criminalized, which kinds cases it should include, etc.

The distinction between these two kinds of decisions is important because they are directed to different people and have different contents. Citizens, as potential offenders, have reasons to obey the one about public wrongs, but not the ones about public responses. And public officials (adjudicators) have a reason to punish, generated by the fact that there is legislation requiring responses of a certain kind. However, this is obviously a simplification, for at least three reasons. First, because adjudicators will also take public wrongs into consideration when deciding about punishment: they can only punish citizens who committed these conducts, and not others. But the point is that they can only respond to public wrongs when they have a reason-for-coercion, and this reason does not come from the decision about public wrongs (they merely determine the kinds of cases where public responses can be applied). Second, because many public responses also require citizens to act in certain ways (to appear in court, to pay a fine, to bear witness, etc.). However, in most cases they are required to do these things because not doing them would be a public wrong, and usually what they follow or obey is the decision made by an adjudicator to apply public responses to a particular case. In addition, when these decisions

[422] However, the distinction between the two kinds of crime is not always clear and in fact there are some conducts that can be catalogued as *mala in se*, but that are considered criminal only when certain limit is trespassed (e.g., statutory rape is based on age limits, and traffic crimes include speed limits).

about public responses are legitimate, they can give people (different from adjudicators) reasons for action as well, even if they are not directed to them. They can have reasons to collaborate, not to interfere, etc.[423] This does not mean that public responses are not mainly directed to adjudicators. Third, because citizens sometimes take the potential public responses as reasons for action, although these reasons might be merely prudential. However, this is a mere possibility, it is not necessary; it does not complicate the distinction between reasons for action and reasons for response, because public responses are still not directed to them, and citizens cannot *obey* those decisions[424]. Fourth, because adjudicators sometimes do not merely apply legislative decisions, but also make them (e.g., common law). And this can be the case both for public wrongs and for public responses.

2.c. Reasons for action and legitimacy

The three authors I am analysing in this chapter assume that the *reason-for-action* condition is necessary for the justification of punishment, and that it can be satisfied when there are legitimate legislative decisions, because people have a reason to obey them. But they hold different accounts of legitimacy, and therefore the connections with the reasons for action are of different kinds. I believe that the legitimacy can generate the kind of reason for action that is necessary to satisfy the first condition for the justification of punishment. However, I believe the three accounts have problems and here I will make a different proposal.

The view defended by Moore was already described as problematic because it is implausible in circumstances of disagreement. His answer would need to be that those who disagree with laws that reflect the content of morality have a reason to obey them, because they are simply wrong. When the law is not just, then there is no reason for obedience. The problem is that even people who hold the same account of legitimacy (other legal moralists) would disagree about which decisions are legitimate if they hold different views of morality. Everyone who disagrees with the content of the law would claim that the *reason-for-action condition* is not satisfied. In pluralist societies this cannot be the ultimate

[423] See chapter 2, section 3.b.

[424] Although the argument could become problematic in some cases, if the decision about public wrong prohibits a certain conduct and the decision about public response offers a reward for doing the same thing. But I will assume that this is not usually the case.

criterion to determine whether people have a reason to obey decisions about public wrongs. But Moore also defends an instrumentalist view about the legitimacy of institutions, and, as I explained in chapter 2, it is not plausible to argue that people do not have a reason for action derived from this fact. Moore would have to accept either that, at least some decisions that are seen as unjust (even by him) have to be obeyed because the institution has a better epistemic position, or that those institutions are never in a better epistemic position (and therefore they are not legitimate).

Nino and Duff, on the other hand, believe that people can have normative reasons to obey criminal laws about public wrongs with which they disagree, if they are legitimate, but they refer to different kinds of reasons. Nino argues that the reason for action is epistemic and that it derives from the deliberative character of the decision-making procedure. When a decision is made through this procedure, individual reasoning has a lower epistemic value and therefore people should obey the democratic decision. One of the problems with this view is that, since the epistemic value of deliberation is a matter of degree, it could be the case that, if it decreases for any reason, some people will start being located in higher epistemic positions. And the same happens if some people's epistemic position is raised. Do these *relative experts* have a reason to obey the decision if they disagree? I believe Nino should respond "no" to this question, because on his account the reasons arise from the comparison. The problem, then, for the justification of punishment, is that the imposition of punishment on some people would cease to be justified, because in his view there is nothing besides the epistemic reasons. Moreover, if someone holds the same opinion as the *relative experts* but is located at a lower epistemic position, compared to the democratic institution, she still seems to have a reason to obey (although the relative expert does not). This conclusion seems implausible. In addition, one could also wonder how we can check that everyone is below the epistemic position of the democratic institution. What if it changes from one topic to another? Finally, verifying the satisfaction of the reason-for-action condition would be very difficult, if not impossible, because there will also be disagreements about who is above the epistemic position of the democratic institution and who is not[425].

In the case of Duff things are different, and his view solves some of the problems faced by the other two. As I explained before, he argues that there are different kinds of cases,

[425] A similar kind of critique can also be found in Bayón, 2009, pp. 196–97.

depending on whether people disagree or not, and whether they are being reasonable or not. There are two scenarios where his account resembles Moore's. First, when people agree with the content of the law, their reason for action is also found in morality, and the fact that it is the law does not add anything to the balance of reasons[426]. Second, he argues that the content of the law can be used as an argument in those cases where the person who disagrees is holding an unreasonable position: she is just wrong[427].

However, an important difference with Moore is that he distinguishes between being wrong and being unreasonable, allowing for more opinions to be considered. And at this point the two accounts start to diverge. Duff believes that in the domain of reasonableness, when someone disagrees she has another type of reason for action that is "relational and civic"[428]. This reason derives from her membership in a community that makes decisions democratically. Therefore, his account is both substantivist (the reasonableness requirement) and procedural (the democratic element).

Although Duff believes in a deliberative version of democracy and not in a merely majoritarian one, in contrast to Nino, the reasons for obeying democratic decisions are not merely epistemic[429]. Duff believes that the law that is enacted with the participation of the members of the community is valuable because for these people it is their own law[430], and this is the source of the relational reasons. Therefore, Duff's account avoids the problem of making people's reasons for obedience depend on their epistemic position[431].

But there are features of this account that I still find problematic. Duff argues that the law should speak differently to people in different positions: it should take a strong stand against unreasonable views, and it should also be emphatic when speaking to those who agree, if they disobey; but it lowers the tone when talking to those who reasonably disagree. He even believes e.g., that this fact could be considered when deciding the sentence or even as a conscience clause[432]. One consequence is that the latter are treated differently,

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426 This is because when the substantive criminal law makes decision a, it merely *declares* that the conduct is wrong. In doing so, it does not even purport to add anything to people's balance of reasons. See section 1.c.
427 Duff, 2012, p. 6
428 Duff, 2012, p. 7
429 Although he believes that democracy has this kind of instrumental value, as I explained in section 1.c.
430 Duff, 2012, p. 3
431 The opposite view has been defended by Bennett, arguing that Duff needs to base his account on epistemic considerations (Bennett, 2011). However, this does not seem to be what follows from the 2012 paper I am discussing here.
432 Duff, 2012, pp. 7–8

and in fact better, than the ones who agree with the law, and this conclusion strikes me as problematic. Why should we treat those who hold reasonable opinions differently, just because some of them defend views that are the same as the ones that can be found in the content of the law and some do not?

Moreover, let us think about the case where I agree with the content of law X and I commit this crime. Then I realise that the law was wrong, but I still hold a reasonable view. To which reasons for action should the State refer when punishing me? According to Duff, at the moment of acting I had only moral reasons deriving from the wrongfulness of the conduct, and no relational reasons. But now I claim that those reasons do not exist, and that I was wrong: I only have relational reasons for action, and therefore I should be treated more leniently. Can the State punish me based on the relational reasons I did not have when committing the crime? The answer could come from a more general account of how we should treat offenders when they change their moral views after committing public wrongs, e.g., if they are sorry for what they did. But in this case, that kind of move would be strange, because actually the person would be treated more leniently precisely because her new views *depart* from the content of the law.

And what if it is the State who changes the law and decriminalizes the conduct? Can it say that those who reasonably disagreed had a (relational) reason to obey, and were correctly punished, while it was wrong for the State to punish those who agreed, because now it claims that the conduct is no longer wrongful?

Besides the production of these counterintuitive effects, I cannot see why a law such as this one does not give *every* member of the community a relational reason for action, regardless of their agreement or disagreement. The legislative decision still speaks to all of them as citizens, because for these people it is their own law. This does not mean that they cannot have other reasons to act in the same way, let these reasons come from the content of the decision (if they agree) or even be merely prudential. It only means that everybody has at least a relational reason to obey legitimate decisions. Moreover, this would be sufficient to satisfy the reason-for-action condition for the justification of punishment.

One could ask whether this alternative view does not have an implausible implication in the case of unreasonable offenders. Saying to them that the reason why they have to refrain

from rape is grounded in the legitimacy of the law seems an inappropriate kind of argument. There seem to be two kinds of worrying consequences in this view. First, what if the person only refrains from rape just for relational reasons? I do not have anything to say about this kind of case, because, as I explained in chapter 2, the only thing that we can expect from other citizens is that they comply with the content of the law, not that they believe that it is correct[433].

Second, it does not give the right consideration to the fact that rape is prohibited because it is wrong, and not wrong because it is prohibited. But the latter is not the kind of claim that I am defending here. In order to explain why, it is necessary to look at what happens when legislation about a new crime is enacted. Duff believes that when criminalizing a conduct the legislative institution is merely *marking* a previous wrong as public by declaring that it is now a public wrong. However, I believe that it is also making a positive decision about which things should and should not be done, because sometimes there is disagreement[434]. Actually, Duff has argued that

> "in such instances, what the law says to those who dissent from the stand it takes is not simply and unqualifiedly that the conduct in question is wrong, but rather that this is now the community's authoritative view. Even if they dissent from its content, they have an obligation as members of the community to accept its authority – to obey the law, even if they are not persuaded by its content, unless and until they can secure a change in it through the normal political process" [435].

As I have mentioned already, in practice when a legislative assembly discusses the creation of a new crime, its members not only discuss about the kind of public response that should be given to previously existing wrongs, but also about whether a conduct is wrong and about the types of case that should be included and excluded. Of course, the arguments are presented in terms of pre-existing moral wrongs, but when there is disagreement this is not enough, and the community says "from now on we decide that this is (also) prohibited/mandatory, and therefore a public wrong"[436]. Even in a case such as rape it is possible to understand how this would work. Probably, there will be agreement regarding

[433] This statement does not say anything yet about (and is compatible with) the reasons for belief that people can have as a consequence of the epistemic value of decision-making procedures.
[434] For this kind of critique see also Bennett, 2011.
[435] Duff, 2001, p. 65
[436] Waldron, 1999, p. 105

some central cases but it is not possible to assume that everyone agrees with all the borderline cases; for instance, whether having sex with someone who is younger than 16 ought to count as rape. When the community decides to criminalize a conduct, it is making a positive decision about what counts as a public wrong.

Now is time to analyse the reasons for obedience with some more detail, and I will do this in order to develop an account of legitimacy of legislative decisions building on Duff's theory. I will refer to two of the main features of his view, namely democracy and reasonableness. These elements seem to be acting as some sort of side-constraint to the relational reasons for action, connected to the membership to the community, but I believe their role should be different. In what follows I will argue that the first one has a greater importance in the generation of reasons for action, and that the second should be left out. The result will be a procedural account with no substantive limits.

Democracy and membership

In what follows I will defend a particular view of what makes legislative decisions about criminalization legitimate. This proposal is based on some factual assumptions, and some normative ones. I will only describe them briefly, since they are quite established in the current literature.

The first factual assumption is that generally people have no choice but to live together with others[437], and normally the decisions made by their institutions affect the members of the community[438]. However, they honestly disagree about what should be done in many cases[439]: they disagree about what is right and wrong[440], and they also have different interests that are sometimes incompatible with each other. Some authors emphasize

[437]Christiano, 2008, p. 83; Pettit, 2012a, pp. 160–63; Waldron, 1999, p. 102

[438] Of course, this is not true in many circumstances, because different decisions could affect different groups of people and some of them might even belong to other communities. Ideally the participation in making legislative decisions should depend on the topic and the moment. I am assuming that political communities more or less coincide with States, and that people are affected by the political decisions made in them. I will not say anything about those whose interests are affected but cannot participate (like children or animals), and with this I do not mean that their interests should not be considered in political decision-making.

[439] Christiano, 2008; Marmor, 2005; Waldron, 1999

[440] Bellamy, 2009; Richardson, 2002; Waldron, 1999. A similar view, although with different conclusions, is defended by Rawls (1996) and Cohen (1996), but these two authors argue that disagreements are *reasonable*. This position is also held by Duff, 2012.

conflicts of judgment, while others say that what we observe are conflicts of interests[441]. This is not the place to defend one of them, and I believe it is plausible to assume that both illuminate an important part of what lies behind real political decision-making. In any case, a derivation of these two facts is the impossibility to have a law divided in separate parts that apply differently to groups or persons according to their views, and therefore there is a necessity to make decisions in spite of disagreements[442].

In addition, and in connection to the previous assumptions, in the case of the criminal law it is necessary to make decisions about whether certain conduct should be criminalized or not. Non-criminalization is not a default position in circumstances of disagreement: in most cases the criminal law deals with conducts that affect others, and not criminalizing them would be a lack of respect for the interests of some members[443]. Typically, this would be the case of actual and potential victims, but also the one of those who have an interest in living in a community where certain conducts are considered as public wrongs[444]. This does not mean that the community must make a positive decision about every possible conduct and omission in the world. It only means that, when the issue about the criminalization of a certain conduct is raised, the fact that there is disagreement should not automatically lead to non-criminalization.

Regarding the normative assumptions, once the necessity to make a collective decision is identified, everyone's interest should be taken into account: they should all be treated as *members*, and the only fair way to do it is to treat each person as an *equal member* of the community[445]. Once the fact of disagreements is added, and since people cannot choose to leave every time they disagree with a law (and probably it would be an excessive response, because people usually disagree with some laws and agree with others), decisions should be made in a way that is acceptable for all of them, in spite of those disagreements.

Now, there are at least two ways of doing this. The first is by having someone making decisions in the name of the interests of the members of the community and giving them

441 About the distinction see Marmor, 2005 and Christiano, 1996, pp. 53–54.
442 Waldron, 1999, pp. 101–02. In the case of the criminal law there can be exceptions to this where the society decides that some conducts should include a conscience clause, but this decision has to meet the same legitimacy criteria than any other.
443 This does not mean that criminalization always needs to be the response.
444 The focus on interests or on the wrongfulness of the conducts can depend on the kind of justification of punishment one is defending. However, some have argued that actually "each citizen has a fundamental interest in having a sense of being properly at home in the society in which he lives" (Christiano, 2008, p. 62).
445 Christiano, 2008, Chapter 1; Dworkin, 2000; Waldron, 1999

equal weight[446]. The second is to give people themselves an equal say in how best to advance those interests[447]. I will assume that the second is to be preferred because it is the only way to respect people's equal moral standing as agents with the "capacity to appreciate justice". Otherwise, she would be treated "like a child or a madman"[448].

> "No political society can rightly claim to advance the interests of its members without giving them a say in how it is organized. And no political society can justly claim to advance the interests of its citizens equally without giving each citizen an equal say in the shaping of its institutions"[449]

It is quite clear that the *equality* and *participation* requirements would necessarily include a decision-making mechanism such as voting, but it would not be sufficient. In order for people to be treated as *moral agents* – as having the capacity to engage in practical reasoning and who should be respected as such – they should be offered *reasons* in response to the ones they provide to the other members of the community. If I offer a reason why I believe hunting is wrong and claim that therefore it should be prohibited (e.g., that it is wrong to kill animals), I would not be satisfied if the only answer I receive from you is "We just don't want to, and we will vote against it". Moreover, citizens have an interest in correcting other people's cognitive biases, and also their own[450]. The way to do it is through deliberation.

As a consequence, the legislative procedure should be one where people exchange reasons and not merely bargain on the basis of their brute preferences, prejudices, or self-interested opinions[451]. But the defence of a deliberative procedure is not necessarily based on its instrumental/epistemic value. There is also non-instrumental value in the fact that a decision is the result of a process where reasons are exchanged[452]. When this happens, people are treated as moral agents who can engage in self-government, can offer reasons

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446 See, e.g., Dworkin, 2000, Chapter 4.
447 Christiano, 2008; Richardson, 2002, Chapter 6; Waldron, 1999
448 Christiano, 2008, p. 63. See also Bellamy, 2009; Cohen, 1996; Nino, 1996; Waldron, 1999
449 Christiano, 2008, p. 12. The same kind of view is defended by Marmor (2005).
450 Christiano, 2008
451 Of course, determining what ought to count as a reason can be a difficult task. About the difference between arguing and bargaining see Elster, 2000. For a list of many sorts of argument that are not reasons see Nino, 1996, pp. 171–72. He mentions, for instance, the mere expression of desires, the description of interests, the description of traditions or customs, the reference to the orders of illegitimate authorities, the expression of normative propositions that are not general, or that are not ready to be applied to cases that are equal to the one in question, obvious pragmatic inconsistencies, etc.
452 Bayón, 2009; Bennett, 2011; Christiano, 2008; Marmor, 2005; Richardson, 2002, Chapter 5

and are treated as capable of responding to the reasons offered by others, and not as mere passive voters. Even if a vote is required to make a decision, if this is done after a deliberation, the remaining disagreements will be more acceptable than the ones that result from mere voting[453]. A participant will know that her reasons were considered, while others offered her reasons for their views, even if her own position was put to the vote and did not gain the support of the majority.

The decisions made through this kind of mechanism will be acceptable as long as the procedure allows the community to reconsider the content of the decision if the people change their minds in the future. In addition, the deliberation requirement does not mean that there is no space for individual or group interests. They are compatible with deliberation as long as the decision-making mechanisms are not coercive[454], and moreover, to a certain degree it seems to be unavoidable.

When decisions are made through a procedure that respects these three elements of participation, equality and deliberation, people have a reason to obey its decisions. This reason is closely connected to the relational reasons mentioned by Duff, because they only exist in a context where people are members of a community (otherwise, instead of obeying they could simply leave or demand a special treatment, according to their own opinions). However, the mere fact that they are members is not sufficient to support this kind of duty if these further three elements are missing. Actually, membership gives people a relational reason to create institutions with (at least) this kind of non-instrumental value (where others are treated as equal members and as rational agents as well), and to participate in making decisions through these institutions[455]. But they do not have a reason *to obey* the decisions until they are the product of these kinds of procedures.

[453] One could argue that merely voting is a better way of treating people as rational agents, since they are respected as individuals who can deliberate on their own without any help. Therefore, people should not argue with each other, but only vote. Against this argument see also Richardson, 2002, p. 79.

[454] Mansbridge et al., 2010. They argue that "any ideal of the political, of legitimate democracy, and of deliberative democracy must include self-interest and conflicts among interests in order to recognize and celebrate in the ideal itself the diversity of free and equal human beings". See also Nino, 1996, p. 171.

[455] This does not necessarily imply that participation mechanisms such as voting should be compulsory, although there is certainly space to defend that view in this context. See, e.g., Dagger, 1997, pp. 147–49; Nino, 1996, pp. 214–217.

Duff also shares the view that membership is not enough and, as I mentioned, considers democracy as an additional requirement[456]. However, I believe it cannot merely count as a side-constraint: it is actually what transforms the reasons to collaborate in reasons for obedience in circumstances of disagreement, if the three conditions of participation, equality and deliberation are satisfied. In the first place, if citizens do not obey a legitimate decision, they are situating themselves above the other members of the community and treating them as inferiors[457]. Second, if they do not obey a decision that is the product of exchanging reasons, they are not behaving as moral agents, and not respecting others as such either. They are offered reasons, but they decide to ignore them, or to act against them.

These three elements are necessary for the existence of reasons to obey legislation about public wrongs. If one of them is missing, people could claim that they do not have a reason to obey the law because they where not treated either as members, as equals or as moral agents[458]. In contrast to Duff's view, the source of the reasons for action is relational, because people have a reason to participate in democratic decision-making procedures, and they owe it to their fellow citizens to follow the decisions made together. However, they only have a reason to obey the collective decisions if the procedures satisfy these other conditions.

As I explained in chapter 2, the kind of reason for action that people have when decisions are legitimate is a second-order reason: a reason to act according to the content of those decisions. Regardless of whether they disagree with the content of decisions about public wrongs, they are bound by their content. If they are punished as a consequence of failing to comply, they cannot claim that they did not have a reason for action. When the law is legitimate, the first condition for the justification of punishment is satisfied.

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456 He claims that people have other kinds of reason to obey decisions in the case of non-democratic systems Duff, 2012, n. 5.

457 Christiano, 2008; Singer, 1973. In Singer's words: "To vote, and yet refuse to be in any way obliged by the result of the vote, is to take an advantage over those who are prepared to accept the majority decision. […]. The dissenter's reason for taking his special position depends on his claim that he is right. But others believe just as sincerely that they are right" (Singer, 1973, p. 55).

458 And when this situation becomes established, it has been said that some people become "legally alienated" (Gargarella, 2009).

Reasonableness

At the beginning of section 2.c. I discussed the implications in terms of reasons for action for the three cases presented by Duff (the offender who agrees, the offender who reasonably disagrees, and the one who disagrees holding an unreasonable position). I argued that the three of them have relational reasons for action, and in the past section I explained how this could only happen when legislation is based on participation, equality and deliberation. But there is a remaining case left: what happens if the decision that results from the democratic process is the unreasonable one?

Duff seems to assume that this will not happen, because deliberative procedures tend to produce reasonable decisions[459]. I agree that this is probably true, since deliberative procedures usually have epistemic value and help protect the rights and interests of the participants. But there is no certainty that it will *always* be the case. As in explained in chapter 2, in non-ideal conditions institutions with a certain degree of instrumental value can sometimes produce bad decisions. The question is: do we have a reason to obey decisions that are unreasonable?

Of course, the problem is that what I consider as reasonable could be different from what others believe. In general we have a difficulty to know when a position or decision is reasonable or not, and also to determine what reasonableness amounts to. If reasonableness is *a feature of people* and it merely means that they offer arguments for their opinions, and do not merely base them on caprice, prejudice or preference, then I would be willing to accept it, but the concept would not be able to put an actual limit to the content of political decisions. It would merely describe a feature of decision-making procedures: they are deliberative. It says something about the input (reasons) and about how they are processed, but nothing else. Something similar happens if what makes people reasonable is the fact that they refer to shared principles as arguments for holding particular views (which is also a plausible interpretation of Duff's view[460]). Normally, principles are so vague that we could derive contradictory proposals from them. It does not pose a real restriction to the content of political decision-making.

[459] See section 1.c.
[460] See Duff, 2012, p. 7.

If, on the contrary, reasonableness is a feature of the *content* of a decision or opinion, then defending it as a limit means taking a stand on precisely the kind of issue that it is supposed to be decided democratically, because there is disagreement.

In any case, the important question is whether there should be a substantive limit to the content of democratic decisions. My answer is similar to my response to Duff 's view about the reasons for obedience in cases of agreement and disagreement. I believe that every time a decision is made democratically (by collective deliberation amongst equal members) it gives people a reason to obey it. And this also applies to (what someone could see as) an unreasonable decision, because people can also disagree about that. Even when this happens, they have a reason to obey legitimate decisions, based on the non-instrumental value of participation, equality and deliberation.

A different question is whether democratic procedures should have epistemic value. The claims defended in the previous sections do not offer any arguments against this and I can see no reason why institutions should not be designed in order to make better decisions, as long as they do not affect the non-instrumental value of institutions. Actually, this would protect against what many could consider unreasonable decisions. Nevertheless, the epistemic value of institutions is not necessary for the justification of criminal punishment, because decisions made through participation, equality and deliberation already offer people reasons for action[461].

Final comments

First, legitimate legislation about public wrongs generates, as any other legitimate decision, different kinds of reasons for action. It does not only give citizens a reason to obey it, but also adjudicators a reason to apply: this is not a reason to respond in any way yet, but only to offer any public response only in those cases where a public wrong was committed. The claim is that public response ought to be imposed on people for conducts that are not determined through this kind of procedure based on participation, equality and

[461] This does not mean that decisions made by institutions with epistemic value would not generate even stronger reasons for action.

deliberation. Otherwise, they adjudicators would be determining what counts as a public wrong in the political community in an illegitimate way[462].

A second observation that is worth making is that legitimate decisions about public wrongs not only give people reason for action from a normative point of view. Evidence also seems to suggest that, when people believe the law as legitimate, the tendency to comply is increased (although this observation does not apply to every type of crime)[463]. This point is relevant because if the opposite were the case, it would generate some practical difficulties.

Third, in order for a legislative decision about public wrongs to satisfy the reason-for-action condition, people should be able to know what the content of the law is and what they are expected to do if they want to comply. In other words, the law should be *action-guiding*. It should not only reflect their interests and views as equal members through a deliberative procedure. It ought to do so in a way that is transparent to them, and the resulting legislation should be public and written in a language that they can understand. In addition, they should be able to adjust their conduct to the law and to determine whether a particular conduct is covered by a norm or not. I will come back to this point in chapter 6, section 1.a.

A final word must be dedicated to a typical objection against the existence of a reason to obey the criminal law. If the reason is content-independent, the objection says, how can this be compatible with different amounts/kinds of punishment for different crimes? If the reason for action is the same in every case, why do not all offenders receive the same kind of public response? The response is that, as I mentioned several times, legitimate decisions give people second-order reasons for action: these are reasons to act according to certain (first-order) reasons. In this case, they have a reason to obey the decision about public wrongs, and the way to do it is by complying with its content. The content of the law is a prohibition to do certain things like hunting, and the first order reason is that hunting is a public wrong, and this prohibition has been determined through a collective deliberation

[462] Duff (et. al.) also shares this view. He argues that "taking wrongdoing seriously involves not only responding to individual instances of wrongdoing when they occur, but also declaring and defining wrongs. And declaring and defining wrongs is an activity which is legitimate only if it is done through a proper participatory process that involves the polity as a whole" (Duff et al., 2007, p. 159).
[463] Ferrante, 2008, pp. 466–67

about what is wrong[464]. If people do not comply, and they are punished, it will be for hunting, and not for disobeying the law. The argument can easily be understood by drawing an analogy with a breach of contract: it generates an obligation to pay damages, but depending on the content of the contract the amount can be higher or lower, because the obligation that was violated can be more or less serious.

2.d. Reasons for coercion and legitimacy

When the State decides to punish us for doing things that we have a reason not to do (because legislation about public wrongs is legitimate), it needs to provide reasons for using this type of coercion instead of other kinds of responses, like recommendations, restoration or even nothing[465]. Some argue that what gives the political institution a normative reason to decide on the use of coercion as a response to certain conducts or omissions should be found in the justice of the outcome (usually, desert, deterrence, or a combination of both). In fact, according to this view, justice can even *require* the use of punishment as a response in certain cases. On the other hand, there is the position according to which punishment (as an intentional imposition of harm) can never be justified.

Moreover, the State also makes decisions about what it is that those who implement the law can and ought to do in order to investigate and decide about punishment. These decisions are expressed through the creation of procedural rules that affect the final decision. For instance, legislation about the admission of evidence in the process, or about the cases when a person can appeal certain decisions can determine whether she will end up going to prison or not. In addition, some procedures are coercive themselves: people can be brought to court, put in remand, etc. The limits to the content of these legislative decisions about procedures are usually grounded on the respect for the rights of the

[464] The same argument works with failures to discharge obligations and committing offences when not covered by permissions.

[465] Another related question is: under which conditions do States (political institutions) have the *standing* to punish those who commit public wrongs? This kind of question will also be answered in the following pages, but in connection to which kinds of reason should be offered to those who are coerced. Since the reasons will come from the procedural origin of these decisions, they will also offer an answer to what gives institutions their *standing*. In addition, it must be remarked that the question about the standing will only be adequately answered after considering adjudicative decision-making (chapters 6 and 7).

offender and other citizens, and these are also reasons that ought to be taken into account when justifying punishment.

When legislative decisions about the content of public responses are not based on reasons, they are *arbitrary*. The problem is, as always, that there is disagreement about what justice requires of the legislative decisions about public responses to crime. If the State offers reasons for the use of coercion that are based on one specific view of justice, and the person who is punished holds a different view, then she could find the decision arbitrary.

The questions I aim to respond in the following sections are the following. First, even if the *reasons-for-action* condition has been satisfied (because the decision about public wrongs is legitimate), how can public responses be justified when we find these kinds of disagreements? Can legitimacy generate such reasons-for-coercion?

I will argue that it can: that legitimacy can make legislative decisions about public responses non-arbitrary. In chapter 6 I will also argue that the legitimacy requirement applies *all the way down* to the adjudicative decisions in particular criminal cases. Here I will only refer to this problem at the legislative level. I will first explain what I believe the idea of arbitrariness amounts to, and discuss some implications in the specific case of punishment. Afterwards, I will argue for one version of non-arbitrary legislative decisions about public responses to crime and explain how the account of legitimacy I am defending can satisfy it. This account of legitimacy will be the same one that I defended in section 2.c. and this should be no surprise: as explained in chapter 2, legitimate decisions generate reasons to obey, but also reasons to apply them. The question here is whether these reasons are adequate and sufficient to justify criminal punishment.

Arbitrariness and punishment

Arbitrariness in decision-making is connected to the requirement that decisions have to be based on reasons[466]. A decision is arbitrary when the reasons on which they ought to be based are lacking (e.g., when the decision is based on "random choice or personal

[466] Richardson, 2002, p. 37; Soames, 2011a

whim"[467]), inadequate[468] (e.g., when the reasons are suitable for other contexts, but not for the one in which the decision is made), or insufficient (e.g., when it is not based on conclusive reasons when they are required).

I am intentionally dismissing other senses in which the term arbitrariness is sometimes used. Often it is linked to unpredictability or to the mere presence of discretion. But a decision can be predictable and still be arbitrary (we could predict that a type of decision will always be made without reasons)[469], and also discretionary but non-arbitrary (when any of the reasons the decision-maker has discretion to use would be sufficient and adequate)[470]. For instance, legislators can have discretion when deciding in the name of citizens, or within the framework of the Constitution, but their decisions can be non-arbitrary if they are based on adequate and sufficient reasons. I will also be ignoring another use of the term: when it refers to the lack of *explicit* motivation of a decision. The reason is that a decision can be non-arbitrary, even if the person/institution who makes it does not explain how it is justified (although the lack of motivation can be a ground for suspicion about the arbitrariness of the decision, and requiring motivation is a good way of verifying that the decision is based on adequate and sufficient reasons).

One of the most important things there is to say about the subject is that we can only say that a decision is arbitrary after taking the context into account, since it depends on the kinds of reasons that are adequate or sufficient in that context. E.g., in criminal legislation one would typically say that criminalizing or exempting from punishment people who have certain physical or personal characteristics is arbitrary: the decision is not based on the kind of (normative) reasons that we want the decision to be linked to (e.g., that in principle all those who committed a certain crime should be treated equally, regardless of those characteristics). And the same holds for procedural legislation: if the reason why some people are not required to produce evidence is that they have money, then this norm is arbitrary. However, if someone chooses her sentimental partner because she is funny and smart or because she has money, it would be more difficult to say that this is arbitrary, since those reasons might be adequate and sufficient in this context.

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[467] Oxford Dictionaries online. See also Galligan, 1986.
[468] I will not refer to *necessary* reasons, because the question is not whether punishment can only be justified through one kind of adequate reason (legitimacy), but merely whether these adequate reasons can be sufficient, even if there are others.
[469] Lovett, 2010, pp. 95–96, 2014; Waldron, 1999, p. 167. See also Leiter, 1995, p. 489, where he refers to the connection between legal indeterminacy and predictability.
[470] Lovett, 2010, pp. 95–96, 2014; Waldron, 1999, p. 168

The difference between decision-making contexts can be found on different dimensions, and this is closely connected to what makes certain reasons adequate and sufficient in some of them, but not in others. Some of these differences are: whether the decision is connected to an action or not (I can decide that blue is better than green, but no action follows from that); if it is connected to an action, whether it affects other people or not (I can decide whether to paint my bedroom in green rather than blue, or decide whether to donate money to this "NGO x" instead of "NGO y"); if it affects other people, whether it is coercive or not (I can decide whether to break into your house or not, or whether to give you a present or not); and in any case, whether it is a political decision or not (depending on whether it is made in the name of the community or not)[471].

In the case of the criminal law, legislative decisions about public responses refer to actions that affect others, that are coercive, and that are made in the name of the political community. Therefore, the adequate and sufficient reasons need to be related to this specific kind of context. In addition, as I mentioned in section 2.c. above, there are some factual assumptions about the context in which political decisions are made. There I referred to the need to make decisions that affect the members of the community in spite of the disagreements that exist amongst them about what the content of the decision should be.

People can disagree about whether a certain decision is arbitrary because they disagree about the kinds of reasons it should be based on, and/or about what makes them sufficient. Some argue that this criterion is *objective*, while some others claim that it should be based on consent, and others that it is connected to certain decision-making procedures[472]. However, not any view can be applied to this context, and we need one that can justify decisions about the use of coercion on those who hold different views about the justification of these responses.

The fact of disagreements and the necessity to make decisions that affect the members of the community require us to reject a criterion of non-arbitrariness based on the justice of

[471] Maybe there are other kinds of element that determine which contexts we are talking about. The point here is just to specify the kind of context in which punishment needs to be justified.
[472] The distinction between the three notions of non-arbitrariness within the republican tradition has been discussed in Richardson, 2002, Chapter 3 and Lovett, 2010, 2014.

the content of political decisions about public responses (an objective criterion of non-arbitrariness). This would be the case of a theory like the one defended by Moore. According to him, the legislation about public responses is can make punishment non-arbitrary if it is just, according to retributivism (this counts as an adequate reason in his view). And the same goes for the procedures through which the rights of offenders are protected: they are based on his view about what is just. However, justice is an inadequate[473] reason for coercion because public responses to crime are decided in the name of the whole community where some people hold different views. For instance, even a consequentialist who also defends an objective view of non-arbitrariness will disagree with Moore. This kind of reasons based on justice are adequate for the defence of a particular position *inside* a legislative debate (in contrast to what would count as inadequate reasons such as mere preferences), but could not to justify a legislative decision to punish those who disagree without treating their views as inferior.

Another possible criterion for determining whether coercion can be justified is consent. If people agreed with a certain public response to crime, e.g., by voting in favour of the legislative decision, then would not be arbitrary to use coercion on them. This is the kind of criterion defended by some versions of anarchism, and certainly the fact that we consent can lift the protection against others coercing us. However, there are several reasons why it should not be used in the context of criminal punishment, and probably the most important ones are that it would give every citizen a veto-power against collective decisions, and also that it would generate a perverse incentive: citizens could just fail to give their consent to every decision about public responses (even if they agree with their content) just to avoid the risk of being punished. In any case, the central point is that it only offers a reason to coerce those who agree and consent, but not those who disagree.

Finally, a further notion of non-arbitrariness holds that decisions are based on adequate reasons when they are the product of the right kind of procedures[474]. I believe that this is the case, and that decisions made according to the account of legitimacy I defend can offer adequate and sufficient reasons in circumstances of disagreement because it can render the decisions non-arbitrary, even for those who disagree.

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[473] Since it is not adequate, it could not be sufficient either.

[474] Actually, the three notions of non-arbitrariness could be reconstructed in terms of legitimacy, but just from different accounts.

Legitimacy and non-arbitrariness

As I explained in chapter 2, legitimacy generates different kinds of reasons for action, and one of them is the fact that those in charge of applying decisions have a reason to do it. If this is right, then the legitimacy of legislative decisions about public responses can produce reasons for those responses. The question is now whether an account of legitimacy based on participation, equality and deliberation can offer adequate and sufficient reasons to make the decision about coercion non-arbitrary to someone who disagrees, and therefore to satisfy the reason-for-coercion condition.

The authors I discussed in this chapter propose different criteria for the justification of punishment in circumstances of disagreement. I have already rejected Moore's view because it does not offer adequate reasons in this context. On the other hand, Nino believes that the decision-making procedure is what generates adequate and sufficient reasons for coercion[475], but punishment is sufficiently justified only when it has epistemic value. According to him, the reasons are sufficient only when the institution is in a higher epistemic position, compared to those on which it is imposed, even if they disagree. Any decision about punishment would be arbitrary if imposed on someone who is in a better epistemic position, compared to the decision-making institution, but not on someone who is in a lower epistemic position, even if these two persons hold the same views. Therefore, according to this view, legitimacy is a sufficient reason to punish some of those who disagree, but not others.

Duff, on the other hand, believes that the justification of punishment is fundamentally based on what happens in the criminal process, especially in the trial[476], and his account does not really focus on legislation about public responses. However, when he discusses the substantive criminal law, and claims that it should be democratically enacted and reasonable, he is actually referring both to the decision to mark a conduct as a public wrong and also to the one about the public response[477]. If this interpretation is right, he can solve the problem faced by Nino's theory, because he believes that punishment is justified

[475] Although he argues that an additional condition is necessary: the fact that the offender consents to be punished by acting against the law. See Nino, 1980, 1983, 1986.
[476] Duff et al., 2007; Duff, 2001, 2012
[477] "The criminal law's authority […] lies primarily in its procedural dimension, as a power to call alleged wrongdoers to public account, to judge their conduct, to condemn and punish their criminal wrongdoing" (Duff, 2012, p. 3).

on everyone who disagrees, as long as the decision is made by democratic procedures and it is reasonable. Regardless of whether this is his view or not, the claim that, in order for public responses to be non-arbitrary, deliberative procedures are adequate but not sufficient because decisions need to be reasonable deserves attention.

As I mentioned in section 2.c., reasonableness is a notion that either does no work as a limit to deliberative procedures (if it merely means that people *are reasonable* as long as they offer reasons for their views, it does not add anything to what I said about what makes legislative decisions legitimate when there is deliberation), or, if it sets some limits, it begs the question about the objective reasons for coercion, and this is precisely what the democratic decision is about. However, as I argued before, reasons connected to justice are adequate as arguments inside the legislative debate, but not to coerce others in situations of disagreement.

I believe that a deliberative decision-making procedure offers an adequate reason for punishment. Assuming that people already have a reason to obey legitimate decisions about public wrongs, all the members of the community have an interest in punishment to be applied to those who are responsible for the commission of those public wrongs and in coercion to be used in order to make this possible through the criminal process. Moreover, they need to make a decision in spite of the fact that they disagree about the content of those public responses, and everyone could claim that these decisions are be arbitrary if they are merely based on the interests and views of others. In this context, the best reason that can be offered to those who disagree (and also to those who do not), is that public responses were decided with their participation, that they were treated as equals with respect to other members of the community holding different views, and that they had a chance to argue for their views.

This notion of non-arbitrariness is very close to the one offered by republicanism, or at least some versions of it. Republicans argue that interferences by the State on people's freedom are non-arbitrary when they track their interests according to their ideas, even in the case of criminal punishment[478]. There are different versions of this idea[479], but some

[478] Pettit, 1997a, 1997b
[479] See also note 472 above.

republicans have offered a notion of non-arbitrariness based on the participation of those affected in the deliberation through which the decision is made[480].

In addition, this kind of legislative procedure is sufficient to justify coercive responses. As I argued, agreement (consent) could not be required, because this would give people a veto-power against the other members of the community, and would situate them outside the reach of the common law just because of their views. Therefore, the most they can demand is that their views and interests are seriously considered and that they are given the same consideration as the views of others. In addition, the fact that those who disagree believe that the public response is unjust or unreasonable is not an argument they can use against coercion either, once it is legitimate, for the reasons discussed above.

Although the fact that the deliberative procedure does not have epistemic value can be seen as a deficiency (and in fact we should aim at increasing this value), it cannot render the public response arbitrary, because all that is needed is deliberation (in order to respect people as moral agents), even if we cannot know whether the exchange of reasons actually increased the quality of the decision. Finally, this decision can even be imposed on those who are located in a better epistemic position compared to the legislative institution.

Summary and conclusions

Justifying the use of coercion, like criminal punishment, is a difficult task in pluralist societies. If the views of the members of the community have to be taken into account, and they disagree about what is right and wrong, some of them could always argue that certain decisions are unjust. As I argued in this chapter, the legitimacy of legislative decisions can justify criminal punishment, at least in general (because adjudicative decisions will present further problems for justification in particular cases, as I will argue in the next chapter).

I argued that, in order for punishment to be justified, two conditions must be met. First, people must have a reason to act according to the content of the law: the reason-for-action

[480] Richardson, 2002. Others argue that it is sufficient for the people to be able to control these decisions after they are made. This is the kind of view defended by Pettit, although he abandoned the notion of non-arbitrariness in his late work (Pettit, 2012a).

condition. Second, the coercive response offered by the State must be non-arbitrary: it ought to be based on adequate and sufficient reasons: the reason-for-coercion condition.

I also explained that legislation in the case of the criminal law includes two kinds of decisions. First, a decision about what is prohibited, required, or permitted. When legislators make these decisions, they establish what will be considered a *public wrong* in the political community. These norms are mainly directed to citizens, although adjudicators will also take them into account when they decide particular cases. The second kind of decision is the one about how the State should respond to public wrongs. Most clearly, it includes those that refer to the types and amounts of punishment that should follow from the commission of each public wrong, but also the procedures through which this ought to be done. These are the decisions about *public responses*.

In the literature there are different accounts of legitimacy of criminal legislation. I discussed the ones defended by Moore (an instrumentalist substantivist), Nino (an instrumentalist proceduralist), and Duff (a mixed account, both in the dimension of institutions and decisions). All of them share the view that legitimate legislation can justify punishment, but they do it from different perspectives, and I argued that all of them have problems.

I defended an account of legitimacy based on the participation of all members of the community, as equals in a deliberation. This kind of procedure produces decisions about public wrongs that people have reasons to obey (satisfying the reason-for-action condition), and it also produces decisions about public responses that adjudicators have a reason to apply. Furthermore, these reasons are both adequate and sufficient to render decisions about public responses non-arbitrary in the particular context of political decisions about criminal punishment (thus satisfying the reason-for-coercion condition).

The most important element of this kind of account is that, when legislation about public wrongs is legitimate, even those who disagree have a reason to obey it. And when legislation about public responses is legitimate, it can even be non-arbitrarily imposed on those who disagree. In addition, adjudicators have a reason to apply these decisions to every case that is covered by them, regardless of whether they agree with their content or not. If they could decide not to do so, they would be positioning themselves above the rest of the members of the community by letting their own views prevail.

Although I have mentioned legislative procedures several times, in this chapter I have not explicitly offered full account of legitimate legislative institutions. This might strike the reader as strange, given the fact that, as I have argued in chapter 2, any account should pay attention to these two objects of political legitimacy, and also that I have mentioned the account of institutions that is defended by Moore, Nino and Duff. Of course, since I have argued that procedures based on participation, equality, and deliberation have non-instrumental value, it follows that this is what should guide institutional design. However, since this chapter is understood as a preparation for the arguments in chapters 6 and 7, I believe that offering a deeper analysis of institutional design would be beyond the scope.

Nevertheless, there are two main critiques to participatory legislative decision-making that should be briefly addressed, even if merely to avoid some misunderstandings. The first critique would say that I have defended an account that is inspired by republican political philosophy, but one of the main referent of this tradition (Pettit) has argued, first, that non-arbitrariness is achieved through accountability and not through participation[481], and second, that participation is always negative in the domain of the criminal law because it generates *outrage dynamics*, and because the decisions are too technical for citizens to make coherent decisions. He argues that an independent institution should make these kinds of decisions (subjected to the control of parliament)[482].

Some other republicans have criticized this view arguing that it is weakly democratic[483] and that it is based on mistaken factual and normative assumptions[484]. Here I will merely remark two points in order to align myself with these critiques and explain why Pettit's

[481] Pettit, 1997b, 2004, 2012a
[482] Pettit, 2001
[483] Bellamy, 2009; Martí, 2009
[484] A very detailed critique of this view has been made by Martí (2009). First, from the empirical perspective, the public seems to be less punitive than polls suggest: they seem to be no more punitive than experts, and the causes of greater punitiveness are more connected to the kind of information culture of every country than with the democratic environment. Second, even when formal channels of participation are supressed, public opinion still has an impact on the decisions made by public officials, and we can assume lobbies and partial interests would still have a capacity to exercise pressure on the independent institution deciding about the criminal law. Finally, if, on the contrary, the independent body is partially dependent on legislators, there is no reason to believe that the risk of *outrage dynamic* can be avoided. On the normative dimension, Martí argues that weakly-democratic republicanism seems to assume that the impossibility of attaining the ideal of self-government should lead to the abandonment of that ideal. On the contrary, Martí argues that approximating the impossible ideal of participation through strongly-democratic institutions would still be desirable. In addition, he argues that it is very problematic to exclude citizens from decisions about the most important issues that affect the members of a political community, even if it is precisely those issues that are more controversial and emotionally engaging, like (but not only) the criminal law. Martí explains that an account such as the one defended by Pettit ends up collapsing into a general, weakly-democratic system.

view is not satisfactory. First, it is hard to imagine how a legislative institution that does not allow citizens to participate, because decisions are too technical, can meet the requirement of tracking people's interests according to their views. If the law has become too technical for people to understand it, then we have reasons to suspect that institutions are too closed to citizens' views, and that they have become disconnected from them. This is not a reason to preserve the technical character of the law, and to exclude citizens, but to open those institutions to participation so that they can exchange reasons about what the law should be, as equal members of the community. Moreover, the outrage dynamic can be a consequence of precisely the kind of elitist decision-making institutions that Pettit defends: penal populism has actually been described as a reaction to elites imposing their views on citizens[485].

Second, from Pettit's perspective, the technicality obstacle to participation is connected to his view about making internally consistent decisions, and he believes that this is not possible when people participate. Against his view, it can be argued, first, that even if one agrees that consistency is desirable, its is neither the only, nor the most important value. In circumstances of disagreement, consistency is not enough to justify public responses to crime, while legitimacy is. In fact, a legitimate decision could satisfy the reason-for-coercion condition without being consistent, and many decisions can be internally consistent while only some of them are legitimate.

These arguments do not assume that applying this kind of institutional design is an easy task. Promoting participation, equality and deliberation can push institutional designs in opposite directions. However, as Martí suggests, the strategy should be to find second best alternatives instead of abandoning the ideal altogether[486].

The second critique is that it is inconsistent for democracy not to put limits to the possible content of political decisions, when they affect the elements that give value to democracy[487], and/or when they violate the same values that ground democracy[488]. They

485 "As a political stance, populism means above all an appeal to 'the people', usually against the elite" (Canovan, 1991, p. 394).
486 Martí, 2009, p. 142
487 E.g., Nino, 1996.
488 See, e.g., Christiano, 2008, where he argues that "there are reasonably clear limits to the authority of democracy and they can be derived from the same principle of public equality that underlies democratic authority" (p. 260). He also argues that the crossing of those limits does not only offer *countervailing* reasons against obedience, but that they *undercut* the authority of democracy itself (pp. 261-262).

argue that these decisions are illegitimate, and also that there should be some institutional mechanism to deal with them. Some examples would be, respectively, the enactment of a criminal prohibition to express one's views freely, and to deny equal exercise of certain rights to parts of the population. Regarding the latter, I can only say that in principle any decision can be criticized by arguing that it e.g. violates equality or fails to treat people as moral agents (the ground for the deliberative element of the account). This should not, however, be taken as a substantive restriction to the content of legislative decisions, because if that argument was accepted there would be little left to be decided by democratic institutions.

Finally, regarding a decision A that affects the legitimacy of a future decision B (e.g. by restricting freedom of speech), it is one thing to identify this situation as a problem, and a different one to say that it affects the legitimacy of the former decision. Decision A would still be based on a procedure that has intrinsic value[489]. The problem is that decision B will be less legitimate. There are three kinds of ways to deal with this problem without abandoning the proceduralist view. First, as I mentioned already, it is possible to introduce epistemic value in the design of the institution. Doing this is not necessary for the two conditions for the justification of punishment, but it could certainly protect the quality of the procedure in the future. Another proposal could be to have an institution in charge of reviewing decisions in order to verify whether they are based on participation, equality and deliberation. In the example, decision A would pass the test, but decision B would not. Third, it might also be desirable to have an institutional mechanism to challenge legislation that clearly makes the legislative institution less legitimate in the future, and at least to require the institution to reconsider decision A.

I mention the two versions of this critique because they could be used to defend an institution like judicial review of legislation. My answer would be that a mechanism of control is desirable in order to check that procedures are respected (that legislation is legitimate), but not to review its content, even if it seems to be incompatible with the values that make institutions non-instrumentally valuable. In order for this to be legitimate, the institution should have at least the same degree of legitimacy than the legislative assembly, and this is certainly not true in the case of courts. As I mentioned already, this is

[489] Singer, 1973, pp. 64–72; Waldron, 1999, p. 255

not the place to discuss the institutional design of legislative institutions, but at the end of chapter 7 I will suggest a mechanism to review the legitimacy of legislation.

Chapter 6 – The political legitimacy of adjudicative decisions

Introduction

The criminal law includes norms about *public wrongs*: some prohibit or require certain conducts (offences), and others give people permissions and duties (defences). It also includes norms about *public responses*, including procedures and punishments. In this chapter I will assume that all of these legislative decisions are legitimate, and therefore that citizens have reasons to obey the former, and adjudicators have reasons to apply the latter[490], which implies that the two conditions for the justification of using punishment mentioned in chapter 5 – the *reason-for-action* and the *reason-for-coercion* conditions – are satisfied. In what follows I will argue that the justification of the use of punishment in particular cases needs further argument[491].

In chapter 2 I referred to the discussion in political philosophy about whether legitimate decisions generate reasons for action (reasons to obey these decisions) and the possibility of arguing that it does, but that this needs to be verified on a case-by-case basis. In addition, in the criminal law literature, there is a discussion about the distinction between the justification of a general norm requiring punishment and the justification of its application to particular cases: the problem of the *distribution* of punishment[492]. This discussion applies to the second condition for the justification of punishment and the question that needs to be answered is this: what else should be verified if one wants to argue that an adjudicator has a reason to apply a general norm to a particular case?

This response is sometimes presented in terms of substantive theories of criminal legislation and of punishment[493], but this is not the kind of project I have here, for reasons that I have mentioned several times: there is a great amount of disagreement about these issues, and I assume that these disagreements will persist in the future. Here the question is the following: once we have verified that legislation is legitimate, that the community has

[490] They also give others a reason not to interfere or to collaborate in obeying or applying these legitimate decisions. These others can include victims, the police, witnesses, etc.
[491] I will not discuss the difficulties to justify punishment when the law is illegitimate, which might justify civic disobedience or conscientious objection by citizens and adjudicators.
[492] Hart, 2008; Nino, 1980, 1986. See also Rawls, 1955.
[493] Gunther, 1993; Hart, 2008; Rawls, 1955

decided that a certain kind of conduct will be considered as a public wrong, and that a public response should follow, when can we say that a particular conduct and a particular response are covered by that norm in a way that justifies punishment?

Just as my aim in chapter 3 was trying to try to convince political philosophers that there is something missing in their *naïve view* of adjudication, here I will direct my attention to legal theorists. Legal positivism has been arguing for two centuries that it is possible to distinguish what the law is from what it should be. Something along these lines will be present in this chapter, but I believe that legal theory has also neglected the relevance of some discussions that have taken place in the domain of political philosophy, especially the one about political legitimacy. Jurists have focused on the discussions about the old distinction between legal validity and justice, and when political philosophy shifted its focus from justice to legitimacy in the last decades, most of them didn't follow. I believe more attention needs to be paid to the difference between validity, justice and legitimacy.

Even if legal theory can be seen as engaging in conceptual analysis and not concerned with normative questions (or at least that these are two separate questions, as legal positivists believe), it is not useful to understand the task of adjudication merely in terms of the identification of *the law* as question of validity. It ought to be understood as a fundamental part of political decision-making, and thus evaluated in terms of its legitimacy. But how does this affect legal theory? Legitimacy, unlike justice, is not only a parameter to criticize the content of the law: it also affects its sources, and therefore it should have an impact on what is identified as law and how it should be interpreted. And this is the case, not (or not necessarily) because interpreting the law requires normative judgement in order to be able to use concepts, but because once we have legitimate legislation in place, what *counts as the law* cannot remain a descriptive question. Other sources of law do not have this legitimacy[494], and therefore the fact that something else is also identified as the law a) does not give adjudicators a normative reason to apply it, and b) must not even be used as a tool for interpretation.

Of course, if one wants to talk about what adjudicators ought to do when identifying the law, one has to be careful to pay attention to what they *can* do, and this question partially depends on what the law *is* and more importantly, what it *can be*, especially connected with

[494] Although they do, for other accounts of legitimacy.

the question of which kinds of things we can do with language. It is not possible to answer these questions without endorsing a legal theory about the identification of the law, and some of the discussions that belong to this domain will be addressed. This does not mean, however, that any account would be compatible, or even relevant, for the normative discussion, connected to the reasons for action and coercion derived from legitimate legislation as presented in chapter 5. I will explain how this works in the following sections.

This chapter will be organized in two parts, each corresponding to one of the conditions for the justification of punishment. First, I will discuss what is necessary if one wants to argue that a particular citizen has a normative reason for or against a particular action that is considered a public wrong. I will argue that, first, they must be able to know what the law requires, and second, they must have *actually done* something that was *previously* marked as a public wrong. Since there can be disagreement about both things, the answers are not straightforward, and I will discuss some of the problems that ought to be faced when making these kinds of decisions in a legitimate way.

Then I will discuss the conditions that must be satisfied if the decision to use punishment in a particular case is to be legitimate. I will argue that the decision must be non-arbitrary: the reasons must be *adequate* and *sufficient*[495]. The implication is that, when there is disagreement, the *reason-for-coercion* condition cannot be satisfied by referring to something different than legitimate legislation (these are the adequate reasons). This requirement alone presents its own problems, but even if we solved them, there would still be a further way in which the decision could be arbitrary: if the reasons are insufficient (not for legislation, but for the use of coercion in a particular case). I believe this danger appears every time adjudicators have discretion (there is more than one option available without *trespassing on the limits* of legitimate law). In deciding about public responses they must offer reasons for their decision, and some difficult questions are: What kinds of reasons are sufficient in order to justify the adjudicative decision in a context of discretion and disagreement? Is there anything special about the criminal law that requires a higher standard, compared to other kinds of decisions in other areas of the law? Can punishment even be justified in a context of discretion (when the law also included acquittal as a possible response)?

[495] About the general notion of arbitrariness see chapter 5, section 2.d.

In order to simplify the presentation of the argument I will mainly be focusing on the justification of punishment of the accused, but not the kinds of reason for action that could justify the use of coercion on other people (like witnesses and victims), although many of the arguments about the role of legitimacy also apply because many decisions also affect them. Moreover, some of the questions about the relationship between legitimate legislation and legitimate adjudicative decisions also arise in other areas of the law. Nevertheless, there will be no discussion of the implications for those cases here. The reason why the argument is centred in the justification of punishing offenders is that there are some specific features that make the response especially serious and the justification especially difficult.

1. Reason-for-action condition

This condition says that the use of punishment can only be justified on people who act in a way they had a reason not to, or fail to do something when they had a reason to do it. Of course, not any reason will do, and in chapter 5 I argued that legitimate legislation about public wrongs counts as a reason for action, because we live with others and we disagree about what we ought and ought not to do. This is a second-order reason to obey legislative decisions when they are legitimate, and the way to do this is to comply with their content (although people can have other reasons to comply with that content as well). For instance, when a prohibition on hunting is created through legislation, people have a reason to obey this norm, because it is legitimate, and the way to do it is by refraining from hunting. Even if they do not agree that hunting is wrong, they have a second order reason not to do it. And if they do decide to go hunting, they expose themselves to punishment, because in the polity they belong to, this is a public wrong.

One of the tasks of adjudication is this: to verify that individuals who are accused of a crime actually did what they had a reason not to do, according to what counts as public wrongs. In the discussion that I am presenting here the point will not be whether it was this person who did it, or whether the brute facts took place or not. Although these facts are obviously relevant, I will assume that they are clear and that they actually happened in

the physical world[496]. The issues are whether legislation provided that person a reason for action or not; whether the law covers that kind of conduct or not; whether there was something wrong in what she did, not from the point of view of a substantive moral theory, but according to the content of legitimate law (the democratic decision about what is considered as a public wrong).

Finding an answer to these questions requires the satisfaction of some sub-conditions. The first one is that it is *possible* for the person to act according to those reasons. I will not focus on people's capacity to act according to reasons (I will assume that they have it), on the possibility of choosing freely (the discussion between determinism and anti-determinism), or on the possibility of knowing whether one is actually doing something or not (while knowing that doing X is criminal, one does not know whether one is actually doing X or not[497]). The discussion will be about the characteristics of legislation and the possibility of identifying which specific conducts people have reason to avoid or to engage in, according to the law.

The second sub-condition is related to the task of verifying that a particular person *actually* failed to be guided by the relevant reasons when acting in a particular way, in a particular case: whether it is possible to say that what she did was a public wrong. In order for this to be possible, those reasons must have *been there* before the conducts took place. If not, specific public wrongs are created retrospectively. I will discuss the possibility of evaluating the presence of reasons for action for citizens in particular cases and distinguish those cases where it is possible to say that the person committed a public wrong from those where it is not possible, paying special attention to the kinds of disagreements that can exist between offender and adjudicators.

1.a. Action-guiding legislation

As I explained in chapter 5, people's reasons for obedience are connected to legislation about public wrongs: legitimate legislative decisions about which actions are mandatory,

[496] Although, as I mentioned in chapter 3, the determination of the facts is closely connected to the identification of the legal norm.
[497] For instance, when a person is drinking and she intends to drive, but she does not know whether she has passed the alcohol limit established by the law or not.

prohibited or permitted. If the conducts that appear as the content of these decisions are to be required of people, it seems that one condition will be that it is possible for them to know what they have a reason to do. If offenders will be punished for not adjusting their actions to the content of the law, they must have the chance of doing so. Remember that the ground for this condition is that they should be treated as moral agents who are capable of responding to reasons, and can be punished only if they did not[498]. From this argument it follows that using punishment on someone who had reasons but had no chance of knowing about their existence would not satisfy the condition. An extreme case would be the one where the law is enacted in a foreign language, and there is no translation, or where the law is secret. Here it is difficult to justify punishing someone and still claim that she is treated as a moral agent if there was no possibility for her to have a clue about what these reasons were.

This does not mean, however, that the person could not be punished if she did not know about the existence of these reasons because she deliberately chose to avoid any possibility of being exposed to that information. It only means that there must be a real opportunity for every citizen to gain the knowledge about the reasons that apply to them (and that would trigger punishment as a response if they do not act accordingly).

One of the ways to describe this requirement is to say that legislation must be *action-guiding*: it must be able to guide people's conduct. This remark takes us directly to the idea of the legality principle, and things like publicity, vagueness, determinacy, the requirement that the law is understandable, etc.; all discussions that can be found in the legal literature - especially in the one about criminal law – and in judicial precedents.

Of course, the probability of having legislation that people cannot know about is lowered by the fact that it is legitimate according to the account defended in chapter 5, because in that case citizens are its makers. It seems that the problems of publicity and understandability are solved by the fact that the law is legitimate. However, even legitimate legislation can be indeterminate. In what follows I will focus on three dimensions of this problem. First, the question of vagueness of legal texts, second the question of over/under-inclusion, and third, the possibility of having conflicts between norms, or more than one norm applying to the same case.

[498] See chapter 5, section 2.a.

The general claim that I will be discussing in what follows is whether the law should be determinate in order to be action-guiding. One of the discussions that one can find in legal theory about this problem revolves around the question of whether the requirement applies to every element of the criminal law, and the implications for how the legislation should be enacted. Should it only apply to criminal offences, or also to defences? Should people also know what the response to their actions will be (*public responses)*? I will analyse how the requirement works in the case of legislation about offences, defences and punishments[499].

Offences

In general, if a norm describing a criminal offence is enacted as a rule (instead of a principle) it is easier for people to know what they have a reason to do. When legislation says that it is a crime to have sex with someone younger than 16 years old, or that it is prohibited to carry a specific type of gun, then knowing what is required from the person in order to comply is quite clear. On the contrary, if legislation uses terms like *unreasonable*, *dangerous*, *abusive*, *cruel*, *discriminatory*, *careless* or *excessive*, the problem is that there is greater room for individual practical deliberation, and for people not knowing with precision whether their actions will constitute an offence or not.

Nevertheless, although this description seems quite plausible, the two alternatives each have their benefits and difficulties, and both need to be qualified. First, it is possible to argue that norms enacted as rules bring more certainty, but that does not necessarily mean that, from the point of view of action-guidance, this is always the best strategy. The more detailed the rule, the more likely it will be over and under-inclusive. It means that the rule will cover conducts that are not actually wrongful according to the background reasons, but are prohibited as a consequence of the kind of generalization that is present in the rule. And there will be other conducts that are wrongful for the same background reasons, but are not criminalized. When people consider the rule as a guide for action, they could find themselves confused about whether they should follow the background reasons or the literal meaning of the rule. One could say that following a rule *means* following its

[499] Clearly, this is a discussion about how the law should be enacted and it might actually belong to the discussion about legitimate legislation. However, unless one argues that the way in which legislation is enacted affects its legitimacy, the two issues can in principle be separated, as I mentioned before.

background reasons[500], but even if this solves the problem of over/under-inclusion, it achieves it at the cost of making the rule almost irrelevant: it ends up being more like an example of direct application of the background reasons, usually vaguer. As a consequence, the norm loses the *action-guiding* power of rules.

Second, vague norms can also be action-guiding. In fact, because they leave more space for practical deliberation, one could claim that it is actually a better way of treating people as capable of practical reasoning. They are required to deliberate about what is the right thing to do considering the complexity of situations, while rules only capture some of their properties. In a sense, the law is not asking the person to do X, based on background reason Y, but to deliberate about what Y requires in each particular case. If this claim is true, then the *reason-for-action* condition, based on the claim that people should be treated as moral agents capable of acting according to reasons could be satisfied. This position was defended by Waldron[501], and it looks like an attractive solution. However, as the author himself explains, the use of this kind of proposal "as a form of action-guidance [should be confined] to areas where we have reason to believe there is not going to be a wide divergence in estimates of appropriate behaviour"[502]. It is not excessive to argue that this kind of agreement cannot be assumed in every area of the criminal law.

Third, and connected to the previous qualification, although incentivizing individual practical deliberation could be adequate in certain areas, like parents' duty to take care of their children[503], it might not be desirable in others, like the prohibition of carrying dangerous firearms or having sex with minors. Moreover, which form of legislating is better might depend on the kind of reasons that people have *for* the action that would be affected if the conduct is prohibited: it is not the same to have a norm that is over-inclusive in restricting people's right to have sex or to drink alcohol as to have one that restricts people's right to freedom of movement or free speech.

Fourth, it must be pointed out that enacting offences as rules does not mean that vagueness will be completely eliminated, and the problem of having to verify whether a

[500] Marmor, 1995, 2001a
[501] Waldron, 2011
[502] Waldron, 2011, p. 78
[503] A similar example is discussed in Soames, 2011a.

certain penumbral case is covered by the rule or not will always be present, at least potentially[504].

Fifth, a quite relevant element that ought to be taken into account when discussing how the law should be enacted and its relationship with legitimacy is the possibility of reaching different types and levels of agreement in the legislative institutions. The account of legitimacy defended in chapter 5 leaves space for different kinds of situation. Sometimes legislators will decide to enact rules, even if they do not agree about the background reasons (and maybe precisely because of that). In these cases, it seems that the guidance for action ought not to be found in the background reasons, basically because there are no univocal background reasons to consider (Waldron's argument above). But in many circumstances it is possible for legislators to reach agreement about the background reasons, and these reasons can be made explicit in legislation. When this happens, the claim that the rule needs to be interpreted according to the background reasons becomes more plausible, although it certainly depends on the kind of conduct. Ideally, legislators should be the ones deciding how these norms should be interpreted[505].

Defences

Now the problem is that most legal systems do not only include prohibitions or obligations (offences) in the criminal law, but they also have either general or specific norms about circumstances where the engagement in a conduct that is covered by an offence definition is not a public wrong, because there is a justificatory defence[506]. Legislators can enact permissions and duties (although in practice they are not always part of the criminal law, and can be found in other parts of the legal system) covering actions (or omissions) that would, in other circumstances, count as a public wrong. In order for a person to know whether her actions are a public wrong or not, she has to take into account, not only legislation about offences, but also legislation about justificatory defences. Thus, defences

[504] See chapter 3.
[505] See the discussion in section 1.b. below.
[506] Something different is happening when there is an excuse: there is a reason for adjudicators not to punish the person (or to punish her less harshly), even if her actions constituted an unjustified offence (a public wrong). Of course, what counts as a justification or as an excuse is the subject of a highly complex debate amongst criminal legal theorists, but I do not intend to take a stand here. I assume that there are defences that qualify as legislation about public wrongs, and others that ought to be counted as norms about public responses. In this section I focus on the former.

should also be action-guiding and then the question about indeterminacy also arises in this domain.

What is in fact going on when a justificatory defence of this kind is part of the criminal law can, of course, depend on how it is enacted. On one dimension, one can find legislation ranging from offences enacted as rules with their specific exceptions (considering each possible defence), to the case where there is separate legislation for offences and defences[507]. On the other dimension, offences and defences can be enacted in more or less vague terms, making both of them more or less over/under-inclusive, allowing for different kinds of interactions[508].

If the defence is vaguely enacted, people might disagree about which conducts are actually covered by them. If, on the other hand, the law is enacted as a long list of rules (offences) and exceptions (defences), it could end up affecting its action-guiding capacity as well, because it would become a complex list of circumstances that normal citizens could not remember, and also because the fact that some exceptions are explicitly enumerated does not eliminate all the cases of over-inclusion. When over-inclusion appears, the same problem mentioned before comes with it: people might not know whether to follow the background reasons or the literal meaning of the rule.

[507] The preference for one or the other depends, amongst other things, on what one believes about the relationship between background reasons: e.g., if offences are *prima facie* or *pro-tanto* reasons against the conduct. The answer can depend on one's broader view about the character of moral conflicts. For instance, one can hold that these types of case, where more than one background reason is present, have no right answer, neither in the law nor in the moral level (e.g., because values are incommensurable).

[508] It has been argued that one of the roles of defences is to help dealing with cases of over-inclusive offences enacted as rules, but that in order to achieve this, they must be enacted I vague terms (Moreso, 2001): if the defence is also enacted as a rule, it will also be over and (more importantly) under-inclusive, and it will not be able to *fix* the cases of over-inclusive offence definitions. However, this solution does not solve the problem. In the case of justificatory defences we are not talking about conducts covered by the rule regarding the offence (which would actually be a *negative element of the offence*), but not covered by the background reasons (or the other way round). There are two norms, based on two different background reasons, but covering the same conduct. Sometimes this reflects the existence of reasons both for and against an action, like in self-defence or defence of others, where there are both reasons for and against my conduct: there are reasons to regret harming another person, and I should prefer not to find myself in that situation. In other cases the justificatory defence is a permission to act in a way that is covered by the offence definition, which does not strictly count as a reason *for* the action (an example can be found in Article 20 section 7° of the Spanish Criminal Code, according to which the exercise of a right is a permission covering all sorts of crime). Consequently, decriminalizing a conduct through a vague justificatory defence might only cover some cases of over-inclusive offences, but not all of them, if the background reasons of the two norms are different. People might still be confronted with some cases where, by looking at the rule about the offence, they do not know whether to follow the rule or its background reasons (because it is not covered by the defence).

Since the legislative debate cannot foresee all the possible circumstances in which criminal offences will take place, it seems a good idea to make at least some general decision about the kinds of case in which people have a duty or permission to act against them. This is achieved by creating general defences, and not only exceptions to the norms about offences. However, I believe the need to have laws that are action-guiding provides an argument for the enactment of both offences and defences with some level of detail. In any case, the relevant conclusion here is that there will be an unavoidable trade-off between certainty and avoiding over/under-inclusion, and that both affect the action-guiding capacity of legislation.

Finally, the same remark made in the past section about the kind of agreement reached by legislators in the case of offences applies here. When there is disagreement about the background reasons, it seems more desirable to enact legislation as rules and exceptions, and people's action should be guided by the literal meaning of the norms. When agreement is possible, the opposite would follow.

Punishments

Now it is the time to ask whether the requirement that the law is *action-guiding* should also apply to the punishments that follow from people's criminal actions. Should the offender be able to *know* precisely what kind and amount of punishment she could be subjected to if we want to say that the law is *action-guiding* in terms of the reason-for-action condition?

First, the answer to this question seems to depend on the theory of punishment one defends. Mainly, if one defends a deterrence-based account of punishment, then one might say that people should be able to know what the specific costs of the action are in order to decide whether she has a reason to do it or not, because the aim of the law is to motivate human conduct. This kind of argument was actually defended by Bentham, who argued that it is more efficacious to enact conduct rules (public wrongs) implicitly by just determining the punishment than by prohibiting them directly[509]. In his opinion, knowing which punishments would follow was the central piece of criminal legislation. Other views,

[509] "To say to the judge, *Cause to be hanged whoever in due form of law is convicted of stealing*, is though not direct, yet as intelligible a way of intimating to men in general that they must not steal, as to say to them directly, *Do not steal*: and one sees, how much more likely to be efficacious" (Bentham, 1960, p. 430).

like retributivist or expressivist accounts of punishment, would not agree with this argument, and some defenders of the deterrence-based theories could actually argue that not knowing which punishment will follow could actually be more effective.

The reason-for-action condition, as presented in chapter 5, only requires that people have a reason to avoid or perform certain conducts, if these actions will be counted as public wrongs. In the case of consequentialism, the fact that people are given additional prudential reasons does not eliminate the requirement that there must be other background reasons for criminalization, e.g., that the conduct produces harm to others. Therefore, even consequentialism satisfies this condition, although it adds the one mentioned before.

More importantly, in the discussion about legitimacy the necessity of this requirement (knowing precisely which kind of punishment will follow from each public wrong) for the satisfaction of the reason-for-action condition cannot depend on the kind of justification of punishment one is defending. Since there is disagreement about the ends of punishment, the use of one account to defend the existence of a specific threat cannot be a necessary condition for the legitimate public responses. This does not mean, however, that if legitimate legislation included consequentialist background reasons, expressing public wrongs in terms of their punishments might not become desirable.

Another kind of argument could be the one derived from the idea of the rule of law[510]. The kind of response that is given to the offender cannot be completely left open, but should be predetermined in the law. But the reason on which this claim is based is not that people need to know punishments before they act. Instead, it is grounded on the worry that adjudicators can have too much power and discretion, and that the decision can be based on their views, and not on the law. But this is a different kind of consideration, connected to the non-arbitrariness of the adjudicative decision, and I will come back to it in section 2. below.

On the other hand, it has been argued that there might be benefits in creating an *acoustic separation* between norms about public wrongs and certain norms about punishments[511]. In some cases it could actually be positive to create rules of conduct and to prevent people from knowing how some the public response will be, e.g., in the case of some excuses like

[510] Dan-Cohen, 1984, p. 650
[511] Dan-Cohen, 1984

duress or necessity: if people do not know about some public responses that will be used in their favour, this will not reduce their compliance with the law about public wrongs (because they face a more serious threat), but it would still produce more lenient responses than in the case of the basic crime[512]. Although this argument points in the same direction as the one I am defending here, it does it for the wrong kinds of reasons. Instead of aiming to treat people as moral agents, it aims to manipulate them in order to produce certain results by hiding the information about potential punishments from them.

A final argument for the requirement that people should be able to know the punishments that will follow from each offence is that the amount of punishment is what reflects the strength of the reasons against the conduct/the degree of wrongfulness in each criminal conduct. A higher sentence for murder than for theft *means* that killing is worse than stealing. But this is not necessarily the case. It is just the way societies have decided to express the degree of wrongfulness. One could think about a criminal law with different types of offence classified according to their seriousness and create different categories of public wrongs. And even if this seems unpractical, the reason to attach an amount of punishment to each offence is just a tool to classify crimes, but this does not make it a necessary element of the reason-for-action condition, as long as there is some kind of criterion to identify the seriousness of each public wrong. In addition, it is compatible with just referring to possible amounts and kinds punishments quite vaguely without specifying which is the one that is going to follow from each conduct, and mentioning the kinds of factor that can make it more or less serious. This last point will be crucial to distinguish between what should be done in cases of indeterminate public wrongs[513] and public responses[514].

In any case, the relevant point is that, according to the account defended here, coercion is the response that society gives to those who fail to comply with the content of legitimate legislation about public wrongs, when they have a reason to do it. To know which conducts are public wrongs is necessary for the justification of punishment, in order for the reason-for-action condition to be satisfied. But other kinds of reason for action (like the fear of being punished) are not, and arguing for them would mean begging the question for the

512 Dan-Cohen, 1984, pp. 632–634, 637–648

513 If the conduct of the accused is covered by a legally reasonable interpretation, she should be acquitted. See section 1.b.

514 Even if the accused holds a legally reasonable view about the public response, she can still be punished if the decision is legitimate. See section 2.b.

defence of a particular justification of punishment. The same goes for the claim about fair notice and the limits to State power, and for the observation that we normally use amounts of punishment to express the seriousness of public wrongs: these arguments might all be relevant, but they are not necessary to meet the reason-for-action condition.

1.b. Non-retroactivity

In the past sections I talked about how the law should be if we want to argue that people have a reason to follow it and the problems this claim generates. The general claim is that legislation ought to be legitimate, but also action-guiding and that this requirement applies to offences and defences but not to punishments. Now there is a further step that we need to take in order to verify the reason-for-action condition for the justification of punishment: that a particular person actually had these reasons for (or against) a specific action and she ignored them. In order for this to be possible, the reasons must have *been there* before she acted. This is, whoever legislates about what those reasons are, and which actions they require, must do it before people act. When looking backwards, a legitimate law must have already ruled the conduct (or omission) out by marking it as a public wrong.

Even when the law is *action-guiding*, sometimes there is more than one interpretation about which actions are required/prohibited/permitted, or, in other words, which actions are public wrongs is relatively indeterminate, at least for some conducts, e.g., because the norm is vague or there is more than one of them applying to the case. If there can be several interpretations of the law's content, and the specification is made after people acted, defendants could claim that what they did was not actually a public wrong before they acted. The problem is different from the one addressed in the past section: not that people could not know that the conduct was a public wrong, but that their interpretation is different from the one made by others, and the law did not rule out any of them.

If there is disagreement about whether the action was in fact a public wrong or not, and this disagreement has to be settled at the adjudicative stage, then how can it be possible to say that the offender actually had a reason to act in a certain way, but she failed to do so? Is the public wrong not *created* when the case is decided? There are many examples of this kind of situation and I believe that one could always think of conducts regarding which a

norm or a set of norms become indeterminate, and there is disagreement. For instance, if neglecting children under your care is a public wrong, and you believe that letting them play in the garden while you work inside the house is not a case of neglect, you could argue that determining that your conduct was actually a crime after you acted might be a case of retroactive legislation, because both your interpretation and the one offered by adjudicators could follow from the law.

One possible solution would be to acquit every person that is accused under this kind of norm. If the law is unclear about the kinds of conducts it requires, then people cannot be punished, because it would be defined after the actions had occurred. The problem with this strategy is that it does not distinguish between clear cases and those that are not. The fact that the law is sometimes indeterminate does not mean that this is true for every case. Even vague norms have areas where their application is straightforward, and others where it is doubtful. If the offender acts in a way that is clearly a public wrong, there is no reason why she should not be punished just because in other cases the same laws provide indeterminate solutions[515]. For instance, leaving a 5-year old child alone at home all day is clearly a case of neglect. Even if the norm is vague, applying it to this case does not appear as a case of retroactive legislation.

Another attempt to solve the problem of retroactivity could be arguing for the legitimization of the decision about the particular case. Ideally, the question about what is the content of the law should be asked to legitimate legislative institutions, and they could also make a decision about what they meant with respect to each particular case. However, even this solution would not be satisfactory, not only because it would be impossible to have such a system working, but also because the decision would still have retroactive effects, and applying it would violate the condition of treating the person as a moral agent capable of acting according to reasons.

Moreover, at least in some cases people will engage in conducts that are vaguely defined as public wrongs *knowing* that there is a danger of doing something criminal. One could argue that punishing people in these situations does not violate the reason-for-action condition,

[515] See, for instance, the discussion around the *void for vagueness* doctrine in the United States, and the famous dissenting opinion of Justice Black in *Coates vs. Cincinnati* (1971), where he argues that, although a law could violate the Constitution when it is vague, it would still have both constitutional and unconstitutional applications.

because they are *skating on thin ice*[516]. Although they don't know what the interpretation of adjudicators would be, they know that there is a risk for the conduct to be considered a public wrong. The problem with this kind of argument is that there might be situations where engaging in those kinds of conducts would be something that is desirable, and we would not want people avoiding it. For instance, we would not want people stopping defending others or exercising freedom of speech just because they know that there is a risk of committing a public wrong. Moreover, punishing people for running these risks could be described as the creation of a new public wrong, a crime of *taking risks*. If this were to happen, it should be the product of a legitimate decision, and should be done before the conduct takes place.

Following this kind of argumentation seems to make the justification of punishment impossible in an enormous number of cases. But how far does the problem go? Actually, what should be left out is the possibility of punishing people based on reasons they did not have because they were *created* in adjudication, but not those whose conduct cannot possibly be understood as an interpretation of the law, even if there is more than one. Even when the law is indeterminate, we can and should distinguish acceptable interpretations from unacceptable ones. I will refer to the former as decisions that are *legally reasonable*: they amongst the acceptable interpretations of legitimate legislation. This means that not every view will be given the same consideration: when the defendant disagrees with the interpretation made by adjudicators, the decision to mark her conduct as a public wrong would not be retroactive if it can be shown that her interpretation is *legally unreasonable*: that it does not possibly follow from legitimate legislation.

This does not rule out the possibility of previously existing laws to have more than one acceptable interpretation. All that is required is some space for the interpretation offered by the defendant to be different from the one made by adjudicators. If the law does not rule out any of them, then they should both be acceptable and the conduct, covered by the interpretation offered by the defendant, should not be marked as a public wrong after it took place, because to do so would violate the reason-for-action condition.

Moreover, if we distinguish between interpretations that are legally reasonable and those that are not, then we must consider the possibility of adjudicators deciding a case to be the

[516] See Ashworth, 2003, p. 62. See also the discussion about these types of case in Waldron, 1994, pp. 534–540.

ones who offer the legally unreasonable interpretation. From the point of view of the reason-for-action condition, it seems that nothing of relevance would follow, if the accused offering a legally reasonable interpretation were not punished (because adjudicators apply the criterion just mentioned). However, there could be situations where the decision is legally unreasonable and the accused does not disagree. Moreover, it could also happen that adjudicators determine that the interpretation offered by the accused is legally unreasonable when it is not. In these kinds of case the decision would be illegitimate, and there should be an institutional mechanism to deal with them[517].

If what creates public wrongs is legitimate legislative decisions, then legally reasonable interpretations will only be those that somehow follow them. In adopting this position I am defending a view of the legitimacy of adjudicative decisions that can be catalogued as partially substantivist[518], because it introduces the limit of *legal reasonableness* to the possible content of adjudicative decisions about public wrongs. Of course now the difficult question is how can we determine the scope of legal reasonableness? I believe the answer needs to refer to a procedural criterion, because there can be disagreement about what counts as a legally reasonable interpretation, and this decision needs to be legitimate as well. According to the account defended here, this will happen when they meet the criteria of participation, equality, and deliberation. Ideally, it should be legislative institutions, because they are the ones who determine what counts as legitimate law, but other second-best procedures could be applied[519].

1.c. Conclusion

The reason-for-action condition for the justification of punishments includes two sub-conditions. On the one hand, legislation must be action-guiding: people must be able to know before acting which conducts are public wrongs. Thus, in principle this is an argument for the enactment of legislation about offences and justificatory defences with some level of precision, and a low degree of vagueness. But:

[517] See chapter 7.
[518] See chapter 2.
[519] I will deal with these possibilities in chapter 7.

1) Too much detail can also affect the action-guiding capacity of the law (because the law can become to complex, and because of over/under-inclusion)
2) Sometimes it is not even desirable (because the aim is to incentivize practical deliberation, or because over-inclusion affects conducts that people have a right to perform)
3) Vague norms can also be action-guiding
4) The desirability of one or the other strategy depends on the kinds of agreements that can be reached in the legislative arena and on the extent to which citizens can be expected to agree with their applications
5) These requirements do not affect the norms about punishments, but only those about offences and justificatory defences

On the other hand, even when legislation about public wrongs is action-guiding, it can still be indeterminate and the adjudicative decision runs the risk of being *retroactive*. Consequently, the decisions will satisfy the reason-for-action condition for the justification of punishment only when these three elements are present:

1) The decision is legally reasonable
2) The interpretation offered by the defendant is legally unreasonable
3) The decision about what counts as legally reasonable is legitimate (when there is disagreement about this point)

2. Reason-for-coercion condition

The discussion presented so far only takes us up to the point where we can say that the person did something that can be considered as a public wrong, that she had a reason not to do it, and that she could know what conduct was expected of her. It means that the reason-for-action condition has been satisfied. But adjudicators not only have to verify that this is the case. They must also have a reason to apply legitimate law about public responses in a way that satisfies the reason-for punishment condition in the particular case: they need to decide whether to respond with punishment or not, what kind and which amount of it. Before that, they also need follow procedures, and verify that others (like the police) did so as well.

The context in which this decision needs to be made is in many cases a context of discretion, where more than one solution is available, and there is disagreement about which is the right one. The question is: what reason do they have to decide (to act) in one or another direction? When can we say that the decision is sufficiently justified? The argument that I will present here makes the justification of the public response depend, like in the case of legislation, on the legitimacy of the adjudicative decision.

The kinds of alternative solutions that this view will be contrasted with are, for instance, the one where the adjudicator takes all the possible considerations into account and makes a decision from the point of view of justice (like in the case of moral instrumentalism[520]). Or we can reply that the content of the decision is not really the issue, if procedures were followed, and participants reach an agreement (like in the battle model[521]). But these answers are obviously unsatisfactory after the discussion I presented in the past chapter. Legislative decisions that are democratically enacted are legitimate and this is what adjudicators have a reason to apply to particular cases. Otherwise, they would be dealing with disagreements in the wrong kind of forum, and that seems to make legal instrumentalism a more attractive option.

In what follows I will present the argument about the reason-for-coercion condition in terms of arbitrariness. As I explained in chapter 5, decisions are arbitrary when they are based on reasons that are *inadequate* or *insufficient* and, in order for coercion to be non-arbitrary, the decision must be based on the right kind of procedure. In the case of legislation, this condition is satisfied when decisions are based on participation, equality and deliberation. But, when there is discretion, this might not be sufficient (as I will argue) to justify punishment in a particular case.

I will first discuss what counts as an *adequate* reason for punishment in adjudication, and some of its implications and difficulties (section 2.a.). I will also explain why two of the models of legitimacy presented in chapter 4 must be rejected (moral instrumentalism and the battle model), and problematize legal instrumentalism. Then, in section 2.b, I will analyse the requirement of the *sufficient* reasons for punishment in contexts of discretion.

[520] See chapter 4.
[521] See chapter 4.

Before the argumentation begins, a caveat must be introduced. In the rest of this chapter I will focus on the discussion about legitimacy and its relationship with discretion, because the aim is to introduce the problem of arbitrariness. However, the requirement of legitimacy is not exhausted with this analysis. Here I will assume that, if there is no discretion, there is no need to worry about legitimacy, but this is clearly an oversimplification, mainly because there can be disagreement about whether there is discretion or not, and about its scope, and the decision in such a context needs to be legitimate as well. I will come back to this at the end of section 2.b., and will discuss how to deal with these cases in chapter 7.

2.a. Adequate reasons for coercion

Because adjudicators have a reason to apply legitimate legislation about public responses, this is the kind of reason they must refer to when deciding about the use of coercion in criminal cases. In other words, the decision should be *legally reasonable*. In terms of legitimacy, adjudicative decisions will be legitimate when they *follow* legitimate legislation. This means that the account of legitimacy of adjudicative decisions I am defending has a substantive element: they cannot be based on reasons that were not marked as public responses by legitimate law.

One of the problems is that there are different versions of what it means to follow legitimate legislation. Before introducing this discussion, I will contrast the account with moral instrumentalism and the battle model. This comparison will highlight the features of the proposal. Finally, I will mention some implications of the need to follow legitimate legislation in terms of the reason-for-coercion condition (problematizing legal instrumentalism).

Rejecting the alternatives

In moral instrumentalism the legitimacy of adjudicative decisions depends on the justice of their content. It is assumed that legislators and adjudicators collaborate in the task of finding the right decision, and there is no duty on the part of adjudicators to follow the

democratic decision, if they believe it would produce unjust outcomes. Legitimate legislation has no special position amongst the sources of law, because whether it should prevail over other sources depends on how well each of them serves the aim of achieving justice. For instance, judicial precedents, according to which the application of a certain law to a certain kind of case is unjust, should be followed (if they produce just outcomes as long as there is no reason to distinguish between the two cases). This happens because the law might refer to certain properties of the actions that will be considered criminal, but this might render its application to a particular case unjust (the law is over-inclusive). Moreover, different values that work as background reasons for different rules can and should be weighed in order to make the right decision. Of course, most of the times adjudicators refer to moral concepts and values that are part of the legal system (e.g., they appear in Constitutions). But, first, this is not necessarily the case (examples can be found in the principles of criminal responsibility and the doctrinal developments that are followed by judges in many legal systems when deciding cases[522]). Second, if the terms are too vague, it might be the case that referring to a certain value does not really constrain the possible content of the decision. It might end up being a mere paying of lip service to the idea of *the law being followed*.

The problem with this kind of view is that there is disagreement about what a just decision amounts to, even between adjudicators. If adjudicators base their decisions on the values and considerations they believe in, they are imposing their views on others, and actually deciding what the content of the law should be. As argued in chapter 5, this is something that must be decided by democratic legislative institutions.

One could relax the requirement of making just decisions, and defend a view according to which they only need to be *reasonable* (in terms of justice) and then argue that adjudicators have to apply the law, but as long as it does not offer unreasonable solutions. This is the position defended by *negative substantivists*, like Duff[523]. But this view is also problematic, because it gives adjudicators the power to limit the content of legislation. As I explained in the previous chapter[524], the legitimacy of legislation is based on procedural criteria alone, and there are no substantive limits (because there is also disagreement about where those

[522] A quite clear example can be found in the case of Germany. See chapter 4.
[523] See chapter 2, section 2.d.
[524] See chapter 5, section 2.d.

limits should be). And in any case, it is not the role of adjudicators to verify whether this is the case.

On the other hand, in the battle model adjudicative decisions are legitimate when they are the result of following a fair procedure. The problem with this view is that here the role of legitimate legislative decisions is even weaker than in moral instrumentalism, because it merely offers guidance or a point of departure. Then, the parties can reach an agreement about the kind of solution they want for the case, or they can have *fair* battle in front of an arbiter, but bring the facts and norms they choose. The procedural considerations (either agreements or legally established procedures) defeat most substantive considerations, including those that come from legitimate legislation. Moreover, although this is not necessarily the case, the model is compatible with having experts in charge of the creation of procedures (judges through judicial precedents), because they are the most important element in ensuring the fairness of the system. This is problematic if there are disagreements about what those procedures should be (e.g., when can we say that a fact-finding activity violates an individual right), because this decision is not made legitimately. Finally the arbiter (e.g., a jury) does not need to give reasons for the decision. If the procedure was followed, they can even decide not to apply the law and acquit the accused, e.g., if they believe that the decision would be unjust.

Of course, in both alternative models the law that is enacted by democratic institutions has some role to play, but the point is that legislation can easily be defeated if other more important considerations are present. In the first case, because justice demands it; in the second, because the parties want it that way, or because respecting the procedures is more important.

In sum, as I argued in the previous chapter, all legal norms have to be democratically enacted in order to be legitimate, and this not only includes those referring to public wrongs, but also those about public responses (including procedural rules). Looking at the three models of chapter 4 from this point of view, legal instrumentalist scores much better than the other two. However, even if there are reasons for favouring it, compared to the other two alternatives, this model still has two fundamental problem: first, it cannot deal with discretion in a satisfactory way (I will come back to this argument in section 2.b.) and, second, it is not always clear which is the best way to follow legitimate legislation.

Following legitimate legislation

As simple as the idea of applying legislation is depicted by the naïve view of adjudication, there is an important discussion in legal philosophy about how to identify the law that has to be applied to each particular case. As I just explained in the previous section, only those theories that defend views according to which legitimate legislation is applied can be compatible with a legitimate adjudicative process, and this seems to be the case of *legal instrumentalism*. However, amongst those who defend this kind of view, there is still disagreement about what it means to follow a legitimate norm, even if it is enacted as a rule.

I will address the discussion as illustrated in the debate that took place between Waldron[525] – defending *textualism* – and Marmor and Soames[526] – defending the *communication* model - [527]. While the latter argue that adjudicators are required to apply rules according to the intentions legislators had when enacting them, Waldron believes they have to do it according to the literal meaning of the texts. The interesting feature of this discussion is that both views recognize the special value of the democratic decision, and the duty of adjudicators to follow it, but they disagree about how this can/should be achieved.

In section 1.a. I mentioned the implications of this kind of difficulty for the action-guidance capacity of the law about public wrongs regarding citizens who are required to obey it. Here I will refer to the discussion in the case of public responses, and the question is somewhat different, because it is about what adjudicators have to do, and about the justification of an action that has an impact on others. What counts is, not only what they *can* do, but also what kind of power they should have and what is it that could render their decisions arbitrary[528].

On the one side, Waldron believes that when legislative institutions that are formed by a plurality of members who hold different views make a decision and enact legislation, they

[525] Waldron, 1999, Chapter 6
[526] Marmor, 1995, 2001a; Soames, 2011b, 2011c
[527] The distinction between these two models is similar to the one presented by Schauer between *conversational* and *entrenched* styles of decision-making (Schauer, 2004).
[528] The distinction between the two discussions can also be observed in the fact that one of the relevant authors (Waldron) seems to be on one side when it comes to citizens following legislation (he believes that vague norms are action guiding), and a different one when it comes to adjudicators (he believes that they have to follow rules).

are merely producing a text. When a law is enacted, legislators need to assume that there are shared conventions about the use of language, and that the words and phrases they use in the text will have the same meaning for those who will apply them[529]. Moreover, he argues that the idea of authority does not need to be related to a person (there is no necessary connection between *authority* and *authorship*), and that it can belong to groups/institutions[530]. In fact, the intentions of particular legislators ought not to be taken into account, because it would "distort an integrated whole by biasing it towards one of its parts"[531].

According to Soames and Marmor, while interpreting a legal rule, sometimes the adjudicator is going beyond the legal text and introducing "new legal content", and thereby exercising what Soames calls a "legitimate, though secondary law-making role, which is limited by deference to primary legislative authorities", which sometimes "requires judicial inquiry into the intentions, purposes, and larger rationale guiding legislators in enacting the legally binding contents that they did".[532] The authors understand this enquiry as a descriptive judgment, and not a normative one. Adjudicators are asked to discern the purposes of a piece of legislation, and this does not involve subscribing to the purposes.[533] Moreover, "the purposes of a law […] are not the causally efficacious motivators that produced the law or provision, but the chief reasons publicly offered to justify and explain its adoption", and in many cases they are easily discernible.[534]

Both views seem to illuminate an important feature of the problem, and the situation might be described as a paradox. If adjudicators are required to follow the intentions of legislators, and it is because they are subjected to their authority, they will be given discretion to interpret rules according to the background reasons (in order to deal with over/under-inclusiveness), and vague norms according to their aims. But when this discretion is given, the effect can be precisely the opposite: they have room to introduce their own views when interpreting the background reasons (assuming that background reasons have a higher degree of vagueness than the rule). If, on the contrary, they are required to apply the rules according to their literal meaning, they will have less space to

[529] Waldron, 1999, p. 129
[530] In the terms of chapter 2, he is referring to legitimate institutions.
[531] Waldron, 1999, p. 141
[532] Soames, 2011c, pp. 37–38
[533] Soames, 2011c, p. 53
[534] Soames, 2011c, p. 54

introduce personal views, but they will not be applying the views of legislators either, since the intentions (background reasons) can differ from the literal meaning.

Waldron shows that intentionality is not necessary in order for legislative decisions to have authority over adjudicators, but his main point is that, when there is disagreement about the background reasons between legislators, it is not possible to refer to them as the ground for the decision[535]. However, this only applies when legislators do not make the reasons for a decision explicit. If legislation explains what those reasons are, because legislators reached an agreement about them as well, then it seems that applying rules according to them could solve some of the problems.

On the other hand, the Marmor-Soames account has the problem that, even if the distinction between rules and background-reasons is a useful one, restricting the analysis to these two levels is problematic, because actually there can be several levels of justification: a rule can be based on background reasons, and these background reasons can in turn be based on other broader background reasons[536]. In the end, these reasons will end up depending on a theory of punishment, a theory of rights, a theory of how moral reasons work, etc., and it will be quite difficult to find any guidance to adjudicators' decisions in a domain filled with such deep disagreements.

But there can be a middle point between these two positions, depending on the circumstances. If the only possible agreement in the legislative institution is the one about the formulation of the rule, then it seems that this is what adjudicators will need to consider for the adjudicative decision. The enquiry about the background reasons faces the problems stressed by Waldron. However, when legislators agree on the background reasons, they should express them together with the formulation of the rule, as a guide for interpretation. If this were the case, it would be problematic to argue that adjudicators ought to ignore them. I believe both sides of the debate would be satisfied with such a proposal. In the case of Marmor-Soames, because it is a clear case where legislators' intentions are an available source of information, while in the case of Waldron, because background reasons are not a matter of disagreement.

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[535] Moreover, even if there are explicit background reasons, there can still be disagreement about what are the best/right means to achieve those aims. But this is a problem connected to discretion, and it will be analysed in section 2.b. below.

[536] Schauer, 2004, p. 133

For instance, legislators create a rule which says that "confession should not be coerced", and they say they do it for epistemic reasons, it means that a later non-coerced confession could be accepted. The answer would be different if it was based on preserving the integrity of the process. When legislators clarify the aims or background reasons of a rule, and they say that adjudicators need to apply it according to those reasons, it merely means that they are enacting a standard of interpretation of the rule.

In terms of arbitrariness, certainly the claim cannot be that the adjudicative decision is arbitrary every time the case on which a rule is applied is not covered by the background reasons, because in many cases we do not agree about which are those reasons[537] (against Marmor-Soames). But it will certainly be so, if those reasons are explicit, and there is an agreement about them (against Waldron).

This conclusion helps to solve the question of what should adjudicators do when confronted with some kinds of case, but it does not mean that discretion is eradicated. One of the main causes is that sometimes more than one norm needs to be applied, and there is more than one background reason. Hence, new disagreements might arise regarding how these reasons should be weighed. Moreover, although the background reasons are explicit, when a norm is vague there can be cases where there is disagreement about which are the best means to achieve its aims (to apply its background reasons). In order to be non-arbitrary, these disagreements will need to be dealt with in a legitimate way. I will discuss these kinds of case in section 2.b. below, where I refer to the specific subject of discretion. The relevant point is, nevertheless, that these kinds of adjudicative decisions can be *guided* by the background reasons of legislation, and not following that guidance could render the decision arbitrary.

Implications

When legislation is legitimate, adjudicators have a reason to apply it. In terms of arbitrariness, not following it makes the adjudicative decision arbitrary, because it is not based on the adequate kind of reason. Any decision that follows these kinds of reasons is

[537] Soames, 2011a, p. 20

legally reasonable. In the previous section I discussed some complexities of the idea of following legislation. Here I will refer to some implications of the argument for the way in which the activity of adjudication ought to be understood.

One of them is that what jurists usually refer to as the *sources of law* can only include legitimate legislative decisions[538] and things like doctrine and precedent should be excluded because they are illegitimate. Of course, this does not mean that in principle adjudicators could not reproduce the reasoning offered in these sources in order, e.g., to interpret legislation and to argue about why it should be applied in a certain way in a particular case. But there is no space to claim that they have to follow these sources, *because* of their status as such[539]. These are *inadequate* reasons for adjudication.

Another implication related to the duty to apply legitimate legislation is that, if an adjudicator disagrees with the content of the law, she is asked to leave her own views aside and apply it anyway. As in the case of people who have to comply with legitimate legislation they disagree with, the legitimate decision gives her a reason to apply these decisions, also in spite of disagreement. This reason is not merely legal; it does not merely derive from the role of adjudicator that the person has. It is a normative reason that has to do with the way we should deal with disagreements in our political communities. As members of the community in charge of deciding about punishment, adjudicators have a duty to follow those decisions, and to speak in the name of the community when they do. Therefore, the decision does not need to be understood as a completely detached statement, and it should actually be producing a normative judgment, as members of the community expressing the views of the polity[540].

Moreover, the adjudicator has a reason to apply legitimate legislation to every case that she is confronted with. If she does not, she is stepping *outside* the legitimate law and situating herself at the level of democratic institutions, acting as a negative legislator. She has a duty

538 These can include constitutional law, if it is legitimate. As I explained in chapter 3, I understand legislative decisions in a broad sense that includes both ordinary and constitutional legislation.
539 Of course, it could be possible to make a legislative decision that says that these sources of law should be followed by adjudicators. Even in this case, they would have a legitimate origin and it would only gain the status of legal source only as a derivation of the legislative decision. From the point of view of the account of legitimacy I defend, this kind of decision should be followed. However, I would argue against it, because it would be a delegation of discretion that could generate problems in terms of the legitimacy of the adjudicative decision: when precedents are followed, decisions are made by people who are different from those affected by the decision, and the same happens when doctrine is followed.
540 About the plausibility of such an approach see Duff et al., 2007, p. 86.

to decide that is connected to the special status of legitimate legislation, and not a mere legal requirement. Moreover, although a *duty to rule* can serve other purposes (like *closing* the legal system in combination with a principle like "everything that is not prohibited is permitted", or giving predictability to the law), here it has a democratic basis. Adjudicators have to make a decision about whether cases are covered by legitimate legislation or not, and not doing it would be a failure to follow the law (at least in those cases that are covered by it).

A further implication (or possibly a reformulation of the ones already mentioned) is that adjudicative decisions cannot be a product of an all-things-considered judgment. Questions like the justice, efficiency or fairness of the decision are not adequate reasons if they do not derive from legitimate legislation, because in the political community there is disagreement about all these things and the institution that is legitimized to settle these disputes is the legislative assembly.

Finally, another implication is that not any theory can be adopted by adjudicators when interpreting the law. Only those accounts that defer to legitimate legislative institutions and their decisions can be used to decide about how the law should be interpreted in particular cases. Because, in order to be non-arbitrary, decisions must track the interests of those affected, according to their views, an account of what counts as *the law* will only be acceptable if it is a tool able to track those views. An account that relies on illegitimate interpretations of the law does not satisfy this condition: e.g., if it argues that the law should be interpreted according to what the doctrine developed by experts says, according to what judicial precedents determine that is reasonable or coherent, or according to what the judge believes is the best interpretation of a norm. At least ideally, legislation should be interpreted according to what *legislators* believe is the best interpretation, and adjudicators should aim at following those interpretations as accurately as possible, without introducing their own views about them. In addition, since even amongst those theories that are compatible with the idea of following legitimate adjudication presented here (Waldron and Marmor/Soames) there is disagreement, the decision in contexts of discretion should be subjected to the filter of legitimacy, and this is the discussion I will present in section 2.b. below.

Conclusion

In terms of the adequate reasons for coercion, adjudicative decisions will be non-arbitrary if they follow legitimate legislation. The way to do it depends on the kind of decision that is applied:

a) When the decision is *not guided* (there is no agreement about the background reasons, and they are not explicit) the rule should be applied according to the literal meaning of the text[541].
b) When the decision is *guided*, the rule should be applied according to the background reasons.

Some implications of this condition are the following:

1) The only legitimate *source of law* is legitimate legislation
2) Adjudicators must apply legitimate law, even if they disagree with it, offering a normative statement as members of the community[542]
3) Adjudicators have a duty to rule (because otherwise they would be acting as negative legislators
4) They are not allowed to produce all-things-considered judgments
5) Legal theories that are used to interpret the law should make it possible for adjudicators to track the views of citizens, as expressed in legitimate legislation.

2.b. Sufficient reasons for punishment

Although adjudicators follow legitimate legislation when deciding a case, this does not mean that the solution is straightforward. In many cases they have discretion. In chapter 3 I explained that discretion can be a product of several kinds of causes, and that it means that the law allows for more than one possible course of action.

[541] When the literal meaning is disputed, and there is no guidance the decision should be legitimate. I will deal with this kind of case below in section 2.b.
[542] Of course, as long as they intend to remain in the role of adjudicators.

The amount of discretion that can be found when one is confronted with the adjudicative task can be different in different cases. We can imagine that legitimate legislation can range from, on the one extreme, a complete and coherent ideal system of highly detailed rules and exceptions where all possible cases are contemplated and adjudicators have no discretion, to, on the other end of the spectrum, a law that is enacted through standards that are multiple and vague and adjudicators are in charge of evaluating every aspect of the case and to make a decision considering and weighing all the given standards[543].

When adjudicators are confronted with these situations of discretion, their decision calls for a justification that could satisfy the reason-for-coercion condition. As I mentioned, following legitimate legislation is an adequate reason for adjudication, but wherever we are between these two extremes, there will probably be disagreements about what ought to be done. When adjudicators decide about the use of punishment on other people, their actions could also be arbitrary if they are based on mere choice and not on sufficient reasons. The question is: what ought to count as a sufficient reason in this context?

One answer could be that, once the boundaries of the law have been set, then any of the available responses is admissible, or that any interpretation is a sufficient reason. Another possibility is to claim that discretion should be dealt with by finding the best solution in substantive terms (within the domain of *legal reasonability*). Whether these options are desirable or even possible will be discussed below.

I will first explain which kinds of arbitrariness can exist when a decision is made in a context of discretion, and then make some comments about the relationship between discretion, arbitrariness and disagreement. Then I will discuss what I will call *the central case* in order to analyse what kind of reason would be sufficient to justify punishment in this context.

[543] Although, as I explained in chapter 3, discretion does not only depend on how legislation is enacted, but also on other factors.

Arbitrariness and sufficient reasons

In section 2.a. of this chapter I described what counts as an adequate reason in the case of punishment, i.e. legitimate legislation. What I aim to show here is that adjudicative decisions can still be arbitrary in different senses or degrees, depending on what counts as a sufficient reason. In order to organize the description I will refer to the different types of discretion mentioned in chapter 3[544]. I hope that distinguishing between these senses of arbitrariness can be useful as a framework to accommodate different accounts of what makes adjudicative decisions arbitrary.

Before I refer to the different senses of arbitrariness, let me mention a sense that will be left out of the analysis (in addition to the ones the ones I mentioned in chapter 5, namely, arbitrariness as unpredictability and arbitrariness as lack of *explicit* motivation). In this section I will not consider the case where a decision is considered arbitrary because it is made *outside* the boundaries of the law (when it is legally unreasonable). As I mentioned in chapter 3, discretion is understood as a hole in a doughnut, and here the doughnut is the legitimate law (although determining which are those boundaries can be quite difficult in some cases). The point now is that, even when legislation is legitimate, and adjudicators decide within its boundaries, there is still space for arbitrariness.

In a context of *strong discretion* we can expect to find two kinds of arbitrariness[545]. The strongest case (that I will call *very strong arbitrariness*) is the one where, having received no standard to make the decision, the adjudicator decides according to no normative reason, even when she is expected to do so[546]. She is given discretion to decide about punishment in a particular case, and she is expected to offer a normative reason, but she decides not to punish the defendant, or to give her a lesser sentence because she is funny and smart, or depending on the results she gets by throwing a dice[547]. The adjudicator is not deciding

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[544] Section 1.a.

[545] In chapter 3 I explained that although the talk about strong and weak discretion can be useful, there is a difference in terms of degree between no discretion and strong discretion. Here I am assuming that the distinction works in order to make the argument simpler, but I believe that arbitrariness could also be a matter of degree.

[546] In what follows I will use "standard" and "reason" as partially overlapping notions. The standard is the criterion that is given to the adjudicator, and the reason is what can justify the decision. The reason can be found in the standard, but it could also come from other sources, e.g., when there is no standard.

[547] An adjudicator could certainly argue that these are normative reasons, but probably she would be wrong. In any case, the relevant point is that, if it is possible to distinguish normative reasons from arguments that are not, there is strong arbitrariness when the latter are used.

outside the law because she was given no standard by legislators, but she does not base her decision on any standard.

A second sense of arbitrariness (*strong arbitrariness*), weaker than the first, is the one that can be observed when, also in a context of *strong discretion* (she is not given any standard to make the decision), the adjudicator bases her decision on normative reasons, but she can choose whether to use reason X (and make decision x), or reason Y (and make decision y), and there is no normative reason for choosing one instead of the other[548]. The choice between the reasons is arbitrary and also (as a consequence) the decision based on one of those reasons. For instance, if the adjudicator has strong discretion to decide about punishment in a particular case and she bases her decision on consequentialist reasons rather than on retributivist principles, but she offers no normative reason for the choice.

Maybe these two senses of arbitrariness are not very useful for analysing what happens in adjudicative decision-making because, arguably, we could expect not to find strong discretion when there is legitimate legislation in place, because there are adequate reasons marked as standards that ought to be followed. However, the amount of discretion depends (amongst other things) on the vagueness of the standards, and sometimes they can in fact be quite vague. Moreover, the reason why I mention them is that (together with the case where the adjudicator decides outside the space of discretion given by the law) they seem to illustrate the most obvious examples of what we usually think of as arbitrary.

But arbitrariness can also exist in a context of *weak discretion*: where standards are given but adjudicators must make a choice between different courses of action, we can still say that some decisions are arbitrary in a weaker sense than the ones mentioned before. In adjudication, the fact that the decision-maker has more than one option available does not mean that the choice does not need to be justified, even when this discretion was – explicitly or implicitly – given by legislators. Depending on which kind of justification one considers as sufficient for this kind of context, a decision that refers to those standards can still be seen as *weakly arbitrary*. I will explain how this would work in the case with punishment, but first I need to clarify a few points about the relationship between discretion, disagreement and arbitrariness in adjudication.

[548] Of course, whether this makes sense depends on the account of reasons one defends. E.g., whether one believes in value pluralism or not. See also note 553 below about the difference between basing a decision on reasons and reaching a decision compelled by them.

Disconnections between discretion, disagreement, and arbitrariness

A first disconnection between discretion and arbitrariness can be found in those cases of strong discretion where no reason is required in the specific context[549]. This happens when the choice is merely between two courses of action that are indifferent from a normative point of view. A typical case would be the one where a coordination problem needs to be solved: a decision needs to be made, but the choice between the alternative courses of action does not need to be justified, because it is irrelevant. In principle, this hardly ever happens in the criminal justice system, because even small decisions could have an impact in the fact that the accused ends up being punished. Nevertheless, the distinction might not be a clear one in some situations. First, a decision in a context of discretion might include elements that require justification, and others that do not (e.g., a decision to send someone to prison, and a decision to send her to one prison instead of another one, or a decision to bring charges, but to do it today instead of tomorrow). In those cases it would be appropriate to justify the different elements separately, treating them as different decisions. Second, different kinds of decision in different contexts might require different degrees of justification (different criteria to determine whether reasons are sufficient), and thus the possibilities are not only these two. Sometimes the sufficient justifications will not be very demanding, and they will still leave some space of discretion where no justification is needed (for instance, adjudicators can be asked to admit evidence based on its reliability, but without having to satisfy a standard like *beyond any reasonable doubt*). Third, there could be decisions that do not seem to require a strong justification, but where the choice of one course of action ends up producing results that would require a special justification. For instance, the admission of evidence might be seen as a decision that does not require a strict standard (e.g., the adjudicator must only decide whether it looks more reliable than not), but it might end up determining whether the person will be convicted or not (if the conviction depends on that piece of evidence).

A second disconnection between discretion and arbitrariness is the one that we find when a judge has no discretion, but the decision ends up being arbitrary. This could happen when an adjudicator applies a norm that is illegitimate. In the account I am defending here one example would be judicial precedents, and also more generally, any piece of legislation that is not the product of a decision based on the principles of participation, equality and

[549] See the definition of arbitrariness in chapter 5, section 2.d.

deliberation. Adjudicators might have no choice but to apply them, but their decision is *tainted* by the arbitrariness of the norm that is applied[550]. Therefore, although the risk of arbitrariness can sometimes be diminished by reducing discretion (giving less space to the adjudicator to choose between different courses of action without meeting the justification requirements), this is not necessarily the case if the decision that the person is bound to make is itself arbitrary. Moreover, legislation can be illegitimate for some people, but not for others (e.g., if some are excluded from the legislative procedure). Then, the possibility of adjudicative decision being arbitrary for this kind of reason might be unequally distributed in the community: it can be arbitrary to punish someone who could not participate in legislative decision-making, but not someone who could.

Another kind of disconnection is the one between disagreement and arbitrariness. Although disagreement seems to illuminate the possibility of arbitrary decisions, this does not need to be the case. Let us imagine a context of discretion where all the participants agree on one course of action, but there is an alternative course of action and there is no reason for choosing one instead of the other. Maybe they were just educated in the same way and their views tend to converge, some information is hidden from them or they just did not happen to think about the other possibility. However, every time there is an alternative course of action available and there is no reason for choosing one of them, the decision could be arbitrary (if a reason for this choice is required in the specific context). The difficulty of this kind of situation is that there is no way of knowing whether a decision is arbitrary without someone raising the question. This circumstance does not, however, eliminate the arbitrariness from the decision, and the most we could do is open the system to challenges by those who might disagree.

Finally, sometimes there can be discretion and disagreement without arbitrariness. This will happen when, although there are alternative courses of action, they are a matter of disagreement, and the context requires justifying the decision, there is a second-order reason for choosing one instead of the other. This reason can either be substantive or procedural, depending, again, on the context. In the case of political decisions, this reason comes from legitimacy.

[550] And this is the case, even if the adjudicator does not realize that the legislative decision is arbitrary. However, this is not the subject of this chapter, because here I am assuming that legislation is legitimate, this kind of problem will be dealt with in chapter 7, when discussing institutional design.

The central case

In order to present my argument about the problem of weak arbitrariness in the case of punishment I will describe what I call the central case:

(1) There are at least two courses of action available (and they are *legally reasonable*)
(2) They include (or lead to) conviction (C) and acquittal (A)
(3) There is disagreement about what should be done

There are many examples in the criminal law where this can happen. Evidence of this can be found in the construction of judicial precedents that exemplify the necessity to determine which one of the available interpretations of the law should be applied to the facts. Moreover, the discussions that arise between prosecution and defence also show that even those who are supposed to know the boundaries of the law (the legal experts) have a space to argue for a particular interpretation in particular cases. As to the content of those disagreements these are some examples: when adjudicators weigh the reasons to exclude evidence (e.g., one of the rights of the offender) with the reasons to punish (e.g., the seriousness of the crime)[551], or the reasons for and against the charging decision. Something quite similar happens in the case of *guided* decisions[552]: the reason is offered by legislation, but there can be disagreements about whether (A) or (C) is the best way to apply it (e.g., the background reasons of legislation about sentencing is deterrence, but adjudicators could disagree about whether this aim can be better realized by giving the offender a higher or lower sentence). Moreover, it could also happen in the case of vague norms (did the police enter "at night" to the person's house in order to obtain the evidence, when it happened at sunset time, and this would produce the exclusion of that piece of evidence?).

The courses of action (A) and (C) that I am referring do not only include the final conviction or acquittal, but also, as can be observed in the examples, numerous kinds of partial decisions that are made through the process where there is more than one option available. In many cases, these are the kinds of decisions that actually determine whether a person will end up being subjected to punishment or not.

[551] Of course, whether they are allowed to do this depends on how norms are enacted, and on whether they are required to apply rules according to their literal meaning, or according to their background reasons.
[552] See section 2.a. in this chapter.

In chapter 5 I argued that the reason-for-coercion condition is satisfied by legislation when the decision tracks the interests of those affected, according to their ideas, and that, in order for this to be possible, the decision must be legitimate: it must be a product of a procedure where people participate as equals in a deliberation, because people disagree about what the right public response ought to be. Legitimate legislation gives adjudicators an adequate reason to act: when deciding about public responses in particular cases, they are actually acting according to the interests of those affected (the members of the community) and following their views. However, in the central case the answer is not predetermined, because both (A) and (C) are possible, and the public response can depend on a choice made by the adjudicator. Therefore, further justification might be needed. The question is: how *strong* should the justification be, in order to count as a sufficient justification for the public response?

As I mentioned before, there can be discretion but no arbitrariness if no reasons are required in a specific context, or where the sufficiency requirement for the justification has already been met. The alternative proposals that follow ought to be read in these terms: as offering a criterion of sufficiency. A first option could be to argue that in order to justify the choice between (C) and (A) it is sufficient to verify that the content of the decision lies within the domain of legal reasonableness. A second alternative is to claim that, within that domain, the standards are given (adequate reasons are marked by legislators), and it is sufficient for the adjudicator to base the decision on some interpretation of those reasons. Third, it could be argued that the decision is based on sufficient reasons only when the reasons *compel* one specific course of action.

If adjudicators have discretion within the space conceded by legal reasonableness, one could argue that the adequate reasons have *run out*, and they leave a range of courses of action open to the adjudicator. The choice between alternative courses of action might need to be based on other kinds of (normative) reasons, but it is up to the adjudicator to choose amongst those reasons, with the only restriction being that the content of the decision lies within the domain of legal reasonableness. In the terms presented above, this would be a case of *strong discretion*, but where decisions are not arbitrary because no further reasons are required: since it is legally reasonable both to choose (C) and (A), the adjudicator can choose the reasons on which she will make the decision. The only

possibilities that are excluded are the one where the decision is *very strongly arbitrary* (it is based on mere prejudice, preference, lot, etc.), and the one where its content lies outside the space of legal reasonableness. However, since there is legitimate legislation in place, the situation can be better described as one of weak discretion. Adjudicators must base their decisions on adequate reasons, and that they permeate the space of legal reasonability. This second alternative suggests that it is sufficient for the adjudicator to base her decision on one of the available interpretations of those adequate reasons (and not on other normative reasons). The problem with this suggestion is that adjudicators can still choose on which reasons they will base their decisions without offering any further reason for that choice (besides the claim that it is their opinion). This possibility violates the reason-for-coercion condition because although the solution is supported by adequate reasons, people could still hold different views about what the decision should be. Both (A) and (C) are within the law, but legislators have not chosen which one should follow. The decision can still be weakly arbitrary, because although it is amongst the legally reasonable interpretations, it depends on the choice of the adjudicator. If the accused disagrees, the decision doesn't track her views, and using coercion on her cannot be justified.

The third alternative aims to deal with this problem. According to this proposal, the decision needs to be *compelled* by reasons, and not merely *supported* by them[553], also in a situation of *weak discretion*. It cannot depend on the choice of the adjudicator, but she must have no choice but to decide in a certain way. It has been argued that this is the kind of justification required in the case of punishment, because it is an action (a decision to act) that has a serious negative impact on other people[554]. If it were another kind of decision (e.g., a decision to give someone a price or to distribute amounts of a certain good amongst different people, or to pick a course of action in order to allow for coordination), the criterion might be a different one.

One version of this proposal is to claim that the reasons for action would be compelling only if the content of the decision is *right* or if it is the best interpretation of the adequate

[553] It could be argued that there is no difference between the two alternatives, because basing a decision on reasons includes sorting reasons and finding the best ones. However, the relevant element here is that in the first case the adjudicator would not need to explain why she bases her decision on some reasons and not on others, or why she does not consider reasons against her decision.

[554] "Where such a decision or action has a vitally significant effect on others, in the sense that it has an immediate and adverse impact upon the life chances and quality of life of those affected by it, a higher standard of rationality is required than of 'ordinary' decisions and actions" (Lucy, 2004, p. 244).

reasons[555]. The decision will be made after considering all the adequate reasons, weighing them, analysing them and evaluating whether (A) or (C) is the course of action that *must* follow from that judgement. This proposal could be sufficient for the justification of punishment, because the decision is no longer based on a choice made by adjudicators. The proposed criterion of non-arbitrariness is here an objective one[556], but the satisfaction of this condition depends on the fact that there is one right answer to each case[557], or at least one best solution within the space of legal reasonableness.

Some authors argue that this is possible[558], while others argue that it is not, because some reasons (values) are incommensurable[559]. Those who defend the latter position would argue that justifying punishment based on *compelling* reasons is not possible. However, the problem is that even those who believe that there is a right answer disagree about what that answer is, and which cases are correctly decided. The alternative cannot deal with disagreement about which is the best interpretation and there is still a possibility that two persons who are accused of the same kind of offence in the same kind of circumstances could face different public responses, depending on who is making the adjudicative decision. The defenders of the proposal would argue that this situation only means that someone is right and someone is wrong, and the latter decision is arbitrary. But this does not solve the problem in a pluralist society, without treating some opinions as inferior to others (and those who defend them as inferiors too).

According to the account that I am defending, in order to meet the reason-for-coercion condition the decision about what adjudicators ought to do (what is the right solution to the case) should have been made by legislative institutions, because this is the forum where disagreements are dealt with in a way that tracks the interests of citizens (including offenders) according to their ideas. The problem is that when there is discretion they have not made such a decision, the public response in the case is not compelled by the reasons offered by legislation. If someone else decides, the decision can only be non-arbitrary if it reflects the views of those affected, and not the views of adjudicators.

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[555] Whether the right decision and the best legally reasonable decision is the same or not depends on the case and on the legal theory one uses. I do not think discussing this point any further would change much in the argument offered in what follows.
[556] See Richardson, 2002.
[557] Lucy, 2004, pp. 230–31
[558] Dworkin, 1998. However, Dworkin includes much more than legitimate legislation amongst the standards included in the law.
[559] Raz, 1986

Let us imagine, however, that it is possible for adjudicators to decide according to the views of those affected and that they make the right decision. From a republican point of view, it would still be possible to argue that, even when their views coincide with the views of citizens, they have the *possibility* of deciding differently. If this is the case, we could argue that citizens are at their mercy[560].

The conclusion that could seem to follow from the existence of these problems is that sometimes a sufficient reason for punishment cannot be offered, and therefore every time there is discretion and disagreement, offenders would need to be acquitted. A conviction could only be justified if it was the only possible course of action in all the stages of the decision, like in the case of public wrongs[561]. Every time there is a disagreement between the offender and the adjudicators about which is the interpretation that ought to be followed, the offender ought to be absolved.

However, in the case of public wrongs the ground for that proposal was that the decision would otherwise be retroactive (the determination of whether the conduct was criminal would have been made after the conduct had already taken place). The same kind of argument does not directly apply here, because the practical problem is different. The question is not whether a person can be punished for doing something that she had no reason to do, but whether an adjudicator has a sufficient reason to act in a way that affects another citizen, when the action is coercive. The fact that there is more than one course of action available, because it is not clear which cases require (A) and which require (C), does not eliminate the reason to apply the law derived from its legitimacy. Always choosing option (A) is a way of failing to follow the *part* of the adequate reasons that favour decision (C) as a response to some cases. E.g., it could be argued that, in doing this, adjudicators would be failing to take into account the views of those affected by the crime. The only thing that needs to be done is to allow the views of those affected to have an impact on the adjudicative decision. The solution I will propose is also based on the argument that in order for punishment to be justified, the decision has to be compelled by reasons. The proposal is that there should be a second-order reason for the choice, and that this reason, as in the legislative domain, ought to be found in the legitimacy of the decision that is made with the participation of those affected.

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[560] This kind of problem has been discussed by Richardson (2002).
[561] See section 1.b.

Legitimacy in a context of discretion

In the case of punishment, I argued that sufficient reasons are those that compel a certain decision. However, when there is discretion and disagreement this criterion cannot easily be satisfied according to the reason-for-coercion condition, because there is more than one option and the content of the decision can depend on the views of adjudicators instead of the ones held by those affected. However, this condition could still be satisfied through a different kind of reason: by making a legitimate adjudicative decision. The fact that the domain of legal reasonableness includes courses of action (A) and (C) does not necessarily make the decision arbitrary, if it tracks the interests of those affected, according to their views.

One possible proposal would be to have legislative institutions deciding about every adjudicative decision, because these decisions affect all the members of the community, and ideally they are the ones who should decide about public responses to crime. However, this would not only be almost impossible to implement, but also unnecessary. Adjudicative decisions do not affect all the members of the community to the same extent, and allowing all of them to have a say would be excessive, and it would also silence the voices of those more directly affected, like the offender and the victim. In order to justify punishment in a particular case, all we need is that those who are more directly affected by the decision have a say.

The requirement eliminates the possibility of merely leaving the decision in the hands of adjudicators so that they can impose their views on others who disagree with them. However, it cannot mean that everyone who is affected ought to have a veto-power against each decision[562]. As in the case of legislation, legitimacy requires participation as equals, but through deliberation. When decisions are the result of procedures based on these three principles, the views of those affected are taken into account, but processed with the views of others. This means that the accused, and also the victim ought to be able to participate in the discussion: they should also share the role of adjudicators. The decision ought to be the result of processing their views together with the ones held by other members of the community who are also affected by the decision. The resulting decision would not be arbitrary, because although legitimate legislation was not able to compel the result,

[562] A consent-based account of non-arbitrariness has already been rejected in chapter 5, section 2.d.

adjudication solves the problem by becoming legitimate through procedure, and the public response is now compelled by these new reasons.

The conclusion that follows from sections 2.a and 2.b is, then, that legitimate adjudicative decisions can satisfy the reason-for-coercion condition when they meet two criteria. The first one is substantive: legal reasonableness marks the limits of the possible public responses by offering the adequate reasons for punishment. The second one is procedural, because within that space of discretion the adequate reasons are not sufficient, the decision should be made with the participation of those affected as equals in a deliberation.

Nevertheless, the endorsement of this account of legitimacy relies on an important simplification. As I mentioned in the introduction to the chapter, the problem is that there can be disagreements about the boundaries of discretion (and also, as a consequence, on whether a particular interpretation is legally reasonable or not). Like in the case of public wrongs[563], the determination of these boundaries needs to be done in a legitimate way. Ideally, the legitimate institution is the one who ought to determine what the law is, and also what should be the space of discretion conceded to adjudicators. But other institutions could also make this kind of decision with a certain degree of legitimacy if the procedures are based on participation, equality and deliberation. These considerations will be relevant for the discussion about institutional design in chapter 7.

Summary

In chapter 5 I presented two conditions for the justification of criminal punishment: the reason-for-action, and the reason-for-coercion conditions. There I argued that, because there are disagreements about when and how punishment should be used, the legislative decisions about public wrongs and public responses needed to be legitimate.

In the legislative level, I argued that legitimacy requires participation of the members of the community, as equals, in a deliberation. However, the implications for the legitimacy of adjudicative decisions are more complex.

[563] Mentioned at the end of section 1.b.

First, there is the requirement that legitimate law is applied to every case. Seen from the point of view of adjudication, this has two implications:

a) The decision should be legally reasonable, both in the case of public wrongs and public responses. There might be more than one interpretation of legitimate legislation, but adjudicators should not apply interpretations that are not possibly derived from legitimate law.
b) In the case of public wrongs, the conduct of the offender should not be covered by another legally reasonable interpretation. Since those interpretations have not been ruled out by legitimate legislation, they cannot be retrospectively ruled out by adjudicators.

Second, it requires that adjudicative decisions are themselves made on the basis of participation, equality and deliberation. There are two reasons for this:

a) There is disagreement about what is legally reasonable, both in the case of public wrongs and public responses. Ideally, this decision should be made by legislators themselves, and if this is not possible, by another legitimate institution.
b) In the case of public responses, within the space of discretion there are disagreements about which one should follow. The decision will be non-arbitrary only if it is made with the participation of those affected, as equals, in a deliberation.

Chapter 7 – Legitimate adjudicative institutions

Introduction

Substantive and procedural legislation determines what people have a reason to do (public wrongs) and what the public responses should be, in the domain of the criminal law. In chapter 5 I argued that, in order to satisfy the two conditions for the justification of punishment, these decisions had to be legitimate, especially in circumstances of disagreement, because people must only be subjected to punishment if they had a reason not to commit the crime (the reason-for-action condition) and the decision was non-arbitrary (the reason-for-coercion condition). In chapter 6 I argued that, if these two conditions are going to be satisfied in particular cases, the adjudicative decision must be legitimate as well, and that the implications of this were that citizens should only be punished if: first, adjudicative decisions were legally reasonable; second, if the offender's conduct could not be covered by another legally reasonable interpretation of the law about public wrongs that would lead to her acquittal; and third, the decision about the public response was legitimate within the domain of legal reasonableness.

In order to be legitimate, the institutional design of the criminal process must take two kinds of considerations into account. The first one is that legitimate legislation is applied to the case and, because there is discretion, this means that the decision stays within the domain of what is legally reasonable. Hence, adjudicative institutions must have instrumental value to the identification of the boundaries of that area. The second consideration is that the particular adjudicative decision is legitimate itself: that it is based on the participation of those affected as equal members in a deliberation. As a consequence, institutions making these kinds of decisions ought to have non-instrumental value as well, at least to decide within the domain of legal reasonableness, in the case of public responses (but in section 2.a. I will explain how this requirement actually applies to a broader area).

Of course, legitimacy is not the only consideration that should be taken into account when one is thinking about the design of the criminal process. There can be other elements that make it valuable, and different institutional designs will be favoured by people who defend

alternative views about which substantive aims the criminal justice system should achieve, about how these aims should be weighed when they conflict with each other, and the means to achieve them. For instance, institutions are supposed to be efficient, they should help to reduce crime and to protect people's rights, they should promote restoration, satisfy victims, express censure, etc. However, since there are disagreements about these issues, I believe in the end legislative institutions must be the one dealing with these questions and the disagreements about the answers, because they are the ones in charge of creating the procedures. They will need to determine how to weigh these considerations when legislating about the design of the adjudicative process (after all, the whole criminal justice system is a product of legislative decisions that create these institutions and these laws should be legitimate, like any other law).

Here I will focus on the kinds of consideration derived from the legitimacy of adjudicative decisions. I am not arguing that the proposals are either the only ones, or the best institutional design. What I will present should be taken as an example of how to think about the relevance of legitimacy for institutional design. Other proposals might be more adequate if the community chooses one set of substantive aims instead of others, or one specific way to weigh them. For instance, it could make a difference whether the legislative institutions decide to use the criminal procedure to promote restoration, to deter potential offenders or to seek for retributive justice. The legitimacy considerations might take different institutional forms in each of these cases.

Moreover, even inside the discussion about legitimacy, it can be argued that it requires, not only the elements defended here, but also other types of instrumental value, both epistemic and non-epistemic. For instance, it has been argued that adjudicative institutions are legitimate if they allow citizens' participation, because this increases civic involvement in public issues, and this brings other good consequences, like a sense of community, not necessarily connected to the content of adjudicative decisions[564]. I believe these considerations are of great importance, and could be added to the discussion, but they are not necessary from the point of view of justifying punishment, and therefore I will not be discussing them in this chapter.

[564] Dzur, 2012; Jordan & Arnold, 1995

Also within the discussion about legitimacy, one could insist that, at least in the domain of what is *legally reasonable*, institutions should have epistemic value, connected to making decisions that are just or fair, and that we should design institutions that would promote this aim. Again, I am happy to include these considerations in a proposal of institutional design, although they are not necessary for the justification of punishment[565]. That said, the epistemic value could (and should) be included, as long as it does not compromise participation, equality and deliberation, and actually it will be if those three values are present[566]. However, this kind of epistemic consideration will not be the focus here, since the discussion will be about the institutional design in connection to the legitimacy of adjudicative decisions (based on the two conditions for the justification of punishment), as presented in chapter 6.

Finally, one could defend a view according to which adjudicative institutions should have other kinds of non-instrumental value that would make them more legitimate, based on considerations that are different from making non-arbitrary decisions, or the promotion other aims like the ones just mentioned. For instance, Duff has argued that criminal procedures should be designed as devices for *calling people to account*, where trials have a performative role[567]. Again, I would agree in including this kind of consideration when thinking about institutional design, and in fact I believe the account presented here is quite sympathetic to the assumptions and proposals of such a view. But, first, I believe that the question of the legitimacy of adjudicative decisions and institutions when identifying the law arises for this kind of account, as for any other. But second, and more importantly, an account of legitimacy like the one I am arguing for (where the key point is the legitimacy of the identification of the law for the justification of punishment) should as far as possible remain open about the kind of procedure it will be applied to. Thus, I want to discuss some issues connected to institutional design and hope they are relevant to this kind of account as well as to others, even if certain changes should be made in order to make them more compatible.

It is important to stress the fact that specific proposals about institutional design should not only take into account considerations derived from certain values and normative

[565] See chapter 5.
[566] Only in the case of public responses, because in decisions about public wrongs people who disagree should be acquitted if they offers a legally reasonable interpretation.
[567] Duff et al., 2007

arguments. They should, first, be analysed and tested in the specific context in which they will be applied, where culture, history, capacities, resources, and many other factors will certainly make a difference. Second, since adjudicative institutions do not work in isolation from other institutions (such as police, political parties, administrative agencies, civil society organizations, international and supranational organizations, etc.), it is plausible to think that proposals should be adequate to each institutional context, which might bring other kinds of normative consideration (including those connected to legitimacy) to the picture. For instance, the design of the criminal process could contribute to building international networks to fight against certain kinds of crime, or could be open to the participation of organizations from the civil society.

In the following sections I will discuss some possible institutional designs that would make adjudicative institutions more legitimate, from the point of view of the identification of the law and the justification of punishment. As I explained in chapter 2, I understand political institutions as "a set (or system) of rules and/or principles that regulate *how* decisions are to be made in the political domain and *by whom*"[568], and I refer to the former as procedures, and to the latter as authorities. Here I will discuss two main alternatives regarding the *who*, namely public officials and citizens. In each case, I will mention some options regarding the *how* and problematize them.

I will assume that institutional designs can be complex and that they can give some space to different kinds of consideration. I will present different alternatives separately, with the main distinction referring to *who* decides – public officials or citizens – but I don't mean this as two possibilities that exclude each other. I believe that a system based on participation, equality and deliberation is more legitimate, and that ideally this requires the direct involvement of citizens. However, since legitimacy is not an all-or-nothing consideration, I am prepared to accept that certain institutions are more legitimate than others, and I will mention this along the way.

Since the practical usefulness of discussing these kinds of proposal is connected to the possibility of thinking about how to reform existing adjudicative institutions, I will refer to certain institutional designs that exist in some legal system in order to discuss how they could be made more legitimate. Of course, each of these institutions is part of a greater

[568] Chapter 2, section 1.d.

system, and they usually make more sense in that context. I will try to discuss some of them as if they were tools and I was deciding about whether to buy them to make institutions more legitimate. There might be other better tools to be created, but here the task is more modest: merely to discuss what we have and to think of ways to improve it.

1. Public officials

One possible response to the need to legitimize adjudicative decisions and institutions is to keep public officials in the position of making adjudicative decisions, but to reform the certain features of legislation and some institutions of the criminal process. Since discretion is the main source of the arbitrariness danger, and latter is an obstacle to the justification of punishment, one strategy is to deal with this problem directly by intervening before any adjudicative decision is made: restricting the available options that adjudicators have, and forcing the law to give a determinate solution to each particular case. In order for this strategy to work, it should be combined with an alternative solution for remaining cases of discretion. A second group of strategies would focus, not on eliminating discretion, but on diminishing its perverse effects. Thus, an attractive proposal would be to bring officials' views closer to the ones held by citizens, so that they reflect them in their decisions, even in a context of discretion (second strategy: elections). Finally, there is the suggestion to control the decisions made by public officials *ex-post*, to verify that they were made according to the views of citizens (third strategy: accountability). These three strategies can be combined, but since they present different types of challenge, I will analyse them separately.

1.a. First strategy: Restricting discretion

This kind of strategy would aim at having an impact on the amount of discretion in the hands of adjudicative institutions, but the mechanism can be either direct or indirect. The direct mechanism would work through institutional reform: all those procedural laws that explicitly give discretion to adjudicators should be eliminated. The indirect mechanism would work through the form of legislation in general, even in the case of substantive

criminal law: legislating in the form of rules rather than in vague terms, and eliminating conflicts between norms.

Since adjudicators have an enormous amount of discretion in criminal justice systems, there is a correlative enormous number of ways in which discretion could be restricted by changing the content of procedural rules, especially those that grant them discretion explicitly. For instance, we could eliminate prosecutorial discretion, plea-bargaining, sentencing discretion, the possibility of dropping charges at any stage of the process, the possibility of deciding through the weighing of principles, etc.

In some of these examples an immediate effect seems to be a rise in the number of cases to be dealt with by courts, and a significant decrease in the efficiency of the system. This is the main reason why an institution like plea-bargaining or prosecutorial discretion is maintained in many legal systems. But the plausibility of this critique certainly depends on other factors, such as whether there is a slower alternative way to process cases, and how slow it is (e.g., whether the alternative is that a judge decides, or a jury trial). Besides, this problem could be tackled either by increasing human and financial resources, or by restricting the scope of the substantive criminal law (criminalizing fewer kinds of conduct). In addition, there are other cases where the effect is not clear, as when adjudicators have to weigh different considerations to decide what the particular norm for the case is (e.g., procedural vs. substantive considerations or substantive vs. substantive considerations), or when they decide about sentencing. If one decides to restrict discretion in any of these contexts, the natural way to do it would be by creating more precise rules about how to deal with particular cases. This takes us to the indirect and more general mechanism.

A general way to restrict discretion would focus directly on the form of legislation. We could enact sentencing guidelines, strict exclusionary rules, clear standards of evidence, etc. More generally, we could enact legislation about public wrongs and about public responses in non-vague terms, make exceptions explicit (instead of opening the possibility of adjudicators to solve conflicts between rules), and even rules that enumerate all the types of case they aim to cover. However, there are some familiar difficulties with such a strategy[569].

[569] See the discussion in chapter 6, section 1.a.

First, such a change would make the law much more complex and detailed, and therefore a) more difficult to produce, and b) harder for citizens to access. It would be harder to reach agreements about each particular circumstance in the legislative domain, to verify that no rule contradicts another rule in the system, and the legislative process would take much longer than what we are used to, necessarily becoming more *technical* if incoherence is to be avoided. Moreover, even if this could be achieved, the law would become an endless list of cases and exceptions. Normal citizens would probably not be able to know every specific rule, and the action-guiding capacity of the law would be affected.

Second, it could be argued that the more complex the law, the higher the probability of having over and under-inclusive rules, and indeterminate solutions, depending on the kind of agreement that legislators have reached in each case[570]. The consequence would, then, be the opposite from what was intended, at least in many cases.

Third, but closely connected to the former point, legislators can sometimes intentionally give discretion to those in charge of applying legislative decisions in order to better promote the ends that they have set. And they could do it through a legitimate decision. As I explained in chapter 3, discretion can be a good thing, and it would be positive to have an institutional design of adjudication that is legitimate and that is able to deal with these cases (instead of assuming that discretion necessarily produces illegitimate decisions).

Fourth, the complete elimination of discretion would anyway be impossible, because of the unavoidable characteristics of natural language. Of course, we could also legislate about interpretation rules that would help to deal with the remaining indeterminacies. However, as I explained in chapter 3, interpretation rules could also provide indeterminate answers.

A possible response to this problem could be a two-part system, one for cases where there is no discretion, and one for the rest of them. The problem is that there must be someone deciding which is which, and it is plausible to think that those who want to defend a particular interpretation of the law would claim that the decision is made in a context of no discretion, but others could disagree. Even if we cannot prove that one of them is wrong and the other one right (because it depends, e.g., on the legal theory one defends), it is

[570] See chapter 6, sections 1.a. and 2.a.

plausible to think that, at least sometimes, both conflicting views in such disagreements would be legally reasonable.

1.b. Second strategy: Elections

This kind of proposal is defended as a means to making public officials represent the views of citizens, and it is actually implemented in a few legal systems through the election of prosecutors and judges. This kind of mechanism is supposed to increase mainly the intrinsic value of the institution. This is not the place to discuss the empirical evidence showing the perverse effects of elections in the case of judges or prosecutors, and their connection to penal populism, because it is not relevant for the kind of argument I will offer. The story would go like this: these public officials get elected or re-elected if they decide high-profile cases according to the views of the public, created through the media. Moreover, only candidates with access to resources can win, and they only need to mobilize certain specific areas of the electorate.

A lot could be done in order to solve some of the problems: regulation of campaign financing, promotion of participation, intervention in the contents produced by the media, etc. Still, the relevant point is that, in terms of legitimacy, elections are not a defensible tool. Even in an ideal electoral system (where campaign financing and participation would not distort equality amongst candidates and information was not manipulated), the selection of judges and prosecutors through voting would need to be done through a majoritarian mechanism: there is one position available, and people choose amongst different candidates to fill it. But choosing only one person for each position could never reflect the plural views of those who are voting in that jurisdiction. In the best possible scenario (where they truly represent the views of the voters), they would only be able represent the views of the majority, and they would only do so in connection to the issues that have appeared in the campaign and that people could know about.

Moreover, and more obviously, there is no deliberative element in merely voting for a public official. After they were chosen, they would be the ones who would need to interpret people's views and decide particular cases, but not as a product of collective deliberation, and this means that the institution will not have enough intrinsic value. Of

course, we could imagine these public officials taking public debates into account when deciding, but this feature is not connected to the election of those candidates anymore (non-elected officials could also do it).

In addition, these problems would appear even if several public officials were elected in the same jurisdiction, and the positions were allocated according to a criterion of proportionality. If cases were still decided by them individually, they would always be able to represent just one view. The solution to each case would depend on which public official was making the decision, and this does not seem a legitimate way of processing citizens' views in circumstances of disagreement.

One could suggest, as a reply, that the judicial and prosecutorial functions should be exercised by collective representative bodies (like courts, but with more members) and that these bodies could be selected through electoral mechanisms. If this were the case I would agree with having such an institution, taking it as a second best in the face of the impossibility of having all citizens participating directly in making these decisions. But I would add some considerations. First, that this does not exclude the possibility of having citizens participating directly, at least at some stages of the criminal process. Second, that there is still a problem in the view according to which these people have a certain kind of expertise (e.g., if they are lawyers) that gives them the capacity to decide about issues that affect the member of society, while citizens cannot make these decisions themselves. If their views about how better to advance the interests of the citizens are different from the ones held by citizens themselves, then we can say that this type of representation is not legitimate. How can they know whether the representatives are actually applying their views if they do not understand the kind of decisions they are making? Finally, the mere fact that we come to elect representative bodies does not solve the whole problem of justifying punishment. The offender and the victim are probably the most directly affected by most decisions that are made in this context, and they should not only be able to express their views, but also to participate in making adjudicative decisions, as I will explain in section 2.b. below.

1.c. Third strategy: Accountability

Controlling the decisions made by public officials after they were made could be proposed as another means to deal with the dangers of discretion. Although this would be described as a restriction of discretion by some authors[571] because it would have some sort of deterrent effect, what it would actually restrict is arbitrariness. The possibility of choosing between more than one course of action would still be available, but those decisions that do not reflect the interests of those affected, according to their ideas, would be rejected. This possibility can increase the instrumental value of the adjudicative institution, because those decisions that are not legally reasonable could be rejected. But it is also supposed to have an impact within the domain of legal reasonableness and to assure that the response chosen by the public official is the same as the one that would have been chosen by those affected[572].

This kind of strategy can be defended from a republican point of view. E.g., Pettit believes that the way to keep public officials' views in harmony with the views of citizens is through mechanisms of control like appeal[573]. Giving those affected the power to control decisions in a context of discretion and disagreement would, first, act as a filter to decisions they do not agree with, and, second, have some deterrent effect on officials, since they probably will tend to predict citizens' views and to decide according to them if they want their decision to be maintained.

The problem with this strategy is that, although giving those affected the power to control decisions in a context of discretion and disagreement could have some positive effects, it would still miss the target. Giving certain people the capacity to block unwanted decisions could be seen as a way of treating them as members, and even to serve equality to some extent, if that power is spread equally. Yet this is not a legitimate way of accommodating different views in a context of disagreement. What is missing is that those who are affected by the decision are offered reasons, and are given the possibility to challenge them through deliberation. If not, the institution does not have the intrinsic value that is necessary in order to legitimize the decision within the domain of legal reasonableness.

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571 E.g. Galligan, 1986.
572 Remember that I argued that when there is discretion about the public wrong the accused should be acquitted.
573 Braithwaite & Pettit, 1990, p. 88

Of course, one could respond that there is no reason why the control devices should not be deliberative. Nevertheless, if people are going to be required to deliberate in order to control decisions made by public officials, why not give them the role of making the decision in the first place? Actually, their deliberation alone would probably be more efficient than having public officials deciding and then having citizens deliberating again.

2. Juries

The institution of the jury seems to represent the best example of citizens' participation in the criminal justice system. It actually exists in many countries and it is a central piece of the battle model (chapter 4), where the legitimacy of the process depends on its intrinsic value, and this value is connected to scepticism about the existence of expert knowledge regarding what is the right solution to cases, from the point of view both of morality and of the law. Therefore, having non-professionals deciding cases fits quite comfortably in this framework. Moreover, the direct participation of citizens in juries has also been defended because of its instrumental value, not because it is epistemically superior, but because it works as some sort of *civic school* for citizens[574], and because it can increase the transparency of the criminal justice system[575].

However, the jury as it works in many countries has many deficiencies, and I will mention some of them in order to suggest ways of improve the institutional design. In order to do this, it is necessary first to explain what kind of value the institution of the jury should have in order to be legitimate. The determination of this should be connected to what makes adjudicative decisions legitimate in the first place (chapter 6). Thus, in what follows I will make the connection more explicit and then analyse the specific problems of existing juries and some proposals.

[574] Dzur, 2012
[575] Bibas, 2009

2.a. Intrinsic and instrumental value

People have reasons to obey legitimate legislation about public wrongs, and adjudicative institutions have a reason to apply it. Therefore, they must have some instrumental value in identifying which cases are covered by the law, and which ones are not. Since legislation can be indeterminate about what counts as a public wrong in a particular case[576], this instrumental value needs to be connected to the identification of legally reasonable interpretations of the law in order to convict all (and only) those whose conduct could only be considered non-criminal under an unreasonable interpretation.

In addition, adjudicators have a duty to apply legislative decisions about coercive responses, and if they ignore them, they would be in fact changing the law according to their own views. On the one hand, in order to be legitimate, adjudicative institutions will need to have some instrumental value connected to identifying which of the available interpretations are legally reasonable, because adjudicative decisions obtain (part of) their legitimacy from the legislative decision that is applied (adequate reasons for punishment)[577]. Institutions should both facilitate this and include mechanisms that help to *correct* decisions when it does not happen.

On the other hand, legislation gives adjudicators discretion about public responses when confronted with particular cases, exposing the adjudicative decision to the risk of being arbitrary, even within the domain of legal reasonableness. Institutional legitimacy in this context cannot merely be grounded in the instrumental value connected to identifying the adequate reasons (what is legally reasonable), because this would be insufficient for the justification of punishment. The procedures through which cases are decided should also be intrinsically valuable if arbitrariness is to be avoided, because the decision should be compelled by reasons[578]. In order to track the interests of those affected, according to their views, decisions should be based on the principles of participation, equality and deliberation, and adjudicative institutions that reflect them are intrinsically valuable.

[576] Chapter 6, section 1.b.
[577] Chapter 6, section 2.a.
[578] Chapter 6, section 2.b.

So far I have identified three criteria for the legitimacy of adjudicative institutions:

(a) They must have *instrumental value* connected to the identification of what is legally reasonable in the case of *public wrongs*
(b) They must have *instrumental value* connected to the identification of what is legally reasonable in the case of *public responses*
(c) They must have *intrinsic value* to deal with disagreements within the domain of legal reasonableness in the case of *public responses*[579]

In addition to these criteria, one could also ask, first, whether institutions should also have intrinsic value (be based on participation, equality and deliberation) more generally (criterion (d)), and not only in the case of (c), and second, whether they should also have some kind of instrumental value when deciding within the domain of legal reasonableness (criterion (e)).

One case where it is possible to question the need of institutions having intrinsic value is the one where there is no discretion, because there is only one legally reasonable decision. In principle, there would be no need for the institution to have this kind of value here (at least not from the point of view of legitimacy[580]), because the adjudicator is supposed to be a mere extension of the legislative institution. The problem with this view is that, since the presence of discretion certainly depends on the characteristics of each case, it is not possible to determine in advance which norms will include no discretion when applied, or which cases will allow more than one interpretation[581]; and since there is potential vagueness in every text, we will never be sure whether there will be discretion in the future. Institutions need to be designed in a way that makes it possible to deal with discretion properly, even if it is not present in some cases (although, as I explained in chapter 3, since adjudicators make many kinds of decisions, it is hard to assume that a whole case can be decided mechanically). And regarding disagreement, as I mentioned several times before, it is a contingent fact, and its absence does not eliminate the question about legitimacy. When

[579] Not in the case of public wrongs, because those who reasonably disagree should be acquitted.
[580] The institution could have other kinds of intrinsic value, like I mentioned at the introduction of this chapter.
[581] The presence of discretion in the application of one norm certainly depends on the relationship with other norms, a fact that is triggered by the characteristics of the case.

confronted with the need to design legitimate institutions, it seems a better choice always to have adjudicative institutions with intrinsic value, even if sometimes people agree.[582]

An additional argument in favour of this proposal is the one about the disagreements that can arise when determining what is legally reasonable and what is not. Even if adjudicative institutions have instrumental value in this regard (in the case both of public wrongs and of public responses), the settlement of these disagreements needs to be in the hands of an institution that is intrinsically valuable. *Ideally*, in the account of legitimate legislative decisions I am defending here, what counts as legally reasonable (legislative decisions) should be determined by legitimate legislative institutions (which have this kind of intrinsic value). When this is not feasible, it should be determined by an institution that has as much intrinsic value as possible.

Finally, there is the question about the instrumental value within the domain of legal reasonableness. In the case of decisions about public wrongs the answer is negative, because of what I argued in chapter 6 about the first condition for the justification of punishment. The fact that one interpretation is in any sense *better* than another one does not change the fact that none of the legally reasonable interpretations were rejected before the conduct took place. Therefore, this kind of instrumental value is not necessary in this context[583].

But things can be different in the case of the decision about public responses. As I explained in chapter 6, there is a discussion about what it means to follow a legitimate norm and sometimes the determination of what should be done within the space of legal reasonableness can be a guided process (when background reasons are explicit and there is agreement about them), while at other times this kind of guidance will not be present. In the first case, the adjudicative institution should have instrumental value connected to making the decision that is the best application of the background reasons. The kind of instrumental value that is not a condition for the justification of punishment is the epistemic value connected to making decisions that are just (although this kind of value should also be promoted as long as it does not conflict with the other considerations).

[582] With the caveat that this intrinsic value should not be used to legitimize a decision about public wrongs retroactively.

[583] One could try to argue that this kind of value could be found in the fact that they can clarify the law for future cases. However, this would be problematic because the determination of what will count as a public wrong in the future would be made without the participation of those who will be criminalized.

After these clarifications, the criteria for the legitimacy of adjudicative institutions are the following:

(A) They must have *instrumental value* connected to the identification of what is legally reasonable in the case of *public wrongs*, and in the case of *public responses* ((a) and (b))
(B) They must have *intrinsic value* ((c) and (d))
(C) They must have *instrumental value* when legislative decisions offer guidance, in the case of *public responses* (e)

With these three considerations in mind, it is time to analyse how existing juries should be modified in order to become more legitimate. In general, the criterion will be that, in order to have intrinsic value, the institution will need to be based on participation, equality and deliberation, and in order to have instrumental value they will need to allow for the exchange of arguments, decisions should be open to challenge and review, and ultimately they will need to allow legislative institutions to have the final word about what is legally reasonable (and about which decision should be made in the case of *guided* decisions). I will discuss some of the implications in terms of institutional design and some of the main critiques that could be made to the proposal, together with some possible solutions. Moreover, an additional difficulty is that these two kinds of value (instrumental and intrinsic) can conflict with each other in practice. In section 3 I will explain how institutional design can help dealing with these conflicts through super-juries.

2.b. Who should participate?

The first problem of juries as they exist in many countries is that they might aim at giving citizens a role in adjudication, but the group of people allowed to participate does not include those who are most directly affected by the decision, i.e., the alleged offender, the alleged victim, and the people close to them. These people should be treated as members of the community and be given the possibility of participating as equals in a deliberation about how to deal with a case. The kind of jury I am imagining is one that does not sit on the other side of the room with respect to the alleged offender, the alleged victim, and the people close to them, and communicate the decision to them, but one where all

participants deliberate as equal members. It looks more like restorative justice procedures[584], where the decision is made by a group to which everyone who is affected belongs. Here, offenders and victims are not treated as outsiders to whom the adjudicators should merely speak, and it would not be enough to engage in communicative practices after the norms were identified (e.g., call them to account for what they have done and giving them a chance to respond, or to bear witness to the alleged crime[585]): they should offer their interpretation about whether the conduct was a public wrong or not and participate in the decision about what should be done as a response to it. In addition, they should have an opportunity to challenge the decisions made by the jury (I will say more about this below).

Against this proposal it could be argued that "no one should be a judge in her own cause", and that therefore alleged offender and victim are the people whose participation is least desirable because they would have an incentive to offer insincere, selfish or biased arguments. One could argue that they will even tend to conceal their interest to get what they want (presumably absolved in the case of the offender and a higher punishment in the case of the victim) and try to block the application of the law. One could also be worried that they will not be able to be neutral, even if they tried, because their situation necessarily makes them cognitively biased.

There is probably some truth to these statements, but, first, it does not seem obvious to me that other participants can detach themselves from their selfish interests, emotions and cognitive biases either, even in the case of experts[586]. In addition, it is one thing to argue that people are biased, and a different one to observe that they disagree. One could ask people to base their position on reasons, and on what is legally reasonable. But the fact that they still disagree cannot merely be interpreted as a sign of *bias* or *self-interest*. It cannot be described as a situation where one is right and the others are wrong, because when there is discretion, more than one answer is possible. Moreover, treating victims and offenders as moral agents requires offering reasons to them but also being open to theirs in

584 Braithwaite, 1999

585 I am no arguing that they should not have this kind of participation as well, but only claiming that it would not be enough.

586 A quite extreme example of how judges' decisions are cognitively biased by some surprising elements is demonstrated by empirical evidence. Two interesting examples are: a) a study that shows that in making sequential parole decisions, the favourable decision ratio decreases when judges become hungry (it drops from 65% to 0%) (Danziger et al., 2011); b) a study showing that the sentence given by judges in circumstances of discretion suffer from an anchoring effect generated, for instance, by seeing a number after throwing a dice (the higher the number, the higher the sentence) (Englich et al., 2006).

circumstances of disagreement, and the fact that they have difficulties in producing those reasons does not necessarily destroy the normative ground for participation. Finally, I am not suggesting that those affected by the decision will necessarily have to agree with its content in practice. Ideally, they every participant ought to change her mind if she is defending a legally unreasonable position or not offering reasons. A deliberation only takes place when everyone listens to the reasons offered by others and is open to change her position. But consensus cannot be required, and in the end it is possible that the jury makes a final decision that the offender or the victim disagrees with.

In any case, it must be stressed that the aim of this proposal is to make adjudicative institutions more legitimate, compared with those where public officials are in charge. Then, there is plenty of room for rehearsing mechanisms to filter certain types of argument, to avoid unnecessary confrontation, to give more time for discussion if necessary, etc.

A second kind of problem is the one presented by the difficulty in determining the criterion of *those affected* and deciding how to implement it. Ideally, the whole community should be participating, because everyone is somehow affected by the decisions about the content and application of the criminal law, although not all of them will be coerced. Although I will not provide a clear parameter here I think it is possible to present two kinds of proposal. First, that some people are more directly affected than others, and that giving them the possibility of participating is more important. The offender, the victim, and the people close to them are clear examples, and also the immediate community. Second, one could have a flexible criterion to determine who should participate, depending, e.g., on the circumstances of the case and on the kind of crime. In any case, there can be several ways of implementing these criteria, and the aim here is just to provide a reason for them.

Another question that must be dealt with is the one about whether participation ought to be mandatory or optional. I believe a duty to participate could be defended in the framework of this account of legitimacy, because people have a (relational) reason to decide together in circumstances of disagreement[587]. However, it is not possible to argue that everyone who is affected will have the duty to participate, because this would produce potentially enormous juries. The relevant point is, nevertheless, that citizens could be called

[587] Chapter 5, section 2.c., and also note 455.

to participate in a jury, and have a right to do so as members of the community who are affected by these kinds of decision.

Finally, regarding the implementation of the selection mechanism there are several kinds of option available, and lottery is not the only one. It would be possible to have representatives elected by citizens, to have a lot system but with quotas for certain groups, to require or allow for the participation of members of the closer community (depending on the crime) to have mixed systems, etc. Anyway, I believe that any institutional design should be a tool that we have to try and modify according to how it ends up working, and this certainly depends on where and how it is used.

2.c. The content of decisions

Juries are famously known as an institution deciding about conviction or acquittal, and this is supposed to be a decision about the facts of the case. Here I am proposing that they make all kinds of decisions, because of (at least potential) discretion and disagreement because, as I explained in chapter 6, although many of these decisions are not about punishment directly, they can determine whether this will be the final result.

For instance, an institution like the grand jury (or accusation jury) would be desirable. As a matter of fact, most countries that had such an institution abandoned it, and where it remains it is widely criticized. However, since there is discretion to decide about whether any person should be charged or not (even in those legal systems where there is no formal prosecutorial discretion), there are reasons in favour of filtering this decision through the views of the community. The problem is that someone must bring the case to the grand jury, and if a public official does it, they would still have a huge amount of discretion. The positive decision to prosecute would be filtered, but not the decision not to bring charges. As a response, at least two options seem attractive: the first one would be to control the decisions made by prosecutors, also in the case of non-accusation. The other would be to open the system to anyone bringing charges, especially victims. However, like in many other cases, the institutional design should be able to find a balance between openness and practical plausibility.

Furthermore, juries should make other kinds of decision as well. It has been suggested that they should have an important role in the case of plea bargains[588], and I agree. Although I have defended the view according to which this kind of institution might not be compatible with the requirement of following the legitimate law, since it allows departures from it, it would still be defensible as a second best through which more efficiency is achieved by accelerating the procedure in cases where the person pleads guilty. In fact, a reduction in the sentence could be an acceptable way of responding to those who face the charges presented against them by directly recognizing their wrongful conduct, if legislative institutions decide it[589].

Sentencing is another decision that appears as a clear candidate for decision-making through juries every time there is discretion. This is probably a good example of a guided decision about public responses, and therefore the institution should not only have intrinsic, but also instrumental value in this case. If the amount and type of punishment is supposed to be linked to vague criteria in order to fit the conduct and the person (e.g., the wrongfulness of the conduct, the deterrent effect, both, etc.), it is an issue that suits the purposes of having juries quite clearly. That does not exclude the possibility of having experts helping to make this decision, for instance, if the jury needs an assessment of the probability of the offender committing more crimes in the future.

In sum, if the claim presented in the previous chapters about the presence of discretion is sound, and adjudicative institutions need to have intrinsic value in general, then it seems to follow that juries should be making every decision where there is a risk of arbitrariness, especially if there is disagreement. As I mentioned in section 2.a., this should be the case in order to deal with disagreements about what is legally reasonable, and to decide about public responses within the space of legal reasonableness. Moreover, they should also have instrumental value (and I will say more about how to increase it in section 2.e.).

588 Bibas, 2009; Burns, 2011

589 I am not arguing in favour of such a rule, but only claiming that it could be implemented if it is a product of legitimate legislation.

2.d. The role of the legitimate legislation

Another difficulty with juries as they exist in many countries is that they can in fact ignore the law and act as *negative* legislators through what is normally called *jury nullification*. Although it can be seen as a tool to control public officials and to hold the State accountable, according to the view I am defending this possibility is not desirable because of the special status of democratic legislation. Adjudicators have a duty to apply the law to particular cases, even if they disagree with it. The implications affect both decisions about public wrongs and about public responses. In the first case, because if the person could only be acquitted through a legally unreasonable interpretation of the law, acquitting her when this is not the case would be an arbitrary decision (it would not be following legitimate legislation). In the second case, because adjudicators need to decide amongst the courses of action that are considered legally reasonable (they should neither choose an option that is legally unreasonable, nor decide not to choose one of the legally reasonable solutions in order to acquit the accused).

Moreover, when legislation offers guidance about the background reasons of certain norms referring to public responses, adjudicators must take them into account. They cannot simply decide another course of action because they disagree with the background reasons expressed by legitimate legislation.

If following legitimate legislation is one of the main considerations, then, as I said, juries should have instrumental value connected to the identification of which interpretations are legally reasonable and which ones are not. I will explain how this could be achieved in the following section, and also in section 3 below. However, some response needs to be given to those who could argue that, if the offender and the victim are given the possibility of participating, they may have great incentives to challenge the content of the law, and to insist on offering reasons against its application to their situation. This is not compatible with what I am suggesting here. I believe that the jury must take legitimate legislation as a reason for the adjudicative decision. If they (including the victim and the accused) do not agree with the content of legislation, they should take some distance from their own convictions and try expressing reasons derived from legitimate law[590].

[590] See chapter 6, section 2.a.

However, there can be instances where this kind of argument would not work, because one or more participants could claim that the law is not legitimate. If *legitimate* legislation marks the limits of legitimate adjudication, there should be a mechanism to challenge legislation that is illegitimate. These mechanisms usually work outside the criminal justice system (people proposing legislative reforms or protesting against certain laws), but this might be a good environment for detecting the presence of these cases. I will come back to this point in section 3 below.

2.e. How should they decide?

Although we can imagine that existing juries make decisions after discussing, and that they base their decisions on reasons, in practice they can decide according to criteria that are not transparent; like in *12 Angry Men*, they might just want to agree on a verdict and go home. Or they might just vote and agree on a final solution even if they disagree about the different sorts of questions that would need to be answered in order to base the decision on reasons. And the likelihood of this happening is higher if, as I am suggesting here, they have to decide on several kinds of issue. The problem is that such an institution might satisfy the requirements of participation and equality, but not the one of deliberation. This element is a fundamental piece of the legitimacy of adjudicative institutions, because it is what makes procedures both instrumentally and non-instrumentally valuable.

Since those who are affected by the verdict should be offered reasons for the decision that is made, the institution of the jury should be designed in a way that a) allows and promotes the exchange of arguments for intrinsic and instrumental reasons, and b) explicitly offers these reasons to those affected, even if the final decision is made through voting[591]. Moreover, this is important because c) it makes it possible to review the reasons and the decision, if those affected believe that it is illegitimate (I will explain more in section 3 below), and this is a further way through which adjudicative institutions can gain instrumental value.

First of all, as I mentioned several times, exchanging reasons is a way of respecting participants as moral agents, and this makes institutions intrinsically valuable. Juries need to

[591] For instance, this is required of juries in Spain. See LO 5/1995, articles 61-66.

have this kind of value because people can disagree about the boundaries of legal reasonableness and because in the case of public responses decisions made within that domain are non-arbitrary only when they allow those affected to defend their views and are offered reasons.

Second, deliberation is important because it is a means to determine which interpretations of legislation are legally reasonable, and sometimes also a tool to determine which ones best realize the aims of the law. In both kinds of cases, the institution gains instrumental value when it is opened to different interpretations, reasons are exchanged and bad arguments are rejected. This instrumental value is epistemic, but connected to identifying what is legally reasonable, and not what is just. In addition, in the cases of public responses, the instrumental value should be connected to the determination of which are the interpretations that better satisfy the aims of the law in the case of *guided* decisions.

One could argue that this kind of deliberation is very difficult to implement, and because juries may disagree on the reasons but agree on the result, we should actually be satisfied with a voting mechanism. However, this view is problematic. Some have remarked that, if juries can agree on the results and not on the reasons, there is a risk that the decision will be internally incoherent as an effect of the discursive dilemma[592], while others have argued that this kind of *conclusion-based* discussion would actually be desirable in the case of the criminal process because it might reduce the chances of having false-positives (convicting innocents)[593]. Nevertheless, although consistency and avoidance of mistaken convictions are both desirable outcomes, these considerations are different from the question of legitimacy. The fact that some people disagree with the outcome (they believe it is a mistaken conviction) is not a consideration that could trump the legitimacy of the procedure; and internal consistency it is only valuable if the decision actually tracks the views of those affected. Coherent decisions can be illegitimate, and when this is the case they are not enough to justify punishment. The aim, according to the account I am defending, is to produce decisions that are the product of a collective exchange of reasons, and the problem with merely voting is not that it produces incoherent decisions, but that they are not legitimate.

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[592] Sometimes, when there are interconnected sub-decisions to be made, individual judgements are consistent, but the collective decision is not. See List & Pettit, 2004. One way of helping to solve this is structuring the debate in a way that makes the conclusions follow the reasons. For an empirical study of the impact of alternative proposals in the case of juries see Strier, 1996.

[593] Gold, 2004

Finally, it must be stressed that the requirement of offering and exchanging reasons not only affects the offender, because she is the one that is going to be punished as a consequence of the final decision. As I mentioned several times, it is possible to understand that all the members of the community are in some way or another affected by the decisions about what counts as public wrongs and about how the criminal justice system should respond to those who commit them. This impact is quite clear in the case of victims, but can be verified regarding other members of the community as well, not only as potential victims, potential offenders, potential witnesses, potential jurors, etc., but also as citizens who have an interest in living in a certain type of community where some kinds of conduct are considered public wrongs, and they attract certain kinds of public response.

2.f. Equality

It has been argued that deliberation and equality conflict with each other. Since in a discussion people cannot decide without exposing their views to the critique and influence of others, a fundamental problem arises when there are differences in "epistemological authority"[594] amongst participants, by which I mean that those who are in typically disadvantaged social positions have a lower capacity to evoke acknowledgement of their arguments, even if they are offering good reasons. As a consequence, deliberation does not help those who are worse off (women, poor people, racial minorities, etc.) to make others recognize their views, but, on the contrary, their voices are silenced. If this is true, it would be a problem for the account I am defending, because having people participating in a deliberation, but not as equals, would not make institutions intrinsically valuable.

One of the difficulties with this kind of critique is that, if the mechanisms through which those inequalities have an impact in the content of decisions are a general feature of society, then it seems hard to imagine how other kinds of institutional device different from deliberation could achieve another result, especially elitist alternatives. In the case of the criminal law, judges and prosecutors have traditionally been socially and economically privileged men[595] helping to fill prisons with poor and racially discriminated minorities and

[594] Sanders, 1997, p. 349.
[595] Actually, the reason why we choose them to perform these tasks might itself be a product of their *supposed* epistemic superiority.

dealing with cases like gendered violence in a sexist way. Second, even if deliberation is imperfect, exchanging arguments is normally a better protection for equality than letting just one person decide. Moreover, there are ways of dealing with this problem without diminishing the intrinsic value of institutions, mainly by *structuring*[596] deliberation and taking the particular circumstances of people into account instead of letting informal rules make the difference, e.g., by giving weaker participants a greater role in the discussion, and especial consideration to their views[597].

But this is not the only challenge to equality. Other difficulties can come from the different degrees of motivation to participate that people have. What if people are given the possibility of participating but they just do not want to? Jury systems usually deal with this problem by creating a legal duty to take part. I believe that such a duty can be justified in the framework of the account I am defending here, because people have reasons to create and sustain legitimate institutions[598]. Fortunately, there is also some evidence showing that participating in a jury has an important positive effect on people's civic engagement[599], and therefore it could be argued that the lack of motivation is a consequence of the lack of participation itself.

2.g. More problems

I have already mentioned some of the problems that must be faced in the implementation of jury decision-making, like the biased position of participants, the determination of who is affected by the decision, the efficiency of the mechanism in some cases like plea-bargaining, the existence of certain inequalities, etc. Unfortunately, these are not the only difficulties that might appear. Here I will analyse some of them and suggest a few responses. Nevertheless, I believe that, since the problems depend on the particular context in which they arise, the solutions might also be closely connected to each circumstance. I

596 Freeman, 1970

597 It could also be added that, if the general problem is the lack of mutual respect between citizens (Sanders, 1997), although the effect on the particular decision might not be positive (because the views of those who are already disadvantaged are given less consideration), the overall effect of increasing participation might be an improvement in terms of mutual respect. At least, there is some evidence showing that the level of satisfaction with jury service does not depend on belonging to the privileged group. See, e.g., Hickerson & Gastil, 2008.

598 Chapter 5, section 2.c.

599 Gastil, Dees, Weiser, & Simmons, 2012

believe that there are numerous possibilities and that there is great space for creative proposals.

First of all, there is a general problem of efficiency. In this regard, one of the first things that must be stressed is that I am describing an ideal whose feasibility depends on several kinds of factor that are external to the criminal process itself, although not to the criminal justice system. For instance, if we could not deal with as many crimes as we now have in a legitimate way, maybe the choice should be to reduce the scope of the criminal law, and really use punishment as a last resort[600].

Second, it must also be stressed that the juries' task might not usually be as complicated as the one they have in many countries, where they are left with the most difficult and contested cases. But in many cases the facts are not contested, and the norms that should be applied are clear, or at least the domain of legal reasonability is clearly determined. When this is the case, the process might actually end up being quite straightforward, and jurors will easily deal with disagreements and decide. Remember that, although the law will leave some space of discretion to adjudicators, it is still different from legislation, and we can expect the discussion to be less complex, since many arguments were already left outside at the legislative stage.

Moreover, a less demanding institutional design might become more attractive if difficulties are found. Perhaps certain members of juries could be appointed for more than one case, or maybe citizens could be asked to act as lay judges in a collective court for a longer period. It might even be desirable to have a representative body composed by public officials, like the one I mentioned in section 1.b. above. These solutions would still rank better in terms of legitimacy than a system where individual judges and prosecutors make all the decisions. And regarding the decision-making mechanisms, although deliberation ought to have a central role, I have remarked several times that decisions might be made through voting in order to put an end to the discussion, as long as those who disagree are given the chance to challenge some decisions.

[600] I am not arguing, however, for a selective application of the law (like in prosecutorial discretion) because from the point of view of this kind of account all those conducts that are covered by legitimate legislation should attract the responses that the law requires.

An additional critique could be that those affected (common citizens) lack the capacity that is to participate in the kind of deliberation juries require. Of course, in order to perform these tasks, jurors will need to have some basic capacities and training. Someone who is not able to understand the content of legislation should not be able to participate. However, this does not necessarily take us down the path of elitism again. I have been insisting on the point that, if common citizens are not able to understand the criminal law, then it is very problematic to punish them as a consequence of violating it, because how can it be "their own law" if they cannot grasp its meaning? The solution must then be different from delegating decisions to experts. But there is much to do in order to improve the quality of information and the capacities of participants through education in general. This is not the kind of proposal I can develop here[601], but it is worth stressing that studies show how participation in deliberations is itself a *school for citizens*[602], not merely because they are confronted with the arguments and information offered by other people, but also because they can learn the necessary civic virtues that are required to participate in democratic decision-making[603].

Finally, in saying that the decisions of the criminal justice system should be left in the hands of juries I do not mean that there are not certain types of decision that should be left those who have the special knowledge (a medical or ballistic exam, for instance). The jury should be able to ask them for information and conclusions about certain issues, and it might also be desirable to allow for more than one opinion to be taken into account. I am not assuming that this kind of decision will necessarily be a simple and undisputed one, but it certainly does not make much sense to ask lay people to make it.

3. Super-juries

As introduced in chapter 6, there are two kinds of consideration that have a weigh in the legitimacy of adjudication: the fact that legitimate law is followed, and that adjudicative decisions are based on participation of those affected as equals in a deliberation[604]. In section 2.a. of this chapter it was also argued that, as a consequence, adjudicative

[601] See, e.g., Callan, 1997; Carr, 1991; Gutmann, 1987; Macedo, 2003; Sehr, 1997.
[602] For this kind of defence of juries see Dzur, 2012.
[603] Gastil & Dillard, 1999a
[604] These two considerations are connected to the two conditions for the justification of punishment analysed in chapter 5 and the implications of having legitimate legislation in place (chapter 6).

institutions needed to have both intrinsic and instrumental value (criteria (A), (B), and (C)). In this final section I aim to deal with problems that can arise in institutional design and propose some solutions that would increase the two kinds of value.

When designing adjudicative institutions, there is the possibility that these two kinds of consideration conflict with each other, together with the instrumental and the intrinsic value. For instance, it could be possible to have adjudicative institutions with intrinsic value applying an illegitimate law, or making a legally unreasonable interpretation of it. It could also be the case that by increasing the intrinsic value (e.g., allowing more people to participate), the instrumental one is diminished (decisions are less likely to be legally reasonable). Or it might happen that different adjudicative institutions reach different and incompatible conclusions about which interpretations are legally unreasonable (and convicting people who should be absolved, if this happens in the case of public wrongs), or about how best to apply legislation according to its explicit aims, even if they are all intrinsically valuable. Furthermore, an adjudicative institution can have little or no intrinsic value, if it is not based on the participation of citizens as equal members in a deliberation, but it could still have a high instrumental value and make decisions that are legally reasonable. Here the problem would be that the choice of the course of action within the area of discretion would be illegitimate according to one dimension and not to the other.

These kinds of relationship between the intrinsic and the instrumental value of institutions cannot be determined abstractly, but only by looking at the particular circumstances and dynamics of the context in which institutions work. Moreover, it is possible to have institutions that have both kinds of value, producing decisions that are legitimate from the point of view of the two considerations, but to verify that in certain cases they happen to make illegitimate decisions. From a theoretical point of view, we could be satisfied with saying that a particular decision is more or less legitimate because one of the causes just mentioned. An account of the legitimacy of adjudicative decisions allows us to do this. However, that is not the kind of analysis I want to engage with here. The aim is, in addition, to suggest institutional ways of dealing with these kinds of case in order to allow the same system to process them.

In all of these examples, the problems would probably take the form of disagreements at the adjudicative stage, but these disagreements would not refer to the content of the

decision. What would happen is that a participant would argue that the process itself is flawed, for reasons that are either connected to the fact that legitimate legislation is not followed, or that the adjudicative decision is not legitimate. If the institutions of the criminal justice system are going to be legitimate, they would need to be able to deal with these kinds of case, and, very importantly, to do it in a legitimate way.

One possible response to these situations could be that, when these sorts of disagreement arise, the offender should simply be acquitted. If there is no agreement about whether the process was legitimate, then there is no ground for punishment. A different kind of solution could be to deal with these kinds of disagreement simply by voting, like in the case of disagreements about the content of the decision. Nevertheless, this would only be legitimate if the decision is legally reasonable and the adjudicative decision is already legitimate. These two conditions must be satisfied before people vote, and then it does not really solve the problem, since the question about the legitimacy is actually the one that is being raised. Retrial could also be proposed as a way of *fixing* the problem of illegitimate adjudicative decisions, and it does seem like a quite natural solution. The general problem with these three kinds of solution is that there should be a way of impeding everyone who disagrees with the content of a decision to disguise it as a challenge to its legitimacy. There must be some legitimate way of distinguishing cases, and thus allowing for the control of illegitimate decisions, but also restricting it to the right kinds of case.

The important question here is: which institution (*who* and *how*) should check whether the different criteria of legitimacy are satisfied? I believe that, in the same way that we can learn from criminal justice systems that are more participatory and propose reforms to their institutions in order to make them more legitimate (what I did with juries in section 2.), there are certain features of instrumentalist models (moral and legal instrumentalism) that could also be useful. One of those elements is the possibility of appeal in order to challenge certain adjudicative decisions. However, because even these kinds of decision need to be legitimate, I suggest that a special kind of jury should be in charge of making them. I will call this institution the *super-jury*.

I believe that both the adjudicative institution deciding a particular case and the legislative institution deciding general laws have special characteristics that make them better suited for making certain types of decision more legitimately. Adjudicators are supposed to follow

the legitimate decisions of legislators and they also are well positioned to make legitimate decisions in circumstances of discretion (through the participation of those affected). But, in addition, they are also well situated to detect particular cases where the law is not legitimate, because participants will raise the issue. On the other hand, legislators are the ones who should have the last word about what the law is, or about what should be counted as legally reasonable, but legislative institutions should remain open to changes in legislation and to the improvement of its legitimacy although they cannot decide every particular case. The proposal here is that these two institutions should be able to engage in some kind of *dialogue* that could help adjusting decisions according to these considerations, and dealing with the conflict between the intrinsic and the instrumental value. In order to achieve this task, the suggestion is that the super-jury acts as an intermediary, filtering some questions, and deciding about them, but transmitting others to the institution that is better situated to make them. In the following section I will explain which kinds of functions it should have, and in section 3.b. I will analyse certain features that would make the institution legitimate.

3.a. Appeal court

The super-jury could have different kinds of function, depending on the problem that it is supposed to be dealing with. It would act as an *appeal court* in the following kinds of case. First, participants could ask for the review of the public response if they believe it is legally unreasonable. The super-jury would review the reasons offered by the participants and verify that they can be included amongst the plausible interpretations of the law. It would not be allowed to choose which one of the legally reasonable solutions should be chosen, but only to discard those that are not amongst them (except for the case where the aims of the law are explicit, as I will mention later).

Second, offenders could challenge a conviction by arguing that the interpretation of the law about public wrongs (on which the conduct is based) is legally reasonable. Even if the rest of the jury prefers another legally reasonable interpretation that leads to conviction, the defendant should be absolved, and if she is not, she should have the possibility to challenge that decision.

Thirdly, participants should be able to appeal the decision by arguing that the adjudicative decision has no intrinsic value because the procedure violates at least one of the three principles of participation, equality and deliberation. If this was the case, the super-jury could, for instance, order a new jury trial.

3.b. Cassation court

A second kind of function that super-juries could have would make it resemble a *cassation court*. If the ground for the challenge to the adjudicative decision is that a different criterion about what counts as legally reasonable was applied to other cases, then the super-jury should be able to produce standards about what the limits of legal reasonableness are, and these standards ought to guide decisions made by other juries in the future. This would be desirable both in the case of public wrong and of public responses, and it might be desirable for the institution to have the option of asking legislators about the subject.

Additionally, the super-jury ought to have a say in those cases where legislation about public responses[605] is vague but its aims are explicit, if there is disagreement about which is the best decision. It should have a say when there is discretion but one or more background reasons are explicit (the decision is *guided*).

It could be argued that, in the case of public responses, different juries could arrive at different solutions for similar cases, because the way similar cases are dealt with depends on the views of the participants deciding each case. Even within the domain of legal reasonableness, this might be legitimate, but it would violate equality. As I mentioned at the beginning of the chapter, the criteria for institutional design need not only be those derived from legitimacy, and there is space to introduce other sorts of consideration, and this could be one of them. Super-juries could also serve as a mechanism to promote the production of similar responses to similar cases, and they could actually perform this task in a legitimate way.

[605] Not in the case of public wrongs, because here, even if there is disagreement, the solution is always the same one: acquittal.

Nevertheless, a small remark must be made about this proposal: homogeneity might not always be desirable. Once we verify that adjudicators (juries) have discretion – because the law does not offer a specific response to each case with certain properties – there is the possibility of reaching different conclusions within the space of discretion by taking the specific circumstances of the case into account. This means that two cases that are similar in certain elements, but not in others, could receive different responses. The desirability of this kind of solution depends on the views that are held about which properties should be relevant while deciding each case, and while distinguishing one case from another. However, it is plausible to claim that if the law is open to more than one interpretation it also opens the door to certain specific features of cases to make a difference in the kind of response that is decided, and this could also mean that decisions could be made by *correctly* distinguishing cases according to properties that were not considered in legislation.

3.c. Constitutional court

There can be cases where those affected insist in the fact that legislation is illegitimate. They do not want to challenge the legitimacy of the adjudicative decision itself, but they claim that at least one of the norms that are applied to the case is illegitimate. As a consequence, they can argue that there is no reason to obey (if it is a norm about public wrongs), or that its application would be arbitrary, because it does not track their interests according to their ideas (in the case of public responses), e.g., because they were not given the opportunity to participate in making the legislative decision.

I argued in section 2.d. that jury nullification was not compatible with the kind of account of adjudication that I am defending here, by which I mean that it is not up to the jury to decide about whether a law should be applied or not (they should not decide about what the law should be). However, the grounds for this kind of challenge are different, or at least different from some of the grounds for nullification: it is not the case that participants disagree with the content of the law (or, at least, it is irrelevant); they claim that there is a violation of one or more of the three elements that concede intrinsic value to legislation (participation, equality and deliberation).

The effects of this kind of defect of the law on its legitimacy are a matter of degree, which implies that actually what the super-jury needs to analyse is whether they are serious enough to affect the reason-for-action or the reason-for-coercion conditions. In doing this, the super-jury would be acting as a constitutional court, but since the criterion of legitimacy is procedural, it would be controlling only procedures and not substance.

Additionally, the question about whether the two conditions for the justification of punishment are satisfied or not, and to what extent, certainly depends of which person one is referring to, because legislation can be legitimate for some people but illegitimate for others. Some of them might have had a say in the democratic arena while others might have been excluded, while some others might have had a say, but their reasons might not have been taken seriously enough. As a consequence, the effects of the decision should in principle only reach those participants who have a claim, but not others.

In the case of the offender, it is quite clear that the illegitimacy of the law would be an obstacle to the justification of her punishment. However, there is still the question about whether another participant could appeal a decision for the same kind of reason. Victims and other citizens could also believe that the law that is applied is illegitimate, and that it affects them, although in different ways. For instance, people could argue that legislation about defences affects them because it gives others a permission to engage in conducts that would otherwise be criminal, or that certain procedural rules affect the rights of witnesses, etc.

In any case, the defence of this kind of appeal mechanism does not preclude the addition of other kinds of similar competence to the super-jury, like the possibility of deciding about cases where some people challenge the law in abstract, even before it is applied (a particular kind of judicial review). Defending an account of legitimacy where procedures are at the centre of the picture and their justification is connected to their intrinsic value does not exclude the possibility of having an institution checking that these conditions are satisfied[606]. Of course, one should verify that this institution in charge of this task is legitimate as well, and in the end the best one can do is suggest mechanisms that tend to increase legitimacy. I believe the super-jury could be a fine candidate for this task.

[606] See the "Summary and Conclusions" in chapter 5.

Ideally, legislative institutions are the ones who should be in charge of changing the law if it is illegitimate because they are the ones with the highest amount of legitimacy. Therefore, it seems appropriate for the super-jury to have the power not to apply legislation in certain cases where the lack of legitimacy is serious, but also to propose changes to the criminal law. Nevertheless the super-jury should not be able to change legislation and it might not be desirable for its decisions to have a general application.

3.d. Intrinsic and instrumental value

Finally, I want to make just a few minor remarks about the characteristics of the *super-jury*. In general, the considerations that should guide its design should be the same as in the case of normal juries, but there might be some grounds for defending different proposals. First of all, juries would be in charge of deciding each and every case, while super-juries would only need to decide appeals. It means that the caseload would probably be lower, and also, presumably, the number of questions that they should be deciding. However, the fact that their decisions would be having a greater impact seems to be a ground to dedicate more resources and a reason to create more sophisticated decision-making mechanisms in order to make the institution more legitimate.

In order for super-juries to have intrinsic value, they should be based on the participation of citizens as equal members. One possible way to select who is going to be a participant is, clearly, by lot, but I see no reason why it could not be a representative body. It would also need to deliberate before deciding each case, and to offer reasons for each ruling or proposal.

In order to have instrumental value, the super-jury should be situated in a better position than the jury regarding the identification of what is legally reasonable and what is not, and also which are the best ways to apply norms according to their background reasons when they are explicit. A way to achieve this could be making the institution reflect the views that are held by the members of the legislative institution as much as possible. Another helpful mechanism would be to give super-juries the possibility of asking legislative institutions about what counts as a legally reasonable interpretation or a good application of the background reasons of certain norms.

It could also be a good idea to have super-juries whose composition is the same for some time, and not to choose a different one every time a new case appears. This would not only make the task easier for its members (since they would have time to adapt to their task), but would also grant some stability to the institution.

A final suggestion is that maybe there should be more than one super-jury, or more than one level of super-juries with different degrees of complexity in their design. For instance, there could be smaller super-juries deciding about simpler questions, and a bigger one deciding about those that are more relevant or complex. Another possibility could be to organize them in a way that resembles the distribution that exists in certain supreme courts of some legal systems, where smaller groups make some decisions while other issues are decided by a plenary.

Conclusions

It is not difficult to find theories of the criminal process or of certain procedural rules that are oriented towards the aim of restricting the power of the State; much more complicated is to come upon positive justifications. This paper was meant as a proposal in this direction: I offered an argument *for* criminalization and the use of punishment as legitimate decisions of a political community. Certainly, given that the account includes certain conditions, it also limits the scope of what should be done. But the core argument is that a criminal justice system where the law is made and applied by citizens and on citizens can be a valuable enterprise. The aim of this dissertation was to defend the role of democracy in the production of political legitimacy, and to show that it is actually a central piece for the justification of punishment in plural societies.

I have defended an account of political legitimacy where legislative decisions are legitimate when they are made with the participation of the members of the community as equals in a deliberation. I have argued that institutions based on these considerations have non-instrumental value because they treat citizens as equal members that can and should respond to reasons, and engage in self-government with others.

One of the central claims I defended is that adjudication offers especial challenges for any account of political legitimacy. I have argued that political philosophy should not assume a *naïve view* of adjudication where laws are *mechanically* applied, because this view is mistaken: there is discretion and disagreements when deciding about the application of the law, and this raises questions that any account of legitimacy should be able to offer answers for. The way adjudicative institutions are designed has a strong impact on how legitimate legislation can legitimately be applied to particular cases, and not any kind of criminal process can be compatible with any account of legitimacy.

In addition, which account one defends also has an impact on the kind of legal theory one can endorse, mainly regarding the interpretation of the law. Some theories are based on assumptions about the role of judges, constitutions, legal precedents, predictability, coherence, etc. but not all of these assumptions are compatible with every account of legitimacy. Unlike theories of justice, accounts of legitimacy such as this one are based on normative considerations that affect, not only the content of the law, but also its sources.

Some of these differences have been illustrated by referring to three models of criminal procedure that are useful for explaining the differences between legal systems like Germany, France and the United States. In contrast to these models, I defended an account according to which the law should only be created by institutions that have non-instrumental value (those that allow for the participation of citizens as equal members, in a collective deliberation), and adjudicators should follow legislation when deciding particular cases, but adjudicative institutions should also deal with discretion through participatory procedures.

From the point of view of the justification of punishment, the previous chapters offer an argument about why legitimacy is a necessary element in communities where there is disagreement about justice. Decisions and institutions need to be legitimate both in the legislative and in the adjudicative domain if punishment is going to be imposed on citizens. The ground for this claim is connected to the fact that there are two conditions in terms of reasons for action that should be met in the specific case of the criminal law (people must have a reason to act according to the law about *public wrongs*, and adjudicators must have a reason to apply coercive *public responses*), and political legitimacy can offer these kinds of reasons in a context of disagreement.

Once these two conditions are combined with the rejection of the naïve view of adjudication, the justification of the use of criminal punishment through legitimacy in particular cases becomes a difficult task. The reasons is that adjudicators will not only be taking a stand in controverted issues, but also that, when the law offers indeterminate answers, the definition of *public wrongs* can be retroactive, and the application of *public responses* can be arbitrary, because it is not compelled by reasons. Even if legislation is legitimate, and adjudicators have a reason to apply it, it does not offer a unique answer, and the existence of disagreement calls for a special justification. I have also argued that this justification is different in the case of public wrongs and public responses.

In the case of public wrongs, legitimate legislation gives citizens a reason to obey it, and the way to do it is by complying with its content. Nevertheless, the ground for the reason-for-action condition is that people should be treated as moral agents capable of responding to reasons. In order for this to be possible, people should be able to know what the law requires of them: legislation must be *action-guiding*. But even when this is the case, action-

guiding legislation can still be interpreted in different ways that are all *legally reasonable*. If the adjudicator decides which interpretation should be followed after the conduct already took place, then the determination of the public wrong would be *retroactive*. As a consequence, from the point of view of legitimacy, people should not be exposed to punishment when an acquittal would also have been legally reasonable. However, because there can be disagreements about what is legally reasonable, decisions need to be made through a legitimate procedure.

In terms of the legitimacy of institutional design in connection to public wrongs, the implications are, first, that adjudicative institutions need to have instrumental value, connected to the identification of what is legally reasonable; second, they need to have intrinsic value, because there are disagreements about which are contours of the domain of legal reasonableness. Ideally, these decisions should be made by legislative institutions, since they are the ones where all the members of the community participate as equals in a deliberation, and the decisions produced by these institutions are the ones generating reasons not to commit public wrongs: they determine what should count as *the law*. But the legislative assembly cannot be the adjudicator in each criminal case. In order for adjudicative institutions to have intrinsic value, they should allow the participation of citizens as equals in a deliberation, and they should pay especial attention to the views of the offender, because she should not be exposed to punishment if she offered a legally reasonable interpretation of the law that would lead to her acquittal. On the other hand, these institutions will have instrumental value if they incentivize deliberation and include mechanisms that make it possible for participants to challenge decisions when they do not follow the criteria mentioned before. Mainly, the offender should be able to challenge a conviction if she believes that her interpretation of the law was legally reasonable. In addition, she and other parties should also be able to challenge the adjudicative decisions if the institution is does not have non-instrumental value in the particular case (if the requirements of participation, equality and deliberation were violated), if the decision is legally unreasonable, or if it is an application of illegitimate legislation.

Regarding public responses things are different. There is no requirement of action-guidance or non-retroactivity because the condition that needs to be satisfied by these decisions is that adjudicators make a *non-arbitrary* decision about the use of coercion in the future. In order to satisfy this criterion, the decision should be based on adequate and

sufficient reasons for the particular context. This reason comes from the legitimacy of legislation, and when there is more than one possible interpretation of the law, the decision can even be made after the crime took place. In the context of criminal punishment an adjudicative decision is based on *adequate* reasons when it follows legitimate legislation (when the decision is legally reasonable), but only based on *sufficient* reasons only when the particular response to crime is *compelled* by reasons. I have argued that this can be achieved in a legitimate way only when the solution is determined with the participation of those affected in conditions of equality and through deliberation: these legitimate procedures offer a second-order reason makes the decision in situations of disagreement non-arbitrary.

In terms of the legitimacy of institutions, the main implication in the case of public responses is that the adjudicative institution needs to have intrinsic value to make these kinds of decisions within the domain of legal reasonableness. However, as in the case of public wrongs, it should also have instrumental value connected to the identification of what is legally reasonable, and intrinsic value to decide about the contours of legal reasonableness.

The whole structure of the arguments about decisions and institutions is guided by two kinds of main considerations. The first one is that legitimate legislation needs to be followed: it determines what is legally reasonable. The second is that adjudicative institutions should have intrinsic and instrumental value to bring legitimacy to those places where the legitimacy of legislation does not arrive. In chapter 7 I have suggested that an attractive proposal is to have juries making these kinds of decisions, but that modifications should be introduced to the institution as it works in existing legal systems in order to adjust it according to the three criteria of participation, equality and deliberation. However, if these two considerations – i.e. legitimacy of legislation and legitimacy of adjudication – worked independently from each other, it would be possible to arrive at situations where legitimacy of the system was affected. The *super-jury* is presented as a solution to this problem: it should be designed on the basis of participation, equality and deliberation, like juries and legislative assemblies, but it would be situated between them in order to allow for different kinds of interactions between the different levels. The super-jury should have functions that resemble those of appeal courts, courts of cassation, and constitutional courts: it could control that juries do not decide outside the space of legal reasonableness and that they have the features that make them intrinsically valuable in particular cases; it

could deal with disagreements about what is legally reasonable, even ask the legislative institution for guidance; and it could check that illegitimate law is not applied. On the other hand, the super-jury should also be able to suggest legislative modifications when juries detect that some laws are illegitimate, at least regarding some groups or individuals.

In order for some of the arguments I defended to be complete, and in order to determine their precise scope, further research would need to be done. One of the main questions is whether they only apply to the case of criminal punishment, or also to other areas of the law, especially those where decisions are clearly coercive. I believe that, in principle, the critique to the naïve view should also have an impact on how political philosophy should think about adjudication in any case where public officials decide in contexts of discretion and disagreement. Perhaps the reason-for-action condition only applies to punishment, but certainly there is much to say about public responses: sometimes these responses are so serious that one could argue that, in order for decisions to be non-arbitrary, they must be compelled by reasons.

In addition, I have argued several times that institutions do not need to have epistemic value connected to justice in order to satisfy the two conditions for the justification of punishment. However, I also mentioned that the account of legitimacy I am defending is not incompatible with this kind of consideration and that the epistemic value of procedures can make institutions even more legitimate. In fact, I believe that deliberative procedures have non-instrumental value, but also that they also are epistemically valuable regarding justice. The latter should be improved through specific kinds of institutional devices, as long as they do not conflict with the three requirements of participation, equality and deliberation, and in the case of adjudicative institutions, as long as they not compromise the instrumental value regarding what is legally reasonable (because a solution can be legally unreasonable, but unjust). This kind of analysis was beyond the scope of the current dissertation, but it is certainly an area where a great deal of work can and should be done.

There are other elements besides legitimacy that also make the criminal procedure a valuable institution, e.g., how it could be made compatible with an expressive account of punishment where the central piece of the process is that people are called to account, or with a justification of punishment based on restoration. As I mentioned in chapter 7, several features of institutional design could be different if a participatory criminal process

was set in the context of one justification of punishment or another (as long as these accounts are made part of the law through legitimate legislation). I believe that a great deal of theoretical work can be done in order to find ways to accommodate legitimacy with these kinds of accounts and to develop more sophisticated institutional designs.

Although the arguments of the thesis are developed with the aim, not only to analyse question that are theoretically interesting, but also to show their practical implications, much more work research be done in order to apply any of the proposals to real criminal justice systems. Obviously, I am not thinking about the political strategy that should be followed in order to apply any of these proposals to an existing legal system, but, first, it would certainly be useful to think about ways in which second best alternatives (like the ones presented in the section about public officials in chapter 7) could be designed, or at least to discuss them in specific institutional frameworks.

Second, specific analysis of certain elements of institutional design deserves more attention, and I have only described some general principles that should guide it in order to enhance participation, equality and deliberation. For instance: it would be useful to develop a deeper study of how to structure deliberations and promote equality between participants in the specific context of the criminal process, paying adequate attention to the differences between types of crime. I am thinking, for instance, in the role of women and men deliberating about cases of gendered violence, and about minorities participating in decisions about racially motivated crimes.

Third, I have focused on crimes where the offender and the victim are individuals for the sake of simplification. But other kinds of crimes deserve careful attention, and they could probably require different kinds of procedures: e.g. corporate crimes where the victim is the whole community.

Finally, more empirical research should be done on how to motivate citizens to participate. This kind of research has been developed in other areas, but not in the specific case of the criminal process, and the studies about juries focus on the institution as it works in some countries[607], but do on the considerations I explored in chapters 6 and 7: mainly, how to improve their instrumental value connected to following and applying legitimate legislation,

[607] I mentioned the studies carried by Gastil et. al. in the United States. See, e.g., Gastil, Dees, et al., 2012.

and how to improve their non-instrumental value with an emphasis on participation, equality and deliberation.

As most pieces written around the topic of democracy recognize, this one ends with the remark that there is no way of implementing most of the proposals without the engagement of citizens, and the development of the capacities that are necessary to participate in a legitimate criminal process. Fortunately, as the literature in democratic theory also remarks, participation itself teaches citizens how to be citizens. How to achieve this is not a proposal that I can develop here. However, what I can say, after the arguments defended along the pages, is that if we do not change our institutions in order to make them more legitimate, punishment needs to be seen as arbitrary practice, even when it is just.

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