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Public choice theory is crucial to understanding the criminal justice system

Radley Balko

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Nancy MacLean's new book, "Democracy in Chains," is causing a lot of controversy. In the book, MacLean, a well-regarded and award-winning historian at Duke University, takes on the late libertarian economist and Nobel laureate James Buchanan, one of the originators of public choice theory. The book has been enthusiastically praised by outlets such as [NPR](#), [New Republic](#), [Slate](#) and [the Atlantic](#).

It has also been [roundly criticized](#) by libertarians (though [not just libertarians](#)) for a number of reasons, including MacLean's [misleading](#) (often deceptive) use of [quotations](#), her conspiratorial tone and tendency to [draw links that don't exist](#), her [fundamental misunderstanding](#) of her subject matter, her sourcing that [at times directly contradicts](#) her assertions, and her tendency to assign sinister motivations to her source material.

I'll leave the in-depth criticism of the book itself to others. Instead, I want to delve into public choice theory itself, explain the influence it has had on my own work and explain why it's so important to the issues we cover here at The Watch. Before I do, I'll go ahead and note that I identify as a libertarian. I'll also disclose that prior to my work here at The Washington Post and previously at the Huffington Post, I worked for Reason magazine and the Cato Institute, two organizations commonly affiliated with the Koch family, one of the targets of MacLean's book. I also know and have worked with some of the people MacLean targets in her book.

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It was during my time at Cato that I was first exposed to the public choice work of Buchanan and Gordon Tullock. Generally speaking, public choice theory is the use of economic tools to analyze political behavior. One of the most important findings from the field is that when people work for the government, they don't always act in the public interest. In fact, they are more likely to act in their own interest.

This is a pretty intuitive observation. And yet somehow it remains controversial. Government employees are human beings, after all. We have no problem believing that people in the private sector tend to act in their own interests. Public choice merely posits that people don't shed that

tendency when they get a government paycheck. It doesn't suggest that government employees are evil or lazy or inherently corrupt. It's more that there's nothing transformative about working for the government that makes someone more or less selfless than someone in the private sector. On some level, this clashes with the high regard we attach to public service. But it doesn't need to. We can still admire, say, someone who gives up a large salary in the private sector to take a job in public service, while recognizing that not every decision that person makes thereafter will always be in the best interests of the public. It doesn't need to be a nefarious thing. It may take the form of cognitive bias instead of some conscious decision. If you think your public service job is critical, for example, you might read data in a way that emphasizes the importance of what you're doing. Or you might be tempted to exaggerate the social problem your agency exists to fight if doing so means not having to lay someone off or take a cut in pay.

The substantive lesson from all of this is that we should design government institutions and align incentives for public official and government employees in ways that acknowledge and compensate for how people actually are (sometimes self-interested) instead of how we wish them to be (always selfless and public-minded).

In the area of criminal justice and civil liberties, the ramifications of this are pretty profound. For example, in a number of areas of constitutional law, the Supreme Court has fashioned a "good faith" exception when police or prosecutors violate someone's constitutional rights. Under certain conditions, a good faith exemption can excuse an otherwise illegal search. When police or prosecutors lose evidence in a criminal case that may have been exculpatory, the Supreme Court has ruled that defendants are out of luck unless they can show that law enforcement officials acted in bad faith — which in most cases is next to impossible. In other words, the courts assume the cops or prosecutors were acting in good faith unless proven otherwise.

These decisions then essentially become road maps for unscrupulous police or prosecutors. Body cameras are a good example. Because the courts have generally assumed good faith when body-camera footage goes missing, or when cameras themselves malfunction, we've seen an small epidemic of lost footage, accidentally deleted footage and damaged cameras.

One of my favorite examples came in a drug dog case the Supreme Court considered a few years ago. Drug dogs have notoriously high rates of false alerts. The fear is that many of these dogs are not alerting when they detect the presence of drugs, but that they're picking up on their handlers' body language and alerting when the *handler* suspects someone may be hiding drugs. There's good evidence for this. There's also at least anecdotal evidence that some handlers can prod a dog to alert on command. Because a drug dog alert is probable cause for a search, under either scenario, these dogs can provide legal justification for a search based on little more than a police officer's hunch. That's exactly the sort of thing the Fourth Amendment is supposed to protect against. During oral arguments in the case, Justice Antonin Scalia seemed perplexed as to why a police officer could possibly want a drug dog that would falsely alert. He speculated that a dog that frequently alerted falsely would be a waste of time and resources. But of course there are *lots* of reasons why a police officer would want such a dog. By the time a K-9 unit is inspecting a car, the police already strongly suspect illegal activity. The drug dog is a shortcut to a search — a search that might find drugs but also weapons or evidence of some other crime.

Between arrest and seizure quotas (which, if not explicit, are often implied) and asset forfeiture, there are plenty of incentives for a cop to want a tool that gives them carte blanche to search anyone they find suspicious. And a properly trained (or improperly trained, depending on your point of view) drug dog does exactly that.

You can see public choice theory in action all over the criminal justice system. It's helpful for understanding why police unions don't always represent the best interests of police, much less the interests of the community. It explains why it's advantageous for police officials to exaggerate the threat of crime in some circumstances and underreport it in others. It explains why a policy such as civil asset forfeiture provides an incentive for police to wait until drugs are already on the streets to make busts, instead of busting drug dealers while they're holding a large supply. (A car or stash house full of drugs provides no financial reward for the investigating police agency. A car or stash house full of cash is a potential windfall.) It explains how federal grants can incentivize police departments to expend resources rounding up hundreds of low-level drug offenders instead investigating crimes such as murder or robbery or rape, which typically don't come with a federal bounty.

As you might imagine, Buchanan's ideas have traditionally received a warm reception on the political right. *Except* when it comes to criminal justice. Oddly, the same Republican politicians who tout the trappings of public choice when railing against the Environmental Protection Agency or the Securities and Exchange Commission demand deference to law enforcement officials, even though they're subject to the same analysis. They can't see how a police officer or prosecutor might be tempted to bend the rules, take shortcuts or take actions that serve their own interests rather than the public's. Perversely, this is the one area of public policy where Buchanan's ideas are *most* important, because the stakes are so high.

Public choice also explains a lot of the odd choices of public interest groups outside of government. To give one recent example, it helps explain why a group such as the National Rifle Association would refuse to speak out against law enforcement practices that threaten gun owners. (A large contingent of its membership is law enforcement.) Or why up until the very last minute, the nation's largest gun rights group actually fought against the plaintiffs in *D.C. v. Heller*, arguably the most significant Second Amendment case in American history. It explains why the Southern Poverty Law Center keeps expanding its definition of "hate groups," or why Mothers Against Drunk Driving keeps pushing to expand the definition of "drunk." Perversely, advocacy groups have a strong incentive to perpetuate the problems they're allegedly fighting — or least to create the perception that those problems are always more dire than they are, and always getting worse.

One of the main themes of MacLean's book is that Buchanan and those who share his worldview want to restrain or circumvent the democratic process when democracy doesn't produce the public policies they favor — hence the title of her book. This is undoubtedly true. I just don't understand why it's controversial. We aren't talking about suppressing voting rights here. We're talking about correcting for democracy's excesses.

Public choice economists by no means have a monopoly on that idea. The political left has long tried to insulate vast realms of federal public policy from the democratic process by ensconcing it in the federal bureaucracy. And there's a whole genre of left-leaning literature bemoaning the shortcomings of democratic rule. All sides of the political spectrum tend to tout the will of the people when they're in power and warn about the tyranny of the majority when they aren't. Buchanan, generally a libertarian, was always in the minority. So it isn't difficult to see why he wouldn't be particularly fond of pure democracy. But that doesn't even mean he was wrong, much less some sort of academic supervillain.

There's a lot of truth to the old Winston Churchill axiom that democracy is the worst form of government, except for all the others. To value democracy over all else is to submit to mob rule. Among other positive outcomes, this is why we have a Bill of Rights. There are some principles that we value more than democracy — principles such as free speech, the free press, habeas corpus, the right to an attorney. We don't allow these things to be voted away by a majority. And it's a good thing we don't, because polls over the years have consistently shown that if left to a majority vote, we would have scrapped the Bill of Rights a long time ago. (The ultimate illustration of this point came in 1995, when a cheeky Rep. Melvin Watt of North Carolina submitted the language of the Fourth Amendment to his House colleagues for a vote. They voted it down by a 3-1 margin.)

As Reason's Brian Doherty points out, one of the odd things about MacLean's book is that it attempts to smear Buchanan as a segregation apologist (there's no evidence for that accusation) while at the same time reading something sinister into Buchanan's mistrust of democracy. But the forced integration of the South *was* an act that thwarted the will of the majority — and a very necessary one. Forced integration imposed constitutional restraints on cities and states in which the majority was treating a minority as second-class citizens.

But you don't need to go back to Jim Crow to see how democracy can undermine justice. Our entire mass-incarceration problem is a lesson in the pitfalls of democracy. Even as the crime rate dropped dramatically in America from the mid-1990s until about 2015, in most years a large majority of the country continued to believe that crime was getting worse. Consequently, for about two generations, America's two major political parties competed to see who could be the toughest on crime — who could do the most to empower the police, expand the prisons, provide more tools to prosecutors, execute more people for more crimes more often — and strip the accused of their rights. They did it because this is what voters wanted. (And because it was easy to demagogue crime to make voters fear it even more.) In places such as California, democracy in its purest form — direct democracy — gave us draconian policies such as Three Strikes.

Look at the elections of judges. Electing judges is obviously a more democratic policy than appointing them. But it's far from clear that judicial elections make the courts fairer or more just. In fact, the evidence suggests otherwise. A 2015 study by the Brennan Center for Justice found that judges facing reelection or retention hand out harsher sentences as Election Day approaches. Similar studies in Washington and Pennsylvania have found similar results. The studies further found that judges who were retiring — i.e. no longer influenced by the democratic process —

were less likely to impose punishment harsher than the sentencing guidelines. The Brennan study also found that in states where judges are elected, the more supportive the public is of capital punishment, the more likely judges are to hand down death sentences when they're up for reelection. A 2016 study found that sentences of black (but not white) defendants increased by 2.4 percentage points in the final six months of a prosecutor's election cycle. A 2015 Reuters study found that appellate court judges who were elected rejected the appeals of death row prisoners at twice the rate of judges who are appointed. In Alabama, judges can impose the death sentence even if a jury recommends otherwise. And not surprisingly, judges are more likely to do so during election years.

If you value democracy above all else, you ought to be celebrating these findings. This is the democratic process doing exactly what it's supposed to do: These elected officials are responding to the will of the people. But I'll go out on a limb and assume that someone of Nancy MacLean's politics would *not* celebrate these findings. And if I'm right, that's because there are some principles that she values more than democracy — justice, fairness, mercy, equality before the law.

The United States leads the developed world in incarceration. We also have one of the world's most politicized criminal justice systems. It seems unlikely that these two things are coincidental. We're the only country in the world where prosecutors are elected, and we're one of only a few where judges are. Incidentally, 95 percent of America's prosecutors are white, and nearly 80 percent are white men. These are the people who disproportionately send black people to prison. This, too, is democracy in action.

A 2007 study of prosecutors in MacLean's own state of North Carolina found that in election years, criminal defendants were significantly more likely to be convicted and less likely to have their charges dismissed. Interestingly, this effect was more pronounced for drug and property crime than for violent crime. Which means that in cases where prosecutors had room for discretion, they were more punitive in election years. Moreover, the effect was even more pronounced among district attorneys facing competition for reelection. In other words, more democracy meant more punitiveness. In fact, a 2012 study of district attorney campaigns found that when incumbent prosecutors do have election opponents, the campaign rhetoric is rarely about policy or priorities, and it tends instead to be more about personality, and aberrant, high-profile cases.

There are counterexamples to all of this. For example, we've recently seen voter pushback against aggressive prosecutors in some parts of the country. In places such as Chicago, Philadelphia, Houston, Cleveland, western Mississippi and Orlando, voters have ousted incumbents known for their punitiveness, ousted incumbents who failed to hold police accountable in high-profile cases or elected reformers after high-profile wrongful convictions or incidents of corruption. These are examples where, if you value fair-minded prosecutors, democracy worked. But it only worked after failing for a very long time. And it has largely worked only in large cities or jurisdictions with large black populations. It's far less likely to work in jurisdictions where the groups most likely to be victimized by the criminal justice system are more clearly in the minority.

In other areas of criminal justice, the role of democracy is less clear. For example, county sheriffs are elected, while police chiefs are appointed. It seems intuitive to think that whether a police executive is elected or appointed might affect how they approach issues such as accountability, transparency, use of force, respect for civil and constitutional rights, and so on. Unfortunately, there hasn't been a whole lot of research in this area. Anecdotally, police chiefs seem to run somewhat more transparent agencies and seem more likely than sheriffs to discipline officers, work with civil rights groups and support reform-oriented policies such as community policing. They also seem more likely to favor gun control. But it could also just *seem* to be that way because the more outspoken police chiefs tend to oversee departments in large cities, while the most outspoken sheriffs tend to be from more western, conservative states.

There are a few parts of the country that also elect public defenders. Whether this is a good or a bad thing, again, depends on what principles you value more than democracy. And even then, the results are mixed. If you think indigent defendants deserve a robust, spirited defense, and that the public defender should argue for the staff and resources to provide that, electing public defenders seems to work in places such as San Francisco. But in other places, candidates have won with campaign promises to slash budgets and to charge the poor for a public defense.

The point here is not that democracy is inherently good or bad for the criminal justice system. It's that it *isn't* inherently good or bad. It's far more complicated than that, which is exactly why it's worthy of study and discussion. And if that's true of criminal justice, it's likely true of most other areas of public policy. And that's exactly what public choice economists do.

We tend to fetishize democracy, but more democracy isn't always the answer to every problem. *Less* democracy may well be the answer to some problems. There's nothing sinister about pointing this out. It's merely recognition of the fact that the majority of people — or more accurately, the majority of voters — aren't always going to get it right every time. There's a wealth of documented human history to back that up.

MacLean undoubtedly disagrees with Buchanan and those he has influenced on where democracy is failing. And the principles she values more than democracy are likely different than those of Buchanan and other public choice economists. But she undoubtedly does prioritize *some* values over democracy. If a majority of Americans voted tomorrow to round up all redheads and exile them to the Arctic Circle, I'd imagine that a lot of people — MacLean included — would object.

Buchanan and other public choice theorists don't want to "chain" democracy. They merely argue that there are areas where democracy fails — and that we should therefore insulate the values we hold important from those failings. To make them into pariahs for this is disingenuous at best. That MacLean also contorts, misapplies and selectively quotes from them in the process suggests that there's a lot more than disingenuousness at work in her book.

To borrow from the great writer and civil liberties advocate James Bovard, democracy might be helpful if a group of five can't decide what to have for dinner. It's less helpful if that group consists of three wolves and two sheep.

