

## Democratic Contractualism and the Justification of Punishment: A Review of Corey Brettschneider's *Democratic Rights*

**Corey Brettschneider. *Democratic Rights: The Substance of Self-Government*. Princeton, N.J.: Princeton University Press, 2007; paperback, 2010; pp. x + 179**

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Princeton University Press's decision to issue a paperback edition of Corey Brettschneider's ambitious *Democratic Rights*, 3 years after the book's initial appearance, is one that students of democratic theory and political theorists in general should applaud. What makes the book ambitious is Brettschneider's attempt to develop a theory of "democratic contractualism" that promises answers to many of the vexing questions of political and legal philosophy. This theory is not altogether novel, of course, for Brettschneider is openly following the path of John Rawls and other contractualists. He extends the contractualist approach, however, by bringing it to bear on topics to which his predecessors have given little or no attention, such as judicial review and the rights of the punished. He also grounds the approach more explicitly even than Rawls did in a commitment to democracy—hence the adjective in "democratic contractualism." *Democratic Rights* is not only ambitious but distinctive, then, and marked by virtues that one does not always find in such books, being clearly written, carefully argued, and admirably concise. It is a book, in short, that is well worth the attention of democratic theorists and anyone who wants to know how far contractualism can take us in political and legal philosophy.

Whether that attention should lead its readers to embrace democratic contractualism is, in my view, doubtful. Democratic contractualism may help to clarify our thinking about important political and legal questions, but I am not convinced that it provides clear answers to them. I shall explain why below, with special attention to the issues of crime and punishment that are most likely to interest the readers of this journal.

Brettschneider's version of contractualism starts with democracy for two reasons. First, he is especially interested in problems of democratic theory, such as the various difficulties that arise when democratic procedures lead to outcomes that threaten individual rights. As the title of his book indicates, Brettschneider believes that the best way to address these difficulties is to develop an account of rights that is internal to democracy and respectful of democratic procedures rather than an account that regards rights as being prior to, and acting as a constraint upon, democracy. This reliance on *democratic* rights, as he puts it, "resolves rather than replicates the problem of constraint. Liberal theories face the

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