B.J.Pol.S. **40**, 917–923 *Copyright © Cambridge University Press, 2010*
doi:10.1017/S0007123410000153
First published online 29 July 2010

Notes and Comments

On the Justifiability of Compulsory Voting: Reply to Lever

LISA HILL*

Annabelle Lever's thought-provoking article rests on three broad claims that I dispute, partly on conceptual and partly on empirical grounds. Her first claim is that low and declining turnout is not especially worrying. This encompasses the implication that socio-economic disparities in turnout are not significant and the claims that high turnout does not confer greater legitimacy on the outcome of elections and that abstention connotes consent and even participation. Her second claim is that there is nothing special about voting as a means for self-government. This encompasses the suggestion that 'the consequences of voting are too uncertain for voting to be a necessary implication of our duties'. Her third claim is that 'voluntary political participation' is a defining value of democracy that is 'undercut' by requiring people to vote. This encompasses the claim that the harms of failure to vote do not justify compelling people to vote and the assumption that there exists a 'right' not to vote.[1] I address each of these arguments in turn.

IS LOW AND DECLINING TURNOUT CAUSE FOR CONCERN?

There is a general tendency throughout the article to underestimate the problem of low turnout, but first I would like to deal with it in relation to the problem of political inequality. According to Lever, the fact that 'it is age and education, rather than race, income and wealth that directly determine voting … makes it harder to know how troubling disparities in turnout really are'.[2] This makes it sound as though socio-economic factors are not implicated in low turnout, but it overlooks the facts that youth and low levels of education are surrogates for other forms of social and economic exclusion. Furthermore, the fact that age and education levels are the strongest indicators for abstention does not make other socio-economic indicators disappear as significant correlates, something that Lever's article tends to gloss over. Aside from the evidence for age and education levels, there is a substantial body of cross-national research pointing to strong negative correlations between voting and such characteristics as social isolation, homelessness, residential instability, being a new immigrant, economic marginality and unemployment.[3] This is a pattern that is well documented in the British case;[4] worse still, Britain's socio-economic status (SES) voting gap has

* School of History and Politics, University of Adelaide (email: lisa.hill@adelaide.edu.au). The author wishes to thank Philip Gerrans for his insightful comments on an earlier version of this Comment. She also thanks her research assistants, Alan Goldstone and Kelly McKinley, for their able assistance and the Australian Research Council for the generous funding that made the completion of this paper possible.

[1] Annabelle Lever, 'Compulsory Voting: A Critical Perspective', *British Journal of Political Science*, 40 (2010), 897–915, pp. 900–901, 908–910, 910–12.

[2] Lever, 'Compulsory Voting', p. 901.

[3] Arend Lijphart, 'Unequal Participation: Democracy's Unresolved Dilemma', *American Political Science Review*, 19 (1997), 1–14; Lisa Hill, 'On the Reasonableness of Compelling Citizens to Vote: The Australian Case', *Political Studies*, 50 (2002), 80–101.

[4] Ruth Fox, Susanna Kalitowski, Matt Korris and Nicola Atkins, *The Audit of Political Engagement 6: The 2009 Report* (London: Hansard Society, 2009), pp. 19–20; Emily Keaney and Ben Rogers,

been steadily widening for some time.[5] It is hard to see why this should not be a matter for concern or why we should be complacent about it for the sake of voluntary participation.

According to Lever, a key motive behind 'abstain[ing] from politics' is the desire for 'self-government'; furthermore, 'non-voting can reflect contentment with the available political choices or, at least, confidence that the winner, whoever it is, will be worthy of support'.[6] This line of argument is unconvincing because it relies on a naïve model of political quiescence. Though it is doubtless true that there are some people who abstain from voting for these kinds of reasons, generally speaking, the more socially and economically marginalized people are, the less likely they are to vote. We should therefore be suspicious of any explanation that assumes disadvantage is correlated with satisfaction. It simply takes silence or apathy for consent and it also conflicts with what survey data consistently tell us about abstainers, namely that they are less satisfied with the state of democracy than are voters. If disadvantage is largely what defines the abstainer, and advantage the voter, then something is going on besides the exercise of autonomy, 'free, equal and reasoned collective action', self-government, 'reasoned judgement' and democratic choice; namely, a democratic system breakdown characterized by such pathologies as unrepresentativeness and the steady transference of power from weak to already strong interests.

Putting aside socio-economic bias in declining turnout, the article also tends to gloss over the more general problem of low and declining turnout. Notwithstanding the bluntness of elections for conferring legitimacy, can we really agree that the legitimacy conferred by elections with around 60 per cent turnout is as high as that conferred by turnout of 95 per cent – as is routine in Australia? Is it acceptable when the voting public continues to shrink and, worse still, in a socially uneven manner? How low is permissible – 20 per cent, 10 per cent, 5 per cent? And are we still talking about democracy at such low levels of citizen participation?[7] Precisely at what point do we start to worry about this problem, if at all? At what point is it admitted that the system is no longer a democracy? Obviously, electoral withdrawal signifies that something is wrong, but there is no evidence that it makes things better; quite the reverse. Do we wait until democracy is the exclusive business of a minority of elites before we start to question the value of voluntarism? Lever denies that high turnout is a 'public good', but if it means high and socially even turnout (which it invariably does) and affects government behaviour in positive ways (which it does – see below), then surely it must be.

Even if Lever has agreed that we should do something about the turnout problem – a problem that none of the multitude of tested remedies (including proportional representation) is able to decisively arrest – she is still unsure about the capacity of compulsory voting to achieve even this effect. In fact, compulsory voting is by far the most effective means for raising voter turnout in the kinds of settings Lever has in mind; studies that underplay this capacity are generally based on faulty interpretations of the available data.[8]

(F'note continued)

A Citizen's Duty: Voter Inequality and the Case for Compulsory Voting (London: Institute for Public Policy Research, 2006), p. 5. http://www.ippr.org.

[5] Ben Rogers, 'Turnout is Really about Class: Compulsory Voting Would Give the Less Well Off a Stronger Political Voice', *Guardian*, 14 May 2005, p. 20.

[6] Lever, 'Compulsory Voting', p. 914.

[7] This provokes questions: What are the constitutive features of a democracy? How are democratic institutions justified? Since 'political equality' is an 'intrinsic value' of democracy (Albert Weale, *Democracy* (London: Macmillan, 1999), p. 42), then the undisputed capacity of compulsory voting to serve this value in terms of election turnout provides a powerful justification for compelling people to vote.

[8] Jonathon Louth and Lisa Hill, 'Compulsory Voting in Australia: Turnout With and Without It', *Australian Review of Public Affairs*, 6 (2005), 25–37.

IS VOTING OVER-RATED?

For Lever, 'voting is, at best, only one form of democratic political participation, and from some perspectives, not an especially important or attractive one'. One of the arguments invoked in support of this claim seems to me to prove, rather than refute, the case for compulsory voting; namely, that the exercise of the individual vote 'only when used in co-ordination with strangers … is likely significantly to advance our interests'.[9]

This is true in voluntary systems, but generally only for the disadvantaged; it is less true for advantaged people, because they know that the norm of voting among others like them will ensure that casting a vote will be worth the trouble. Informational certainty about the voting intentions of others with similar interests means that forgoing a relaxing morning at home will be worthwhile. However, under a compulsory regime, co-ordination among the disadvantaged will also be assured; it will no longer be irrational for them to vote and each vote will now be rendered more consequential.

Should we be complacent about low turnout for the sake of voluntarism? Since elections can be rather blunt instruments for communicating mandates, it is understandable that Lever would regard turnout as 'a poor proxy for legitimacy'. While there may indeed be other indicators of legitimacy, are they better or more consequential than voting? Elections are the means by which we decide who governs us and how; the belief that those who do not participate in them are consenting to the outcome is not justified because non-voting does not always connote consent; in most cases, it connotes something far less agentic. Elections remain the primary and most consequential means by which governors detect the consent or dissent of the governed.

I am perplexed by the argument that 'the consequences of voting are too uncertain for voting to be a necessary implication of our duties'.[10] Why should certainty of outcomes be a criterion here? The outcomes of wars and court cases are always uncertain, but that does not diminish or negate our duties to defend our country against invasion or to serve on juries. The state certainly has a responsibility to ensure that court cases are as fair as possible or that wars are conducted rationally and efficiently so that the sacrifices of citizens are not wasted, but surely this is a separate issue. In a similar way, the state should do its best to remove biases like malapportionment and vote-buying from an electoral system, but this is a separate issue from whether or not citizens should be required to vote. Rational behaviour is no more than maximizing probable utility; certainty of outcomes is not a necessary – let alone possible – condition for acting.

Lever writes as though elections are just one other form of self-governing activity. While she concedes that '[f]ailure to vote' may result in 'serious losses', she also insists that voting is not 'more important than other forms of collective choice and action'.[11] This assumption seems to me to be faulty given the centrality of representative parliaments in determining the breadth and legality of democratic activity. The idea that we can participate in self-governing activities in spheres other than (or instead of) legislative politics is problematic because it is the legislature that generally determines the democratic framework, that is, whether these other spheres 'of collective choice and action' will be allowed to exist. It can, for example, limit free speech and the right to protest; it can outlaw certain interest groups; it can make striking illegal. There is little point in celebrating the voluntary aspects of democracy when there are no democratic spheres left within which to participate voluntarily; and so what if I participate in other kinds of self-governing activity? It needs to be shown that such activities actually provide me with better and more effective kinds of representation than legislative ones, particularly if I am disadvantaged.

Further, it is rather idealistic to assume that those who fail to vote are otherwise engaged in potentially more consequential forms of civic activity. Failure to vote is, in fact, part of a generalized trend of political demobilization in industrialized democracies worldwide. The fact is that more and

[9] Lever, 'Compulsory Voting', p. 907.
[10] Lever, 'Compulsory Voting', p. 912.
[11] Lever, 'Compulsory Voting', pp. 909–10.

more electors are increasingly time-poor, and voting is often the only democratic activity for which they have time. Furthermore, it is probably the most efficient means for participating democratically given the amount of time it takes relative to the impact.

Even if people only turn up to vote for 'none of the above', this is still a meaningful activity. According to Lever, the latter denotes nothing more than that voters 'preferred this option to the others'.[12] I disagree: ticking a 'none of the above' option conveys vitally important information to politicians, potential politicians and other voters; it proclaims that there is a constituency of citizens whose votes are up for grabs and that an as-yet unavailable electoral alternative needs to be framed. For those who fail to vote because they find none of the existing candidates acceptable, this option could eliminate at least one ground for alienation from politics. This is particularly true of young abstainers; aside from the deprivation thesis, one major reason for youth disengagement is that conventional, and increasingly centrist, political agendas no longer resonate with young people.[13] Parties are failing to respond to this message because they do not have to; after all, young people do not vote. Instead, parties quite rationally cater to the older members of the community who do vote. But if the young were compelled to turn up, this would have to change and democracy would be enriched and deepened.

Lever argues that non-voters can express their 'capacities for self-government' in other spheres of life besides legislative politics. One example given is the family, which, if it is 'just', is 'both a school and model of democracy' capable of providing 'some of our most compelling experiences of mutuality, solidarity and responsibility, as well as some of the greatest challenges to our ideals of freedom, equality and deliberation'.[14] This is controversial for a number of reasons. First, few families are 'just'; whereas elections explicitly seek to guarantee formal equality of rights and power, families are notoriously bad at doing this. Of course, as Lever notes, the effect of votes on outcomes is not always certain, but their effect is far more certain at the polling booth than it is in the family. Furthermore, it is debatable whether families are the ideal site for democracy. While we would certainly want more democratic relations between adult members, the same does not always apply to children. Without advocating authoritarianism, if I were to let my children vote in elections about whether they should be allowed to subsist on a diet of Smarties, I would be rather a negligent parent. In any case, it is highly unlikely that democratic participation in local, less formal forums like the family will ever be a satisfactory self-protective and self-governing substitute for legislative politics.

The 'right to abstain', says Lever, enables 'the weak, timid and unpopular to protest in ways that feel safe' and 'prevent[s] coercion by neighbours, family, employers or the state'.[15] This spin on abstention seems disingenuous, considering that Lever has in mind 'long-established, stable and … functional democracies'. Moreover, anyone this vulnerable to electoral coercion is unlikely to be participating in other forms of self-governing activity apart from voting. Voting is perhaps the only form of political activity where a vulnerable person's privacy can be guaranteed absolutely. It is hard to see how the 'weak, timid and unpopular' could benefit from more disempowerment, especially where the disconnection involves such a relatively safe form of political engagement.

Can democracy really do without voters? And can we, as individuals, do without voting? Lever suggests that '[d]emocratic voting rights protect our interests as individuals even when we do not exercise them'.[16] I disagree. Unlike the 'right to marry', which Lever posits as analogous, voting is one of those rights that, when it goes unexercised too often and for too long, causes other rights (such as the right to equal treatment before the law; the right to equality of opportunity) to be undermined. If this were not true, port-barrelling would not be a cliché of politics. It is well

[12] Lever, 'Compulsory Voting', p. 911.

[13] Matt Henn and Mark Weinstein, 'Youth and Voting Behaviour in Britain' (paper prepared for the Annual Meeting of the American Political Science Association, San Francisco, 2001), pp. 19–20. See http://pro.harvard.edu/papers/050/050001HennMatt00.pdf

[14] Lever, 'Compulsory Voting', p. 909.

[15] Lever, 'Compulsory Voting', pp. 911–12.

[16] Lever, 'Compulsory Voting', p. 906.

documented, for example, that states tend to be more attentive to the demands of voting groups such as senior citizens and the middle classes, at the great expense of those who abstain. Political science has long known that voting 'helps those who are already better off'[17] and that 'if you don't vote, you don't count'.[18] By contrast, complete and socially even voting can have the opposite effect: Chong and Olivera's cross-country analysis of ninety-one countries over the period 1960–2000 'shows that compulsory voting, when enforced strictly, improves income distribution'.[19]

Therefore, although it is certainly true that governments 'we did not choose' should 'nonetheless protect our interests', this is not always what happens and it should not surprise us when it does not. The consequences of voting may sometimes be uncertain, but the consequences of abstention are not. Democracy, such as it exists, will go on without the participation of abstainers, governing them without their interests in mind and without their consent.

Voting not only protects our material interests; it also protects our rights. John Stuart Mill regarded the vote as a kind of insurance policy against state and domestic abuses of power and many have agreed with him. The US Supreme Court has asserted that the right to vote is fundamental because it is the 'preservative of all rights'.[20] It has also affirmed the right to vote 'as the citizen's link to his laws and government' and that it 'is protective of all fundamental rights and privileges'.[21] Were people to fail persistently and ubiquitously to express this right, there would be no check against the potential tyranny of those in power. Democratic participation preserves rights; failure to exercise our voting rights imperils all of our rights including the right to vote itself. In principle, one should not have to exercise a right in order to remain entitled to it; in practice, things may be different, particularly where this right is concerned.

MUST ALL SELF-GOVERNING ACTIVITIES BE VOLUNTARY?

According to Lever, compulsory voting 'undercuts the idea that voluntary political participation is a distinctive human good, and that democracies are justified in part by their ability to realize that good'.[22] This argument seems to take voluntarism as the defining feature of democracy. But if there is a defining feature of democracy, it is the fact that citizens determine who will represent and govern them. While it is agreed that 'voluntary political participation is a distinctive human good' and that democracies are partly justified 'by their ability to realize that good', this does not mean that the *means* for securing the widest possible scope for voluntary action must, by definition, be voluntarily achieved (although it is preferable). It is important to remember that democracy did not just evolve spontaneously: it was fought for and defended over centuries, so that people could live in greater freedom. Reformers did not see the democratic project as a matter of choice for the very reason that they valued freedom so much. An analogous case is a war of defence: people are justifiably conscripted to protect a society from foreign tyranny so that its people can live in freedom. It is not unreasonable to expect people to be willingly conscripted to vote in order to enjoy the freedom of

[17] S. Verba and N. H. Nie, *Participation in America: Political Democracy and Social Equality* (New York: Harper & Row, 1972), p. 338.

[18] Walter Dean Burnham, 'The Turnout Problem', in A. James Reichly, ed., *Elections American Style* (Washington, D.C.: The Brookings Institution, 1987), pp. 97–133, at p. 99.

[19] These findings tend to contradict Lever's imputation that compulsory voting achieves 'nothing more than raise turnout', if that. See Alberto Chong and Mauricio Olivera, 'On Compulsory Voting and Income Inequality in a Cross-Section of Countries', Working Paper No. 533 (Washington, D.C.: Inter-American Development Bank Research Department, 2005); and also Dennis C. Mueller and Thomas Stratmann, 'The Economic Effects of Democratic Participation', *Journal of Public Economics*, 87 (2003), 2129–55.

[20] Anthony Ciccone, 'The Constitutional Right to Vote is Not a Duty', *Hamline Journal of Public Law and Policy*, 23 (2002), 325–57, pp. 325 and 328.

[21] United States Supreme Court, *Evans* v. *Cornman*, 398 U.S. 419 (1970), p. 422.

[22] Lever, 'Compulsory Voting', p. 910.

living in a reasonably well-functioning democracy, given the relatively low costs involved. They can be asked to do this precisely for the sake of self-government. Voting may be the one democratic activity that can be justifiably compelled, so that all the other voluntary forms can flourish.

There are times when one has to reduce a value in order to promote it. The distinction between honouring and promoting a value is apposite here. This distinction is a version of the analytical distinction between a consequentialist and a deontological attitude towards a particular value. Under a consequentialist strategy, we can design institutions so that the value is *promoted* by them whereas under a deontological strategy we can design them so as to *honour* the value.[23] Consequentialists will honour values only in so far 'as honouring them is part of promoting them, or is necessary in order to promote them'.[24] They will, for example, approve affirmative action programmes that reduce the value of equality of opportunity in order to promote it in the long term. Lever's argument about compulsory voting seems to fall into the deontological camp. In order to promote, overall, the values of freedom and democratic self-government, sacrificing the freedom to abstain from voting may be warranted. Therefore, although I agree with Lever that people 'must … have rights to limit their participation in politics', I do not agree that such rights necessarily encompass a right not to vote.[25] Despite the intuitive appeal of her argument, not all democratic action must, by definition, be voluntary.

For Lever, forcing people to vote 'undercuts a democratic conception of equality', because 'it implies that there is something uniquely important about electing representatives to a legislature', despite disagreement among people about whether it is uniquely important.[26] Therefore, to 'mandate voting, in the face of this disagreement, is effectively to say that some people's views are entitled to more respect and weight than others'. It is hard to see why disagreement about whether or not voting is 'uniquely important' should compel us to admit that requiring people to vote is wrong. Some people disagree that honour killing is wrong, but the state is justified in refusing to accord this opinion equal respect with the opinion that it is abhorrent.

Although I have argued for the centrality of elections to self-government, I agree with Lever that people's 'self-interest … is unlikely to provide a justification for forcing them to vote'. I also agree that failure to vote is not really free-riding and that the caricature of non-voters as 'selfish exploiters of voters, who are selflessly contributing to the common good' is misplaced.[27] Non-voting is not, as is commonly claimed, a form of free-riding since voters benefit, not only from voting but from the failure of others to do so. Rather, widespread failure to vote among distinct social groups is better understood as system failure.

But there are still 'harm' grounds for resorting to compulsory voting. The harm of government policies that distribute costs and benefits unequally may not give grounds for a duty to vote (though I am not even sure about this); it does, however, create objective grounds or reasons why I will want to vote in order to prevent further harm. There is a problem though: I am inhibited by the fact that I know that others like me will probably not vote, and therefore my vote will have little effect. Therefore, to regard compulsory voting as a paternalistic imposition on people may be the wrong way of looking at it. Instead, it may be better understood as a co-ordinating mechanism for reversing the norm of non-voting that exists among certain (usually low-status) social groups and that is perpetuated by the irrationality of their voting under a voluntary regime. In this light, rather than representing an unjustifiable burden imposed by a paternalistic state, compulsory voting is more of a benign co-ordinating mechanism for the joint enterprise of political community and democratic equality; in other words, it is a legitimate response to a collective action problem caused by informational uncertainty and maladaptive norms.

[23] Philip Pettit, 'Analytical Philosophy', in Robert E. Goodin and Philip Pettit, eds, *A Companion to Contemporary Political Philosophy* (London: Wiley-Blackwell, 1995), pp. 7–38, at p. 32.

[24] Philip Pettit, 'Consequentialism', in P. Singer, ed., *A Companion to Ethics* (Oxford: Blackwell, 1991), pp. 230–40, at p. 231.

[25] Lever, 'Compulsory Voting', p. 912.

[26] Lever, 'Compulsory Voting', p. 910.

[27] Hill, 'On the Reasonableness of Compelling Citizens to Vote'.

For this reason, compulsory voting might be best understood as a form of self-paternalism. Self-paternalism is not true paternalism (in fact, it is a form of autonomy). There are certain transactions or decisions that are usually regretted; for example, selling oneself into slavery or failing to wear a seat belt, which has led to an injury. These are decisions that rational citizens might retrospectively wish they had not been in a position to make; accordingly, people will generally agree to laws that will prevent them from yielding to actions 'which they deem harmful to themselves'.[28] In contrast to the standard liberal model of individuals being at all times the sole and best judge of their own interests, this model of 'retrospective rationality' anticipates 'many occasions on which the individual concerned might mistake [his or her] future interests and, hence, on which legal compulsion could help protect a person from [him or her]self'. Individuals cannot always 'adequately anticipate their future preferences. Retrospective rationality saves them from this fate'.[29] The case of Ulysses and the Sirens offers a useful analogy, an example that also underlines the important distinction between our imperfectly informed (and often irrational) *desires* and preferences, on the one hand, and *reasons* informed by objective interests, on the other. Compulsory voting serves reasons rather than desires and preferences.

Lever seems to assume the existence of a 'right' to abstain from democratic participation (she refers a number of times to rights 'to abstain, to withhold assent, to refrain from making a statement or from participating').[30] As I have conceded above, many forms of political association should be voluntary in a democracy. But the existence of a right not to vote seems doubtful and, as far as I can tell, has yet to be recognized in any liberal-democratic court. Many voting libertarians assume that the right to vote can be inverted or waived, but the fact that this assumption is problematic has been shown repeatedly in landmark American legal cases. US courts have found, for example, that there is no right to waive such rights as the right to workplace safety, a minimum wage and equal employment opportunities. Some cases have also confirmed that an individual's ability to waive constitutional rights in exchange for government benefits is limited. Some rights (such as the right to bear arms or the right to a state-funded education) can be waived, but this does not mean that all rights can be waived; neither does it prove the 'general existence of inverse rights'.[31]

Some rights exist, not just to protect individual choice, but to serve other ends. If a particular right defines the structure of government or even the structure of a decent society, then any individual's desire to waive is irrelevant.[32] A good example is the right to be free from slavery and involuntary servitude. The Thirteenth Amendment of the US Constitution was designed not just to protect individual liberty, but to eradicate a practice that violently conflicted with the ideal of a free society. If, hypothetically, an Afro-American citizen assented to a life of slavery, the state would not recognize this attempt to waive a right to equal protection since that state has an interest in maintaining a society free from slavery.[33] The same would be true of many other rights such as a right to education and the right to vote. The right to vote is not just an individual right; it also exists for the purpose of constituting and perpetuating representative democracy, a collective benefit.[34] The *right not to vote* cannot be universalized because it could potentially destroy the form of government for which the *right to vote* exists, that is, democracy.

[28] Guido Calabresi and A. Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral', *Harvard Law Review*, 85 (1972), 1089–128, p. 1113.

[29] Robert Goodin, *Political Theory and Public Policy* (Chicago: University of Chicago Press, 1982), p. 49.

[30] Lever, 'Compulsory Voting', pp. 911–12.

[31] Anonymous, 'The Case for Compulsory Voting in the United States', *Harvard Law Review*, 121 (2007), 591–612, p. 599; David Fellman, *The Defendant's Rights Today* (Madison: University of Wisconsin Press, 1976), p. 182.

[32] Seth F. Kreimer, 'The Problem of Negative Rights in a Positive State', *University of Pennsylvania Law Review*, 132 (1984), 1293–397, p. 1387.

[33] Kreimer, 'The Problem of Negative Rights', pp. 1387–8.

[34] Anonymous, 'The Case for Compulsory Voting', p. 600.