

# The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration

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## I. INTRODUCTION

That the last several decades have seen an explosion of Americans' reliance on imprisonment as a penal sanction is unquestioned.<sup>1</sup> So vast has this expansion been that the term "mass incarceration" has entered scholarly vocabulary as a way of describing this phenomenon.<sup>2</sup> The sheer cost of maintaining this prison state may indeed be making it buckle somewhat under the weight of the incarcerateds' fiscal burden.<sup>3</sup> Yet, for now, the prison state survives.<sup>4</sup> It may weaken, soften, change a bit further, but it will not die unless we understand what makes it strong.<sup>5</sup>

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<sup>1</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* 7–8 (2010) (“[T]he United States now boasts an incarceration rate that is six to ten times greater than that of other industrialized nations—a development directly traceable to the [post-1982] drug war.”) (citation omitted). Continues Alexander: “The only country in the world that even comes close to the American rate of incarceration is Russia, and no other country in the world incarcerates such an astonishing percentage of its racial or ethnic minorities.” *Id.* at 8.

<sup>2</sup> See, e.g., MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993 (2010); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010); Jonathan Simon, *Consuming Obsessions: Housing, Homicide, and Mass Incarceration Since 1950*, 2010 U. CHI. LEGAL F. 165 (2010).

<sup>3</sup> See Nancy Wolff, *Marie Gottschalk*, *The Prison and the Gallows: The Politics of Mass Incarceration in America*, 33 J. HEALTH POL., POL’Y, & L. 332, 337 (2008) (book review) (“One possible way to reduce reflexive inhumanity . . . is by emphasizing self-interest—that is, by making people aware of how much it costs to support mass incarceration (approximately \$200 billion annually).”). Wolff argues, however, that a more effective strategy would be to focus on the cost per crime category, highlighting the dramatic incarceration costs for fairly minor crimes. See *id.* at 337–38. See also ALEXANDER, *supra* note 1, at 14 (noting that bursting state budgets in a period of recession have led some states to modestly soften their drug laws); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1297 n.152, 1304 (2004) (optimistically concluding that it “appears that the financial cost of mass incarceration to taxpayers is beginning to sway legislators toward curbing prison growth” and that “the costs of mass incarceration might similarly place an outer limit on legislative determinations of sentences, with a preference for noncarceral alternatives, especially for low-level drug offenses.”).

Numerous theories have, of course, been floated to explain why the prison state was born and still thrives.<sup>6</sup> Explanations range from the rise of modern conservative politics<sup>7</sup> to the need of a fractured citizenry to build social solidarity around a common scapegoat.<sup>8</sup> I tend to believe that there are multiple causes of the prison version of Leviathan's rising.<sup>9</sup> Yet one cause supported by converging sources of empirical data too often ignored is a form of democratic pathology, specifically, the absence or ill health of populist deliberative democracy.

Populist deliberative democracy (PDD), briefly defined, has several features.<sup>10</sup> First, it involves all social groups widely in policymaking.<sup>11</sup> It does not

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<sup>4</sup> See ALEXANDER, *supra* note 1, at 9, 11, 14 (noting that “[f]ar from fading away, it appears that prisons are here to stay[,]” especially given that “[t]here is no broad-based movement brewing to end mass incarceration” and that the ill effects of mass imprisonment are substantial even if many individual sentences become somewhat shorter).

<sup>5</sup> See López, *supra* note 2, at 1068-69 (arguing that mass incarceration's modern manifestation as a major tool in perpetuating racial stratification is likely to slow or halt reform of the carceral trends of the past few decades).

<sup>6</sup> See, e.g., JOHN HAGAN, WHO ARE THE CRIMINALS?: THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REAGAN 2, 104-07 (2010) (arguing that the politicization of criminal justice policymaking, a growing free market philosophy favoring de-regulation of financial crimes but racially-biased enhanced regulation of minority street crimes, and the collapse of an American economy generating a reasonably equal distribution of wealth combined to foster mass incarceration's rise); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 4-5, 7 (2007) (arguing that mass incarceration has taken on a life of its own as it has become a model for solving a wide array of social problems and organized methods of governance—affecting how government handles welfare, education, immigration, and a host of other matters while creating powerful interest groups vested in mass incarceration's continuing rule).

<sup>7</sup> See López, *supra* note 2, at 1031-36 (summarizing the theory that mass incarceration arose as a conservative counter-punch against the successes of the mid-twentieth century's civil rights movement).

<sup>8</sup> See Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 832 (2000).

<sup>9</sup> ALEXANDER, *supra* note 1, at 2-3 (rooting mass incarceration's rise in a search for replacing the Jim Crow system of racial control); Kennedy, *supra* note 8, at 830-31 (viewing mass incarceration and harsh criminal justice system penalties more generally as serving symbolic unity among an increasingly diverse and morally divided American public); Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 237 (2009) (partially attributing mass incarceration's continued existence to policy and advocacy failures, particularly concerning the availability of effective alternatives to imprisonment).

<sup>10</sup> The term “populist deliberative democracy” here is mine, but its features are similar to those described by many commentators as essential to the success of deliberative democracy schemes more generally. See Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 271, 276-96 (2006) [hereinafter Taslitz, *Deliberation*] (discussing the nature, structural features, and benefits of deliberative democracy generally). The particular way in which I phrase those features here tracks how they play out in the particular context of mass incarceration in the pages to follow.

reject representative decision-making, but representatives act only after receiving widespread and diverse input from individuals and social groups.<sup>12</sup> Second, it provides such diverse persons and groups ample opportunity for effective voices in deliberative fora; that is, voices in relatively small venues offering opportunities for *informed* discussion with the real prospect of such discussion at least sometimes altering policy outcomes.<sup>13</sup> Third, all this activity occurs in an expectation of compromise rather than domination.<sup>14</sup> Citizens and groups practiced in realizing this spirit understand its mutual benefits and develop the skills necessary to achieve them.<sup>15</sup> Fourth, political activity aims at inclusion, not exclusion, requiring a strong commitment to individual liberties.<sup>16</sup> Fifth, and finally, the deliberative, inclusive spirit knows no exceptions, requiring, for example, even convicted offenders to have some voice in their fate.<sup>17</sup>

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<sup>11</sup> See *id.* at 276 (“For deliberation to be democratic, it must be inclusive, using an expansive definition of who is part of the process, that is, of who has the right to deliberate—or at least a voice in choosing the deliberators—and of who is included in the group to whom deliberators owe their justifications.”). See also AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 3–4, 8–9 (2004) (making a similar point).

<sup>12</sup> See ROBERT W. BENNETT, *TALKING IT THROUGH: PUZZLES OF AMERICAN DEMOCRACY* 2–3, 35–40 (2003). Bennett distinguishes his approach from “deliberative” ones because he is more concerned with the benefits of political conversation than with whether it achieves viable outcomes. See *id.* at 2. Deliberative democracy, on the other hand, is “usefully defined as a system of political communication of publicly-stated reasons for proposed collective outcomes, culminating in common action.” Taslitz, *Deliberation*, *supra* note 10, at 276. In all other respects, however, Bennett’s theory shares the goals of deliberative ones and usefully informs them. See also *id.* at 277 (“Most deliberative theorists also recognize that resource constraints, such as limited time and money, often require selecting representatives to deliberate on our behalf.”).

<sup>13</sup> See ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 138–39 (1999) [hereinafter *TASLITZ, CULTURE OF THE COURTROOM*] (explaining “effective” voice); Taslitz, *Deliberation*, *supra* note 10, at 277 (“[M]any thinkers favor encouraging deliberation among smaller, more local populations where greater participatory deliberation may be feasible.”).

<sup>14</sup> See GUTMANN & THOMPSON, *supra* note 11, at 3–5; Taslitz, *Deliberation*, *supra* note 10, at 277 (noting that one characteristic of a deliberative democratic process is that it involves “reason-giving among free and equal persons seeking fair terms of cooperation.”).

<sup>15</sup> See *infra* text accompanying notes 96–108.

<sup>16</sup> Deliberative theorists differ on whether a deliberative *process* is sufficient or whether substantive constraints on that process’s outcome are also necessary. See Taslitz, *Deliberation*, *supra* note 10, at 277–78. Here I side with writers favoring substantive constraints. Those writers fall into two camps. Camp 1 argues that some outcomes, “such as enslaving certain classes of human beings, are inconsistent with the very idea of reason-giving communication among equals.” *Id.* at 278. Camp 2 sees substantive constraints as inherent in the very nature of deliberation. *Id.* “For example, without free speech, there cannot, by definition, be open reciprocal communication, and without freedom of religion, certain views will inappropriately simply be taken off the table.” *Id.* One major function of a constitution is to delineate these substantive constraints. See *infra* text accompanying notes 96–108 (elaborating on the importance of inclusion).

<sup>17</sup> See JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY*, 10 (2006) (analyzing the causes and consequences for American democracy of denying felons and ex-felons the right to vote); KATHERINE IRENE PETTUS, *FELONY*

This definition, of course, portrays an ideal type.<sup>18</sup> Real social institutions will display these features in degrees, not dichotomies.<sup>19</sup> But the “ideal” here is a practical one, its features’ value in reducing state punitiveness having been shown in various studies.<sup>20</sup> Where it is most closely realized, publics will likely seek shorter and less frequent periods of imprisonment, alternatives to incarceration, and an embrace of rehabilitation as one important goal of criminal punishment.<sup>21</sup> But this sort of democracy itself should also reduce crime by enhancing state legitimacy and citizen respect for law and heightening the overall level and equality of distribution of that ever-elusive idea of human happiness.<sup>22</sup> Happiness, it turns out, is anti-criminogenic.<sup>23</sup>

This paper looks at converging sources of evidence for this thesis. Thus, the paper begins in Part II.A by examining studies of inter-state variation in punitiveness, variation closely linked to the strength of PDD institutions and culture. Next, in Part II.B, the paper explores comparative national data, concluding that countries with higher levels of important aspects of PDD have lower incarceration rates than countries like the United States that are influenced more by raw populism than the deliberative kind. Paradoxically, PDD-like processes seem to lead to greater deference to criminal justice experts because criminal justice policies become less politicized. Those experts in turn tend to favor alternatives to incarceration.

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DISFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES 4-5 (2005) (making a similar point).

<sup>18</sup> See Dhananjai Shivakumar, *The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology*, 105 YALE L.J. 1383, 1399 (1996) (“Ideal types are theoretical constructs that model certain aspects of social reality and help us to explain particular historical conditions. For example, ‘perfect competition’ is an ideal type that models a process of human behavior under explicit assumptions *that actually hold true in no historical society.*”) (emphasis added). Nevertheless, “the comparison of an actual group of sellers and buyers within this model yields significant insight into how the varying levels of information in the markets...may affect behavior.” *Id.*

<sup>19</sup> See Cass E. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962, 1018–20 (2005); Taslitz, *Deliberation*, *supra* note 10, at 277 (“Deliberative democracy is not an either/or affair, but rather a spectrum of institutions, some of which may themselves involve little deliberation but which, as a whole, promote deliberative ideals.”) (footnotes omitted). Among the justifications for deliberative democracy are enhancing governmental legitimacy, promoting public spiritedness, unifying diverse social groups into a “People,” and promoting public scrutiny and error correction. *See id.* at 279–84. Poorly designed or implemented deliberative institutions can, however, fail to achieve, or can even undermine, these goals. *See id.* at 310–13 (cataloguing the cognitive dangers of poorly-created or executed deliberative mechanisms). Fairly precise and detailed technical precautions are thus required for deliberative democracy to achieve its promise. *See id.* at 313–15.

<sup>20</sup> *See infra* Part II.

<sup>21</sup> *See id.*

<sup>22</sup> *Id.*

<sup>23</sup> *See infra* text accompanying notes 383–412.

Part II.C examines the likely effect of more deliberative, inclusive criminal justice policymaking by incorporating the voices of the group most harmed by crime: the victims of crime in poor, urban, racial-minority communities. Those victims tend to favor broader social reforms to prevent crime in the first place and more rehabilitative than retributive responses when crime does occur.

Part II.D examines “democratic social science”: the use of social science mechanisms that either mimic PDD or achieve some of its benefits. Incorporating such social science in current policymaking processes, with some modifications to increase the political salience of that social science, should also moderate excessive retributivism, which is oft ill-informed.

Part II.E explores empirical data on what enhances individual and group happiness, finding that PDD practices increase happiness, thereby decreasing both crime itself and the punitive public spirit.

Part III, the conclusion, steps back to synthesize the more specific points made in this paper. No single paper can “prove” that PDD would soften national impulses toward mass incarceration. I argue, however, that I have at least made a plausible case that this may be so, meriting further research. I also claim that this study of the PDD-carceral connection teaches several lessons for softening criminal justice policy in positive ways.

First, more informed decisions will be better ones. That requires some deference to criminal justice experts. But encouraging such deference simultaneously requires better educating the public. “Teaching” is useless, however, unless students are attentive and open-minded. Deliberative mechanisms that engage the public with the specifics of concrete cases and compel them to engage with people outside their social sphere and ideas outside their political one help to encourage such attentiveness and open-mindedness. Indeed, such mechanisms better enable ordinary persons to draw on their own justice instincts in a more effective, informed way. Unfortunately, these mechanisms require small-group contact, making them hard to implement on a widespread basis.

Second, any mechanism that encourages greater empathy for other groups will moderate carceral impulses. Again, such empathy requires prolonged, increased contact with members of such groups in shared tasks. Such contact is likewise hard to foster society-wide.

Ultimately, therefore, reformers should encourage any empathy-promoting, accurate information-expanding, and particularly inclusive deliberative efforts in connection with criminal justice. That may lead to small victories and gradual improvement in currently harsh carceral policies. More likely, however, if the thesis suggested here is correct, more fundamental changes in America’s political system to move away from raw populism toward more deliberative populism will be necessary. I can see no such changes on the horizon. Absent unexpected shocks to the political system, therefore, I see an immediate future of, at best, modest improvement in a bleak carceral justice polity.

## II. EVIDENCE OF THE VIRTUES OF PDD IN RESTRAINING HARSH CRIMINAL JUSTICE SYSTEM POLICIES

Evidence of the virtues of PDD in reducing mass incarceration comes from converging sources of data, including respectively comparative interstate data, comparative international data, comparative intrastate data, democratic social science, and happiness studies.

### A. Comparative Interstate Data

Political scientist Vanessa Barker recently published one of the first studies seeking to answer this question: Why do states vary in their degree of reliance on mass incarceration?<sup>24</sup> Barker ignored outlier states—those that were extraordinarily harsh or mild—selecting three states that she saw as representative of three major American approaches to mass incarceration: California, New York, and Washington State.<sup>25</sup> Barker found that the more decentralized the decision-

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<sup>24</sup> VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* 4–8 (2009).

<sup>25</sup> *See id.* at 10–11, 15–18. Race, of course, always plays a role in the American story of mass incarceration, but it cannot alone explain differences in incarceration rates. *See id.* at 18–19. “Racial politics rather than racial demographics shape imprisonment patterns and are likely to vary by political context.” *Id.* at 18. For example, New York has nearly twice the African-American population of California yet a far more moderate imprisonment regime. *See id.* at 18–19. This difference partly results from New York’s relatively greater effectiveness in incorporating Blacks into its political system, unlike the more racially-polarized politics of California. *See id.* Nor does Washington State’s low absolute and low proportionate Black population alone explain why that state opted for penal *de-escalation* when facing high crime and a rapidly-growing Black population in the 1960s. *See id.* at 18. Some theorists indeed argue that a large or growing Black population triggers a sense of majority White racial threat, resulting in high imprisonment rates to restrict the “menace” and maintain social distance from it. Loïc Wacquant, *Deadly Symbiosis*, 3 *PUNISHMENT & SOC’Y* 95, 95, 120–21 (2001). Washington (growing Black population) and New York (large absolute and proportionate Black population) do not fit this model. *See* Loïc Wacquant, *The New “Peculiar Institution”: On the Prison as Surrogate Ghetto*, 4 *THEORETICAL CRIMINOLOGY* 377, 377 (2000) (arguing that the perceived mid-twentieth century failure of urban ghettos to adequately contain a growing Black working class led to racially-skewed prisons to serve the same goals as the ghetto: stigmatization, constraint, confinement, and institutional-encasement of a racially-tainted class). *See* BARKER, *supra* note 24, at 18. Other theorists argue that when the Black population exceeds a certain level, its sheer size gives that population sufficient political clout, leading to lower or less racially-disparate incarceration rates. *See* Bradley Keen & David Jacobs, *Racial Threat, Partisan Politics, and Racial Disparities in Prison Admissions: A Panel Analysis*, 47 *CRIMINOLOGY* 209, 215 (2009). That may help to explain New York’s relative carceral moderation but not California’s harshness in light of its still substantial Black population. Furthermore, the Black size tipping-point theory still turns on its role in involving Blacks in a more-inclusive political process. That intermediate step of inclusiveness—an element of PDD—would seem to be important, and local political cultures may affect the success with which inclusiveness is achieved. *See* BARKER, *supra* note 24, at 18–19. It is also worth noting that, while a greater degree of PDD in law-creation should contribute to lower rates of mass incarceration, that is not alone sufficient to prevent racial *disparities* in the criminal justice system. *See* TASK FORCE ON RACE AND THE CRIMINAL JUSTICE SYSTEM, RESEARCH WORKING GROUP, *PRELIMINARY REPORT ON RACE AND WASHINGTON’S CRIMINAL JUSTICE SYSTEM* 1–28 (2011)

making process, and the higher the degrees of collective agency, the lower the reliance on mass incarceration will be.<sup>26</sup> “Decentralization” means that there are structurally many easy points of access to decision-making processes by individuals and groups seeking social change.<sup>27</sup> “Collective agency” measures the degree to which ordinary people are in fact mobilized into the policy making process in a deliberative fashion.<sup>28</sup> High scores on both measures are required to reduce mass incarceration.<sup>29</sup>

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(documenting such disparities). This is partly so because of implicit or unconscious racial biases. *See id.* at 30–36.

<sup>26</sup> *See id.* at 36–46. Barker’s study focuses on *imprisonment*, not on non-incarcerative penal sanctioning. *See id.* at 14–15. Although non-incarcerative alternatives can help to enlighten understanding mass incarceration, it is *incarceration* (in Barker’s words, “imprisonment”) that is the topic of the current symposium. *Id.* Barker herself focuses on imprisonment for several reasons: (1) all states use it; (2) it is the “most intrusive and tactile [of] displays of state power”; (3) it is a “raw and physical form of power that can subdue the minds and bodies within its grasp, especially as it infringes on a person’s sense of autonomy and selfhood”; and (4) it “captures something meaningful about the relationship between rulers and ruled in democratic societies,” namely “the extent to which individual rights and autonomy are valued and protected from abuses of governmental power and from the intolerance of the majority.” *Id.* at 14–15.

<sup>27</sup> *See id.* at 37. Barker speaks of the importance of the extent to which there is a high degree of “centralization” of political structures. *See id.* at 36–37. I find it easier to use the term “decentralization” to describe greater access to the levers of power rather than “centralization” to describe degrees of limited access.

<sup>28</sup> *See id.* at 40–41. More specifically, Barker defines high collective agency as high degrees of “civic engagement and social capital.” *Id.* at 41. The idea of “social capital” is drawn from Robert Putnam’s work. *See* ROBERT PUTNAM & RAFELLA Y. NANETTI, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 167-71 (1994). The term social capital “capture[s] how well people connect and cooperate with one another through civic engagement in order to bring about common goods.” BARKER, *supra* note 24, at 40 (footnotes omitted). People in societies with high social capital “tend to be active in politics and community life, creating both dense and loose networks of social ties that can then increase cooperation, social cohesion, and mutual trust.” *Id.* Barker starts her study by declaring that where “people share a sense of civic duty, responsibility for self-governance, and social connectedness, they may be less willing to inflict on one another the violence of penal sanctioning.” *Id.* at 41. On the other hand, low degrees of civic engagement combined with high degrees of social polarization, says Barker, likely means that “polity members’ antipathy toward one another, especially toward marginalized social groups, such as criminal offenders, can easily be expressed through penal sanctioning without much concern for the social reintegration of offenders.” *Id.*

<sup>29</sup> *See infra* text accompanying notes 30–60 (explaining why one state with high decentralization but low collective efficacy nevertheless demonstrated high rates of mass incarceration). Barker recognizes that some will find her argument—that more democracy, at least of a certain type, leads to lower levels of incarceration—counter-intuitive. *See* BARKER, *supra* note 24, at 172, 176. For the reasons to follow, I find Barker’s counterintuitive conclusions persuasive and enlightening. Differences in crime rates do not, it should be noted, suffice to explain differences in penalty. *See id.* at 16. Some states with relatively high crime rates have relatively low rates of imprisonment. *See id.* Political differences play a far more important role. *See id.* at 16–17.

## 1. California

California's system of governance, for example, is highly decentralized.<sup>30</sup> Propositions, initiatives, petitions, and other mechanisms enable, in theory, anyone to propose changes in the law, permitting the people to vote directly on their fate.<sup>31</sup> But California is woefully short on collective agency, particularly when it comes to crime.<sup>32</sup> The proposition and related processes are indeed generally captured by relatively powerful social groups.<sup>33</sup> Moreover, these groups then control a large degree of the public debate, using it to foster a culture viewing crime as resulting from individual moral failings and social indecency.<sup>34</sup> This approach polarizes society, pitting more powerful against less powerful social groups and fanning retributive flames.<sup>35</sup> The result is that California is by far the harshest of the three states that Barker studied.<sup>36</sup>

The proposition process at first blush seems to embrace an ideal of widespread citizen participation.<sup>37</sup> But a proposition either survives or fails. Compromise is not possible. The winner takes all.<sup>38</sup> Perhaps negotiation could, in theory, be possible in the crafting of the initial proposition. This does not occur, however, because affluent whites dominate the political process in an otherwise

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<sup>30</sup> See BARKER, *supra* note 24, at 19–21, 43.

<sup>31</sup> See generally JOE MATTHEWS & MARK PAUL, CALIFORNIA CRACKUP: HOW REFORM BROKE THE GOLDEN STATE AND HOW WE CAN FIX IT (2010) (discussing the history, flaws, and ill consequences for democracy of the initiative and related California governance processes).

<sup>32</sup> See BARKER, *supra* note 24, at 10 (arguing that high social polarization in California results in a “depressed sense of mutual obligation and heightened contentiousness and uncompromising, winner-take-all politics” in which “citizens tend to support and often demand that state elites pursue a more retributive penal regime”). *Id.* at 43 (“[F]ew people [in California] turn out to vote or participate in local affairs.”).

<sup>33</sup> See *id.* at 50–51.

<sup>34</sup> See *id.* at 10 (“[K]ey actors such as the governor, state officials, and social activists are more likely to view crime as a result of moral depravity, individual failing, and social indecency.”), 43 (noting California politics is “dominated by... a relatively small pool of the population”). This retributive regime also “changed the moral calculus of justice in the state, dramatizing the pain and suffering of crime victims as the justification for increased sanctions.” *Id.* at 10–11.

<sup>35</sup> See BARKER, *supra* note 24, at 43 (noting that California's political configuration, especially via the initiative process, has led “to more coercive social controls as a disconnected and divided polity readily calls on the state's power to punish to solve complex policy problems, especially those involving socially marginalized groups such as criminal offenders and racial minorities”).

<sup>36</sup> See *infra* text accompanying notes 37–144.

<sup>37</sup> See BARKER, *supra* note 24, at 43 (“California is an open polity, meaning that ordinary people and grassroots movements can [in theory] influence the policy-making process through multiple access points.”); MATTHEWS & PAUL, *supra* note 31, at 10–11, 170–71.

<sup>38</sup> See BARKER, *supra* note 24, at 43.

racially and class-diverse state.<sup>39</sup> Overall levels of voting, participation in local affairs, and other kinds of civic participation are also low.<sup>40</sup>

The result is that the skill of compromise with ideological opponents is undeveloped, social norms of reciprocity weak.<sup>41</sup> Moreover, neither the formal democratic process nor the state's political culture require input from diverse civic groups and individual citizens before propositions and their cousins hit the voting machines.<sup>42</sup> Reliance on propositions and initiatives also frees individual politicians from accountability for the outcome because no politician authored the legislation or was necessarily involved heavily in its passage or failure.<sup>43</sup> Once propositions are proposed, the only option left to both sides is mutual warfare.<sup>44</sup> Affluent whites usually win.<sup>45</sup>

California's system is thus, at best, one of agonistic populism, a means of non-violent warfare. At its worst, it is populism for well-off whites, empowering them in practice to exercise greater dominion over marginalized racial and class groups.<sup>46</sup> These are precisely the groups most victimized by both crime and its punishment and who, given limited time and financial resources, historically have the most difficulty in making their voices heard in public fora.<sup>47</sup> How California's political culture came to be what it is today is a complex story carefully traced by Barker, a task that she ably repeats to explain the rise of New York and Washington's very different political cultures.<sup>48</sup> What matters for my purposes here is not to re-tell those tales in any detail but to discuss a few selected high points and where they leave us today.

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<sup>39</sup> See *id.* ("Initially created to undercut corrupt politicians and express distrust of state elites, the initiative process has also been used to legislate intolerance toward minority racial and ethnic groups since its inception.").

<sup>40</sup> See *id.* at 42, 49–51.

<sup>41</sup> See *id.* at 43, 50. For a concise analysis of the importance of the role of reciprocity in social affairs, see Andrew E. Taslitz, *Reciprocity and the Criminal Responsibility of Corporations*, 41 STETSON L. REV. (forthcoming 2011).

<sup>42</sup> See BARKER, *supra* note 24, at 43.

<sup>43</sup> See *id.*

<sup>44</sup> The result of such warfare in the area of criminal justice is the weakening of social trust and solidarity among social groups. *Id.* at 19, 50–51, 83–84 (arguing that this warfare intensifies the majority's use of repressive state power to resolve social conflict in its favor while excluding minorities from equal citizenship in practice).

<sup>45</sup> See *supra* notes 35, 39 and accompanying text.

<sup>46</sup> This sort of raw populism, different from the more deliberative kind that I advocate here, succeeded in replacing California's earlier reparative criminal justice philosophy with a retributive one favoring the infliction of pain on offenders. See *id.*; BARKER, *supra* note 24, at 43–83 (tracing this history).

<sup>47</sup> See *infra* Part II.C.

<sup>48</sup> See BARKER, *supra* note 24, at 47–84 (California), 85–124 (Washington), 125–69 (New York).

The rising crime rate of the 1960s in this environment led to then-Governor Reagan's embrace of harsh penal sanctions as a solution.<sup>49</sup> Reagan portrayed his effort as a campaign to protect victims against brutality.<sup>50</sup> This passionate, emotive embrace of victims against their supposed assailants became the trope governing later criminal justice reforms bubbling up via the initiative and similar processes.<sup>51</sup> The eventual results extended through the years well beyond Reagan's time as Governor and included passage of the Three Strikes Proposition,<sup>52</sup> the Victims' Bill of Rights Proposition,<sup>53</sup> and the Crime Victims' Justice Reform Act Proposition,<sup>54</sup> all aimed at ever-harsher incarcerative policies.<sup>55</sup> This Reaganite retributive criminal justice philosophy proved politically advantageous to later politicians, leading it to play a continuing role in criminal justice "reforms" in California, likely doing so still.<sup>56</sup>

Recent California reforms, prompted in part by the escalating cost of incarceration, have been touted as marking a turn toward rehabilitation over retribution.<sup>57</sup> Rhetorically, however, the major reform so touted, the 2007 Prison Reform Act (PRA), again emphasized public safety and crime victims, not offenders' rights or place in the polity, as the sole justifications for a renewed rehabilitative emphasis.<sup>58</sup> Moreover, the PRA's main program is to expand prison

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<sup>49</sup> See *id.* at 47–49, 58–60, 62–67, 83, 101, 127; HAGAN, *supra* note 6, at 28–29, 137–67 (revealing how Reagan's views on crime as California Governor were later reflected during his time as America's President).

<sup>50</sup> See BARKER, *supra* note 24, at 65 (noting that Reagan "thoroughly intertwined crime, civil disorder, and race riots as a collective threat to democratic order"), 47–48, 67–68 (noting that the Reagan-Deukmejian "penalty package" increased penal sanctions for seriously violent crimes, linking the pain and suffering of victims to the need for change), 62, 127 (Reagan's view was that offenders are punished to avenge victims).

<sup>51</sup> See *id.* at 47–49.

<sup>52</sup> Three Strikes and You Are Out, Proposition 184, Cal. Gen. Assemb., Sess. 1993-1994 (Cal. 1994); see FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 1–14 (2001) (analyzing the history and social and political consequences of California's Three Strikes legislation).

<sup>53</sup> Victims' Bill of Rights, Proposition 8, Cal. Gen. Assemb., Sess. 1993-1994 (Cal. 1982).

<sup>54</sup> Crime Victims Justice Reform Act, Proposition 115, Cal. Gen. Assemb., Sess. 1993-1994 (Cal. 1990).

<sup>55</sup> See BARKER, *supra* note 24, at 47–49. The psychological reasons behind this harshness, Barker explained, were these: "Populism helped Californians make sense of the complex social changes associated with late modernity, translating rising crime, unruly youth culture, and racial unrest as signs of moral depravity necessitating strict discipline and authoritarian response." *Id.* at 49.

<sup>56</sup> See *id.* at 47–49, 66–84.

<sup>57</sup> See *id.* at 78–79, 80. But see Hadar Aviram, *Humonetarianism: The New Correctional Discourse of Scarcity*, 7 HASTINGS RACE & POVERTY L.J. 1, 47–52 (2010) (expressing cautious optimism about cost-based concerns prompting future California reforms but conceding massive obstacles to real, long-term improvements whose realization "remains to be seen").

<sup>58</sup> See BARKER, *supra* note 24, at 81 (arguing that California's recent purported increased emphasis on rehabilitation, especially in the PRA, was not "an indicator of deep-seated change"), 81–

capacity, pressure from the courts to alleviate over-crowding being a prime causal factor in the PRA's passage.<sup>59</sup> Building more prisons is hardly a turn away from mass incarceration.<sup>60</sup> California stands as a powerful example of how raw, unmediated populism—as opposed to the deliberative kind favored here—can result in extraordinarily harsh incarcerative policies heedless of social cost and proportionate justice.

## 2. New York

New York, occupying the middle rung of the harshness ladder, is decidedly not a populist state.<sup>61</sup> Its political system is highly centralized and bureaucratized.<sup>62</sup> Initiatives, propositions, and referenda are not options. Individuals and groups seeking to affect policy must navigate complex bureaucratic procedures.<sup>63</sup> Policy problems are viewed in technical rather than populist terms.<sup>64</sup> Governmental processes, even the budgetary process, are

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83 (explaining the failure in California, just three years before passage of the PRA, of Proposition 66, which aimed to soften the Three Strikes Law but was soundly rejected by the electorate because of populist appeals to the fear of crime). These results occurred despite earlier polls showing strong public support for the measure. See *California Field Poll, Release #2141*, FIELD RES. CORP., Oct. 13, 2004, at 2.

<sup>59</sup> See BARKER, *supra* note 24, at 80–81; Press Release, Cal. Dep't of Corr. & Rehab., Gov. Schwarzenegger Signs Historic Bipartisan Agreement, Takes Important Step Toward Solving California's Prison Overcrowding Crisis, (May 2, 2007), available at [http://www.cdce.ca.gov/News/2007\\_Press\\_Releases/Press20070503.html](http://www.cdce.ca.gov/News/2007_Press_Releases/Press20070503.html).

<sup>60</sup> Barker concludes,

[P]roposition 66's failure indicates the strength and persistence of California's populist political traditions and the longevity of its retributive penal regime rather than the emergency of a sustainable reform movement. Today, California's imprisonment rate continues to climb, hovering above the national average despite a brief period of decline between 1999 and 2002.

BARKER, *supra* note 24, at 83. In *Brown v. Plata*, 131 S. Ct. 1910 (2011), the Court affirmed a three-judge district court order to reduce overcrowding in California's state prison system to prevent continuing violations of the Eighth Amendment's prohibition on cruel and unusual punishment. But that holding does not likely mean that California will therefore abandon mass incarceration. To the contrary, on June 8, 2011, California prison officials unveiled a plan to comply with the *Brown* holding. That plan has three parts: (1) transferring some inmates to out-of-state prisons; (2) “[b]uilding new prisons, health care, and mental health facilities and converting juvenile detention centers to adult facilities”; and (3) shifting low-level, non-violent offenders to county jails. See *California Presents Long-Overdue Plan to Reduce Prison Overcrowding*, WHAT THE FOLLY (June 8, 2011), <http://www.whatthefolly.com/2011/06/08/us-news-california-presents-plan-to-reduce-prison-overcrowding> (last visited June 28, 2011). This plan hardly constitutes a massive reorientation toward alternatives to incarceration.

<sup>61</sup> BARKER, *supra* note 24, at 128.

<sup>62</sup> See *id.* at 128–29.

<sup>63</sup> See *id.* at 136.

<sup>64</sup> See *id.* at 45–46, 126–29.

notoriously opaque.<sup>65</sup> Where input is needed on special problems, New York's elites turn to expert commissions, rather than broad-based citizen participation.<sup>66</sup> Elites operate relatively free of public debate, often caught up in cronyism, patronage politics, and internal power struggles.<sup>67</sup>

This intense centralization again limits citizen experience in cross-group compromise and coalition-building outside elite hangers-on.<sup>68</sup> Public participation in governing is so low that New York has recently been placed under court order to improve voter participation.<sup>69</sup>

In this highly centralized environment of low collective efficacy, the state maintains its legitimacy in two ways: first, by portraying itself as encouraging policy in the name of the public good rather than merely fostering the individual pursuit of self-interest; second, by proving to be effective in providing essential public goods.<sup>70</sup> The latter tactic portrays the state as having and using technical expertise to solve common problems.<sup>71</sup> The most basic function of a state, of course, is public safety.<sup>72</sup> New York State, therefore, rather than waging war on behalf of victims, waged war on crime as a disease needing specialized knowledge and skills to eradicate it.<sup>73</sup> The state's need to constantly prove its effectiveness

<sup>65</sup> See *id.* at 134–37.

<sup>66</sup> See BARKER, *supra* note 24, at 140–41.

<sup>67</sup> See *id.* at 128–31.

<sup>68</sup> Barker elaborates:

New York does not allow for direct democracy, which limits public participation to voting for representatives and further concentrates power among elites. Because centralization routinely blocks citizens' access to elites and other key decision makers, citizens may become quiescent. Because their demands and protests are often met with advanced bureaucratic procedures and institutionalized channels of action, citizens may not be encouraged to develop a sense of their own efficacy in the political field. In this context, citizens may not develop a lively sense of civic responsibility, a responsibility to keep a check on state power.

*Id.* at 136.

<sup>69</sup> See *id.* at 136–67; U.S. CENSUS BUREAU, PERSONS REPORTED VOTING AND REGISTRATION, BY STATE: 2006, Table 4b (2006), <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/index.html> (only 37.6% of potential New York State voters actually voted, well below the national average).

<sup>70</sup> See BARKER, *supra* note 24, at 128–30.

<sup>71</sup> See *id.* at 129 (“They value expertise and scientific engagement with social problems and are therefore less likely to pursue strictly punitive responses, which are considered crass and unscientific.”).

<sup>72</sup> See *id.* at 162; ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868 52, 208 (2006) (tracing Lockean roots of this idea); N.Y. State Dep't of Corr. Services, *Pataki: We'll Reduce Crime Further Across New York State...*, 13 DOCS TODAY 2, 2 (2004) (“[G]overnment's most important responsibility [is] ensuring the safety and security of its people.”) (quoting Governor George Pataki) [hereinafter *Pataki Signs*].

<sup>73</sup> See BARKER, *supra* note 24, at 145–46, 167; BARBARA LAVIN MCELENY, CORRECTIONAL REFORM IN NEW YORK: THE ROCKEFELLER YEARS AND BEYOND 48 (1985) (“With this infection

also required it to show short-term results.<sup>74</sup> Accordingly, rather than investing in long-term rehabilitative strategies or ones designed to address the causes of crime, the state turned to targeted incarceration as a remedy.<sup>75</sup>

Targeted incarceration originally primarily meant locking up drug dealers and users and violent criminals.<sup>76</sup> Demonstrating criminal justice system effectiveness also required early attention to the needs of crime victims, providing them financial assistance, for example, via a Crime Victims Board to administer a victim's compensation program as long ago as 1966.<sup>77</sup> This early attention to crime victims likely dampened victim outrage, helping to prevent the rise of an angry victims' rights movement like that in California.<sup>78</sup>

Because it was public safety more than anything else that New York's elites sought to protect, they also pioneered efforts to soften responses to other sorts of non-violent crime.<sup>79</sup> During Governor Mario Cuomo's time in office, the state worked to treat non-violent, low-level, non-drug-using offenders relatively gently.<sup>80</sup> Cuomo picked up on earlier commissions' recommendation for alternatives to incarceration, such as fines, restitution, and community service.<sup>81</sup> He created the Division of Correctional Alternatives to encourage community-based programs, yet did so during the state's prison boom.<sup>82</sup> Cuomo and state legislators depicted these efforts as designed to free up resources to fight serious and other violent offenders more effectively.<sup>83</sup>

Under Governor Pataki's reign, Pataki rhetorically embraced harsher criminal punishments as essential to public safety.<sup>84</sup> But Pataki did not kill the major

comes crime—theft, burglary, mugging, prostitution, assault, and murder.”) (quoting Governor Nelson Rockefeller).

<sup>74</sup> See BARKER, *supra* note 24, at 129.

<sup>75</sup> See *id.* at 129–30.

<sup>76</sup> See *id.* at 129–30, 147–49.

<sup>77</sup> See *id.* 142–43; *Rockefeller Seeks State Fund to Aid Victims of Crime*, N.Y. TIMES, Oct. 24, 1965, at 1.

<sup>78</sup> See BARKER, *supra* note 24, at 143; N.Y. STATE DIVISION OF THE BUDGET, N.Y. STATISTICAL YEARBOOK 1979, Table L-9 (showing rising victim compensation); NEW YORK STATE OFFICE OF VICTIM SERVICES, <http://www.ovs.ny.gov/helpforcrimevictims/helpforcrimevictims.aspx> (last visited Apr. 15, 2011) (discussing rising victim services).

<sup>79</sup> See BARKER, *supra* note 24, at 153–58.

<sup>80</sup> See *id.* at 157; PAMELA L. GRISET, *DETERMINATE SENTENCING: THE PROMISE AND REALITY OF RETRIBUTIVE JUSTICE* 97–99 (1991); Mario Cuomo, *Governor of the State of New York, Annual Message to the Legislature*, Jan. 5, 1983, in, PUBLIC PAPERS OF MARIO CUOMO, GOVERNOR OF THE STATE OF NEW YORK 40–41 (1983).

<sup>81</sup> See BARKER, *supra* note 24, at 157–58; Cuomo, *supra* note 80, at 39.

<sup>82</sup> See BARKER, *supra* note 24, at 158.

<sup>83</sup> See *id.* at 157–58; Cuomo, *supra* note 80, at 40 (explaining that the State must “make the most effective use of police resources” by moving police from low-crime areas to the “fight against serious, violent, and organized crime”).

<sup>84</sup> See BARKER, *supra* note 24, at 162–63.

alternatives-to-incarceration-programs. Instead, he pushed for harsher sex-offender penalties, ended parole for violent first-offenders, and barred work release for violent felons.<sup>85</sup> Yet, under Pataki, the overall prison population dramatically declined, emptying prisons of nonthreatening criminals.<sup>86</sup> Moreover, Pataki signed legislation reducing the harshest aspects of the Rockefeller era drug laws.<sup>87</sup> Pataki considered those drug laws unduly harsh for non-violent offenders, though the remaining punishment scheme was still far from mild.<sup>88</sup> But the strong perceived link between endangered public safety and drug use seemed to be weakening.<sup>89</sup> Pataki described his efforts partly in economic terms, “right-sizing” prisons and aiming resources more squarely at violent offenders.<sup>90</sup> Post-Pataki governors and legislators have seemed willing to pursue a similar path.<sup>91</sup>

New York State government’s disease model of crime and its focus on containing violence rather than protecting victims or overtly assailing marginalized groups seemed to reduce, relative to California, social polarization like that occurring in the Sunshine State.<sup>92</sup> The political system’s need to show short-term results via efficient performance rather than waging moral combat led to relatively mild sanctioning systems for non-violent crime, harsh ones for violent offenders and, for a time, also harsh punishments for crimes like drug use that were popularly associated with violence, however misguided that perception may have been.<sup>93</sup> These simultaneous and opposing forces of incarcerative punishment versus rehabilitative release softened New York’s overly punitive tendencies

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<sup>85</sup> See *id.* at 163–64; James Dao, *Pataki Bars Sexual Offenders from New Probation Program for Nonviolent Felons*, N.Y. TIMES, May 1, 1995 at B4 (“I will not gamble with the safety of the public. People who commit felony sex crimes must serve their time in prison...”) (quoting Governor Pataki); GOV. GEORGE E. PATAKI, PUBLIC SAFETY AND SECURITY, at N.Y. STATE 2005-06 EXECUTIVE BUDGET 48 (2005).

<sup>86</sup> See BARKER, *supra* note 24, at 164 (noting HIV testing mandated for offenders “so victims do not suffer needlessly”); Press Release, N.Y. State Dep’t of Corr. Serv., *Press Release* (Jan. 23, 2004) (available at <http://www.docs.state.ny.us/PressRel/DOCSinitatives.html>).

<sup>87</sup> See BARKER, *supra* note 24, at 164–65; *Pataki Signs*, *supra* note 72, at 4.

<sup>88</sup> See BARKER, *supra* note 24, at 165; *Pataki Signs*, *supra* note 87, at 4 (“Hundreds of nonviolent [drug] offenders serving unduly long sentences will have an opportunity to be immediately reunited with their families” because of “meaningful reform that is both just and balanced.”).

<sup>89</sup> See *supra* note 88.

<sup>90</sup> See BARKER, *supra* note 24, at 164; Joseph B. Treaster, *Ideas & Trends: It’s Pataki, Sounding Like Cuomo: Drug Wars Cont.: The Liberals’ Unlikely Ally*, N.Y. TIMES, Feb. 5, 1995, at A3.

<sup>91</sup> See BARKER, *supra* note 24, at 165–66.

<sup>92</sup> See *id.* at 167.

<sup>93</sup> See *id.* *Supra* text accompanying notes 25–92.

without curtailing them entirely.<sup>94</sup> In this respect, elite, pragmatic rule seemed superior to affluent white populism.<sup>95</sup>

### 3. Washington State

Washington State, on the other hand, is both politically decentralized and highly collectively-efficacious, including in setting criminal justice policy.<sup>96</sup> The state has an initiative process, but Washington's political culture encourages deliberation and compromise over domination.<sup>97</sup> The system arose from the progressive populism of the farmers' cooperative movement, "which depended on collaboration among various social groups and between the state and civil society."<sup>98</sup> Civic engagement, social trust, and reciprocity norms have long been high.<sup>99</sup>

Major contributors to civic engagement are Washington's frequent use of town-hall meetings and hybrid state-citizen commissions, governance mechanisms heavily used since the 1960s.<sup>100</sup> Major commissions concerning criminal justice policy included the Washington State Citizens Council on Crime in 1966, the Washington State Commission on the Causes and Prevention of Citizen Unrest in 1968, and the Washington State Sentencing Guidelines Commission of 1981 to

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<sup>94</sup> See BARKER, *supra* note 24, at 167; *supra* text accompanying notes 25–92.

<sup>95</sup> Yet Barker cautions that "state officials have tended to prioritize public security...at the expense of individual freedom and autonomy." BARKER, *supra* note 24, at 167. Concludes Barker, "[t]he state's antidemocratic tendencies make it vulnerable to periods of increased punitiveness and increased reliance on confinement and other forms of state coercion, creating a restrictive form of citizenship in the name of the public good." *Id.*

<sup>96</sup> See *id.* at 42, Table 2.I. Barker measures the degree of centralization using the index of Governors' Institutional Powers (GIP) and the presence or absence of direct democracy measures like citizen initiatives. See *id.* at 42; Thad Beyle, *The Governors*, in *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 194, 212-13 (Virginia Gay & Russell L. Hanson eds., 8th ed. 2004) (collecting GIP measures for various states). Barker measures collective agency by a combination of voter participation rates and Putnam's composite index of social capital, "which includes how often people attend local town meetings, participate in local and state politics, and how much people trust one another." BARKER, *supra* note 24, at tbl.2.I, at b; see Beyle at 93 (summarizing voter participation rates for the various states); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000) (discussing the concept of, and measure of, social capital).

<sup>97</sup> See BARKER, *supra* note 24, at 44–45; see generally ELISABETH S. CLEMENS, *THE PEOPLE'S LOBBY: ORGANIZATIONAL INNOVATION AND THE RISE OF INTEREST GROUP POLITICS IN THE UNITED STATES, 1890-1925* (1997) (comparing organizational politics in California, Washington, and Wisconsin during the 1890-1925 period and concluding that Washington's progressive-style populism arose from the farmers' cooperative movement of the time for self-governance).

<sup>98</sup> BARKER, *supra* note 24, at 44.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 44–45.

1983.<sup>101</sup> These hybrid commissions include citizen representatives, civic leaders, and government actors.<sup>102</sup> These commissions “open up a space for dialogue between civil society organizations and state actors,” a space, Barker explains, “not available through conventional electoral politics” that “can potentially generate trust among the participants.”<sup>103</sup> The frequent use of town hall meetings is likewise used to encourage debate among “state officials, ordinary citizens, civic leaders, grassroots movements, and special interest groups.”<sup>104</sup> Says Barker, “[i]n these settings, participants are encouraged to listen to a range of different viewpoints and work through dialogue and negotiation to reach a compromise, if not consensus.”<sup>105</sup>

These governance practices have numerous benefits. They involve diverse social groups in the policymaking process, while convincing group members that their opinions are taken seriously by state elites.<sup>106</sup> These practices also promote the very idea of self-governance as a way to achieve state legitimacy.<sup>107</sup> These habits of cross-group social trust and interaction likewise discourage harsh penal sanctions.<sup>108</sup> Widespread incarceration, particularly if directed at the poor and racial minorities, infringes liberty, intensifies social division<sup>109</sup>—as many other commentators have shown<sup>110</sup>—and expands state power over civil society,<sup>111</sup> power seemingly wielded by the more against the less powerful.<sup>112</sup> When elites and the marginalized communicate routinely and are used to working together,

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<sup>101</sup> *Id.*; see David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, in 28 CRIME & JUSTICE 71 (Michael Tonry ed., 2001).

<sup>102</sup> See BARKER, *supra* note 24, at 44–45.

<sup>103</sup> See *id.* at 44; Lars Tragardh, *Democratic Governance and the Creation of Social Capital in Sweden: The Discreet Charm of Governmental Commissions*, in STATE AND CIVIL SOCIETY IN NORTHERN EUROPE: THE SWEDISH MODEL RECONSIDERED (Lars Tragardh ed., 2007).

<sup>104</sup> See BARKER, *supra* note 24, at 44.

<sup>105</sup> See *id.*; compare JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1984) (1981) (articulating a theory of the importance of open political communication).

<sup>106</sup> BARKER, *supra* note 24, at 44–45.

<sup>107</sup> *Id.*

<sup>108</sup> See *id.* (“The institutions and collective agency that make up Washington’s democratic process make polity members reluctant but not unwilling to employ repressive forms of state power against one another.”).

<sup>109</sup> *Id.*

<sup>110</sup> See, e.g., ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 22–39 (2003); Bruce Western, Mary Pattillo & David Weiman, *Introduction* to IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 1, 1–17 (Mary Pattillo, David Weiman & Bruce Western eds., 2004) (summarizing how mass incarceration promotes family and community breakdown); ALEXANDER, *supra* note 1.

<sup>111</sup> BARKER, *supra* note 24, at 45.

<sup>112</sup> See DAVIS, *supra* note 110; Western, Pattillo & Weiman, *supra* note 110; ALEXANDER, *supra* note 1, at 3–12 (arguing that the criminal justice system in the “new Jim Crow”—a systematic effort to achieve Black racial subordination).

they are thus hesitant to turn too readily to incarceration.<sup>113</sup> The result has been decades of low imprisonment rates in the state.<sup>114</sup>

Indeed, Washington State responded to rising crime in poor black neighborhoods in the 1960s by seeking to eradicate its causes rather than isolating neighborhood residents behind bars.<sup>115</sup> White suburbanites, black families, and civil rights organizations, for example, “worked with the Kirkland Fair Housing Organization and Operation Equity to challenge residential segregation and demand equal protection in housing.”<sup>116</sup> These efforts resulted in new laws against residential racial discrimination,<sup>117</sup> in contrast to California’s 1968 Proposition 14, which aimed to block fair housing, depicting limits on residential segregation as limiting individual freedom, a campaign inflaming California’s inter-racial politics.<sup>118</sup> In that same year, by contrast, Washington created a State Commission on the Causes and Prevention of Civil Unrest, which recommended protecting minorities’ labor market participation.<sup>119</sup> By the early 1970s, the state acted on these recommendations, creating, among other things, local community multiservice centers that provided “outreach, counseling, basic education, vocational and job training, and job placement” to African-Americans in poor neighborhoods.<sup>120</sup> Efforts like these fostered improving minority community living conditions over criminalizing poverty as the way to contain crime.<sup>121</sup> Crime was thus viewed more holistically, state policy aiming at its causes as well as its consequences and policy-setting occurring with the “full and equal political participation of African Americans.”<sup>122</sup>

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<sup>113</sup> See BARKER, *supra* note 24, at 45 (arguing that mass incarceration “contradict[s] the basic principles of a deliberative political process rooted in intensive civic engagement, self-governance, and mutual cooperation,” thus making Washington a “penal regime [that] emphasizes the principle of parsimony, the reliance on the least repressive sanction possible . . .”).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 102.

<sup>116</sup> See *id.*; QUINTARD TAYLOR, *THE FORGING OF A BLACK COMMUNITY: SEATTLE’S CENTRAL DISTRICT FROM 1870 THROUGH THE CIVIL RIGHTS ERA* (1994).

<sup>117</sup> BARKER, *supra* note 24, at 102; see TAYLOR, *supra* note 116.

<sup>118</sup> BARKER, *supra* note 24, at 102; David B. Oppenheimer, *California’s Anti-discrimination Legislation, Proposition 14, and the Constitutional Protection of Minority Rights: The Fiftieth Anniversary of the California Fair Employment and Housing Act*, 40 *GOLDEN GATE U. L. REV.* 117, 124, 126 (2010).

<sup>119</sup> See BARKER, *supra* note 24, at 102; DANIEL J. EVANS, *WASHINGTON STATE COMM’N ON THE CAUSES AND PREVENTION OF CIVIL UNREST, REPORT ON RACE AND VIOLENCE IN WASHINGTON, 1969*, [hereinafter EVANS, *REPORT ON RACE*].

<sup>120</sup> BARKER, *supra* note 24, at 102; EVANS, *REPORT ON RACE*, *supra* note 119 (source of quote).

<sup>121</sup> See BARKER, *supra* note 24, at 102–03.

<sup>122</sup> *Id.* at 103.

Thus, from an early date, Washington created subsidy programs to divert juvenile and adult offenders, not solely first-time ones, away from incarceration.<sup>123</sup> A hybrid commission, the Law and Justice Planning Office, urged against removing offenders from their communities because that would “disrupt[ ] the ties they have to society, especially employment and family financial support and relationships.”<sup>124</sup> The state also eventually institutionalized that Office’s 1978 recommendations to avoid prison overcrowding, including increasing community based sentencing alternatives, even for convicted felons; reducing the number of offenses primarily punishable by incarceration; cutting the number of parolees re-imprisoned because of technical violations; and expanding parole, work release, and diversion programs.<sup>125</sup> The state also implemented a “correctional volunteer” program matching newly-released inmates with a “responsible person within the community, in order to assist the offender to readjust when released from the institution.”<sup>126</sup> The state has also long run a community service program, allowing convicted felons to work on public service projects rather than being incarcerated.<sup>127</sup>

Perhaps the best example of Washington’s deliberative populism at work is its sentencing guidelines. Those guidelines are presumptive only, permitting departure by sentencing judges for good reasons.<sup>128</sup> The guidelines’ underlying philosophy is using the “least restrictive” sanction to achieve a sanction’s purpose, thus limiting mandatory prison terms to the three violent crimes of murder, assault, and rape.<sup>129</sup> The guidelines heavily emphasize “noncustodial sanctions such as community supervision, community service, and restitution for a wide range of lower level offenders.”<sup>130</sup> Additionally, the guidelines linked imprisonment to state prison capacity, generously encouraged good time credits and work release, and urged “frugal use of the state’s resources.”<sup>131</sup> By the late 1980s, these guidelines had reduced imprisonment rates by twenty percent.<sup>132</sup>

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<sup>123</sup> See *id.* at 103; Richard C. J. Kitto, Jr., *Comment—A Perspective on Adult Corrections in Washington*, 51 WASH. L. REV. 495, 504 (1976).

<sup>124</sup> BARKER, *supra* note 24, at 103; WASHINGTON LAW AND JUSTICE PLANNING DIV. COMPREHENSIVE PLAN FOR LAW ENFORCEMENT 324 (1970) [hereinafter COMPREHENSIVE PLAN] (source of quote).

<sup>125</sup> BARKER, *supra* note 24, at 103–04; *Testimony to the H. Institutions Comm., July 28, 1978*, 1978 Leg. (Wash. 1978) (statement of William Henry, Law and Justice Planning Div.).

<sup>126</sup> BARKER, *supra* note 24, at 104; COMPREHENSIVE PLAN, *supra* note 124, at 338.

<sup>127</sup> BARKER, *supra* note 24, at 104.

<sup>128</sup> *Id.* at 105; Sentencing Reform Act of 1981, WASH. REV. CODE ANN. § 9.94A.725 (West 2010).

<sup>129</sup> BARKER, *supra* note 24, at 105.; Boerner & Lieb, *supra* note 101, at 105.

<sup>130</sup> BARKER, *supra* note 24, at 105. See Sentencing Reform Act § 9, *supra* note 128.

<sup>131</sup> See BARKER, *supra* note 24, at 105–06; BARKER, *supra* note 24, at 106.

<sup>132</sup> See BARKER, *supra* note 24, at 106; Boerner & Lieb, *supra* note 101, at 95. Compare the modesty of Washington’s guidelines to the harshness of the federal guidelines. See generally

These enlightened guidelines resulted precisely from the deliberative populism that characterized state politics.<sup>133</sup> Numerous, often conflicting, viewpoints were given voice repeatedly in public fora.<sup>134</sup> The state involved not only prosecutors and victims' groups, but citizens' groups, interested individuals, and varied representatives of neighborhoods, races, and classes in the process.<sup>135</sup> The state legislature's Institutions Committee created a sentencing task force that brought to the table such diverse groups as the American Civil Liberties Union Prisoners' Rights Committee and the Families and Friends of Missing Persons and Violent Crime Victims.<sup>136</sup> The Sentencing Guidelines Commission itself, including citizen representatives, held statewide public hearings at which "ordinary people, citizens, voters, and representatives of civil society and professional associations expressed a range of views on crime control and penal sanctioning."<sup>137</sup> At these meetings, as at most public ones held in Washington, "ordinary people unaffiliated with either an interest group or professional organization...[were] strongly encouraged to participate..., a tradition of the underlying political culture."<sup>138</sup> This collective deliberative effort diffused social tension, encouraged compromise, maximized viewpoint diversity, and ultimately restrained state harshness.<sup>139</sup> Barker summarized the guidelines as resulting from,

neither a top-down directive from the governor's office, nor the brainchild of correctional officers, nor a moral protest from the grassroots. Instead, it was the result of collective enterprise, which was put into motion and made meaningful by a wide range of state actors and civil society organizations working within the state's democratized political structures and deliberative forums. Decentralized decision making, power sharing, and structural integration of citizen participation through hybrid commissions provided the institutional mechanisms that enabled a diverse set of reformers to discuss, debate, and eventually reach a compromise on sentencing reform and penal sanctioning without resorting to unilateral decisions, crude policy instruments, or mechanical responses ... either to public opinion or special interest groups.<sup>140</sup>

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Matthew Jill, *One Small Step: The Past, Present, and Future of the Federal Sentencing System*, 44 CRIM. L. BULL. 90, 95, 97 (2008) (explaining the harshness of the federal guidelines).

<sup>133</sup> See BARKER, *supra* note 24, at 106.

<sup>134</sup> See *id.* at 106–09.

<sup>135</sup> See *id.*

<sup>136</sup> See *id.* at 107.

<sup>137</sup> *Id.* at 107–08.

<sup>138</sup> *Id.*

<sup>139</sup> See *id.* 107–09.

<sup>140</sup> *Id.* at 106. *But see id.* at 118–23 (discussing how, more recently, Washington has adopted some more repressive measures). *Id.* at 120 (Barker argues convincingly that the "state's democratized deliberation and its less repressive penal politics are still rather strong and persistent.").

#### 4. Some Caveats

The stories in each of these states are, of course, more complex than this outline suggests. Each system at one time or another can have more or less pragmatism, unconstrained populism, or deliberation. No single system fits purely into one category or another.<sup>141</sup> Nevertheless, in relative terms, wild populism, pragmatism, and deliberativeness well-defined respectively California, New York, and Washington State.<sup>142</sup> Washington's deliberativeness in particular seems to have powerfully contributed to its limited reliance on incarceration.

Of course, other factors, such as perceived relative crime rates, the size of minority racial groups, the strength of local conservative versus liberal political parties, and the health of local economies, likely also contribute to local variations in reliance on mass incarceration.<sup>143</sup> Yet, as Barker convincingly explains, states with, for example, similar crime rates may have radically different imprisonment rates.<sup>144</sup> Holding each of these and other factors constant without considering the

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*See id.* at 109–23 (It would needlessly prolong my discussion here to focus on her analysis of this continuing history. I simply refer interested readers to her reasoning in her own words). *See also id.* at 109–17 (Particularly interesting is Barker's discussion of how deliberation moderated an initially vengeful victims' rights movement).

<sup>141</sup> *See id.* at 120 (conceding that Washington's political culture "is influenced by multiple and competing political traditions, tensions that are not fully resolved," but with deliberativeness dominating). *See generally* KATHERINE BECKETT & STEVE HERBERT, *BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA* (2009) (tracing the restrictions placed on the geographic movement of the homeless and lower-class racial minorities by new legal mechanisms in Seattle, Washington). Barker optimistically summarizes her study of Washington State as follows:

Deliberative democracy to a certain degree is based on and facilitates a sense of reciprocity and mutual respect. In Washington, polity members tend to be less willing to inflict imprisonment on one another out of a concern for others' well-being and autonomy. At the same time, I tried to show how a democratic process that is rooted in a more progressive form of populism with its narratives of mutual cooperation, public goods, and self-governance provides the institutional and cultural support to restrain the repressive powers of the state in favor of the authority and control of civil society organizations. Also, the legacy of cooperatives and self-governance provide the cultural and institutional support necessary for officials to pursue noncustodial community sanctions based primarily on the discipline of labor and the perceived virtues but coercive powers of civil society. Taken together, these policies and practices restrain state coercion, creating more inclusionary but normalizing conditions of citizenship.

BARKER, *supra* note 24, at 123.

<sup>142</sup> BARKER, *supra* note 24, at 141–42.

<sup>143</sup> *See* David Jacobs & Aubrey L. Jackson, *On the Politics of Imprisonments: A Review of Systematic Findings*, 6 ANN. REV. L. & SOC. SCI. 129, 132–43 (2010).

<sup>144</sup> *See* BARKER, *supra* note 24, at 16–17. It is important to stress that Barker's study addresses reliance on mass incarceration, the subject of this symposium. Another author has come up with a forty-four item indicator of overall "state punitiveness," a much broader measure than incarceration. *See* BESIKI KUTATELADZE, *IS AMERICA REALLY SO PUNITIVE? EXPLORING A CONTINUUM OF U.S. STATE CRIMINAL JUSTICE POLICIES* 14–15 (2009). On this measure, Washington was in the second least punitive quintile, as was New York, though New York was more punitive than Washington, and California was in the second most punitive quintile. *See id.* at 247–50. The forty-four measures were

influence of governmental structure simply does not tell the whole tale. Studying the strength or weakness of deliberative populist governmental structures and political cultures helps to complete the story. Indeed, as we will shortly see, other analogous empirical data lend further support to Barker's conclusions.

### B. A Comparative Law Analogy

#### 1. The Mildness of Coordinated Market Economies

A comparative law analogy buttresses the case for the role that broader deliberative populist democracy can play in restraining or reversing the growth of mass imprisonment. Recent comparative social science research has focused on the differences between "coordinated market economies" [CMEs] and "liberal market economies" [LMEs], the former relying far less on mass incarceration than does the latter.<sup>145</sup>

CMEs have several characteristics. Notably, they "incorporate[] a wide range of social groups and institutions into a highly co-ordinated governmental structure. . . ." <sup>146</sup> Their economies are highly regulated, with opportunities for varied groups to make their wishes known in the regulatory process.<sup>147</sup> CMEs tend to be

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divided into five broad types of punitiveness: (1) political and symbolic punishment; (2) incarceration; (3) punishing immorality; (4) conditions of confinement; and (5) juvenile justice. *Id.* Although some states show consistency among their measures of punitive harshness, most do not. *See id.* at 256. New York's measures fluctuated widely, for example, being minimally punitive for symbolic punishment and punishing immorality but moderately punitive for incarceration and more than moderately punitive on the remaining measures. *See id.* at 257. Washington's score solely on incarceration as a measure was well below New York's and California's. *See id.* at 249–50. This quantitative data, while not tracking Barker's analysis precisely, is largely consistent with it. It does emphasize, however, that punitiveness more generally, and mass incarceration specifically, have multiple causes. Note, too, that Barker sought to choose "representative" states rather than outliers of most or least punitive states. *See BARKER, supra* note 24, at 15, 183. Barker also left out the Southern states from her analysis because of their "historical ties to feudal-like social and political hierarchies, slavery, weakened central government, and under-democratized polity," putting them on a different penal developmental path that, in Barker's view, requires its own unique, intensive study. *Id.* at 21. *See also id.* at 183–85 (presenting quantitative data on social capital across the fifty states that offers further support for Barker's more qualitative study of three illustrative states).

<sup>145</sup> *See* NICOLA LACEY, *THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* 58–60 (2008); *see also* Peter A. Hall & David Soskice, *An Introduction to the Varieties of Capitalism*, in *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* 1, 8 (Peter A. Hall and David Soskice eds., 2001) (coining the CME and LME language); *cf. generally* Nicola Lacey & Lucia Zedner, *Discourses of Community in Criminal Justice*, 22 *J. L. & SOC'Y* 301, 302, 311, 318 (1995) (applying these categories to German criminal justice).

<sup>146</sup> LACEY, *supra* note 145, at 58.

<sup>147</sup> *See id.* at 58–59; Bob Hancke, *Introducing the Debate*, in *DEBATING VARIETIES OF CAPITALISM: A READER* 1, 1–16 (Bob Hancke ed., 2009).

associated with proportional representation legislative schemes.<sup>148</sup> This results in multi-party governance, with many of these parties each representing a relatively small subset of the population.<sup>149</sup> Governing thus requires compromise among these groups.<sup>150</sup> Electoral politics is thus itself inclusionary, often requiring coalition governments and some measure of consensus.<sup>151</sup> The need to build consensus also acts as a constraint on wide swings in popular opinion because it is rare that any one party—even one enamored of the popular majority opinion of the moment—can govern without paying significant heed to minority views.<sup>152</sup>

This electoral tendency toward greater inclusiveness also tends to make left-of-center governments in CMEs more frequent.<sup>153</sup> Even right-leaning CME governments are more likely to be left of what constitutes the center in the United States.<sup>154</sup> Furthermore, building inter-party coalitions requires an express commitment to at least certain policy stances acceptable to all the coalition partners.<sup>155</sup> Center-left governments are more likely because the center represents the middle classes, who generally have an interest in maintaining relatively robust levels of public services, a goal shared by the left, which would prefer even higher levels of such services.<sup>156</sup> Correspondingly, the center constrains the left's often extraordinarily expensive demands.<sup>157</sup> Relatively high levels of party discipline enable center-left governments to be reasonably effective at implementing the grand electoral bargain.<sup>158</sup> The result of these inclusive, center-left politics is a generous welfare state, a greater commitment to government involvement in the economy to make good on electoral commitments, and in response to multi-group demands, a greater effort by the state to encourage citizen training in job-specific skills in the industries that further governmental goals and as a way of maintaining an impression of state support for economic and job stability.<sup>159</sup> Educating

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<sup>148</sup> See LACEY, *supra* note 145, at 63–64. *But see id.* at 64 n. 7 (noting that New Zealand is the exception, having a unique history).

<sup>149</sup> *See id.* at 64–66.

<sup>150</sup> *See id.* at 66 (noting CMEs' "consensus-building dynamic").

<sup>151</sup> *See id.* at 67–68.

<sup>152</sup> *See id.*

<sup>153</sup> *See id.* at 67. *See generally* Torben Iversen & David Soskice, *Electoral Institutions and the Politics of Coalitions: Why Some Democracies Redistribute More Than Others*, 100 AM. POL. SCI. REV. 165 (2006) (making this point and concluding that there are relatively greater degrees of economic equality in LMEs).

<sup>154</sup> *See* LACEY, *supra* note 145, at 58–59, 67–68, 121–22 (noting that the United States is the "extreme case" of an individualistic, non-interventionist state with weak coordinating institutions—the exact opposite of the CMEs and their typically left-of-center governments).

<sup>155</sup> *See id.* at 67.

<sup>156</sup> *See id.* at 67–68.

<sup>157</sup> *See id.* at 68.

<sup>158</sup> *See id.* at 67–68, 76–77 (discussing the "discipline of coalition politics").

<sup>159</sup> *See id.* 78–80.

workers thus also becomes a major function of CME governments.<sup>160</sup> CMEs have thus apparently done a better job than LMEs in maintaining a reasonably large manufacturing sector rather than devolving into a largely services-providing economy.<sup>161</sup>

Because CME policies are more insulated from wide, emotional swings in public opinion, while being expected to deliver on electoral commitments in a disciplined way, and because professional expertise is needed so to deliver, CMEs tend to be more deferential toward their professional bureaucrats.<sup>162</sup> The coalitional nature of government also depolarizes it, reducing the obsession of any one governing-party-of-the-moment for retaining absolute, uncompromising control over every aspect of policymaking.<sup>163</sup> This too increases deference toward bureaucrats and their social status.<sup>164</sup> Additionally, because bureaucrats are seen as part of the civil service, they are consulted on criminal justice policy, improving their ability sometimes to veto misguided criminal justice efforts by various

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<sup>160</sup> *See id.* at 79.

<sup>161</sup> *See id.* at 79–80.

<sup>162</sup> *See id.* at 71, 72–75. Other commentators have stressed the moderating effect on punitiveness of criminal justice experts having major input into criminal justice policies in much of Europe. *See Jacobs & Jackson, supra* note 143, at 143. Part of the explanation that they offer is that more educated persons, which by definition includes criminal justice experts, tend toward less punitive responses to crime. *See id.* They also tend to describe what I here call CMEs as “centralized democracies,” *id.*, in which “elites representing factions with conflicting interests meet to reach compromises, which are left largely unchallenged by non-elites.” *Id.* at 144. The emphasis in these descriptions is on the supposed hierarchical nature of such societies, thus freeing experts to rule policy rather than uninformed laypersons doing so. *See id.* But political scientist Nicola Lacey, whom I cite liberally here, and I look at the matter through a different lens. In Lacey’s view, the broader incorporation of numerous interests in which many different groups are represented allows for more inclusive, deliberative, respectful politics. *See LACEY, supra* note 145 and accompanying text. Such a politics is closer to having many of the key features of PDD than is a more direct populist democracy like the United States. All deliberative processes of high quality require accurate, complete information, and it is those processes themselves that thus arguably breed more respect for experts and more willingness to defer to them. “Corporatism” is thus for me a form of representative deliberative democracy better insulated from direct, raw populist opinion than systems like that of the United States. Even those emphasizing corporatist hierarchy agree that the result is “a solidaristic society that attempts to bring all individuals into full citizenship.” *Jacobs & Jackson, supra* note 143, at 144. Such a society stresses reintegration of offenders into society rather than “segregation, incapacitation, and retribution.” *Id.* Such societies depend more on civil society’s restraints, “which place much greater emphasis on community than on individual rights.” *Id.*; *see DAVID GARLAND, THE CULTURE OF CONTROL* 49 (2001) (making a similar point first). I also prefer Lacey’s emphasis because she helps to explain why corporatist democratic cultures depoliticize criminal justice policy in a way that allows experts and criminal justice bureaucrats to impact policy more effectively. *See LACEY, supra* note 145.

<sup>163</sup> *See id.* at 72.

<sup>164</sup> *Id.*

parties.<sup>165</sup> The term “professional bureaucrats” includes judges, prosecutors, and other governmental criminal justice officials.<sup>166</sup>

However, professional criminal justice bureaucracies are relatively independent of momentary public passions, rooting their status in professional expertise rather than electoral appeal, thus able to act free from undue interference by the governing party leader; accordingly, the bureaucracy tends to constrain the severity of criminal justice policy.<sup>167</sup> The broad-based, coalitional nature of the electoral system also makes it harder for any one social group to use criminal justice as a way to wage war on another such group.<sup>168</sup> The more effective representation of diverse views on nearly every subject, including criminal justice policy, likewise makes it harder for group polarization—the tendency of members of like-minded groups largely repeating similar arguments among themselves to become more extreme in those views—to occur.<sup>169</sup> The more generous welfare state also reduces poverty, social isolation, and other arguably criminogenic social situations.<sup>170</sup> Lower crime in turn reduces the *logical*, though not necessarily the *perceived*, need for harsh criminal justice policies.<sup>171</sup> Furthermore, greater relative political and economic equality moderates views of certain groups or individuals

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<sup>165</sup> *Id.* at 72–74 (noting that CME bureaucrats are “an important constraint on *ad hoc* policymaking.”).

<sup>166</sup> *Id.* at 72.

<sup>167</sup> *Id.* at 72–73, 75; MICHAEL CAVADINO & JAMES DIGNAN, PENAL SYSTEMS: A COMPARATIVE APPROACH 35–36, 55, 102, 105, 114–23, 132, 180–83 (2006) (surveying numerous nations to establish that strong bureaucracies weaken criminal justice harshness); Joachim J. Savelsberg, *Knowledge, Domination, and Criminal Punishment Revisited*, 1 PUNISHMENT & SOC’Y 45, 64 (1999); David Downes, *Visions of Penal Control in the Netherlands*, in CRIME, PUNISHMENT, AND POLITICS IN COMPARATIVE PERSPECTIVE 93, 99 (Michael Tonry ed., 2007).

<sup>168</sup> See LACEY, *supra* note 145, at 74–75 (comparing CMEs to two illustrative LMEs: the United States and Great Britain and explaining the electoral dynamic).

<sup>169</sup> See, e.g., CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 1–3 (2009) (defining group polarization).

<sup>170</sup> See LACEY, *supra* note 145, at 80 Figure 3 (showing that poverty reduction via redistribution tends to be higher in CMEs than LMEs), 81 Figure 4 (showing poverty reduction via vocational training intensity to be higher in CMEs than LMEs), 86 (reducing absolute and relative poverty by generous welfare provisions should have a “knock on effect on crime”).

<sup>171</sup> See Jacobs & Jackson, *supra* note 143, at 131 (noting that “crime rates do not have a close relationship with . . . imprisonment rates.”). These authors examine empirical data suggesting that the Republican Party often wins state-level elections by painting a picture of an enormous political and racial threat from rampant criminality, requiring a harsh law-and-order response. Once in office, Republicans keep their word, imposing harsher plea bargains, seeking harsher sentences, and building more prisons. See *id.* at 133–38. Democrats are limited in their ability to fully mimic this strategy because their core ideological constituencies include less punitive minority voters. See *id.* at 136–37. The Republican strategy may partly be effective precisely because it exaggerates the danger crime poses, suggesting that the public would be somewhat less punitive if aware of, and believing in, the true state of affairs. See *infra* text accompanying notes 310–48.

as socially-degraded.<sup>172</sup> Likewise, citizens come to view the criminal justice system as more about deterrence and rehabilitation than state-imposed degradation.<sup>173</sup> This attitude too discourages undue reliance on mass incarceration.<sup>174</sup>

Indeed, the CME Western social-democracies (the most left-leaning CMEs) of Sweden, Denmark, Finland, and Norway have vastly lower imprisonment and homicide rates than do the Western LMEs of the United States, South Africa, New Zealand, England and Wales, and Australia.<sup>175</sup> The more conservative, corporatist CMEs, such as the Netherlands, Italy, Germany, and France, likewise have markedly lower rates on these scores than do the LMEs.<sup>176</sup> Of course, no country is purely coordinated or liberal, there being degrees of each tendency present in each country at particular times.<sup>177</sup> A widely-respected rating of the relative degree of coordination clearly shows ever-higher coordination levels associated with ever-lower imprisonment and homicide rates.<sup>178</sup> The contrast between the highest and lowest coordination-level economies of respectively Norway (highest) and the United States (lowest) is particularly striking: 73 persons imprisoned, 82 murdered per 100,000 population in Norway versus 701 persons imprisoned, 737 murdered per 100,000 in the United States.<sup>179</sup>

## 2. The Harshness of Liberal Market Economies

LMEs and CMEs are bizarro-world doppelgangers. LMEs make a fetish of an imagined perfect free-market economy characterized by vibrant economic and

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<sup>172</sup> See LACEY, *supra* note 145, at 81–84 (discussing that greater economic inequality breeds disrespect by those on the higher rungs for those on the bottom, thus reducing the power of respect as a moderating force on criminal justice policy); RICHARD SENNETT, *RESPECT IN A WORLD OF INEQUALITY* 23 (2003) (noting the problem of “showing mutual respect across the boundaries of inequality”); Ken Pease, *Punishment Demand and Punishment Numbers*, in *POLICY AND THEORY IN CRIMINAL JUSTICE* 113 (Don M. Gottfredson & Ronald V. Clarke eds., 1990) (explaining further the link among economic inequality, status inequality, and criminal punishment); *cf.* JAMES WHITMAN, *HARSH JUSTICE* 193 (2003) (noting the degrading purpose of most criminal punishment in the United States despite our *formal* commitment to status egalitarianism).

<sup>173</sup> *Cf.* LACEY, *supra* note 145, at 84 (noting anti-degradation mentality is weak in CMEs).

<sup>174</sup> See *id.* (explaining that lower disparities in wealth and long-term skills investment and a consensus or bargaining-oriented political system in CMEs “make it easier for governments to pursue inclusionary criminal justice policies”).

<sup>175</sup> See *id.* at 60, Figure 1.

<sup>176</sup> See *id.*

<sup>177</sup> See *id.* (assigning a “coordination index rating” to each nation discussed based upon the degree of market coordination versus liberalism).

<sup>178</sup> LACEY, *supra* note 145.

<sup>179</sup> See *id.*; *cf.* Michael Tonry, *Punishment Policies and Patterns in Western Countries*, in *SENTENCING AND SANCTIONS IN WESTERN COUNTRIES* 3, 3–28 (Michael Tonry & Richard S. Frase eds., 2001) (summarizing the similarities and differences in sentencing practices among Western countries, with the United States at the harshest end of the continuum).

political competition in a relatively regulatory-free world.<sup>180</sup> Of course, LME economies in practice far from fulfill this ideal, and at least one of the major parties in each such economy tends to favor more activist, interventionist regulatory policy.<sup>181</sup> But even for such parties, government intervention is seen as largely a sometimes necessary evil, helping to correct for departures from, or flaws in, the effort to implement the imaginary ideal.<sup>182</sup> LME cultures include a strong strain envisioning government as itself a necessary evil, its exercise of its power to be limited to constraining greater evils.<sup>183</sup> LME cultures likewise tend to embrace intense adversarialism, a logic of winners and losers.<sup>184</sup> Life is a contest. The strong survive.<sup>185</sup> Perhaps the weak do not die, but their weakness marks them as deserving of a less happy life than achieved by their stronger compatriots.<sup>186</sup> If the strong choose to show compassion toward their inferiors, that is a stance to be applauded, but it is lauded precisely because it is an act of charity—a free choice, in a sense, to show mercy toward the undeserving.<sup>187</sup> Mercy as government policy would thus violate the natural order, depriving the deserving of control over the resources they have earned, compromising their autonomy relative to the less-deserving losers.<sup>188</sup>

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<sup>180</sup> See *infra* text accompanying notes 181–289.

<sup>181</sup> In the United States, that party is the Democratic Party. See generally JULES WITCOVER, *PARTY OF THE PEOPLE: A HISTORY OF THE DEMOCRATS* 517–697 (2003) (tracing history and policies of the modern Democratic Party).

<sup>182</sup> See, e.g., GARRY WILLS, *A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT* 297 (1999).

<sup>183</sup> See *id.*; BARKER, *supra* note 24, at 63 (noting “the American disposition to be suspicious of state power”).

<sup>184</sup> See LACEY, *supra* note 145, at 64 (“[L]iberal market economies tend to have first-past-the-post, winner-takes-all systems.”); JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* 98–100 (2010) (describing the current American politico-economic system as one designed increasingly to benefit winners at the expense of losers, thus dramatically sharpening economic inequality).

<sup>185</sup> See DEBORAH TANNEN, *THE ARGUMENT CULTURE: STOPPING AMERICA’S WAR OF WORDS* (1999) (documenting and deriding America’s culture of contest).

<sup>186</sup> See Andrew E. Taslitz, *Why Did Tinkerbelle Get Off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 *TEX. TECH L. REV.* 419, 447 (2009) [hereinafter Taslitz, *Tinkerbelle*] (discussing Americans’ difficulty having compassion for the “undeserving,” including those too weak to pull their own weight); Lisa A. Crooms, *Don’t Believe the Hype: Black Women, Patriarchy, and the New Welfarism*, 38 *HOW. L.J.* 611 (1995) (arguing that images of poor Black women as undeserving of help led to the end of America’s earlier welfare system and its replacement by its modern more limited form).

<sup>187</sup> See Taslitz, *Tinkerbelle*, *supra* note 186, at 447 (discussing social forces encouraging and discouraging compassion in America, including a lower likelihood of compassion toward those whom we see as fundamentally different from us); LINDA ROSS MEYER, *THE JUSTICE OF MERCY* 4 (2010) (offering one definition of mercy “as a compassionate gift to an undeserving guilty person...”).

<sup>188</sup> Cf. BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 31 (2011) (arguing that America’s embrace of the idea that the free market

A weakly regulatory, highly individualistic, adversarial economic and political culture leads to flexibility and innovation having priority over stability and long-term public investment in education and job-specific skills.<sup>189</sup> This dynamism, accompanied by a distrust of state power, leads to a relatively weaker welfare state and a less coordinated state commitment to maintaining worker skills.<sup>190</sup> Workers are largely left to fend for themselves.<sup>191</sup> This ideological commitment to individual economic independence via struggle leads to more poverty and life-course economic instability, again arguably factors contributing to higher crime rates.<sup>192</sup> Higher resulting economic inequality fosters greater inter-group tension, particularly because economic losers are viewed as somehow tainted.<sup>193</sup>

The adversarial culture also may help to promote a two-party system. In all political systems, compromise and negotiation necessarily occur. But adversarial LMEs more closely embrace a winner-take-all mentality.<sup>194</sup> That mentality, combined with a narrower range of social groups having effective representation,

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achieves a “natural order” not to be disturbed by the state is complemented by the idea that criminals challenge that natural order and are beyond it, thus enabling, without alone causing, harsh American criminal justice policies); Jacobs & Jackson, *supra* note 143, at 133 (“Libertarian Republicans are inclined to see criminals as unfettered individuals whose freely made decisions make them morally accountable for their pernicious acts.”).

<sup>189</sup> See LACEY, *supra* note 145, at 58–59.

<sup>190</sup> See *id.* at 81–85.

<sup>191</sup> See *id.* at 85–90.

<sup>192</sup> See *id.* at 82–83; cf. David Downes & Kirstine Hansen, *Welfare and Punishment in Comparative Perspective*, in PERSPECTIVES ON PUNISHMENT 133 (Sarah Armstrong & Lesley McAra eds., 2006) (demonstrating that countries with more generous welfare spending, with rare exceptions, have lower imprisonment rates than those with less generous welfare expenditures); Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 35 (David Garland ed., 2001) (finding a similar relationship among American states, that is, those with lower levels of welfare spending largely had higher levels of incarceration and vice-versa; states with larger racial minority populations also had higher incarceration rates, adding to the authors’ conclusion that welfare and incarceration regimes are but two aspects of a single regime for controlling “social marginality”); see generally BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006) (tracing in greater detail the interaction among American social, economic, and criminal justice policies).

<sup>193</sup> See LACEY, *supra* note 145, at 83 (noting markedly greater LME economic disparities themselves become a form of status distinction encouraging degradation of the lower-status group); *supra* text accompanying notes 172–73 (discussing degradation, stigma, and other forms of social taint).

<sup>194</sup> See HACKER & PIERSON, *supra* note 184, at 3–5; LACEY, *supra* note 145, at 64; TASLITZ, CULTURE AND THE COURTROOM, *supra* note 13, at 37–44, 58–63, 134–51 (discussing how adversarial culture works in American courtrooms to silence socially and economically weaker voices).

valorizes conflict over settlement.<sup>195</sup> When compromise occurs, furthermore, the bargain is struck among fewer social groups,<sup>196</sup> leaving others as outcasts.<sup>197</sup>

The winner-take-all attitude also leads the winning party to seek to dominate all levels of policymaking while it has control.<sup>198</sup> That makes appointment of bureaucrats more political, their role seen as less an independent, stable, professional source of policy input than servants of the governing party's will.<sup>199</sup> Those bureaucrats envisioned as independent of the executive and the legislature—primarily the judiciary—are, however, themselves often paradoxically subject to more overtly political influences.<sup>200</sup> This subjection is strongest in the many states relying on an elected judiciary, judicial elections increasingly mimicking legislative and executive ones in their campaign style and consequences.<sup>201</sup> Bureaucracies thus fail to achieve deference in policy consultation with other government actors, limiting their role in constraining extreme policies, particularly in criminal justice.<sup>202</sup>

LME elections, in turn, tend to be determined by a large block of median voters, whose party affiliation (or lack thereof) does not determine their vote.<sup>203</sup> These floating median voters view crime as a threat.<sup>204</sup> Indeed, the demonization

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<sup>195</sup> The winner-take-all mentality and limitation to a two-party system without proportional representation partly account for narrower group representation. See TANNEN, *supra* note 185, at 23 (discussing valorization of conflict); *supra* text accompanying notes 184–86.

<sup>196</sup> See LACEY, *supra* note 145, at 65–66.

<sup>197</sup> See Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 54–58 (2003) (explaining how class and racial stigma renders the stigmatized “subpersons” excluded from complete, respectful treatment as equal members of political society).

<sup>198</sup> See LACEY, *supra* note 145, at 72–74; Jacobs & Jackson, *supra* note 143, at 135–39 (discussing elected-Republican dominance of criminal justice policy at the state level).

<sup>199</sup> See LACEY, *supra* note 145, at 72–75.

<sup>200</sup> See *id.* at 94–97.

<sup>201</sup> See, e.g., *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (recognizing a free speech right of judicial candidates for office to recite overt policy positions to the electorate); Jacobs & Jackson, *supra* note 143, at 137–38 (summarizing data showing that lenient elected judges risk losing their seats).

<sup>202</sup> See LACEY, *supra* note 145, at 96 (arguing that the American judiciary's exclusion from overt policy consultation with the executive and legislative branches has led the latter to “regard the judiciary as an irksome and even irresponsible thorn in the flesh of criminal justice policy, to be thwarted as often as possible by legislative or other means,” while its constitutional tools to resist government excesses “have tended to be relatively weak in the face of a determined executive with a clear legislative majority.”); see also JONATHAN SIMON, *GOVERNING THROUGH CRIME* 111–40 (2009).

<sup>203</sup> See LACEY, *supra* note 145, at 66–67. See generally Paul Chevigny, *The Populism of Fear: Politics of Crime in the Americas*, 5 PUNISHMENT & SOC'Y 77 (2003) (discussing fear of crime as a populist political motivator uniting voters across party lines and throughout the Americas); Bert Useem, Raymond V. Liedka, & Anne Morrison Piehl, *Popular Support for the Prison Build-up*, 5 PUNISHMENT & SOC'Y 5, 5–9 (2003).

<sup>204</sup> See LACEY, *supra* note 145, at 69–71, 76, 177–79.

of the poor *because they are poor* and of marginalized racial groups links group membership with criminality.<sup>205</sup> Because such groups have inadequate political representation and power, there are no structural safeguards against declaring, for example, a “war on drugs” that ends up being a war on an entire racial socioeconomic group.<sup>206</sup> The low social status of the poor, exacerbated by economic inequality, also makes demonizing them easier.<sup>207</sup> Furthermore, because government action can be justified only on grounds of suppressing a greater evil, and government’s greatest power is arrest and punishment, the exercise of that power is more readily seen as a marker of its subjects’ degraded nature.<sup>208</sup> Punishment thus serves to degrade, isolate, and purify at least as much as to deter or rehabilitate.<sup>209</sup>

Harsh criminal justice system policies thus have political appeal to both major parties in LMEs.<sup>210</sup> Harsher policies do not require new bureaucracies or novel implementation mechanisms but merely the expansion of pre-existing institutions necessary in any society.<sup>211</sup> As one commentator put it, “Mass imprisonment allows the political order to address its most vulnerable problem, crime, with a solution that is solvable precisely at the process level where Feeley and Sarat [] and many political scientists before and since have thought government was pretty

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<sup>205</sup> See Crooms, *supra* note 186, at 611–12, 614, 621–28 (discussing demonization of the poor, especially the Black poor); Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Justice*, 5 OHIO ST. J. CRIM. L. 1, 3–13 (2007) (discussing subconscious processes leading to demonization and fear of the Black poor).

<sup>206</sup> See GLENN C. LOURY, RACE, INCARCERATION, AND AMERICAN VALUES 11 (2008) (arguing for a race-based explanation for rising American incarceration rates); MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 31–35 (1995) (arguing that the War on Drugs was probably actually foreseen to be a war on poor racial minorities, particularly African-Americans).

<sup>207</sup> See Crooms, *supra* note 186, at 611–13, 615, 620–28 (analyzing low social status of the poor, though not always using that terminology); Andrew E. Taslitz, *Judging Jena’s D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. REV. 393, 399–405 (2009) [hereinafter Taslitz, *Judging Jena*] (discussing the social functions of racial status and its cousin, racial esteem, and their opposites); *supra* text accompanying notes 46–47 (discussing view of the poor as unworthy).

<sup>208</sup> See DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 53 (2009) (arguing that criminal convictions, especially of racial minorities, are powerfully stigmatizing, creating difficult obstacles to ex-offenders finding jobs); WILLS, *supra* note 182 (discussing Americans’ views of government as, at best, a necessary evil).

<sup>209</sup> See generally Joseph E. Kennedy, *The Jena 6, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. REV. 477 (2009) (arguing that the unique combination of racial poverty and residential segregation, the related decline of the working poor, and the misguided policy of mass incarceration have subjected poverty-stricken African-Americans to harshly disparate criminal punishment, a consequence that reinforces community poverty, isolation, fear, and crime).

<sup>210</sup> See LACEY, *supra* note 145, at 69–71; Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006) (analyzing the connection between partisan politics and media coverage of crime).

<sup>211</sup> See LACEY, *supra* note 145, at 69–70; SIMON, *supra* note 202, at 25–26.

successful.”<sup>212</sup> Weak party discipline makes party platforms more important to swaying median voters, further adding to the appeal of tough-on-crime policies.<sup>213</sup>

Moreover, in decentralized democracies characterized by high levels of class and racial segregation, as is true in the United States, local politicians can readily advocate popular policies whose costs “do not necessarily fall on the[ir] electoral constituency,” or at least not fully so.<sup>214</sup> Once again, harsh criminal punishment fits this bill.<sup>215</sup> The lack of broadly-inclusive, multi-party compromise and a strong professional bureaucracy shatters buffers between high majoritarian emotional fervor and policymaking.<sup>216</sup> This de-bufferization permits politicians to arouse passions rooted in fear of crime, fanning the flames of real and imagined dangers to stoke voter passions, an effective competition for the median voters’ support.<sup>217</sup> But this promise to cure crime in turn heightens voter expectations of success in doing so.<sup>218</sup> Enlarging the resources devoted to arresting and imprisoning offenders creates the impression of such success, as does criminalizing ever more conduct.<sup>219</sup>

CME political and economic structure does not guarantee milder criminal justice policies on all fronts. For example, there is some reason to believe that CME obsession with stability makes CMEs more resistant, in the long run, to incorporating immigrants—viewed as an unsettling outside force—into the political economy than is true in LMEs.<sup>220</sup> The very dynamism of LMEs and willingness to reward winners may, despite periodic nativist fervor, make LMEs more open to accepting immigrants into the system who “play by the rules,” that is, who shed signs of difference, while accepting and managing to succeed in

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<sup>212</sup> SIMON, *supra* note 202, at 159.

<sup>213</sup> See LACEY, *supra* note 145, at 70.

<sup>214</sup> See *id.* at 71; Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 OHIO ST. J. CRIM. L. 47, 48–54 (2007) (collecting data and marshaling theoretical arguments supporting the idea that current housing and hate crimes laws are inadequate to address low-level hate crimes aimed at maintaining residential racial segregation; local politicians likely have little incentive to change the status quo where, as in this example, the law’s cost falls on the excluded racial minorities rather than on the white majority voters in the legislator’s district).

<sup>215</sup> See LACEY, *supra* note 145, at 70–71.

<sup>216</sup> See *id.* at 71–72 (discussing voter fervor in majoritarian systems); *supra* text accompanying notes 162–166 (discussing the buffering role of the bureaucracy in CMEs).

<sup>217</sup> See LACEY, *supra* note 145, at 71 (“What we see in the latter [majoritarian systems] is a vicious cycle of mutual reinforcement, grounded in a set of incentives conducing to politicians’ attraction to single issues such as criminal justice, which are, superficially, easy to demonstrate that they have been acted upon ...”).

<sup>218</sup> See *id.*

<sup>219</sup> See *id.* at 71–72; DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3–17 (2008) (documenting the massive expansion in American criminal law and its accompanying growth in punishment, especially via mass incarceration).

<sup>220</sup> See LACEY, *supra* note 145, at 148–49; Loïc Wacquant, ‘Suitable Enemies’: *Foreigners and Immigrants in the Prisons of Europe*, 1 PUNISHMENT & SOC’Y 215, 216 (1999) (“From this point of view, *foreigners and quasi-foreigners would be the ‘blacks’ of Europe.*”) (emphasis in original).

adversarial struggles.<sup>221</sup> To say that LMEs may be more successful at this task in the long run, if they truly are, is, of course, very different from saying that they do a normatively good job in welcoming “foreigners.”<sup>222</sup>

Moreover, global financial crises and the globalization of economics may strain CME commitment to a vigorous welfare state, though it seems unlikely that they will pare welfare benefits down to those in the United States.<sup>223</sup> Correspondingly, the high financial and social costs of mass imprisonment, particularly in the extreme case of the United States, create pressures at some point to slow the influx into the system.<sup>224</sup> Nor does it make sense to believe that punishment tendencies in either CMEs or LMEs cannot be altered by political reforms, for example, by sustained social movements to push toward a more inclusive politics in the United States without entirely sacrificing its current political-economic system.<sup>225</sup> Furthermore, I am always skeptical of reductionist theories, so I do not claim that political inclusiveness alone explains criminal justice system policies. Country-specific circumstances also contribute to outliers like Canada, a relatively punishment-mild LME.<sup>226</sup> I likewise make no claim that CMEs are overall superior or inferior societies to LMEs.

Nevertheless, the CME-LME comparison offers powerful reason to believe that CMEs are far less likely than LMEs to resort to mass incarceration. This reluctance is due in significant part to a more inclusive, compromise-oriented political system offering more opportunities to varied social groups for continued, between-elections effective voice in their fates. CME criminal justice policies are

<sup>221</sup> See Ediberto Román, *The Alien Invasion?*, 45 HOUS. L. REV. 841–897 (2008) (quoting Senator Hillary Rodham Clinton as saying she favored “a path to earned legalization to undocumented immigrants who are willing to work hard, play by the rules, learn English and pay fines”) (footnote omitted).

<sup>222</sup> See generally Claire Valier, *Foreigners, Crime and Changing Mobilities*, 43 BRIT. J. CRIMINOLOGY 1 (2003) (discussing the concept of the “foreigner” in twentieth-century American culture and academic writing); see also Thomas R. Dominczyk, *The New Melting Pot: As American Attitudes toward Foreigners Continue to Decline, Athletes are Welcomed With Open Arms*, 8 SETON HALL J. SPORT L. 165 (1998) (discussing inconsistencies in Americans’ reception and treatment of immigrants from different backgrounds).

<sup>223</sup> See LACEY, *supra* note 145, at 131–34, 137–38, 142, 144.

<sup>224</sup> See *id.* at 186–86. Marc Mauer argues, however, that retrenchment of mass incarceration in the United States because of the enormous cost of the endeavor is likely to be limited given the strong emotional hold of retribution “on a populace further sensitized to the risks of violent crime by a TV media that propagates widespread images of both violence and effective policing in response to it.” *Id.* at 183–84; Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, 3 PUNISHMENT & SOCIETY 9, 15–17 (2001).

<sup>225</sup> See LACEY, *supra* note 145, at 191–92 (arguing that bipartisan agreement on a national criminal justice commission, followed by assigning future criminal justice policy to “institutions encompassing both wide representation and expertise” might de-politicize criminal justice policy in LMEs).

<sup>226</sup> See *id.* at 27, 118, 181–82. Lacey also notes that America’s sorry history of racial conflict is an example of a country-specific circumstance that likely magnifies other LME forces contributing to penal harshness in the United States. See *id.* at 123–29.

also probably better informed than LME policies because of the former's greater deference to a professionalized criminal justice bureaucracy. The clash of more diverse viewpoints among more varied social groups also enhances information-levels, reduces group polarization, and encourages inter-group conversation. The consequence is more-informed, deliberative, inclusive dialogue about criminal justice policy than is true in places like the United States. Comparative political science thus provides further analogical support for the idea that a more vibrant, populist, deliberative, democracy in the United States would help to restrain, or perhaps reverse, this country's commitment to mass incarceration.

### C. *Urban Racial Localism*

#### 1. Who is Heard in Federal and State Legislatures

So far, this section has examined interstate and international data. But intrastate and local data also demonstrate the virtues of PDD. Political scientist Lisa L. Miller did a particularly relevant study comparing group representation in criminal justice legislative policy setting at the federal, state, and local levels.<sup>227</sup> Miller's state- and local-level data focused primarily on the state of Pennsylvania and the cities of Philadelphia and Pittsburgh.<sup>228</sup> That data revealed strong representation at the state and local legislative levels of pro-incarceration groups, weak representation of anti-incarceration groups.<sup>229</sup> However, at the local level—which lacks the power and resources alone significantly to influence federal and statewide criminal justice policy—the anti-incarceration forces fared much better.<sup>230</sup>

Thus, by far the largest percentage of witnesses at federal congressional and state legislative hearings were criminal justice and law enforcement institutional agencies: the police, immigration officials, judges, and Treasury and military officials.<sup>231</sup> Single-issue citizens' groups, such as Mothers Against Drunk Driving or Women Organized Against Rape, again favoring harsher policies, also did

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<sup>227</sup> See generally LISA MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY AND THE POLITICS OF CRIME CONTROL* 15 (2008) (discussing the study).

<sup>228</sup> See *id.* at 21, 193–99.

<sup>229</sup> See *id.* at 112–13.

<sup>230</sup> See *id.* at 130–35.

<sup>231</sup> See *id.* at 95–96, 98; cf. SIMON, *supra* note 202, at 4 (arguing that recent federal and state legislative policies have resulted in a system of elite “governance through crime”). Governance through crime is characterized by three features: (1) acting in the name of crime control or analogous problems legitimates governmental interventions; (2) but the crime control label masks other political motivations; and (3) the metaphors of crime control invidiously migrate to subtly alter governance in some more local institutions, such as schools, family, and workplaces—all with the predictable result of further isolating poor racial minorities, reducing judicial power as a check on governmental abuses, and undermining the democratic nature of American politics. See *id.* at 4–5.

well.<sup>232</sup> Professional associations of lawyers, doctors, and social service agencies having strong representation were largely those who stood to benefit from government criminal justice largesse.<sup>233</sup> The single-issue citizens' groups and criminal justice agencies also tended to be repeat legislative players.<sup>234</sup> But broadly-representative, multi-issue citizens' groups favoring more comprehensive, rehabilitation-oriented criminal justice reform were woefully underrepresented, constituting, for example, but 1.5% of the total number of federal and 3% of the total number of state legislative witnesses.<sup>235</sup> Moreover, most of these multi-issue groups were *not* repeat legislative players.<sup>236</sup>

These differences in power-disparities were not limited to the dramatic differences in the percentage of witnesses testifying.<sup>237</sup> Thus, government agencies and other institutions lobby overtly, engaging in a wide range of informal legislative contacts and having "relatively unfettered access to legislators."<sup>238</sup> They also have substantial resources—financial, temporal, and symbolic—with which to bring political pressure to bear.<sup>239</sup> The voices of prosecutors, corrections officials, probation departments, and crime commissions are loudly heard.<sup>240</sup> Although professional groups as a whole are also fairly active, they tend to focus on specialized interests important to their members.<sup>241</sup>

Legislators listen to these organized groups partly because of a belief in their expertise on complex issues.<sup>242</sup> Legislators also tend to look for fairly simple, specific, concrete policy solutions to readily identifiable problems, and solutions

<sup>232</sup> See MILLER, *supra* note 227, at 67.

<sup>233</sup> *Id.* at 79.

<sup>234</sup> *Id.* at 77–78, 98–99.

<sup>235</sup> *Id.* at 67–68.

<sup>236</sup> See *id.* at 68; cf. MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 20–23, 116–17 (2008) (arguing that federal- versus state-level federalism has failed, with many of the virtues of state level authority, such as providing government closer to the people and encouraging policy experimentation, being better served at the level of the municipality, town, and village).

<sup>237</sup> Cf. FEELEY & RUBIN, *supra* note 236, at 20–23, 116–17 (arguing that state-level government is now both rigid and beholden to the powerful, making it slow in responding to local community needs).

<sup>238</sup> See MILLER, *supra* note 227, at 103–05.

<sup>239</sup> See *id.* at 72, 103, 118.

<sup>240</sup> *Id.* at 80.

<sup>241</sup> See *id.* at 98.

<sup>242</sup> *Id.* at 80. The one major group with obvious expertise that repeatedly advocated for the poor in the area of criminal justice policy was the American Civil Liberties Union (ACLU). See *id.* at 7, 182. But the ACLU, despite its history as an advocate for the legal rights of all, see SAMUEL WALKER, *IN DEFENSE OF CIVIL LIBERTIES: A HISTORY OF THE ACLU* 5 (2d ed. 1999), adopts a narrow, legalistic approach focusing primarily on individualistic or process-oriented issues (for example, affecting the rights of the accused) that fall far from the more diffuse, quality-of-life issues of concern to the urban poor. See MILLER, *supra* note 227, at 116–17.

that can be touted to the electorate.<sup>243</sup> Organized groups often provide just that, appearing with focused draft legislation and reams of supporting documents and research on narrow questions.<sup>244</sup> These groups have a strong stake in such questions, money from state budgets or membership dues giving these groups the resources to do their political job, and repeat player status allowing them to cozy up to state legislators and their staff.<sup>245</sup>

Furthermore, federal and state legislatures as a whole represent majorities—meaning middle class whites—and many legislators cannot win reelection by catering to minority rather than majority needs.<sup>246</sup> A public too busy to investigate the facts and swayed by the fear-mongering of politicians using anxiety over crime as an electoral tool likewise defers to the demands that politicians make good on their tough-on-crime promises.<sup>247</sup> There are, therefore, strong political reasons for legislators to heed the word of groups who urge harsher criminal justice system policies that, within broad limits, expand the groups' own budget and power. State criminal justice institutions and single-issue citizens' groups thus tend to stress ever-harsher punishments and isolated, simplistic solutions to the complex problem of crime and its control.<sup>248</sup> These observations extend not simply to what is criminalized, but also to how police and prosecutors are allowed to—or encouraged to—do their jobs.<sup>249</sup>

Broad, informal, anti-incarceration citizens' groups, like neighborhood associations, come from the most heavily-policed, most crime-ridden neighborhoods.<sup>250</sup> These small, multi-issue groups lack the resources and technical

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<sup>243</sup> *Id.* at 70–71, 80.

<sup>244</sup> *See id.* at 107–08.

<sup>245</sup> *Id.* at 88, 118.

<sup>246</sup> *See, e.g.,* Gregory S. Parks & Jeffrey S. Rachlinski, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659, 669 (2010) (noting that Barack Obama was only the third African-American in history elected to the United States Senate); DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS 91 (1999) (“Most white representatives from black influence districts do not spend much time representing their black constituents, while most black members of Congress spend a substantial portion of their time representing white constituents.”).

<sup>247</sup> RAY SURETTE, MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES 207, 212–14, 217, 223–24, 226 (2d ed. 1998); *See Kennedy, supra* note 8, at 869–70 (summarizing the complex relationship among media portrayals of crime, audience perceptions of it, and policymakers' use of it, with a particular analysis of the role of appeals to fear).

<sup>248</sup> *See MILLER, supra* note 227, at 8 (“National elected officials face a different set of constituent pressures than local ones because of their geographic and electoral isolation from the problem and, I suggest, because this isolation allows for the emergence of single-issue groups with narrow interests whose problem definitions and issue frames intersect with prosecutors and police around punishing offenders.”).

<sup>249</sup> *See id.* at 61, 73–75.

<sup>250</sup> *See infra* text accompanying notes 255–57 (discussing the communities from which the anti-incarceration groups come); *see generally* OWEN FISS, A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM 3–4 (2003) (describing life in these communities).

expertise that the larger groups have.<sup>251</sup> They are prompted to action by the pain that both crime and crime-fighting techniques bring to their lives.<sup>252</sup> They have no lobbyists, little money for travel or hiring lawyers, and are often skeptical of formal governmental processes.<sup>253</sup> Moreover, their experience teaches them that crime is a multi-faceted problem that requires multi-faceted solutions.<sup>254</sup> Abandoned homes shelter crack addicts while darkened streets do the same for dealers; poor schooling leaves too many children without hope of decent employment, thus making them vulnerable to being lured into crime; aggressive and unfair police tactics produce community distrust that hampers police access to the citizens who can help in solving crimes; and poverty makes for small, crowded living quarters that drive bored youth onto the street, where trouble awaits them.<sup>255</sup>

These problems are shared by the entire community, uniting them in their fear, and many of the offenders are the children, siblings, friends, and acquaintances of the law-abiding.<sup>256</sup> These groups, therefore, tend not to demand specific policies, but rather affordable housing, accountable and talented teachers, responsive and caring police, and job programs as part of the solution to crime and a failing criminal justice system.<sup>257</sup> The overwhelming nature of these demands discourages legislator attention, for politicians find it hard to craft solutions that they can even claim to achieve short-term results from which they can reap political rewards.<sup>258</sup> Moreover, broad citizens' groups do not come armed with

<sup>251</sup> See MILLER, *supra* note 227, at 69.

<sup>252</sup> See *id.* at 160–63, 170–71 (citizens' groups are less punitive, more focused on harm-reduction, angry at police abuses, yet desirous of greater police presence, more concerned with prevention, redistributing physical safety, and crime's root causes).

<sup>253</sup> See *id.* at 103.

<sup>254</sup> See *id.* at 174 (“They advocate for more police, but in the context of cleaner neighborhoods, more opportunities, and better schools, which requires a reallocation of power and resources. As the issue migrates to other legislative venues, the police message resonates, but much of the rest is left behind.”).

<sup>255</sup> See *id.* at 152–56 (discussing neighborhood quality of life/crime connection), *id.* at 171 (stating “housing, blight, police-community relations, economic development, education, and services”). See also ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868 78–79 (2006) (explaining the link between aggressive policing strategies and rising crime, combined with low capture rates); Andrew E. Taslitz, *The Fourth Amendment In the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 LAW & CONTEMP. PROBS. 125, 167–68 (2002) (explaining connection between the housing quality of the poor and their greater presence on the streets).

<sup>256</sup> See MILLER, *supra* note 227, at 159–60 (quoting a Philadelphia legislator: “I think in the African American community, the minority community, the Latino community, there’re [sic] many parents whose kids are having these problems and they’re not really advocating them being locked up”); *id.* at 173 (“But at the local level, where the damage of crime is felt in personal, familial, and community terms, such a coupling [of victims’ needs with harsher punishment] is much more tenuous.”).

<sup>257</sup> See *id.* at 107–09.

<sup>258</sup> *Id.* at 108 (“Broad citizen groups bring to legislators a set of problems with depth and breadth that have few simple policy solutions. The convergence of citizen organizations interested in

specific proposals, draft legislation, or author expertly-written position papers.<sup>259</sup> These oversights can irritate legislators who complain that citizens' groups do not know what they want and offer little help in the practical task of legislating.<sup>260</sup> Cultural differences complicate matters, as middle-class legislators defer to busy prosecutors or police chiefs, putting them on early in hearings so that they can get back to the task of protecting the community. Meanwhile, citizen representatives often are relegated to speak during the little time remaining at the end of the hearing—ignoring the speakers' need to catch buses home, for many cannot afford cars, and to drive home early enough to pick children up from school or placate irate employers grudging about giving the speakers time off to pursue their "personal business."<sup>261</sup> The result, explains Miller, is that broad citizens' groups "make up a tiny fraction of the 'interested parties,' a miniscule portion of witnesses at hearings, and an almost imperceptible percentage of personal contacts with legislators" at the state and federal levels.<sup>262</sup> Further magnifying the problem, most of these broad groups consist of poor urban minorities in which legislators from farm country, small towns, and white middle-class neighborhoods often have little interest.<sup>263</sup>

## 2. Who Gets Heard by Local Legislatures

Once the state- and federal-level dynamics are understood, it takes far less space to explain this point: the urban poor do much better at being heard by local legislatures than higher-level ones. Crime can dominate the lives of the poor. The law-abiding are fearful, lose what money they have to thieves, take insufficient advantage of services that may be offered at night, face medical expenses they can ill afford, and suffer community disruption that makes political organizing difficult.<sup>264</sup> Nevertheless, they can elect city council representatives who live in

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quality-of-life concerns and a legislative process that seems most amenable to policy-oriented groups results in a highly restrictive venue for these broader groups.").

<sup>259</sup> *Id.* at 107–08.

<sup>260</sup> *See id.* at 107.

<sup>261</sup> *See id.* at 111–12; *cf.* FISS, *supra* note 250, at 28–31 (arguing that the de facto geographic, economic, and political isolation of the residents of America's ghettos is so intractable as to require but one solution: giving residents vouchers enabling them to leave).

<sup>262</sup> *See* MILLER, *supra* note 227, at 103.

<sup>263</sup> *Id.* at 112. One Democratic Pennsylvania Senator bemoaned this emotional and cultural distance between most state-level legislators and the urban poor:

The more you get away from where it [crime] begins, the more you're talking about [just] a bad guy that has committed a crime....What are we going to do? Without knowing or caring whether he has a family, who's supporting him, what ties he has to the community or she has to the community. And you don't care how he got there. It's too bad, it's too late.

*Id.*

<sup>264</sup> *See* Tracey L. Meares & Dan M. Kahan, *When Rights are Wrong: The Paradox of Unwanted Rights*, in URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 13–14

the same neighborhoods and are motivated to fight for similar interests.<sup>265</sup> Furthermore, they are geographically close to city hall should they wish to pursue formal means of being heard.<sup>266</sup> However, they also have at their disposal an array of relatively cheap informal means: protests, vigils, strikes, *ad hoc* rallies, and unexpected visits to legislators' offices.<sup>267</sup> Moreover, crime is so prevalent in the neighborhoods that spawn these groups that the groups seek broad, long- and short-term solutions, rather than the relatively narrow ones offered by more organized groups.<sup>268</sup> Police are often seen as part of the problem and bring with them a history of policing as a symbol of racial oppression.<sup>269</sup>

Local legislators may be limited in what they can do, but they thus find it impossible to ignore entirely the constant local public pressure for action to regulate the police and to improve the problems of crime and the criminal justice system.<sup>270</sup> Indeed, local councilmen are often far better versed about a range of

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(Tracey L. Meares & Dan M. Kahan eds., 1999) (making similar point, though over-estimating racial minority political power); Cathy J. Cohen & Michael C. Dawson, *Neighborhood Poverty and African American Politics*, 87 AM. POL. SCI. REV. 286 (1993) (arguing that traditional types of political activity, such as voting, giving money to candidates, and volunteering in partisan political organizations are much diminished in severely impoverished neighborhoods relative to more affluent ones).

<sup>265</sup> See MILLER, *supra* note 227, at 125–26, 135–36. For background on the socio-political histories of Pittsburgh and Philadelphia, see generally Peter C. Buffum & Rita Sagi, *Philadelphia: Politics of Reform and Retreat*, in CRIME IN CITY POLITICS (Anne Heinz, Herbert Jacob & Robert L. Lineberry eds., 1983) (documenting the history, corruption, and reform of Philadelphia's government between 1948–1978); Matthew J. Countryman, *From Protest to Politics: Community Control and Black Independent Politics in Philadelphia, 1965–1984*, 32 J. URB. HIST. 813 (2006) (tracking the history of independent black electoral activism within Philadelphia in the 1960s and 1970s, focusing specifically on the Black Power movement); SOCIAL CAPITAL IN THE CITY: CIVIC ENGAGEMENT AND CIVIC LIFE IN PHILADELPHIA (Richardson Dilworth ed., 2006) (addressing the development of “community” and the political and intellectual role of social capitalism within a community); BARBARA FERMAN, CHALLENGING THE GROWTH MACHINE: NEIGHBORHOOD POLITICS IN CHICAGO AND PITTSBURGH (1996) (contrasting the different levels of success between urban growth policies in Pittsburgh and Chicago).

<sup>266</sup> See MILLER, *supra* note 227, at 176–79.

<sup>267</sup> *Id.* at 128–29, 137–38.

<sup>268</sup> See *id.* at 148; Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROBS. 221, 224–48 (2003) (summarizing the efforts of poor, racial minority community members in Cincinnati to achieve longer-term, more comprehensive solutions to the problem of alleged police abuses in that city).

<sup>269</sup> See MILLER, *supra* note 227, at 124–25, 162–64.

<sup>270</sup> See *id.* at 24–25, 133–38, 144–46. A Pennsylvania House Democratic representative understood well the local dynamic:

Local officials are living in those communities, they're confronted by community leaders who can't make it to Harrisburg, saying, “If we did this, clean up this neighborhood . . . .” It's more real and pragmatic and more visceral at the local level. Those local officials don't leave their place of work and go off somewhere else. They're there all the time.

*Id.* at 112.

criminal justice issues than their state and federal counterparts.<sup>271</sup> These local legislators are also very familiar with the local citizens' groups—sometimes a dizzying array of them—and their informal actions and protests.<sup>272</sup> One result is that broad citizens' groups also represent large percentages of the witnesses testifying at local legislative hearings, meet regularly with local police officials, and share ideas and information with them.<sup>273</sup> They engage in more formal action too, including lobbying, while using threats to go to the media as an effective tool to get councilmen to come to neighborhood meetings, and to do so with an attentive ear.<sup>274</sup>

Correspondingly, local criminal justice agencies thus see local government as hostile to the agencies' criminal justice interests.<sup>275</sup> They recognize that the real power over the criminal justice system is held by higher levels of government, so they concentrate their resources at these levels.<sup>276</sup> By doing so, they can promote legislation to preempt local reform measures while blocking more comprehensive solutions to criminal justice problems.<sup>277</sup> None of this is to suggest that city councils are controlled by urban racial minorities, for local officials have many other groups to whom they must answer, and many material and political obstacles which they must navigate.<sup>278</sup> But, in terms of criminal justice policy, poor racial minorities tend to have a much greater and more effective voice at the lower levels of government than the higher ones.<sup>279</sup>

Cognitive psychologist Michael Wenzel and his colleagues have done research on when people prefer retributive responses aimed at punishing rule-violators versus restorative responses aimed at repairing harms done. Their work

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<sup>271</sup> See *id.* at 135–38.

<sup>272</sup> See *id.* at 143–46.

<sup>273</sup> See *id.* at 128.

<sup>274</sup> See MILLER, *supra* note 227, at 137–38.

<sup>275</sup> See *supra* text accompanying notes 231–45, at 40–42.

<sup>276</sup> Local criminal justice agencies are often so busy just doing their jobs—responding to crime and addressing internal organizational issues—that they lack the resources to devote full-time staff to local lobbying. MILLER, *supra* note 227, at 143. Police will, of course, attend City Council hearings when invited by Councilmen and will on certain issues occasionally initiate Council contact. *Id.* at 141–42. But the more common local pattern is “relatively quiescent police advocacy” on criminal justice policy. *Id.* at 142. Police apparently see state legislators as both more receptive to law enforcement positions on such policy issues and more able to garner the resources for action, for it is at the state level at which police aim their limited political resources. See *supra* text accompanying notes 231–45.

<sup>277</sup> See *supra* text accompanying notes 231–45.

<sup>278</sup> See MILLER, *supra* note 227, at 144.

<sup>279</sup> See *id.* at 156 (“Such intense citizen pressures can hardly be ignored by local lawmakers.”). Said one Pittsburgh City Council member: “There is more to worry about from grassroots [at the local level] because they can really hurt you at the polls.” *Id.*

further helps in understanding the different policy-orientations of local, multi-issue groups (restorative in orientation) and of more punitive political forces.<sup>280</sup>

Retributive responses are unilateral, seeking punishment of the offender in proportion to the harm he has done.<sup>281</sup> Such responses are coercive, requiring neither the offender's agreement to the punishment nor his intellectual or emotional acceptance of its wisdom.<sup>282</sup> Restorative justice responses, by contrast, seek to heal the victim, the offender, and the community.<sup>283</sup> Restorative justice processes require the offender's agreement to participate and to accept certain consequences.<sup>284</sup> Moreover, such processes aim to make the offender accept that he has done harm, to take responsibility for it, and to express sincere remorse.<sup>285</sup> Retribution aims at unilateral, external censure, while restoration ultimately seeks collective choice and offender self-censure.<sup>286</sup> While retributive responses seek to disempower the offender, thus degrading him in the way that he degraded his victim, restorative responses seek to empower both offender and community by bringing the offender's values and actions in line with community norms.<sup>287</sup> Retribution thus views the harm of crime as a status insult, while restoration views the harm as a breach in the collective community.<sup>288</sup> Different harms require different cures: insult-for-insult versus communal embrace.<sup>289</sup> Restorative justice thus, unlike its retributive cousin, aims at achieving a dialogue of mutual respect

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<sup>280</sup> See generally Michael Wenzel et al., *Retributive and Restorative Justice*, 32 LAW & HUM. BEHAV. 375 (2008) (addressing the effect retributive and restorative justice have on criminal behavior).

<sup>281</sup> See *id.* at 378 (emphasizing unilateral nature of retributive justice); Andrew E. Taslitz, *The Inadequacies of Civil Society: Law's Complementary Role in Regulating Harmful Speech*, 1 U. MD. L. J. ON RACE RELIG. GENDER & CLASS 306, 334–37 (2001) [hereinafter Taslitz, *Civil Society*] (emphasizing proportionality requirements of retributive justice).

<sup>282</sup> See Wenzel et al., *supra* note 280, at 378.

<sup>283</sup> *Id.* at 376, 378.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 378.

<sup>286</sup> *Id.* at 379–80.

<sup>287</sup> See *id.* at 381–83 (concerning restorative responses); JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 25 (1988) (noting that moral injuries are experienced as insults that degrade us); Taslitz, *Civil Society*, *supra* note 281, at 320–24, 335–39 (noting in turn that society seeks retribution by proportionately degrading the offender).

<sup>288</sup> See Taslitz, *Civil Society*, *supra* note 281, at 320–24 (concerning retribution as a response to a status insult); Wenzel et al., *supra* note 280, at 380–81 (restorative justice as seeking to heal the communal harms of crime); Neil Vidmar, *Retribution and Revenge*, in *HANDBOOK OF JUSTICE RESEARCH IN LAW* 42 (Joseph Sanders & V. Lee Hamilton eds., 2000) (“An offense is a threat to community consensus about the correctness—that is, the moral nature—of the rule and hence the values that bind social groups together.”).

<sup>289</sup> See Taslitz, *Civil Society*, *supra* note 281, at 335–38 (summarizing Evil-For-Evil argument); Wenzel et al., *supra* note 280, at 381–84 (noting restorative justice aims at restoring the offender as an equal member of the political-moral community who reaffirms the group values that he previously breached).

and equal voice, with the goal of healing the victim, the offender, and the community.<sup>290</sup> Restoration does not ignore punishment, which may be necessary for healing, but rather seeks different forms and goals of punishment than does retribution.<sup>291</sup> Restoration is also concerned with *more* than punishment, with cure as well as pain.<sup>292</sup>

Wenzel and his colleagues' work revealed that the choice of response—retributive or restorative—is strongly related to the nature of inter-group status competition.<sup>293</sup> Individuals partly define themselves by their group connections.<sup>294</sup> Observers may associate victim and offender with different social groups, with “self and non-self,” so that one’s gain is the other’s loss.<sup>295</sup> Healing, by contrast, assumes similarity: the offender and victim as wounded parts of a single social body seeking restored health. Indeed, Wenzel posits that what benefits one part of the body benefits another and the social organism as a whole.<sup>296</sup> Accordingly, when parties lack a common identity they are more likely to see rule transgressions as insults to status,<sup>297</sup> eliciting a retributive response.<sup>298</sup> When they share a common identity, they are instead more likely to see such transgressions as challenges to shared values, eliciting a healing response.<sup>299</sup> Social distance thus promotes retributive punishment, and social closeness tends to lead to restorative justice remedies.

Granted, persons having a sense of belonging to two distinct groups may share a sense of membership in a common, higher-order group; for example, those with differing religious views still being “Americans.”<sup>300</sup> But two processes can make differences prevail over similarities. First, there can be a “functional antagonism” between two groups; particularly where the victim’s group sees itself as holding values *relevant* to the situation that are different from the offender’s

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<sup>290</sup> See Wenzel et al., *supra* note 280, at 381, 383–84.

<sup>291</sup> See *supra* text accompanying notes 281–90.

<sup>292</sup> See WESLEY CRAGG, *THE PRACTICE OF PUNISHMENT: TOWARDS A THEORY OF RESTORATIVE JUSTICE* 114, 117 (1992) (discussing restorative justice as healing); ELIZABETH V. SPELMAN, *REPAIR: THE IMPULSE TO RESTORE IN A FRAGILE WORLD* 52 (2003) (similar); *supra* text accompanying notes 281–90.

<sup>293</sup> Wenzel et al., *supra* note 280, at 383.

<sup>294</sup> See TASLITZ, *CULTURE OF THE COURTROOM*, *supra* note 13, at 134–35.

<sup>295</sup> Wenzel et al., *supra* note 280, at 383.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 382–84.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> See *id.* at 384; S. L. GAERTNER & J. F. DOVIDIO, *REDUCING INTERGROUP BIAS: THE COMMON INGROUP IDENTITY MODEL* 49 (2000); John C. Turner, *A Self-Categorization Theory*, in *REDISCOVERING THE SOCIAL GROUP: A SELF-CATEGORIZATION THEORY* (A. Hagg, P. Oakes, S.D. Reicher & M.S. Wetherell eds., 1987).

group.<sup>301</sup> Second, the victim's group might view its values as more "representative and normative of the inclusive group generally."<sup>302</sup> Consequently, the offender's group becomes defined as "deviant or subversive."<sup>303</sup> Racial minority status has repeatedly been shown, at least at the subconscious level, to trigger a physical fear of those belonging to other races.<sup>304</sup> The minority race's members thus come to be linked by the majority to crime.<sup>305</sup> A spate of empirical studies demonstrate this phenomenon: from judges meting out harsher sentences to offenders with "Afro-centric features," to police using more aggressive interrogation techniques with black suspects than white ones,<sup>306</sup> to employers evaluating black applicants with minor criminal records more negatively than identically-situated white applicants.<sup>307</sup> Residential and educational segregation heighten the sense of difference, thereby minimizing opportunities for members of different groups to get to know one another well enough as individuals to trigger individualized-assessments and a sense of group commonality over stereotypical assessments and group division.<sup>308</sup>

This combination of factors again suggests that giving local urban racial communities in heavily-policed areas more of an "effective" voice in state and federal legislatures—a voice prompting serious deliberation and having the prospect of altering criminal justice policy—should serve as an anti-incarceration counter-force.<sup>309</sup> That, in turn, should moderate, or perhaps even help reverse, the growth of the mass-incarceration state.

#### D. Democratic Social Science

Social science concerning how individuals and groups make sentencing-related judgments in specific cases adds further support to the argument that widespread PDD, especially concerning the criminal justice system, would discourage mass incarceration. For example, for decades the public perceived crime rates to

<sup>301</sup> See Wenzel et al., *supra* note 280, at 384 (making similar point); Michael C. Hogg, *Social Identity and Group Cohesiveness*, in REDISCOVERING THE SOCIAL GROUP: A SELF-CATEGORIZATION THEORY, *supra* note 300, at 112 (first articulating the "functional antagonism" idea).

<sup>302</sup> Wenzel et al., *supra* note 280, at 385.

<sup>303</sup> *Id.*

<sup>304</sup> See, e.g., Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 125 (2006) [hereinafter Taslitz, *Wrongly Accused*]; Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 SW. U.L. REV. 1091 (2008) [hereinafter *Wrongly Accused Redux*].

<sup>305</sup> See Taslitz, *Wrongly Accused*, *supra* note 304, at 126–28; Taslitz, *Wrongly Accused Redux*, *supra* note 304, at 1099–1108, 1112–16, 1118–19.

<sup>306</sup> See Taslitz, *Wrongly Accused*, *supra* note 304, at 130–33.

<sup>307</sup> See DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 64–72 (2007); Taslitz, *Wrongly Accused Redux*, *supra* note 304, at 1102–07.

<sup>308</sup> See Bell, *supra* note 214 (residential segregation).

<sup>309</sup> See TASLITZ, CULTURE OF THE COURTROOM, *supra* note 13, at 138–39.

be rising when, in fact, they were falling.<sup>310</sup> Similarly, the public overestimates the proportion of all crime consisting of violence: believing that abolition of the death penalty raises homicide rates, even though cross-country data suggests the opposite; overestimating the likelihood of a suspect committing crime while on bail and of a convicted person's recidivating; and wrongly assuming that clear "profiles" exist for certain kinds of offenders.<sup>311</sup> Yet, these conclusions are based on surveys requiring quick responses, without respondents' engaging in careful study of the issues.<sup>312</sup> Moreover, the generalizations made by respondents seem to stem from the public's passive acceptance of media and politician-driven images of the nature and extent of crime.<sup>313</sup> Those images have likewise led the public to believe that judges impose unduly lenient sentences, despite the ever-harsher nature of sentences via mandatory minimum legislation, sentencing guidelines, moral panics, and a host of other mechanisms.<sup>314</sup> These mistaken impressions have fostered a public attitude in which most people worry more about what they perceive to be excessive restraints on law enforcement than about denials of due process or violations of sentencing proportionality principles.<sup>315</sup>

Yet, when ordinary persons are confronted with vignettes asking them to make sentencing judgments in specific cases, their sentencing judgments are far less harsh.<sup>316</sup> Even though they are not dealing with real people face-to-face, or hearing testimony conveying rich narratives, confronting subjects with the specifics that occur in real cases moves them further from what their gut-reaction generalizations revealed in surveys about criminal justice would suggest.<sup>317</sup> Even victims of certain real crimes likewise display leniency in specific cases.<sup>318</sup> Concerning the latter point, a 1982 study of burglary victims found them favoring

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<sup>310</sup> JULIAN V. ROBERTS & MICHAEL J. HOUGH, UNDERSTANDING PUBLIC ATTITUDES TO CRIMINAL JUSTICE 10–13 (2005); Humphrey Taylor, *How Hard It is to Communicate Good News*, Harris Poll 34 (Wed. June 2, 1999), available at <http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-HOW-HARD-IT-IS-TO-COMMUNICATE-GOOD-NEWS-1999-06.pdf>.

<sup>311</sup> ROBERTS & HOUGH, *supra* note 310, at 12.

<sup>312</sup> *Id.* at 12–15, 23.

<sup>313</sup> *Id.* at 10–11, 17–18.

<sup>314</sup> *See id.*; Kennedy, *supra* note 8, at 860–87 (discussing moral panics).

<sup>315</sup> ROBERTS & HOUGH, *supra* note 310, at 14–15.

<sup>316</sup> *See id.* at 21–22. The results of vignette studies reported in this section hold across English-speaking countries (citing David Indermaur, *Perceptions of Crime Seriousness and Sentencing: A Comparison of Court Practice and the Perceptions of a Sample of the Public and Judges*, REPORT TO THE CRIMINOLOGY RESEARCH COUNCIL, AUSTRALIAN INSTITUTE OF CRIMINOLOGY (1990)).

<sup>317</sup> ROBERTS & HOUGH, *supra* note 310, at 21–22; *see generally* Jennifer Cumberland & Edward Zamble, *General and Specific Measures of Attitudes toward Early Release of Criminal Offenders*, 24 CAN. J. BEHAV. SCI. 442 (1992) (Can.) (describing the differences in global attitude toward the release of criminal offenders); Edward Zamble & Kerry Lee Kalm, *General and Specific Measures of Public Attitudes Toward Sentencing*, 22 CAN. J. BEHAV. SCI. 327, 328 (1990).

<sup>318</sup> ROBERTS & HOUGH, *supra* note 310, at 22.

harsh penalties for burglaries in general, but non-custodial penalties for “their” burglar.<sup>319</sup>

Many more studies, however, have used vignettes or other methods for conveying case-specificity without turning to real victims.<sup>320</sup> These more abstract (abstracted from the experience of actually being victimized) studies yielded similar results.<sup>321</sup> In a 1992 study, for example, respondents expressed support for denying parole to violent or serious offenders.<sup>322</sup> Yet, four-fifths of the subjects given specific burglar parole applications favored granting them.<sup>323</sup> More than half the subjects reviewing aggravated assault and robbery convicts’ files likewise favored putting them on parole.<sup>324</sup> When asked about initial sentencing of newly-convicted offenders, rather than potential parolees, numerous studies yield similar results: harsh attitudes in the abstract, lenience for particular individuals.<sup>325</sup> Results like this suggest that the specificity of seemingly real cases and the associated more-intense, more-informed concentration on those cases triggers well-considered justice judgments that readily deviate from the criminal justice narratives conveyed by media and politicians.<sup>326</sup>

Other sorts of polls reveal some reasons why they differ from judgments in specific cases. Most polls impose on respondents a “forced choice” among pre-selected options.<sup>327</sup> Polls using follow-up questions can reveal subtler attitudes.<sup>328</sup> For example, most Americans in polls express broad support for the death penalty.<sup>329</sup> Yet, polls with follow-up questions reveal that the support for capital punishment is limited to a few extreme cases—truly the worst-of-the-worst.<sup>330</sup> Other follow-up polls reveal that, when answering survey questions, the images

<sup>319</sup> MIKE MAGUIRE & TREVOR BENNETT, *BURGLARY IN A DWELLING: THE OFFENCE, THE OFFENDER AND THE VICTIM* 139, 141, 170 (1982).

<sup>320</sup> See ROBERTS & HOUGH, *supra* note 310, at 21; Cumberland & Zamble, *supra* note 317, at 445; Zamble & Kalm, *supra* note 317, at 328.

<sup>321</sup> *Id.*

<sup>322</sup> See ROBERTS & HOUGH, *supra* note 310, at 21; Cumberland & Zamble, *supra* note 317, at 445.

<sup>323</sup> See Cumberland & Zamble, *supra* note 317, at Table 1.

<sup>324</sup> *See id.*

<sup>325</sup> ROBERTS & HOUGH, *supra* note 310, at 22; Zamble & Kalm, *supra* note 317, at 335; see also Indermaur, *supra* note 316, at 46.

<sup>326</sup> ROBERTS & HOUGH, *supra* note 310, at 21–25; John Hagan, Gabrielle Ferrales, & Guillermina Jasso, *How Law Rules: Torture, Terror, and the Normative Judgments of Iraqi Judges*, 42 *LAW & SOC’Y REV.* 605, 615 (2008) (using the “factorial survey method,” described as the ‘methodological gold standard’ for the study of social norms in decision-making situations . . . including judgments about crime and punishment,” a method involving “[v]ignettes, or scenarios . . . followed by questions that elicit normative judgments—in this study, about sentence length.”).

<sup>327</sup> ROBERTS & HOUGH, *supra* note 310, at 20.

<sup>328</sup> *Id.* at 23.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

popping into people's minds are of serious, violent, repeat offenders.<sup>331</sup> Specific case facts confront subjects with very different sorts of offenders.<sup>332</sup> Even relatively serious cases seem less straightforward in light of the complexity of detail similar to that found in real life.<sup>333</sup> More time to think and more information to ponder softens retributive impulses.<sup>334</sup> Indeed, such information also softens responsibility judgments as respondents realize that many of the factors contributing to crime are not fully within the offender's control.<sup>335</sup> As one commentator summarized the research, "When people are told about an offender's history of childhood abuse, for example, their desire for severe punishment diminishes."<sup>336</sup>

Deliberative polling further supports these conclusions. Deliberative polls start with a survey of public attitudes on certain issues.<sup>337</sup> But, respondents next participate in a weekend seminar.<sup>338</sup> Researchers measure attitudes at the start and end of the seminar.<sup>339</sup> The seminar itself involves respondents listening to presentations on the issues.<sup>340</sup> Participants can then deliberate before responding.<sup>341</sup> Because participants constitute a representative sample, their conclusions can more readily be generalized than would be true of other fully or partly qualitative methods.<sup>342</sup>

Deliberative polls done about criminal justice issues inform respondents about the many alternatives to incarceration, correct mistaken information in media reports, and provide ample new information about the criminal justice system.<sup>343</sup>

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<sup>331</sup> *Id.* at 23–24; Anthony N. Doob & Julian V. Roberts, *Public Punitiveness and Public Knowledge of the Facts: Some Canadian Surveys*, in PUBLIC ATTITUDES TO SENTENCING: SURVEY FROM FIVE COUNTRIES 111 (Nigel Walker & Mike Hough eds., 1988).

<sup>332</sup> *See supra* text accompanying notes 320–26.

<sup>333</sup> ROBERTS & HOUGH, *supra* note 310, at 24.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *See id.* at 25; *see generally* JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* (2009) (offering a detailed defense of deliberative polling against its critics, relying both on empirical data and political theory); LAWRENCE R. JACOBS ET AL., *TALKING TOGETHER: PUBLIC DELIBERATION AND POLITICAL PARTICIPATION IN AMERICA* 5 (2009).

<sup>338</sup> ROBERTS & HOUGH, *supra* note 310, at 25.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> FISHKIN, *supra* note 337, at 25 ("Deliberative Polling...was developed explicitly to combine random sampling with deliberation."). The conclusions of deliberative polls can either be reported to enter into the "actual public dialogue, or, in some cases, the actual policy process." *Id.*

<sup>343</sup> *See* FISHKIN, *supra* note 337, at 32–43; ROBERTS & HOUGH, *supra* note 310, at 25; Loretta J. Stalans, *Measuring Attitudes to Sentencing and Sentencing Goals*, in *SOCIAL PSYCHOLOGY OF PUNISHMENT OF CRIME* 231, 241–42 (Margit E. Oswald, Steffen Bieneck & Jörg Hupfeld-Heinemann eds., 2009).

Participants break up into smaller groups for discussion, debate, and deliberation, after which respondents are again interviewed.<sup>344</sup> Providing new information and encouraging participants to then engage in sustained thought about its consequences promotes more careful, systematic analysis.<sup>345</sup> Furthermore, as much research demonstrates, persons who know that they will be held accountable for their views, even if only in the sense of reporting them to others, become “flexible balanced thinkers who actively entertain counterarguments from conflicting sides.”<sup>346</sup> Accountability reduces reliance on emotions and prior attitudes or values in favor of more careful information processing.<sup>347</sup> Indeed, although angry, unaccountable subjects give more severe sentences than calm ones, research has demonstrated that initially angry, *accountable* subjects move much of the way toward the greater leniency of the calmer participants.<sup>348</sup>

Unfortunately, the expense and time-consumption involved in deliberative polling has meant that few have been done in the area of criminal justice severity.<sup>349</sup> Moreover, those that have been done have relied on general questions rather than incorporating detailed case summaries.<sup>350</sup> Nevertheless, those that have been done reveal a move toward rehabilitative sentencing strategies and away from harsher prison sentences.<sup>351</sup> The most well-known such deliberative poll indeed found,

[T]hat respondents had shifted their attitudes away from a punitive stance immediately after the event and were less supportive of the use of prison for young offenders and believed that prison was a less effective option; moreover, this shift remained 10 months after the deliberative poll, suggesting that the attitude change was enduring.<sup>352</sup>

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<sup>344</sup> See FISHKIN, *supra* note 337, at 38–40; ROBERTS & HOUGH, *supra* note 310, at 25; Stalans, *supra* note 343, at 242.

<sup>345</sup> See FISHKIN, *supra* note 337, at ch.2; Stalans, *supra* note 343, at 242.

<sup>346</sup> See Stalans, *supra* note 343, at 243 (quoting Jennifer S. Lerner et al., *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 J. PERSONALITY & SOC. PSYCH. BULL. 563, 563–74 (1998)).

<sup>347</sup> Jennifer S. Lerner, Julie H. Goldberg, & Philip E. Tetlock, *Sober Second Thoughts: The Effects of Accountability, Anger, and Authoritarianism on Attributes of Responsibility*, 24 J. PERSONALITY & SOC. PSYCH. BULL. 563, 564 (1998); see generally Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 52–53 (2010) (summarizing empirical data on the virtues of explanation and accountability in reducing cognitive errors).

<sup>348</sup> See Lerner et al., *supra* note 347.

<sup>349</sup> See ROBERTS & HOUGH, *supra* note 310, at 25.

<sup>350</sup> See Stalans, *supra* note 343, at 242.

<sup>351</sup> See *id.* at 244; Mike Hough & Alison Park, *How Malleable Are Attitudes to Crime and Punishment? Findings from a British Deliberative Poll*, in CHANGING ATTITUDES TO PUNISHMENT: PUBLIC OPINION, CRIME, AND JUSTICE 163 (Julian V. Roberts & Mike Hough eds., 2002).

<sup>352</sup> Stalans, *supra* note 343, at 242.

In addition to adding support to the idea that PDD lowers reliance on incarceration as a sentence, this data suggests another route for expanding democracy in the realm of criminal justice: incorporate vignettes and deliberative polling results into public policy decisions. These results provide a better picture of informed, reasoned popular attitudes than do most surveys. It may be impractical routinely to incorporate PDD into everyday policymaking. But relying on social science of certain kinds mimics much of real-world PDD, thus introducing a PDD element into the decision-making process. Granted, much more social science of this kind is needed in the criminal justice area. Nevertheless, social science can thus itself render criminal justice policymaking more democratic, and, in the process, less punitive.

#### E. *Happiness Research*

Empirical research on what makes humans happy has recently exploded.<sup>353</sup> Although there is lively debate about how to define and measure happiness, none of that debate needs to be reviewed here because it would not alter my conclusions.<sup>354</sup> Happiness research reveals support for the conclusion, with little to challenge it, that aspects of PDD promote human happiness. Human happiness in turn reduces criminality, thus reducing the supposed justification for harsh criminal justice policies.<sup>355</sup> Increased happiness should also reduce some of the emotional need to strike back at perceived threats to safety by means of severe sentences of incarceration.<sup>356</sup>

Government that promotes voice and accountability, is effective, promotes the rule of law, and minimizes corruption is an important happiness-promoter.<sup>357</sup> Voice and accountability are particularly relevant here and refer to the “degree to which citizens participate in choosing their government and the degree of freedom accorded to speech, association, and media expression.”<sup>358</sup> Rule of law concerns include police and court effectiveness and the degree to which officials abide by society’s rules.<sup>359</sup> In the United States, those rules especially include muscular

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<sup>353</sup> See generally DEREK BOK, *THE POLITICS OF HAPPINESS: WHAT GOVERNMENT CAN LEARN FROM THE NEW RESEARCH ON WELL-BEING* (2010) (outlining the historical study of happiness and new developments of current research); ARTHUR C. BROOKS, *GROSS NATIONAL HAPPINESS: WHY HAPPINESS MATTERS FOR AMERICA—AND HOW WE CAN GET MORE OF IT* (2008) (discussing why some Americans are happier than others).

<sup>354</sup> See BOK, *supra* note 353, at 9–10, 41–42.

<sup>355</sup> See *infra* text accompanying notes 357–412.

<sup>356</sup> *Id.*

<sup>357</sup> See BOK, *supra* note 353, at 23, 181.

<sup>358</sup> *Id.* at 181.

<sup>359</sup> *Id.*

personal freedom guarantees.<sup>360</sup> Trust in public officials, particularly the police, is maximized when they adhere to procedural and other guarantees of personal freedom and treat persons subject to their authority with dignity.<sup>361</sup> Police and other public agencies', including courts', responsiveness to citizen demands matter, and increased citizen voice is interpreted as an expression of respect.<sup>362</sup>

Equality values also play a role. "According to a World Values study," explains former Harvard University President Derek Bok, "tolerance of minority groups—whether defined by race, religion, gender, or sexual orientation—is likewise associated with greater happiness, not merely for the groups directly affected but for the entire population."<sup>363</sup> It is not income equality that matters so much as status equality.<sup>364</sup> Extreme status inequality, including that conveyed by inequality of imprisonment, violation of constitutional rights, and irrational attitudes undervaluing the accomplishments of salient social groups and their individual members, can do much to undermine happiness.<sup>365</sup>

Political inequality is particularly troubling. The actual or perceived inequality of access to political institutions is a form of voice-suppression, a significant injury to happiness.<sup>366</sup> Yet as voice-suppression snowballs, individuals feeling excluded from the political process become still less likely to participate in it because they see it as a sham.<sup>367</sup> When government policies indeed reflect exclusion of certain groups' perspectives, it feeds the perception and reality of sham-like processes.<sup>368</sup> But exclusion also undermines individual and collective well-being. As Derek Bok put it, "[a]lthough some people have more knowledge of public affairs than others, political equality is now considered necessary because

<sup>360</sup> *Id.* at 22–23.

<sup>361</sup> *See id.* at 23, 181–82, 201–02. On trust's social significance more generally, *see* MAREK KOHN, TRUST: SELF-INTEREST AND THE COMMON GOOD 8–16, 104–08, 124–33 (2008).

<sup>362</sup> *See* BOK, *supra* note 353, at 23.

<sup>363</sup> *Id.*; *see* Ronald Inglehart, et al., *Development, Freedom, and Rising Happiness: A Global Perspective (1981-2007)*, 3 *PERSP. ON PSYCHOL. SCI.* 264, 271 (2008).

<sup>364</sup> *See e.g.*, Betsey Stevenson & Justin Wolfers, *Happiness Inequality in the United States*, in *LAW AND HAPPINESS* 33, 34–35, 56–74 (Eric A. Posner & Cass R. Sunstein eds., 2010).

<sup>365</sup> *See* ALEXANDER, *supra* note 1, at 95–136 (documenting racial inequality in the distribution of imprisonment and other law enforcement practices and in the protection of constitutional rights); *cf.* BOK, *supra* note 353, at 94–95 (discussing happiness-diminishing effects of political inequality and of inequality of opportunity); Alberto Alesina & George-Marios Angeletos, *Fairness and Redistribution*, 95 *AM. ECON. REV.* 960, 965 (2005) (concluding that "[p]eople enjoy great satisfaction when they know (or believe) that they live in a just world, where hard work and good behavior ultimately pay off").

<sup>366</sup> *See supra* text accompanying notes 357–65 (analyzing the link among political inequality, voice-suppression, and poverty in criminal justice legislation); *infra* text accompanying notes 370–82 (on voice suppression).

<sup>367</sup> *See* BOK, *supra* note 353, at 90.

<sup>368</sup> *See* Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatalogical Term*, 39 *TEX. TECH L. REV.* 1383, 1395–98 (2007) (discussing emotional, moral, and political costs of sham-like processes).

no one, however well informed, can be trusted to fully understand the concerns of others or to weigh their interests as perceptively and as sympathetically as those directly affected by the government's policies."<sup>369</sup>

Voice-promoting procedures matter because of the "feedback information" they convey to the self.<sup>370</sup> Specifically, procedures address three core psychological needs: autonomy, relatedness, and competence.<sup>371</sup> Autonomy encompasses the experience of being causal, of being able to organize one's own actions in an effort to affect the world.<sup>372</sup> Relatedness includes the desire to connect to others in relationships of care and to be treated as a respected member of salient social groups.<sup>373</sup> Competence concerns one's "predisposition to control the environment and to experience oneself as capable and effective."<sup>374</sup>

Voice is therefore important because it promotes a sense of autonomy and competence.<sup>375</sup> To achieve this result, "effective voice" is required, that is, a voice perceived as having the real prospect of at least sometimes changing outcomes.<sup>376</sup> Ineffective voice conveys the sense of empty ritual, of not really being "listened to."<sup>377</sup> Effective voice, on the other hand, addresses relatedness too because such voice "is an important signal about one's standing in a group."<sup>378</sup> Individuals involved in arbitrations, mediations, civil or criminal trials, or other dispute resolution mechanisms that give them a chance to speak their minds are far more likely to accept negative outcomes as legitimate.<sup>379</sup> They are also far more likely to respect and obey the law in the future.<sup>380</sup> On a broader scale, more democratic institutions achieve similar results in the political realm because they enhance individuals' perceptions of autonomy.<sup>381</sup> Indeed, a number of studies, most famously one involving Swiss cantons, suggest that the more opportunities available for direct democratic participation in government and other institutions affecting everyday life, the greater the levels of happiness.<sup>382</sup>

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<sup>369</sup> BOK, *supra* note 353, at 89.

<sup>370</sup> See BRUNO S. FREY, *HAPPINESS: A REVOLUTION IN ECONOMICS* 109 (2008).

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> FREY, *supra* note 370 (procedural justice meted out by relevant institutions also contributes to a positive sense of self).

<sup>375</sup> *Id.* at 110.

<sup>376</sup> TASLITZ, *CULTURE OF THE COURTROOM*, *supra* note 13, at 137–41.

<sup>377</sup> *Id.*

<sup>378</sup> FREY, *supra* note 370, at 110.

<sup>379</sup> *See id.*

<sup>380</sup> See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 161–78 (1990).

<sup>381</sup> See FREY, *supra* note 370, at 113–16.

<sup>382</sup> *Id.* at 116–22 (also noting many later studies were redesigned to address criticisms of the Swiss canton study).

Institutions thus affect levels of happiness, and the law plays an important role in shaping and reflecting those institutions.<sup>383</sup> Institutions can shape how individuals interact and how they feel about their interactions.<sup>384</sup> Institutions can leave room for fair procedures to emerge at varying levels of daily life or block them.<sup>385</sup> Institutions affect not only individual happiness but the happiness of salient social groups, broader communities, and perhaps even of nations.<sup>386</sup>

Voice and equality of voice promote happiness, which is a good in itself. Surely a happier society, if consistent with other social goods, is a better society. But happiness also may be anti-criminogenic.

For example, depression in youth promotes drug or alcohol usage, dropping out of school, and “deficits in social functioning,” all of which are risk factors for criminal behavior.<sup>387</sup> By contrast, happy people “get better performance reviews, have more prestigious jobs, and earn higher salaries.”<sup>388</sup> They are also “more likely to get married and, once married, they are more satisfied with their marriage.”<sup>389</sup> Those who are happily married and working at well-paying jobs are likewise less likely to turn to crime.<sup>390</sup>

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<sup>383</sup> See *id.* at 111 (addressing self-worth).

<sup>384</sup> See *id.* at 111–12.

<sup>385</sup> See *id.* at 112–13.

<sup>386</sup> See BOK, *supra* note 353, at 22–27; see FREY, *supra* note 370, at 61–68 (arguing that the more potent causal arrow points to democracy’s primarily *causing* happiness). Concerning causation, at least one study has found that the causal arrow runs both ways: democracy contributes to happiness, and happy people enhance democracy and improve government quality. This same study found, however, that the “more potent” of the two effects was that happy people improve the quality of their government. See CAROL GRAHAM, *HAPPINESS AROUND THE WORLD: THE PARADOX OF HAPPY PEASANTS AND MISERABLE MILLIONAIRES* (2010).

<sup>387</sup> CHRISTINE CARTER, *RAISING HAPPINESS: 10 SIMPLE STEPS FOR MORE JOYFUL KIDS AND HAPPIER PARENTS* xii (2010). Christine Carter is the Executive Director of the University of California Berkeley’s Greater Good Science Center, which is devoted to “positive psychology,” the study of “what makes happy people happy, functional families functional[.]” *Id.* at x. See generally Joanne Savage, *Understanding Persistent Offending: Linking Developmental Psychology with Research on the Criminal Career*, in *THE DEVELOPMENT OF PERSISTENT CRIMINALITY* 3, 13–14, 28–32 (Joanne Savage ed., 2009) (noting link between these factors and persistent criminality); see also Child Trend Databank, *Adolescents Who Feel Sad or Hopeless* (2010) [http://www.childrends.databank.org/sites/default/files/30\\_%20Felt\\_Sad\\_or\\_Hopless.pdf](http://www.childrends.databank.org/sites/default/files/30_%20Felt_Sad_or_Hopless.pdf) (collecting references and statistics about correlations and predictors of, and consequences of, youthful depression).

<sup>388</sup> CARTER, *supra* note 387, at xiii.

<sup>389</sup> *Id.* See generally BARBARA L. FREDRICKSON, *POSITIVITY: GROUNDBREAKING RESEARCH REVEALS HOW TO EMBRACE THE HIDDEN STRENGTH OF POSITIVE EMOTIONS, OVERCOME NEGATIVITY, AND THRIVE* 131–32 (2009); ED DIENER & ROBERT BISWAS-DIENER, *HAPPINESS: UNLOCKING THE MYSTERIES OF PSYCHOLOGICAL WEALTH* 55–57 (2008) (for scientifically-informed summaries of the benefits of personal happiness).

<sup>390</sup> See Linda S. Pagani, *The Influence of Family Context on the Development and Persistence of Antisocial Behavior*, in *THE DEVELOPMENT OF PERSISTENT CRIMINALITY* 37, 44 (Joanne Savage ed., 2009) (marriage); Carter Hay & Walter Forrest, *The Implications of Family Poverty for a Pattern of Persistent Offending*, in *THE DEVELOPMENT OF PERSISTENT CRIMINALITY* 54, 55 (Joanne Savage ed.,

Positive emotions lead to greater thinking flexibility and awareness of the big picture while fostering emotional strength, more deeply-bonded friendships, and greater ability to handle stress.<sup>391</sup> Emotionally resilient people with strong support systems and ties to their communities shy away from crime.<sup>392</sup>

Parental depression harms children.<sup>393</sup> The children of depressed parents act out more, perform worse on tests, use less expressive language, and have weaker social skills.<sup>394</sup> Their parents are less likely to constructively correct bad behaviors, are less sensitive to their children's needs, and are less able to play with them in positive ways.<sup>395</sup> Parental unhappiness is also contagious; children's emotions mimic those of their parents.<sup>396</sup> Indeed, it is not only parents that matter, but friends, neighbors, and siblings living in close proximity, whose greater happiness or unhappiness will likewise reproduce itself in children.<sup>397</sup> Sad, lonely

2009) (unemployment); Thomas G. Blomberg, et al., *Educational Achievement Among Incarcerated Youth: Post-Release Schooling, Employment, and Crime Desistance*, in THE DEVELOPMENT OF PERSISTENT CRIMINALITY 250, 251, 253-54, 261-63 (Joanne Savage ed., 2009) (unemployment).

<sup>391</sup> See CARTER, *supra* note 387, at xiii-xiv; FREDRICKSON, *supra* note 389, at 126-27.

<sup>392</sup> See Stephanie Ellis & Joanne Savage, *Strain, Social Support, and Persistent Criminality*, in THE DEVELOPMENT OF PERSISTENT CRIMINALITY 76 (Joanne Savage ed., 2009) (noting that the literature suggests that "social support" may strengthen social bonds and improve coping skills, attenuating the effects of social strain, promoting psychological well-being, and thus reducing future crime and delinquency, and finding further support for this conclusion in their own study).

<sup>393</sup> See CARTER, *supra* note 387, at 5-6.

<sup>394</sup> *Id.* The leading research linking parental unhappiness to bad outcomes for children includes Susan B. Campbell et al., *Trajectories of Maternal Depressive Symptoms, Maternal Sensitivity, and Children's Functioning at School Entry*, 43 DEVELOPMENTAL PSYCHOL. 1202 (2007); Xin Feng, Daniel S. Shaw & Jennifer S. Silk, *Developmental Trajectories of Anxiety Symptoms Among Boys Across Early and Middle Childhood*, 117 J. ABNORMAL PSYCHOL. 32 (2008); Xin Feng, et al., *Emotional Exchange in Mother-Child Dyads: Stability, Mutual Influence, and Associations with Maternal Depression and Child Problem Behavior*, 21 J. FAM. PSYCHOL. 714 (2007); Karen L. Franck & Cheryl Buehler, *A Family Process Model of Marital Hostility, Parental Depressive Affect, and Early Adolescent Problem Behavior: The Roles of Triangulation and Parental Warmth*, 21 J. FAMILY PSYCHOL. 614, 614 (2007); Kristin Anderson Moore et al., *Depression Among Moms: Prevalence, Predictors, and Acting Out Among Third Grade Children*, CHILD TRENDS (March 2006) <http://www.aecf.org/upload/publicationfiles/momdepressionrb.pdf>.

<sup>395</sup> See CARTER, *supra* note 387, at 5.

<sup>396</sup> *Id.* at 6. See generally Andrew N. Meltzoff, *Imitation and Other Minds: The "Like Me" Hypothesis*, in PERSPECTIVES ON IMITATION: FROM NEUROSCIENCE TO SOCIAL SCIENCE 55-77 (Susan Hurley & Nick Chater eds., 2005) (discussing children's emotions mimicking those of their parents); Cameron Anderson, Dacher Keltner & Oliver P. John, *Emotional Convergence Between People over Time*, 84 J. OF PERSONALITY AND SOC. PSYCHOL. 1054 (2003) (noting also that the less powerful person in a relationship mimics the emotions of the more powerful). Compare Ferran Casas et al., *Does Subjective Well-Being Show a Relationship Between Parents and Their Children?*, 9 J. OF HAPPINESS STUDIES 197 (2008); with Bill E. Peterson, *Generativity and Successful Parenting: An Analysis of Young Adult Outcomes*, 74 J. PERSONALITY 847 (2006) (arguing that happy parents lead children to mimic that happiness).

<sup>397</sup> CARTER, *supra* note 387, at 6-7; James H. Fowler & Nicholas A. Christakis, *Dynamic Spread of Happiness in a Large Social Network: Longitudinal Analysis Over 20 Years in the Framingham Heart Study*, 337 BRIT. MED. J. 2338, 2344 (2008) (documenting how the probability of

children, parents, friends, and neighbors make for low self-esteem, anger, defeatism, eating and sleeping disorders, and the quest to find quick, often illegal, solutions to life's pain.<sup>398</sup> Poor social relationships also have ill consequences from an early age, as one psychologist explains:

Children consistently rejected by their peers have more problems; for example, they are more likely to get in trouble with the law, do poorly in school, or have psychiatric problems as adults. But kids who develop strong relationships and are socially intelligent—as emotional intelligence guru Daniel Goleman calls it—tend to flourish.<sup>399</sup>

Avoiding criminal activity also requires skills in conflict resolution, which in turn requires empathy.<sup>400</sup> Kids who cannot take other viewpoints into account will not settle disputes well.<sup>401</sup> Positive conflict resolution boosts school performance, self-confidence, and self-esteem, while promoting creative problem-solving.<sup>402</sup> Ineffective conflict resolution, on the other hand, has the opposite effect, often ending in violence.<sup>403</sup>

Happier, more empathetic people also tend toward generosity and kindness, behaviors that again strengthen bonds with others and even improve physical health and longevity.<sup>404</sup> But helping others, rather than hurting them, itself further increases positive emotions and self-worth.<sup>405</sup> Generosity “reduces adolescent depression” and “several studies have shown that teenagers who volunteer are less likely to fail a subject in school, get pregnant, or abuse substances.”<sup>406</sup> Forgiving people also heightens happiness, while persons who are routinely unforgiving “can't seem to stop plotting revenge or ruminating about how they've been

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happiness among those living in close proximity or otherwise closely connected rises when one of their number is happy).

<sup>398</sup> See CARTER, *supra* note 387, at 21.

<sup>399</sup> *Id.* at 22.

<sup>400</sup> *Id.* at 26–27 (linking good conflict resolution to empathy).

<sup>401</sup> *Id.* at 26–27.

<sup>402</sup> *Id.* at 27.

<sup>403</sup> CARTER, *supra* note 387, at 26.

<sup>404</sup> See *id.* at 30–31; STEPHEN POST & JILL NEIMARK, WHY GOOD THINGS HAPPEN TO GOOD PEOPLE 7–10 (2007) (discussing the kindness-health connection); Stephen G. Post, *Altruism, Happiness, and Health: It's Good to be Good*, 12 INT'L J. BEHAV. MED. 66 (2005).

<sup>405</sup> See CARTER, *supra* note 387, at 31–32. The causal connection between happiness and kindness is thus apparently bi-directional: happiness breeds kindness and kindness breeds happiness. See *id.*

<sup>406</sup> *Id.* at 31. See also Peter L. Benson, E. Gil Clary & Peter C. Scales, *Altruism and Health: Is There a Link During Adolescence?*, in ALTRUISM AND HEALTH: PERSPECTIVES FROM EMPIRICAL RESEARCH 97–115 (Stephen G. Post ed., 2007) (noting the link between generosity and depression-reduction).

wronged.”<sup>407</sup> Such hostility promotes still more conflict, further amplifying anger and anxiety.<sup>408</sup> On the other hand, forgiving promotes empathy, with all its attendant benefits.<sup>409</sup>

In short, PDD would at least contribute to higher levels of happiness, which should in turn help to drive down crime. Lower crime does not necessarily translate into lower perceptions of crime.<sup>410</sup> But, as discussed earlier, PDD processes should reduce the citizenry’s emotional commitment to harsh punishments like incarceration, and logic suggests that greater societal happiness should likewise soften retributive impulses. That softening due to higher happiness levels should occur, in part, because of happiness’s empathy-promoting qualities. This is because empathy is a prerequisite to compassion, which in turn fosters the impulse to mitigate punishment.<sup>411</sup> Moreover, PDD processes should improve the citizenry’s knowledge base, perhaps bringing perceptions about crime closer to reality. In such an environment, additional declines in the crime rate might serve as an effective rhetorical tool for arguing against the continued national obsession with incarceration.<sup>412</sup>

#### IV. CONCLUSION

Numerous criticisms have been raised of PDD—fears that it is ultimately elitist, that it will be controlled by slanted presentations, that high-status members will dominate discussions, and that brutal antagonism is a good and unavoidable thing for democracy—being just a few of the common complaints.<sup>413</sup> I do not have the space to address those criticisms here but note only that I think that recent research decisively answers each of these objections, and I refer skeptical readers to those sources.<sup>414</sup> On the other hand, though I think PDD a politically desirable

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<sup>407</sup> CARTER, *supra* note 387, at 71.

<sup>408</sup> *See id.* at 71–72.

<sup>409</sup> *See id.* at 71.

<sup>410</sup> *See* ROBERTS & HOUGH, *supra* note 310, at 10–15.

<sup>411</sup> *See* Taslitz, *Tinkerbelle*, *supra* note 186, at 441 (2009).

<sup>412</sup> The uncoupling of actual crime rates from criminal justice policy—that is, rising mass incarceration in a time of declining crime rates—is likely due in part to the public’s *misperception* about the true crime rate. *See* ROBERTS & HOUGH, *supra* note 310, at 153–60. If that is so, then bringing perceptions into line with reality should soften political support for incarceration as the form of punishment, arguably therefore later leading to actual changes in criminal justice policy. Criminologists Julian V. Roberts and Michael J. Hough interpret a variety of experimental evidence—showing greater, more accurate, and more balanced information as softening retributive impulses—to support just such a strategy. *See id.*

<sup>413</sup> These concerns were all raised in the roundtable held in connection with this symposium [Mass Incarceration: Causes, Consequences, and Exit Strategies].

<sup>414</sup> *See generally* LAWRENCE R. JACOBS ET AL., TALKING TOGETHER: PUBLIC DELIBERATION AND POLITICAL PARTICIPATION IN AMERICA (2009) (articulating empirical and theoretical responses to the critiques of deliberative democracy); FISHKIN, *supra* note 337 (2009) (similar).

contributor to sound governance, my narrower task here has been to present evidence that PDD-like processes can contribute to moderating or reversing the American obsession with mass incarceration. Note that I said contribute. I make no reductionist claim that there is a single explanation for the current state of affairs. Nor do I claim that in a single article I have made a decisive case. Indeed, some readers may see alternative explanations to some of the phenomena that I report or find any one piece of evidence interesting but not overwhelming. I have drawn, however, on multiple data sources and theories. My argument is that these converging evidence sources build a more-than-plausible case for PDD's carceral-restraining power.

Remember too that PDD is an ideal to which real-world institutions may aspire without likely ever achieving full realization. PDD can also manifest itself in numerous ways. Accordingly, the evidence on which I have drawn includes processes that sometimes embody only certain aspects of the ideal. Even given this qualification, however, I believe that the evidence underscores the value of two underlying anti-carceral forces: (1) improved use of criminal justice expertise; and (2) the promotion of empathy for excluded groups and marginalized persons.

#### A. Expertise

Many writers laud deference to criminal justice expertise as essential to moderating mass incarceration.<sup>415</sup> It is the politicization of criminal justice that they believe furthers mass incarceration.<sup>416</sup> If the experts were let alone to rule this area of policy, all would be well. Populism is the problem, not the solution.<sup>417</sup> Franklin Zimring and colleagues make this case forcefully, analogizing to the Federal Reserve's role in economic policy. The authors maintain that the Federal Reserve was created to be independent because of a form of democratic breakdown specific to macroeconomic policy: the masses will push for policies that lead to high inflation and excessively low interest rates, yet lack any understanding of the complexity of the issues, resulting in harsh boom-bust economic cycles.<sup>418</sup> Independence of the central bank is needed not because democracy generally fails, but because it fails in this policy instance.<sup>419</sup> Zimring and his colleagues also maintain that the same is so with criminal justice policy: the masses will, in their ignorance and fear and because of manipulation by politicians, agitate for mass

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<sup>415</sup> See FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 175–80 (1997).

<sup>416</sup> See FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 217–32 (2001).

<sup>417</sup> See *id.*

<sup>418</sup> *Id.* at 204–09.

<sup>419</sup> See *id.* at 207–08.

incarceration, thus causing unnecessary human suffering, doing little to lower crime rates, and costing enormous and unnecessary sums of money.<sup>420</sup>

I agree with much of this analysis but would cast expertise in a different light. PDD processes make use of experts in the relevant area—here, criminal justice—to inform lay citizens in settings where they are more likely to listen and learn from the experts. Properly administered, these settings offer various viewpoints and seem to be effective in creating sharply improved lay-citizen understanding of complex issues.<sup>421</sup> Furthermore, decision-making requires accurate emotional, as well as intellectual, information.<sup>422</sup> PDD-like processes can help lay people obtain more *informed* understandings of their own affective and cognitive intuitions. Even Zimring and his colleagues come close to conceding the point thus:

The tendency for members of the public to vote only their attitudes toward criminals may be dependent on the citizen's role, as well as on the way in which the issue is made into a choice. Turn a complaining cab driver into a sentencing judge and his or her sensitivity to questions of desert and proportionality in individual cases might be just as strong as the judge sitting in the next courtroom. Because the questions voters can decide are limited in form, we cannot know how much of the upward bias is a product of the character of who is making the decision and how much is a function of how the issue is presented.<sup>423</sup>

I disagree with this quote only to the extent that it is so tentative. Ample research suggests that the cab driver and the judge converge under the right circumstances.<sup>424</sup> But if this is true, the case for a limited exception to general principles of democratic rule in criminal justice fails because several of the propositions justifying such an exception weaken—namely the bias and ignorance of the people in a complex area.

My other disagreement with the common wisdom about criminal justice expertise is that it favors elite rule in this policy area without explaining how to get the *political support* for such rule in a democracy. The more direct, non-inclusive, winner-take-all, raw-populist forms of American government, for example, at least next to many of the Western European Continental governments, create incentives for politicians to manipulate the people by distorting criminal justice policy for

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<sup>420</sup> See *id.* at 207–09. Explain the authors, “The lesson here for criminal justice reform is the importance of a commitment and respect for expertise, which is itself a justifying ideology for the insulated delegation of punishment power.” *Id.* at 209.

<sup>421</sup> See *supra* text accompanying notes 337–52.

<sup>422</sup> See *supra* text accompanying notes 316–36 (discussing research showing that giving experimental subjects rich narratives, including filling them with case-specific facts, or studying real crime victims judging real offenders significantly moderated the subjects’ and victims’ punitive zeal).

<sup>423</sup> See ZIMRING ET AL., *supra* note 416, at 202.

<sup>424</sup> See *supra* text accompanying notes 316–36.

political gain.<sup>425</sup> American politicians have proven quite adept in this task. Even in states like New York, where political elites rule relatively insulated from many direct populist pressures, the politicians still seek “tough-on-crime” poses as a way of getting votes.<sup>426</sup> These politicians may give true criminal justice experts more of a voice than in other, more directly populist, states. This moderates mass incarceration somewhat, but the politicization of criminal justice policy still reigns, just to a somewhat lesser degree.<sup>427</sup> The case I have tried to argue for here is that more PDD-like policies should do an even better job of encouraging deference to criminal justice experts. Deliberative citizens apparently become informed enough about criminal justice problems to allay their baseless fears. Moreover, deliberation likely increases their willingness to consider alternatives and to see the wisdom in deferring to experts. At a minimum, deliberation seemingly causes the political grip of politician-manipulated crime fears to fade sufficiently so that the politicians no longer see a benefit in raw-populist policies, preferring to let the experts rule to a greater degree.<sup>428</sup>

But at what point have PDD practices sufficiently pervaded the polity to contribute significantly to the end of raw-populist rule? More importantly, radical changes in American government to promote pervasive PDD, particularly in the criminal justice area, would require a mass movement that I can see nowhere on the horizon. The best we can hope for is to expand PDD wherever small opportunities present themselves or to encourage more local PDD revolutions at the level of the neighborhood, the city, and, with any luck, more individual states. That practical political limitation is one reason that PDD is likely to contribute only modestly in the near future to change. But the difficulty of the task makes it no less desirable.

One final comment about my own expertise. I am making a descriptive claim: that PDD can contribute to moderating or reversing the obsession with mass incarceration. I have assumed that that is a good thing, but others may not agree, and I have not and cannot in this paper defend that claim. At the roundtable held in connection with this symposium, one colleague asked me whether I would support PDD if, in fact, led to more mass incarceration. I hesitated because it is a counterfactual, and I would be guessing about how that state of affairs might affect my own views. My response was that I would still favor PDD on different grounds not addressed here—on grounds of political theory. But I would unquestionably view that result as a high cost to promote other democratic values. Yet there is also good reason to believe that that potential conflict between my personal policy preference to reduce mass incarceration and PDD achieving the opposite is highly unlikely to occur *because of* something that I value highly in a

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<sup>425</sup> See *supra* text accompanying notes 180–226.

<sup>426</sup> See *supra* text accompanying notes 62–95.

<sup>427</sup> See *supra* text accompanying notes 30–95.

<sup>428</sup> See *supra* text accompanying notes 96–144.

just society and that is integral to sound deliberation: specifically, the promotion of empathy.

### B. *Empathy-Promotion*

Empathy is the ability to stand in another person's shoes—to see *and feel* the world through that other's eyes.<sup>429</sup> Empathy is not the same thing as sympathy or compassion. You might not like what you see and feel, thus having no desire to aid the other person.<sup>430</sup> But empathy is an essential first step in understanding the other, and empathy often has numerous benefits, particularly political ones.<sup>431</sup> True deliberation cannot occur without cognitive and emotional open-mindedness to others' views and a willingness to view them with respect.<sup>432</sup> Correspondingly, PDD-like processes help to promote empathy itself.<sup>433</sup>

One of the dangers inherent in certain deliberative processes is that of group polarization—the like-minded getting more extreme in their views upon hearing each other echoing them.<sup>434</sup> Another danger is that those with strongly-held views who see them losing in the deliberative process will just shut down, participating no further and closing their minds.<sup>435</sup> Yet the chief polarization-worrier in legal academia, Cass Sunstein, agrees that PDD versions of deliberation, more specifically the deliberative poll, are unlikely to be dogged by polarization.<sup>436</sup> Such polls are also unlikely to face loser-rejection of the process.<sup>437</sup> Sunstein attributes this to these features of deliberative polling: participants discuss and offer opinions but do not vote (thus, no losers); they listen to a balanced panel of experts; moderators play a key role in promoting civility and equal floor time; and participants receive a set of balanced materials.<sup>438</sup>

A deeper understanding of why the polarization and loser-resistance phenomena can be minimized or cured by PDD, however, comes from understanding some of the underlying psychological processes and how empathy addresses them. Two related processes are the fundamental attribution error and

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<sup>429</sup> See Taslitz, *Tinkerbelle*, *supra* note 186, at 431–41.

<sup>430</sup> See *id.* at 420.

<sup>431</sup> See *id.*

<sup>432</sup> See MICHAEL E. MORRELL, *EMPATHY AND DEMOCRACY: FEELING, THINKING, AND DELIBERATION* 104 (2010); *infra* text accompanying notes 435–60.

<sup>433</sup> See *infra* text accompanying notes 435–60.

<sup>434</sup> See Taslitz, *Deliberation*, *supra* note 10, at 311.

<sup>435</sup> See MORRELL, *supra* note 432, at 120.

<sup>436</sup> See Cass R. Sunstein, *The Law of Group Polarization*, 10 J. POL. PHIL. 175, 188, 193–95 (2002).

<sup>437</sup> *Id.*; MORRELL, *supra* note 432, at 118–26.

<sup>438</sup> Sunstein, *supra* note 436, at 194 (similar but adding one more factor); David Schkade et al., *What Happened on Deliberation Day?*, 95 CALIF. L. REV. 915, 935 (2007) (dropping the additional factor earlier recognized by Sunstein).

the actor/observer bias.<sup>439</sup> The fundamental attribution error is the tendency to attribute others' motives and behavior to their character rather than the situation in which they find themselves.<sup>440</sup> The actor/observer bias is the tendency of actors to attribute their successful behavior to their own character and their unsuccessful behavior to the situation, while observers conclude that character alone explains others' behavior.<sup>441</sup> For example, a student doing well on a test attributes her success to her intelligence and hard work. The same student who fails the test blames it on the unfair instructor or the noisy neighbor who interfered with the student's studying. On the other hand, a student seeing a colleague fail the test attributes the failure to the colleague's stupidity or laziness.

In the political realm, a similar process results in the tendency to attribute relatively negative emotions to others whose attitudinal positions differ from their own.<sup>442</sup> The more a person cares about an issue, the stronger that person's tendency to attribute ill, probably selfish, motives to opponents.<sup>443</sup> Such distrust is inconsistent with respectful, open-minded discussion, attitude change, or compromise.<sup>444</sup> Moreover, where the actor/observer bias is strong in one person but not another, the two will differ in their interpretation of the facts.<sup>445</sup> Thus, a wealthy businessman who climbed his way up the economic ladder might attribute his success to his natural talent and hard work, and the failure of the poor to do better to their slothfulness, if this is an issue about which he feels strongly. A poorer person might explain his relative deprivation based on poor neighborhood schools and the need at an early age to care for a sick mother. He might also explain the businessman's success by the latter's utter ruthlessness.<sup>446</sup> When the two sides cannot even agree on the basic facts, and distrust one another to boot, real conversation is unlikely.<sup>447</sup> Furthermore, each side is likely to credit only those who already agree with their views, thus promoting polarization.<sup>448</sup>

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<sup>439</sup> See Taslitz, *Wrongly Accused*, *supra* note 304, at 126 (discussing fundamental attribution error); see also Robert Gould & Harold Sigall, *The Effects of Empathy and Outcome on Attribution: An Examination of the Divergent-Perspectives Hypothesis*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 480 (1977) (also discussing actor-observer bias).

<sup>440</sup> See Taslitz, *Wrongly Accused*, *supra* note 304, at 126.

<sup>441</sup> See MORRELL, *supra* note 432, at 102–03.

<sup>442</sup> Glenn D. Reeder et al., *On Attributing Negative Motives to Others Who Disagree with Our Opinions*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1498, 1507 (2005).

<sup>443</sup> See *id.* at 1508; see also MORRELL, *supra* note 432, at 104–05.

<sup>444</sup> See also MORRELL, *supra* note 432, at 104–05 (“If [deliberative] interlocutors ... attribute unethical and strategic motives to those with whom they disagree, one can hardly imagine how it would be possible for them to give each other equal consideration, reach any sort of mutual understanding, or be able to reciprocally address validity claims.”).

<sup>445</sup> See *id.* at 104.

<sup>446</sup> *Id.* at 105 (using analogous examples).

<sup>447</sup> *Id.*

<sup>448</sup> CASS R. SUNSTEIN, *WHY GROUPS GO TO EXTREMES* 10–16 (2008) (explaining the causes of group polarization); Andrew E. Taslitz, *Forgetting Freud: The Courts' Fear of the Subconscious in*

Empathy, however, can overcome both the inability to see the other's view of the facts and the distrust of the other. It does this because the very definition of empathy is the ability to see and feel the world through another's eyes.<sup>449</sup> Empathy can be promoted in at least two ways: imagination and experience.<sup>450</sup> Ample empirical data attests to the success of these methods in fostering empathy.<sup>451</sup>

Thus, observers in experiments who were asked to role-play by observing a target with the goal of discerning the target's true thoughts *and* feelings reduced actor/observer bias significantly relative to instructions only to discern the target's thoughts or only to observe carefully period.<sup>452</sup> Other experimental data reveals that actors "see themselves [and persons close to them]...as versatile, complex, and multifaceted; they do not see one specific trait as being dominant in any given behavior."<sup>453</sup> Yet, they see others as simpler, thus being more willing to judge those others based upon stereotypes or presumed traits.<sup>454</sup> But "[t]he empirical evidence supports the hypothesis that instructing people to be sensitive to others' thoughts and feelings will increase the probability that they will come to see others as more multifaceted and complex, and because of this, be less biased in their attributional [sic] judgments."<sup>455</sup>

Research on bias against out-groups supports similar conclusions.<sup>456</sup> Role-playing instructions are effective in reducing such bias. Indeed, role-playing instructions are quite more effective at bias-reduction than are simple instructions to avoid out-group bias.<sup>457</sup> Furthermore, role-playing decreases stereotyping and increases positive out-group evaluations. Other research found similar results when participants read first-hand accounts of discrimination.<sup>458</sup> Such accounts improved empathy, opening minds and hearts. Other empathy experiments found even more positive attitudes toward convicted murderers and drug users as a class,

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*Date Rape (and Other) Cases*, 16 B.U. PUB. INT. L.J. 145, 171 (2007) (defining the "confirmation bias" or tendency to seek out or only pay attention to data and arguments that already support your pre-existing views).

<sup>449</sup> See Taslitz, *Tinkerbelle*, *supra* note 186, at 420, 431–41.

<sup>450</sup> See MORRELL, *supra* note 432, at 106–18; Taslitz, *Tinkerbelle*, *supra* note 186, 431–41.

<sup>451</sup> See *infra* text accompanying notes 451–60.

<sup>452</sup> See MORRELL, *supra* note 432, at 107; Valerie Melburg, et al., *A Reexamination of the Empathic Observers Paradigm for the Study of Divergent Attributions*, 124 J. SOC. PSYCHOL. 201, 204 (1984).

<sup>453</sup> See MORRELL, *supra* note 432, at 108.

<sup>454</sup> See *id.*

<sup>455</sup> *Id.*

<sup>456</sup> See *id.* at 109–15.

<sup>457</sup> See *id.* at 109–11.

<sup>458</sup> See *id.* at 112 (summarizing the research); Krystina A. Finlay & Walter G. Stephan, *Improving Intergroup Relations: The Effects of Empathy on Racial Attitudes*, 30 J. APPLIED SOC. PSYCHOL. 1720 (2000) (using first-hand accounts).

once perspective-taking instructions were given.<sup>459</sup> In the case of the drug users, greater empathy led to greater willingness to help drug users as a class.<sup>460</sup> Indeed, the data suggests that perspective-taking instructions or first-hand accounts about individual members of a group can foster an enduring change in attitudes toward other members of the group, softening negative feelings and increasing positive ones.<sup>461</sup>

Empathy thus aids useful deliberation, but deliberation can itself promote empathy. Thus, in prisoners' dilemma games, players are "more likely to cooperate if there is some communication between them prior to engaging in the game."<sup>462</sup> Explains political scientist Michael E. Morrell, "this gives indirect evidence that empathizing may importantly influence the way people approach conflict situations."<sup>463</sup> But the empathy was itself *induced* by the prior contact.<sup>464</sup> More direct evidence comes from experiments by C. Daniel Batson and Tecia Moran, who found that role-playing instructions encouraging altruism raised the likelihood of cooperation in both a business frame and a social frame version of the prisoners' dilemma, though cooperation was greater in the social frame than the business frame.<sup>465</sup> Another study concluded that similar instructions raised cooperation even for targets who had previously defected.<sup>466</sup> In both studies, the participants themselves attributed their behavior to increased empathy.<sup>467</sup> A well-designed PDD process is indeed targeted to promote the imaginative and experiential tools to foster empathy, and Morrell argues that much more attention must be explicitly devoted to this design feature for PDD to succeed.<sup>468</sup> Face-to-face deliberation, the use of written stories and film, conversation designed

<sup>459</sup> See MORRELL, *supra* note 432, at 110–11; C. Daniel Batson et al., *Empathy and Attitudes: Can Feeling for a Member of a Stigmatized Group Improve Feelings Toward the Group?*, 72 J. PERSONALITY SOC. PSYCHOL. 105, 116 (1997) (murderers); C. Daniel Batson, et al., *Empathy, Attitudes, and Action: Can Feeling for a Member of a Stigmatized Group Motivate One to Help the Group?*, 28 PERSONALITY SOC. PSYCHOL. BULL. 1656, 1663 (2002) [hereinafter Batson, *Empathy*] (drug users).

<sup>460</sup> See Batson, *Empathy*, *supra* note 459, at 1663.

<sup>461</sup> See MORRELL, *supra* note 432, at 110–11.

<sup>462</sup> *Id.* at 115. See generally John M. Orbell, Alphons J.C. van de Kragt & Robyn M. Dawes, *Explaining Discussion-Induced Cooperation*, 54 J. PERSONALITY SOC. PSYCHOL. 811 (1988) (addressing how discussion between subjects affects the prisoner's dilemma).

<sup>463</sup> MORRELL, *supra* note 432, at 115.

<sup>464</sup> See *id.*

<sup>465</sup> See *id.* at 115–16 & n.6 (summarizing the research) See generally C. Daniel Batson & Tecia Moran, *Empathy-Induced Altruism in a Prisoners' Dilemma*, 29 EUR. J. SOC. PSYCHOL. 909 (1999) (studying these frames).

<sup>466</sup> See MORRELL, *supra* note 432, at 115–16; C. Daniel Batson & Nadia Ahmad, *Empathy-Induced Altruism in a Prisoner's Dilemma II: What if the Target of Empathy Has Defected?*, 31 EUR. J. SOC. PSYCHOL. 25, 34 (2001).

<sup>467</sup> See MORRELL, *supra* note 432, at 115–16.

<sup>468</sup> See *id.* at 116–18.

specifically to encourage cognitive and affective sharing, and role-playing instructions are ways to foster these outcomes.<sup>469</sup> Experimental research dealing specifically with deliberative contexts indeed reveals that empathy promotes open-mindedness and the perception of its occurring even among deliberative “losers.”<sup>470</sup> Empathy also increased everyone’s enjoyment of the process, and both the enjoyment and the open-mindedness make it more likely that even potential losers will continue in serious deliberation.<sup>471</sup> Contrary to some earlier studies, there is also evidence that empathy-promoting deliberation raises political participation of the now-more-informed participants as well.<sup>472</sup>

PDD at its best thus works in part by promoting more complex, less-stereotyped, more individualized, more concrete, more empathetic judgments about other relevant individuals and groups. But those sorts of judgments are precisely the kinds that lead to more creative solutions to problems, softer assessments of others’ perceived wrongs, and greater willingness to understand their life situation. That PDD about criminal justice issues promotes less punitive, or at least less mass-incarceration-obsessed, policy is thus no accident.

Empathy also helps to answer concerns about the role of race. Many readers will justifiably see mass incarceration as primarily reflective of racial and class biases, at least unconscious and institutional ones.<sup>473</sup> But the research suggests that empathy-inducing PDD-like processes will reduce racial bias and actions stemming from it.<sup>474</sup> That arguably should likewise reduce the political appeal of

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<sup>469</sup> See *id.* at 118.

<sup>470</sup> *Id.* at 125–26.

<sup>471</sup> See *id.*

<sup>472</sup> See JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY* (James H. Kuklinski et al. eds., 2002) (arguing that, under most circumstances, people prefer a political system that they can trust but largely stay uninvolved in); MORRELL, *supra* note 432, at 184–86 (summarizing Hibbing and Theiss-Morse’s work, and that of social scientists reaching similar conclusions, on this point); FISHKIN, *supra* note 337 (summarizing more recent data contradicting the Hibbing/Theiss-Morse thesis); JACOBS ET AL., *supra* note 337 (similar); MORRELL, *supra* note 432, at 186–87 (arguing that empathy-emphasizing PDD structures widely adopted will encourage direct participation rather than discourage it). A related question is whether PDD should aim only to advise, or should it result in some final vote or consensus product that includes a product which actually creates public policy. A policy-determining decision would be more likely to produce group polarization for the reasons noted above, but some authors see ways to compensate for the problem, one such author indeed recommending a new PDD-like branch of government. ETHAN LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* (2004). Here I will say only that it is best and most realistic to start small (advisory), continue real-world experimentation, but think big (hoping for a more PDD-expansive policy future).

<sup>473</sup> See ALEXANDER, *supra* note 1.

<sup>474</sup> See FISHKIN, *supra* note 337 (summarizing evidence that, overall, PDD done properly helps to overcome status inequalities); JACOBS ET AL., *supra* note 337 (similar); BARKER, *supra* note 24, at 18–19, 55, 62, 76, 178–79 (arguing that states that do a better job of incorporating Blacks into the political process, especially into a more PDD-like one, have lower incarceration rates); Taslitz, *Tinkerbell*, *supra* note 186, at 433–35 (processes that increase empathy reduce racial bias and vice-versa).

race-bias-manipulation to politicians. PDD and race-bias-reduction are thus interactive. While PDD seems independently to discourage mass incarceration, in the particular context of the United States and its history of slavery, Jim Crow, and other forms of racism, PDD may also work indirectly to reduce political support for widespread incarceration by reducing the sense of racial threat that partly underlies it.

### *C. A Final Word*

PDD's connection to attitudes toward mass incarceration and toward punishment more generally merits further investigation. The practical, political, and cultural obstacles to widespread PDD adoption in the United States are daunting. But daunting and impossible are not the same thing, and little victories matter. Political change often comes slowly, over the course of decades, perhaps never at all. But denouncing the wasteland before us changes nothing. One must first know what seeds to plant, what crops to grow. PDD holds promise as one tool for a more fruitful criminal justice future.