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Resources for a better penal politics

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## Punishment and Democratic Theory

### Resources for a Better Penal Politics

Albert Dzur, Ian Loader, and Richard Sparks

### Introduction

On July 16, 2015, President Barack Obama toured El Reno Federal Correctional Institution near Oklahoma City and had a forty-five-minute roundtable discussion with six nonviolent drug offenders, a conversation recorded by HBO for a documentary on criminal justice. Mass incarceration, the president said during his visit, has become an unquestioned part of American life: “We have a tendency sometimes to almost take it for granted or think it’s normal. It’s not normal. It’s not what happens in other countries. What is normal is teenagers doing stupid things. What is normal is young people making mistakes.”<sup>1</sup> The president’s El Reno trip was intended to build support for a significant shift in federal policy: reduction or elimination of mandatory minimum sentences, alternative sanctions for nonviolent offenders, restoration of voting rights to former prisoners, and “ban the box” rules to discourage employers from asking job candidates about their criminal records. The president’s visit and his proposed reforms illustrate a departure from a dominant leadership paradigm in the United States, aptly characterized by Jonathan Simon as “governing through crime.”<sup>2</sup> For over a generation few political costs were paid and many benefits reaped by elected officials for increasing sentences, ignoring racial disparities, and indeed considering mass incarceration to be “normal.” President Obama’s attempt to bring criminal justice into public view, to begin a dialogue

on how to punish better and more fairly, is in itself a significant change in the political culture.<sup>3</sup>

The president's prison visit is a further sign that over recent years, in the wake of the crime drop and falling levels of public concern with and attention to crime, the seemingly inexorable upsurge in US imprisonment is slowing down, or being sent into reverse.<sup>4</sup> The recent publication and discussion of high-profile reports on the *problems* of mass incarceration and police racism and brutality are also indicators that the terms of debate about crime and justice may be shifting.<sup>5</sup> It is no doubt too early to tell to what extent, or how durably, the penal climate is altering and to know whether recent reversals signify a material change (in that climate), or simply a reversible fluctuation (in the penal weather). It would certainly be naïve to rely on simple optimism that things are taking a turn for the better, to assume that state austerity will alone be sufficient to produce significant penal change, or to underestimate the reach and embeddedness of the American carceral state.<sup>6</sup> In this regard, we should recall something else that makes the El Reno trip remarkable: Obama was the first sitting president to visit a federal prison, the first leader of America's democracy to visit the unfree world that has been constructed in that democracy's midst. What had been keeping these powerful men away for so long from the disempowered and disenfranchised? What was so repellent about the institutions over which the president has ultimate oversight? Why did it take the intolerable financial burden of massive public spending on incarceration at a time of deep economic recession to push criminal justice, slowly and hesitantly at first, on to state and federal executives' agendas?

These are important caveats: reminders of the invisibility of the prison within the life of modern democracies. It may nonetheless be the case that room is opening up for new forms of constructive thinking and strategic intervention in the penal field wherein we can bring to bear new intellectual resources in addressing questions of punishment.<sup>7</sup> But what concepts and arguments are available to us at this moment of possibility, after more than a generation of “normal” mass incarceration, to speak to its abnormality and to fix what is broken about a dysfunctional system that implicates all of us who have grown accustomed to it and in whose name it was assembled? What social and institutional resources exist for creating different futures for the penal arrangements of modern capitalist democracies? How—if at all—can criminology and related forms of knowledge make such futures more likely to be achieved? What are the best outcomes for which we can reasonably hope in penal politics?

In this introductory chapter we want to outline and develop the core idea that animates this volume: namely, that one underexploited resource for a better penal politics lies in investigating the ideals and institutions of democracy and thinking about how these ideals can be theorized and given practical effect in reshaping the criminal justice and penal arrangements of advanced capitalist democracies today.

## The Long Shadow of Mass Incarceration

Over the last thirty years mass incarceration (especially in the United States) came to seem inexorable and unremitting. This was so not just in terms of chronically high levels of imprisonment. It was also registered in terms of massive racial disproportion and the demotic symbolic politics that made “the prison” appear a necessary, obvious, commonsense solution to problems of crime and violence. But the more immovable mass

imprisonment came to seem, the more it imposed a block on our capacity to imagine alternatives to it. The major and urgent task became that of tracing the contours of this phenomenon and grasping its social, institutional, economic, and cultural impact.

The long shadow cast by mass incarceration over penal scholarship has generated much original work on this phenomenon and its wider consequences. We consequently now know a great deal about the structural *causes* of this phenomenon and about the political dynamics that have fueled and shaped it.<sup>8</sup> Of late, rather more sustained attention has been devoted to examining the *effects* of mass incarceration, not only in terms of its impact on crime,<sup>9</sup> but also in respect of how it has reshaped other institutions of American society from the economy, to families, to communities, to the political process.<sup>10</sup> This has been important work. But beneath the shadow cast by penal excess it is also possible to discern certain temptations and attendant pathologies that have informed both analyses of mass imprisonment and prescriptions for how best to respond to it. Our judgment is that these pathologies have become an impediment to our capacity to think not just about, but also *beyond*, mass incarceration.

Common among them, we suggest, has been nostalgia: a lament for a better and lost world in which welfare liberal social policies were ascendant, where these coincided with (or helped produce) imprisonment rates that were lower and more stable, and where the climate of social and penal policymaking was much “cooler” and more rational. As we have noted elsewhere, this lamentation for mid-twentieth-century welfare liberalism (or in European terms, social democracy) is often accompanied by the miserabilist premise that what gets bad is going to get worse.<sup>11</sup> In terms of intervention, the heating-up of the penal climate over recent decades has given rise to a situation in which

countervoices of social science have tended to eschew spaces of public engagement for fear of being trashed by a febrile media, as well as adopting a certain defensiveness in the diagnosis of what is to be done. The result is that penal politics has come to be seen as a rear-guard action where the principal objective is damage limitation or the protection of the hard-won and fragile gains of the past.

Two points might usefully be made about these structuring orientations toward mass incarceration. The first is to ask why lament and defensiveness has become so prevalent in the social analysis of, and responses to, penal excess. One answer is that mass imprisonment has played to criminology's self-image (and, we should add, its strengths) as a "dismal science." Our most powerful and compelling stories of penal change are narratives of decline and disaster. They have variously documented, warned, alerted, and critiqued. In the process the field has spun or imported (and sometimes loosely deployed or overextended) certain now-familiar concepts—risk, populism, punitiveness, and neoliberalism being obvious cases in point. But the social analysis of punishment has much less frequently speculated, reconstituted, or imagined alternatives to the penal disasters that it describes or denounces.

The second is to bring more clearly into view one alternative world that is to be found (sometimes expressly, often implicitly) in dominant accounts of mass imprisonment. What holds these responses to mass incarceration together, we think, is an outlook that one might call penal elitism. This is the worldview which holds that so long as experts—government officials, justice professionals, lawyers, researchers, and so on—are given the predominant say over the shape of penal policies, or else reinstated to a position of dominance, better penal outcomes will follow—where "better" means

something along the lines of more moderate, milder, rights-respecting, liberal, or principled. The flip-side of this warm embrace of expertise has been a certain “discomfort with democracy”:<sup>12</sup> a fear of permitting the demos too great an influence over penal policy and a concern that too intimate a connection between the public and policymakers will lead to immoderately punitive measures. This discomfort with democratic practice (and the resultant tendency to neglect democratic theory)<sup>13</sup> has been one of the most striking analytic effects generated by the three decade long penal upsurge. It has come close to acquiring the status of orthodoxy among analysts and critics of mass incarceration—one that has made a return to insulated professionalism and technocratic governance seem an obvious antidote to “hot” issues such as criminal justice. Protecting punishment from democracy has, in short, become the default answer to the question of what we can reasonably hope for in penal politics. So much so that the problematic that animates and organizes this book may (initially) strike readers as counterintuitive, even decidedly odd.

Distrust of the public has first and foremost shaped thinking on how to explain the rise of mass imprisonment—and the “exceptional” character of penal regimes in the United States. Reflected in scholarship on so-called penal populism, but also in the day-to-day assumptions of politicians and sitting government officials, looms an image of the punitive public demanding tough sentences and resistant to progressive reform. This, the argument runs, has been coupled with “the radically extensive and extraordinarily decentralized quality of US democracy”<sup>14</sup>—porous state and local political systems that have given way to democratic pressures of uninformed electorates and frenzied media responses to dramatic criminal events.<sup>15</sup> The ability of penal bureaucrats to manage or

fend off these pressures is, conversely, posited as the principal explanation for the relative mildness of punishment in Scandinavia and parts of Western Europe.<sup>16</sup> By extension, keeping the public at bay has become a central plank of several influential accounts of how to temper punitive excesses. Here the claim is that the only way to scale back imprisonment is to insulate criminal justice policy through more backroom decisions, more expert interventions in sentencing commissions, and fewer grandstands offered to politicians seeking office on the back of tough-on-crime promises. The attendant ambition is to defend existing institutions of mediation between public demands and penal outcomes (such as parole boards) or to create new expert authorities, operating at one remove from direct political pressure, in and through which rational penal policy can be formed.<sup>17</sup>

Such technocratic solutions have also loomed large in recent governmental thinking about how to navigate a route away from mass incarceration. Even as the current administration began to draw mass incarceration into focus as a policy problem, high-ranking officials continued to block broader critical thinking on the issue as a *public* problem. In 2013, at the beginning of the policy shift, US Attorney General Eric Holder, the nation's most visible criminal justice professional, proclaimed that his colleagues needed to be "smarter on crime," meaning more sensible about sentencing for nonviolent or low-level offenses and more conscious of the racial biases of current practice.<sup>18</sup> Though Holder applauded the professionalism of his colleagues standing at the gateway to prison—the police, attorneys, prosecutors, judges, wardens, probation officers—his "smarter on crime" remarks implied that status-quo tough sentences and racial bias do not lead to safer streets; they are "dumb." At a time when leading scholars increasingly see



criminal justice as “the most dysfunctional of the major institutional accomplishments of the Enlightenment,”<sup>19</sup> Holder’s framework suggests that the way forward is a return to Enlightenment rationality (rather than an immanent critique of it) to become more sophisticated criminal justice experts and professionals. Being smart on crime, on this view, means listening to the experts more and the electorate less.

## Penal Politics and Democratic Hope

This volume takes issue with technocratic discourse and the attendant suspicion of the public—and its participation in political life—that is at its root. It is not entirely correct to say, as President Obama did, that “we,” meaning “the public,” think mass incarceration is normal. It may be more precise to say that we the public have not been provided many opportunities to think seriously about mass incarceration at all. Crime and punishment saturate news and entertainment media, to be sure. But we actually don’t engage in much concerted public discourse about the process or the practices our taxes support. Indeed, institutions involved in policing, adjudicating, and punishing have successfully repelled critical public awareness and involvement. Criminal justice work is often physically removed from the lay public, as with prisons that tightly control communication and interaction with those outside. Probation and other postincarceration administrative decisions and programs too are normally conducted outside the public gaze, commonly attracting attention only when something goes very wrong. Even the court process leading to prison can hardly be called public, as backroom plea bargaining has drastically replaced trials, leaving a scant 1 to 4 percent of state and federal criminal cases in the United States for the courtroom.

The aim of this volume is to connect debate about the future of punishment to a wider conversation about ideals and institutions of democracy. We want to encourage research and reflection on the mutually corrosive relationship that occurs, but also on the mutually supportive associations that may be fostered, between penal practices and democracy. In so doing, our aim is to treat democratic values and commitments as an underexploited “resource of hope” for building a better—by which we mean more deliberative and inclusive—penal politics.<sup>20</sup> Doing this, however, means making connections between areas of scholarship that have long and puzzlingly been disconnected: namely, between the social analysis of punishment and political theory in general and democratic theory in particular.

The United States remains the “world champion” in incarceration, to borrow Nils Christie’s words, and jurisdictions in the United Kingdom, though some distance behind, are persistently among the European countries with the highest per capita rates of imprisonment. Yet until recently Anglo-American political theory has hardly registered mass incarceration and has done little to analyze any incongruity with mainstream normative commitments.<sup>21</sup> This disconnect is puzzling, first, because of the powerful lines of argument present within progressive, liberal, and conservative traditions alike which draw limits to state coercion and demand strict scrutiny over threats to individual rights, human development, and civic dignity posed by institutionalized exclusion and stigmatization. It is puzzling, second, because of the common ground occupied by restorative justice advocates and political theorists concerned with deliberative democratic institutional design. It is puzzling, third, because of the available links to robust and sophisticated theoretical discussions within criminology by David Garland,

Jonathan Simon, and other scholars on the state, citizen action, and efficacy of punishment.

But this general dissociation between punishment and political theory also holds for the more particular domain of theorizing about democracy. The disconnection that concerns us here is of a particular kind, and the allegation may at first sight appear somewhat puzzling. Of course legal and political theorists have long concerned themselves with problems about the relationship between systems of law and personal and political liberty, and with questions about the justification of coercion in general and the right to punish in particular. Our point is rather that it is just *because* these sorts of problems are of such central and permanent interest that the slow and hesitant extent to which scholars of those questions have taken note of a phenomenon of such scale and consequence as that of contemporary mass incarceration is so puzzling. Against this backdrop, this volume therefore also invites people whose primary focus is with the concept of democracy and the development of democratic practices to consider how mass incarceration bears upon their core concepts and fundamental arguments about how institutions function and how they might improve, or be supplemented, or replaced, or transformed. Contemporary democratic theorists have to date done considerably less to address the subjects of crime, punishment, prison, and re-entry than we might have expected, despite the massive social, political, economic, and moral reverberations of mass incarceration. At a time often referred to as a renaissance in democratic theory, the field has been eerily silent on punishment. We think this neglect—what Bernard Harcourt has called the “invisibility of the prison in democratic theory”<sup>22</sup>—has emaciated scholarship on power, social justice, political equality, citizenship, institutional

innovation, and related topics. By avoiding the real world of mass incarceration, democratic theory has risked becoming less democratic, less relevant to political reform, and less able to contribute productively to public discourse.

So just how should we go about better acquainting democratic theory with the study of mass incarceration in particular and punishment in general? How might the former alter the ways in which we think about, research, and evaluate the latter? Why should the carceral state command the attention of democratic theorists? What questions open up if we examine punishment through the lens of democratic theory and practice? We want to suggest three main ways in which a productive interplay between punishment and democratic theory is being developed.

A first line of analysis seeks to extend the *critique* of mass incarceration by situating it within the frame of democratic ideals and practice, thereby extending and recasting our analysis of what is at stake in penal policy and politics. Much of the empirical research on American punishment in recent years has focused on the impact of political systems *on* punishment—whether in terms of the advent of governing through crime,<sup>23</sup> the rise of symbolic and populist political forms,<sup>24</sup> the incentive and opportunity structures created (or blocked) by different political arrangements,<sup>25</sup> or the mobilization of social movements in the penal field.<sup>26</sup> But thinking about punishment through the lens of democracy also calls for analyses of the impact of mass incarceration *upon* democratic politics.<sup>27</sup>

To think democratically—rather than simply in crime control terms—about punishment is not just to revisit longstanding questions about the claims of retribution, deterrence, or rehabilitation as penal aims, or about the grounding of the sovereign right

to punish in general. Rather, in our current contexts, it is also to seek to ask sharper questions about the collateral effects of the transformations of the carceral state upon political participation, the formation of civic identities and the associational life of impacted communities. The recent body of work on felon disenfranchisement is most obviously of importance here. But the very particular and locally variable phenomenon of felon disenfranchisement is one that opens a much wider set of concerns. It has as such provided a jumping-off point for the emergence of broader research agenda on what Lerman and Weaver term the political consequences of the carceral state, for investigating and theorizing the ways in which American punishment “violate(s) the democratic imperatives of voice, responsiveness, and accountability.”<sup>28</sup> The further development of this agenda entails, among other matters: demonstrating that how societies punish goes to the quality and reach of their democratic claims; problematizing the relations between (excessive) punishment and democratic legitimacy; and identifying the ways in which crime control institutions attend to, or breach, democratic principles.

A second—in some respects more established and well-trodden—path entails finding within penal and political theory arguments for *restraining* the reach of the penal state, whether via desert theory, penal communication, or republicanism. Democratic theory has, arguably, been an underutilized resource in such normative thinking about justifying and limiting the scope of state punishment. It is a field that might usefully be mined further in order to make the numerous sage recommendations for penal moderation or parsimony more compelling and better grounded—and we and others have recently intimated that the concepts of legitimacy and citizenship might prove to be useful meeting grounds for extending that conversation.<sup>29</sup> In our view, such an extension of

penal theory offers grounds for questioning the *democratic* credentials of a society that punishes its citizens in the way that the American polity currently does. Quite a few criminologists in the United States and elsewhere have taken steps in these directions,<sup>32</sup> sometimes in alliance with progressive administrators and practitioners, and those parties need to be both supported and challenged by democratic theory.

A third point of connection is to be found in the use of democratic theory as a resource for exploring strategies of penal reform and for more broadly *reconstructing* how democratic societies might respond to crime. This has been a lively but still nascent theme with a small body of literature on deliberative democracy and punishment. Work here has largely developed as a response to, and critique of, the orthodoxy of insulating criminal justice from political control. It has sought instead to explore the unfulfilled promise of the ideal of greater democratic participation in crime control, and to bring to notice and advance understanding of practical innovations that give effect to such public involvement, in respect of restorative justice, justice reinvestment, and beyond.<sup>33</sup> There remains a great deal more theoretical work to be done along these lines, not least in demonstrating that populism and technocracy are not the polarized ideologies they are typically assumed to be within criminology, but can be theorized instead as twin pathologies of our contemporary anti-political malaise,<sup>34</sup> both of which “disfigure” the ideal and practice of democratic government by neglecting the normative force of democratic procedures.<sup>35</sup> But there is also a rich agenda of research and theorizing entailed in furthering practices of “democratic experimentalism” in crime control and punishment<sup>36</sup>—that is to say, in fostering the development of, and learning lessons from, deliberative practices whose aim is to promote civic reintegration, emphasize mutual

accountability for penal decisions, and foster proper recognition that those whom we punish are co-citizens.<sup>37</sup> In other words, we need greater reflection on what it would look like to impose sanctions without magnifying existing inequalities and in ways that maintain equality of concern and respect for all parties involved.

In our view, these points of intersection between democratic theory and penal practice offer a theoretically rich and politically promising agenda for thinking about punishment beyond mass incarceration. It is an agenda that focuses—via the three moments of critique, restraint, and reconstruction we have described—on the aims and practices of crime control institutions and asks from the standpoint of democratic theory what one tasks police, probation, and prisons to do. From this standpoint, the overarching question that emerges is how to produce criminal justice institutions that *contribute* to democratic development and *build up* civic capabilities and participatory resources. Can this democratic ambition for criminal justice be justified, and if so how? What might one require of different criminal justice institutions if we conceived of their purposes at least in part in these terms? How would such institutions have to be remade and reimagined if they are to become agents of a deeper democracy?

## Organization of this Volume

This collection of original chapters seeks to catalyze an engaged, multidisciplinary discussion among philosophers, political theorists, and theoretically inclined criminologists about how contemporary democratic theory might begin to think beyond mass incarceration.<sup>38</sup> Rather than viewing punishment as a natural reaction to crime and imprisonment as a sensible outgrowth of this reaction, we frame these as institutions with deep implications for contemporary civic identity and that present unmet demands for

public oversight and reflective democratic influence. What conceptual resources can be deployed to support decarceration and alternatives to prison? How might democratic theory strengthen recent efforts in restorative justice and other reform movements? How can the normative complexity of criminal justice be grappled with by lay citizens rather than experts or officials—from street-level policing decisions, to adjudication, to prison and probation policy? How, in short, might modern publics forge a creative alternative to an unreflective commitment to mass incarceration? In reflecting on these questions, the authors investigate how to better situate the prison in the discourse of reform, offer conceptual guideposts for thinking about incarceration, critically examine the methods and uses of public opinion regarding punishment, and suggest ways of reconceiving crime control institutions to enhance rather than thwart citizen capabilities.

One explanation for the *doxa* surrounding the normalcy of mass incarceration, and a problem facing any attempt at a more critical public discourse for reform, is social geography. As Rebecca Thorpe's chapter forcefully points out, prisons are out of sight, out of mind, and highly ambiguous for many people. The rapid growth of prisons since the 1970s, especially in rural America, has provided jobs and revenues in impoverished communities. This kind of public investment is an economic dead end, however. As prison areas are rarely sites of further growth or development, it represents the shortsighted triumph of penal policy over more constructive approaches to rebuilding the poor, urban, and racially segregated neighborhoods disproportionately filling the rural prison cells.

How to orient our normative thinking about reform is the subject of the next three chapters. Reform efforts targeting contemporary penal institutions need to take their



bearings from some overarching understanding of the purposes served by criminal justice. Antony Duff and Sandra Marshall draw attention to the ideal role of the criminal law in a democratic republic, understood as a political society made up of free and equal citizens. Criminal law in such a society would be recognized by citizens to be something they shared and took part in as a common law. Focusing in particular on citizens convicted of crimes, they discuss the civic roles related to punishment that emerge in a democratic republic and how these roles, considered as a matter of ideal theory, reflect just how far current punishment practices are from widely embraced political ideals.

Seeking a gravitational principle that can shed light on the core question of just how much punishment is enough, Richard Dagger calls our attention to the importance of fair play. When punishment is deployed justifiably it intends to pay back those who do not play fair and it communicates disapproval of rule breaking, thus shoring up a cooperative, law-abiding system. When used in excess, it is a symptom of dysfunction calling into question the fairness of the laws and the status of the polity as a cooperative enterprise. Honing in on the value of political equality, Peter Ramsay argues that taking this value seriously results in strict limits on the use of imprisonment as a sanction. It is a mistake, he argues, to see an incarcerated person as a full and equal citizen. Prison inevitably takes away the exercise of free association and free assembly, and it severely limits free speech. Prisoners are in no way able to take part on equal terms with their fellow citizens in the regular political process. Political equality demands radical decrementalism in penal reform and points the way toward the abolition of incarceration.

Chapters 6 and 7 consider what more widespread citizen participation might contribute to criminal justice institutions. Focusing on adjudication and sentencing,

Christopher Bennett asks whether greater lay participation would help produce more moderate decisions than the professionalized, official justice that has done little to block the development of mass incarceration. Democratization efforts may prove less beneficial in this respect than some scholars believe, he argues, but could be normatively significant nonetheless if they held citizens responsible as co-owners for punishment enacted for the public good. One approach already available for involving citizens as stakeholders in criminal justice is the wide range of practices offered by restorative justice programs as supplements to or substitutes for traditional sentencing procedures. Thom Brooks discusses the advantages of restorative justice as an alternative to mainstream criminal procedures for both victims and offenders. To serve as an effective institutional reform movement, however, restorative justice needs to become a more routine part of the criminal justice system and expand to handle a wider variety of cases, including serious offenses. To do so, Brooks argues, it may need to include penalties like suspended sentences and short prison stays for cooling off or rehabilitation.

Chapters 8 through 10 approach the complicated and controversial relationship between public opinion—about criminal offenses, offenders, and proper punishment—and the development of public policy that undergirds mass incarceration. In response to what she sees as the limitations of mainstream academic discourse, Lynne Copson argues that any satisfying theory of criminal justice reform must move some significant distance from conventional assumptions about what the public wants from crime control measures and what victims and offenders require. Reform must be grounded in utopian thought: committed to posing large and general questions about the kind of society we wish to have and the kind of citizens we hope to become.

Taking up the debate over so-called penal populism, David Green and Elizabeth Turner reject the aforementioned elite-centered orthodoxy that points to the political success of “tough on crime” campaign rhetoric and advocate expert dominated sentencing commissions insulated from demotic electoral pressures as an antidote to penal severity. Like Copson, Green and Turner favor more direct and robust public involvement. Incremental strategies that rely on stealth, Green points out, have had some modest success in the United States and United Kingdom, but they do nothing to build lasting support among the citizenry. It is better for governments to expand real opportunities for the public to contribute to criminal justice policy discussions, policymaking, and adjudication. One possibility Turner explores is the use of deliberative democratic techniques such as deliberative polls and citizens’ juries, which have uncovered less public support for “get tough” measures than traditional public opinion polling because they typically provide context and promote discussion of multiple viewpoints. While it is a mistake to think that such methods disclose “real” public opinion, they do ask people to foster defensible positions, alert them to issues they may not have contemplated, and help participants see their connections to others’ lives.

Rebuilding crime control institutions that can both respect and enable the civic capacity of regular citizens is an uphill struggle. Chapters 11 to 13 take aim at exclusionary practices in the penal system, policymaking process, and in the legal system. Amy Lerman and Vesla Weaver investigate the legal and institutional barriers to democracy inside prisons. An early twentieth-century reform idea, inmate self-governance through advisory councils thrived in the 1960s and 1970s, reflecting reform-minded idealism about creating more democratic prisons as well as pragmatic thinking

about how to respond to inmates' demands for voice that had found violent expression in disruptive riots. Despite early positive evidence about the effects of inmate associations, courts have held that the state's interest in prison safety supported a tight rein on organizations such as unions. The prison was not a "public forum," the Supreme Court held in 1977, allowing administrators to override the associational rights of inmates and block organizations if they had the potential for disruption. Drawing on survey data from California prisons, Lerman and Weaver show that inmate participation in self-governance correlates with a decrease in prison violence. They advocate further democratic innovation inside one of our currently least democratic institutions.

Lisa Miller disputes the common view of the American political system as overly sensitive to democracy in its openness to popular pressure. She shows how the combination of federalism, separation of powers, multiple decision-making venues, and judicial supremacy produce a labyrinthine obstacle course with many veto points for those with the resources to block social policy. The public good of security from violence has close connections to poverty reduction, employment, education, and other social welfare measures, but the complexity of the American system—not to mention its counterdemocratic fixtures such as the Senate and Supreme Court—makes it extremely difficult for these to survive the policy gauntlet.

Drawing attention to relatively unexplored links between democratic theory and the criminal law, Roberto Gargarella suggests that criminal trials, sentencing, and penal decision-making can become both more democratic and more deliberative. Trials can treat offenders as active contributors to a moral dialogue about harmful action and the law, not as passive subjects of condemnation, while sentencing and justice policymaking

can become more open to civil society. Rejecting both penal elitism and pure populism, a deliberative democratic approach to criminal justice seeks out ways of constructively welcoming citizen participation and action on criminal justice issues. Openness to public engagement, even when it takes the form of disruptive social protest, is needed to address the serious legitimacy problems facing the law in many countries.

This collection comes at an opportune moment when the onward march of mass incarceration has taken a pause, thus weakening the politically and intellectually convenient alibi of inevitability. Against this backdrop, the chapters in this volume offer an exciting agenda for theorization, empirical inquiry, and civic engagement. They present a new *political* mode of judgment and critique of actually existing penal practices, reminding us that criminal justice and punishment are always about more than just the regulation of crime. As the arguments presented in the pages that follow forcefully attest, issues of crime control are also inescapably entangled with the question of how to foster and sustain better democratic governance; the task that confronts us is not simply “downsizing the carceral state,” but “strengthening the democratic state.”<sup>39</sup>

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<sup>1</sup> *New York Times*, July 16, 2015.

<sup>2</sup> Jonathan Simon, *Governing through Crime* (Oxford: Oxford University Press, 2007).

<sup>3</sup> It is noteworthy that similar shifts in political leadership around prisons appear to be underway in the United Kingdom where the new Conservative Justice Secretary, Michael Gove, has publically signaled that he would like to see much less reliance upon imprisonment and to make productive changes to what happens inside prisons. See, for example, Gove’s speech to the Prisoners Learning Alliance on

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July 17, 2015: [www.gov.uk/government/speeches/the-treasure-in-the-heart-of-man-making-prisons-work](http://www.gov.uk/government/speeches/the-treasure-in-the-heart-of-man-making-prisons-work).

<sup>4</sup> David Green, “US Penal-Reform Catalysts, Drivers and Prospects,” *Punishment & Society* 17, no. 3 (2015): 271–298.

<sup>5</sup> We have in mind here the enquiry set up by the National Academy of Sciences into the causes and consequences of high rates of incarceration: Jeremy Travis, Bruce Western, and Steve Redburn (eds.), *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Washington, DC: National Academy of Sciences, 2014) and the *President’s Task Force on 21st Century Policing*, whose final report was published in May 2015: [www.cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf).

<sup>6</sup> Amy E. Lerman and Vesla M. Weaver, *Arresting Citizenship: The Democratic Consequences of American Crime Control* (Chicago: University of Chicago Press, 2014) and Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics* (Princeton, NJ: Princeton University Press, 2015).

<sup>7</sup> A point also made recently by Jonathan Simon, “Editorial: Mass Incarceration on Trial,” *Punishment & Society* 13, no. 3 (2011): 251–255.

<sup>8</sup> On the former, see inter alia David Garland, *The Culture of Control* (New York: Oxford University Press, 2000); David Garland (ed.), *Mass Imprisonment: Social Causes and Consequences* (New York: Sage, 2001); Nicola Lacey, *The Prisoners’ Dilemma* (Cambridge: Cambridge University Press, 2007); and Loïc Wacquant, *Punishing the Poor* (Durham, NC: Duke University Press, 2009). On the latter, key contributions have included Marie Gottschalk, *The Prison and the*

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*Gallows* (New York: Cambridge University Press, 2006); Simon, *Governing through Crime*; and Naomi Murakawa, *The First Civil Right: How Liberals Build Prison America* (New York: Oxford University Press, 2014).

<sup>9</sup> Frank Zimring, *The Great American Crime Decline* (Oxford: Oxford University Press, 2008, ch. 3).

<sup>10</sup> On the economy, see Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage Foundation, 2007) and Devah Pager, *Marked: Race, Crime and Finding Work in an Era of Mass Incarceration* (Chicago: University of Chicago Press, 2007); on the family, Megan Comfort, *Doing Time Together* (Chicago: University of Chicago Press, 2007); on communities, Todd Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (New York: Oxford University Press, 2008); on the political process, Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (New York: Oxford University Press, 2006) and Lerman and Weaver, *Arresting Citizenship*.

<sup>11</sup> Ian Loader and Richard Sparks, “Beyond Lamentation: Towards a Democratic Egalitarian Politics of Crime and Justice,” in Tim Newburn and Jill Peay (eds.), *Policing: Politics, Culture and Control* (Oxford: Hart, 2012) 11-41

<sup>12</sup> We borrow this coinage from Roberto M. Unger, who originally claimed it was one of the “dirty little secrets of contemporary jurisprudence.” Roberto M. Unger, *What Should Legal Analysis Become* (London: Verso, 1996, 72). This terminology also plays a role in earlier work by Ian Loader and Richard Sparks; see especially their *Public Criminology?* (London: Routledge, 2010).

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- <sup>13</sup> To take just one recent example: in a collection of chapters reflecting on the normative significance of public opinion in shaping penal policy and outcomes, those contributors who argue for limiting public involvement in such matters consistently defend that position with little or no reference to the underlying theory of democracy that is implicit in their argument. This results in a status-quo bias that is complacent about the operation of existing expert-dominated criminal justice while imposing stern tests of any proposal to extend public participation. Jesper Ryberg and Julian Roberts (eds.), *Popular Punishment: On the Normative Significance of Public Opinion* (New York: Oxford University Press, 2014). See especially the chapters by Jan W. de Keijser and Roberts.
- <sup>14</sup> Nicola Lacey and David Soskice, “Crime, Punishment and Segregation in the United States: The Paradox of Local Democracy,” *Punishment & Society* 17, no. 4 (2015): 461.
- <sup>15</sup> David Garland, *Peculiar Institution: America’s Death Penalty in an Age of Abolition* (Oxford: Oxford University Press, 2010); Lacey and Soskice, “Crime, Punishment and Segregation in the United States.”
- <sup>16</sup> See, for example, Michael Tonry, “Determinants of Penal Policies,” in Michael Tonry (ed.), *Crime, Punishment and Politics in Comparative Perspective* (Chicago: University of Chicago Press, 2007) and Sonja Snacken, “Resisting Punitiveness in Europe?,” *Theoretical Criminology* 14, no. 3 (2010): 273–292.
- <sup>17</sup> See, for example, Phillip Pettit, “Is Criminal Justice Politically Feasible?” *Buffalo Criminal Law Review* 5, no. 2 (2002): 427–450; Julian Roberts, Loretta Stalans, David Indermaur, and Mike Hough, *Penal Populism and Public Opinion: Lessons*



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*from Five Countries* (Oxford: Oxford University Press, 2003); Frank Zimring and David Johnson, "Public Opinion and the Governance of Punishment in Democratic Political Systems," *ANNALS of the American Academy of Social and Political Science* 605, no. 1 (2006): 265–280; and Lawrence Sherman, "Evidence and Liberty: The Promise of Experimental Criminology," *Criminology & Criminal Justice* 9, no. 1 (2009): 5–28.

<sup>18</sup> Eric Holder, "Remarks at the Annual Meeting of the American Bar Association's House of Delegates," San Francisco, August 12, 2013, [www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations](http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations).

<sup>19</sup> John Braithwaite, "Between Proportionality and Impunity: Confrontation - Truth - Prevention." *Criminology* 43, no. 2 (2005): 283.

<sup>20</sup> Raymond Williams, *Resources of Hope* (London: Verso, 1989).

<sup>21</sup> There are of course key exceptions, especially among those who address the meetings points between penal theory and political theory. See, for example, John Braithwaite and Phillip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1990); Barbara Hudson, *Justice in the Risk Society* (Maidenhead: Open University Press, 1993); and Matt Matravers (ed.), *Punishment and Political Theory* (Oxford: Hart, 1999).

<sup>22</sup> Bernard Harcourt, "The Invisibility of the Prison in Democratic Theory: A Problem of 'Virtual Democracy,'" *The Good Society* 23, no. 1 (2014): 6–16. Harcourt's point, of course, is that the prison is not unseeable, just not seen.

<sup>23</sup> Simon, *Governing through Crime*.

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- <sup>24</sup> John Pratt, *Penal Populism* (New York: Routledge, 2007).
- <sup>25</sup> Lisa Miller, *The Perils of Federalism: Race, Poverty and the Politics of Crime Control* (New York: Oxford University Press, 2008) and Vanessa Barker, *The Politics of Imprisonment* (New York: Oxford University Press, 2009).
- <sup>26</sup> Gottschalk, *The Prison and the Gallows*.
- <sup>27</sup> Vesla M. Weaver, Jacob S. Hacker, and Christopher Wildeman, “Detaining Democracy? Criminal Justice and American Civic Life,” *Annals of the American Academy of Political and Social Sciences* 651 (2014): 6–13.
- <sup>28</sup> Lerman and Weaver, *Arresting Citizenship*.
- <sup>29</sup> Ian Loader and Richard Sparks, “Unfinished Business: Legitimacy, Crime Control and Democratic Politics,” in Justice Tankebe and Alison Liebling (eds.), *Legitimacy and Criminal Justice: An International Exploration* (Oxford: Oxford University Press, 2013) and Anthony Duff, “A Criminal Law for Citizens,” *Theoretical Criminology* 14, no. 3 (2010): 293–309.
- <sup>32</sup> Elliott Currie, “Consciousness, Solidarity and Hope as Prevention and Rehabilitation,” *International Journal for Crime, Justice and Social Democracy* 2, no. 2 (2013): 3–11; David Brown, “Mapping the Conditions of Penal Hope,” *International Journal for Crime, Justice and Social Democracy* 2, no. 3 (2013): 27–42.
- <sup>33</sup> For example, Archon Fung, *Empowered Participation: Reinventing Urban Democracy* (Princeton, NJ: Princeton University Press, 2004); Albert Dzur and Rekha Mirchandani, “Punishment and Democracy: The Role of Public Deliberation,” *Punishment & Society* 9, no. 2 (2007): 151–175; Albert Dzur, “Trench Democracy: Participatory Innovation in Unlikely Places,” *Boston Review*,

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October 11, 2013, [www.bostonreview.net/blog/dzur-trench-democracy-1](http://www.bostonreview.net/blog/dzur-trench-democracy-1); David Brown, Chris Cunneen, Melanie Schwartz, Julie Stubbs, and Courtney Young, *Justice Reinvestment: Winding Back Imprisonment* (Basingstoke: Palgrave, 2015).

<sup>34</sup> Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (Cambridge: Cambridge University Press, 2008).

<sup>35</sup> Nadia Urbinati, *Democracy Disfigured: Opinion, Truth, and the People* (Cambridge, MA: Harvard University Press, 2014).

<sup>36</sup> Roberto M. Unger, *Democracy Realized* (London: Verso, 1998).

<sup>37</sup> Albert W. Dzur, *Punishment, Participatory Democracy, and the Jury* (New York: Oxford University Press, 2012).

<sup>38</sup> Some of the chapters in the book originated as contributions to a special issue of the *Good Society* journal on democratic theory and mass incarceration. *Good Society* 23, no. 1 (2014). Thanks to Joshua Miller for his early organizational work.

<sup>39</sup> Lerman and Weaver, *Arresting Citizenship*, 237.