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How Changes in American Culture Triggered Hyper-Incarceration: Variations on the Tazian View

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American imprisonment rates are far higher than the rates in virtually every Western country, even after taking into account differing rates of crime. The late Professor Andrew Taslitz suggested that at least one explanation for this puzzle is the relative lack of “populist, deliberative democracy” in the United States. This article examines that thesis from a comparative perspective, looking in particular at how differences between American and European attitudes toward populism, capitalism, religiosity, racial attitudes and proceduralism may have led to increased incarceration rates. It also tries to explain another puzzle that has received little attention: why these cultural differences, which have existed for some time, only had an impact on incarceration rates after the 1960s.

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INTRODUCTION

One of the last articles written by the late Andrew Taslitz (known as Taz to his friends) was entitled *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*.¹ The piece is quintessentially Tazian. It brings together Taz' concern for racial minorities and criminal defendants, his belief in the reformist potency of democracy, and his fascination with social scientific findings (including research on "happiness"!), in a provocative effort to tackle the single biggest problem in our criminal justice system today: mass incarceration. His prescriptions in the article—in particular his assertion that "populist, deliberative democracy" can be a way of softening the harshness of American criminal justice—are worth taking seriously. So that is what this article does, as part of this symposium's effort to honor Professor Taslitz' work.

As Taz describes it, populist, deliberative democracy (or PDD) is not regular old democracy. Rather, in the criminal justice context it involves all "social groups," including convicted offenders, in deliberations that take place in multiple venues, with the expectation that "compromise rather than domination" will occur.² He contrasts this type of democracy with "raw populism" that is not deliberative and that tends to be based on less information about competing interests.³ Although Taz does not think PDD will by itself result in less reliance on incarceration,⁴ he does marshal some strong evidence that it could move the country in that direction.

I think Taz was on to something. At the same time, as he willingly admitted, PDD is not a panacea, and many other causes contribute to "mass incarceration" (or what I prefer to call "hyper-incarceration," given the rapid increase in our use of imprisonment). In this brief piece, I first compare America's incarceration policies to those in Western Europe in order to get a better sense of the hyper-incarceration phenomenon, then summarize Taz' suggestions as to why our incarceration rates are so different, and end with some of my own thoughts about cultural reasons that might explain our hyper-incarceration. In particular, following the lead of others, I assess

1. Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133 (2011).

2. *Id.* at 135.

3. *Id.* at 136.

4. *Id.* at 163 ("I am always skeptical of reductionist theories, so I do not claim that political inclusiveness alone explains criminal justice system policies.").

whether our unique approaches to democracy, economics, religion, race and procedure have anything to do with hyper-incarceration. Additionally, and in contrast to most other writers, I address why these intrinsic differences with Europe did not have a significant effect on incarceration rates prior to their huge increase during the 1970s. Although much of what I say on this score is speculative, it provides hypotheses worth testing. As usual, Taz has written a piece that spurs deep thought about a crucial criminal justice issue.

I. THE HYPER-INCARCERATION PROBLEM

Taz relegates his description of hyper-incarceration to a footnote, presumably because this penal development has been so well-documented. In the note, he quotes Michelle Alexander for the proposition that “the United States now boasts an incarceration rate that is six to ten times greater than that of other industrialized nations,” and pretty much leaves it at that.⁵ Here I want to recite a few more facts about hyper-incarceration, particularly from a comparative perspective, because it helps set up some of the social science data that Taz uses to make the case for PDD as a partial solution.

It is well-known that our incarceration rate has skyrocketed since the late 1960s, from the neighborhood of 100 people per 100,000 to somewhere between 500 and 600 people per 100,000.⁶ We are not only sentencing more people but putting them in prison for longer periods of time. For instance, the average time spent in prison for non-capital murder before the 1970s was never over 25 years; now the average duration of murder sentences is upwards of 80 years.⁷ One in nine prisoners are serving life sentences and a third of these, or about 50,000, are saddled with life without parole.⁸ Only about 65% of the prisoners serving life were convicted of homicide; about 10,000, or

5. *Id.* at 133 (citing Michelle Alexander, *The New Jim Crow* 7–8 (2010)).

6. Frank E. Zimring, *Is There a Remedy for the Irrelevance of Academic Criminal Law?*, 64 J. LEG. ED. 5, 7 (2014) (citing U.S. Census Bureau publications from 1975, 1995 and 2011). Some estimates put the American rate above 700. ROY WALMSLEY, *WORLD PRISON POPULATION LIST*, CENTRE FOR INT’L STUD. (10th ed. 2013), available at <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf> (stating that the U.S. rate is 743 per 100,000). The incarceration rate has declined recently, but only slightly. See DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *CORRECTIONAL POPULATIONS IN THE U.S. 2013* (2014) available at www.bjs.gov/content/pub/pdf/cpus13.pdf (noting that the rate of decline has slowed appreciably since 2010, from 2.1% to .6%).

7. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 237 (2011).

8. THE SENTENCING PROJECT, *LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA* 7 (2013), available at http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf.

about 6% of the total, committed nonviolent offenses, predominantly drug-and property-related offenses.⁹

Furthermore, this severity in sentencing is not a trend that has come and gone. Since 2008, the number of convicted criminals serving life sentences has increased by nearly 12 percent, and the number serving life sentences without the option of parole by 22.2 percent.¹⁰ In 1986, the average incarceration period for a drug offender was 22 months; by 2004, drug offender prison terms had nearly tripled — to 62 months — and by 2011 there were nearly 12 times as many drug offenders in prison as there were in 1980.¹¹ Particularly troubling is the fact that this hyper-incarceration does not appear to have had an impact on crime rates.¹²

How do these developments compare to the imprisonment rates of other countries? The statistic that gets the most play is that, while the United States only accounts for about 5% of the world's crime, it has 25% of its prisoners.¹³ Another eye-opening set of numbers: We have one-quarter of China's population but three-quarter million more people in prison than China does.¹⁴

The most relevant data, however, come from Western Europe, which demographically and politically is the polity most comparable to the United States. As Alexander noted, our overall imprisonment rate is at least six times that of Western Europe's.¹⁵ The imprisonment

9. *Id.*

10. *Id.*

11. THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS 3 (2012), available at http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

12. Holgar Spamann, *The U.S. Crime Puzzle: A Comparative Perspective on U.S. Crime and Punishment*, <http://ssrn.com/abstract=2463720> (2014) (concluding, based on regression analysis, that “either residual US punishment is not working, or some omitted factor, such as segregation, pushes up the latent US crime rate”); Justin McCrary & Sarath Sanga, *General Equilibrium Effects of Prison on Crime: Evidence from International Comparisons*, 13 CATO PAPERS ON PUB. POL’Y 165 (2012) (concluding that the five-fold increase in incarceration since the 1970s has had, at best, a modest impact on crime.). While crime levels decreased during the recent upswing in punishment, particularly during the 1990s, the reasons are multifold. See Andromachi Tseloni et al., *Exploring the International Decline in Crime Rates*, 7 EUR. J. CRIMINOLOGY 375, 389 (2010) (concluding that “severe punishment” in the U.S. probably had little to do with its crime drop, given analogous drops in many European countries); OLIVER ROEDER, LAUREN-BROOKE EISEN & JULIA BOWLING, WHAT CAUSED THE CRIME DECLINE? (2015) (noting that incarceration has had a limited, diminishing effect on crime).

13. International Centre for Prison Studies, *Entire World, Prison Population Rates per 100,000*, available at www.prisonstudies.org/info/worldbrief/wpb_stats/php?area=area&category=WB_poprate.

14. Adam Liptak, *U.S. Prison Population Dwarfs that of Other Nations*, N.Y. TIMES, Apr. 23, 2008, available at http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all&_r=0.

15. See *supra* note 5.

rate per 100,000 of countries like Germany, France and the Netherlands is in the seventies, and in the United Kingdom in the low one-hundreds.¹⁶ Even the rates of most eastern European countries are less than half of ours.¹⁷

Our penalty structure is also much harsher than that of most Western European countries. In countries like Germany and the Netherlands, only between 20 and 30% of convicted offenders receive a prison sentence and the average sentence is less than 12 months, while in the U.S. roughly 70% of offenders are sent to prison for an average of three years.¹⁸ We have the death penalty in 32 states,¹⁹ while European countries have banned capital punishment.²⁰ We still allow life sentences for juveniles, often without parole.²¹ Europe does not permit such sentences, with or without parole.²² As noted above, over 10% of our adult prisoners are serving life sentences. In contrast, a few European countries—Portugal, Spain and Norway—do not allow life sentences even for adults.²³ In most other European countries the percentage of life sentences is much lower than 10%—for instance, in France it is about .8%, in Germany 3%, and in Italy 5%.²⁴ Moreover, in those European countries that have life sentences, virtually

16. See Stuntz, *supra* note 7, at 50.

17. *Id.*

18. VERA INSTITUTE OF JUSTICE, SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES 9–10 (2013).

19. DEATH PENALTY INFORMATION CTR., STATES WITH AND WITHOUT THE DEATH PENALTY, available at <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Aug. 31, 2014).

20. Charter of Fundamental Rights of the European Union, art. 2, available at www.europa.eu/parl.europa.eu/charter/pdf/text_en.pdf (banning the death penalty in member states).

21. *Graham v. Florida*, 130 S.Ct. 2011, 2015 (2010) (noting seven jurisdictions permit life without parole for juvenile offenders for homicide crimes and 37 states, the District of Columbia, and the Federal Government permit sentences of life without parole for a juvenile non-homicide offender in some circumstances). *Miller v. Alabama*, 132 S.Ct. 2455 (2012), declared *mandatory* life without parole sentences unconstitutional, but life sentences with and without parole for that group are still permissible, and roughly 7000 juveniles are serving such sentences. Ashley Nellis & Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America* 3, 17–25 (2009), available at www.sentencingproject.org/doc/publications/publications/inc_noexitseptember2009.pdf.

22. Connie de la Vega & Michelle Leighton, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U. SAN FRAN. L. REV. 983, 989 (2008) (reporting that 135 countries, including every country in Europe, has expressly rejected life sentences for juveniles).

23. Frieder Dünkel, Dirk van Zyl Smit & Nicola Padfield, *Concluding Thoughts*, in *RELEASE FROM PRISON: EUROPEAN POL'Y AND PRACTICE* 395, 420 (Nicola Padfield, Dirk van Zyl Smit & Frieder Dünkel, eds. 2010) (hereafter *EUROPEAN POL'Y AND PRACTICE*).

24. Kim Reufflet, *France*, in *EUROPEAN POL'Y AND PRACTICE*, *supra* note 23, at 177 (indicating that “about 500 prisoners are serving life sentences” out of a prison population of 62,700); Frieder Dünkel & Ineke Pruin, *Germany*, in *EUROPEAN POL'Y AND PRACTICE*, *supra* note 23, at 192–93, 198 (noting 1,973 prisoners serving a life sentence in a prison population of approximately 74,000); Alessandra Gualazzi & Chiara Mancuso, *Italy*, in *EUROPEAN POL'Y AND PRACTICE*, *supra* note 23, at 202–03, 208 (noting 1,973 prisoners serving a life sentence in a prison population of approximately 74,000).

none recognizes life without parole. Judicial reconsideration of a life sentence is usually required after a period of time—10 years in Belgium, 12 years in Denmark, 15 years in Austria, Germany, and Switzerland, and 18 years in France, although in most of these countries judges individualize the minimum sentence, so it varies from case to case.²⁵ In practice, most prisoners are released well ahead of the full life sentence. In Austria for instance, 75% of those who receive a life sentence are released at 15 years;²⁶ similarly, in Ireland a “mandatory” life sentence usually amounts to 15 years even for the worst offenders.²⁷

Our heightened crime rate is one explanation for these differences. But it is a weak one. As Nora Deimleitner has pointed out, “a number of sophisticated statistical studies have shattered the myth that the United States and European countries have dramatically different crime rates,” especially with respect to property crime.²⁸ In any event, our crime rate is nowhere near six times that of European countries, the current differential in imprisonment rates. A more plausible theory is that, compared to European countries, we suffer proportionately more very-serious crimes than other types of crimes, which might justify a greater proportion of longer sentences. For instance, comparing U.S. rates to 23 other states within the European Union, our homicide rate is nearly twice that of the nearest country and our rape rate is second only to Sweden’s and far above the rape rate of most other countries; at the same time, we are barely in the upper third of the pack in terms of robberies, assaults, burglaries and thefts.²⁹ That means that the ratio of very-serious to serious crimes is significantly higher in the United States than in other countries. Even so, our combined homicide and rape rate expressed as a ratio of the

TICE, *supra* note 23, at 266, 275 tbl. 11.2 (1,408 serving a life sentence out of a population of 26,587).

25. Dünkel, Zyl Smit & Padfield, *supra* note 23, at 408.

26. Karin Brickmüller & Veronika Hofinger, *Austria*, in EUROPEAN POL’Y AND PRACTICE, *supra* note 23, at 55, 69 tbl. 3.1.

27. Thomas O’Malley, *Ireland*, in EUROPEAN POL’Y AND PRACTICE, *supra* note 23, at 238, 258.

28. Nora V. Deimleitner, *Is There a Future for Leniency in the United States Criminal Justice System?*, 103 U. MICH. L. REV. 1231, 1264 (2005).

29. CIVITAS, COMPARISONS OF CRIME IN OECD COUNTRIES 1–10 (2012) (showing data for homicide, rape, assault, burglary and car theft for the 36 countries in the Organization for Economic Cooperation and Development), available at www.civitas.org.uk/crime/crime_stats_oecdjan2012.pdf. The text refers only to data from the 23 European Union countries on the list.

rate of all index crimes is still only about 2%, far below the 10%-plus life-sentence rate.

These numbers suggest another key difference between the United States and Europe. In most states in the United States sentence lengths are essentially fixed at the front-end. These states have abolished parole or at least abide by the “truth-in-sentencing” rule that prisoners serve a minimum of 85% of their sentence.³⁰ American legislatures have also eagerly adopted three-strikes laws and mandatory sentencing provisions that leave no discretion to judges, even for relatively minor crimes.³¹ All of these practices have led to longer sentences and more people in prison (without, unfortunately, a concomitant reduction in crime).³² In Europe, in contrast, in-

30. Office of Justice Programs, *Forty-two Percent of State Parole Discharges Were Successful* (Oct. 3, 2001), <http://www.ojp.gov/archives/pressreleases/2001/bjs01181.html> (“By the end of [2000] 15 states had abolished parole board authority for releasing all offenders, and an additional 5 states had abolished parole board authority for releasing certain violent offenders.”); Paula M. Ditton & Doris J. Wilson, *Truth in Sentencing in State Prisons* 3 (1999), available at <http://bjs.gov/content/pub/pdf/tssp.pdf> (noting that 28 jurisdictions implemented truth-in-sentencing policies partially funded by federal grants).

31. U.S. Dep’t of Justice, National Institute of Justice, *“Three Strikes and You’re Out”: A Review of State Legislation* 1 (Sept.1997), available at <https://ncjrs.gov/pdffiles/165369.pdf> (stating that between 1993 and 1995, 24 states and the federal Government enacted three strikes laws); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 101 (2007) (describing the proliferation of mandatory penalties and noting that it was part of a broader shift toward a “zero tolerance” approach that applied to both severe and low-level crimes).

32. William Spelman, *Crime, Cash, and Limited Options: Explaining the Prison Boom*, 8 *CRIMINOLOGY & PUB. POL’Y* 29, 57 (2009) (study examining over 30 variables in multiple states during the period 1977 to 2005 finding that truth-in-sentencing policies (for example, no discretionary parole) were positively correlated with prison population); Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 *STAN. L. & POL’Y REV.* 75, 75–76, 79 (1999) (finding that implementation of the Truth-in-Sentencing and three strikes laws increased correctional spending but did not appear to reduce violent crime); Mark Osier, *Amoral Numbers and Narcotics Sentencing*, 47 *VAL. U. L. REV.* 755, 755 (2013) (“[T]he arbitrary mandatory minimums and sentencing guidelines that rank-order the severity of crimes . . . have too often created broad and often tragic outcomes in our society.”). Kevin Reitz has argued that determinate sentencing has not increased sentences. Keith Reitz, *Don’t Blame Determinacy: U.S. Incarceration Rates Have Been Driven by Other Forces*, 84 *TEX. L. REV.* 1787, 1787 (2006). But his analysis, even if correct, does not address the impact of mandatory sentences, three-strikes laws, and truth-in-sentencing. John Pfaff has conducted research suggesting that prosecutors are primarily to blame for the increased numbers of people in prison, given the huge increase in felony filings beginning in the 1990s. John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 *GA. ST. U. L. REV.* 1239, 1253 (2012). But one reason prosecutors have been able to exert such power is because mandatory sentencing and other punitive measures enacted by legislatures have moved discretion from judges to prosecutors. See, e.g., Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors and the Exercise of Discretion*, 117 *YALE L.J.* 1240, 1494 (2008) (“the most significant consequence” of the federal sentencing guidelines was “the transfer of power over punishment from judges to line prosecutors” and the Department of Justice). Our adversarial system has probable exacerbated these tendencies. See *infra* text accompanying notes 128–37.

determinacy reigns. European countries have resisted mandatory sentences except with respect to the most severe crimes, have rejected stringent sentencing guidelines systems, and have retained numerous early release mechanisms.³³

In short, the United States is much more willing to resort to imprisonment and long sentences than Western Europe. Why? Of course, there are many reasons, perhaps dozens, some of which I'll canvass in Part IV. But at this point I'll turn to Taz' contention that one potent cause of hyper-incarceration is the absence of populist-deliberative democracy.

II. TAZIAN INSIGHTS ON HYPER-INCARCERATION

One of the delights of Taz' work is the eclectic evidence he marshals in support of his arguments. In *Democratic Breakdown*, he plumbs the work of scholars who have studied international economies, domestic political structures, local racial politics, deliberative decision-making and the origins of happiness to make his case that PDD can have a palliative effect on a polity's reaction to crime. Here I'll summarize his description of this work and the insights he draws from it. Since this is only a summary, I skip over many of the nuances.

Most relevant to the U.S.-Europe comparison is Taz' description of the contrast between what comparativists call "liberal market economies"—of which the U.S. is a prime example—and "coordinated market economies," which predominate in Europe.³⁴ As developed by Michael Cavadino and James Dignan³⁵ and elaborated on by Nicola Lacey,³⁶ a liberal market economy aims at a free-market "characterized by vibrant economic and political competition in a relatively regulatory-free world," and thus tends to generate a distrust of government intervention and produce adversarial and polarized legislatures and bureaucracies.³⁷ A coordinated market economy, in contrast, is more heavily regulated, in an effort to please a wide array

33. Ely Aharanson, *Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion*, 76 L. & CONTEMP. PROBS. 161, 166–75 (2013) (describing difference between the U.S. and Europe in these three areas).

34. Taslitz, *supra* note 1, at 153–64.

35. *See generally*, MICHAEL CAVADINO & JAMES DIGNAN, *PENAL SYSTEMS: A COMPARATIVE APPROACH* (2006).

36. *See generally*, NICOLA LACEY, *THE PRISONER'S DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008).

37. Taslitz, *supra* note 1, at 157–58, 160 (noting that a "winner-take-all attitude leads the winning party to seek to dominate all levels of policymaking while it has control, including the

of groups; it tends to be associated with proportional representation and multi-party governance.³⁸ The cacophony of parties in the latter type of system requires significant compromise and consensus building and usually results in center-left governments with generous welfare policies, because the center is controlled by a middle class interested in robust social services.³⁹

According to Taz, the impact of a coordinated economy and more diffuse democratic process on criminal justice policies is at least three-fold. First, “[t]he broad-based, coalitional nature of the electoral system . . . makes it harder for any one social group to use criminal justice as a way to wage war on another such group.”⁴⁰ Second, the same coalition-seeking reduces the ability of any given party to control policymaking, which, together with a greater trust in government generally, increases deference to relatively lenient criminal justice experts.⁴¹ Third, “[t]he more generous welfare state . . . reduces poverty, social isolation, and other arguably criminogenic social situations,” reducing the necessity of harsh punishment policies.⁴² The result, borne out by data comparing criminal justice systems in liberal market and coordinated market economies, is less severe punishment.⁴³

Taz also delves into the research political scientist Vanessa Barker has conducted comparing contrasting democratic proclivities *within* the United States.⁴⁴ Barker looked at the criminal justice and associated politics of three states: California, Washington and New York.⁴⁵ As Taz notes, Barker found that, while Californians’ easy access to the referenda process is highly populist, their democracy is not “deliberative” in the PDD sense, but rather captured by relatively powerful (and white) social groups that tend to favor punitive policies such as

appointment of bureaucrats, who are “seen as less an independent stable, professional source of policy input than servants of the governing party’s will”).

38. *Id.* at 153–54 (“Even right-leaning CME governments are more likely to be left of what constitutes the center in the United States.”).

39. *Id.* at 154.

40. *Id.* at 156.

41. *Id.*

42. *Id.*

43. *Id.* (citing LACEY, *supra* note 36, and 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).

44. *Id.* at 138–53.

45. VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* (2009).

three-strikes laws.⁴⁶ In contrast to this “raw populism,” Washington’s use of town-hall meetings and hybrid state-citizen commissions has led to government endorsement of diversion programs, community-based alternatives to prison, and shorter sentences.⁴⁷ In-between in terms of punitiveness is New York, which eschewed grass-roots input like Washington’s but also avoided the raw populism of California. Instead, New York relied heavily on the deliberations of experts who generally carried out the crime control agenda favored by politicians, but mediated it with their empirically-based knowledge that non-violent offenders usually do not require imprisonment.⁴⁸ To Taz, Barker’s work reinforces the conclusion that PDD has moderating effects on punishment policy.

The third area Taz examines—the study of local politics and criminal justice—picks up the same themes. Here Taz relies on the work of another political scientist, Lisa Miller, who looked at data from Pennsylvania, and in particular Philadelphia and Pittsburgh.⁴⁹ According to Taz, Miller found that anti-incarceration groups tend to come from the most heavily-policed and most crime-ridden neighborhoods (which also tend to be populated mostly by minority groups), because “their experience teaches them that crime is a multi-faceted problem that requires multi-faceted solutions.”⁵⁰ Drawing from this insight, but also relying on the work of cognitive psychologist Michael Wenzel and his colleagues,⁵¹ Taz claims that inner city groups are more likely to favor restorative justice efforts, aimed at re-integrating offenders and reconciling them with their victims, over retribution-based dispositions.⁵² Unfortunately, Taz notes (here again relying on Miller’s data), these groups tend to be more diffuse and less focused on a single policy prescription than pro-incarceration groups, and for this and other reasons get short shrift at the levels of government

46. *Id.* at 140–43.

47. *Id.* at 148–51.

48. *Id.* at 143–48.

49. LISA MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY AND THE POLITICS OF CRIME CONTROL* 15 (2008).

50. Taslitz, *supra* note 1, at 167.

51. Michael Wenzel et al., *Retributive and Restorative Justice*, 32 *LAW & HUM. BEHAV.* 375 (2008).

52. Taslitz, *supra* note 1, at 172 (noting that Wenzel’s work indicates that the choice of a retributive or restorative response to crime depends in part on whether the offender and victim are from the same social group).

where most criminal justice policy is made.⁵³ At the same time, these local groups are relatively more effective at exerting pressure at the municipal level, where councilpersons feel compelled to listen to their constituents.⁵⁴ These findings lead Taz to conclude 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.”⁵⁵

Taz then turns to the results of what he calls “democratic social science.”⁵⁶ The primary finding here is that people become much less punitive and much less focused on retributive dispositions when they are given detailed information about a perpetrator and his or her crime and allowed to deliberate on a just result.⁵⁷ Thus, for example, Taz reports a study that found that respondents were much tougher on burglars in the abstract than when told about specific cases involving burglary.⁵⁸ “Deliberative polling” that informs respondents about the many alternatives to imprisonment or that makes clear that the survey respondents will be held “accountable” for their views also tends to produce more lenient punishments.⁵⁹ Taz argues that incorporation of vignettes and deliberative polling into decisions about criminal justice is another way in which democracy could reduce hyper-incarceration.⁶⁰

Finally, Taz gleans what he can from “happiness jurisprudence,” a diffuse body of research which he claims supports the conclusion, “with little to challenge it,” that PDD promotes happiness.⁶¹ That state of mind in turn reduces both criminality and “the emotional need to strike back at perceived threats to safety by means of severe

53. *Id.* at 165–66 (“[F]ederal 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.”).

54. *Id.* at 169–70.

55. *Id.* at 173.

56. *Id.* at 173–78.

57. *Id.* at 174 (“when ordinary persons are confronted with vignettes asking them to make sentencing judgments in specific cases, their sentencing judgments are far less harsh.”).

58. *Id.* (citing MIKE MAGUIRE & TREVOR BENNETT, *BURGLARY IN A DWELLING: THE OFFENCE, THE OFFENDER AND THE VICTIM* 139, 141, 170 (1982)).

59. *Id.* at 176–77.

60. *Id.* at 178 (“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.”).

61. *Id.*

sentences of incarceration.”⁶² The primary manner in which PDD produces these results is, once again, through providing a means of giving people effective voice. Voice promotes esteem-building perceptions of autonomy and competence, and thus counters crime-inducing factors.⁶³ More importantly in terms of affecting attitudes toward incarceration, Taz argues that, because PDD requires listening and acquiring information, it promotes empathy, which is a key requisite for compassion and the willingness to mitigate in cases involving people from “outside” groups.⁶⁴

In his conclusion, Taz stresses that he is not contending that the reins of criminal justice should be handed over to the general public. Instead, he argues, PDD should increase 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 of 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 great degree.⁶⁵

At the same time, Taz expresses concern that, unless lay people are heavily involved through a deliberative process, as occurred in Washington, experts will be over-influenced by the most powerful, best organized groups, which tend to be obsessed with crime control.⁶⁶

Taz makes a convincing case for PDD as a mechanism for rethinking hyper-incarceration policies. American democracy—Taz’ raw populism—is not incapable of changing incarceration-friendly policies; in recent years several states, reacting primarily to fiscal concerns or judicial mandates, have enacted laws that have the effect of reducing the prison population.⁶⁷ But our criminal justice system is still

62. *Id.*

63. *Id.* at 180.

64. *Id.* at 184 (“[E]mpathy is a prerequisite to compassion, which in turn fosters the impulse to mitigate punishment.”).

65. *Id.* at 187.

66. *Id.* at 186–87 (“The more direct, non-inclusive, winner-take-all, raw-populist forms of American government . . . create incentives for politicians to manipulate the people by distorting criminal justice policy for political gain . . . Even in states like New York, where . . . political elites rule relatively insulated from many direct populist pressures [politicians] still seek ‘tough-on-crime’ poses as a way of getting votes.”).

67. THE SENTENCING PROJECT: FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES 2, n.3 (July 2014), available at http://sentencingproject.org/doc/publications/inc_Fewer_Prison-

more punitive by several orders of magnitude than Europe's. If dramatic change is to occur, something more fundamental than an economic downturn is required.⁶⁸ In that regard, local deliberations by informed citizens from all walks of life, informed by experts, could be part of the recipe for a more empathetic, less prison-heavy regime.

As Taz recognized, however, instituting PDD throughout the country—even at the level experienced in Washington state, much less to the ideal extent he envisions—is a “daunting” task.⁶⁹ He does not flesh out his thoughts on that subject. Below I outline some aspects of our culture that might explain why, in contrast to European culture, American culture is particularly infertile ground for PDD.

III. AMERICAN CULTURE AND CRIMINAL PUNISHMENT

Numerous scholars have discussed “American exceptionalism” as it applies to criminal justice, and in particular the death penalty.⁷⁰ Taz and others have characterized American culture as more populist, capitalist, religious, racist, and proceduralist than European culture, in ways that increase societal punitiveness.⁷¹ Without exhausting the possibilities, these explanations all seem, on the surface at least, to be plausible candidates for America's willingness to impose harsh punishments.

Yet at least one possible problem confronts all of these explanations: the phenomena they describe all pre-existed the huge increase in imprisonment rates since the 1960s, when our incarceration prac-

ers_Less_Crime.pdf (stating that “29 states have adopted reforms designed to scale back the scope and severity of their mandatory sentencing policies over the past decade,” although also noting that “the overall scale of change has been quite modest” at less than 2% annually nationally, with a disproportionate amount of that reduction due to California's “Realignment” policy that to a large extent amounted to moving prisoners to jails). *But see* Kay Whitlock, “Bipartisan” Criminal Justice Reform: A Misguided Merger, TRUTHOUT, Feb. 25, 2015, available at <http://truth-out.org/news/item/29272-bipartisan-criminal-justice-reform-pushes-privatization> (arguing that much of the reform effort is driven by entities interested in privatization)

68. Cf. Graham Cates, *Can Justice Reform Survive the Next Election?*, THE CRIME REPORT, July 16, 2014, available at www.thecrimereport.org/news/inside-criminal-justice/2014-07-can-justice-reform-survive-the-next-election (quoting criminologist Alfred Blumstein as saying “there's no guarantee that progress in changing the policies that made America the world leader in incarceration will last through a different administration”).

69. Taslitz, *supra* note 1, at 193.

70. See David Garland, *Capital Punishment and American Culture*, 7 PUNISHMENT & SOC'Y, 347–76 (2005); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003); FRANKLIN E. ZIMRING, *THE CONTRADICTION OF AMERICAN CAPITAL PUNISHMENT* (2003); Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97 (2002).

71. See e.g., Carol S. Steiker, *Why We're So Tough on Crime*, BOSTON REVIEW BOOKS (2003), available at <http://new.bostonreview.net/BR28.5/steiker.html>.

tices were not that different from Europe's.⁷² If these factors helped trigger hyper-incarceration, why didn't hyper-incarceration begin much earlier? After detailing how these memes might, in theory, lead to a tendency to favor severe penalties for crime, I will suggest an answer to that question. In short, the answer is that all of these cultural traits not only describe American society but have noticeably intensified their influence on American politics in the last five decades, precisely the period of hyper-incarceration. As a result, PDD has more of an uphill battle now than it did four decades ago.

A. American Populism

Taz' article lays the groundwork here, in particular by noting the correlation of punitive policies with relatively polarized market economies and California's raw populism. But a nay-sayer might point out that we had a two-party, highly populist system before 1960, and yet our incarceration rates at that time were European-like. So how, precisely, do the findings of Cavadino and Dignan, Lacey and Barker explain our current state of affairs?

A possible answer to that question combines Taz' insights with rising crime rates in the 1960s and 1970s. Due to the huge influx of baby boomers, the expansion of drug markets, and various other factors, the number of index crimes in the United States more than doubled between 1960 and 1972.⁷³ Not surprisingly, crime became more salient to the American public during that time.⁷⁴ The media added fuel to the fire, reporting not only increases in crime but exag-

72. Bruce Western & Christopher Wildeman, *Punishment, Inequality and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 858 (2009) (presenting data showing that "between 1925 and 1973, the fraction of the U.S. population in state and federal prison varied in a narrow range around 100 per 100,000—close to the total incarceration rates in Western Europe").

73. In 1960, the FBI reported 2,019,600 index crimes; by 1972 the number was 5,891,924. FBI, U.S. DEP'T OF JUSTICE, *Crime in the United States 1972: Uniform Crime Reports 61 tbl.1* (1973). Satoshi Kanasawa, *When Crime Rates Go Down, Recidivism Rates Go Up*, PSYCHOLOGY TODAY (Aug. 24, 2008), available at www.psychologytoday.com/blog/the-scientific-fundamentalist/200808 ("Crime rates increased in the 1970s . . . as the baby boomers became young adults."); Lawrence Rosenthal, *Pragmatism, Originalism, Race and the Case against Terry v. Ohio*, 43 TEX. TECH. L. REV. 299, 304 (2010) ("There is something approaching a consensus among criminologists that the crime spike of the late 1980s and early 1990s was a function of the introduction of crack cocaine into major cities.").

74. *Search of Gallup Poll Public Opinion Database*, Scholarly Resources, Wilmington, Del. available at <http://brain.gallup.com/home.aspx> (noting that in October 1951 one percent of respondents thought crime was the most important issue facing the United States, while in January 1994, 49 percent of respondents ranked crime the most important noneconomic problem facing the United States).

generating its impact.⁷⁵ Even today, with crime rates receding, Americans perceive offending to be on the upswing because of what they see and hear on TV, radio, newspapers and the Internet.⁷⁶ The way in which our political system parlays this state of affairs into higher incarceration rates is well-known. In the United States at both the federal and state levels, tough-on-crime rhetoric is seen as an electoral no-brainer, with candidates vying to outdo one another in convincing the public how outraged they are by criminal conduct.⁷⁷

But it is in comparing our experience with Europe's reaction to influxes of crime that the impact of our unique political culture during the past half-century becomes apparent, in the ways that Taz outlines. Interestingly, crime rates during the 1960s and 70s increased even more rapidly in Europe than they did in the U.S.⁷⁸ And Europeans too are assaulted by media reports about crime, reports that leave them feeling as insecure as Americans.⁷⁹ Yet crime has not become the political football it did in the United States, where it was a central theme in the 1968 elections that presaged hyper-incarceration and has often figured prominently in subsequent federal and state campaigns

75. *Crime on the Rise?: Public Perception of Crime Out of Sync with Reality, The Crime Report*, Nov. 10, 2008, available at www.utexas.edu/features/2008/11/10/crime/ (noting that, while today "crime is a staple topic of media coverage and political campaigns," prior to the 1960s it was not, and quoting a criminologist to the effect that "mass media" was a principal, and misleading, source of the public's information about crime).

76. Lydia Saad, *Most Americans Believe Crime in U.S. is Worsening*, Gallup (Oct. 31, 2011), available at www.gallup.com/poll/150464/americans-believe-crime-worsening.aspx ("Despite a sharp decline in the United States' violent crime rate since the mid-1990s, the majority of Americans continue to believe the nation's crime problem is getting worse, as they have for most of the past decade. Currently, 68% say there is more crime in the U.S. than there was a year ago.").

77. Katherine Beckett & Theodore Sasson, *The Origins of the Current Conservative Discourse on Law and Order* 44, 50, in *DEFENDING JUSTICE, THE RISE OF THE MODERN "TOUGH ON CRIME" MOVEMENT* (2005), available at www.publiceye.org/defendingjustice/pdfs/chapters/toughcrime.pdf (arguing that, beginning in the 1960s, conservative politicians have "worked . . . to alter popular perceptions of crime . . . and to promote policies that involve 'getting tough' and 'cracking down,'" as part of a larger effort to increase votes, and documenting how, observing the success of this move, Democrats jumped on "the law-and-order bandwagon"); Garland, *supra* note 70, at 133 ("Many of the laws passed in the 1990s—Megan's law, Three Strikes, sexual predator statutes, the reintroduction of children's prisons, paedophile registers, and mandatory sentences . . . are designed to be expressive, cathartic actions, undertaken to denounce the crime and reassure the public.").

78. Paolo Buonanno, Francesco Drago, Roberto Galbiati & Giulio Zanella, *Crime in Europe and in the U.S.: Dissecting the "Reversal of Misfortunes,"* 26 *ECONOMIC POL'Y* 347, 349–51 (2011) (showing tables of faster crime increase in Europe than in the U.S., both overall and with respect to property crimes, between 1970 and 2000).

79. See generally, GORADZ MEŠKO ET AL., *CRIME, MEDIA AND FEAR OF CRIME* (2009), available at www.academia.edu/1470327/Crime_media_and_fear_of_crime (discussing media coverage of crime in several European countries and noting, inter alia, that reporting on crime in Germany doubled between the early 1950s and the mid-1990s).

as well.⁸⁰ In contrast, in Europe, as James Whitman has observed, politicians are as likely to debate prison reform and the rights and dignity of convicts as they are to inveigh against the criminal element.⁸¹ I had a similar experience; I took a class of American students I taught in Dublin, Ireland in 2000 on a field trip to the national Parliament, where the leader of the Tory party (the “conservative” party) expressed amazement that the United States still had the death penalty and three-strikes laws, and emphasized that his party favored rehabilitative programs for prisoners (“otherwise, what’s the point?”).

The differences between the relatively adversarial nature of our system and the more coalitional, inclusive nature of European governments helps explain these different political repercussions of the rise in crime since the 1960s. In part because of Europe’s less populist background, politicians are less likely to have a knee-jerk reaction to the latest crime or crime wave, whether or not exaggerated by the media.⁸² Furthermore, as Taz points out, coordinated economies are more likely to rely on experts in criminal justice matters.⁸³ Indeed, in some European countries criminal statutes are drafted not by legislators or their aides but by unelected scholars, who are less likely to be influenced by the public’s moods.⁸⁴ Our adversarial political system, in contrast, tends to magnify the crime problem and feed punitive attitudes.

Excessive punitiveness is also likely to accompany a second aspect of American-style democracy. Most American states have carried populism to its logical end by requiring the election of judges and prosecutors,⁸⁵ a phenomenon that is largely unheard of in Western

80. See Beckett & Sasson, *supra* note 77.

81. See Whitman, *supra* note 70, at 76 (recounting the French response to a prison scandal, in which “French politicians of all major tendencies, and in every branch of French government, vied with each other over the issue of prison reform [and] entered into a contest to show who had the deeper commitment to making punishment more *humane*.”).

82. *Id.* at 15 (“For the most part, . . . American-style politics has failed to exert an American-style influence on German or French criminal justice,” in large part because of the “success of bureaucratic control.”).

83. Taslitz, *supra* note 1, at 186–87.

84. Markus Dirk Dubber, *The Promise of German Criminal Law: A Science of Crime and Punishment*, 6 GERMAN L. J. 1049, 1051 (2005) (noting that the German system of criminal law has been “assembled by generations of scholars and their stables of assistants”).

85. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM L. REV. 265, 266 (2008) (noting that “roughly 90 percent of state general jurisdiction judges are currently selected or retained” through an election process); see also Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMIN. 717, 734 (1996) (95% of state prosecutors are elected).

Europe.⁸⁶ Unfortunately, considerable research shows that both judges and prosecutors change their behavior, in a more punitive direction, near election time.⁸⁷ In Europe, in contrast, professional bureaucracies are insulated from retributive demands from the public because they are not subject to the beck and call of the populace, which may be uninformed or reacting to the most recent media-driven crisis.⁸⁸

Of course, we have been electing judges and prosecutors for some time, well before the punitive upsurge. But, here again, times have changed. Our willingness to subject the justice system to popular vote has grown appreciably in the last quarter-century. As Matthew Streib notes, since the mid-1980s,

Judicial elections have changed immensely, perhaps more so than elections for any other office. Once compared to playing a game of checkers by mail, many of today's judicial races are as rough and tumble as any congressional election. As one observer famously remarked, judicial elections are getting "noisier, nastier, and costlier." Candidate spending in judicial elections, both at the supreme court and intermediate appellate levels, has skyrocketed. Interest groups and political parties, recognizing the extreme importance of electing judges who support their views, are becoming more active.⁸⁹

86. Mary L. Vulcansek, *Appointing Judges the European Way*, 34 *FORD. URB. L. J.* 363, 368 (2007) (noting that "continental Europe" has "three models for naming judges: civil service, shared appointment, and shared appointment with partisan quotas"); Micah S. Myers, *Prosecuting Human Rights Violations in Europe and America: How Legal Structure Affects Compliance International Obligations*, 25 *MICH. J. INT'L L.* 211, 238 (2003) ("European prosecutors are selected largely on the basis of competitive examinations, which helps "insulate [them] from political influence.").

87. Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When it Runs for Office?*, 48 *AM. J. POL. SCI.* 247, 261 (2004) (finding that "judges become significantly more punitive the closer they are to standing for reelection"); Jason J. Czarnecki, *Voting and Electoral Politics in the Wisconsin Supreme Court*, 87 *MARQ. L. REV.* 323 (2003) (finding that justices are less likely to protect defendant and prisoner rights once they have experienced elective politics); Melissa Bann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 *AM. POL. Q.* 485, 495-97 (1995) (finding that state judges are more likely to uphold death sentences in last two years of their term); Siddhartha Bandyopadhyay & Bryan C. McCannon, *The Effect of the Election of Prosecutors on Criminal Trials* 161 *PUBLIC CHOICE* 141, 155 (2014) (finding that "when reelection pressures are strong, prosecutors increase the number of cases taken to trial and plea bargain less").

88. See Myers, *supra* note 86. Cf. JOEL D. ABERBACH, ROBERT D. PUTNAM & BERT A. ROCKMAN, *BUREAUCRATS AND POLITICIANS IN WESTERN DEMOCRACIES* 94-95 (1981) (noting the "startling" difference between American bureaucrats, who see their role as furthering political aims and European bureaucrats, who do not).

89. Matthew J. Streib, *The Study of Judicial Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 2 (Matthew J. Streib, ed. 2007).

The pace described by Streib has accelerated in the past decade and a half. In 2000, contested campaigns figured in only four of 18 supreme court elections; by 2006, they occurred in ten out of 11.⁹⁰ Negative campaign ads and attacks on candidates by opposing candidates increased significantly during that period.⁹¹ The Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*⁹² undoubtedly stoked the flames, as evidenced by the fact that spending on state judicial elections more than doubled between 2007-2008 and 2011-2012.⁹³ Prosecutorial elections are not likely to be as fiery, but they too hardly reflect the deliberative democracy that Taz describes. According to Ronald Wright, "when it comes to the prosecutor, one of the most ubiquitous and powerful figures to appear regularly on the ballot, we rely most on anecdotes."⁹⁴ PDD does not have much of a chance under these circumstances.

B. American Conservatism: Capitalism, Individualism and Religiosity

The term "liberal market economy" is, of course, another way of describing relatively uncabined capitalism. As Taz indicates, this type of economic regime is epitomized by lower welfare levels and a lack of effort to ensure economic equality.⁹⁵ It also tends to be associated with a dog-eat-dog, laissez-faire, winner-or-loser ethos.⁹⁶ More positively, it can be characterized as a commitment to rugged individualism, where people can make of their lives what they want without dependence on or interference by others.⁹⁷ Translated to the criminal justice context, one can imagine how people immersed in this political

90. James Sample et al., *The New Politics of Judicial Elections* vi (2006), available at www.followthemoney.org/press/Reports/200705171.pdf.

91. *Id.*

92. 558 U.S. 310 (2010) (holding that a federal statute barring independent corporate expenditures for electioneering violated the First Amendment).

93. BRENNAN CTR. FOR JUSTICE, *NEW POLITICS OF JUDICIAL ELECTIONS*, 2012-2012 (Oct. 23, 2013), available at www.brennancenter.org/publication/new-politics-judicial-elections-2011-12.

94. Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 590 (2009).

95. Taslitz, *supra* note 1, at 159 (stating that LMEs tend to be associated with "a relatively weaker welfare state and a less coordinated state commitment to maintain worker skills," as well as "more poverty and life-course economic instability . . .").

96. *Id.* at 160 (describing the "winner-take-all attitude").

97. JOHN MICKELTHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION* 304 (2004) (citing a Pew survey showing that Americans are much more likely than Europeans to say that it is more important "to allow individuals to be free to pursue their goals" than "for the government to ensure that nobody is in need").

economy are more likely to attribute crime and its close associate—poverty—to individual choice rather than to mitigating circumstance;⁹⁸ likewise, they would be more likely to see a person who offends as an “outsider” not worthy of empathy, especially if they are not given the type of detailed personal stories Taz reports are more likely to induce leniency.⁹⁹ Retributivism—the idea that offenders should get what they deserve—is a perfect fit in such a society, as are determinate sentences based on just desert.¹⁰⁰

Again, however, this homo economicus mindset¹⁰¹ would seem to describe the United States throughout its history. It must also be noted that retributivist dispositions do not have to be harsh. Deserved punishment can be short.¹⁰² Before drawing a connection between our individualist tendencies and hyper-incarceration, some explanation of why it blossomed only after the 1960s is needed.

That something else was the resurgence of conservatism in the 1970s, a movement that parlayed a number of traditional American values into a concerted campaign against the “criminal element.” The adversarial American political system was the perfect vehicle for bringing this campaign to fruition. As Thomas and Mary Edsall demonstrate, “[c]onservatives, mostly Republicans, recognized in the 1960s that ‘tough on crime’ policies could be used as ‘wedge issues’ to separate white and working class Americans from their traditional support of liberal politicians.”¹⁰³ A key avenue for creating this

98. *Id.* at 312 (reporting survey results showing that Europeans are much more likely than Americans to believe that “success is determined by forces outside their control”).

99. Incheol Choi & Richard E. Nisbett, *Situational Salience and Cultural Differences in the Correspondence Bias and Actor-Observer Bias*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 949 (1998) (describing a cognitive bias known as “fundamental attribution error” or “observer bias” that attributes behavior to internal rather than external causes and is more likely to be found among Americans); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1329 (1998) (arguing that discrimination is “at its core” the result of fundamental attribution error).

100. For a description of retributivism and determinate sentencing, see Robert Pugsley, *Retributivism: A Just Basis for Determinate Sentences*, 7 HOFSTRA L. REV. 379, 398 (1979) (“Retributivism affirmatively supports determinate sentencing schemes because articulable, narrowly drawn sentencing ranges can be derived from ascertaining what an offender deserves for committing a particular type of offense.”).

101. See Wikipedia, at http://en.wikipedia.org/wiki/Homo_economicus (“[H]omo economicus, or economic human, is the concept in many economic theories of humans as rational and narrowly self-interested actors who have the ability to make judgments toward their subjectively defined ends.”).

102. For instance, Andrew Von Hirsch, one of the progenitors of modern retributivism, proposed a maximum sentence of five years for homicide and a maximum of three years for all other serious crimes. ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 36–46 (1993).

103. THOMAS EDSALL & MARY EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS AND TAXES ON AMERICAN POLITICS* 4 (1991); see generally KATHERINE BECKET, *MAKING*

wedge was the rejuvenation of American individualism, or rather the glorification of a “ruthless individualism” that is consistent with laissez faire economics.¹⁰⁴ Various studies indicate that focus on the “self” increased significantly after the 1960s.¹⁰⁵

Religion was another avenue the conservative movement exploited. There is no doubt that the United States is more religious than Europe. In most European countries, even heavily Catholic ones like Spain, less than 25% of the population says that religion is important to them.¹⁰⁶ The percentage of Europeans who say they never or practically never go to church hovers around 45%.¹⁰⁷ In the U.S., in contrast, more than half say a belief in God is important to them and less than 18% never attend church.¹⁰⁸ Although Christianity certainly has its forgiving elements, many American Christians, especially those of the evangelical stripe, believe strongly in the concept of evil, the need to exact vengeance, and importance of expressing moral outrage at criminals.¹⁰⁹ Fundamentalist Christians “equate criminal behavior with sinful behavior,” leading them to endorse “the view that crime

CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 4 (1999) (noting how “tough-on-crime” issues separate rural white men from many minorities and women).

104. See Claire Andre & Manuel Velasquez, *Creating the Good Society*, 5 ISSUES IN ETHICS 1 (1992), available at <http://www.scu.edu/ethics/publications/iie/v5n1/> (reviewing Robert Bellah et al.’s book, *The Good Society*, stating “a ruthless individualism, expressed primarily through a market mentality, has invaded every sphere of our lives, undermining those institutions, such as the family or the university, that have traditionally functioned as foci of collective purposes, history, and culture”).

105. Jean M. Twenge, W. Keith Campbell, & Brittany Gentile, *Increases in Individualistic Words and Phrases in American Books, 1960-2008*, 7 PLOS ONE 1371 (2012), available at <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0040181> (finding, based on a Google scan, “increasing individualism” reflected in books and other works since 1960 and reporting other research finding “increases in individualistic traits such as narcissism, surgency, and positive self-views” in the period); MICKELTHWAIT & WOOLDRIDGE, *supra* note 97, at 312 (describing a 2003 poll indicating that the percentage of Americans who believed that success is determined by forces outside their control had fallen from 41 percent in 1988 to 32 percent by the time of the poll, whereas the opposite trend was found in Germany). Since the 2008 economic crash, Americans’ willingness to attribute poverty to moral fault rather than devastating events has lessened considerably. Patrick O’Connor, *Attitudes Toward Poverty Show Dramatic Change*, WALL ST. J. (June 24, 2014) (description of poll showing that 46% of Americans today attribute poverty to circumstances rather than attitude, and that the increase occurs among Republicans and independents as well as Democrats), available at <http://blogs.wsj.com/washwire/2014/06/20/attitudes-toward-poverty-show-dramatic-change-wsjnbc-poll/>. Perhaps that change in attitude presages a more lenient attitude toward crime.

106. Pew Research Report, *The American-Western European Values*, Feb. 29, 2012, available at www.pewglobal.org/2011/11/17/the-american-western-european-values-gap/.

107. Noelle Knox, *Religion Takes a Back Seat in Western Europe*, USA TODAY, Aug. 8, 2005 (chart), available at http://usatoday30.usatoday.com/news/world/2005-08-10-europe-religion-cover_x.htm.

108. Pew Research Report, *supra* note 106; Knox, *supra* note 107.

109. MICKELTHWAIT & WOOLDRIDGE, *supra* note 97, at 326 (“America’s religiosity has encouraged Americans to see problems in terms of individual virtues and vices.”).

results from the defendant's character and not from unfortunate or unjust circumstances."¹¹⁰ Rather than an attitude of "There but for the Grace of God go I," their reaction to crime, especially if they see God as angry or judgmental, is an "eye for an eye."¹¹¹ This view is consonant with both the adversarialism of American populism and the individualistic aspects of a liberal market economy.

Most important to the thesis of this article, this conservative brand of religion has mushroomed over the past four decades, precisely the period of hyper-incarceration. With the advent of the New Religious right, the United States is more religiously conservative now than it was in the 1960s by a large margin.¹¹² These conservative religious groups have been extremely effective at raising money, using the media and lobbying elected officials.¹¹³ There is no analogously strong political force in largely secular Europe.

Before leaving the liberal market economy theme, there is another, more prosaic way capitalism may lead to harsher punishments. Because the U.S. is a bastion of free enterprise, many Americans prefer private solutions to government ones, even in arenas, like health care and education, which are seen as quintessentially governmental endeavors in Europe. It has only been in the past several decades, however, that we've begun privatizing prison and jails, with imprisonment-enhancing consequences. Companies like the Corrections Corporation of America are taking over state prison systems, with the aim of expanding them.¹¹⁴ As one spokesperson for the company said in explaining its construction of three, at-the-time unnecessary, prisons in California: "If you build it in the right place, the prisoners will

110. James D. Unnever & Frances T. Cullen, *Christian Fundamentalism and Support for Capital Punishment*, 43 J. RES. CRIME & DELINQ. 169, 171 (2006).

111. Christopher D. Bader et al., *Divine Justice: The Relationship between Images of God and Attitudes Toward Criminal Punishment*, 35 CRIM. J. REV. 90, 91 (2012) (noting these attitudes); JAMES A. MORONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* 463 (2003) ("fears of rampant immorality obscure concerns about common sense or fairness. . . . Every new sermon about bad behavior carries this melancholy dark side").

112. Michael Hout, Andrew Greeley & Melissa Wilde, *The Demographic Imperative in Religious Change in the United States*, 107 AM. J. SOCIOLOGY 468, 468 (2001) ("The decline of the 'mainline' religious denominations and concomitant growth of more conservative denominations and sects has been among the major U.S. religious trends of the past 60 years or so.").

113. See generally, WILLIAM MARTIN, *WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT* (2004) (describing the increasing power of evangelical Christians, particularly from the 1960s through 2004).

114. CTR. FOR LAW AND GLOBAL JUSTICE, *CRUEL AND UNUSUAL PUNISHMENT, U.S. SENTENCING PRACTICES IN GLOBAL CONTEXT* 16 (2012) (noting that "private facilities currently house about 6% of state prisoners and 16% of federal prisoners" and that "[t]he rise of private prisons [has] contributed to the increase in lengthy prison terms," in part because their owners fund "campaigns and policies seeking longer criminal sentences and mandatory sentences").

come.”¹¹⁵ One stunning consequence of this development is that a number of states have agreed to produce a certain number of prisoners per year or pay the private facility for the empty beds, a sure-fire method of encouraging unnecessary incarceration.¹¹⁶ Again, this relatively recent development could explain some of the American-European divergence in punishment, because relatively socialist Europe has for the most part maintained prisons as public entities.¹¹⁷

C. American Racial Attitudes

Taz has probably written more about the relationship of race to the criminal justice system than any other Caucasian law professor. He was passionate about the issue, and firmly believed that the criminal justice system had a disproportionately negative effect on people of color, especially African-Americans.¹¹⁸ As he and others have pointed out, there is no doubt that the percentage of African-Ameri-

115. Marc Lipsher, *Corrections Corporation of America Casts Longing Eyes on California*, WALL ST. J., May 27, 1998.

116. Andy Kroll, *This is How Private Prison Companies Make Money Even When Crime Rates Fall*, MOTHER JONES, Sept. 19, 2013, available at www.motherjones.com/mojol/2013/09/private-prisons-occupancy-quota-cca-crime (“In the Public Interest found that 41 of the [contracts that states have with private prison companies] included occupancy requirements mandating that local or state government keep those facilities between 80 and 100 percent full. In other words, whether crime is rising or falling, the state must keep those beds full.”); see also Andrea Nill Sanchez, *Private Prisons Spend Millions on Lobbying to Put More People in Jail*, THINK PROGRESS, June 24, 2011, available at <http://thinkprogress.org/justice/2011/06/23/251363/cca-geo-group-prison-industry/> (describing millions of dollars of lobbying expenditures by the private prison industry and noting that, since 1997, “while the total number of people in prison increased less than 16 percent, the number of people held in private federal and state facilities increased by 120 and 33 percent, correspondingly”).

117. Cody Mason, *International Growth Trends in Prison Privatization 2* (2013), available at http://sentencingproject.org/doc/publications/inc_International%20Growth%20Trends%20in%20Prison%20Privatization.pdf (noting that most private prison growth has taken place in English-speaking countries).

118. Even sampling only the most obvious titles from the previous ten years produces a long list. See, e.g., Andrew E. Taslitz, *Racial Threat Versus Racial Empathy in Sentencing*, 41 AM. J. CRIM. L. 1 (2013); Andrew S. Taslitz, *Curing Own Race Bias: What Cognitive Science and the Henderson Case Teach about Improving Jurors Ability to Identify Race-Tainted Identification Error*, 16 N.Y.U. J. LEG. & PUB. POL’Y 1049 (2013); Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado’s Rotten Social Background*, 2 ALA. CIV. RTS. & CIV. LIB. REV. 79 (2011); Andrew E. Taslitz, *Judging Jena’s D.A.: The Prosecutor and Racial Esteem*, 44 HARV. CIV. RTS. & CIV. LIB. REV. 329 (2009); Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent—The Informants Example*, 37 S.W. L. REV. 1091 (2008); Andrew E. Taslitz, *Racial Blindspot: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1 (2007); Andrew E. Taslitz, *Racial Profiling, Terrorism and Time*, 109 PENN ST. L. REV. 1181 (2005).

cans in prison far outpaces their representation in the general population and that the percentage has increased since the 1960s.¹¹⁹

Not all of this can be attributed to racism of course. African-Americans migrated to urban areas in huge numbers after War World II, and the resulting ghettoization and poverty inflated their crime rate.¹²⁰ But in *Democratic Breakdown* Taz suggests that the political economy of the United States once again exacerbated the situation by facilitating a punitive stance toward minority crime. He argues that, compared to coalitional societies, liberal market economies tend to shut out minority groups that do not “play by the rules,” at the same time demonizing them as prime causes of most social ills, including crime.¹²¹ As already noted, he also points out that urban minority groups have a hard time exerting their influence at the state or federal level, where “legislators from farm country, small towns, and white middle-class neighborhoods” predominate.¹²²

Yet our country has been afflicted by racism since its birth, and the political attributes described by Taz have also been with us for some time. What racialized practices changed in a way that can help explain the hyper-incarceration of the past 45 years? Here the work of Michelle Alexander, whom Taz cites frequently, comes to the fore. Professor Alexander notes that the rise in black incarceration rates from the late 1970s through the 1980s parallels the hyper-criminalization of conduct associated with drug possession, and that most of our drug crime policies came during the Nixon and Reagan presidencies when Republicans were developing their Southern strategy.¹²³ From these types of observations, she argues that our “war on drugs” was, and still is, a cover for a continuation of the racially-tinged criminal justice practices of yesteryear, when blacks suspected of crime used to be lynched or beaten rather than prosecuted in court. In other words,

119. See Andrew E. Taslitz, *The Political Geography of Race Data in the Criminal Justice System*, 66 L. & CONTEMP. PROBS. 1, 1 (2003) (noting “the reality that racial and ethnic minorities, especially African Americans, make up a far larger percentage of those arrested and incarcerated than should be expected from their percentage of the country’s total population”); see also MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* vii (1995) (“[B]y 1990 a quarter of young black males were in jail or prison, on probation or parole [and t]he chance that a black male was in jail or prison was seven times that of a white male.”).

120. Stuntz, *supra* note 7, at 20–21 (noting, inter alia, that murder rates went up as the percentage of the urban black population increased).

121. Taslitz, *supra* note 1, at 161–62.

122. See *supra* text accompanying notes 49–55.

123. MICHELLE ALEXANDER, *THE NEW JIM CROW* 43–44 (rev. ed. 2012); see also TONRY, *supra* note 119, at 31–35 (arguing that the War on Drugs was probably planned, or at least predicted, to be a war on poor racial minorities, particularly African Americans).

she argues, incarceration for drug-related crimes has taken the place of Jim Crow.¹²⁴

The story of race and hyper-incarceration is undoubtedly more complicated than simple unalloyed racism. For instance, both progressives and blacks themselves lobbied for increased drug penalties during the last quintile of the twentieth century, as a way of supporting struggling minority neighborhoods.¹²⁵ The important point for present purposes is that, for a host of reasons, changes in the way racial themes influenced formal policy since the 1960s fed directly into harsh imprisonment policies.¹²⁶ Europe, with less of a racial history, simply could not emulate this pattern.

D. American Proceduralism

Taz states at the outset of *Democratic Breakdown* that PDD requires “a strong commitment to individual liberties,” but does not expand on what he means by “individual liberties.”¹²⁷ William Stuntz has made the counter-intuitive argument that one cause of our increased imprisonment rate and longer sentences has been our commitment to strong procedural protections for criminal defendants, including allegiance to the Fourth Amendment’s prohibition against unreasonable searches and seizures, the Fifth Amendment’s privilege against self-incrimination, the right to a (racially-balanced) jury, the right to confront, face-to-face, all accusers, and the requirement that the prosecution prove every element of the crime beyond a reasonable doubt.¹²⁸ According to Stuntz, these procedural rights make trial so time-consuming that, given their increasing caseloads, prosecutors have had to resort to plea bargaining and guilty pleas as the main method of adjudicating criminal cases.¹²⁹ Needing bargaining lever-

124. ALEXANDER, *supra* note, at 11 (“This book argues that mass incarceration is, metaphorically, the New Jim Crow.”).

125. See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 36–44 (2012) (describing “black support for punitive crime policy”); Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS L. Q. 845, 862–67 (2014) (describing the “liberal war on drugs”).

126. Walker, *supra* note 124, at 866 (“[T]he War on Drugs contributed directly to the evil of mass incarceration. However, the origins of that war stemmed not simply from a conservative conspiracy, as Alexander implies, but a complex set of concerns, including a liberal desire to help minorities trapped in high-crime neighborhoods.”).

127. Taslitz, *supra* note 1, at 135.

128. Stuntz, *supra* note 7, at 257–74.

129. *Id.* at 235–36 (noting the huge decrease in criminal trials in the 1970s and stating that the Warren Court’s “law of criminal procedure raised the cost of policing and prosecution when that cost was already too high”).

age to sustain this system, Stuntz continued, prosecutors have lobbied for easy-to-prove crimes and heavy penalties, which legislators, for reasons already alluded to, have been only too happy to enact.¹³⁰

As a result, modern criminal codes have become bloated. For instance, in many states proof that the defendant is anywhere near illicit drugs can result in a very stiff sentence.¹³¹ These drug possession laws can also be used to prosecute people for suspected, but harder-to-prove, more serious crimes like robbery and homicide.¹³² The reach of rape, theft and fraud law has also expanded.¹³³

If Stuntz' diagnosis about the pathology of American crime definition and prosecutorial-legislative interaction is correct,¹³⁴ then our commitment to defendant-oriented procedural protections as a method of ensuring fair punishment has backfired. In most European countries, in contrast, there are no all-lay juries, rules of evidence are minimal, and the right to silence and prevent disclosure of information to the court is much reduced.¹³⁵ As a result, trials are a much cheaper proposition and take place in virtually all serious cases, the most importance consequence of which, for present purposes, is that judges have much more control over the adjudication and sentencing pro-

130. *Id.* at 264–67 (describing how “criminal liability rules grew broader, the number of overlapping criminal offenses mushroomed, and the definition of crimes grew more specific” (and thus easier to prove), in part because these moves allowed legislators to look tough on crime and in part because “broader and more specific substantive law was a means of inducing guilty pleas”); see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533–39 (2001) (explaining why prosecutors lobby legislators for more and easier-to-prove crimes and stating that the “single most important feature of the existing system for defining criminal law” is that “legislators have good reason to listen when prosecutors urge some statutory change”).

131. *Id.* at 267–68 (providing examples, including a case holding that conviction for possession with intent to distribute and conspiracy to do the same is proven by “some nexus between the defendant and the drugs”).

132. *Id.* at 269.

133. *Id.* at 263–64.

134. For an article providing empirical support for Stuntz' position, see Daniel P. Kessler & Anne Morrison Piehl, *The Role of Discretion in the Criminal Justice System*, 14 J. L. ECON. & ORG. 256 (1998) (finding, based on a study of prosecutorial behavior after the passage of California's three-strikes laws, that prosecutors not only sought longer sentences for those charged with a third strike but also sought longer sentences for those charged with “similar crimes,” in a process the authors call “prosecutorial maximization”); see also Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENT'G REP. 326, 329 (2011) (stating that the Department of Justice “has sought more and harsher mandatory sentencing laws ‘not because the enhancements are inherently just or required for adequate deterrence, but precisely because higher sentences provide increased plea bargaining leverage’”).

135. For a description of European models of criminal justice and recent trends toward “convergence” of the inquisitorial/inquest and adversarial/contest traditions, see John D. Jackson, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?*, 68 MOD. L. REV. 737, 740–43 (2005).

cess.¹³⁶ While some sort of plea bargaining system exists in most European countries,¹³⁷ it does not create the up-ratcheting of punishment that Stuntz describes in the United States because judges, not prosecutors, are the primary power-brokers.¹³⁸

One counter to Stuntz' thesis that heightened procedure causes heightened punishment is that our Constitution has provided for an adversarial rather than inquisitorial process from its inception. But the obvious rejoinder is that those adversarial rights were not applied to the states, where most criminal cases are tried, until the 1960s. That is when the Warren Court's incorporation of the guarantees found in the Fourth, Fifth and Sixth amendments changed the face of American criminal trials.¹³⁹ That is when plea bargaining took off.¹⁴⁰ And, of course, that is when hyper-incarceration began.

CONCLUSION

The causes of American hyper-incarceration are manifold. Professor Taslitz's suggestion that our political economy is one of the primary culprits behind this debacle is hard to dismiss, especially when one looks at how its interaction with increases in crime compares to the reaction of differently constructed European political systems to crime upsurges. There is also abundant evidence, once put in compar-

136. Mar Jimeno-Bulnes, *American Criminal Procedure in a European Context*, 21 CARDOZO J. INT'L & COMP. L. 409, 453 (2013) (noting that "a common aspect" of the plea bargaining process that occurs in France, Germany, Italy, and Spain is that judges control the process, and that such control "usually takes place at the appropriate hearing").

137. See Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L. L. J. 1, 27, 63 (2004) (noting that numerous countries now allow plea bargaining, but concluding, based on a survey of four continental and Latin American criminal justice systems, that criminal procedure is "still overwhelmingly conceptualized around the model of the official investigation," which eschews guilty pleas and requires trial in most cases).

138. Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 215–17 (2006) (describing the high degree of control German judges have over charging, adjudication and sentencing decisions, and noting that the German approach is representative of the "civil-law, inquisitorial criminal justice system" prevalent in Europe).

139. See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* 2–4 (5th ed. 2008) (noting that the Warren Court found "virtually every Bill of Rights guarantee pertaining to the criminal process. . . to be inherent in the due process of law and . . . thus imposed on the states through incorporation into the Fourteenth Amendment").

140. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 38–39 (1979) (noting that, while guilty pleas have been a predominant aspect of the American system for decades, "[a] major effect of the 'due process revolution' was to augment the pressures for plea negotiation" and produce "more intense plea negotiation," with the result that guilty pleas increased significantly).

ative perspective, that the post-1960s rise of contested criminal justice elections, robust individualism, religious conservatism, prison privatization, racialized anti-urbanite sentencing practices, and procedural protections has contributed to American incarceration rates.

Because these forces are all on the upswing, or at least holding steady, Taz' call for a populist, deliberative democratic antidote to hyper-incarceration is bound to run into resistance as a structural matter. Localized, deliberative conversations about criminal justice have not typically been organized or attended by the two major political parties, or by state and federal politicians. But that does not mean these types of sessions cannot occur. The fact that the state of Washington was able to pull off something like them is cause for hope.¹⁴¹ And Taz is probably right that, if they do occur, adversarialism will decrease, empathy will increase, coalitions will build, experts and outsiders will be heard, and, when all is said and done, incarceration will be viewed differently by a large segment of the populace.¹⁴² It would be a terrific way of honoring Taz to establish "Taslitz talks" around the country, designed to implement a grand PDD experiment aimed at reforming our criminal justice system.

141. See *supra* text accompanying note 47.

142. One note of caution, however. Research suggests that local governments, especially those in smaller cities, are more likely to cater to property owners within the jurisdiction. See WILLIAM A. FISCHER, *THE HOMEOWNER HYPOTHESIS* 80–94 (2001). That group might tend to be more punitive and fearful of "outsiders" than those who rent, a group that often comprises the bulk of racial minorities that Taz thinks will be less punitive. See Stuntz, *supra* note 7, at 191–94 (stating that beginning in the 1960s "white suburbanites' power grew at the expense of black city-dwellers," a fact which "changed the justice system almost entirely for the worse").

