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# Democracy Enhancement in Criminal Law and Procedure

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## DEMOCRACY ENHANCEMENT IN CRIMINAL LAW AND PROCEDURE

Janet Moore\*

*There is a democracy deficit at the intersection of crime, race, and poverty. The causes and consequences of hyperincarceration disproportionately affect those least likely to mount an effective oppositional politics: poor people and people of color. This Article breaks new ground by arguing that the democracy deficit calls for a democracy-enhancing theory of criminal law and procedure that modifies traditional justifications of retributivism and deterrence by prioritizing self-governance. Part I contextualizes the argument within cyclical retrenchments in movements for racial and economic justice. Part II sketches the contours of a democracy-enhancing theory. Parts III and IV turn that theoretical lens on a single jurisdiction, North Carolina, to map a previously unnoticed constellation of cutting-edge criminal justice reforms. Part III explains why those reforms were improbable. Part IV tests the democracy-enhancing effect of the reforms. Part V identifies some conditions that allowed reform to occur and occasionally survive counterattack. The Article concludes that those conditions privilege grassroots over grassroots advocacy, and highlights examples of direct action by low-income people and people of color as a vital component of a more broadly democratic foundation for criminal law and procedure.*

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## INTRODUCTION

In late October 2010, Oklahoma Senator James Inhofe landed his private plane on a closed runway at a small airport in south Texas. He did not notice the “giant yellow X,” the repair trucks, or the fleeing workers “until it was too late to safely abort the landing.”<sup>1</sup> The Federal Aviation Administration (FAA) sanctioned the senator by ordering him to take remedial flying lessons.<sup>2</sup> He shot back with Senate Bill 1335, “The Pilot’s Bill of Rights.”<sup>3</sup>

Inhofe sought to check the government’s “power to take action against an individual.”<sup>4</sup> He explained that he never fully appreciated “the feeling of desperation” that adverse government action can inspire “until it happened to me.”<sup>5</sup> He was troubled that “pilots sometimes aren’t given access to all the evidence that might help their case.”<sup>6</sup> He was shocked that “it took me, a U.S. senator, four months to get the voice recording to prove I was right” in defending against the FAA’s accusations.<sup>7</sup>

Sixty-four cosponsoring senators quickly backed Inhofe’s bill,<sup>8</sup> as did organizations comprising more than half a million “single-issue people who fly airplanes.”<sup>9</sup> Even Indiana Jones joined the fight. Lobbying on this “real justice issue,” actor Harrison Ford decried agency treatment of private pilots as the sole exception to “the standard that we face everywhere else for justice.”<sup>10</sup>

The Pilot’s Bill of Rights cures that injustice by requiring the FAA to release “all relevant evidence” to a targeted pilot before proceeding with any enforcement action.<sup>11</sup> The bill became law just thirteen months after Inhofe introduced

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<sup>1</sup> Joan Lowy, *Inhofe Targets FAA After His Flying Is Faulted*, WASH. TIMES (July 10, 2011), <http://www.washingtontimes.com/news/2011/jul/10/inhofe-targets-faa-after-his-flyng-is-faulted/?page=all>.

<sup>2</sup> *Id.*

<sup>3</sup> S. 1335, 112th Cong. §§ 1–5 (2011) (enacted). For a detailed legislative history, see S. 1335 (112<sup>th</sup>): *Pilot’s Bill of Rights*, <https://www.govtrack.us/congress/bills/112/s1335> (last visited Apr. 4, 2014).

<sup>4</sup> Lowy, *supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Chris Casteel, *Oklahoma Sen. Jim Inhofe Scores Legislative Victory With Pilots’ Rights Bill*, OKLAHOMAN (July 2, 2012), <http://newsok.com/controversial-landing-leads-to-inhofe-bill-on-pilot-rights/article/3689518> (subscription required).

<sup>8</sup> S. 1335 (112<sup>th</sup>): *Pilot’s Bill of Rights*, *supra* note 3.

<sup>9</sup> Lowy, *supra* note 1.

<sup>10</sup> Ford’s remarks are reported on Senator Inhofe’s website. *Actor, Pilot Harrison Ford Endorses Inhofe’s Pilot Bill of Rights*, JAMES M. INHOFE (Oct. 20, 2011), [http://inhofe.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=221db5bb-99b7-a687-ba91-52914db0c3c9](http://inhofe.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=221db5bb-99b7-a687-ba91-52914db0c3c9).

<sup>11</sup> *Id.* The bill mandates that the FAA release data, including investigative reports, “that would facilitate the individual’s ability to productively participate in the investigation” of any alleged infraction that could affect his or her certification. Pilot’s Bill of Rights, S. 1335, 112th Cong. § 2(b)(4). The FAA must disclose such information to the targeted individual at least thirty days before ruling on the alleged infraction. *Id.* § 2(b)(5). To address Inhofe’s concern that appeals of FAA decisions to the National Transportation

it.<sup>12</sup> Thus proceeded the campaign to open the black box—not the flight recorder that explains pilot error or equipment malfunction, but its cognate, the investigative file that can help a pilot defend against agency allegations of wrongdoing.

John Thompson shares Inhofe’s interest in checking government power over the individual—and in ensuring accuracy and reliability in adjudications—by mandating enforceable governmental discovery duties.<sup>13</sup> Thompson was not ordered to take remedial flying lessons. He was sentenced to death. For fourteen of the eighteen years that he was incarcerated, Thompson spent twenty-three hours a day in solitary confinement in a windowless six-by-nine-foot cell.<sup>14</sup> A few weeks before his final execution date, a last-ditch investigation unearthed a microfiche copy of a laboratory report never previously disclosed by prosecutors or law enforcement.<sup>15</sup> The exculpatory evidence in that report eventually led to Thompson’s release.<sup>16</sup>

Despite their differences, the cases of Thompson and Inhofe share a salient theme. They raise concerns about the unfairness and inefficiency caused when government agents do not reveal information that is beneficial to the defense. In criminal cases like Thompson’s, such discovery obligations are imposed by *Brady v. Maryland*<sup>17</sup> and related cases, criminal discovery rules, and codes of professional ethics.<sup>18</sup> But two recent Supreme Court cases seriously undermined the already weak enforceability of those discovery duties.<sup>19</sup> In Thompson’s case, five justices gave a wink and nod to *Brady* violations; the Court vacated Thompson’s \$14,000,000 damages award despite prosecutors’ conceded violation of their due process discovery duties.<sup>20</sup> The same majority told prosecutors who comply with *Brady* that they can be damned if they do; the First Amendment could not shield prosecutor Richard Ceballos from his supervisors’ retaliation when he brought *Brady* information to light.<sup>21</sup>

No single-issue lobby, group of legislators, or movie star reacted to the experiences of Thompson or Ceballos by demanding nationally applicable, mandatory criminal discovery reform along the lines of Inhofe’s Bill of Rights for private pilots.<sup>22</sup> And when a few U.S. senators recently sought criminal discovery

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Safety Board are simply “rubber stamps,” Lowy, *supra* note 1, the Pilot’s Bill of Rights expands appeal rights and reduces deference to FAA rulings. *See* S. 1335, § 2(d)–(e).

<sup>12</sup> *See* Pilot’s Bill of Rights, Pub. L. No. 112-153, 126 Stat. 1159 (2012) (to be codified at 49 U.S.C. §§ 44101, 44701, 44703, 44710 (2012)); Casteel, *supra* note 7; S.1335—*Pilot’s Bill of Rights*, *supra* note 3.

<sup>13</sup> *See* Janet Moore, *Democracy and Criminal Discovery Reform after Connick and Garcetti*, 77 BROOK. L. REV. 1329, 1330–31 (2012).

<sup>14</sup> *Id.* at 1348.

<sup>15</sup> *Id.* at 1348–49.

<sup>16</sup> *Id.*

<sup>17</sup> 373 U.S. 83 (1963).

<sup>18</sup> Moore, *supra* note 13, at 1329–30.

<sup>19</sup> *Id.* at 1353–54, 1365–66.

<sup>20</sup> *Connick v. Thompson*, 131 S. Ct. 1350, 1355–56 (2011).

<sup>21</sup> *See Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006).

<sup>22</sup> Moore, *supra* note 13, at 1377 & n.345 (discussing the death, by the secret vote of a single senator, of federal whistle-blower legislation designed in part to protect prosecutors

reform, their proposal fell far short of the expansive provisions in the Pilot's Bill of Rights.

The Fairness in Disclosure of Evidence Act of 2012<sup>23</sup> responded to highly publicized *Brady* violations that occurred during the federal prosecution of former Alaska Senator Ted Stevens.<sup>24</sup> Stevens's colleague from Alaska, Senator Lisa Murkowski, proposed the Act. Where Inhofe had dozens of senatorial cosponsors for his reform bill, Murkowski had five.<sup>25</sup> Where a half-million single-issue voters backed the Pilot's Bill of Rights, a whopping 143 lawyers, law enforcement officers, and jurists gave their joint public imprimatur to the Fairness in Disclosure Act.<sup>26</sup> Murkowski's Act, while improving on *Brady*, also would have required far narrower disclosure than the Pilot's Bill of Rights.<sup>27</sup> Nevertheless, after a single hearing, the Act died in committee.<sup>28</sup>

Murkowski's Act also did not begin to approach existing state models for broad criminal discovery. For example, North Carolina pioneered the nation's only mandatory, statewide, full open-file reform model.<sup>29</sup> Those statutes mandate

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who strive to comply with discovery duties); see also John Thompson, Op-Ed., *The Prosecution Rests, But I Can't*, N.Y. TIMES (Apr. 9, 2011), <http://www.nytimes.com/2011/04/10/opinion/10thompson.html?pagewanted=all> (describing *Connick* and its aftermath).

<sup>23</sup> S. 2197, 112th Cong. § 2 (2012).

<sup>24</sup> *In re Special Proceedings*, 842 F. Supp. 2d 232, 241–42 (D.D.C. 2012). A 500-page investigative report found that Stevens's prosecution was “permeated by the systematic concealment of significant exculpatory evidence.” *Id.* at 235. But the judge accepted the special investigator's decision not to recommend contempt proceedings. *Id.* at 244. On the lack of sanctions for *Brady* violations, see, for example, Moore, *supra* note 13, at 1341–71.

<sup>25</sup> *S. 2197—Fairness in Disclosure of Evidence Act of 2012*, OPEN CONGRESS, <http://www.opencongress.org/bill/112-s2197/show> (last visited Apr. 3, 2014).

<sup>26</sup> See THE CONSTITUTION PROJECT, *A Call for Congress to Reform Federal Criminal Discovery* (Mar. 15, 2012), <http://www.constitutionproject.org/wp-content/uploads/2012/10/callforcriminaldiscoveryreform.pdf>. This “Call for Congress” issued the same day that Senator Murkowski introduced her bill, see *S. 2197*, *supra* note 25, which was also the same day the special prosecutors' 500-page report was made available to the public. 842 F. Supp. 2d at 257. For the special prosecutor's full report, see Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, Dated April 7, 2009, *In re Special Proceedings*, 842 F. Supp. 2d 232, 241–42 (D.D.C. 2012) (No. 08-242 (RWR)), available at <http://www.wc.com/assets/attachments/Schuelke%20Report.pdf>.

<sup>27</sup> As discussed in Moore, *supra* note 13, at 1339–41, *Brady*'s materiality-prejudice test hamstringing the doctrine's enforceability by requiring proof that disclosure of exculpatory or impeachment information would have created a reasonable possibility of a different outcome. The federal Fairness in Disclosure Act would have significantly strengthened discovery duties by defining them more broadly and by shifting the burden of proof, requiring prosecutors to prove that nondisclosure of information that “may reasonably appear to be favorable” to the defendant was harmless beyond a reasonable doubt. S. 2197, 112th Cong. §§ 2(a)(1), (h) (2012). The Act also improves upon *Brady* by requiring disclosure “before the entry of any guilty plea.” *Id.* § 2(c)(1). See Moore, *supra* note 13, at 1343–46 (discussing doctrine limiting *Brady* disclosure duties to trial).

<sup>28</sup> *S. 2197 (112th): Fairness in Disclosure of Evidence Act of 2012*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/s2197> (last visited Apr. 3, 2014).

<sup>29</sup> Moore, *supra* note 13, at 1380–86 (discussing N.C. GEN. STAT. §§ 15A-903 to -910 (2012)).

disclosure to the defense of all information obtained in the state's investigation of a criminal case.<sup>30</sup> They require recordation of oral statements<sup>31</sup> that are critical for impeaching prosecution witnesses,<sup>32</sup> evaluating and negotiating plea offers, and counseling defendants on whether to testify.<sup>33</sup> Willful violators of these discovery statutes face criminal penalties.<sup>34</sup>

Several factors drive the wide variance in discovery duties that government actors owe an accused. A federal regulatory action against a private pilot raises very different concerns than those at issue in a criminal prosecution. The civil rights claims raised by Thompson and Ceballos under 42 U.S.C. § 1983 also raised distinctive stakes in the contest between federal deference to local authority on one hand and the vindication of federal constitutional rights on the other.<sup>35</sup>

But the magnitude of the respective threats by the FAA and federal prosecutors to the interests of Inhofe and Stevens is minuscule compared with the very nearly successful attempt of New Orleans prosecutors to “fry” Thompson, a young, low-income African American man accused of murdering the wealthy white son of a prominent local businessman.<sup>36</sup> The disparate responses to these cases might be dismissed as illustrating a political principle so basic as to be banal: Them as has, gets. Sharp systemic disparities enhance (for some) and hinder (for others) access to the political influence necessary to drive change. Inhofe occupies one end of the spectrum. His speed and strength in manipulating the levers of power appear steroid enhanced.

Thompson's case arose at the other end of the spectrum—amid the democracy deficit at an intersection of crime, race, and poverty.<sup>37</sup> That intersection is

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<sup>30</sup> *Id.* at 1332–33 (discussing N.C. GEN. STAT. § 15A-903(a)(1)(a) (2012)).

<sup>31</sup> *Id.* (discussing N.C. GEN. STAT. § 15A-903(a)(1)(c) (2012)).

<sup>32</sup> See R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1430–31 (2011).

<sup>33</sup> See AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY 1–2 (3d ed. 1996).

<sup>34</sup> Moore, *supra* note 13, at 1332–33 (discussing N.C. GEN. STAT. § 15A-903(d)).

<sup>35</sup> See, e.g., Gary S. Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court's Constitutional Remedies Jurisprudence*, 115 PENN ST. L. REV. 877, 889–97 (2011) (discussing Supreme Court justifications for limiting availability of civil rights remedies under 42 U.S.C. § 1983).

<sup>36</sup> *Connick v. Thompson*, 131 S. Ct. 1350, 1356, 1373 n.7, 1373–74 (2011) (Ginsburg, J., dissenting). As the Fifth Circuit Court of Appeals noted in upholding Thompson's multimillion-dollar jury verdict, such elevated victim status tends to “receive[] a lot of attention.” *Thompson v. Connick*, 553 F.3d 836, 843 (5th Cir. 2008), *aff'd en banc*, 578 F.3d 293 (5th Cir. 2009) (per curiam) (equally divided decision), *rev'd*, 131 S. Ct. 1350 (2011). Empirical research reveals that victim status, including racial or ethnic identity, is a significant contributor to outcome severity in criminal cases. Cassia Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIM. JUST. 427, 428 (2000).

<sup>37</sup> These terms are not reified. Of the abundant literature on the socially constructed meanings of “crime,” “race,” and “poverty” respectively, see, for example, MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS 326–37 (2012) (discussing relative definitions of poverty and building upon concepts of comparative fairness and well-being articulated in THOMAS NAGEL, EQUALITY AND PARTIALITY 64–68 (1991) and Larry S. Temkin, *Equality, Priority, or What?*, 19 ECON. &

structured by concentrated disadvantage.<sup>38</sup> The multidimensional and recalcitrant resource disparities that, in some sense, serve as the foundation upon which criminal justice systems rest<sup>39</sup> also raise hurdles to creating and maintaining coalitions across lines of race and class.<sup>40</sup> Crime, hyperincarceration,<sup>41</sup> and their causes and consequences are felt most directly and disproportionately by those least likely to mount effective oppositional politics and oversee the formation and implementation of criminal law and procedure—poor people and people of color.<sup>42</sup>

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PHIL. 61, 70–71 (2003)); LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 3–8 (1993) (“[C]rime . . . is a slippery, variable, protean concept. . . .”); KAREN F. PARKER, *UNEQUAL CRIME DECLINE: THEORIZING RACE, URBAN INEQUALITY, AND CRIMINAL VIOLENCE* 6–7 (2008) (expressing “amaze[ment] to find that scholars disagreed entirely on the meaning of the term [race]”); Marjorie S. Zatz & Nancy Rodriguez, *Conceptualizing Race and Ethnicity in Studies of Crime and Criminal Justice*, in *THE MANY COLORS OF CRIME* 39, 39–40 (Ruth D. Peterson et al. eds., 2006) (noting that “race, ethnicity, gender, and class . . . do not have any inherent, absolute meaning” external to their social construction).

<sup>38</sup> See, e.g., Travis C. Pratt & Francis T. Cullen, *Assessing Macro-Level Predictors and Theories of Crime: A Meta-Analysis*, 32 *CRIME & JUST.* 373, 378–79 (2005) (“[T]he strongest and most stable macro-level predictors of crime include racial heterogeneity . . . poverty, and family disruption—factors typically treated as indicators of ‘concentrated disadvantage.’”); Robert J. Sampson & Lydia Bean, *Cultural Mechanisms and Killing Fields: A Revised Theory of Community-Level Racial Inequality*, in *THE MANY COLORS OF CRIME*, *supra* note 37, at 8, 11 (“It is unambiguously the case in meta-analysis[] . . . that concentrated neighborhood disadvantage is the largest and most consistent predictor of violence across studies.”).

<sup>39</sup> See, e.g., *United States v. Bannister*, 786 F. Supp. 2d 617, 628–45, 670–88 (E.D.N.Y. 2011) (discussing factors affecting defendants’ lives, choices, and probabilities of successful reentry into society after imprisonment, such as segregated housing; inadequate schooling; unmet physical and mental health needs; and missing, dysfunctional, and violent family relationships).

<sup>40</sup> See, e.g., Derrick A. Bell, Jr., *Racial Realism*, in *THE LEGAL STUDIES READER: A CONVERSATION & READINGS ABOUT THE LAW* 250, 253 (George Wright & Maria Stalzer Wyant Cuzzo eds., 2004) (contending that “[b]lack people will never gain full equality in this country” due to adaptability of white dominance but that resistance “itself has meaning and should give us hope for the future”); Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 *NW. U. L. REV.* 248, 250–52 (2012) (critiquing Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 *NW. U. L. REV.* 149 (2011), for failure to distinguish Bell’s interest-convergence and racial realism theories).

<sup>41</sup> Loïc Wacquant correctly rejects the term “mass incarceration.” It is precisely because unprecedented incarceration rates disproportionately affect low-income people and people of color while leaving the majority either unscathed or in some respect well served that those rates are less readily remedied through the democratic process. Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 *DAEDALUS* 74, 74, 78–79 (2010).

<sup>42</sup> See, e.g., ALEXIA COOPER & ERICA L. SMITH, *BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES 1980–2008: ANNUAL RATES FOR 2009 AND 2010*, at 3 (2011), available at <http://www.bjs.gov/content/pub/pdf/htus8008.pdf> (discussing disproportionate homicide victimization of minority individuals); ERIKA HARRELL, *BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, BLACK VICTIMS OF*

For some, the democracy deficit at the intersection of crime, race, and poverty supports skepticism if not despair toward litigation, legislation, and activism as avenues toward sustainable reform.<sup>43</sup> But disparity need not breed despair.<sup>44</sup> This Article argues that the democracy deficit calls for a democracy-enhancing theory of criminal law and procedure, which refocuses the traditional justifications of retributivism, deterrence, and rehabilitation by prioritizing self-governance.

More specifically, this approach prioritizes direct participation by poor people and people of color, not only in the formation and oversight of what are too often perceived as criminal *injustice* systems, but also in reversing criminogenic policies that rely on those systems as mechanisms of social control. Thus, a democracy-enhancing emphasis holds intrinsic value as well as promise for improving crime prevention, system legitimacy, and case outcomes.

The argument unfolds in five parts. Part I contextualizes the despairity narrative in criminal law and procedure within a broader and cyclical retrenchment across movements for racial and economic justice. Part II explains the attraction of a democracy enhancement theory and sketches its contours. Parts III and IV train this roughly honed theoretical lens on North Carolina's previously unmapped cluster of pioneering criminal justice reforms.

Part III examines the regressive socioeconomic and political state history that made these reforms unlikely. Part IV describes the reforms and assesses their democracy-enhancing potential. While each helps to level power disparities, two pack significant punch. First, evidence-based early intervention programs, such as Nurse-Family Partnerships, build capacities for resilience and self-governance while costing pennies on the dollar vis-à-vis investment in criminal justice apparatuses. At the opposite, most resource-intensive end of the criminal justice spectrum, North Carolina's Racial Justice Act vindicated the dignitary interests and participatory rights of diverse decision makers in capital juries by redressing racial bias in the exercise of peremptory strikes.

Part V acknowledges that, just as motives for North Carolina's constellation of criminal justice reforms have been mixed, so too their effectiveness and abilities

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VIOLENT CRIME 1–3, 5, tbl.5 (2007), available at <http://www.bjs.gov/content/pub/pdf/bvvc.pdf> (discussing disproportionate violent crime victimization of African Americans); Erica J. Hashimoto, *Class Matters*, 101 J. CRIM. L. & CRIMINOLOGY 31, 32–33 (2011) (noting overrepresentation of low-income people in criminal justice systems and calling for more data collection); Toya Z. Like & Jody Miller, *Race, Inequality, and Gender Violence: A Contextual Examination*, in THE MANY COLORS OF CRIME, *supra* note 37, at 157, 158 (noting adolescent African American girls are at even higher risk of nonstranger violence than their male cohorts). For a brief introduction to the effects of conscious and unconscious racial biases in criminal justice systems, see Janet Moore, *Causes, Consequences and Cures of Racial and Ethnic Disproportionality in Conviction and Incarceration Rates: An Introduction*, 3 FREEDOM CENTER J. 35 (2011).

<sup>43</sup> See *infra* Part I.B.

<sup>44</sup> See *infra* Part I (defining “despairity” as “the tendency to despair of litigation and legislation as avenues to reform given demographic disparities in access to those levers of power”). See, e.g., NICOLA LACEY, THE PRISONERS’ DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES xv, 156–69 (2008) (noting but contesting the “general[] and depressing” scholarly agreement that globalization of the United States’ distinctively punitive “penal populism” is inevitable).

to survive reaction and repeal.<sup>45</sup> This Part interrogates the conditions that allowed these reforms to occur and occasionally to survive counterattack. Distinguishing characteristics include institutionalized capacities for critical reflection and collaboration on hot-button criminal justice issues. Oppositional politics also play a role. They are informed by a relatively robust and proactive indigent defense function and diverse mechanisms for the collection, assessment, and strategic use of criminal justice data.

The Article concludes that those conditions privilege advocacy by elites, and highlights examples of direct action by low-income people and people of color as a vital component of a more broadly democratic foundation for criminal law and procedure and, ultimately, of any sustainable turn away from criminogenic policies that feed the carceral state.

### I. DESPAIRITY IN CONTEXT

This Part identifies the despairity narrative in criminal law and procedure as a tendency to despair of litigation and legislation as avenues to reform given demographic disparities in access to those levers of power. This Part also contextualizes the despairity narrative within a broader and cyclical retrenchment across movements for racial and economic justice. Part I.A discusses sources of the democracy deficit at the intersection of crime, race, and poverty. Part I.B focuses on the despairity motif among criminal justice scholars. Part I.C situates that motif amidst an old and ongoing struggle to fulfill what historian John Hope Franklin described as this country's broken "promise of real equality."<sup>46</sup>

#### A. *Human Beings and Citizens: Sources of the Democracy Deficit*

In October 2010, as Inhofe was landing his plane in south Texas; as attorneys were preparing to argue Thompson's case before the Supreme Court; and as special prosecutors were investigating government suppression of exculpatory evidence in Stevens's case, eleven men from a Brooklyn housing project were hammering out plea deals on federal drug and weapons charges. *United States v. Bannister*<sup>47</sup> discusses the outcome in these cases. For several reasons, *Bannister* provides a distinctive window into the sources of the democracy deficit that contributed to the disparate long-term outcomes in the Inhofe, Thompson, and Stevens cases.

First, *Bannister*'s opening lines transform a mine-run federal sentencing decision into a *cri de coeur* over lives impaled at the intersection of crime, race, and poverty. The judiciary is generally disinclined to detail the recalcitrant links between racial and class disparities in rates of undereducation, unemployment,

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<sup>45</sup> Cf. EDWARD HALLETT CARR, WHAT IS HISTORY? 153 (1961) ("[N]o sane person ever believed in a kind of progress which advanced in an unbroken straight line without reverses and deviations and breaks in continuity so that even the sharpest reverse is not necessarily fatal to the belief.").

<sup>46</sup> John Hope Franklin, *Foreword*, in DEMOCRACY BETRAYED xi–xii (David S. Cecelski & Timothy B. Tyson eds., 1998).

<sup>47</sup> 786 F. Supp. 2d 617 (E.D.N.Y. 2011).

poverty, substance abuse and addiction, family instability, and violence on one hand and criminal victimization, offending, incarceration, and recidivism on the other.<sup>48</sup> *Bannister* comprises more than seventy pages of historical, legal, and socioeconomic analysis on those issues. That analysis was informed by the highly unusual personal visit of a presiding judge to the neighborhood in which the defendants lived and committed their crimes.<sup>49</sup>

The opinion's findings and conclusions are also noteworthy. The court found "substantial evidence" that mandatory minimum sentences for crack cocaine charges are the unconstitutional result of racial prejudice.<sup>50</sup> The court further concluded that factors shaping defendants' lives and opportunities rendered several of the mandatory minimum prison sentences excessive.<sup>51</sup> Finally, the court acknowledged the improbability that scarce public funds would support the rehabilitation programs required by the sentencing order or that the defendants' imprisonment would yield any positive outcome whatsoever. To the contrary, the court observed that the defendants were likely condemned upon completion of their sentences to lives in "a permanent underclass with almost no opportunity to achieve economic stability, let alone the American dream of upward mobility."<sup>52</sup>

The opinion's final lines are circumspect. The court insists that while the defendants

are hemmed in by circumstances, the law must believe that free will offers an escape. Otherwise, its vaunted belief in redemption and deterrence—both specific and general—is a euphemism for cruelty. These defendants are not merely criminals, but human beings and fellow American citizens, deserving of an opportunity for rehabilitation. Even now, they are capable of useful lives, lived lawfully.<sup>53</sup>

*Bannister's* parting words embody the court's relentlessly grim inability to match the defendants' capacities for "useful lives, lived lawfully" with even a remote likelihood that opportunities for rehabilitation will find any actualization. The court's need to expressly affirm not only the defendants' citizenship but also their humanity speaks volumes about their exclusion from approved structures of

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<sup>48</sup> *But see* *Kowalski v. Tesmer*, 543 U.S. 125, 140 (2004) (Ginsburg, J., dissenting) (noting that 70% of defendants represented by appointed counsel plead guilty; 70% of those plea-convicted defendants serve time in jail or prison; and nearly 70% of incarcerated inmates failed to graduate high school and are in the lowest two of five literacy levels—and therefore unable, for example, to "use a bus schedule"). Public defense cases also disproportionately involve defendants suffering from mental illness. *See* NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 75 (2009) [hereinafter JUSTICE DENIED], available at <http://www.constitutionproject.org/pdf/139.pdf>.

<sup>49</sup> Tom Hays, *Veteran Federal Judge Visits Drug Gang's NYC Turf*, USA TODAY (Mar. 5, 2011, 1:30 AM), [http://usatoday30.usatoday.com/news/topstories/2011-03-05-3103728283\\_x.htm](http://usatoday30.usatoday.com/news/topstories/2011-03-05-3103728283_x.htm).

<sup>50</sup> *Bannister*, 786 F. Supp. 2d at 666–67.

<sup>51</sup> *Id.* at 670, 674, 680–88.

<sup>52</sup> *Id.* at 689.

<sup>53</sup> *Id.* at 690.

self-governance, their deviance from a norm so elusive as to approach the chimerical.<sup>54</sup>

### B. From Disparity to Despairity

*Bannister* adds an important chapter to a massive literature on the racialized, politicized, and industrialized criminal justice policies in the United States; their contribution to unprecedented levels of incarceration; and the harsh effects on the low-income and minority individuals who disproportionately encounter criminal justice systems—often with multiple identities of victim, accused defendant, actual perpetrator, and witness.<sup>55</sup> That literature has been decades in the making. More than a century ago, W.E.B. DuBois exposed the incommensurably low rates of education and employment and inversely high rates of criminal justice involvement for urban African American males.<sup>56</sup> In the same era, Ida B. Wells barely escaped lynching during a career dedicated to identifying and challenging structural forms of repressive violence manifest not only in extralegal executions but also in convict leasing—two social control mechanisms that systematically resoldered well-forged links between crime, class, and color.<sup>57</sup>

Of course, historical comparisons must be approached with caution.<sup>58</sup> As Marie Gottschalk notes, “[T]he creation of the carceral state was more subtle and complex than just drawing a straight line from the plantation to Jim Crow to the ghetto to the prison-industrial complex today.”<sup>59</sup> Whether the democracy deficit at the intransigent intersection of race, class, and crime is described in terms of the New Jim Crow<sup>60</sup> or hyperincarceration,<sup>61</sup> the upshot is the same. As illustrated

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<sup>54</sup> See, e.g., LACEY, *supra* note 44, at 27–35, 116–18 (contrasting exclusionary and degrading criminal justice systems with inclusionary and rehabilitative systems). On the psychosocial need to define and exclude an “Other,” see, for example, JULIA KRISTEVA, POWERS OF HORROR: AN ESSAY ON ABJECTION 65–66 (Leon S. Roudiez trans., 1982) (noting various rites, the intentions of which are “to separate this or that social, sexual, or age group from another one”); Sampson & Bean, *supra* note 38, at 26–27 (discussing “symbolic violence” through which “people try[] to establish a worthy identity by drawing symbolic boundaries” between themselves and lower-caste Others).

<sup>55</sup> See *supra* note 42 and accompanying text.

<sup>56</sup> W.E. BURGHARDT DUBOIS, THE PHILADELPHIA NEGRO: A SOCIAL STUDY 83–99, 235–58 (Benjamin Blom, Inc. 1967) (1899).

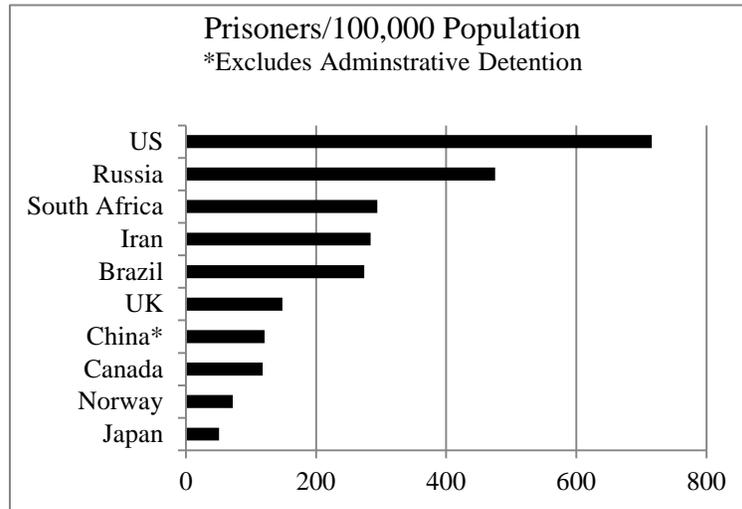
<sup>57</sup> See ANGELA D. SIMS, ETHICAL COMPLICATIONS OF LYNCHING: IDA B. WELLS’S INTERROGATION OF AMERICAN TERROR 45–61 (2010); IDA WELLS, CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS 61–63 (1970).

<sup>58</sup> See, e.g., CARR, *supra* note 45, at 34–35 (“[T]he historian is engaged on a continuous process of moulding his facts to his interpretation and his interpretation to his facts. It is impossible to assign primacy to one over the other.”).

<sup>59</sup> MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 263 (2006).

<sup>60</sup> See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 25–27 (2012); David Jacobs & Aubrey L. Jackson, *On the Politics of Imprisonment: A Review of Systematic Findings*, 6 ANN. REV. L. & SOC. SCI. 129, 146 (2010) (concluding that law-and-order campaigns combined with an emphasis on the linkage between race and street crime provide a plausible explanation for the rapid increase in U.S. imprisonment rates); Victor R. Thompson & Lawrence D. Bobo, *Thinking*

below, the United States' myriad local, state, and federal criminal justice systems impose incarceration levels and lengths that are nearly unparalleled around the globe.<sup>62</sup>



These practices impose astounding costs in tax dollars and wasted lives. With a few important exceptions,<sup>63</sup> the literature that documents these phenomena

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*About Crime: Race and Lay Accounts of Lawbreaking Behavior*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 16, 21–24 (2011) (discussing racial variance in individual-personal versus social-structural explanations for criminal offending). *See generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (comparing mass incarceration today to Jim Crow laws of the past); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007) (discussing the war on crime and its effects on legislative and judicial decisions, family and social interactions, public schools, and employment); *AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION* (Mary Louise Frampton et al. eds., 2008) (discussing the war on crime and its history, consequences, and potential solutions).

<sup>61</sup> See Wacquant, *supra* note 41, at 78–80.

<sup>62</sup> See, e.g., LACEY, *supra* note 44, at 140 fig.14; Roy Walmsley, *World Prison Population List*, INT'L CTR. FOR PRISON STUDIES 2–6 & tbls.1–5 (2013), [http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wpp1\\_10.pdf](http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wpp1_10.pdf) (providing data); CONNIE DE LA VEGA ET AL., *CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT* 15–46 (2012), [www.usfca.edu/law/docs/criminalsentencing](http://www.usfca.edu/law/docs/criminalsentencing) (same).

<sup>63</sup> See Forman, *supra* note 60, at 45–64 (critiquing elision, in some New Jim Crow scholarship, of complex roles of socioeconomic class and violent intraracial crime); *see also* COOPER & SMITH, *supra* note 42, at 11–16 (providing tables and figures showing significantly disproportionate rates of black homicide perpetration and victimization despite overall decrease in homicide rates across racial categories); HARRELL, *supra* note 42, at 1–3 (providing tables and figures showing declining but disproportionate rates of black violent crime victimization).

appears as empirically unassailable as the possibilities for criminal justice reform through democratic avenues of litigation, legislation, and activism appear dismal.

As noted above, *Bannister* is unusual in its extensive judicial discussion of these issues. The opinion also is remarkable in being so thoroughly unremarked. Months after the decision issued, it had received virtually no citation or commentary from jurists,<sup>64</sup> scholars,<sup>65</sup> practitioners,<sup>66</sup> or the press.<sup>67</sup> This silence may be partly ad hominem. Some view the opinion's author, Judge Jack B. Weinstein, as "a legal maverick" whose "liberal decisions have angered conservatives and run afoul of appellate courts."<sup>68</sup>

But *Bannister*'s silent treatment also may illustrate disparity begetting despairity. To be sure, disproportionate arrest, conviction, and sentencing rates along lines of race, ethnicity, and class are not confined to the United States.<sup>69</sup> Nevertheless, the intractability of this country's distinctive inequalities at the intersection of crime, race, and poverty often lead to skepticism if not despair toward litigation, legislation, and activism as quintessentially democratic avenues toward sustainable reform in criminal law and procedure. In addition to the structural factors tallied up in *Bannister*, commentators and jurists have recognized the unprecedented concentration of power in the prosecution function,<sup>70</sup> consistent

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<sup>64</sup> Within the first twenty months of its issuance, courts cited *Bannister* twice, and only to distinguish it. See *United States v. Taylor*, No. 11 Cr. 310 (PGG), 2012 WL 5991886, at \*5 n.8 (S.D.N.Y. Nov. 30, 2012); *United States v. Ilayayev*, 800 F. Supp. 2d 417, 421 (E.D.N.Y. 2011).

<sup>65</sup> *But see* Moore, *supra* note 13, at 1385 n.395.

<sup>66</sup> For example, as of February 2, 2013, the website of the National Association of Criminal Defense Attorneys contained no reference to the case. Search Results for "Bannister", NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS, <http://www.nacdl.org/> (use "Search" bar in upper-right-hand corner; then search for "Bannister") (netting only one unrelated search result as of Apr. 3, 2014).

<sup>67</sup> A cursory Google search as of April 3, 2014 revealed minimal coverage of the decision by media outlets. *But see* Hays, *supra* note 49 (commenting on the presiding judge's decision to visit a crime-ridden neighborhood to assist in sentencing).

<sup>68</sup> Hays, *supra* note 49. *But see, e.g., Jack B. Weinstein Receives ALI's John Minor Wisdom Award*, AM. L. INST., [http://www.ali.org/ali\\_old/R3102\\_04-Jackweinstein.htm](http://www.ali.org/ali_old/R3102_04-Jackweinstein.htm) (last visited Apr. 3, 2014) (describing recipient as "'a legal polymath'—a creative jurist, a productive scholar, a pioneering civil rights advocate, and 'one of the few judges whose achievements warrant mention in the same breath as the achievements of Judge Wisdom'").

<sup>69</sup> See LACEY, *supra* note 44 at 148–69 (discussing increased incarceration rates of foreign nationals in the United Kingdom and several European Union members); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 277–78 (George Steinmetz et al. eds., 2009) (discussing incarceration rate for low-income, less-educated foreign nationals and first-generation descendants in France); Molly Townes O'Brien, *Criminal Law's Tribalism*, 11 CONN. PUB. INT. L.J. 31, 31–32 (2011) (discussing available data indicating a "global tendency of each population to imprison a disproportionate percentage of some minority groups").

<sup>70</sup> See, e.g., *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (describing "the vast power and the immense discretion that are placed in the hands of a prosecutor"); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial*

underfunding of indigent defense services,<sup>71</sup> years of racially coded tough-on-crime politics,<sup>72</sup> and heightened federal judicial deference to local authority<sup>73</sup> as circumstances limiting opportunities to improve the fairness, efficiency, and transparency of criminal justice systems.

Professor Nicola Lacey has observed the rise of this country's distinctively harsh "penal populism" from the other side of the Atlantic, noting "the general, and depressing, conclusion" that other nations "are constrained to tread the same path[.]"<sup>74</sup> The law-and-economics analysis of the late Professor William Stuntz struck a similarly bleak tone. This leading scholar launched a jeremiad against the "pathological politics" infecting the formulation and implementation of criminal law and procedure.<sup>75</sup> As he observed with characteristic acerbity, "[O]rganized interest group pressure to narrow criminal liability is rare."<sup>76</sup>

Given the improbability of a broad-based movement to reverse the disproportionate criminal victimization and incarceration of poor people and

*Accountability*, 157 U. PA. L. REV. 959, 960 (2009) ("No government official in America has as much unreviewable power and discretion as the prosecutor.").

<sup>71</sup> See JUSTICE DENIED, *supra* note 48, at 93–95; Robert P. Mosteller, *Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice*, 75 MO. L. REV. 931, 959–74 (2010) (critiquing Professor Darryl K. Brown's proposals to ration service and absorb defense investigative function into law enforcement and prosecutorial, judicial, and forensic science functions).

<sup>72</sup> See sources cited *supra* note 60.

<sup>73</sup> See, e.g., Joseph L. Hoffmann & Nancy J. King, Essay, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 818–33 (2009) (citing low success of noncapital habeas petitioners to urge the elimination of habeas access for most prisoners and reallocation of resources from the back end to the front end of litigation). *But see* John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435, 444–56 (2011) (contesting evidence and argument for Hoffman and King's proposal); Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 133–46 (2012) (same).

<sup>74</sup> LACEY, *supra* note 44, at xv. Lacey describes institutional variances between nations that temper the inevitability of globalized penal politics patterned after the United States. *Id.* at 156–69. *But see* Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 YALE L. & POL'Y REV. 83, 108–32 (2010) (detailing international expansion of U.S. criminal justice policies and procedures).

<sup>75</sup> See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) [hereinafter *Pathological Politics*]; William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 794–98 (2006) [hereinafter *Political Constitution*]; William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1973–74 (2008).

<sup>76</sup> Stuntz, *Pathological Politics*, *supra* note 75, at 553 (emphasis omitted); see also Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 110 (Seyla Benhabib ed., 1996) ("[T]here is . . . no natural tendency for an emergence of secondary associations to correct for inequalities of political opportunity due to underlying economic inequalities . . ."); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, in THE LEGAL STUDIES READER: A CONVERSATION & READINGS ABOUT THE LAW, *supra* note 40, at 199, 207–08, 218–20 (identifying structural barriers to have-nots achieving reform through litigation).

people of color, Stuntz offered a Gilded Age recipe for promoting more democratic decision making in criminal cases. He argued for more policing and prosecution of cases before more locally drawn venires that exercise broader discretion in applying fewer and more vaguely drawn criminal statutes.<sup>77</sup> He saw these developments as “achievable,” but failed to explain how or why this was so, and conceded that his proposals for related reforms were unlikely to come to fruition.<sup>78</sup>

Stuntz was not alone in presenting a truncated view of democracy’s possibilities in the context of criminal justice reform. Twenty years ago, Professor Donald Dripps used public choice theory to ask and answer the question, “Why Don’t Legislatures Give a Damn About the Rights of the Accused?”<sup>79</sup> More recently, Professors Marc Miller and Ronald Wright cited tough-on-crime politics as justifying the subordination of litigation and legislation in favor of internal bureaucratic reform as the most effective avenue for regulating prosecutorial decision making.<sup>80</sup> And the New Jim Crow scholarship, while offering the most recent analysis of penal politics as a mechanism for caste construction and control, points to little empirical or theoretical ground from which to reclaim law and

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<sup>77</sup> Stuntz, *Unequal Justice*, *supra* note 75, at 1974, 1982–97, 2031–39. These arguments are also presented in WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 30–31 (2011) (proposing local democracy as a possible explanation for low crime rates and a small prison population in turn-of-the-century Chicago). *But see, e.g.*, IRVIN WALLER, *LESS LAW, MORE ORDER* xi–xvi (2006) (citing empirical research showing that investments in “police, courts, and corrections is not the way to prevent and reduce” crime).

<sup>78</sup> Stuntz, *Unequal Justice*, *supra* note 75, at 2031–39; *cf.* Stuntz, *Pathological Politics*, *supra* note 75, at 510–12, 600 (conceding improbability of proposal for judicial narrowing of overbroad and overly punitive criminal laws via federal constitution); Stuntz, *Political Constitution*, *supra* note 75, at 785, 846–50 (concluding that recommended reforms “probably won’t” occur and discussing legislatures’ enacting overbroad and overly punitive criminal laws in reaction to the courts’ constitutional regulation of criminal procedure).

<sup>79</sup> Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1089–92 (1993); *see also* Craig S. Lerner, *Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 604–13 (2004) (surveying public process and public choice explanations for the fact that “[l]egislators have declined to protect criminal defendants, except in rare and narrowly circumscribed circumstances when powerful constituencies (the press, lawyers) have been threatened”).

<sup>80</sup> Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 128–30 (2008). *But see* Marc L. Miller, *A Map and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1353–54 (2005) (highlighting state legislative sentencing reforms); Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980–2000*, 2002 CRIME & JUST. 39, 41–43 [hereinafter *Counting the Cost*] (discussing sentencing reforms in the face of “politics of crime”); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 231–42 (2004) [hereinafter *Parity*] (describing successful state legislative efforts to balance prosecutorial and defense resources through parity assessment).

politics as viable avenues toward sustainable reform.<sup>81</sup> That scholarship calls for a mass movement but fails to engage the historical difficulty of building and sustaining coalitions across lines of race, ethnicity, and socioeconomic class.<sup>82</sup>

In light of the existing scholarship, the lack of commentary on *Bannister* may stem from a perception that the opinion carries coal to Newcastle. The dominant narrative contains good reasons for skepticism toward litigation, legislation, and activism as meaningful avenues for reducing the footprint of the carceral state while obtaining greater transparency, accountability, and fairness in the formation and implementation of criminal law and procedure. The hurdles to reform are daunting. Nor is the despairity narrative confined to theorists and practitioners who work on criminal justice issues. Similar retrenchment also is evident in broader movements for racial<sup>83</sup> and economic justice.<sup>84</sup>

### C. Despairity's Broader Context

Retrenchment within and across justice movements is a predictable response to postindustrial economic dislocation accompanied by increasingly unbridgeable gaps between haves and have-nots<sup>85</sup>—including, importantly, increasing geographic segregation by socioeconomic class.<sup>86</sup> Intensifying concentration of

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<sup>81</sup> See, e.g., ALEXANDER, *supra* note 60, at 244–51 (suggesting that successful multiracial oppositional politics in this context may require surrendering affirmative-action-based advocacy); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 185–91 (2011) (promoting deliberative democracy's promotion of empathy across difference).

<sup>82</sup> For example, released prisoner and longtime criminal justice reformer Susan Burton suggests that defendants “crash the system” by refusing plea offers and taking cases to trial but acknowledges that such collective action imposes significant risks to individual defendants. Michelle Alexander, Op-Ed., *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), <http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html>.

<sup>83</sup> See, e.g., Bell, *supra* note 40, at 245 (analogizing between Legal Realism and the state of racial inequality in the United States and arguing for Racial Realism as an approach to civil rights).

<sup>84</sup> See, e.g., GARY J. DORRIEN, RECONSTRUCTING THE COMMON GOOD: THEOLOGY AND THE SOCIAL ORDER vi–vii (1990) (arguing that although the “ravages . . . of poverty have not diminished with the triumph of liberal capitalism . . . [t]he language of socialism has become severely problematic . . . and not only because it was perverted long ago by totalitarians”).

<sup>85</sup> See, e.g., LACEY, *supra* note 44, at 21–22; Harry J. Holzer, *Workforce Development as an Antipoverty Strategy: What Do We Know? What Should We Do?*, 6, 7 (Inst. for the Study of Labor, Discussion Paper No. 3776, 2008) (tracking an 87% decline in federal workforce development funds from 1979, with “even greater” reduction in spending on disadvantaged populations, and observing that spending on federal employment and training in the United States is “just over 0.1% of GDP—a smaller fraction than is spent . . . virtually anywhere else in the industrial world”).

<sup>86</sup> See, e.g., Pedro Carneiro & James J. Heckman, *Human Capital Policy, in* INEQUALITY IN AMERICA: WHAT ROLE FOR HUMAN CAPITAL POLICIES? 77, 84–85 (Benjamin M. Friedman ed., 2003) (“Declining real wages for low-skilled workers and increasing real returns to college graduation” combined with differential in high school

economic power in fewer hands<sup>87</sup> conjoins degraded opportunities for social mobility<sup>88</sup> and the flourishing of state capitalism as taxpayers rescue deregulated industries deemed “too big to fail”<sup>89</sup> and too big to prosecute.<sup>90</sup> The rightward ideological shift across branches of state and federal government, including the federal courts, prioritizes the market over the commons and the individual over the collective.<sup>91</sup> Retreat from social welfare guarantees<sup>92</sup> and the dead end of federal constitutional avenues toward poverty relief<sup>93</sup> accompany the advance of an

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dropout and college attendance rates will make “the America of tomorrow even more unequal than the America of today and the America of the past.”); Lawrence F. Katz, *Comment*, in *id.* at 269, 276–77 (discussing growing geographic concentration of poverty in the United States); Sean F. Reardon & Kendra Bischoff, *Income Inequality and Income Segregation*, 116 AM. J. SOC. 1092, 1099–1100, 1106–07, 1125 (discussing increased residential segregation by income level, particularly between highest and lowest rungs of the economic ladder and with highest rates of change occurring among black families).

<sup>87</sup> See Reardon & Bischoff, *supra* note 86, at 1094–96 (documenting the “U-shaped” U.S. income inequality trend, with 2006 rates returning to disparity levels of the 1920s, “exceptional rise” in upper-income increases, and the top decile receiving 45% of the national income).

<sup>88</sup> PEW CHARITABLE TRUSTS, *PURSUING THE AMERICAN DREAM: ECONOMIC MOBILITY ACROSS GENERATIONS 2–9* (2012), [http://www.pewtrusts.org/uploadedFiles/www.pewtrusts.org/Reports/Economic\\_Mobility/Pursuing\\_American\\_Dream.pdf](http://www.pewtrusts.org/uploadedFiles/www.pewtrusts.org/Reports/Economic_Mobility/Pursuing_American_Dream.pdf) (discussing absolute income gains but relative and racially disparate “stickiness,” or limited mobility, with 43% stuck at the bottom of the economic ladder).

<sup>89</sup> See Benjamin A. Templin, *The Government Shareholder: Regulating Public Ownership of Private Enterprise*, 62 ADMIN. L. REV. 1127, 1128 (2010) (“By the end of the 2009 fiscal year, the U.S. government became one of the largest shareholders in the world owning a portfolio of investments valued at \$ 959 billion.”); Mariana Pargendler, *State Ownership and Corporate Governance*, 80 FORDHAM L. REV. 2917, 2925–26 (2012) (describing as anomalous the “partial nationalizations of distressed firms” in the United States after the 2008 financial crisis). For a different view of state capitalism and its historical roots in the United States, see generally William J. Novak, *Law and the Social Control of American Capitalism*, 60 EMORY L.J. 377 (2010).

<sup>90</sup> See, e.g., Dominic Rushe & Jill Treanor, *HSBC’s Record \$1.9Bn Fine Preferable to Prosecution, US Authorities Insist*, GUARDIAN (Dec. 11, 2012, 3:37 PM), <http://www.guardian.co.uk/business/2012/dec/11/hsbc-fine-prosecution-money-laundering> (discussing the U.S. Department of Justice’s declination to prosecute HSBC, one of the world’s largest banks, for, among other things, laundering money for terrorists and drug dealers).

<sup>91</sup> On alternatives to the hegemony of *homo economicus*, the classical liberal subject as autonomous self-interest maximizer, see Janet Moore, *Covenant and Feminist Reconstructions of Subjectivity Within Theories of Justice*, 55 LAW & CONTEMP. PROBS. 159, 163–70, 186–89 (1992).

<sup>92</sup> See, e.g., LACEY, *supra* note 44, at 85; Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239, 243–50 (2010) [hereinafter *Governance*]; Wendy A. Bach, *Welfare Reform, Privatization, and Power: Reconfiguring Administrative Law Structures from the Ground Up*, 74 BROOK. L. REV. 275, 278–82 (2009) [hereinafter *Welfare Reform*].

<sup>93</sup> See, e.g., Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 122–26 (2009) (probing causes of varying judicial scrutiny afforded to class-based and race-based claims for redress); Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of*

ostensibly race-blind public ethos and jurisprudence.<sup>94</sup>

These developments are not unique. They mark the latest oscillation in an ongoing contest over the appropriate location and limits of socioeconomic, political, and legal power in state capitalist democracies. In the United States, those tensions are radical. Founding federal documents championed equal liberty while simultaneously denigrating the First Nations as “merciless . . . Savages,”<sup>95</sup> and consigning black slaves to proportional personhood,<sup>96</sup> and while states limited suffrage within narrow confines of gender, race, and class.<sup>97</sup> Historian John Hope Franklin located this fundamental polarity in a broken promise—“the promise of real equality, made by the Founding Fathers more than two centuries ago, a promise neither they nor their successors kept.”<sup>98</sup>

This tension between liberatory promise and renegeing is “so fundamental—and so morally embarrassing—that we have gone to [great] lengths to obscure it.”<sup>99</sup> But cycles of reform and reaction are traceable in thirty- to fifty-year segments. At the birth of the new republic, even within the confines of propertied white male privilege, the transition from the post-Revolutionary Articles of Confederation to the Constitution was hotly contested by Antifederalists opposed to a dangerous new concentration of political authority.<sup>100</sup> There was particular concern that the new structure was designed to benefit commercial elites at the expense of the yeoman farmer and a broader common good.<sup>101</sup> Passions lingered

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*Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 *FORDHAM URB. L.J.* 629, 630–31 (2008) (discussing the Supreme Court’s effective elimination of legal redress for poverty-based claims).

<sup>94</sup> See, e.g., *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2625, 2631 (2013) (holding that the Voting Rights Act was an unconstitutional violation of states’ rights because “things have changed dramatically [since the enactment of the Voting Rights Act]. . . . [V]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009))); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278, 1332–38 (2011) (critically examining the race-neutral arguments underlying the decisions in *Ricci v. DeStefano*, 557 U.S. 557 (2009) and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)).

<sup>95</sup> THE DECLARATION OF INDEPENDENCE para. 24 (U.S. 1776).

<sup>96</sup> U.S. CONST. art. I, § 2.

<sup>97</sup> See, e.g., ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 43 (2009) (discussing race- and gender-based limitations on voting during founding period); *id.* at 16 (discussing class-based limitations); see also *id.* at xx (discussing all three limitations).

<sup>98</sup> Franklin, *supra* note 46, at xii.

<sup>99</sup> William H. Chafe, *Epilogue from Greensboro, North Carolina: Race and the Possibilities of American Democracy*, in *DEMOCRACY BETRAYED*, *supra* note 46, at 277, 278.

<sup>100</sup> See, e.g., Calvin R. Massey, *Antifederalism and the Ninth Amendment*, 64 *CHI.-KENT L. REV.* 987, 989 (1988).

<sup>101</sup> See, e.g., Centinel, Letter I, in *THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION* 16 (Herbert J. Storing ed., 1985) (“[T]he proposed

after the Constitution's ratification and ignited uprisings such as the Whiskey Rebellion.<sup>102</sup>

In the 1830s, transcendentalist precursors of the Social Gospel movement decried the structural subjugation and exploitation of women and slaves as well as the "wage slavery" to which business interests subjected the working poor.<sup>103</sup> Post-Reconstruction African Americans and poor whites joined forces in Fusionist and other progressive movements to expand social, economic, and political opportunities.<sup>104</sup> In subsequent decades, labor and civil rights leaders found common ground to combat hierarchies fed by twinned theories of socioeconomic Darwinism and an oxymoronic "scientific racism."

Each oppositional movement met with co-optation, reaction, and, in some instances, outright revolution and repeal. From the Whiskey Rebellion to the Alien and Sedition Acts; from the ethnic and sectarian riots of the 1820s and '30s through the horrifying violence of the Civil War and the white supremacy movement's murderous overthrow of Fusionist governments at the turn of the century; from the pitched battles between capital and labor in the 1920s and '30s to the most recent civil rights era and its aftermath, efforts to actualize the liberatory potential inherent in aspects of this nation's founding have collided with the determination of elites to obtain, retain, or regain privilege.

As the oscillation between these opposing interests continues, some see bright spots on the horizon. In light of trends favoring globalization, deregulation, tax reduction, and diminution of government, new governance scholars discount the adversarial pursuit and vindication of rights through litigation and legislation in favor of local collaboration and internal agency self-reform.<sup>105</sup> Others see opportunities in the retreat from social welfare commitments to incorporate, through state constitutions and statutes, international human rights models for securing socioeconomic prerequisites to meaningful participation in democratic

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plan . . . is a most daring attempt to establish a despotic aristocracy among freemen, that the world has ever witnessed.")

<sup>102</sup> See, e.g., David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879, 904–08 (1996).

<sup>103</sup> See DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 643–56 (2007) (discussing confluence and divergence of interests between abolitionists, transcendentalists, and early feminists); 2 THEODORE PARKER, *Of Justice and Conscience*, in THE COLLECTED WORKS OF THEODORE PARKER, SERMONS—PRAYERS 37, 48 (Francis Power Cobbe ed., 1879) ("I do not pretend to understand the moral universe; the arc is a long one, my eye reaches but little ways . . . from what I see I am sure it bends towards justice.").

<sup>104</sup> See 1898 WILMINGTON RACE RIOT COMM'N, 1898 WILMINGTON RACE RIOT REPORT 35–46 (2006) [hereinafter WILMINGTON REPORT], available at <http://www.history.ncdcr.gov/1898-wrrc/report/report.htm>; David S. Cecelski & Timothy B. Tyson, *Preface*, in DEMOCRACY BETRAYED, *supra* note 46, at xii, xiv; Michael Honey, *Class, Race, and Power in the New South: Racial Violence and the Delusions of White Supremacy*, in DEMOCRACY BETRAYED, *supra* note 46, at 163, 174; *infra* Part III.B.

<sup>105</sup> See, e.g., Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 248–51 (2006).

self-governance.<sup>106</sup> From an increasingly dominant “race-blind” civil rights jurisprudence, Professor Reva Siegel wrestles a core commitment to the vindication of individual human dignity and community harmony (or at least to the minimization of intergroup resentment).<sup>107</sup>

Some commentators on criminal law and procedure also accentuate the positive. A “liberty affirming” theme is detected in post-Warren era rulings that heralded the Supreme Court’s resurgent conservatism.<sup>108</sup> Professors Marc Miller and Ronald Wright identify unexpected pockets of legislative support for criminal justice-system improvements.<sup>109</sup> David Cole views converging interest in cost cutting during tight fiscal times as a sign that the nation is “turning the corner on mass incarceration.”<sup>110</sup> And Inhofe and Murkowski might be surprised by the scope and history of North Carolina’s pioneering full open-file criminal discovery reform.<sup>111</sup>

But there may be some whistling past the graveyard in all of the foregoing scholarship. Some scholars challenge new governance theories as masking old patterns of deference to market-driven paradigms, and as failing to account for the barriers to expanding deliberative democracy beyond the usual cadre of elites.<sup>112</sup> Theologian Gary Dorrien questions the possibility of meaningful poverty reduction in a polity that often brands analysis of income disparity as class warfare and views discussion of income guarantees or other significant resource redistribution as socialist anathema.<sup>113</sup> And it is reasonable to worry that antibalkanization analysis embodies an uncomfortably familiar solicitude for the feelings of wounded white privilege.<sup>114</sup>

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<sup>106</sup> See, e.g., Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351, 391–404 (2008).

<sup>107</sup> See Siegel, *supra* note 94, at 1298–1303, 1352.

<sup>108</sup> Louis D. Bilonis, *Conservative Reformation, Popularization, and the Lessons of Reading Criminal Justice as Constitutional Law*, 52 UCLA L. REV. 979, 1047 (2005).

<sup>109</sup> See Miller, *supra* note 80, at 1359–63; Wright, *Counting the Cost*, *supra* note 80, at 58–77; Wright, *Parity*, *supra* note 80, at 263–68.

<sup>110</sup> See David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 31 (2011).

<sup>111</sup> See Moore, *supra* note 13, at 1371–77 (detailing the legislative history of open-file criminal discovery reform).

<sup>112</sup> See, e.g., Susan Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 HARV. J.L. & GENDER 323, 343–49 (2007); Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 338–63 (2009).

<sup>113</sup> GARY DORRIEN, *ECONOMY, DIFFERENCE, EMPIRE: SOCIAL ETHICS FOR SOCIAL JUSTICE* 139–50, 187–93 (2010); see also MICHELE LANDIS DAUBER, *THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE* 14–15, 33–34, 152–54 (2013) (tracing U.S. history of justifying resource redistribution by casting recipients as innocent disaster victims).

<sup>114</sup> See DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* 1 (2008) (discussing civil rights jurisprudence that measures relief “less by the character of harm suffered by blacks than the degree of disadvantage the relief sought will impose on whites”); cf. REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* xvii (1932) (“[W]ill a disinherited group, such as the Negroes for instance, ever win full justice in

In criminal justice scholarship, the despairity narrative can cast rosier views in a similarly cold light. The Supreme Court's purported "liberty affirming" turn can readily be reframed as a sympathetic (and selective) response to tough-on-crime politics.<sup>115</sup> Convergent interests around cost cutting have historically proven to be evanescent motivators of criminal justice reform.<sup>116</sup> And it will take more focused empirical research to discern the feet-on-the-street effectiveness of initiatives such as funding parity for prosecutors and public defenders<sup>117</sup> or statewide, full open-file discovery.<sup>118</sup>

This Article responds to these deeply rooted tensions and recurring oscillations by arguing for the development of a democracy-enhancing theory of criminal law and procedure as a more stable ground—at least complementary if not philosophically and strategically superior to budget-driven interest convergence—for sustainable reform at the intransigent intersection of crime, race, and poverty that *Bannister* maps so vividly. Part II explains the attraction of a democracy-enhancement theory and sketches its contours. While roughly honed, this theoretical lens is adequate for the analytical and normative work undertaken in Parts III through V.

## II. DEMOCRACY ENHANCEMENT IN CRIMINAL LAW AND PROCEDURE

This Part sketches the contours of a democracy-enhancing theory of criminal law and procedure. Part II.A defines "democracy" as it is used in the ensuing argument. Part II.B anticipates and responds to some objections against the democracy-enhancement frame. Part II.C clarifies distinctions between democracy enhancement and the two major theoretical justifications for criminal conviction and punishment: retributivism, which emphasizes individual moral culpability, and utilitarianism, which emphasizes deterrence. Part II.D identifies some resources for the future task of fully articulating a democracy-enhancement theory.

### A. Defining Democracy

Professor Nicola Lacey frames democracy as a set of core values embodying "the will of citizens" enacted through their "participation . . . in decision-making" along with "accountability of officials for proper conduct and effective delivery of policies in the public interest[,] adherence to the rule of law and respect for human rights."<sup>119</sup> Working within that framework, this Article defines democracy

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society [through accommodation]? Will not even its most minimum demands seem exorbitant to the dominant whites, among whom only a very small minority will regard the inter-racial problem from the perspective of objective justice?").

<sup>115</sup> Joseph E. Kennedy, *Cautious Liberalism*, 94 GEO. L.J. 1537, 1548–53 (2004).

<sup>116</sup> See, e.g., MARK COLVIN, *PENITENTIARIES, REFORMATORIES, AND CHAIN GANGS: SOCIAL THEORY AND THE HISTORY OF PUNISHMENT IN AMERICA* 69–71, 106–07 (1997) (describing role of budget crises in penology's historical "cycles of reform, stagnation, and repression").

<sup>117</sup> See Wright, *Parity*, *supra* note 80, at 253–62.

<sup>118</sup> Moore, *supra* note 13, at 1371–77.

<sup>119</sup> LACEY, *supra* note 44, at 9.

enhancement as the promotion of individual and communal self-governance. Minimally, self-governance means exercising rational and emotional intelligence to check concentrated power. Maximally, democracy enhancement promotes the exercise of moral imagination through equal participation by individuals-in-community in the pursuit of equal dignity and human flourishing.<sup>120</sup>

The metaethical stance is pragmatic and eclectic. The theory aims to bridge oppositions between retributivism's deontological rules, which emphasize the autonomous individual's generation of and submission to the morally just precept, and utilitarianism's teleological goals, which emphasize maximal well-being. Kantian respect for the equal dignity of persons unites with critical theory's recognition that communicative action necessarily entails intersubjectivity. Appreciation for classical virtues—courage, temperance, prudence, and justice—is tempered by Niebuhrian suspicion of hubris, perfectionism, and end-of-history narratives.<sup>121</sup>

The subject of self-governance, the individual-in-community, is more than a consumer or producer of goods.<sup>122</sup> Self-governance is an activity occurring simultaneously and in multiple spheres. At the level of individual impulse, self-governance involves interaction between the amygdala and the frontal lobe. Self-governance also unfolds in contests and collaboration between and among individuals, groups, institutions and other collective interests.

Thus, democracy as self-governance is simultaneously an ongoing set of activities and an ideal never fully achieved.<sup>123</sup> In the criminal justice context, democracy occurs more or less—mostly less at the intersection of crime, race, and poverty—as actors exercise and shape discretion in varied settings, often with multiple, overlapping, and shifting roles.

Criminal justice stories involve perpetrators and victims, accusers and accused. But as the *Bannister* decision indicates, those actors and identities are just the tip of the iceberg. Relevant acts and omissions also flow from parents, extended families, schools, neighborhood organizations, and churches; businesses, foundations, and public service providers; the popular press and other media; legislative and executive branch representatives (including mayors, governors, and appointed panels or commissions) and their constituencies; law enforcement, prosecutors, defense counsel, juries, and judges; corrections personnel, and probation, parole, or other reentry workers.

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<sup>120</sup> Moore, *supra* note 91, at 159, 163–70, 186–89.

<sup>121</sup> See, e.g., REINHOLD NIEBUHR, *THE IRONY OF AMERICAN HISTORY* 138 (1952) (“A too confident sense of justice always leads to injustice.”); cf. CORNEL WEST, *PROPHECY DELIVERANCE! AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY* 17 (1982) (“This emphasis on process, development discontinuity, and even disruption precludes the possibility of human perfection and human utopias.”).

<sup>122</sup> Moore, *supra* note 91, at 167–70.

<sup>123</sup> Cf. Sheldon S. Wolin, *Fugitive Democracy*, in *DEMOCRACY AND DIFFERENCE* 31, 43 (1996) (“Democracy needs to be reconceived as something other than a form of government: as a mode of being that is conditioned by bitter experience, doomed to succeed only temporarily, but is a recurrent possibility as long as the memory of the political survives.”).

To enhance democracy in the formation, implementation, and oversight of criminal law and procedure, particularly at the tail end of these relational networks, is to prioritize participation by the low-income and minority individuals who are most directly and disproportionately affected by crime and criminal justice systems, particularly at the front end. Such an approach has the potential not only to improve crime prevention and case outcomes, but also to shore up the often fragile legitimacy of what many perceive, with some justification, to be criminal *injustice* systems.

To that end, a democracy-enhancing theory of criminal law and procedure persistently asks whether and how particular developments promote self-governance, the reduction of the carceral footprint, and the shaping and oversight of criminal justice policies and institutions by the low-income and minority individuals and communities disproportionately affected by crime, its causes, and its consequences. This approach incorporates aspects of traditional justifications for criminal law while demanding more. Democracy enhancement takes moral desert more seriously than retributivism, aims for more effective deterrence than utilitarianism, sharpens the focus of rehabilitative theory, and may provide more stable ground for the healing relationships that constitute restorative justice.

### B. *Why Democracy?*

The call for a democracy-enhancing theory of criminal law and procedure raises important questions. Their comprehensive identification and discussion is beyond the preliminary sketch offered here, but several warrant immediate attention. Is democracy enhancement too narrow a lens through which to reimagine and refocus criminal law and procedure? Does this focus foreground procedure at the expense of substantive justice? Conversely, is democracy enhancement too protean a concept to be useful? Does this approach improperly discount interest convergence and cost-benefit analysis as effective reform tactics?

#### 1. *Is Democracy Too Small?*

Professor Allegra McLeod helpfully raises the first questions about the limits of a democracy-enhancing focus, noting that attempts to improve existing criminal justice systems are often merely ameliorative and can even make things worse.<sup>124</sup> McLeod rightly insists that reformers must keep their eyes unswervingly on the decarceration prize.<sup>125</sup> To that end, she argues for an imaginative stance that identifies and pursues “unfinished alternatives” to the carceral state.<sup>126</sup>

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<sup>124</sup> Allegra McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1615–30 (2012) [hereinafter *Decarceration Courts*] (discussing flaws in alternative court models).

<sup>125</sup> *Id.* at 1632; see also Allegra McLeod, *Confronting Criminal Law’s Violence: The Possibilities of Unfinished Alternatives*, 8 UNBOUND: HARV. J. LEGAL LEFT 109, 129–30 (2013) [hereinafter *Confronting Violence*] (arguing for regrouping of social controls outside of criminal justice apparatuses).

<sup>126</sup> McLeod, *Confronting Violence*, *supra* note 125, at 132.

The carceral norm is a national addiction. Reformers too readily serve as enablers. But McLeod's decarceration proposals require more than expanded "imaginative horizons."<sup>127</sup> They require revised patterns of resource allocation.<sup>128</sup> Those revisions in turn require a robust and sustainable oppositional politics.

A democracy-enhancing theory of criminal law and procedure aims simultaneously to reimagine the justification and purpose of criminal justice systems while reducing the footprint of the carceral state. The theory does so by prioritizing the empowerment of low-income and minority individuals and communities to participate more fully in the formation and implementation of criminal justice policies.

That participation is not merely procedural, nor is it an end in itself. The animating principle and goal of a democracy-enhancing theory is the actualization of equal human dignity. Essential prerequisites include reducing criminal offending and victimization as well as the predictable causes and consequences of crime discussed in *Bannister*. Thus, a democracy-enhancing theory bridges dichotomies pitting procedural versus substantive justice, utilitarian goals versus deontological rules, and the exercise of free will by autonomous individuals versus the collective generation and enforcement of norms and identities.

## 2. *Is Democracy Too Large?*

A democracy-enhancing theory of criminal law and procedure acknowledges cost-benefit analysis and interest convergence as useful reform tactics. But there are good reasons to maintain an arm's-length partnership with *homo economicus*,<sup>129</sup> some of which are empirical.

As noted above, budget cutting grows more or less salient as state capitalism spins through repetitive boom-and-bust cycles. Moreover, as discussed in Part IV.B.1, "smart on crime" and "justice reinvestment" initiatives tend to morph away from evidence-based prevention via human capital development and toward extension of surveillance and control structures. Those policy choices are predictable despite their criminogenesis<sup>130</sup> and the fact that evidence-based prevention costs pennies on the increasingly scarce tax dollar.<sup>131</sup> Indeed, as Professor James Forman notes, black-majority jurisdictions, such as Washington, D.C., also exhibit tough-on-crime hyperincarceration patterns.<sup>132</sup>

Such decision making belies rational choice theory in part because the theory rests on a flawed account of human subjectivity. On that account, the subject is

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<sup>127</sup> *Id.* at 113.

<sup>128</sup> *Id.* at 113, 116, 118, 130.

<sup>129</sup> *See supra* note 91. I thank Mike Cassidy for inspiring the analysis in this subpart.

<sup>130</sup> *See, e.g.,* L.M. Vieraitis et al., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974–2002*, 6 CRIMINOLOGY & PUB. POL'Y 589, 606, 614–16 (2007) (documenting and discussing criminogenic effect of imprisonment).

<sup>131</sup> *See infra* Part IV.C.1.

<sup>132</sup> James Forman, Jr., *The Roots of Prosecutorial Discretion: How Mandatory Minimums Came to Washington, D.C.'s Local Courts*, Notes for Panel Presentation at Mid-Year Meeting of Ass'n of Am. Law Schools, San Diego, California (June 11, 2013) (on file with Author).

first and foremost a consumer of goods—a radically individuated, calculating self-interest maximizer. Yet according to Professor Daniel Kahneman, winner of a Nobel Prize in economics, “it is self-evident that people are neither fully rational nor completely selfish, and that their tastes are anything but stable.”<sup>133</sup> Emotion regularly trumps critical analysis.<sup>134</sup> Fear and anger over crime and perceptions of crime override data-driven policy making.

Moreover, to the extent that self-interested rationality is at work, cycles of criminogenesis, victimization, arrest, prosecution, incarceration, and recidivism feed too many families. Interests converging around cost cutting inevitably collide with countervailing, converging interests of myriad stakeholders. Among the more obvious are law enforcement officers and forensic analysts; prosecutors and victim advocates; judges and court personnel; probation and parole officers; and defense attorneys, investigators, and paralegals. Layers of administrators keep the machinery running. Jails and prisons employ thousands, with prisons increasingly run for profit and sited in low-income rural areas. Universities and nonprofit organizations receive millions of dollars annually in tax and foundation dollars to evaluate, critique, advise, and attempt to reform these stakeholders and the systems in which they are mutually embedded.

Cost-benefit analysis and interest convergence are useful tactics for treating symptoms but cannot cure such metastasis.

### 3. *Is Democracy Just Right?*

There are more than empirical reasons for circumspection toward privileging cost-benefit analysis and interest convergence in the struggle for sustainable criminal justice reform. Democracy enhancement draws upon a richer and deeper normative commitment—often overshadowed, if not actively repressed, by dominant utilitarian analyses—to the equal dignity of persons.<sup>135</sup>

As discussed in Part I.C, it is ultimately the deep normative pull of that commitment—the commitment to fulfill what Franklin called the broken promise of “real equality”<sup>136</sup>—that explains small and large expansions of human rights and corresponding obligations in the struggle against equally radical commitments to the development and maintenance of hierarchy.<sup>137</sup> The democracy deficit at the intersection of crime, race, and poverty throws the unsatisfactory nature of that progress into sharp relief.

Professor Steven L. Winter’s archeology of democratic theory is helpful in unpacking these points. Winter highlights the critical role of interpersonal respect

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<sup>133</sup> DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 269 (2011).

<sup>134</sup> *See, e.g., id.* at 252–53 (discussing optimistic bias); *id.* at 380–85 (discussing the peak-end rule and duration neglect).

<sup>135</sup> *See Moore, supra* note 91.

<sup>136</sup> Franklin, *supra* note 46, at xii.

<sup>137</sup> *Cf. JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870–1920*, at 373 (1986) (noting that only deeply norm-driven reforms can “be more than cosmetic”).

in the classical conception of *isonomia*.<sup>138</sup> He contrasts democracy's philosophical and etymological roots, which are grounded in the power (*kratos*) of the masses (*demos*), with those of *isonomia*, which references equal participation in the generation and administration of law.<sup>139</sup>

Winter's discussion of *isonomia* points to an underlying historical shift from *thesmos* to *nomos*—from the external to the internal generation of perceived obligation.<sup>140</sup> Legitimacy means lawfulness. That meaning derives from mutuality.

Winter emphasizes that the collaborative activity of self-governance requires “fortitude and initiative—the virtue” of habitually and actively controlling public institutions.<sup>141</sup> As the *Bannister* opinion indicates, unique hurdles impede the development and exercise of these capacities at the intersection of crime, race, and poverty.

A democracy-enhancing theory of criminal law and procedure aims to knock down those hurdles. In terms of deep norms and theory, this approach claims *isomoiria*, the joinder of political and economic equality,<sup>142</sup> as a precondition of *isonomia*, mutual and legitimate self-governance. Expressly claiming Franklin's “real equality” as a deep norm allows a democracy-enhancing theory to incorporate and improve upon the traditional criminal law justifications of retributivism and deterrence.

### C. Democracy Enhancement and Criminal Theory

Retributivism insists that “free will offers an escape”<sup>143</sup> from circumstances, such as resource disparities, that provide contexts for and shape decision making. On this theory, it is the ineluctably moral decision of an autonomous individual to do an illegal act that warrants condemnation and punishment. Retributivism's focus on individual moral desert allows for consideration of resource disparities (whether capital, human, or social) at various pivot points in the system. Existing data collection and assessment limit analysis of the degree to which those factors affect declination by crime victims, law enforcement officers, and prosecutors, respectively, to accuse, arrest, or charge. Consideration of these factors is most regularized in the application of rules that mitigate charge level and sentence.<sup>144</sup> A blunter instrument is the Supreme Court's recent use of developmental neurobiology to draw bright-line sentencing limits under the Eighth Amendment.<sup>145</sup>

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<sup>138</sup> Steven L. Winter, *Down Freedom's Main Line*, 41 NETHERLANDS J. LEGAL PHIL. 202, 237 (2012).

<sup>139</sup> *Id.* at 237–38.

<sup>140</sup> *Id.* at 237 n.118.

<sup>141</sup> *Id.* at 240.

<sup>142</sup> *Id.* at 238 n.123.

<sup>143</sup> *United States v. Bannister*, 786 F. Supp. 2d 617, 690 (E.D.N.Y. 2011).

<sup>144</sup> *See, e.g., Moore, supra note 42*, at 38 (discussing Vera's work); *Miller & Wright, supra note 80*, at 155–59; *Spohn, supra note 36*, at 473–78, 481.

<sup>145</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (holding mandatory life imprisonment unconstitutional for juveniles); *see also Roper v. Simmons*, 543 U.S. 551, 559–60 (2004) (barring juvenile executions); *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002) (barring execution of defendants with mental retardation).

But retributivism is itself profoundly immoral to the extent that it fails to account for and remediate structural disparities that, on one hand, significantly enhance the rewards of criminal offending,<sup>146</sup> and, on the other, inhibit participation in policy formation and implementation—that is, the definition of crime and the oversight of its enforcement—by the low-income people and people of color who have disproportionate contact with crime and criminal justice systems. A democracy-enhancing theory of criminal law and procedure should focus like a laser on the concentrated disadvantage that characterizes the intersection of crime, race, and poverty to promote the development and exercise of personal and communal self-governance.

A democracy-enhancement emphasis can usefully recalibrate other traditional theoretical justifications for criminal law. For utilitarians, this new emphasis holds promise for addressing the delegitimization and reduced deterrent effect of criminal justice systems for those excluded from system generation and oversight. Democracy enhancement's prioritization of self-governance also can productively refine rehabilitative theory by directing efforts toward fuller integration of individuals-in-community and citizens into the polity. With respect to restorative justice, enhancing self-governance by redressing real and perceived disparities in power, authority, and privilege within and across the systems in which crime and punishment are generated can improve possibilities for—and, indeed, is likely prerequisite to—personal healing and mending of broken relationships.

#### *D. Resources for Theory Building*

Future work will hone this quick sketch of a democracy-enhancing theory for criminal law and procedure. There are a number of resources for the task. Again, pragmatism entails eclecticism. Theory development should be interdisciplinary. Debates among criminologists are salient, particularly as they contest the racial invariance of concentrated disadvantage as a factor causing criminal justice involvement.<sup>147</sup> Social psychology and other cognitive sciences, including developmental neurobiology, also have much to offer. Pertinent areas of investigation include identification of factors that contribute to or hinder resiliency in the face of stress,<sup>148</sup> as well as discussions of the existence, verifiability, and

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<sup>146</sup> Regina Austin, “*The Black Community, Its Lawbreakers, and a Politics of Identification*,” 65 S. CAL. L. REV. 1769, 1774–87 (1992).

<sup>147</sup> On the debate over racial invariance in the relationship between concentrated disadvantage and crime, compare Sampson & Bean, *supra* note 38, at 8, 11 (discussing “resilient” invariance findings related to “factors representing disadvantage, e.g., differing combinations of poverty, income, family disruption, and joblessness/unemployment”), with Jeffery T. Ulmer et al., *Racial and Ethnic Disparities in Structural Disadvantage and Crime: White, Black, and Hispanic Comparisons*, 93 SOC. SCI. Q. 799, 800 (2012) (“[T]he degree to which differences across groups in structural disadvantage predict racial or ethnic differences in violence is far from settled.”).

<sup>148</sup> See, e.g., M.E.M. Haglund et al., *Psychobiological Mechanisms of Resilience: Relevance to Prevention and Treatment of Stress-Related Psychopathology*, 19 DEVELOPMENT & PSYCHOPATHOLOGY 889, 894–96 tbl.1, 906 tbl.2, 910 tbl.3 (2007) (summarizing neurochemical, neurological, and behavioral linkages to traumatic stress and resiliency).

implications of implicit or unconscious bias—whether those biases are rooted in differences between racial or ethnic groups, socioeconomic classes, or gender identities.<sup>149</sup>

As a leading skeptic on the role of both implicit bias and conscious discrimination in causing racial disparities in the workplace, Professor Amy Wax notes that calls to redress underlying “pervasive substantive inequalities” tend to “say very little about how to do that.”<sup>150</sup> In addition to the resources noted above, the scholarship of Professor Matthew Adler in social welfare economics, as well as that of Professors Iris Marion Young and Seyla Benhabib in political philosophy, offers useful framing devices to at least begin saying more “about how to do that” descriptive and normative work.

Development of a democracy-enhancing theory of criminal law and procedure resonates with Adler’s pathbreaking work on fair distribution as central to inequality-averse social welfare economic theory.<sup>151</sup> Adler’s framing of social welfare economic theory emphasizes the discipline’s normative clout.<sup>152</sup> He resists the prevalent cabining of utilitarian well-being to the satisfaction of personal preference. He deduces a formula for evaluating the contribution of decision outcomes to enhanced individual well-being with priority given to improving the lot of the less well-off. Significant for purposes of developing a democracy-enhancing theory of criminal law and procedure, Adler acknowledges the need to account for the extent to which individuals shape their own opportunities and life histories.<sup>153</sup> Personal responsibility, or free will, must be incorporated as a variable in his economic calculus.

In the field of political philosophy, Young and Benhabib provide feminist revisions of critical theory’s discourse model. These scholars work with the model’s three core commitments: (1) communication and, more specifically, rational argument is constitutive of human identity; (2) an ideal speech situation requires commitment to consensus, such that all who are affected by a discourse outcome agree to that outcome (the universalization principle); and (3) all

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<sup>149</sup> See, e.g., Amy L. Wax, *Supply Side or Discrimination?, Assessing the Role of Unconscious Bias*, 83 TEMPLE L. REV. 877, 887–902 (2011) (surveying literature and challenging empirical support for unconscious bias as a causal factor capable of objective proof or redress through law). *But see, e.g.*, State v. Golphin, Nos. 97 CRS 47314–15, 98 CRS 34832, 30544, & 01 CRS 65079 at 2, 20–24, 90–95 (N.C. Sup. Ct. Dec. 13, 2012) (vacating death sentences based in part on prosecutors’ implicit racial biases against African American prospective jurors), available at [https://www.aclu.org/files/assets/rja\\_or\\_der\\_12-13-12.pdf](https://www.aclu.org/files/assets/rja_or_der_12-13-12.pdf).

<sup>150</sup> Wax, *supra* note 149, at 900–02 (discussing Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009)).

<sup>151</sup> See Janet Moore, *G Forces: Gideon v. Wainwright and Matthew Adler’s Move Beyond Cost-Benefit Analysis*, 11 SEATTLE J. SOCIAL JUSTICE 1025, 1036 (2013) (“An economic theory that shifts the analysis from gross satisfaction of personal preference to inequality reduction can be a powerful tool for public defense reform advocates.” (discussing ADLER, *supra* note 37)).

<sup>152</sup> ADLER, *supra* note 37, at 12 (describing cost-benefit analysis as “a kind of moral decision procedure”).

<sup>153</sup> *Id.* at 36–38.

interested parties must have equal and unhindered access to full participation in the conversation (the discourse principle).<sup>154</sup> Young and Benhabib insist that the intersubjective communication that is the core of democratic processes and outcomes requires mining messy, highly particularized, real-world differences among people.<sup>155</sup> That process in turn requires satisfaction of basic material needs that are prerequisites to participation.<sup>156</sup>

Young's reframing of critical theory's discourse model may be particularly helpful in fleshing out a democracy-enhancing theory of criminal law and procedure. She prioritizes three questions: Who is at the table? Who is speaking or purporting to speak for whom? Who is privileging which manner of communication?<sup>157</sup> These questions must remain front and center in addressing the democracy deficit at the intersection of crime, race, and poverty.

In Young's assessment, adversarialism is built into consensus generation as a necessary oppositional moment. Deliberation requires capacities for "no-saying,"<sup>158</sup> self-reflection, and reality checking as participants struggle to see, hear, and understand contentions raised from perspectives different from their own. In Young's phrasing, "struggle is a process of communicative *engagement*" between members of a democratic society; because the "field of struggle is not level[,] . . . [d]isorderly, disruptive, annoying, or distracting means of communication are often necessary."<sup>159</sup> Young therefore resists moves to restrict discourses or their mode of expression to formal argument, appeals to a common good, or those that some label as moderate and civil.

By retaining discourse theory's dual emphases on equal access to deliberative processes and the production of genuine consensus, Young distinguishes her "agonistic" description of democratic formation as struggle from liberal theory's "aggregative model."<sup>160</sup> In her view, the latter entails zero-sum, majoritarian competition among ostensibly morally neutral policy preferences—a competition that fails to afford adequate structural protections against the perpetuation and reinforcement of "might makes right" dominance.<sup>161</sup> In contrast, a theory that is fully attentive to particularized differences of other-regarding equals obtains a richer capacity for intersubjective transformation and the reshaping of "private, self-regarding desire into public appeals to justice."<sup>162</sup>

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<sup>154</sup> See, e.g., IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 22–51 (2000); Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 67, 69–74, 78, 81–87 (Seyla Benhabib ed., 1996).

<sup>155</sup> See, e.g., YOUNG, *supra* note 154, at 37–44.

<sup>156</sup> Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, in DEMOCRACY AND DIFFERENCE, *supra* note 154, at 120, 121; Benhabib, *supra* note 154, at 67, 84.

<sup>157</sup> YOUNG, *supra* note 154, at 37–44.

<sup>158</sup> Stephen K. White & Evan Farr, "No-Saying" in *Habermas*, 40 POL. THEORY 32, 33 (2012).

<sup>159</sup> YOUNG, *supra* note 154, at 50–51.

<sup>160</sup> *Id.* at 49–51.

<sup>161</sup> *Id.* at 50–51.

<sup>162</sup> *Id.*

It is in this possibility of intersubjective transformation that the messy struggle toward democracy—power of the people—converges with the elusive goal of *isonomia*: mutuality in generation and administration of the law. Critics question whether that possibility can be actualized on any meaningful scale and challenge the real-world efficacy of both social welfare economics<sup>163</sup> and deliberativist models as avenues toward change.<sup>164</sup>

For example, skeptics focus both on the improbability of any broad, sustainable will to engage in such communication<sup>165</sup> and the inefficiency of oppositional, self-reflective moments that inevitably become to a greater or lesser degree “[d]isorderly, disruptive, annoying, or distracting.”<sup>166</sup> Recent empirical research supports a more hopeful view.<sup>167</sup> For example, people want to engage in face-to-face deliberation on policy matters—and seize opportunities to do so, including across boundaries of class, race, and ethnicity—more readily than skeptics might anticipate.<sup>168</sup> And in some circumstances, “deliberative drift” allows communication to shift back and forth across the border between zero-sum negotiations and richer normative discourse, trust-building, and engagement toward consensus building.<sup>169</sup>

But a more pointed criticism highlights the challenges and failures of efforts to empower those at the receiving end of systems. The low-income and minority communities most directly and disproportionately affected by crime, its causes, and its consequences face onerous obstacles to active participation in the formation, implementation, and oversight of the policies and institutions that create and maintain those systems.<sup>170</sup> Parts III through V respond to that concern by testing the rudimentary democracy-enhancement theory sketched here. They do so

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<sup>163</sup> See, e.g., Moore, *supra* note 151, at 1045–50 (engaging critiques of Adler’s work).

<sup>164</sup> See, e.g., Christopher H. Schroeder, *Deliberative Democracy’s Attempt to Turn Politics into Law*, 65 LAW & CONTEMP. PROBS. 95, 115–16 (2002) (“the demands of deliberation . . . are so onerous that there are good reasons to believe they cannot be achieved by human society as currently constituted—as deliberativists themselves concede.” (citing AMY GUTMAN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 357 (1996))).

<sup>165</sup> *Id.* at 124–27 (concluding that “[t]he behavior necessary to satisfy the demands of deliberation stands quite outside anything that can be achieved”).

<sup>166</sup> YOUNG, *supra* note 154, at 50.

<sup>167</sup> Taslitz, *supra* note 81, at 168–73.

<sup>168</sup> See, e.g., Jane Mansbridge et al., *The Place of Self-Interest and the Role of Power in Deliberative Democracy*, 18 J. POL. PHIL. 64, 73–74 (2010); Michael A. Neblo et al., *Who Wants to Deliberate—and Why?*, 104 AM. POL. SCI. REV. 566, 574–75 (2010) (finding younger people, lower-income people, and minorities are more willing to deliberate than predicted); see also Benhabib, *supra* note 154, at 73–74, 84–87 (discussing deliberation through “multiple forms of associations, networks, and organizations” and concluding that “the deliberative theory of democracy is not a theory in search of practice; rather it . . . elucidate[s] . . . the logic of existing democratic practice”).

<sup>169</sup> Peter McLaverty & Darren Halpin, *Deliberative Drift: The Emergence of Deliberation in the Policy Process*, 29 INT’L POL. SCI. REV. 197, 202–04, 208 (2008).

<sup>170</sup> See, e.g., Bach, *Welfare Reform*, *supra* note 92, at 307–18 (discussing the empowerment of historically “less-powerful groups” to attain a collaborative government).

by mapping a previously unnoticed constellation of criminal justice reforms in a single and improbable jurisdiction, the border-south state of North Carolina.

### III. A PRETTY QUESTION: WHY NORTH CAROLINA?

Given the depth and intransigence of the resource disparities encountered in circumstances of concentrated disadvantage and the correspondingly limited political capital of the low-income and minority communities that disproportionately experience crime and criminal justice systems, reform initiatives within these systems are remarkable—and should be remarked upon.<sup>171</sup> It is especially interesting to find a constellation of cutting-edge reforms in a single jurisdiction seldom seen as a hotbed of progressive politics.<sup>172</sup> North Carolina is a case in point.<sup>173</sup>

This jurisdiction was the first in the nation to adopt mandatory, statewide full open-file discovery in criminal cases.<sup>174</sup> Full open-file discovery resulted from hard-fought litigation and the opportunistic exploitation of what was, by all appearances, a wholly unpromising political moment.<sup>175</sup> Despite pushback from prosecutors, the case law and legislative history have continued to trend toward greater openness and enforceability.<sup>176</sup>

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<sup>171</sup> See Moore, *supra* note 13, at 1375–77; cf. Jennifer E. Laurin, *Still Convicting the Innocent*, 90 TEX. L. REV. 1473, 1499 (2012) (reviewing BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011) and querying institutional explanations for North Carolina’s distinctive Innocence Inquiry Commission). Some remark that things could be worse. See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 234–48 (2007) (describing the “substantially contracted” field of criminal law’s effect on “most people” and the failure of many tough-on-crime bills in three state legislatures); cf. VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* 111–12 (2009) (citing failed proposals to require killing or castrating sex offenders in Washington’s Community Protection Act, WASH. REV. CODE § 71.09.010–.903 (1990)).

<sup>172</sup> See, e.g., N.Y. Times Editorial Bd., *The Decline of North Carolina*, N.Y. TIMES (July 9, 2013), [http://www.nytimes.com/2013/07/10/opinion/the-decline-of-north-carolina.html?\\_r=0](http://www.nytimes.com/2013/07/10/opinion/the-decline-of-north-carolina.html?_r=0) (discussing “Moral Monday” protests against “the grotesque damage that a new Republican majority has been doing to a tradition of caring for the least fortunate”).

<sup>173</sup> Aspects of the analysis in this Part are drawn from the Brief of Amici Curiae Historians and Law Professors in Support of Defendant’s Motion for Appropriate Relief Pursuant to the Racial Justice Act, *State v. Al-Bayyinah*, No. 98 CRS 836, 1009 (Davie County, N.C. Sup. Ct. Sept. 15, 2010), which the Author researched and wrote after representing Mr. al-Bayyinah on direct appeal. *State v. al-Bayyinah*, 567 S.E.2d 120 (N.C. 2002) (vacating convictions and death sentence); *State v. al-Bayyinah*, 616 S.E.2d 500 (N.C. 2005) (affirming convictions and death sentence after retrial), *cert. denied*, 547 U.S. 1076 (2006).

<sup>174</sup> Moore, *supra* note 13, at 1378–79.

<sup>175</sup> *Id.* at 1379.

<sup>176</sup> *Id.* at 1379–84. That trend is due in part to legislative accommodation of prosecutorial concerns for fair accountability and enforceability with respect to investigative agencies that possess discoverable material without prosecutors’ knowledge or control. *Id.*

But full open-file discovery is just one of several pioneering criminal justice reforms in this single and unlikely jurisdiction. As discussed in more detail in Part IV, other cutting-edge reforms have focused on identifying and reducing wrongful convictions; increasing efficiency and lessening cost; and curing demographic disparities in criminal offending and victimization as well as in the processing of criminal cases. Before describing that constellation of reforms, this Part searches the state's socioeconomic and political history for some clues about their genesis. Hunting for hints of democracy enhancement at the intersection of race, crime, and poverty reveals a pattern better described as democracy assaulting.

#### A. *Race, Populism, and Tar Heel Politics: An Introduction*

North Carolina's previously unheralded leadership in criminal justice reform raises what historian V.O. Key, Jr. described in 1949 as the "pretty question" regarding jurisdictional motivations and aptitudes for change.<sup>177</sup> Key's opus, *Southern Politics in State and Nation*, is best known for developing racial threat analysis and linking it to what was then a distinctively weak adversarial partisan politics across southern states.<sup>178</sup>

Key labeled North Carolina as the South's "Progressive Plutocracy."<sup>179</sup> He saw the state as "far more 'presentable' than its southern neighbors" in business, education, "race relations . . . [and] scrupulously orderly" political processes.<sup>180</sup> He praised the state's "consistently sensitive appreciation of Negro rights" and "spirit of self-examination" driven in part by a strong commitment to public education.<sup>181</sup>

Key left much untold. He ignored or belittled the active role African Americans played in crafting their own political and economic destiny.<sup>182</sup> He papered over the state's history of murderous racial violence.<sup>183</sup> He was inattentive

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<sup>177</sup> V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 208 (1949) ("What moves a people to action . . . is a pretty question.")

<sup>178</sup> *Id.* at 5–11; see also Dan T. Carter, *More than Race: Conservatism in the White South Since V.O. Key Jr.*, in *UNLOCKING V.O. KEY JR.: "SOUTHERN POLITICS" FOR THE TWENTY-FIRST CENTURY* 130 (Angie Maxwell & Todd G. Shields eds., 2011) [hereinafter *UNLOCKING KEY*] (summarizing Key's racial threat analysis). Scholars rank *Southern Politics* as "easily comparable" to Myrdal's *An American Dilemma* and Woodward's *The Strange Career of Jim Crow*. Ronald Keith Gaddie & Justin J. Wert, *Before KKV, V.O. Key Jr.: Southern Politics and Social Science Methodology*, in *UNLOCKING KEY* at 77–78, 84.

<sup>179</sup> KEY, *supra* note 177, at 205.

<sup>180</sup> *Id.* In Key's view, the state's political leadership was "stodgy and conservative" but never consisted of "scoundrels or nincompoops." *Id.* at 211.

<sup>181</sup> *Id.* at 209.

<sup>182</sup> Kari Frederickson, *World War II, White Violence, and Black Politics in V.O. Key Jr.'s Southern Politics*, in *UNLOCKING KEY*, *supra* note 178, at 39, 39–41 (chiding Key's "secondary interest" in "[w]hat actual black people might have been doing" to shape the political landscape); Carter, *supra* note 178, at 129–30 (describing Key's treatment of African American southerners as passive victims); *id.* at 138 (describing interlocking roles of race and class in southern political culture).

<sup>183</sup> KEY, *supra* note 177, at 208 (describing the violent white supremacist revolution against biracial Fusionist governments as a "bitter" campaign through which Democrats redeemed the state from "shameless corruption"). Reconstruction-era corruption in North

to class differences and elided the conditions of the working poor who operated the textile and tobacco mills owned by the state's "economic oligarchy."<sup>184</sup> He failed to account for the pivotal role of evangelical Christianity in the formation of southern politics, and he also ignored the role of women.<sup>185</sup>

Despite these omissions, aspects of Key's description accurately reflect a powerful mythos that continues to shape perception and action in North Carolina.<sup>186</sup> A broad progressive streak runs sometimes beneath, sometimes alongside, and almost always against strains of conservatism and reactionary extremism. Key emphasized the former aspect of the state's Janus-faced sociopolitical culture.<sup>187</sup> Frank Porter Graham and Terry Sanford are typically identified with this lesser-known aspect.<sup>188</sup> In contrast, for many, the state's dominant aspect is indelibly embodied in Jesse Helms, "an unyielding icon of conservatives and archenemy of liberals."<sup>189</sup>

For thirty years, North Carolina voters sent Helms to the U.S. Senate as a champion of low taxes, small government, free markets, and traditional social values. As one voter put it, it was impossible to "get to the right of Helms without falling plumb off the Earth." Some put Helms alongside Ronald Reagan as a key catalyst and communicator of conservatism's resurgence in the late twentieth and early twenty-first centuries.<sup>190</sup> Nationally syndicated political columnist David

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Carolina was dominated by whites and "transcended party lines." See, e.g., ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877*, at 387–89 (1984).

<sup>184</sup> KEY, *supra* note 177, at 211–15.

<sup>185</sup> Charles Reagan Wilson, *The Morality-Driven South: Populists, Prohibitionists, Religion, and V.O. Key Jr.'s Southern Politics*, in *UNLOCKING KEY*, *supra* note 178, at 3–5 (critiquing Key's failure to account for the role of evangelical Christianity in the formation of southern politics); Carter, *supra* note 178, at 129–30 (describing Key's failures to account for the role of women).

<sup>186</sup> Mythos is not "something antithetical to fact . . . opposed to reality . . . primitive or arbitrary." Martin L. Bowles, *Myth, Meaning, and Work Organization*, 10 *ORG. STUD.* 405, 406–08 (1989). Mythology comprises deeply rooted interpretive constructs invoked to make sense of the world and one's role within it. See *id.* The concept poses no challenge to sociologists' view of culture as practice. See Sampson & Bean, *supra* note 38, at 27–28.

<sup>187</sup> KEY, *supra* note 177, at 205–10 (summarizing the history of North Carolina's "Progressive Plutocracy"). But see *supra* notes 182–185 and accompanying text (critiquing omissions in Key's analysis); ROB CHRISTENSEN, *THE PARADOX OF TAR HEEL POLITICS: THE PERSONALITIES, ELECTIONS, AND EVENTS THAT SHAPED MODERN NORTH CAROLINA 1–3* (2008) (noting the difficulty of "pigeonhol[ing]" North Carolina politics); Franco Ordonez, *Attention North Carolina Is Getting Isn't Quite What It Wants*, *MCCLATCHY WASH. BUREAU* (May 25, 2012), <http://www.mcclatchydc.com/2012/05/25/150208/attention-north-carolina-is-getting.html> (describing Paul Luebke's division of the state's cultural actors between "modernizers and traditionalists").

<sup>188</sup> CHRISTENSEN, *supra* note 187, at 3; ROBERT R. KORSTAD & JAMES L. LELOUDIS, *TO RIGHT THESE WRONGS: THE NORTH CAROLINA FUND AND THE BATTLE TO END POVERTY AND INEQUALITY IN 1960S AMERICA 12* (2010).

<sup>189</sup> David S. Broder, *Jesse Helms, White Racist*, *WASH. POST* (Aug. 29, 2001, reposted July 7, 2008, 12:00 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/06/AR2008070602321.html>.

<sup>190</sup> WILLIAM A. LINK, *RIGHTEOUS WARRIOR: JESSE HELMS AND THE RISE OF MODERN CONSERVATISM 5–9* (2008); see also Larry J. Sabato, *The Political Parties and PACs:*

Broder also described Helms as the nation's "last prominent unabashed white racist politician."<sup>191</sup>

The roots of North Carolina's racialized politics run deep and are particularly tangled at the intersection of race, crime, and poverty. Historically, the State's formation and application of criminal law and procedure, like the use of extralegal violence, have been closely focused on the intersection of race, class, and gender hierarchies. Colonial slave codes morphed into nineteenth-century black codes, which sprang into new life in post-Reconstruction Jim Crow laws. Such shape-shifting typically responded to socioeconomic and political advances by African Americans.<sup>192</sup> The pattern is evident in North Carolina's racialized application of court-sanctioned and extralegal executions as well as in other instances of mass political violence. As discussed below, that pattern began in the colonial period and developed in an economy dependent on low-cost labor.

### B. *From Slave Codes to the Wilmington Massacre*

Of the nearly 800 judicially sanctioned executions carried out in North Carolina's first 235 years as a colony and a state, more than 70% targeted African Americans; during the same period, three whites were executed for crimes against African Americans.<sup>193</sup> Aggravated forms of execution, including burning at the stake, were reserved for "petit treason"—the uniquely threatening offenses of slave revolt and husband killing.<sup>194</sup> The imbalanced application of capital punishment was so profound and long-standing that even after the advent of the electric chair,

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*Novel Relationships in the New System of Campaign Finance*, 3 J.L. & POL. 423, 433 (1987).

<sup>191</sup> Broder, *supra* note 189; see also CHRISTENSEN, *supra* note 187, at 269 (describing Helms's nationally televised response to the phoned-in suggestion that he receive "a Nobel Peace Prize for everything [he had] done to help keep down the niggers"); Linda Chavez, *Race to the Finish: The Supreme Court and the FCC's Racial Preference Program*, 44 ARK. L. REV. 1097, 1104–05 (1991) (attributing a racially charged campaign advertisement's effectiveness in part to the opposing candidate's self-dealing use of Federal Communications Commission affirmative action policies); Earl Sheridan, *Book Review*, 123 POL. SCI. Q. 515, 517 (2008) (reviewing Mark A. Smith, *THE RIGHT TALK: HOW CONSERVATIVES TRANSFORMED THE GREAT SOCIETY INTO THE ECONOMIC SOCIETY* (2007) and describing famous "white hands" television advertisement from the 1990 Helms Senate campaign); *Jesse Helms "Hands" Ad*, YOUTUBE, <http://www.youtube.com/watch?v=KIyewCdXMzk> (last visited Apr. 3, 2014) (video of "white hands" campaign advertisement).

<sup>192</sup> JAMES BALDWIN, *My Dungeon Shook: Letter to My Nephew on the One-Hundredth Anniversary of the Emancipation*, in *THE PRICE OF THE TICKET: COLLECTED NONFICTION 1948–1985*, at 336 (1985) ("[T]he black man has functioned in the white man's world as a fixed star, as an immovable pillar: and as he moves out of his place, heaven and earth are shaken to their foundations.").

<sup>193</sup> Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2038–39, 2043–49, 2053–56 (2010).

<sup>194</sup> Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in *FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA* 103–04 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

one white man slit his own throat instead of becoming “the first white man electrocuted in North Carolina.”<sup>195</sup>

In the antebellum era, Gabriel’s uprising, Nat Turner’s rebellion, and the circulation of David Walker’s revolutionary *Appeal to the Coloured Citizens of the World* led to slave-owner hysteria.<sup>196</sup> Tortured slaves “confessed” to plotting rebellion. Some were burned at the stake or beheaded. The decapitated heads were mounted on stakes to inspire terror and submission.<sup>197</sup> The state legislature soon stripped free blacks of voting rights.<sup>198</sup> Additional new laws forbade slaves and free blacks from preaching, teaching, or public speaking in any forum.<sup>199</sup> Teaching literacy to African Americans became a crime.<sup>200</sup>

Reactionary violence also marred Reconstruction. For example, freed blacks and whites formed Union Leagues in the pursuit of political and economic self-education and advocacy (as well as in self-defense).<sup>201</sup> Ku Klux Klan thuggery soon eliminated that cooperation.<sup>202</sup> Despite such violent suppression, in the 1870s, while other Southern states fell to Redemptionist takeovers, North Carolina retained a Republican governor and rejected a revanchist white-supremacist constitution.<sup>203</sup>

Then, in 1892 and 1894, low-income farm workers and other rural white Populists joined with black and white Republicans to take the governor’s mansion, the state legislature, and several local governmental councils, commissions, and appointed positions from Democrats.<sup>204</sup> These Fusionists sought to increase “the liberty of the laboring people, both white and black.”<sup>205</sup> They “capped interest rates on personal debt, increased expenditures for public education, shifted the weight of taxation from individuals to corporations and railroads, and made generous appropriations to state charitable and correctional institutions.”<sup>206</sup> They also expanded voting rights and local democracy, instituting city and county elections in place of legislatively appointed authorities.<sup>207</sup>

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<sup>195</sup> Kotch & Mosteller, *supra* note 193, at 2039 (internal quotation marks omitted); *see also id.* at 2043–56 (examining the history of race and executions in North Carolina).

<sup>196</sup> Stephen Kantrowitz, *The Two Faces of Domination in North Carolina, 1800–1898*, in *DEMOCRACY BETRAYED*, *supra* note 46, at 97–102.

<sup>197</sup> DAVID S. CECELSKI, *THE WATERMAN’S SONG: SLAVERY AND FREEDOM IN MARITIME NORTH CAROLINA* 53–54 (2001).

<sup>198</sup> TIMOTHY B. TYSON, *BLOOD DONE SIGN MY NAME* 132 (2004).

<sup>199</sup> *Id.*

<sup>200</sup> *See id.*; *see also* N.C. Sch. for the Deaf & Dumb v. N.C. Inst. for the Deaf, Dumb & Blind, 23 S.E. 171, 172 (N.C. 1895).

<sup>201</sup> *See* TYSON, *supra* note 198, at 282–85; FONER, *supra* note 183, at 283–84 (citing the North Carolina Union League chapter as exemplifying the “remarkable degree of interracial harmony” that existed within some local leagues).

<sup>202</sup> FONER, *supra* note 183, at 344, 427–31 (describing reports from one North Carolina judicial district of murders, rapes, arson, and hundreds of beatings in anti-Union League violence).

<sup>203</sup> *Id.* at 444.

<sup>204</sup> KORSTAD & LELOUDIS, *supra* note 188, at 11–12.

<sup>205</sup> *Id.* at 12.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

This “historic experiment in interracial democracy” came to an abrupt and violent end with the Wilmington massacre of 1898.<sup>208</sup> Part of a statewide and national white-supremacy movement, the 1898 revolution shackled the state with decades of Jim Crow rule.<sup>209</sup> At the time, Wilmington was North Carolina’s largest city and had an active and prosperous black majority.<sup>210</sup> Wilmington was also a Fusionist stronghold. But the depression of 1893 and blacks’ growing political and economic success stoked white resentment.<sup>211</sup>

Local whites plotted a violent resurgence.<sup>212</sup> Like their counterparts across the state and nation, they drew on nascent theories of social Darwinism and scientific racism to insist that “North Carolina is a *white man’s state*, and *white men* will rule it . . . .”<sup>213</sup> The media added fuel to the fire. In the run-up to the 1898 elections, newspapers put racist cartoons on the front page. Examples include a black vampire labeled “NEGRO RULE” emerging from a Fusionist ballot box to ensnare fleeing white victims in fearsome claws:<sup>214</sup>



On the eve of the 1898 election, Alfred C. Waddell, a former U.S. congressman, incited murder: “You are Anglo-Saxons. . . . You are armed and

<sup>208</sup> Cecelski & Tyson, *supra* note 46, at xiv.

<sup>209</sup> *Id.* at xiv–xv.

<sup>210</sup> WILMINGTON REPORT, *supra* note 104, at 35, 46–52; Michael Honey, *Class, Race, and Power in the New South: Racial Violence and the Delusions of White Supremacy*, in DEMOCRACY BETRAYED, *supra* note 46, at 174.

<sup>211</sup> See WILMINGTON REPORT, *supra* note 104, at 52.

<sup>212</sup> *Id.* at 52–53.

<sup>213</sup> Raymond Gavins, *Fear, Hope, and Struggle: Recasting Black North Carolina in the Age of Jim Crow*, in DEMOCRACY BETRAYED, *supra* note 46, at 188.

<sup>214</sup> *Election 1898 Political Cartoons in the News & Observer*, UNIV. OF N.C., <http://www2.lib.unc.edu/ncc/1898/sources/cartoons/0927.html> (last visited Apr. 3, 2014) (image entitled *The Vampire That Hovers Over North Carolina*); see also *id.* (images entitled *Remember!* and *A Warning. Get Back! We Will not Stand It*).

prepared . . . [I]f you find the negro out voting, tell him to leave the polls, and if he refuses, kill him.”<sup>215</sup> Across the state, the Klan and the Red Shirts—organized gangs of working-class whites—used rifles and shotguns to turn the election.<sup>216</sup> The Wilmington faction issued a “White Declaration of Independence,” destroyed the local black newspaper, and began killing “every damn nigger in sight.” Estimated death tolls range from 9 to 300 or more.<sup>217</sup> All elected Fusionist leaders were forced to resign at gunpoint, marched to the train station, and banished from the city.<sup>218</sup> Local Christian pastors praised the homicidal violence as “God’s service”<sup>219</sup> and “a mere incident,” reasoning that “[y]ou cannot make an omelet without breaking an egg.”<sup>220</sup>

### C. Resurgent White Supremacy

With the Democrat white-supremacist takeover complete, statewide regulations soon disenfranchised blacks, barred them from jury service, and replaced previously common patterns of integrated housing with systematic apartheid that “thoroughly ‘sorted’ along lines of race and class.”<sup>221</sup> Support for black schools dropped from parity to fifty-four cents on the dollar.<sup>222</sup> A key booster of the Red Shirt revolution, *Raleigh News & Observer* publisher Josephus Daniels, celebrated such developments as “permanent good government by the party of the White Man.”<sup>223</sup> The new governor, Charles Brantley Aycock, explained that the rule of law required the “white man’s party . . . [to] disfranchise the negro . . . while we work out the industrial, commercial, intellectual and moral development of the State.”<sup>224</sup>

That working out has taken some time. Half a century later, black veterans of World War II came home intent on a “double-V” campaign to defeat oppression at

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<sup>215</sup> Glenda E. Gilmore, *Murder, Memory, and the Flight of the Incubus*, in DEMOCRACY BETRAYED, *supra* note 46, at 84–85.

<sup>216</sup> A. Leon Higginbotham, Jr. et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1606–07 (1994).

<sup>217</sup> Timothy B. Tyson, *The Ghosts of 1898: Wilmington’s Race Riot and the Rise of White Supremacy*, RALEIGH NEWS & OBSERVER, Nov. 17, 2006, at 1A.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* (quoting the Reverend J.W. Kramer).

<sup>220</sup> John Haley, *Race, Rhetoric, and Revolution*, in DEMOCRACY BETRAYED, *supra* note 46, at 209 (quoting Reverend Calvin S. Blackwell of Wilmington’s First Baptist Church).

<sup>221</sup> KORSTAD & LELOUDIS, *supra* note 188, at 17; Gavins, *supra* note 213, at 190–91.

<sup>222</sup> STEWART E. TOLNAY & E. M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930, at 84–85 n.57 (1995); KORSTAD & LELOUDIS, *supra* note 188, at 16.

<sup>223</sup> J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910, at 76 (1974); *see also* JOHN HALEY, CHARLES N. HUNTER AND RACE RELATIONS IN NORTH CAROLINA 214–15, 284 (George B. Tindall et al. eds., 1987).

<sup>224</sup> KORSTAD & LELOUDIS, *supra* note 188, at 14–15.

home as well as overseas.<sup>225</sup> As race riots exploded in other cities, Governor J. Melville Broughton warned against protests linked to racial integration. He chose an auspicious site to give his speech. At the mouth of the Cape Fear River in Wilmington—the same river that Red Shirt revolutionary Alfred Waddell had threatened to choke with black bodies—the governor reminded the crowd that “blood flowed freely in the streets of this city” in 1898 and might again if “agitators” did not cease efforts whose “ultimate conclusion would result only in a mongrel race.”<sup>226</sup>

Similar threatening references to the violent anti-Fusionist rebellion tainted North Carolina’s hotly contested Democratic primary race for the Senate in 1950. Willis Smith’s supporters attacked “bloc voting” (i.e., black voting) for incumbent Frank Porter Graham as a repeat of “THEIR REIGN not so many years ago” and as the looming return of “carpet-bag rule.”<sup>227</sup> Other flyers screamed, “WHITE PEOPLE WAKE UP BEFORE IT’S TOO LATE,” warning that a vote for Graham was a vote for “Northern political labor leaders” and “mingling of the races,” with blacks working in the same factories, eating in the same restaurants, riding the same public transit, studying in the same schools, and sleeping in hotels and hospitals “with you, your wife and daughters.”<sup>228</sup>

The civil rights era saw continued hardening of political rhetoric and action in North Carolina as in other parts of the nation. In the 1960 gubernatorial race, the campaign of segregationist candidate Beverly Lake vowed not to “sit idly by . . . and let the NAACP and other evil outside influences make a mockery of North Carolina . . . [and] our way of life.”<sup>229</sup>

By 1965, North Carolina had more Klan activity than any other state, with a larger dues-paying membership than Alabama and Mississippi combined.<sup>230</sup> North Carolina’s Klan has remained active in the late twentieth and early twenty-first centuries. In the 1980s, fifteen robed Klansmen gathered outside a county jail to

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<sup>225</sup> *Id.* at 22; see also Kari Frederickson, *World War II, White Violence, and Black Politics in V.O. Key Jr.’s Southern Politics*, in UNLOCKING KEY, *supra* note 178, at 39–46 (discussing how World War II was a critical event in the origins of the black freedom struggle).

<sup>226</sup> Timothy B. Tyson, *Wars for Democracy: African American Militancy and Interracial Violence in North Carolina During World War II*, in DEMOCRACY BETRAYED, *supra* note 46, at 253–54.

<sup>227</sup> Jonathan Gentry, *All That’s Not Fit to Print: Anticommunist and White Supremacist Campaign Literature in the 1950 North Carolina Democratic Senate Primary*, 82 N.C. HIST. REV. 33, 48–49 (2005) (emphasis in original).

<sup>228</sup> KORSTAD & LELOUDIS, *supra* note 188, at 26 (emphasis in original). In turn, flyers supporting Graham warned that Smith’s election would return white workers to twelve-hour days at pennies per hour and lead to reinstatement of child labor. *Id.* at 27; see also Gavin Wright, *Cheap Labor and Southern Textiles, 1880–1930*, 96 Q. J. ECON. 605, 609–611 tbs.I, II & III (1981) (documenting use of child labor in North Carolina textile mills between 1880 and 1920); *id.* at 607, 626–29 (attributing industry decline to “dramatic increase in real wage costs” with decline of child labor).

<sup>229</sup> Gene R. Nichol, *Bill Aycock and the North Carolina Speaker Ban Law*, 79 N.C. L. REV. 1725, 1727–28 (2001).

<sup>230</sup> GREENSBORO TRUTH & RECONCILIATION COMM’N, FINAL REPORT 101 (2006), available at [http://www.greensborotrc.org/pre1979\\_kkk.pdf](http://www.greensborotrc.org/pre1979_kkk.pdf).

offer the \$50,000 bond for a black man charged with raping a white victim.<sup>231</sup> A local pastor spoke out publicly against the Klan.<sup>232</sup> A cross was burned on his lawn, and nineteen shots were fired into the home where he and his family were sleeping.<sup>233</sup> When Klansmen killed five anti-Klan protesters in Greensboro, all-white juries acquitted the charged defendants.<sup>234</sup> More recent strange fruit includes an Imperial Wizard's May 2012 homage to "white unity" at a cross-burning and new-member induction ceremony near the small town of Harmony, North Carolina.<sup>235</sup>

Of course, such conduct is not confined to North Carolina,<sup>236</sup> nor to the South.<sup>237</sup> But it was one of North Carolina's Supreme Court justices who observed during lynching's twentieth-century heyday that "the Lynch law of our country has a very ancient and respectable pedigree."<sup>238</sup> In the same era, the state's chief justice expressly and repeatedly urged speedier judicially sanctioned executions as a cure for lynching.<sup>239</sup> At the time, North Carolina tracked trends around the

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<sup>231</sup> Ashley Halsey, *In N.C., the Klan's Cry of 'White Power' is Growing Louder*, PHILADELPHIA INQUIRER, Aug. 24, 1984, at A1.

<sup>232</sup> *Id.*

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

<sup>234</sup> GREENSBORO TRUTH & RECONCILIATION COMM'N, EXECUTIVE SUMMARY OF FINAL REPORT 2, [http://www.greensborotrc.org/exec\\_summary.pdf](http://www.greensborotrc.org/exec_summary.pdf). In contrast, a few years later capital juries spared two white defendants from the death penalty despite their openly racist crimes of hunting down and executing a black couple to earn coveted spider tattoos. *Second Ex-Paratrooper Gets Life in North Carolina Racial Killings*, N.Y. TIMES, May 13, 1997, at A17, available at [http://www.nytimes.com/1997/05/13/us/second-ex-paratrooper-gets-life-in-north-carolina-racial-killings.html?ref=michael\\_james](http://www.nytimes.com/1997/05/13/us/second-ex-paratrooper-gets-life-in-north-carolina-racial-killings.html?ref=michael_james).

<sup>235</sup> *KKK Hold Rally in NC Town of 600*, WFMY NEWS (May 27, 2012, 8:02 AM), <http://www.digtriad.com/news/watercooler/article/230081/176/KKK-Hold-Rally-In-NC-To-wn-Of-600> [hereafter *KKK Hold Rally*]; cf. STRANGE FRUIT (California Newsreel 2002) (linking history of lynchings with Klan rallies in the writing and popularization of jazz classic).

<sup>236</sup> See *Virginia v. Black*, 538 U.S. 343, 349 (2003) (discussing incidents of cross burning and defendants' threats to "take a .30/.30 and just random[ly] shoot the blacks" (alteration in original)).

<sup>237</sup> See, e.g., Kathy Lynn Gray, *Man Gets 30 Days for Burning Cross*, COLUMBUS DISPATCH (June 22, 2012, 10:21 AM), <http://www.dispatch.com/content/stories/local/2012/06/22/man-gets-30-days-for-burning-cross.html> (discussing federal sentencing for Ohio cross burning).

<sup>238</sup> *State v. Lewis*, 55 S.E. 600, 610 (N.C. 1906) (Brown, J., dissenting) (quoting "[a] most interesting writer in the American Law Register, Mr. John Marshall Gest"). Justice Brown would have affirmed the trial court's quashing of the indictment on the basis that lynching was neither a common-law nor a statutorily defined offense. *Id.* at 610–11.

<sup>239</sup> E.g., *State v. Neville*, 95 S.E. 55, 59 (N.C. 1918); *State v. Cameron*, 81 S.E. 748, 751 (N.C. 1914); *State v. Cole*, 44 S.E. 391, 397, 399 (N.C. 1903) (Clark, C.J., dissenting); *State v. Rhyne*, 33 S.E. 128, 135–36 (N.C. 1899) (Clark, C.J. dissenting); see also Walter Clark, *True Remedy for Lynch Law*, 28 AM. L. REV. 801, 806 (1894) ("To have [a deterrent] effect the punishment must be prompt and certain whenever guilt is clear beyond all reasonable doubt. This principle which is so often ignored by the courts is the one which instinctively actuates lynching mobs."). But see *Neville*, 95 S.E. at 60 (Brown, Walker, Hoke, and Allen, JJ., concurring) (finding "no unreasonable delay" in processing North

country in that nearly 90% of the state's 168 recorded lynchings between 1865 and 1941 victimized blacks,<sup>240</sup> with at least twenty-five black men lynched between 1900 and 1918 alone.<sup>241</sup> In North Carolina, as elsewhere, the line separating court-sanctioned executions from extralegal vigilantism often blurred.<sup>242</sup>

#### *D. Race, Class, Labor, and the War on Poverty*

North Carolina's racially imbalanced application of state-sanctioned and private violence devolved in an economy dependent on low-cost labor. After the 1898 white supremacist revolution, the state's textile and tobacco industries began a period of explosive growth. Most nonfactory workers were sharecroppers.<sup>243</sup> And, as reflected in the "WHITE PEOPLE WAKE UP" flyer, factory work was considered "whites only" for decades, particularly in the textile industry.<sup>244</sup>

The tobacco industry was integrated, but shop foremen were white and the dirtiest work was reserved for African American employees. Black tobacco workers engaged in significant union organizing; ensuing self-education projects and voter drives shifted the balance in some local elections. Occasionally there was some interracial cooperation within and across these movements.<sup>245</sup>

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Carolina's criminal cases and claiming that "there are few, if any, states in the Union where they are more rapidly disposed of."); *Cameron*, 81 S.E. at 752 (Allen, Walker, Brown, and Hoke, JJ., concurring) (discounting allegations of delayed justice); Joseph Edwin Proffit, *Lynching: Its Cause and Cure*, 7 YALE L.J. 264, 264-67 (1898) (criticizing the idea that expedient justice requires mob rule). Chief Justice Clark's concerns about delay were not idiosyncratic; decades later, then-Associate Justice William Rehnquist also promoted court-ordered executions as a bulwark against "anarchy . . . self-help, vigilante justice, and lynch law." *Coleman v. Balkcom*, 451 U.S. 949, 961 (1981) (Rehnquist, J. dissenting from the denial of certiorari) (internal quotation marks omitted).

<sup>240</sup> VANN R. NEWKIRK, *LYNCHING IN NORTH CAROLINA: A HISTORY, 1865-1941*, app. II at 167-70 (2009).

<sup>241</sup> Raymond Gavins, *The NAACP in North Carolina During the Age of Segregation*, in *NEW DIRECTIONS IN CIVIL RIGHTS STUDIES* 105, 106-07 (Armstead L. Robinson & Patricia Sullivan eds., 1991) [hereinafter *NEW DIRECTIONS*].

<sup>242</sup> See generally *State v. Newsome*, 143 S.E. 187 (N.C. 1928); JAMES ELBERT CUTLER, *LYNCH-LAW: AN INVESTIGATION INTO THE HISTORY OF LYNCHING IN THE UNITED STATES* 264 (1905) (describing a coroner's condoning of lynching as the act of "good citizens" defending their "homes, wives [and] daughters"). Much constitutional criminal procedure developed along the boundary between legal and extralegal violence, typically in racially charged cases with low-income defendants. See, e.g., *Brown v. Mississippi*, 297 U.S. 278, 281-85, 287 (1936) (vacating black defendants' capital murder convictions in the "so-called trial" after confessions were obtained through partial lynching and whippings); *Powell v. Alabama*, 287 U.S. 45, 49-52, 72-73 (1932) (finding that the denial of counsel violated due process in one-day capital trials of black males charged with raping white women in the context of "tense, hostile and excited public sentiment").

<sup>243</sup> See, e.g., KORSTAD & LELOUDIS, *supra* note 188, at 100-01.

<sup>244</sup> *Id.* at 17.

<sup>245</sup> See *id.* at 22; HERBERT J. LAHNE, *THE COTTON MILL WORKER* 233-34 (1944) (discussing the Communist-backed National Textile Workers Union making "no concessions to Southern prejudice on race"); Robert Korstad & Nelson Lichtenstein, *Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement*, 75

But labor organizing hit the skids repeatedly in North Carolina. Milder union-busting tactics in 1900 included owners closing mills, company stores, and housing to union members. Workers were blacklisted and their families left homeless, without “provisions [or] contact with the outside world, for the post office was in the company store.”<sup>246</sup> In 1929, strikes were crushed in violent melees that led to criminal convictions of union workers and *nolle prosequi* decisions or acquittals for those accused of attacking or killing strikers.<sup>247</sup> The latter group of defendants often comprised local sheriffs’ deputies or state National Guardsmen.<sup>248</sup>

That antiunion fervor was formalized in 1947, as North Carolina pioneered “right to work” statutes that criminalized “closed shop” agreements between business and labor.<sup>249</sup> In 1949, the U.S. Supreme Court gave those laws a constitutional stamp of approval.<sup>250</sup> Thereafter the Congress of Industrial Organizations mounted an aggressive seven-year organizing campaign called “Operation Dixie”—but deliberately retreated from previously active recruitment across racial lines. Ultimately antiunion regulations, the segregated workforce, tensions between the black laboring and middle classes, and the real and imaginary links between unions and the Communist Party combined to hinder the development of organized labor in North Carolina.<sup>251</sup>

The War on Poverty hit similar walls in the 1960s. As in the earlier Progressive and Fusion eras, there was some significant cooperation across color lines. Striking examples of such cooperation include the actions of Klan leaders Lloyd Jacobs and C.P. Ellis. Jacobs, an ex-convict, recruited NAACP members, student activists, and low-income people to join him in protesting prison conditions through an organization called the North Carolina Justice Committee.<sup>252</sup> Ellis was a vocal opponent of school integration, the civil rights movement, and War on Poverty efforts to aid blacks. He was astonished to be elected cochair of a community council responsible for creating a school desegregation plan—particularly because he shared the role with black activist Ann Atwater. Until then, Ellis and Atwater had only “cussed each other, bawled each other, [and] hated each

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J. AM. HIST. 786, 788–93 (1988) (discussing union drive by black workers in Winston-Salem).

<sup>246</sup> LAHNE, *supra* note 245, at 186–87.

<sup>247</sup> *Id.* at 216–21.

<sup>248</sup> *Id.* at 216–21, 227, 230–31.

<sup>249</sup> H.B. 229, 1947 Gen. Assemb., Reg. Sess. (N.C. 1947) (codified at N.C. GEN. STAT. §§ 95-78 to -84 (2011)).

<sup>250</sup> *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 527–29 nn.1–3, 537 (1949) (affirming *State v. Whitaker*, 45 S.E.2d 860 (N.C. 1947)).

<sup>251</sup> KORSTAD & LELOUDIS, *supra* note 188, at 28–29, 168–69; *see also* LAHNE, *supra* note 245, at 216–21 (discussing violence against Communist-backed and non-Communist union workers and organizers); Risa Lauren Goluboff, “*Let Economic Equality Take Care of Itself*”: *The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 UCLA L. REV. 1393, 1422–27 (2005) (discussing the NAACP’s waxing and waning interests in the black labor movement); Korstad & Lichtenstein, *supra* note 245, at 801–06 (discussing class tensions and the role of NAACP and Urban League in the rise and fall of union drive by black workers in Winston-Salem).

<sup>252</sup> KORSTAD & LELOUDIS, *supra* note 188, at 315–16.

other.”<sup>253</sup> But when forced into a working relationship with Atwater, Ellis found “a whole world was opening up” and that he “was learning new truths that [he] had never learned before.”<sup>254</sup> Among other things, he realized that structural disadvantages “shut out” low-income people of all races from economic and political opportunity.<sup>255</sup>

But such interracial, intraclass cooperation remained rare and evanescent, as were attempts to fulfill demands for maximum feasible participation (MFP) by low-income people in designing and overseeing poverty-reduction programs. Congress incorporated MFP requirements into legislation such as the Economic Opportunity Act (EOA) and the Model Cities Act.<sup>256</sup> The MFP mandate was modeled on the North Carolina Fund (the “Fund”). This novel approach to antipoverty advocacy was initially supported by state and national philanthropic foundations. Only later, after the EOA was crafted to follow the Fund’s model, did the Fund distribute federal dollars.<sup>257</sup>

Professor Tara Melish focuses blame for the demise of the EOA’s MFP mandate—and for much of the antipathy toward the War on Poverty—on the “increasingly belligerent, extreme, and confrontational demands” of welfare rights activists for resource redistribution.<sup>258</sup> Professors Robert R. Korstad and James L. Leloudis describe a more complex set of tensions at work in North Carolina. Their research shows that MFP drew consistent fire from the outset as white supremacists, farm and business owners, local governments, and nonprofits—with varied motives—resisted the mandate, finding it a direct challenge to their power and authority.<sup>259</sup>

Such reactions, as well as the Fund’s deliberately limited time span, cabined antipoverty and racial justice work in North Carolina. The movements took another hit when new federal tax laws restricted philanthropic foundations from supporting work that could be construed as political (including education and organization involving voter registration drives) and made the restrictions enforceable through large monetary fines against not only the foundations but also their employees and board members.<sup>260</sup> The triple whammy landed with elimination, reallocation, and privatization of governmental support programs for poor people in the 1990s.<sup>261</sup>

Thus, even before the 2008 recession, North Carolina consistently ranked among the lowest ten states, near Texas and Mississippi, for per-pupil spending on

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<sup>253</sup> *Id.* at 317.

<sup>254</sup> *Id.* at 317–18.

<sup>255</sup> *Id.* at 316–18.

<sup>256</sup> *Id.* at 166–67, 306, 340–41.

<sup>257</sup> *Id.* at 82–92, 166–67, 172–73.

<sup>258</sup> Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21<sup>st</sup> Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1, 59–68 (2010).

<sup>259</sup> KORSTAD & LELOUDIS, *supra* note 188, at 172–73.

<sup>260</sup> *Id.* at 328–35.

<sup>261</sup> *Id.* at 252–53; *see also* Bach, *Governance*, *supra* note 92, at 243–50 (describing effects of 1996 federal welfare reform that limited welfare assistance, and discussing some responsive poverty-reduction efforts).

public education.<sup>262</sup> Conversely, the state ranked sixteenth and fourteenth for highest overall and child-poverty rates, respectively, among the states.<sup>263</sup> These rates spike in several urban and rural areas and are sharply skewed by race and ethnicity.<sup>264</sup> For example, the median net worth of minority to white households in the state is fourteen cents on the dollar.<sup>265</sup> To translate these numbers into the civil legal setting, approximately 80% of the low-income population that is eligible for and in need of legal services has no access to an attorney.<sup>266</sup> The state ranks thirtieth in support for civil legal services; Florida invests twice as much and Maryland three times as much in services per eligible client.<sup>267</sup> As another point of comparison, while there is one attorney for every 442 North Carolinians, the legal aid attorney-client ratio is one to 15,500.<sup>268</sup>

In addition, conservative populism retains deep and vibrant roots in North Carolina. Recent developments are typical of national trends. In 2010, millions of dollars from inside and outside the state were targeted to seat the first Republican-majority North Carolina General Assembly since Reconstruction.<sup>269</sup> The state legislature promptly began to cut taxes and spending,<sup>270</sup> and enacted what one expert called “the largest and most restrictive” cluster of voting regulations since passage of the federal Voting Rights Act fifty years ago.<sup>271</sup> Those initiatives track

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<sup>262</sup> Compare U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES: 2008, at 8 tbl.8 (2010) (showing only six states with less per-pupil spending), available at <http://www2.census.gov/govs/school/08f33pub.pdf>, with U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES: 2010, at 8 tbl.8 (2012) (same), available at <http://www2.census.gov/govs/school/10f33pub.pdf>.

<sup>263</sup> GENE NICHOL & HEATHER HUNT, CTR. ON POVERTY, WORK, AND OPPORTUNITY, UNIV. OF N.C. AT CHAPEL HILL, DOCUMENTING POVERTY, ECONOMIC DISTRESS AND CHALLENGE IN NORTH CAROLINA: A REPORT FOR THE Z. SMITH REYNOLDS FOUNDATION 11 (2010), available at [http://www.law.unc.edu/documents/poverty/publications/documentingpoverty\\_finalreport.pdf](http://www.law.unc.edu/documents/poverty/publications/documentingpoverty_finalreport.pdf).

<sup>264</sup> *Id.* at 11–14.

<sup>265</sup> *Id.* at 14.

<sup>266</sup> N.C. EQUAL ACCESS TO JUSTICE COMM’N, INITIAL REPORT 8 (2008), available at <http://www.ncequalaccesstojustice.com/wp-content/uploads/2009/07/fullsummitreport.pdf>.

<sup>267</sup> *Id.* at 14.

<sup>268</sup> *Id.* at 22.

<sup>269</sup> See *Final REDMAP Report*, REDISTRICTING MAJORITY PROJECT (Dec. 21, 2010, 2:54 AM), <http://www.redistrictingmajorityproject.com/?p=638> (citing new “control” of state legislatures as the greatest partisan success “in modern history”); cf. Jane Mayer, *State for Sale: A Conservative Multimillionaire Has Taken Control in North Carolina*, NEW YORKER (Oct. 10, 2011), [http://www.newyorker.com/reporting/2011/10/10/111010fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2011/10/10/111010fa_fact_mayer) (detailing strategies behind political victories in 2010 in North Carolina).

<sup>270</sup> See, e.g., Dan Kane, *A New Loophole For Businesses Will Cost State \$336 Million a Year*, RALEIGH NEWS & OBSERVER (June 3, 2012), <http://www.newsobserver.com/2012/06/03/2105416/a-new-loophole-for-businesses.html> (finding that tax breaks for businesses equaled salaries and benefits for 6,400 laid-off state employees, including 900 teachers).

<sup>271</sup> Michael Gordon, *Fight Over NC’s Voting Laws: Is it Race, or Is It Politics?*, RALEIGH NEWS & OBSERVER (Oct. 19, 2013), available at <http://www.newsobserver.com/2013/10/19/3296978/voting-fight-is-it-race-or-is.html> (discussing complaint filed in *United States v. State of North Carolina*, No. 13-CV-861 (M.D.N.C. Sept. 30, 2013), available at

legal and political shifts occurring across the country.<sup>272</sup> As discussed below, the initiatives include resurgent “tough on crime” rhetoric and legislation that threatens North Carolina’s improbable role as a criminal justice reform pioneer.

#### IV. REFORM, REACTION, AND RESILIENCE: AN UNLIKELY CONSTELLATION OF CUTTING-EDGE CRIMINAL JUSTICE REFORMS

North Carolina’s complex and often violent history makes the state a surprising site for cutting-edge criminal justice reforms, which this Part sorts into three categories. The first involves “innocentric” efforts to identify and reduce wrongful convictions. The second targets efficiency and cost reduction. These reforms are laudatory. Several directly redress power disparities that undermine system fairness, reliability, and legitimacy. But it is the third category of reform that more directly addresses the democracy deficit at the intersection of crime, race, and poverty.

This category includes early intervention programs such as Nurse-Family Partnership (NFP) programs, which are designed at least in part to increase capacities for resilience and self-governance and to reduce criminal offending and victimization. Within the machinery of the criminal justice systems, two examples are North Carolina’s Indigent Defense Services system and the state’s Racial Justice Act. The former strengthens a defendant’s role and voice in case processing, and the latter vindicated the rights of black jurors to participate in capital cases.

The foregoing categorization of North Carolina’s reforms is not hard and fast; motivations for these reforms overlap and vary. Their abilities to withstand reaction and repeal are also mixed.

##### A. *Innocentric Reforms*

As indicated in the Introduction, the experiences of Inhofe and Stevens are linked to Thompson’s by a single factor: the need of an accused to access the prosecuting authority’s investigative file in order to mount a full and fair defense. Prior scholarship describes North Carolina’s pioneering full open-file discovery reform.<sup>273</sup> That reform is a broadly democracy-enhancing tool. As Inhofe realized when “it happened to [him],”<sup>274</sup> access to that information helps to level the playing field between a defendant and the concentrated power of a charging and prosecuting authority.

Full open-file discovery cannot compensate for prosecutors’ superior investigative resources and ability to select the number and level of charges against a particular defendant. But access to the full investigative file can empower

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[http://www.justice.gov/usao/nm/news/2013/20130930\\_US\\_v\\_NC.pdf](http://www.justice.gov/usao/nm/news/2013/20130930_US_v_NC.pdf), which challenges voting restrictions imposed by, for example, N.C. GEN. STAT. §§ 163 to 166.13-14 (2013)).

<sup>272</sup> See WENDY WEISER & DIANA KASDAN, BRENNAN CTR. FOR JUSTICE, VOTING LAW CHANGES: ELECTION UPDATE 2–3 (2012), available at [http://www.brennancenter.org/sites/default/files/legacy/publications/Voting\\_Law\\_Changes\\_Election\\_Update.pdf](http://www.brennancenter.org/sites/default/files/legacy/publications/Voting_Law_Changes_Election_Update.pdf).

<sup>273</sup> See Moore, *supra* note 13, at 1371–86.

<sup>274</sup> Lowy, *supra* note 1.

defendants to exercise a greater level of autonomy. A defendant's decision to enter a plea or exercise the right to trial is more likely to be fully informed and voluntary when the defendant knows the strengths and weaknesses of the state's case. In the minority of cases that go to trial, full open-file discovery helps to ensure that the defendant's voice is heard through the full and fair airing of the evidence. Fact finders, who speak for the community either as elected judges in bench trials or as jurors exercising a quintessentially democratic check on concentrated government power, are likewise more fully able to undertake deliberations with confidence and issue reliable judgments. Thus, discovery reform enhances democracy while simultaneously promoting efficiency and finality of case processing and verdicts.<sup>275</sup>

Full open-file discovery also spun off additional pioneering reforms in North Carolina. Newly opened prosecution files revealed still more wrongful convictions in a number of high-profile cases.<sup>276</sup> Two types of responsive innocent reforms bolstered full open-file mandates by seeking to prevent erroneous convictions. First, the state pioneered the creation of an independent Innocence Inquiry Commission to investigate and correct wrongful convictions.<sup>277</sup> Second, North Carolina joined the minority of states undertaking reform of forensic investigation procedures.

### 1. *The Innocence Commission*

North Carolina's Innocence Inquiry Commission (IIC) is the only state agency in the country with the authority to refer prisoners with colorable innocence claims to court for potential exoneration and release.<sup>278</sup> As was the case with mandatory statewide full open-file discovery reform, implementation of the new IIC statutes led to another spate of high-profile exonerations.<sup>279</sup>

There also was predictable pushback. Prosecutors unsuccessfully sought to bar IIC claims by prisoners who plead guilty or no contest, to restrict sources of IIC referrals, to expand prosecutors' adversarial participation in IIC proceedings, and to trim witness immunity protections.<sup>280</sup> The legislature rejected these

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<sup>275</sup> See Moore, *supra* note 13, at 1371–72, 1377.

<sup>276</sup> *Id.* at 1379 & n.360.

<sup>277</sup> North Carolina Innocence Inquiry Commission Act, N.C. GEN. STAT. §§ 15A-1460 to -1475 (2011); see also Robert J. Norris et al., "Than That One Innocent Suffer": *Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301, 1355 tbl.5 (2011) (listing jurisdictions with innocence commissions and their dates of establishment).

<sup>278</sup> Samuel Wiseman, *Innocence After Death*, 60 CASE W. RES. L. REV. 687, 734 (2010).

<sup>279</sup> David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1049–53 (2010). The Commission received more than 1,300 claims from its inception in 2007 through April 2013 and closed 1,113 cases, leading to the release of four prisoners based on clear and convincing evidence of innocence. See *NC Innocence Inquiry Commission Case Statistics*, N.C. INNOCENCE INQUIRY COMM'N, <http://www.innocencecommission-nc.gov/stats.html> (last visited Apr. 3, 2014).

<sup>280</sup> H.B. 778, §§ 1–4, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011) (as referred to Judiciary Subcomm. B, Apr. 7, 2011), available at <http://www.ncleg.net/Sessions/2011/Bil>

proposals, but agreed to eliminate the IIC's discretion to exclude from its proceedings any crime victim whose presence "may interfere with the investigation[.]"<sup>281</sup> The legislature also restricted state compensation to IIC-exonerated prisoners who plead not guilty or no contest.<sup>282</sup>

Theoretically, these amendments marginally enhance individual voices vis-à-vis concentrated authority. Their practical effect is open to question. The first amendment helps to guarantee victims a place at the table. Increased transparency improves procedural justice. New information can change victims' perceptions about defendants' guilt.<sup>283</sup> But victims who are not called as witnesses or otherwise engaged by the IIC's investigation and review process may be frustrated by the real or perceived inability to shape the outcome. This limitation is driven by the uniquely nonadversarial structure of the IIC's investigative and first-tier decision-making processes.<sup>284</sup>

With respect to the second amendment, some defendants might strengthen either a pretrial innocence claim or plea bargaining position by pointing to the compensation exclusion as warranting concessions from the prosecution. But given the institutional pressures facing charged defendants,<sup>285</sup> including pressures on overloaded defense attorneys,<sup>286</sup> it is unlikely that many defendants will know that this exclusion is an automatic collateral consequence of any guilty plea. It is more likely that the exclusion will operate as intended: as completely barring compensation for anyone who pleads guilty but whom the IIC reveals to be a victim of wrongful imprisonment. Thus, the amendment exacerbates the power disparities that drive the plea process and yield wrongful convictions in the first place.

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ls/House/PDF/H778v1.pdf. The original statute allowed adversarial hearings before a three-judge panel in the multitiered process. N.C. GEN. STAT. § 15A-1469(c-d) (2011). The proposed amendment would have expanded that authority to earlier stages in the process. H.B. 778, § 3, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011).

<sup>281</sup> H.B. 778, § 6, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011) (codified at N.C. GEN. STAT. § 15A-1468(b) (2011)); *cf.* N.C. GEN. STAT. § 15A-1467(c) (2011) ("If a formal inquiry regarding a claim of factual innocence is granted, the Director shall use all due diligence to notify the victim in the case and explain the inquiry process. The Commission shall give the victim notice that the victim has the right to present his or her views and concerns throughout the Commission's investigation.").

<sup>282</sup> H.B. 778, § 11 2011 Gen. Assemb., Reg. Sess. (N.C. 2011) (codified at N.C. GEN. STAT. § 148-82(b) (2011)). It is unclear whether this amendment trumps the eligibility of any wrongfully imprisoned individual to seek state compensation after obtaining a gubernatorial pardon of innocence. *See* N.C. GEN. STAT. § 148-82(a) (2013).

<sup>283</sup> *See generally* JENNIFER THOMPSON-CANNINO ET AL., PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION (2009) (discussing the experiences of a rape victim and the defendant, who was wrongfully convicted because of the victim's mistaken eyewitness identification, but later exonerated).

<sup>284</sup> *See* Wolitz, *supra* note 279, at 1051-52.

<sup>285</sup> *See* Bibas, *supra* note 70, at 960-62.

<sup>286</sup> Moore, *supra* note 13, at 1026, 1058-62.

## 2. Forensic Science Reforms

Mounting evidence of wrongful convictions and exonerations also led the General Assembly to mandate improvements in eyewitness identification procedures that have been cited as the nation's "most comprehensive."<sup>287</sup> Addressing other predictable sources of error, the state mandated recordation of interrogations in felony cases,<sup>288</sup> along with the preservation of biological evidence for future testing.<sup>289</sup>

In 2011, North Carolina also joined a minority of states in reforming procedures governing its forensic science laboratory.<sup>290</sup> This reform followed a chilling indictment of national forensic capabilities by the National Academy of Sciences (NAS), which stated that

the existing legal regime—including the rules governing the admissibility of forensic evidence, the applicable standards governing appellate review of trial court decisions, the limitations of the adversary process, and judges and lawyers who often lack the scientific expertise necessary to comprehend and evaluate forensic evidence—is inadequate to the task of curing the documented ills of the forensic science disciplines.<sup>291</sup>

In addition to the NAS critique, North Carolina's Innocence Commission proceedings and other litigation revealed flaws in the qualifications, evaluations, and testimony of State Bureau of Investigation (SBI) forensic sciences staff. Among other things, previously unknown records demonstrated that SBI employees had provided biased or false testimony favoring the prosecution.<sup>292</sup>

Responsive legislation created an independent state-oversight authority and specified qualification and evaluation standards to increase transparency and accountability.<sup>293</sup> The full open-file discovery statutes were amended to specifically require disclosure not only of forensic test results but also of all underlying or preliminary notes and results.<sup>294</sup> Legislators also created the position of forensic science ombudsman, tasked to work with all stakeholders including "the general public to ensure all processes, procedures, practices, and protocols at the State Crime Laboratory are consistent with State and federal law, best forensic law practices, and in the best interests of justice in this State."<sup>295</sup>

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<sup>287</sup> Norris et al., *supra* note 277, at 1318.

<sup>288</sup> N.C. GEN. STAT. § 15A-211 (2011); *see also* Norris et al., *supra* note 277, at 1330–41 (discussing varying recordation requirements in the nineteen states that regulate interrogation).

<sup>289</sup> N.C. GEN. STAT. § 15A-268 (2011).

<sup>290</sup> *Id.* § 114-16.1.

<sup>291</sup> NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 85 (2009).

<sup>292</sup> Norris et al., *supra* note 277, at 1321–22.

<sup>293</sup> N.C. GEN. STAT. § 114-16.1 (2011).

<sup>294</sup> *Id.* § 15A-903(a)(1)(a) (2011).

<sup>295</sup> *Id.* § 114-16.2. The state Indigent Defense Services agency also created a Forensic Resource Counsel position to help defenders "understand[] and . . . challeng[e] the forensic

Despite demonstrated and systemic flaws in the SBI's forensic analysis department, North Carolina did not follow other states in creating an independent watchdog.<sup>296</sup> Instead, after passage of this reform legislation, a retired judge was appointed to clean house at the SBI lab.<sup>297</sup> An outside auditor tested all forensic workers for whom accreditation methods existed to determine their competence.<sup>298</sup> A number failed those tests.<sup>299</sup>

Significantly, prosecutors recognized this news as impeachment information, which they had a duty to provide to the defense under *Brady* and the state's full open-file discovery statutes. To the astonishment of many, the former judge in charge of the SBI's reformation refused to give prosecutors the test results of individual forensic examiners.<sup>300</sup> Instead of complying with *Brady*, the judge insisted that the information was protected by a personnel records exception.<sup>301</sup> The prosecutors subpoenaed the information, and the SBI was forced to reveal it.<sup>302</sup>

That remarkable turn in North Carolina's innocentric reforms may illustrate the long-term power of litigation and legislation to change the internal culture of prosecutorial offices.<sup>303</sup> These reforms also enhance democracy at the most granular level. They check government power, reduce opportunities for intentional and unintentional biasing of investigations toward the prosecution, and help level the playing field for an individual who is subject to a charge or investigation.

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science evidence" by providing a database of information about forensic experts as well as training programs, research updates, and "other resources to support litigation." See *Forensic Resources*, N.C. INDIGENT DEFENSE SERVS., <http://www.ncids.com/forensic/> (last visited Apr. 3, 2014).

<sup>296</sup> See Norris et al., *supra* note 277, at 1321–27, 1327 tbl.2; cf. Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 531–33 (2008) (citing Cincinnati's collaborative agreement as a model for participatory governance, oversight, and reform of policing).

<sup>297</sup> North Carolina Department of Justice, *Permanent Director Named for State Crime Lab* (Oct. 7, 2011), <http://www.ncdoj.gov/getdoc/56afaa4b-24e2-4b7a-a10a-552e36a92e13/Permanent-director-named-for-State-Crime-Lab.aspx>; Mandy Locke & Joseph Neff, *SBI Fights District Attorneys' Attempts to Learn About Failed Tests*, RALEIGH NEWS & OBSERVER (June 14, 2012), <http://www.newsobserver.com/2012/06/14/2137375/sbi-fights-district-attorneys.html>.

<sup>298</sup> Locke & Neff, *supra* note 297.

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

<sup>300</sup> Memorandum from Joseph John, Sr., on Forensic Scientist Certification to All Elected Dist. Attorneys and Staff 3 (June 13, 2012), available at [http://www.ncids.com/forensic/sbi/analyst\\_certification/2012-06-16\\_SBI\\_Memo.pdf](http://www.ncids.com/forensic/sbi/analyst_certification/2012-06-16_SBI_Memo.pdf) [hereinafter *June 13, 2012 Memo*]; Memorandum from Joseph John, Sr., on Forensic Scientist Certification to All Elected Dist. Attorneys and Staff (Jan. 13, 2012), available at [http://www.ncids.com/forensic/sbi/analyst\\_certification/2012-01-13\\_SBI\\_Memo.pdf](http://www.ncids.com/forensic/sbi/analyst_certification/2012-01-13_SBI_Memo.pdf) [hereinafter *January 13, 2012 Memo*]; Motion for Release of SBI Testing Information (June 12, 2012), available at [http://www.ncids.com/forensic/sbi/analyst\\_certification/2012-06-12\\_State's\\_Motion.pdf](http://www.ncids.com/forensic/sbi/analyst_certification/2012-06-12_State's_Motion.pdf).

<sup>301</sup> *June 13, 2012 Memo*, *supra* note 300; *January 13, 2012 Memo*, *supra* note 300.

<sup>302</sup> See, e.g., *In re Matter of the North Carolina State Crime Lab*, No. 12CRS0031, 2012 WL 3062033, at \*2–3 (June 14, 2012).

<sup>303</sup> See Moore, *supra* note 13, at 1333.

On the other hand, the wrongful conviction movement addresses only a tiny percentage of criminal cases.<sup>304</sup> As discussed below, with respect to the majority of cases involving guilty defendants, North Carolina also was early in creating a sentencing commission now viewed as “the exemplar of smart political and rational reform.”<sup>305</sup>

## B. Focusing on the Bottom Line

### 1. The Sentencing Commission and Justice Reinvestment

North Carolina’s sentencing commission is viewed as a model in part because it has the largest and most diverse membership of any sentencing commission in the country, ensuring that “[v]irtually every conceivable interest is represented.”<sup>306</sup> But the commission was not exemplary solely because of its structure. It was the “linchpin” connecting penal politics with a fiscal bottom line.<sup>307</sup> By fulfilling a legislative mandate to conduct impact analyses on pending legislation, the commission helped to reduce the state’s incarceration rate from the highest in the nation to near the national average.<sup>308</sup>

As discussed in Part II.B.2, convergent interests around cost cutting carry reformers only so far. In the 1980s, North Carolina faced significant increases in prison and jail populations, with correspondingly grim budget implications.<sup>309</sup> The commission did not stop North Carolina from riding the nationwide wave of budget-busting “three strikes” mandatory sentences.<sup>310</sup> As a result, North Carolina became one of seventeen states to participate in the Council of State Governments’ Justice Reinvestment initiative—again with predictably mixed results.

The original vision of justice reinvestment entailed redirection of money spent on criminal cases and incarceration to rebuild “the schools, healthcare facilities, parks, and public spaces [] of neighborhoods devastated by high levels of

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<sup>304</sup> Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1552–56 (2008).

<sup>305</sup> Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 782–83 (2005).

<sup>306</sup> *Id.* at 783.

<sup>307</sup> GOTTSCHALK, *supra* note 59, at 243; *see also* Wright, *Counting the Cost*, *supra* note 80.

<sup>308</sup> Wright, *Counting the Cost*, *supra* note 80, at 39. A recent law review article argued for fiscal impact statements but did not mention North Carolina’s exemplary role among jurisdictions that have required such analyses for years. *See* Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 646–48 (2012) (citing the United Kingdom as exemplar).

<sup>309</sup> On the contribution of the “nothing works” movement to increased incarceration rates and longer sentences, *see, for example*, Craig Haney, *Demonizing the “Enemy”*: The Role of “Science” in Declaring the “War on Prisoners,” 9 CONN. PUB. INT. L.J. 185, 204–14 (2010); Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 593–96 (2009).

<sup>310</sup> *See, e.g.*, *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (approving constitutionality of three-strikes sentencing); Robert Ward Shaw, Comment, *The States, Balanced Budgets, and Fundamental Shifts in Federalism*, 82 N.C. L. REV. 1195, 1205–06 (2004).

incarceration.”<sup>311</sup> But consistent with this grasstops-driven initiative in other states, North Carolina’s reinvestment focused instead on expanding surveillance and control of released prisoners through increased probation and parole oversight—albeit with “evidence-based” risk assessment protocols driving the categorization of people and programming.<sup>312</sup>

## 2. *Collateral Consequences*

North Carolina is also one of a handful of states to tackle the jungle of collateral consequences that block access to the jobs, housing, education, and transportation that released prisoners need to reintegrate successfully into their communities.<sup>313</sup> But the state has yet to follow the lead of other jurisdictions by eliminating collateral consequences outright or “banning the box” to limit potential employers’ access to applicants’ criminal histories.<sup>314</sup>

Instead, North Carolina joined the very small group of states that grant certificates of rehabilitation to people with convictions who meet specified criteria that predict successful reentry.<sup>315</sup> The corresponding state law also has been cited as a national model for limiting civil liability for employers who hire people with criminal records, should that hiring decision cause future harm.<sup>316</sup> Both of these mechanisms are viewed as reducing barriers to employment. Finally, the state is one of only two in the country to have constructed a collateral consequences database through which defendants and complaining witnesses as well as prosecutors, defense attorneys, and judges can become fully aware of the collateral costs and benefits of specific charges, plea offers, and sentences.<sup>317</sup>

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<sup>311</sup> Nkechi Taifa & Catherine Beane, *Integrative Solutions to Interrelated Issues: A Multidisciplinary Look Behind the Cycle of Incarceration*, 3 HARV. L. & POL’Y REV. 283, 298 (2009).

<sup>312</sup> Nancy LaVigne et al., *Justice Reinvestment Initiative State Assessment Report*, URBAN INST. & U.S. DEP’T OF JUSTICE 46 (2013) (documenting North Carolina’s nearly quintupled investment in probation and parole resources relative to treatment). N.C. GEN. STAT. § 15A-1343.2 (Supp. 2012); see also *North Carolina Overview*, JUSTICE CTR., COUNCIL OF STATE GOV’TS, <http://csgjusticecenter.org/jr/nc/> (last visited Apr. 3, 2014) (describing how the Council of State Governments Justice Center worked with North Carolina to develop the Justice Reinvestment Act of 2011); cf. Fan, *supra* note 308, at 633–34 (disclaiming “starry-eyed and egalitarian hope for reclamation of every soul” in favor of “data-driven,” cost-effective, and “culturally conscious” selection of participants and programs).

<sup>313</sup> Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 717–20, 724 (2012) (highlighting barriers and citing authorities).

<sup>314</sup> See *State Reforms Reducing Collateral Consequences for People with Criminal Records: 2011–12 Legislative Round-Up*, LEGISLATIVE UPDATE (ACLU/Crossroad Bible Inst./Sentencing Project, Nat’l Employment Law Project), Sept. 2012, at 2, available at <http://www.nelp.org/page/-/SCLP/2012/StateCollateralConsequencesLegislativeRoundupSept2012.pdf?nocdn=1> [hereinafter *Reducing Collateral Consequences*].

<sup>315</sup> Radice, *supra* note 313, at 723–24.

<sup>316</sup> *Reducing Collateral Consequences*, *supra* note 314, at 6 (discussing N.C. GEN. STAT. § 15A-173.5 (2011)).

<sup>317</sup> See Joel M. Schumm, *Padilla and the Future of the Defense Function*, 39 FORDHAM URB. L.J. 3, 3–4, 13 (2011). For Ohio’s collateral consequences database, see

*C. Class, Race, and Reform: NFP, IDS, and RJA*

*1. Human Beings and Citizens: Isomoiria and Democracy Enhancement*

The foregoing constellation of reforms addresses the mechanics of criminal justice systems as traditionally conceived. A democracy-enhancing theory of criminal law and procedure should address causal factors driving the disproportionate representation of low-income and minority individuals in criminal justice systems—whether as crime victims, offenders, or, as is too often the case, individuals with dual victim/offender identities. *Bannister* traces the cradle-to-prison pipeline that disproportionately funnels low-income African American children, particularly boys, from low literacy levels in racially and socioeconomically segregated early elementary school settings to dropping out in middle or early high school, then into juvenile systems and on to contact with criminal law and procedure as adults.<sup>318</sup>

Nobel Prize-winning economist and law professor James Heckman reports that early intervention programs divert those pipelines by empowering families to improve their own prenatal care, parenting and communication skills, health and nutrition, and literacy.<sup>319</sup> Available data indicate that these programs reduce the risk of offending while conserving increasingly scarce tax dollars.<sup>320</sup> Conversely,

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*Civil Impacts of Criminal Convictions Under Ohio Law*, CIVICC OHIO.ORG, <http://opd.ohio.gov/civicc> (last visited Apr. 3, 2014).

<sup>318</sup> See *United States v. Bannister*, 786 F. Supp. 2d 617, 628–45, 670–88 (E.D.N.Y. 2011); see also *Hinds Cnty. Sch. Dist. Bd. of Trs. v. R.B. ex rel. D.L.B.*, 10 So. 3d 387, 411–12 (Miss. 2008) (Graves, J., dissenting) (discussing the “school-to-prison pipeline” resulting from overzealous punishment of school-aged youth). For examples of the abundant “pipeline” literature, see Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the “School-To-Jail” Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633, 634–38, 662–67 (2011) (summarizing varying causal explanations for the pipeline and arguing that regression analysis reveals the causal role of racial bias in school disciplinary decision making); Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1338 n.255 (2011) (listing sources of pipeline data and analysis).

<sup>319</sup> Cf. James J. Heckman, *Skill Formation and the Economics of Investing in Disadvantaged Children*, SCI., June 30, 2006, at 1900–01 (arguing for skills acquisition as a priority for disadvantaged children). *But see* Holzer, *supra* note 85, at 15–20 (challenging Heckman’s “nothing works” critique of investing in adult human capital formation and emphasis on triaging scarce resources by diverting investments to early childhood development); Alan B. Krueger, *Inequality, Too Much of a Good Thing*, in JAMES J. HECKMAN & ALAN B. KRUEGER, *INEQUALITY IN AMERICA: WHAT ROLE FOR HUMAN CAPITAL POLICIES?* 1, 24–27, 60–61 (Benjamin M. Friedman ed., 2003) (critiquing exclusive focus on early intervention).

<sup>320</sup> Flavio Cunha et al., *Interpreting the Evidence on Life Cycle Skill Formation*, in 1 HANDBOOK OF THE ECONOMICS OF EDUCATION 697, 756 (Eric A. Hanushek & Finis Welch eds., 2006); Mark Soler et al., *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL’Y 483, 489–92 (2009) (describing metastudy analyses).

popular programs like D.A.R.E. (Drug Abuse Resistance Education) and Scared Straight appear to have no effect or may even cause harm.<sup>321</sup>

Heckman describes successful early intervention as investment in human capital. Those initiatives are as readily viewed as enhancing individual and community self-governance.<sup>322</sup> The related empirical data hold promise for a democracy-enhancing approach to criminal law and procedure. Democracy enhancement at those levels can reduce the risk of criminal justice involvement before the mill begins its crushing cycle of offense and victimization, arrest, charge, conviction, incarceration, reentry, and recidivism.<sup>323</sup>

As Professor Heckman explains, “Skill formation is a life cycle process. It starts in the womb and goes on throughout life. . . . [T]he traditional debate about nature versus nurture is scientifically obsolete.”<sup>324</sup> When these capacities develop early on, they simultaneously “raise[] skill attainment at later stages” and “facilitate[] the productivity of later investment.”<sup>325</sup> The mutually reinforcing relationship of these capacities frees early investment in human development of any “equity-efficiency trade-off.”<sup>326</sup>

A number of early-intervention programs have been tested over time in terms of their payoff in reducing the risk of criminal justice involvement.<sup>327</sup> One top-performing example is the Nurse-Family Partnership (NFP).<sup>328</sup> The program pairs a registered nurse with low-income, first-time mothers during pregnancy and for the first two years of the baby’s life.<sup>329</sup>

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<sup>321</sup> Soler et al., *supra* note 320, at 491–92.

<sup>322</sup> Cf. Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 433–34 (2006) (arguing for constitutional recognition that early caregiving is “essential to the development of those psychological capacities that are necessary to the maintenance and flourishing of our modern democratic polity”).

<sup>323</sup> See Forman, *supra* note 60, at 52 n.118 (arguing that “the state frequently squanders opportunities to intervene *before* adolescents become murderers”). Forman promotes improved educational opportunities, programs, and services for incarcerated youth and adults. *Id.* at n.119.

<sup>324</sup> Cunha et al., *supra* note 320, at 698.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*; see also Philip J. Cook et al., *School Crime Control and Prevention*, 39 CRIME & JUST. 313, 317, 377, 391 (2010) (“[T]his field is burdened by a lack of timely policy research and a tendency to launch major initiatives without first (or ever!) doing a high-quality evaluation.”); Soler, *supra* note 320, at 489–91 (describing testing methodology and results of Colorado’s Blueprints for Violence Prevention initiative).

<sup>328</sup> Soler, *supra* note 320, at 490; see also SHARON MIHALIC ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, BLUEPRINTS FOR VIOLENCE PREVENTION 1–20 (2004) (delineating criteria for selecting effective programing), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/204274.pdf>. Other highly effective model programs that are more resource intensive than the Nurse-Family Partnerships include Functional Family Therapy, Multisystemic Therapy, and Multidimensional Treatment Foster Care. *Id.* at 26–28.

<sup>329</sup> David L. Olds et al., *Taking Preventive Intervention to Scale: Nurse-Family Partnerships*, 10 COGNITIVE & BEH. PRAC. 278, 281–82 (2003). Further research is needed to determine the extent to which NFP’s commitment to voluntary and mutually respectful relationships between nurses and mothers prevents the degradation critiqued by Khiara M.

Economists at the RAND Corporation calculated that each dollar invested in NFP involvement with a high-risk family saves more than five dollars in social services, health care, and criminal justice expenditures.<sup>330</sup> One might fruitfully compare the economic impact of early intervention and prevention with the cost of processing criminal cases—the bulk of which are low-level misdemeanors.<sup>331</sup> Accounting solely for personnel and physical-plant investments, an estimate from one jurisdiction concluded that flooding courtrooms with these cases is the criminal justice equivalent of swamping intensive care units with nosebleeds—at a cost to taxpayers of approximately \$40,000 per hour.<sup>332</sup>

North Carolina has promoted NFP in association with a twenty-year-old state legislative initiative called Smart Start.<sup>333</sup> Established in 1993, Smart Start is a multipronged strategy to improve life outcomes by increasing low-income children's preparation for kindergarten. "We want to develop their brains. We want them to start school healthy and ready to learn," explained then-Governor Jim Hunt.<sup>334</sup> Because NFP is an evidence-based model, fidelity to program design and structure is a prerequisite for accreditation. North Carolina was approved to begin an NFP program in one county in 2000 and has since expanded to 10 of the state's 100 counties.<sup>335</sup>

That rate of expansion belies claims of social scientists that "the public is nearly universal in its support for early intervention—so much so that 'child saving' can be considered a core cultural belief."<sup>336</sup> Moreover, despite investing in early empowerment through Smart Start, and despite overall improving test scores, North Carolina still ranks fourth from the bottom among states for SAT scores.<sup>337</sup> The state also ranks second highest for teenage dropout rates.<sup>338</sup>

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Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 122 n.27 (2011).

<sup>330</sup> Lynn A. Karoly et al., *Many Happy Returns: Early Childhood Programs Entail Costs, but the Paybacks Could Be Substantial*, RAND REV., Fall 2005, at 10, 16–17.

<sup>331</sup> See generally ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009), available at [www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20808](http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20808) (arguing that the "explosive growth" of misdemeanor cases results in underrepresented misdemeanants and high tax costs).

<sup>332</sup> ELI BRAUN, OHIO JUSTICE & POL'Y CTR., \$42,000 FOR A COURTHOUSE HOUR: THE COST OF PROCESSING ADULT CRIMINAL CASES IN HAMILTON COUNTY OHIO 6 (2010), available at <http://www.ohiojpc.org/text/publications/court%20cost.pdf>.

<sup>333</sup> *Hunt Back for Smart Start*, RALEIGH NEWS & OBSERVER (Mar. 22, 2011), [http://www.newsobserver.com/2011/03/22/1071553\\_hunt-back-for-smart-start.html](http://www.newsobserver.com/2011/03/22/1071553_hunt-back-for-smart-start.html).

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

<sup>335</sup> M. Tina Markanda, *North Carolina Nurse-Family Partnership: Evidence-Based Nurse Home Visitation Program and Health Care Reform*, 71 N.C. MED. J. 302, 302–03 (2010).

<sup>336</sup> Frances T. Cullen et al., *Public Support for Early Intervention: Is Child Saving a "Habit of the Heart"?* 2 VICTIMS & OFFENDERS 109, 111 (2007).

<sup>337</sup> Tico A. Almeida, *Refocusing School Finance Litigation on At-Risk Children: Leandro v. State of North Carolina*, 22 YALE L. & POL'Y REV. 525, 528 (2004).

<sup>338</sup> *Id.* at 525, 527–28.

NFP designer David Olds also notes that the program grew during the economic boom years of the 1990s. He was prescient in predicting that continued support would be uncertain in harder times despite the fact that “it is during periods of economic stagnation and high unemployment that the program of this kind is needed most.”<sup>339</sup> Smart Start has come under repeated attack in recent years, including cuts to its \$300 million annual state funding. The 2008 economic crisis also did not spare the foundations that have supported North Carolina’s NFP programs from the outset.<sup>340</sup>

## 2. *Indigent Defense Services*

The “basic facts” linking poverty with harm to healthy human development are “increasingly well known.”<sup>341</sup> So too is the failure of “political will” in the United States “to invest in programs that work” and address the “moral scandal” of the highest child poverty rate in the Western industrialized world by bringing those rates in line with nations averaging “between one eighth and one half” that rate.<sup>342</sup> As these policy decisions feed predictable patterns of criminal victimization and offending, the public defender occupies a unique role in the struggle for expanded self-governance. This role’s “peculiar sacredness” derives from the duty to give voice to and vindicate the interests of the disproportionately low-income and minority individuals who face government prosecution.<sup>343</sup>

Despite recent attacks on its independence, North Carolina’s Indigent Defense Services (IDS) system remains relatively well positioned to fulfill this role. The state enjoys one of the better-developed public defender programs in the country. Four components of the state’s Indigent Defense Act have been critical. The first three fulfilled the American Bar Association’s *Ten Principles of a Public Defense Delivery System*, widely acknowledged as establishing best practice standards for structuring indigent defense.<sup>344</sup>

First, at the statutes’ inception, their express purpose prioritized quality of service and independence of counsel.<sup>345</sup> Second, that independence was secured through system governance by a relatively broad-based commission that was not

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<sup>339</sup> Olds et al., *supra* note 329, at 288.

<sup>340</sup> See *Hunt Back for Smart Start*, *supra* note 333 (describing 2011 budget negotiations and conservative criticism of Smart Start’s “wasting money” and “overpaid” leadership).

<sup>341</sup> J. Lawrence Aber et al., *The Impact of Poverty on the Mental Health and Development of Very Young Children*, in HANDBOOK OF INFANT MENTAL HEALTH 113, 113 (Charles H. Zeanah, Jr., ed., 2d ed. 2000).

<sup>342</sup> *Id.* at 124–25.

<sup>343</sup> See Moore, *supra* note 151, at 1055–56 & n.126 (quoting *Avery v. Alabama*, 308 U.S. 444, 447 (1940)).

<sup>344</sup> See AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2–3 (2002), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf).

<sup>345</sup> N.C. GEN. STAT. § 7A-498.1 (2011) (stating that the Act’s purpose is to “[e]nhance oversight” and “[i]mprove the quality . . . and . . . ensure the independence” of defense representation “in the most efficient and cost-effective manner without sacrificing quality representation”).

beholden to the executive, legislative, or judicial branches.<sup>346</sup> Third, that commission was empowered to establish and enforce detailed, statewide standards for qualification, training, and performance for attorneys in all indigent defense practice areas ranging from termination of parental rights to death penalty cases.<sup>347</sup>

Finally, and perhaps uniquely among jurisdictions in the United States, IDS has enjoyed relatively robust data collection, assessment, and research capacities.<sup>348</sup> Reports have tracked per-case costs, identified avenues for improving efficiency without sacrificing quality of service, and highlighted opportunities to obtain more effective criminal justice policies.<sup>349</sup> The IDS research division is the first in the nation to undertake broad-based, empirical examination of best practice standards for public defender training and performance.<sup>350</sup>

IDS also enhances client service through listserv and other web-based training and communication networks. These resources create communities of knowledge and support among lawyers in various specialty areas.<sup>351</sup> In addition to offering a rich intellectual, practical, and emotional resource for practitioners struggling with demanding caseloads, this communications network reciprocally helps IDS administrators respond to concerns of lawyers in the trenches.

In terms of more traditional exercises of oppositional politics, the statewide IDS communications network also keeps the public defense bar alert and responsive to pending legislative changes—but apparently with diminishing effect. For example, recent cost-cutting and “tough on crime” legislation requires low-bid contracting of public defense services, and transferred ultimate responsibility for evaluating quality of contract service from IDS to elected local judges.<sup>352</sup> The

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<sup>346</sup> See *id.* § 7A-498.4.

<sup>347</sup> *Id.* §§ 7A-498.5 to .6. For the full guidelines, see *IDS Standards and Performance Guidelines*, N.C. OFFICE OF INDIGENT DEFENSE SERVS., [http://www.ncids.org/Attorney/Standards\\_Guidelines.html?c=Information%20for%20Counsel,%20Standards%20And%20Performance%20Guidelines](http://www.ncids.org/Attorney/Standards_Guidelines.html?c=Information%20for%20Counsel,%20Standards%20And%20Performance%20Guidelines) (last visited Apr. 3, 2014).

<sup>348</sup> See N.C. GEN. STAT. § 7A-498.1 (2004) (stating the Act’s purpose includes “[g]enerat[ing] reliable statistical information in order to evaluate the services provided and funds expended”).

<sup>349</sup> See generally N.C. OFFICE OF INDIGENT DEFENSE SERVS., NORTH CAROLINA’S CRIMINAL JUSTICE SYSTEM: A COMPARISON OF PROSECUTION AND INDIGENT DEFENSE RESOURCES (2011), available at <http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/ProsecutionOfIndigentDefense.pdf>.

<sup>350</sup> MARGARET A. GRESSENS & DARRYL V. ATKINSON, N.C. OFFICE OF INDIGENT DEFENSE SERVS., THE CHALLENGE: EVALUATING INDIGENT DEFENSE—THE NORTH CAROLINA SYSTEMS EVALUATION PROJECT PERFORMANCE MEASURES GUIDE 4–6 (2012), available at [http://www.ncids.org/Systems%20Evaluation%20Project/Projects/PM\\_Guide.pdf](http://www.ncids.org/Systems%20Evaluation%20Project/Projects/PM_Guide.pdf). IDS also appears to be pioneering the role of Forensic Resource Counsel to train and assist defenders in understanding and challenging forensic science evidence. See *supra* note 295.

<sup>351</sup> *About the IDS Commission and the IDS Office*, N.C. OFFICE OF INDIGENT DEFENSE SERVS., <http://www.ncids.org/about.html> (last visited Apr. 3, 2014).

<sup>352</sup> Current Operations and Capital Improvements Appropriations Act of 2013, 2013 N.C. Sess. Laws 360, §§ 18A.4, available at <http://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S402v7.pdf> (mandating contracts with private counsel who can provide “services more efficiently than current costs and ensure that the quality of representation is sufficient to meet applicable constitutional and statutory standards,” with provider selection based

General Assembly also politicized the appointment of regional chief defenders by transferring that authority from IDS to elected local judges as well.<sup>353</sup>

As when prosecutors pushed proposals to weaken the state's pioneering criminal discovery reform statutes,<sup>354</sup> there was defense-led opposition to the amendment of these core IDS provisions. That opposition was ultimately thwarted, however. The legislature rejected amendments that would have maintained compliance with the ABA *Ten Principles* by requiring IDS to ensure that low-bid contracts provide quality representation and to retain authority over public defender appointments.<sup>355</sup>

### 3. *The Racial Justice Act*

As the foregoing discussion makes clear, few of North Carolina's cutting-edge reforms attack the roots of the concentrated disadvantage and democracy deficit that mark the intersection of race, crime, and poverty.<sup>356</sup> There are noteworthy exceptions, however. The president of the North Carolina Conference of District Attorneys has publicly "highlight[ed] a great social issue that has been years in the making and is bigger than any of us: race and justice and disproportionate minority contact with the criminal justice system."<sup>357</sup> Professors Marc Miller and Ronald Wright also note that the prosecutor in North Carolina's largest city was one of a select few in the nation to participate in an internal self-assessment designed to detect the influence of racial bias, whether implicit or conscious, in prosecutorial decision making.<sup>358</sup>

In addition, Professors Mosteller, Grosso, and O'Brien have highlighted the state's innovative Racial Justice Act (RJA). This legislation was the first in the nation to open meaningful avenues toward relief from capital prosecutions and

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solely on "cost-effectiveness" and with "[d]isputes regarding the ability of the potential contractor to provide effective representation . . . determined by the senior resident superior court judge for the district").

<sup>353</sup> *Id.* at § 18A.5(a) (amending N.C. GEN. STAT. § 7A-498.7(b)).

<sup>354</sup> See Moore, *supra* note 13, at 1341–44.

<sup>355</sup> The original bill required IDS to award contracts based solely on efficiency and cost effectiveness, and transferred authority from IDS to local judges both to resolve issues about quality and to appoint local public defenders. S.B. 402 §§ 18.A.4 to .5, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013), available at <http://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S402v2.pdf>. Defense advocates initially stripped those provisions from the bill. S.B. 402, §§ 18.A.1–3, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013), available at <http://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S402v4.pdf>. Two days later, the contracting requirement was back, but with IDS retaining final contracting authority and required to consider quality of representation as well as efficiency and cost effectiveness. S.B. 402, §§ 18.A.4, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013), available at <http://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S402v5.pdf>. That victory was partial and short lived, however. See *supra* notes 352–353.

<sup>356</sup> See Pratt & Cullen, *supra* note 38, at 378–79.

<sup>357</sup> Ben David, *Community-Based Prosecution in North Carolina: An Inside-Out Approach to Public Service at the Courthouse, on the Street, and in the Classroom*, 47 WAKE FOREST L. REV. 373, 375–76 (2012).

<sup>358</sup> Miller & Wright, *supra* note 80, at 162–63.

death sentences based on statistical evidence that race was a substantial factor in discretionary decision making by prosecutors and jurors.<sup>359</sup>

As these scholars explain, the RJA moved significantly beyond the limited constitutional protections against race bias afforded to prospective jurors by *Batson v. Kentucky*<sup>360</sup> and to capitally charged defendants under *McCleskey v. Kemp*,<sup>361</sup> in part by allowing defendants to prove the existence and effect of bias through statistical evidence.<sup>362</sup> Thus, the RJA also expanded upon the only prior statutory model from Kentucky.<sup>363</sup> Finally, the RJA was the first law of any kind to result in judicial findings, in *State v. Robinson*,<sup>364</sup> that a death penalty system was infected by the intentional, statewide, race-based discrimination by prosecutors against African Americans in jury selection.<sup>365</sup>

Two months after *Robinson*, the state legislature overrode a gubernatorial veto of amendments that gutted key RJA provisions.<sup>366</sup> Nevertheless, the *Robinson* findings were reinforced by a second RJA order vacating three more death sentences under the amended statutes.<sup>367</sup> The presiding judge again found that prosecutors had discriminated against prospective African American jurors on the basis of race.<sup>368</sup> Such discrimination, the court held, “is at war with our basic concepts of a democratic society and representative government.”<sup>369</sup> The court expressed hope that acknowledging “the ugly truth of race discrimination” in the selection of capital jurors would help to realize “our ideal of equal justice under the law.”<sup>370</sup>

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<sup>359</sup> See North Carolina Racial Justice Act, N.C. GEN. STAT. §§ 15A-2010 to -2012 (Supp. 2012). For an analysis of the legal and political history that led to the Racial Justice Act, see Kotch & Mosteller, *supra* note 193; Barbara O’Brien & Catherine M. Grosso, *Confronting Race: How a Confluence of Social Movements Convinced North Carolina to Go Where the McCleskey Court Wouldn’t*, 2011 MICH. ST. L. REV. 463, 496–98. For analysis of the statute’s application, see Robert P. Mosteller, *Responding to McCleskey and Batson: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 116–32 (2012).

<sup>360</sup> 476 U.S. 79 (1986).

<sup>361</sup> 481 U.S. 279 (1987).

<sup>362</sup> Mosteller, *supra* note 359, at 107–16; O’Brien & Grosso, *supra* note 359, at 467–76.

<sup>363</sup> See Olatunde C.A. Johnson, *Legislating Racial Fairness in Criminal Justice*, 39 COLUM. HUM. RTS. L. REV. 233, 238–44 (2007).

<sup>364</sup> *State v. Robinson*, No. 91-CRS-23143 (N.C. Super. Ct. Apr. 20, 2012), available at [https://www.aclu.org/files/assets/marcus\\_robinson\\_order.pdf](https://www.aclu.org/files/assets/marcus_robinson_order.pdf).

<sup>365</sup> *Id.* at 3, 70–71, 87–88, 95, 108, 160–67.

<sup>366</sup> An Act to Amend Death Penalty Procedure, S.B. 416, §§ 2–9, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011) (enacted) (codified as amended at N.C. GEN. STAT. §§ 15A-2004(b), 15A-2011 to -2012). *But see* Mosteller, *supra* note 359, at 105–06 (describing amendments as “less sweeping” than vetoed revisions “but [still] quite significant”).

<sup>367</sup> *State v. Golphin*, Nos. 97 CRS 47314–15, 98 CRS 34832, 30544, & 01 CRS 65079, at 2 (N.C. Sup. Ct. Dec. 13, 2012), available at [https://www.aclu.org/files/assets/tja\\_order\\_12-13-12.pdf](https://www.aclu.org/files/assets/tja_order_12-13-12.pdf).

<sup>368</sup> *Id.* at 5.

<sup>369</sup> *Id.* at 6 (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)).

<sup>370</sup> *Id.*; see also *id.* at 87–91 (discussing history of de jure and de facto exclusion of African Americans from jury service).

The RJA rulings constitute historic vindications of participatory democracy at the intersection of crime, race, and poverty. The rulings are noteworthy for other reasons as well. The court found, consistent with the first RJA order, that regression analysis revealed race-based disparate treatment of prospective jurors by prosecutors to be a significant factor in the imposition of the defendants' death sentences.<sup>371</sup> As required by the amended statute, the second RJA order was not based on statistical evidence alone.

Instead, the second RJA order was "based primarily on the words and deeds of the prosecutors" constituting "powerful evidence of race consciousness and race-based decision making."<sup>372</sup> The prosecution provided what the court found to be the most compelling evidence of the prosecutors' own intentional discrimination.

One prosecutor undercut the State's case by committing perjury during the RJA hearing itself.<sup>373</sup> Other prosecutorial "words and deeds" included a "Top Gun" training program sponsored by the state Conference of District Attorneys, which promoted strategies to avoid *Batson's* already weakly enforceable strictures against race-based peremptory strikes.<sup>374</sup> Prosecutors also offered what the trial court found to be "patently irrational, nonsensical" justifications for striking African Americans from venires. These included prospective jurors' military service, affiliation with the state government, and church attendance.<sup>375</sup>

Yet another set of prosecutorial "words and deeds" brings this discussion full circle by linking the RJA litigation with North Carolina's prior pioneering reform of full open-file discovery. These "words and deeds" comprised prosecutors' notes, which documented the consideration of race in the exercise of jury strikes against African Americans. The notes were "long buried in the case files and brought to light for the first time" at the RJA hearing.<sup>376</sup> They were not "brought to light" because prosecutors complied with the court's RJA discovery order, which required the information's disclosure to the defense. Instead, the information had been identified and preserved through a prior, independent defense investigation made possible by mandatory, statewide full open-file discovery statutes.<sup>377</sup>

The RJA rulings are hardly the end of this particular democracy-enhancement story. They came at a cost to murder victims' survivors who saw execution as just punishment despite the race-based elimination of prospective jurors.<sup>378</sup> In April

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<sup>371</sup> *Id.* at 136–201.

<sup>372</sup> *Id.* at 3, 112–20.

<sup>373</sup> *Id.* at 80.

<sup>374</sup> *Id.* at 4–5, 73–77.

<sup>375</sup> *Id.* at 121–24.

<sup>376</sup> *Id.* at 3; *see also id.* at 50 n.5 (stating that disappearance of prosecutor's notes from file "could easily be construed to support the inference that the State intentionally destroyed [them]" but declining to so find due to sworn testimony by local judges regarding the prosecutor's "excellent reputation for truthfulness and integrity").

<sup>377</sup> *See id.* at 47, 50 & n.5 (discussing 2006 investigation of postconviction counsel); *State v. Golphin*, Nos. 97 CRS 47314–15, 98 CRS 34832, 30544, & 01 CRS 65079, at 60–66 (N.C. Sup. Ct. Hearing Tp. Oct. 1, 2012) (discussing 2006 postconviction discovery procedure).

<sup>378</sup> *See* Angela Wright, *Emotional Response to RJA Verdicts*, CIVITAS REV. ONLINE (Dec. 14, 2012), <http://www.civitasreview.com/miscellaneous/emotional-response-to-rja-ve>

and October, 2013, respectively, the North Carolina Supreme Court granted the State's petitions for discretionary review of the orders vacating the death sentences under the RJA.<sup>379</sup> In June 2013, the RJA was repealed entirely and retroactively,<sup>380</sup> with the aim of speeding up state-sanctioned executions.<sup>381</sup>

#### D. Constellation Mapping and Circumspection

To map the foregoing constellation of laws and policies in North Carolina is to reveal cycles of reform, reaction, retrenchment, and repeal that warrant considerable circumspection. Other states may achieve similar or better outcomes through other means. North Carolina also has failed to fully exploit all available reform opportunities. A salient example relates to the nationally publicized decision of Governor Beverly Perdue to issue pardons of innocence for a group of civil rights and antipoverty activists known as "The Wilmington Ten."<sup>382</sup>

Perdue issued the pardons just before leaving office in January 2013, but the cases arose forty years earlier. The defendants were convicted of firebombing a white-owned grocery store in North Carolina's largest port city—the site of the infamous Wilmington Massacre during the white supremacy campaign of the 1890s.<sup>383</sup> The grocery store fire occurred amid protests over the closure of the local African American high school and dispersal of the black students to white schools.<sup>384</sup>

The cases of the Wilmington Ten, like other cases that ultimately motivated North Carolina's enactment of mandatory statewide full open-file criminal discovery,<sup>385</sup> involved years of postconviction litigation and a federal appellate court vacating the convictions based on *Brady* violations.<sup>386</sup> The Fourth Circuit reached the "inescapable" conclusion that the Wilmington Ten prosecutor knew his key witness committed perjury and suppressed the witness's contradictory prior statement from the defense (along with other material exculpatory evidence).<sup>387</sup>

Yet the taint of prior conviction and imprisonment still hung over the Wilmington Ten until Perdue issued the pardons of innocence. The governor's signing statement cited the recantation of prior witnesses as a reason for issuing the

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rdicts/ (describing the departure from the courtroom of the widow of murdered highway patrol Sergeant Ed Lowry and uniformed officers, who had filled "over three-fourths of the courtroom," as the judge read the order entitling the defendants to reduced sentences).

<sup>379</sup> *State v. Augustine*, 748 S.E.2d 318 (N.C. 2013); *State v. Robinson*, 366 N.C. 558 (2013). The author filed Brief for North Carolina Citizens Excluded From Jury Service Based on Race as Amici Curiae Supporting Defendant-Appellee, *Robinson*, 366 N.C. 558 (No. 411A94-5).

<sup>380</sup> 2013 N.C. Sess. Laws 154, § 5(a)–(d).

<sup>381</sup> *Id.* §§ 1–4.

<sup>382</sup> See, e.g., Valerie Bauerlein, *Full Pardon in 'Wilmington 10' Case*, WALL ST. J. (Jan. 1, 2013, 7:31 PM), <http://online.wsj.com/article/SB10001424127887323320404578216040822458954.html> (subscription required).

<sup>383</sup> See *supra* Part III.B.

<sup>384</sup> *Chavis v. North Carolina*, 637 F.2d 213, 215–16 (4th Cir. 1980).

<sup>385</sup> See Moore, *supra* note 13, at 1377–79.

<sup>386</sup> *Chavis*, 637 F.2d at 223–24.

<sup>387</sup> *Id.*

pardons. But the signing statement also emphasized newly discovered evidence that the prosecutor relied on race in jury selection.<sup>388</sup>

The governor decried the latter conduct as

utterly incompatible with basic notions of fairness and with every ideal that North Carolina holds dear. The legitimacy of our criminal justice system hinges on it operating in a fair and equitable manner . . . not based on race or other forms of prejudice. . . . [T]hese convictions were tainted by naked racism and represent an ugly stain on North Carolina's criminal justice system that cannot be allowed to stand any longer.<sup>389</sup>

Perdue was not alone in condemning the infection of criminal proceedings with racially biased juror exclusion. She was joined by Wilmington's prosecutor—the same man who, as president-elect of the state Conference of District Attorneys, publicly called for innovative responses to “a great social issue that has been years in the making and is bigger than any of us: race and justice.”<sup>390</sup> The prosecutor was quoted as saying,

When jurors are excluded from the judicial process on the basis of race . . . the defendant and the entire community are denied a fair trial. . . . Where, as here, the process that was in place to search for the truth is determined to be so fundamentally flawed that we cannot know it, the verdict cannot stand the test of time.<sup>391</sup>

Such statements might have inspired hope that the RJA orders finding statewide infection of capital jury selection with comparable race bias would inspire gubernatorial disapprobation and even conversion of existing death sentences to RJA-mandated sentences of life imprisonment without parole. At minimum, such sentiments might have been expected to stem the tide toward the RJA's repeal. Future research should explore the reasons why such aspirations were so completely thwarted. Some preliminary thoughts are offered here.

First, the cases of the Wilmington Ten and the RJA litigants stood in a very different procedural posture. For the former, forty years of litigation and extrajudicial advocacy revealed the unfairness under settled federal constitutional law, and the factual wrongfulness, of the convictions and sentences. In contrast, when the governor issued the Wilmington Ten pardons, the ink was barely dry on the RJA amendments, orders, and petitions for appellate review—none of which

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<sup>388</sup> The local newspaper published the full text of the governor's signing statement, which was deleted from the gubernatorial website after Perdue left office. *See Special to the Wilmington Journal from the Governor of the State of North Carolina, Governor Beverly Perdue*, WILMINGTON J. (Jan. 1, 2013), <http://wilmingtonjournal.com/gov-perdue-issues-pardon-of-innocence-for-wilmington-10/>.

<sup>389</sup> *Id.*

<sup>390</sup> David, *supra* note 357, at 375–76.

<sup>391</sup> Anne Blythe, *Perdue Pardons Wilmington 10*, CHARLOTTE OBSERVER (Jan. 1, 2013), <http://www.charlotteobserver.com/2012/12/31/3758600/perdue-pardons-wilmington-10.html> (internal quotation marks omitted).

implicated any of the innocentric interests that garner (relatively) ready popular support.

Second, as the foregoing analysis of North Carolina's criminal justice reforms demonstrates, change is seldom insulated from reaction and repeal. It was precisely the effectiveness of the RJA's direct, systemic assault on the infection of race bias in capital cases that proved to be the statute's undoing. Other categorical interventions to halt executions have had mixed long-term results, including backlash against judicial, executive, and legislative decision makers and increased support for capital punishment.<sup>392</sup> Put bluntly, the RJA jumped on the political third rail at the intersection of crime, race, and poverty.

The foregoing analysis also makes clear that while several of North Carolina's pioneering reforms resulted from litigation and legislation, none exemplifies direct input or leadership from the low-income and minority individuals who are disproportionately affected by crime and criminal justice systems. Certainly these reforms appear to level the playing field. One or two could be cast as fundamentally concerned with democracy enhancement. But with the exception of the Innocence Inquiry Commission and the RJA, support has been deeply rooted in arguments for efficiency—the wise stewardship of increasingly scarce tax dollars. One need not share Derrick Bell's suspicion toward interest convergence, Matthew Adler's critique of cost-benefit analysis, or Iris Marion Young's commitment to democracy as fully participatory communicative action to seek a more sustainable theoretical grounding for criminal justice reform.

Viewed through the lens of a democracy-enhancement theory discussed in Part II, therefore, North Carolina's reforms present a decidedly mixed picture. The next Part digs below the surface to examine the state's institutional culture in light of the outlines of a democracy-enhancement theory, probing for causal explanations behind the constellation of cutting-edge criminal justice reforms and their occasional resilience against reaction and repeal. To that end, Part V focuses particularly on the institutionalization of capacities for critical reflection and action through oppositional politics.

#### V. DEMOS, DELIBERATORS, AND DEFENDERS

Mixed motives sparked North Carolina's constellation of cutting-edge criminal justice reforms. Initiatives driven by concerns for fairness or involving significant resource redistribution—whether that redistribution targets economic, human, or social capital, including the prerogatives of white privilege—have been less resilient in the face of reaction and repeal than those with more immediately obvious cost-benefit payoffs. The search in this Part is for replicable conditions that promote sustainable reform, particularly conditions that enable jurisdictions to embed self-reflective capacities within processes for criminal justice policy making and implementation.

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<sup>392</sup> See, e.g., Kelly Holthusen, *How to Argue for Your Life in Fifteen Minutes or Less: An Analysis of Illinois Governor Ryan's Clemency Review Boards*, 30 NEW ENG. J. CRIM. & CIV. CONFINEMENT 105, 122–23 (2004) (discussing response to gubernatorial decisions); Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563, 574–77 (2009) (discussing response to U.S. Supreme Court rulings).

A. *Demos*

The historian V.O. Key, Jr. correctly noted that North Carolina's then-nascent oppositional politics had the potential to grow from the ground up.<sup>393</sup> The state's geography is trifurcated between the Appalachian Mountains, the Piedmont, and the sea. In parallel fashion, economic interests were historically divided among a relatively small slave-owning plantation elite in the east, small farmers in the center of the state, and a historically poorer and more isolated mountain population. As discussed in Part III, the post-Reconstruction white supremacy campaigns, the violent imposition of one-party rule, and Jim Crow repression coincided with concentrating power in the tobacco and textile manufacturing industries, rapidly expanding banking interests, and the development of a small group of highly influential law firms. In Key's description, from North Carolina's inception, the state's regional economic interests created "more-tender sectional sensibilities than any other state in the South . . . ."<sup>394</sup>

But most states can claim geographic, economic and political divisions that will be viewed as significant by the people who have to navigate them. Likewise, opposition between conservative, business-oriented factions and populist undercurrents is commonplace. A number of states also have greater racial and ethnic diversity than North Carolina. A recent spike in Latino immigration has reduced the non-Hispanic white population to 65% while the black population has remained fairly consistent at just under 25% of the population.<sup>395</sup>

Nevertheless, both before and after the Red Shirt revolution, the African American population in North Carolina enjoyed strong, well-educated, business-oriented, politically active leadership.<sup>396</sup> During the Jim Crow era, blacks developed independent institutional structures in addition to business and schools—"churches, newspapers, fraternal lodges, and women's clubs"—and hammered out new coalitions with partners inside and outside the state.<sup>397</sup> Those resources provided a foundation for oppositional politics in the most recent Civil Rights era and beyond. Exemplary leaders include nationally renowned historian John Hope Franklin as well as leading civil rights attorneys such as Julius L. Chambers and James E. Ferguson II.<sup>398</sup> As Professors O'Brien and Grosso explain,

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<sup>393</sup> See KEY, *supra* note 177, at 218–28.

<sup>394</sup> *Id.* at 219.

<sup>395</sup> See KORSTAD & LELOUDIS, *supra* note 188, at 311; *State and County QuickFacts: North Carolina*, U.S. CENSUS BUREAU (last revised Mar. 27, 2014), <http://quickfacts.census.gov/qfd/states/37000.html>.

<sup>396</sup> See, e.g., KORSTAD & LELOUDIS, *supra* note 188, at 81, 189–90 (discussing black leadership in Durham).

<sup>397</sup> ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE 187–88* (1984).

<sup>398</sup> Patricia Sullivan, *Southern Reformers, the New Deal, and the Movement's Foundation*, in *NEW DIRECTIONS*, *supra* note 241, at 89 & n.19 (discussing John Hope Franklin); Douglas Martin, *Julius Chambers, a Fighter for Civil Rights, Dies at 76*, N.Y. TIMES (Aug. 6, 2013), [http://www.nytimes.com/2013/08/07/us/julius-chambers-a-fighter-for-civil-rights-dies-at-76.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/08/07/us/julius-chambers-a-fighter-for-civil-rights-dies-at-76.html?pagewanted=all&_r=0) (discussing Chambers's leadership); see also Charles E. Daye, *The Evolution of the Modern Law School: Crucial Trends That Bridge Past and Future*, 73 N.C. L. REV. 675, 685 (1995) (describing Chambers's role as a

such leadership energized similar coalition building that led to the near success of a legislative moratorium on executions and, in turn, to passage of the RJJA.<sup>399</sup>

### B. Deliberators

Despite the state's halting progress on education, there is at least one distinctive example of an "honest broker" deliberative function served by a public university in the context of criminal law and procedure. Professors at the University of North Carolina at Chapel Hill's School of Government evaluate and interpret legislation and case law as part of their duties in training prosecutors, judges, and indigent defense attorneys from all corners of the state's unified court system. Because institutions and individual actors are mutually constitutive,<sup>400</sup> leadership development is critical. Critiques of criminal justice systems, agencies, and agents often emphasize the powerful impact of institutional culture on stakeholders' identity formation, including through the shaping of next-generation leadership (whether intentional or unintentional).<sup>401</sup> It appears that relatively few states have similar evaluation, interpretation, training and research functions that are embedded in their local universities and focused on criminal law and procedure.<sup>402</sup>

Foundations and nonprofits also provide some institutionally independent space to improve the quality of deliberation and decision making on issues of criminal law and procedure. As discussed in Part IV.A, Key and other scholars overstate the scope and direction of North Carolina's progress on education.<sup>403</sup> There is bitter irony in the fact that one of the state's leading white supremacists simultaneously oversaw the violent overthrow of elected Fusionist governments, the development of Jim Crow, and the biggest investment in the state's history to improve public education for both black and white students. Significantly, it was investments from northern foundations that supported the white supremacist movement's "school-building campaign of staggering proportions: during the period 1902–10, the state erected on average more than one new schoolhouse a day."<sup>404</sup>

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civil rights leader and litigator of key cases in both school desegregation and employment discrimination); *Lawyer Limelight: James E. Ferguson II*, LAWDRAGON (Jan. 5, 2012) (interview with James Ferguson describing his civil rights advocacy), available at <http://www.lawdragon.com/lawyer-limelights/james-e-ferguson-ii/>.

<sup>399</sup> O'Brien & Grosso, *supra* note 359, at 495–98.

<sup>400</sup> See Elizabeth S. Clemens & James M. Cook, *Politics and Institutionalism: Explaining Durability and Change*, 25 ANN. REV. SOC. 441, 445–46 (1999).

<sup>401</sup> See, e.g., Miller & Wright, *supra* note 80, at 184–87.

<sup>402</sup> One corollary to North Carolina's School of Government is the Washington State Institute for Public Policy. See generally STEVE AOS ET AL., WASH. STATE INST. FOR PUB. POL'Y, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES (2006).

<sup>403</sup> See KEY, *supra* note 177, at 208–09 (emphasizing educational advances under white supremacist rule). But see *supra* notes 222, 262 and accompanying text.

<sup>404</sup> At the same time, per-pupil funding for black and white students dropped from parity to thirty cents on the dollar. KORSTAD & LELOUDIS, *supra* note 188, at 59; see also J. Morgan Kousser, *Progressivism—For Middle-Class Whites Only: North Carolina*

Foundations and nonprofits also help expand opportunities and capacities for oppositional politics at the intersection of crime, race, and poverty. Like other states, North Carolina has a long history of such public-private partnerships. In the antebellum, Reconstruction, and Jim Crow eras, black leaders tapped northern philanthropists and mission societies to build educational and business infrastructure.<sup>405</sup> As noted above, a white supremacist governor used foundation funds to support a school-building campaign in the first part of the twentieth century. In the early 1960s, then-Governor Terry Sanford obtained funding from the Ford Foundation, as well as North Carolina's Z. Smith Reynolds and Mary Reynolds Babcock foundations, for a homegrown War on Poverty.<sup>406</sup> The resulting North Carolina Fund became a model for the federal War on Poverty, particularly in emphasizing maximum feasible participation by low-income and minority individuals and communities in program development, implementation, and oversight.<sup>407</sup>

As discussed in Part III, the Fund saw limited success, but African American leadership (both grassroots and elite) was critical to the Fund's creation and accomplishments.<sup>408</sup> Local philanthropists have continued to support research on the concentrated disadvantage that exists at the intersection of crime, race, and poverty. For example, the Z. Smith Reynolds Foundation recently provided support to the School of Government to create the state's pioneering web-searchable collateral consequences database.<sup>409</sup> In the wake of negative reaction by prosecutors and the public to litigation under the RJA, the Fund also supports the development of training materials for justice system personnel on detecting and eliminating racial bias from criminal proceedings.<sup>410</sup>

### C. Defenders

Such training may be one of the most important factors in achieving reform that is sustainable over the long term. This is particularly true when training is directed through a statewide indigent defense services system<sup>411</sup> that is bolstered by collaboration between the criminal defense and plaintiffs' bars to obtain

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*Education, 1880–1910*, 46 J.S. HIST. 169, 189–90 (1980) (contesting the definition of “progress” in early twentieth-century educational funding, saying that “[i]ncreasing inequality in services . . . inevitably spawned increasing inequality in income and wealth—a peculiar definition of progress”).

<sup>405</sup> KORSTAD & LELOUDIS, *supra* note 188, at 59.

<sup>406</sup> Aidan Smith, *This Month in North Carolina History: July 1963—The North Carolina Fund*, UNIV. OF N.C. (July 2005), <http://www2.lib.unc.edu/ncc/ref/nchistory/jul2005/>.

<sup>407</sup> KORSTAD & LELOUDIS, *supra* note 188, at 59–66, 79–82.

<sup>408</sup> *See id.* at 81–82.

<sup>409</sup> *See The Collateral Consequences Assessment Tool (C-CAT)*, UNIV. OF N.C. SCH. OF GOV'T, <http://www.sog.unc.edu/node/2582> (last visited Apr. 3, 2014).

<sup>410</sup> Alyson Grine, *Race Manual Underway*, N.C. PUB. DEFENDER (Univ. of N.C. Sch. of Gov't, Chapel Hill, N.C.), Aug. 2012, at 3.

<sup>411</sup> *See supra* Part IV.C.2.

adequate resources and drive policy change.<sup>412</sup> Other free-standing, defense-oriented institutions such as the Center for Death Penalty Litigation also make major contributions to strengthening oppositional politics in the context of criminal law and procedure.<sup>413</sup>

It is perhaps this combination of factors that distinguishes North Carolina from other jurisdictions. To be sure, other jurisdictions have unified defender systems,<sup>414</sup> excellent defender training programs,<sup>415</sup> and partnerships between the criminal defense and plaintiffs' bars.<sup>416</sup> But North Carolina appears to be a fairly rare example where these factors coincide.

As noted in Part IV.C.2, other crucial components of effective indigent defense reform include the capacities to establish and enforce statewide standards for attorney qualification, performance, and workload; create and maintain statewide training and listserv programs that empower attorneys to meet those standards and demand the resources necessary to do so; and collect, assess, and use statewide data on outcomes in promoting system improvements. Access to data is enhanced where, as in North Carolina, the state has merged case processing into a statewide, unified court system. Although far from comprehensive, such data collection and assessment capacities are prerequisites to politically effective action based on fairness, transparency, accountability, and efficiency.<sup>417</sup>

At the back end, statutes permit self-correction of indigent defense service failures by allowing investigation and litigation of postconviction motions involving ineffective assistance on direct appeal instead of being limited to local trial courts.<sup>418</sup> North Carolina also has benefited from pockets of strong investigative reporting by major media outlets. Detailed analysis of wrongful convictions has played an especially critical role in expanding public awareness of

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<sup>412</sup> See Wright, *Parity*, *supra* note 80, at 231–42 (describing successful state legislative efforts to balance prosecutorial and defense resources through parity assessment); see also Moore, *supra* note 13, at 1378–79 (describing the role of the defense bar in shaping legislative history of full open-file discovery).

<sup>413</sup> See O'Brien & Grosso, *supra* note 359, at 486–87.

<sup>414</sup> Colorado, Montana, and New Hampshire are examples.

<sup>415</sup> Kentucky's Department of Public Advocacy, the Public Defender Services of Washington, D.C., and Colorado's Public Defender system are examples.

<sup>416</sup> North Carolina Advocates for Justice and Arizona Attorneys for Criminal Justice are two organizations that join attorneys across practice areas. See generally ARIZ. ATTORNEYS FOR CRIM. JUST., <http://www.aacj.org/> (last visited Apr. 3, 2014).

<sup>417</sup> See, e.g., Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 94–98 (2011) (proposing mandatory disclosure of prosecution costs).

<sup>418</sup> See generally Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007) (arguing for procedures allowing litigation on direct appeal of claims that trial counsel were constitutionally ineffective). But see N.C. GEN. STAT. §§ 15A-1415(b)(3), 1415(c), 1418, 1419(a)(1) (2011) (allowing appellate lawyers to litigate constitutional claims through postconviction motions filed on direct appeal, with no procedural bar to subsequent litigation of other constitutional claims post appeal, since 1977).

and receptivity to broader concerns about fairness and accountability in criminal proceedings.<sup>419</sup>

#### *D. Diversity and Deep Analogies*

The foregoing discussion does not exhaust prerequisites for creating and sustaining oppositional politics in the context of criminal law and procedure. Nor are the highlighted institutional factors idiosyncratic to any single jurisdiction. Moreover, any circumstance that supports oppositional politics in the context of criminal law and procedure must be augmented with vision, opportunism, and tenacity. There also must be cracks in the mortar that open up wiggle room for “political entrepreneurs.”<sup>420</sup> Another characteristic that helps to drive and sustain reform is diversity within institutions, as well as the embedding of institutions themselves in broader “networks that crosscut important . . . boundaries.”<sup>421</sup> Professors O’Brien and Grosso describe how networking across diversity occurred in movements leading to enactment of the RJA.<sup>422</sup>

Successful articulation and implementation of new policies also may require “deep analogies to already institutionalized models or widely held norms.”<sup>423</sup> On this point, North Carolina’s strikingly Janus-faced sociopolitical and legal histories serve as unlikely resources for the long-haul work of expanding democracy at the intersection of crime, race, and poverty. It may be that the state’s progressive self-conception—a mythos inscribed in scholarship as early as Key’s *Southern Politics*—is itself an important catalyst. That mythology may moderate reaction and lower the activation energy required to initiate change.

The state’s progressive sociopolitical subtext is discernible even in recent events. The May 2012 Klan rally outside Harmony, North Carolina, may have drawn more protesters than participants.<sup>424</sup> In response to the pardon of the Wilmington Ten, due in part to the past prosecutor’s race-based discrimination during jury selection, the current prosecutor stated publicly that such conduct denies both defendants and the community a fair trial.<sup>425</sup> In addition, “Moral Monday” protests against the recent conservative legislative agenda have drawn

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<sup>419</sup> See, e.g., Joseph Neff, *Time of Death*, RALEIGH NEWS & OBSERVER (Dec. 8, 2002), available at [http://web.campbell.edu/faculty/bartlett/Forensic%20Entomology/newsobserver\\_com%20%20Series1.htm](http://web.campbell.edu/faculty/bartlett/Forensic%20Entomology/newsobserver_com%20%20Series1.htm) (covering the wrongful conviction of death row inmate Alan Gell); Phoebe Zerwick, Special Report, *Murder, Race, Justice: The State vs. Darryl Hunt*, WINSTON-SALEM J., <http://www.journalnow.com/app/specialreports/hunt/> (last visited Apr. 3, 2014).

<sup>420</sup> Clemens & Cook, *supra* note 400, at 453.

<sup>421</sup> *Id.*; see also *id.* at 460 (describing “multivocality—that fact that single actions can be interpreted coherently from multiple perspectives simultaneously” as a requirement for “robust action”).

<sup>422</sup> O’Brien & Grosso, *supra* note 359, at 476–82.

<sup>423</sup> Clemens & Cook, *supra* note 400, at 457.

<sup>424</sup> *KKK Hold Rally*, *supra* note 235.

<sup>425</sup> Blythe, *supra* note 391.

national attention, particularly as law professors and pastors join the hundreds of protesters who have been arrested.<sup>426</sup>

These recent events reveal deep analogies to historic tensions between the state's conservative and progressive movements. Innovation and stability are (often unhappily) wedded. That dialectical tension supports a cautious optimism about the degree to which institutional improvements, particularly those obtained through law, can equalize power disparities without co-opting "subordinate groups through symbolic displays leaving elite wealth, status, and power in society intact."<sup>427</sup>

The predictable cycle of action and reaction also grounds a healthy skepticism about the pace if not the overall trajectory of change. Since "mobilization from below begets counter-mobilization from above,"<sup>428</sup> policy innovators must be prepared to augment regulation through litigation or legislation with sustained grassroots advocacy. Sometimes "technically savvy and ideologically committed representatives of the have-nots" must pull a laboring oar to navigate inevitable backlash.<sup>429</sup>

In other words, it is not time to abandon ship. Litigation, legislation, and activism remain viable avenues toward improving lives and systems. Despite predictable reaction and setbacks, the unlikely constellation of pioneering criminal justice reforms in a single jurisdiction should inspire reform advocates to focus and renew their efforts.

#### CONCLUSION

The core question animating this work is a search for sustainable production of the conditions that allow jurisdictions to reduce the footprint of the carceral state and improve criminal justice systems through the traditional clash of law and politics as vitally necessary complements to internal agency reform. The analysis revealed several interesting characteristics of one reform jurisdiction. Vibrant oppositional politics incorporate relatively robust and proactive indigent defense functions. Diverse mechanisms institutionalize the collection, assessment, and strategic use of criminal justice data. Networking within and across institutions deepens capacities for effective action.

Such conditions embed greater opportunities for meaningful self-reflection into discourse on criminal justice issues than can exist in jurisdictions lacking those capacities. Concededly, where such conditions promote opportunities for criminal justice reform, they tend to privilege grassroots over grassroots advocacy and might be dismissed—like Inhofe's Pilot's Bill of Rights—as still more

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<sup>426</sup> See Anne Blythe, *N.C. Lawmakers Go Home, But 'Moral Monday' Protesters Will Return*, RALEIGH NEWS & OBSERVER (July 28, 2013), <http://www.newsobserver.com/2013/07/28/3065359/moral-mondays-not-over-yet.html>; N.Y. Times Editorial Bd., *supra* note 172; Jedediah Purdy, *Why I Got Arrested in Raleigh: The States Are the New Front Line*, HUFFINGTON POST (June 11, 2013, 8:59 AM), [http://www.huffingtonpost.com/jedediah-purdy/why-i-got-arrested-in-ral\\_b\\_3420683.html](http://www.huffingtonpost.com/jedediah-purdy/why-i-got-arrested-in-ral_b_3420683.html).

<sup>427</sup> Robin Stryker, *Half Empty, Half Full, or Neither: Law, Inequality, and Social Change in Capitalist Democracies*, 3 ANN. REV. L. & SOC. SCI. 69, 72 (2007).

<sup>428</sup> *Id.* at 87.

<sup>429</sup> *Id.* at 88.

superfluous examples of “them as has, gets.” Nor are these movements immune from predictable backlash. Nevertheless, engaged scholarship may enhance attempts to wrest greater transparency and accountability from concentrated government power—including attempts like Inhofe’s—by expanding avenues toward broader democratic and productive demands for reform.

One focus for such additional research is analysis of effective activism by those most directly affected by crime and criminal justice systems—poor people and people of color. Some justice advocates suggest that defendants and defenders “crash the system”—that is, collectively monkeywrench the machinery by refusing plea offers and insisting on taking cases to trial.<sup>430</sup> Other scholars have noted the work of organizations such as All of Us or None and Families Against Mandatory Minimums.<sup>431</sup> But legal scholars have yet to assess the democracy-enhancing potential, strategies, or influence of other solo and small-organization efforts such as Silicon Valley Debug, which trains families and communities in strategies to improve case outcomes.<sup>432</sup> Innovative peace-making movements such as CeaseFire<sup>433</sup> and the Violence Interrupters also hold promise for scholarly investigation,<sup>434</sup> as does the grassroots activism of exonerated prisoners like John Thompson.

Interdisciplinary action research opportunities also can focus on democracy enhancement through leadership development.<sup>435</sup> Readily available avenues include court-watch and data-collection programs. In the specific context of indigent defense reform, Know Your Rights cards and consumer satisfaction surveys can develop experienced consumer-activist leadership to help redress the “Public Pretender” conundrum that besets service providers. In the same vein, community-based mediation diversion alternatives empower individuals and neighborhoods with problem-solving and violence-prevention strategies.

Through these and other practical applications, scholars and practitioners can concretize a democracy-enhancing theory of criminal law and procedure that empowers the low-income and minority individuals who are most directly and disproportionately affected by the causes and consequences of crime to ask their own policy questions, build their own coalitions, and advocate for their own

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<sup>430</sup> Alexander, *supra* note 82.

<sup>431</sup> Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 267–68 (2009) (citing examples of grassroots organizations and coalitions).

<sup>432</sup> See, e.g., *Falsely Arrested for Murder: How a Family Proved the Innocence, and Won the Release of a Young Father Facing Life*, in SILICON VALLEY DE-BUG, COURT WARRIORS: A GUIDE FOR FAMILIES, COMMUNITIES, AND ORGANIZATIONS TO INFLUENCE THE CRIMINAL COURT SYSTEM 11, 11–12 (2011), available at <http://issuu.com/svdebug/doc/s/courtwarriors>.

<sup>433</sup> See generally WESLEY G. SKOGAN ET. AL., EVALUATION OF CEASEFIRE-CHICAGO (2009), available at [http://www.skogan.org/files/Evaluation\\_of\\_CeaseFire-Chicago\\_Main\\_Report.03-2009.pdf](http://www.skogan.org/files/Evaluation_of_CeaseFire-Chicago_Main_Report.03-2009.pdf) (evaluating the impacts of CeaseFire-Chicago, a violence intervention program).

<sup>434</sup> See generally THE INTERRUPTERS (Kartemquin Films 2011).

<sup>435</sup> Cf. Anthony V. Alfieri, *Post-racialism in the Inner City: Structure and Culture in Lawyering*, 98 GEO. L.J. 921, 962–63 (2010) (describing participatory community research aimed at diverting African American youth from the school-to-prison pipeline).

solutions. These are the crucial voices without which meaningful and sustainable criminal justice reform will remain elusive. They are the source of dangerous hope—dangerous because it is more often than not likely to be disappointed,<sup>436</sup> and because when linked with vision, opportunism, and tenacity, it can at least occasionally level power disparities instead of ameliorating, reproducing, or augmenting them.

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<sup>436</sup> Cf. Bell, *supra* note 40, at 252–53.