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MANIFESTO OF DEMOCRATIC CRIMINAL JUSTICE

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ABSTRACT—It is widely recognized that the American criminal system is in a state of crisis, but views about what has gone wrong and how it could be set right can seem chaotically divergent. This Essay argues that, within the welter of diverse views, one foundational, enormously important, and yet largely unrecognized line of disagreement can be seen. On one side are those who think the root of the present crisis is the outsized influence of a vengeful, poorly informed, or otherwise wrongheaded American public and the primary solution is to place control over the criminal system in the hands of officials and experts. On the other side are those who think the root of the crisis is a set of bureaucratic attitudes, structures, and incentives divorced from the American public's concerns and sense of justice and the primary solution is to make criminal justice more community focused and responsive to lay influences. The former view reflects a norm of bureaucratic professionalization; the latter view reflects a norm of democratization. This Essay defines the two camps, specifies the concepts of bureaucracy and democracy underlying each one, and identifies some of the unifying ideas on the democratization side. This Essay thus attempts to bring conceptual order to the present cacophony of voices on criminal justice reform by specifying the conflict of visions at their center. As the opening piece of this Symposium Issue of the *Northwestern University Law Review*—a symposium not just *about* democratizing criminal justice but *in defense* of democratizing criminal justice—this Essay also paves the way for what will follow: a full-throated defense of the democratic criminal justice vision.

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INTRODUCTION: TWO VISIONS OF CRIMINAL JUSTICE

In the first words of his last work, Bill Stuntz wrote: "Among the great untold stories of our time is this one: the last half of the twentieth century saw America's criminal justice system unravel."[1] An unraveling suggests that things once were different—better—and in many ways they were. Enlightenment political theorists from Hobbes to Locke, Montesquieu, Rousseau, Beccaria, and Tocqueville all predicted that democracy would bring reason and reasonableness, respect for individual rights, and compassion to criminal justice,[2] and the United States from the Founding through the Early Republic through the mid-twentieth century substantially confirmed their prediction. The Bill of Rights is largely about crime and punishment: three of the ten Amendments that the Anti-Federalists demanded as a condition of constituting a national democratic government are about criminal procedure (the Fourth, Fifth, and Sixth); another is about punishment (the Eighth); and one more—the First—is substantially, albeit implicitly, about the limits of criminalization. Popular movements for criminal justice reform, which the reformers themselves understood as pulling criminal justice out of a "monarchical" and into a "republican" era,[3]

[1] WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 1 (2011).

[2] Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 935–36 (2016).

[3] Witness, for example, Benjamin Rush, perhaps the leading anti-death penalty activist of the Founding period:

> [C]apital punishments are the natural offspring of monarchical governments. Kings believe that they possess their crowns by a *divine* right: no wonder, therefore, they assume the divine power of taking away human life . . . . But the principles of republican governments speak a very different language . . . . They appreciate human life, and increase public and private obligations to preserve it. They consider human sacrifices as no less offensive to the sovereignty of the people, than they are to the majesty of heaven. They view the attributes of government, like the attributes of the deity, as infinitely more honoured by destroying evil by means of *merciful* than by exterminating punishments. The united states have adopted these peaceful and benevolent forms of government. It becomes them therefore to adopt their mild and benevolent principles. An execution in a republic is like a human sacrifice in religion. It is an offering to monarchy . . . .

swept through the young country from the Founding through the mid-nineteenth century, substantially eliminating punishments of the body (corporal punishment and maiming); aiming to abolish and succeeding in limiting capital punishment (abolition was a major issue just after the Founding); experimenting with rehabilitative prisons; and codifying substantive criminal law so as to reduce pockets of harshness and arbitrariness and transfer control from the judiciary to the more popularly accountable legislature.[4] This penal moderation continued for most of the twentieth century: from the late 1920s through the early 1970s, America's incarceration rate was fairly low, fairly stable, and roughly equal to what it is in Western European countries today.[5] The history is by no means simple or uniformly bright. America is a big, complicated country: some communities and jurisdictions favored severity and rejected reform.[6] Most or all excluded some groups—above all, black Americans—from the circle of those regarded as citizens in a moral sense, and the decencies that held within the circle of moral citizenship did not hold outside it.[7] But within the circle of moral equality, and in terms of long historical timelines, American criminal law tended toward a reasonable compassion from the 1770s to the 1970s. Furthermore, as Europe democratized, it too reformed criminal justice in the direction of greater mildness.[8] The early theorists were not wrong: democracies are vigorous in their own defense and can be temperamental, but they are not steadily cruel.

And then came the unraveling. It is a complex unraveling—complex enough that it is difficult to disentangle which among the dysfunctions are central and which peripheral, which cause and which effect. The present crisis in criminal justice may well have begun with the astonishing increase in crime itself—a "hurricane of crime"[9] as one leading historian has termed it—that began in the 1960s, shortly before the increase in punitiveness in the 1970s.[10] But if that hurricane of crime spurred or helped spur the criminal system's transformation, the transformation has proved so extreme as to become calamitous in its own right.

BENJAMIN RUSH, CONSIDERATIONS ON THE INJUSTICE AND IMPOLICY OF PUNISHING MURDER BY DEATH 18–19 (Philadelphia, Mathew Carey Press 1792).

[4] Kleinfeld, *Two Cultures*, *supra* note 2, at 935, 987–88.

[5] *Id.* at 937.

[6] *Id.* at 936 n.11.

[7] *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 83–106 (1993).

[8] Kleinfeld, *Two Cultures*, *supra* note 2, at 936–37; *see also* James Q. Whitman, *The Case for Penal Modernism: Beyond Utility and Desert*, 1 CRITICAL ANALYSIS L. 143, 143–44, 165, 168 (2014).

[9] FRIEDMAN, *supra* note 7, at x.

[10] *See* Kleinfeld, *Two Cultures*, *supra* note 2, at 1021–27.

The catalogue of dysfunction starts with mass incarceration, prison conditions, policing, and—the site at which those three lines intersect—racial justice. Mid-twentieth-century America imprisoned about one adult per thousand people, a rate that appears to be roughly typical throughout the economically advanced, contemporary Western world, including Western Europe today.[11] In the 1970s, America's imprisonment rate started rising, rising, rising, until, as of 2007, 1 out of every 132 people was imprisoned[12] and 1 out of every 31 adults was under some form of correctional control (in prison, on probation, or on parole).[13] Within those prisons and other correctional facilities, conditions today are often uselessly, counterproductively cruel—at once brutal in ways that have nothing to do with a crime's prescribed sentence and criminogenic in ways that contribute to the very crime problem that imprisonment is meant to ameliorate.[14] Turning from the prison to the street, from the hidden side of criminal justice to its most visible face (the face of the state itself for many Americans), the police have become one of the most controversial facets of American life today: an institution that at its best is a place of service and even heroism morphs too often into a form of state-sponsored violence and discrimination, experienced within some communities as an alien and oppressive force.[15] Finally, running through all three issues is the red thread of race. The number of black and Hispanic Americans harassed by or in

[11] *Id.* at 939. Note, however, that the "one adult per thousand people" number on the American side excludes the local jail population, as well as juveniles held in juvenile facilities; it therefore probably understates the real rate of American imprisonment insofar as we are interested in imprisonment of all kinds. MARGARET WERNER CAHALAN WITH THE ASSISTANCE OF LEE ANNE PARSONS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984, at 35 tbl.3-7 & n.a (1986), http://www.bjs.gov/content/pub/pdf/hcsus5084.pdf [https://perma.cc/T3EA-424Q].

[12] Kleinfeld, *Two Cultures*, *supra* note 2, at 938. High as this number is, it probably *understates* the true rate of American imprisonment, at least if one is interested in imprisonment of all kinds. The claim is based on the number of people "held in public and private adult correctional facilities and in local jails" per 100,000 "U.S. residents"—so the numerator excludes juveniles held in juvenile facilities (though it includes juveniles held in adult facilities), while the denominator includes both adults and juveniles. HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2007, at 6 tbl.8 & nn.a & e (2009), http://www.bjs.gov/content/pub/pdf/p07.pdf [https://perma.cc/66FE-GW44].

[13] Kleinfeld, *Two Cultures*, *supra* note 2, at 938. This number is based on the "U.S. adult resident population on correctional supervision" out of the "U.S. adult resident population" in total. LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2007 STATISTICAL TABLES 1 tbl.1 (2009), http://bjs.gov/content/pub/pdf/ppus07st.pdf [https://perma.cc/7CLC-GJYM].

[14] *See* Kleinfeld, *Two Cultures*, *supra* note 2, at 996–1003.

[15] Stuntz makes a related point: "[R]esidents of the communities where mass incaraceration hits hardest, or at least many of them, are bound to see the justice system as an alien force that does not have those communites' best interests at heart." STUNTZ, *supra* note 1, at 286.

fear of police or incarcerated is not only extremely disproportionate relative to other racial and ethnic groups but so large in absolute terms as to make the fist of the criminal justice system part of ordinary life in many black and Hispanic neighborhoods.[16] The result is that the criminal system has become one of the significant obstacles to democratic solidarity in American life today. As I have written elsewhere: "There is tragedy and irony in this. *Crime* is supposed to be antisocial; *punishment* should be prosocial. But American punishment has morphed into its own enemy: it has become antisocial itself."[17] In the present crisis, not just crime but *both* crime and the mechanisms by which we respond to crime mutually assail the common citizenship—the sense of fellow feeling, the practical conditions of equality, and the shared norms—on which democratic life depends.[18]

Mass incarceration, prison conditions, policing, and racial justice are the most familiar problems, but there are more technical, legalistic forms of dysfunction that are also significant and probably contribute causally to the big four. One is the law governing American punishment, which gives rise to far more severe sentences than in any other economically advanced, democratic nation today and far more severe than was true of American punishment itself for most of this country's own history.[19] The issue of sentencing severity concerns not just decades-long terms of imprisonment for major crimes but also a good deal of mid- and low-level carceral churn, which appears to contribute significantly to mass incarceration.[20] Severity also surfaces in the rigidity of a sentencing system that seems unwilling to allow equitable judgment a role, or at least to deny that form of moral discretion to anyone but prosecutors.[21] And it surfaces in grading decisions, as legislatures routinely—it seems almost reflexively—use felonies where

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[16] *See* Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1494–95 (2016); *see also* STUNTZ, *supra* note 1, at 1; ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 3 & tbl.1, 11 & figs.17 & 18, 13 & figs.19, 20a & 20b (2011), https://www.bjs.gov/content/pub/pdf/htus8008.pdf [https://perma.cc/F7RV-VSRG]; E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011, at 7 tbl.7, 8 tbl.8, 9 tbl.9, 26 app. tbls.6 & 7, 27 app. tbls.8 & 9, 28 app. tbls.10 & 11 (2012), https://www.bjs.gov/content/pub/pdf/p11.pdf [https://perma.cc/P6EH-NB9D]; BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENT FELONS IN LARGE URBAN COUNTIES 3 tbls.4 & 5 (2006), https://www.bjs.gov/content/pub/pdf/vfluc.pdf [https://perma.cc/UV4M-CMW5].

[17] Kleinfeld, *Two Cultures*, *supra* note 2, at 1036.

[18] *See* Kleinfeld, *Reconstructivism*, *supra* note 16, at 1493–94, 1562–64.

[19] *See* Kleinfeld, *Two Cultures*, *supra* note 2, at 936–38, 1020–32.

[20] *See* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 72–77 (2017).

[21] *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 6–8 (1998).

misdemeanors would do, misdemeanors where violations would do, and imprisonment where noncarceral options would do.

Overcriminalization is another concern, and one that is, in my view, often misunderstood. The term brings to mind debates about drugs or perhaps crimes of vice generally, but if we understand criminalization more conceptually—as whatever form of law operates to expand the set of conduct that counts as criminal—then a much broader array of legal developments comes into view. If the departments of the law were countries on a map, criminal law would be an expansionist power, pushing into its neighbors. Consider, as a nonexhaustive list: the use of criminal law as the backstop of the regulatory state and, relatedly, criminal law's intrusion into areas once governed civilly or otherwise noncriminally (like the corporate sphere); the elimination or technification of *mens rea* standards in ways that delink criminal guilt and actual culpability, thus sweeping a larger and more ambiguously wrongful set of actions into criminal law's net (and making guilt easier to prove); the broadening of liability rules such that more and more people tangentially connected to crime are guilty of something; the narrowing of defenses such that fewer and fewer people with claims of excuse or justification (including, particularly, the mentally ill) can escape being guilty of something; the expansion of federal criminal law such that, rather than different sovereigns in different settings, many acts are criminal on multiple levels and thus subject to a layer cake of prosecutors, each with an option on enforcement; the sheer proliferation of offenses in penal codes, many inchoate in subtle ways (like possession crimes) or overlapping such that a single course of conduct can be charged in multiple ways (often at the same time); and the use of strategic and often pretextual crime definitions, which, in making serious offenders easier to prosecute, had the side effect of making criminals of us all. At the root of all this is a view of the criminal law as a general instrument of social control coupled with the state's limitless appetite for social control. Criminal law will tend to expand when its governing principle is expediency; the civil/criminal distinction is inconvenient for the project of power. Yet the effect is to rob criminal law of its moral authority and to produce an enforcement system so filled with law as to become, paradoxically, almost lawless—for limitless criminalization makes enforcement limitlessly discretionary.[22]

Another set of important but legally technical dysfunctions concern procedure and institutional design. The Warren Court's procedural

[22] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 592 (2001) ("[M]ore law has produced a fundamentally lawless system . . . .").

revolution has been substantially diminished, hollowed out by a string of anti-Warren Courts and a long series of not particularly dramatic cases that collectively amount to a counterrevolution.[23] Indeed, it seems to me that the Warren Court's procedural revolution can now be seen in historical perspective as the last gasp of the mid-twentieth century's experiments in penal mildness. Of even greater consequence—of the greatest consequence—the trial has died: more than 95% of felony cases are now resolved by guilty plea, typically as the result of plea bargains.[24] With that procedural development has come an institutional one: the massive increase in prosecutors' power relative to other actors in the criminal justice system. It was once the case that the grand jury supervised the charging function; judges, juries, and the press in open courtrooms supervised the finding of guilt; substantive law created by legislators and judges set a high standard for what constitutes guilt (which also, by making guilt hard to prove, enhanced the role of judges, juries, and defense counsel at trial); and judges controlled sentencing. Plea bargaining and related legal developments have removed these checks and balances, ordinarily characteristic of America's very approach to governance, and created a shadow system of criminal procedure whose core characteristic is that prosecutors are substantially unconstrained. Substantive criminal law paves the ways by giving prosecutors the tools by which to extract confessions—widely divergent charges for a given course of conduct, widely divergent sentences for a given charge, and offense definitions that are easy to prove. (In a sense, well-constructed substantive criminal law *is* part of the system of checks and balances.) Procedural law cooperates by not imposing vigorous oversight on the bargains. And in a flash, virtually the whole apparatus *assumed* in the Constitution—the apparatus of trial, jury, judge, and press—disappears. The democratic public disappears. In a sense, adjudication disappears. In its place is just an unmarked door, opening to a windowless room, two lawyers within, striking a deal.

Finally, a reasonable assessment of any criminal system must of course include how well that system functions to control crime. The evidence on that score for American criminal justice is uncertain. America has a high crime rate relative to most advanced nations and, in some neighborhoods, daily life is statistically as dangerous as life in a failed state[25]—and has the look and feel of life in a failed state. On the other hand,

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[23] *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure?: Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2466–71 (1996).

[24] STUNTZ, *supra* note 1, at 7.

[25] *See* Kleinfeld, *Two Cultures*, *supra* note 2, at 1020–26. For example, the upscale Chicago neighborhood of Hyde Park, where the University of Chicago sits, has a homicide rate of 3 per 100,000

America's crime rate has declined significantly since the hurricane of crime that arguably brought the era of penal severity about, and the decline correlates with the severity.[26] What role the criminal justice system played in the decline is difficult to know: crime rates can be high or low and can rise or fall for many reasons, and isolating the causal effect of the criminal justice system with confidence is simply beyond the present reach of human knowledge. My own, admittedly debatable view is that American criminal law's severity has succeeded in taking a significant number of highly dangerous people off the street. But if the criminal system's severity has provided some benefits, it has done so in a way that also exacts enormous social costs, and if it has contributed to making parts of the country safer, it has utterly failed to provide a reasonable measure of safety in poor urban neighborhoods and poor rural areas.[27] If the "we" of "We the People" is a truly democratic "we" that includes us all, then this much is true: despite our penal severity, we are not safe.

This catalogue of dysfunction, which is not exhaustive, has made America's criminal system the focal point of profound social conflict, particularly with regard to issues of race. The crisis of criminal justice is one of the great policy issues of our time. To use a term like *crisis* can sound like alarmism, or the rhetorical excess of academics who think their field is the center of the world, or political advocacy from the left. Yet some of us gathered together for this Symposium on democratizing criminal justice, as well as the larger group that gathered together for the conference from which this Symposium comes, are liberal, some conservative; some of us are academics, others are judges, legal practitioners, or policymakers; and the present crisis has come to be acknowledged by leaders within both parties, the federal and state judiciaries, Congress and many state legislatures, many governors, the last

(based on a 2011 source); the adjacent neighborhood of Washington Park, which is poor and 98% black, has a homicide rate of 78 per 100,000. STUNTZ, *supra* note 1, at 21. The Chicago neighborhood of Austin (at roughly 100,000 people, the largest neighborhood in Chicago) had a 2015 homicide rate of 48 per 100,000, which spiked in 2016 to 87 per 100,000, while the Chicago neighborhood of Lakeview (also roughly 100,000 people and the second largest neighborhood in Chicago) had in both years a homicide rate of 1 per 100,000. UNIV. OF CHI. CRIME LAB, GUN VIOLENCE IN CHICAGO, 2016, at 31 (2017), http://urbanlabs.uchicago.edu/attachments/store/2435a5d4658e2ca19f4f225b810ce0dbdb9231cbdb8d702e784087469ee3/UChicagoCrimeLab+Gun+Violence+in+Chicago+2016.pdf [https://perma.cc/G3JP-AB25]. By way of context, the homicide rate in wealthy European nations toward the end of the twentieth century was 1 per 100,000; in the United States as a whole was 7 per 100,000; and in sub-Saharan Africa was 22 per 100,000. RANDOLPH ROTH, AMERICAN HOMICIDE 7 fig.1.4 (2009). With the highest homicide rate in the world (for which there is data), Honduras in 2014 was at 75 per 100,000. *Intentional Homicides (Per 100,000 People)*, WORLD BANK (2017), http://data.worldbank.org/indicator/VC.IHR.PSRC.P5 [https://perma.cc/2YMA-C4S7].

[26] *See* Kleinfeld, *Two Cultures*, *supra* note 2, at 1020–26; *see also* PFAFF, *supra* note 20, at 1–13.

[27] *See supra* note 25 and accompanying text.

President, and almost every major candidate for the presidency in the last election (though not the winner, or at least, not in the same way as the others).[28] Furthermore, the role of *law* in the criminal justice crisis is unusual. Every major policy challenge facing the country has legal elements, but criminal law and procedure are at issue in the criminal justice crisis not just because of what they regulate—because of crime—but because of the content and character of the law itself. Criminal justice as a body of law, practice, and policy is itself one of the great challenges facing America today. That is true of no other area of law.

Yet if the existence of the crisis is now all but a matter of consensus, when it comes to understanding *why* the system has unraveled and *how* it could be set right—the fundamental problems of diagnosis and prescription, of understanding and action—the consensus evaporates and in its place is what can seem like a cacophony of conflicting voices. The disagreements reflect more than just the usual variety of views that attend any active field of scholarship and policy. They reflect unusually fundamental and passionate differences in outlook. This is not a situation in which well-meaning people mostly agree about what to do but can't

[28] *See, e.g.*, Barack Obama, Remarks by the President at the NAACP Conference (July 14, 2015), http://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference [https://perma.cc/8WRH-9PH9] ("[T]oday, I want to focus on one aspect of American life that remains particularly skewed by race and by wealth, a source of inequity that has ripple effects on families and on communities and ultimately on our nation — and that is our criminal justice system . . . . But here's the good news . . . . [W]hen, let's face it, it seems like Republicans and Democrats cannot agree on anything . . . a lot of them agree on this."); *see also* Stephanie Clifford, *From the Bench, a New Look at Punishment*, N.Y. TIMES (Aug. 26, 2015), https://www.nytimes.com/2015/08/27/nyregion/from-the-bench-a-new-look-at-punishment.html [https://perma.cc/YUC3-WJTQ] ("[A]cross the country, some judges are refashioning sentences, asking prosecutors to drop cases that judges see as unfair, considering how to reduce the long-term impact of old convictions, and writing essays advocating change."); Carl Hulse, *Unlikely Cause Unites the Left and the Right: Justice Reform*, N.Y. TIMES (Feb. 18, 2015), https://www.nytimes.com/2015/02/19/us/politics/unlikely-cause-unites-the-left-and-the-right-justice-reform.html [https://perma.cc/UPS8-LUFX] (describing the view among many U.S. Senators that the "criminal justice system is broken" and their bipartisan efforts to reform it); Eric Tucker, *Addiction, Drug Sentences and Policing Being Discussed by Candidates in 2016 Presidential Race*, U.S. NEWS & WORLD REP. (Nov. 25, 2015, 4:19 PM), https://www.usnews.com/news/politics/articles/2015/11/25/criminal-justice-issues-showing-up-in-2016-presidential-race [https://perma.cc/VDN5-GESH] ("[E]ven among those in both parties who support changing the criminal justice system, there's no consensus on how to do it and candidates are scrambling to differentiate themselves on what law and order means."); *Confidence in Institutions*, GALLUP, http://www.gallup.com/poll/1597/confidence-institutions.aspx [https://perma.cc/5AAZ-XZGJ] (reporting that, as of June 2016, only 23% of Americans describe their level of confidence in the criminal justice system as either a "great deal" or "quite a lot"). *But see* Donald J. Trump, Remarks on Creating a New and Better Future for America's Inner Cities (Aug. 16, 2016), https://www.donaldjtrump.com/press-releases/donald-j.-trump-remarks-in-milwaukee-wisconsin [https://perma.cc/N7PE-A5VF] ("Tonight, I am going to talk about how to make our communities safe again from crime and lawlessness . . . . Law and order must be restored . . . . There is no compassion in tolerating lawless conduct. Crime and violence is an attack on the poor, and will never be accepted in a Trump Administration.").

summon the political will to do it. The crisis of criminal justice is in part a crisis of ideas.

The premise of this Symposium and the first contribution we hope it makes to the discourse on criminal justice is that the voices of diagnosis and reform are not a cacophony. Within the welter of diverse views about what has gone wrong and how it could be set right, one foundational, enormously important, and yet largely unrecognized line of disagreement can be seen. On one side are those who think the root of the present crisis is the outsized influence of the American public—a violent, vengeful, stupid, uninformed, racist, indifferent, or otherwise wrongheaded American public—and the solution is to place control over criminal justice in the hands of officials and experts. On the other side are those who think the root of the present crisis is a set of bureaucratic attitudes, structures, and incentives divorced from the American public's concerns and sense of justice, and the solution is to make criminal justice more community focused and responsive to lay influences. The first side flies the banners of professionalization, instrumental rationality, and bureaucratic control. The second side flies the banners of community, value rationality, and—the watchword of the movement—*democracy*. The two views, *bureaucratic professionalization* versus *democratization*, represent a conflict of visions.

To some extent, of course, this dichotomy compresses the nuances of the views on both sides, as any such characterization would. An individual's views might partake of both sides depending on the particular issue, or might fall in the middle, or the dichotomy itself might not apply. Empirically, American criminal justice exhibits a marbling of democratic and bureaucratic elements, and normative views about reform—about what a good system of criminal justice would look like—tend to exhibit some measure of marbling as well. Furthermore, democratization and bureaucratic professionalization must be read as big tent positions that house under their banners variations on their operative themes. Yet with those caveats in place, the dichotomy nonetheless has force. It sops up much of the variation in the field. It brings clarity and conceptual order to what might otherwise seem like a riot of claims and arguments; indeed, even if one rejects the dichotomy as a way of characterizing whole positions or schools of thought, one might still find it helpful for understanding and evaluating particular arguments or concerns. Above all, however, what recommends the dichotomy is that, in broad strokes, it fits. Among those deeply versed in criminal justice, there really is a deep division between those who basically see the democratic public as the problem and those who basically see it as the solution. For all the nuances in any particular person's ideas—and it is possible to attend overmuch to

those nuances—one can typically see in those ideas a *direction* of thought. Arguments come with premises and implications, tonalities of thought and feeling, even a spirit, which run deeper than the arguments' particulars, and which place the arguments within a larger family of ideas or point of view.[29] These families are built collectively and it is they that really move the worlds of thought and action. In ideas about politics, it matters which way one thinks the arrow points. In criminal justice, very often, it points either toward more or less democratic control.

There is also something to be gained from making common cause. That too is a premise of this Symposium and the conference on which it is based. Those of us assembled here are the democratizers, and we are writing together to identify and critically examine the foundational ideas that define the democratization perspective; to fit those ideas together into a whole, a point of view of our own; and to project those shared ideas out into the world with more force than we could alone. The genesis of this project is different from most academic conferences and symposia. It was not our goal merely to discuss the theme of democracy and criminal law, and the papers gathered here are neither one-off pieces on the subject nor just the latest steps in the various authors' various research agendas. Rather, each author was asked to survey and sum up the democratic themes in his or her career of work as a whole—retrospectively interpreting past work rather than advancing an isolated thesis—and, in addition, to participate in collectively authoring a set of policy proposals for reforming criminal justice in a democratic direction. It bears emphasis that, because of this approach, the essays in this Symposium—including this Manifesto—do not present all of the fine-grained evidence, argumentative nuance, and responses to objections necessary to fully defend the democratization program. That scholarly rigor is indispensably important, and it exists, but it is contained in the many past articles and books written by the various contributors to this Symposium. We could not possibly do justice to all of that prior scholarship, nor indeed to the force of the objections themselves, by trying to review it all in these short essays. It is not our project here to review it but to *build* on it, to draw it together. Our goal here is to collectively define what democratizing criminal justice means and thereby—hopefully—to launch a movement in the world of ideas and, perhaps, one day, politics as well. One can think of this Symposium as the proceedings of the founding meeting of the Comintern—but in a nice, pro-democracy way. Whether we have succeeded is for readers to judge.

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[29] What is the "spirit" of an argument? I attempt a nonmetaphorical definition in *Reconstructivism*: "[T]he spirit of a normative position is the unity of its reasons and the feelings that make those reasons seem compelling." Kleinfeld, *Reconstructivism*, *supra* note 16, at 1564.

I. THE CONCEPTUAL ROOTS OF THE TWO VISIONS

We term our perspective the "democratic justice view" and the "democratization movement." But in what sense do we use the term "democracy"? And what should we term the other of our view?

"Democracy" is at once an intuitive and a profoundly contested concept. An astonishing variety of governments have claimed the title of "democracy," including not just diverse forms of contemporary constitutional organization (parliamentary, presidential, national, federated, etc.) but also many authoritarian "people's republics" and "democratic republics" as well. Some of these claims to democracy are hypocritical, of course, but others reflect sincere disagreement about what democracy means, and even the hypocrisies are interesting from the standpoint of intellectual history: claiming to represent "the people" seems to be a political imperative of the modern era, and so "democracy" becomes part of the justificatory rhetoric of wildly divergent forms of government. Turning from politics to theory, the array of different conceptions of democracy (majoritarian, pluralist, liberal, deliberative, egalitarian, etc.) is so diverse that one can lose all sense of a common core. To some extent, the cause of this conceptual chaos is, again, the felt need in the modern world to claim the mantle of democracy, and so the intellectuals, like the politicians, indulge in sleight of hand, self-deception, hypocrisy, or a sort of radical drift (sometimes conscious, sometimes not) in which they elaborate the concept of democracy in ways that preserve the term but for purposes no ordinarily socialized member of the culture could recognize as corresponding to its substance. The trick is to re-formulate what "democracy" means; enough intellectual dexterity and one can get license to claim (and even believe) oneself to be a democrat while espousing views that are in fairness anything but. Few people want to admit even to themselves that they are anti-democratic, though many are. Yet even if one recognizes these manipulations for what they are and sets them aside, there is still a large zone of reasonable and good faith disagreement about what "democracy" means. Much as the term might seem intuitively appropriate for the idea that criminal justice should be "more community focused and responsive to lay influences," as those of us participating in this Symposium believe, our efforts might be hampered if we lack an articulate explanation of what we mean by "democracy."

I would thus like to propose a conception of democracy, not necessarily for all contexts, but for purposes of clarifying the shared vision underlying our movement to democratize criminal justice. The theoretical effort will take us from Max Weber and Jürgen Habermas to Alexis de Tocqueville and Philip Pettit, but I submit that the conception of

democracy thus developed is not obscure but just a way of spelling out analytically a familiar and widely shared set of ideas.

Max Weber was above all a theorist of modernity, and among his transformative ideas was that bureaucratization is modernity's defining feature.[30] The term "bureaucracy" did not carry for him the pejorative implications it carries in contemporary American politics. He meant it in its etymological sense: "bureau" meaning "office" and "kratos" meaning "rule"—thus rule by officeholders, government through officials. He described the bureaucratic form of life in exquisite and startlingly prescient detail, but in his account one can distill, I submit, three core features of all bureaucracy as such. The first is the displacement of the laity by an officialdom, or to be more precise, governance and administration, not by the lay people in their capacity as citizens or as ad hoc officials, nor by charismatic leadership, but by a *professionalized corps of officials and experts*.[31] The second is government through technical expertise, knowledge, and general rules applied to particular cases, as opposed to prudential judgment, equitable discretion, individualized moral evaluation, intuition, or common sense.[32] The third, which turns on Weber's insight that to adopt a form of government is to adopt a form of thought, is the pervasive use of and preference for *instrumental rationality*—a term Weber coined.[33] That is, bureaucratic government operates with a distinct conception of what it *means* to be rational, a conception Weber thought characteristic of modernity itself, according to which one identifies an end to be maximized and uses the technical apparatus of government to secure that end as efficiently as possible. The other of instrumental rationality is not *irrationality* but what Weber termed *value rationality*, in which decisions are taken by consciously considering which course of action best coheres with one's own or the community's ethos, norms, or values, typically through attention to concrete particulars or a concrete balancing of interests.[34] To act in a certain way because one thinks so acting is, for

[30] MAX WEBER, ECONOMY AND SOCIETY 217, 975, 1002–03, 1393–95 (Guenther Roth & Claus Wittich eds. & trans., Univ. of Cal. Press 1978) (1922).

[31] *See id.* at 217–26, 267, 290, 758–63, 956–58, 973–75.

[32] *See id.*

[33] *Id.* at 24–26, 891.

[34] *Id.* In certain passages, Weber does slip into referring to equitable, particularistic decisionmaking as "irrational," rather than "value rational," but both the overall context and the tenor of those passages does not suggest that he regarded them as instances of nonthinking or poor thinking so much as thinking of a different kind. *See, e.g.*, *id.* at 656–67. My view is that Weber found it convenient to adopt the language of modernity—a perspective for which "rationality" just means instrumental, general forms of reason—in order to make certain points about modernity, and since his focus was expressly descriptive rather than normative, he did not greatly concern himself with the negative implications of the term "irrational."

example, "required by duty, honor, the pursuit of beauty, a religious call, personal loyalty, or the importance of some 'cause'" is to act on value rational grounds.[35]

Taken together, Weber envisioned modern government—and incidentally, modern business as well—as structured such that power is exercised by officeholders with subject matter expertise employing technical knowledge to accomplish some given set of ends in instrumentally rational ways. For many of us today, it might be difficult to imagine any other way of ordering the world—encountering Weber's ideas is for me like seeing the social world as I've known it laid out in conceptual form, something I don't so much choose to believe as find, in Holmes's phrase, "that I can't help believing"[36]—but Weber had the historical and comparative knowledge to know that there *are* other ways of ordering the world, and he lived closer to the cusp of the change than we do. Notably, Weber was neither wholly for nor against the brave new world of bureaucratic modernity. He thought much would be gained by it but also certain things of value—certain ways of relating spiritually to the world, for example—irretrievably lost, and his writing about bureaucratization is tinged with the sadness of the loss.[37] Mostly he thought the transformation inevitable.[38] Also important for present purposes, Weber argued that law and lawyers have a tendency toward bureaucratic organization, in part because he thought bureaucratic legitimacy bottoms out in "legal

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[35] *Id.* at 25. The types of rationality can and often do mix:

> Choice between alternative and conflicting ends and results may well be determined in a value-rational manner. In that case, action is instrumentally rational only in respect to the choice of means. On the other hand, the actor may, instead of deciding between alternative and conflicting ends in terms of a rational orientation to a system of values, simply take them as given subjective wants and arrange them in a scale of consciously assessed relative urgency.

Id. at 26.

[36] Letter from Oliver Wendell Holmes to Harold Laski (Jan. 11, 1929), *in* THE ESSENTIAL HOLMES 107 (Richard A. Posner ed., 1992) ("[W]hen I say that a thing is true I only mean that I can't help believing it . . . ."); *see also* Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918) ("If, as I have suggested elsewhere, the truth may be defined as the system of my (intellectual) limitations, what gives it objectivity is the fact that I find my fellow man to a greater or less extent (never wholly) subject to the same *Can't Helps*.").

[37] *See, e.g.*, MAX WEBER, SCIENCE AS A VOCATION (1918), *reprinted in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 129, 155 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) ("The fate of our times is characterized by rationalization and intellectualization and, above all, by the 'disenchantment of the world.' Precisely the ultimate and most sublime values have retreated from public life either into the transcendental realm of mystic life or into the brotherliness of direct and personal human relations. It is not accidental that our greatest art is intimate and not monumental, nor is it accidental that today only within the smallest and intimate circles, in personal human situations, in *pianissimo*, that something is pulsating that corresponds to the prophetic *pneuma*, which in former times swept through the great communities like a firebrand, welding them together.").

[38] *See id.*

authority"[39] and in part because he saw law's tendency to order the world by general rules as characteristic of the formal orientation of bureaucratic governance.[40]

Yet, in a variety of ways, Weber thought the Anglo-American, common law tradition resists that bureaucratic pull. He saw the jury trial as a form of resistance to bureaucracy—a grant of authority to the laity in the midst of a process otherwise dominated by legal professionals and a preservation of the laity's characteristically particularistic, equitable, value rational mode of reasoning in the midst of law's otherwise formal, rule-based mode of administration.[41] He also saw the common law tradition of developing norms in response to particular, individual situations as anti-bureaucratic in character,[42] and likewise the tendency to resolve cases on the basis of a "concrete balancing of interests" or "in terms of concrete ethical or other practical valuations" (which is related to both common law and realist styles of adjudication).[43] Weber even remarked in this anti-bureaucratic vein on the common law's regard for "the very personal authority of an individual judge" and the view of the common law judge's "opinion" (as we revealingly term it) as "the very personal creation of the concrete individual judge"—in contrast to the Continent's view of judges as civil servants exercising a neutral form of technical expertise.[44] These points will prove relevant later, as we attempt to specify what it is the movement to democratize criminal justice is for and against, but to anticipate the thought: the democratization movement's goal in part is to join in Anglo-American law's traditional resistance to the *total* bureaucratization of legal arrangements. We aim to preserve pockets of nonbureaucratic reason and authority within a system of criminal law that is inevitably bureaucratized to a substantial extent. We *want* a criminal system built of ill-fitting parts, a criminal system that both accommodates and frustrates official purposes, that interferes, that resists—a system that functions, not hierarchically, but agonistically.

What does all this mean for the concept of democracy? As Weber saw vividly, bureaucratization's modes of thought, modes of governance, and ambition to direct events tends to conflict with democracy's often

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[39] WEBER, ECONOMY AND SOCIETY, *supra* note 30, at 215 (arguing that legal authority "rest[s] on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands").

[40] *See id*. at 653–58.

[41] *See id.* at 758–63, 813–14, 891–95.

[42] *Id.*

[43] *Id.* at 891, 976.

[44] *Id.* at 890.

antithetical modes of thought, modes of governance, and equal ambition to direct events: "If, however, an 'ethos'—not to speak of other impulses—takes hold of the masses on some individual question, its postulates of *substantive* justice, oriented toward some concrete instance and person, will unavoidably collide with the formalism and the rule-bound and cool 'matter-of-factness' of bureaucratic administration."[45] The root problem is that a system of rule premised on the equality and sovereignty of the governed will seek to prevent "the development of a closed status group of officials" and to minimize "the authority of officialdom in the interest of expanding the sphere of influence of 'public opinion.'"[46] It will not wholly relieve the tension to put democratic forces formally in command:

> The power position of a fully developed bureaucracy is always great, under normal conditions overpowering. The political "master" always finds himself, vis-[á]-vis the trained official, in the position of a dilettante facing the expert . . . . [even when] the "master," whom the bureaucracy serves, is the "people" . . . or a parliament . . . or a popularly elected president . . . .[47]

Above all, democratic forces will resent "the *leveling of the governed* in [the] face of the governing and bureaucratically articulated group, which in its turn may occupy a quite autocratic position, both in fact and in form."[48] Thus, Weber concluded, "'democracy' as such is opposed to the 'rule' of bureaucracy."[49] Others have echoed these ideas.[50] It is interesting to encounter them at the present moment, amidst Brexit and the other tensions between Europe's national democracies and the bureaucratically articulated European Union, and the perennial tensions in the United States between elected leadership and the administrative state.

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[45] *Id.* at 980. Ironically, as Weber recognized, democracy also helps bring bureaucracy about: "Bureaucracy inevitably accompanies modern *mass democracy*," because (among other things) mass democracy opposes "the feudal, patrimonial, and—at least in intent—the plutocratic privileges" that come with the administration of government by local notables. *Id.* at 983–84. Thus "democracy inevitably comes into conflict with the bureaucratic tendencies which have been produced by its very fight against the notables." *Id.* at 985.

[46] *Id.* at 985.

[47] *Id.* at 991–92.

[48] *Id.* at 985.

[49] *Id.* at 991.

[50] *See, e.g.*, NORBERTO BOBBIO, THE FUTURE OF DEMOCRACY 37–38 (Richard Bellamy ed., Roger Griffin trans., Polity Press 1987) (1984) ("Technocracy and democracy are antithetical: if the expert plays a leading role in industrial society he cannot be considered as just any citizen. The hypothesis which underlies democracy is that all are in a position to make decisions about everything. The technocracy claims, on the contrary, that the only ones called on to make decisions are the few who have the relevant expertise . . . . [W]hereas in a democratic society power is transmitted from the base upwards, in a bureaucratic society power descends from the top.").

We can draw on this democracy/bureaucracy opposition to clarify what we mean by "democracy" (and what our opponents mean by its absence) in the movement to democratize criminal justice. It comes to this: one dimension of democracy is its character as an *anti-bureaucratic force* or (more modestly) as a *counterweight* to bureaucratic forces. This means that democratizers in the criminal justice context reverse Weber's three core features of all bureaucracy as such. That is, we think there is an important place in the criminal system for governance by lay people in their capacity as citizens; we want to maintain room in criminal law and procedure for prudential, equitable, and individualized moral judgment; and we think criminal justice is often better served by the exercise of value rationality than by instrumental rationality. We also favor (again, in the criminal justice context) Anglo-American law's traditional "pockets of resistance" response to the bureaucratization of law.

We turn now to two bodies of thought within more conventional democratic theory: the theoretical traditions of *deliberative democracy* and *participatory democracy*. Key to both traditions is that they do not consider it sufficient for democratic purposes that the people elect a set of representatives who rule them, let alone that the people elect a set of representatives who, together with appointed officials, constitute a governing class that rules them. Indeed, both traditions deny that relationships of *representation* are, by themselves, sufficient for democratic purposes. Deliberative and participatory democracy insist, as their names imply, on the importance of the broader political community's *deliberation* on matters of public concern and *participation* in the activity of government, such that the law, policies, and practices of the state substantially reflect and result from the will, beliefs, and values of the people living within the state. Deliberative and participatory democracy thus envision a much larger role for "We the People" than is envisaged by the familiar conception of democracy as a regime wholly based on electing representatives.

To get clear on the stakes here, it's useful to contrast deliberative and participatory democracy with Joseph Schumpeter's skeptical, minimalist alternative. For Schumpeter, there is no "will of the people" that could or should decide matters of policy or direct the actions of elected representatives, and whatever emerges from public deliberation would probably have disastrous effects if made the basis for policy.[51] The electorate's role is not "the deciding of issues" but "the election of the men

[51] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 252–53 (Routledge 2003) (1943).

who are to do the deciding."[52] The "men who are to do the deciding" are drawn "from those elements of the population that are available for the political vocation" and thus from a selective "social stratum"—a governing class, an elite.[53] Inevitably, that elite exhibits internal disagreement, and thus there is "competition for political leadership"[54] within that class. Democracy means only that the basis for winning that competition is getting more votes at regular elections. Put in terms of a definition: "the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."[55] Thus democracy consists essentially in choosing which set of elites rules at a given time. Neither deliberation nor participation matters, and although elections do, representation is not the reason: the winners do not stand in for, recapitulate the views and values of, or otherwise *represent* the electorate. The election procedure is purely an accountability mechanism, enabling the electorate to protect itself against incompetence or abuse. Thus government is (as even Schumpeter thinks it should be) *for* the people. But it is not *by* them, nor *of* them: "If results that prove in the long run satisfactory to the people at large are made the test of government *for* the people, then government *by* the people, as conceived by the classical doctrine of democracy, would often fail to meet it."[56] Having chosen a government, the people should get out of the way of its efficient stewardship. In particular, the professional bureaucracy must be able to do its work unimpeded.[57] Thus democracy in even the minimal sense of majoritarian elections alone is not a good in itself (for what if a country "in a democratic way, practices the persecution of Christians, the burning of witches, and the slaughtering of Jews"?), but a *means* or "*method*" by which to advance "ultimate ideals"—among them "justice"—and its value depends on its tendency to advance those ideals.[58]

Like all the best worldly, demoralized realisms (there are quite a number, and they share a rhetorical structure), Schumpeter's account has the arresting effect of seeming to lay bare a hard, stark truth. And like all the best worldly, demoralized realisms, his account is clearly partly true, which can make it seem wholly true. But notice what is lost: Schumpeter's conception of democracy loses all sense of the ideal of a sovereign people

[52] *Id.* at 269.
[53] *Id.* at 290–91.
[54] *Id.* at 269.
[55] *Id.*
[56] *Id.* at 256.
[57] *Id.* at 293.
[58] *Id.* at 242.

governing itself. Deliberative and participatory democracy are complex traditions that involve diverse theorists and theories, but what gives them shape is precisely the effort to recover that ideal.

Deliberative democracy focuses on the importance, in any political community that aspires to be truly democratic, of free and equal citizens within the community deliberating on matters of shared political concern, including questions of value.[59] From that foundation, the tendrils of the tradition curl in different directions, some of which I think are mistaken or unhelpful, but at (what I see as) its best, the deliberative tradition advances three core claims: (1) that the public sphere of a democracy should be constituted in conditions of sufficient freedom and equality that all of the individuals comprising the political community are in a position to communicate about public life on fair terms, with access to the relevant means of communication and without fear of reprisal, manipulation through propaganda, or other forms of domination; (2) that citizens in a democracy should debate at least the most important political decisions in the public sphere, and the debate should be not just an airing of immoveable preferences but, at least aspirationally, a setting in which minds might change; and (3) that government, in establishing law and policy or taking action, should heed and should find itself compelled to heed the results of the public debate.[60] These deliberative conditions are necessary to democracy because they serve an essential democratic end. The end is to ensure that the individuals who comprise society can participate in "democratic opinion- and will-formation,"[61] and that government has to listen once the democratic opinion and will are formed. The fundamental idea is one of authorship: where the community makes the law out of its own convictions, the community can truly be seen as self-governing; the people can rationally see themselves as the law's author. As Habermas puts it: "The idea of self-legislation by *citizens*, that is, requires that those subject to law as its addressees can at the same time understand themselves as authors of law."[62]

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[59] *See* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 1 (1996) ("We address the challenge of moral disagreement here by developing a conception of democracy that secures a central place for moral discussion in political life. Along with a growing number of other political theorists, we call this conception deliberative democracy. The core idea is simple: when citizens or their representatives disagree morally, they should continue to reason together to reach mutually acceptable decisions.").

[60] These general ideas, though not this framing, can be found in, for example, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 107, 110, 127 (William Rehg trans., MIT Press 1996) (1992); *see also* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 3–7 (2004).

[61] HABERMAS, *supra* note 60, at 300.

[62] *Id.* at 120.

In other words, central to democracy on a deliberative view is a community's capacity to freely develop its political culture and to project that culture into the realm of government. There is, it must be said, a portion of the deliberative tradition that takes these premises in an anti-majoritarian, indeed, anti-popular sovereignty, direction. Rather than honoring the flawed processes of deliberation that take place in actual social life, these theorists turn to a hypothetical consensus that would presumably follow from a perfectly rational deliberative process.[63] The philosophical game then becomes one of specifying the idealizing conditions for "rational" deliberation and rejecting the results of actual processes of social deliberation for not being close enough to the ideal (not being "rational" enough). At its most distorted, theorists use this version of deliberative theory to reject voting and other real indicia of social conviction in favor of whatever conclusion the theorist thinks is most rational—the conclusion the community would have arrived at if only the community had deliberated better—and, indeed, to call that conclusion the "democratic" one even if it has no substantial public support. As I discuss at greater length later in this Symposium, I think this rationalist version of deliberative democracy is a mistake of the first order.[64] But nothing in the foundational ideas of the theory necessitates it. To say that a democratic community should be able to freely develop its political culture and project that culture into the realm of government is not to deny the importance of voting in elections and other more prosaic features of majoritarian governance; the deliberative features of democracy are necessary, not sufficient. To say that is also not to imply an exaggerated faith in the prospects for consensus or need for consensus,[65] the likelihood that

[63] I discuss this issue at greater length in Joshua Kleinfeld, *Three Principles of Democratic Justice*, 111 NW. U. L. REV. 1455 (2017).

[64] *Id.*

[65] For example, Habermas's "discourse principle" holds that "[j]ust those action norms are valid to which all possibly affected persons could agree as participants in rational discourses." HABERMAS, *supra* note 60, at 107. It should be said that this orientation to consensus is for Habermas a regulative ideal: democratic deliberation must be oriented to a consensus that is "*possible in principle*," despite "overwhelming evidence of persistent dissensus" because only the orientation to consensus keeps discourse functioning according to its purpose, namely, ordering politics in a rational and noncoercive way for all. Jürgen Habermas, *Reply to Symposium Participants, Benjamin N. Cardozo School of Law*, 17 CARDOZO L. REV. 1477, 1491 (1996). Nonetheless, the idea of consensus is both much too demanding and not demanding enough. It is too demanding because it rejects what might be *the* foundational principle on which every large-scale, real democracy in the world operates: the principle of a fair vote. It is not demanding enough because it rests on a *hypothetical* assent and *possible* consensus rather than an actual decision undertaken by real people. The two flaws are related: an impossible standard can only be satisfied in imaginary conditions. To make the structure work, Habermas has to postulate that, in ideal communicative conditions, people will tend toward consensus, and so real discourse only fails to reach consensus because its communicative conditions fall short of

deliberative processes will reach true or best substantive conclusions,[66] or the possibility or desirability of a collective consciousness into which individual citizens are incorporated (or subordinated).[67] In fact, the deliberative program is not nearly so exotic as it might seem. As First Amendment scholar Robert Post has remarked, the version of deliberative democracy presented here is "the theory of the American First Amendment, which rests on the idea that if citizens are free to participate in the formation of public opinion, and if the decisions of the state are made responsive to public opinion, citizens will be able to experience their government as their own . . . ."[68]

Indeed, I would suggest—taking inspiration from the American First Amendment tradition—that we extend the idea of deliberative democracy past the notion of express political deliberation to a broader conception of cultural self-formation, where "deliberation" just refers to the communicative processes by which culture (all culture, not just political culture) is fashioned, and "democracy" means that government responds to the culture thus formed.[69] Put another way, democracy implies the freedom of the members of a political community to form themselves culturally and the subordination of government to the culture thus formed. If democracy is government "by, of, and for the people," deliberative democracy is about the "of." The exercise of political power, including the exercise of political power that is law, is democratic insofar as it is made *from—out of—*a community's ethical life. This cultural extension of the deliberative tradition carries the tradition past where some deliberative democrats would want it to go, but others—in particular, a group of people who

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the ideal. I do not think human reason is capable of overcoming disagreement to this extent. But I see this insistence on consensus as native to Habermas's particular brand of "discourse-theoretic" deliberative democracy, not deliberative democracy itself.

[66] *See supra* note 65.

[67] For instance, Jean-Jacques Rousseau's famous presentation of how individual wills combine to form a general will, though a foundation stone in the deliberative tradition, seems so exaggerated as to be at once metaphysically implausible and, paradoxically, anti-democratic, even totalitarian:

> If, then, we eliminate from the social pact everything that is not essential to it, we find it comes down to this: Each one of us puts into the community his person and all his powers under the supreme direction of the general will; and as a body, we incorporate every member as an indivisible part of the whole.

JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 61 (Maurice Cranston trans., Penguin Books 1968) (1762) (internal quotation marks omitted). What this gets right is the basic conceptual orientation—the idea of opinion formation in democratic societies as something very important and necessary to understand, and as something collective and intersubjective—but the extremity of Rousseau's account is, in my view, his problem, not deliberative democracy's.

[68] Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 27 (2006).

[69] I develop this thought later in this Symposium, where I write wholly for myself rather than for a collective. *See* Kleinfeld, *Three Principles*, *supra* note 63, at 1465–75.

straddle republican, communitarian, and deliberative ideas—think that the deliberative tradition at its best comes to a cultural conclusion.[70]

Note, finally, that deliberative democracy is an anti-bureaucratic form of democratic theory. When citizens communicate about matters of political concern, obviously the laity is engaged and obviously they will reason in value rational terms about matters of substantive justice (though a deliberative democrat might hold that experts and officials play an essential part in good public deliberation, provided they contribute in nondominating ways—providing information, for example). When government heeds the command of public opinion or culture, obviously the bureaucracy is subordinated to the democracy (though, again, a deliberative democrat might well think these things typically go best when the bureaucracy is subordinated on questions of ends and enlisted on questions of means—a possibility Weber's theory of bureaucracy can accommodate).[71] The point surfaces in a particularly interesting way in Habermas's *Theory of Communicative Action*, a work of social theory that predates his major work on deliberative democracy and that focuses, under Weber's influence, on a distinction between what Habermas terms "system" and "lifeworld."[72] Those terms have an odd ring in English-speaking ears, but the essential

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[70] Habermas is among those who do not agree with the cultural extension of deliberative theory. He notes that some "contemporary republicans," who give "public communication a communitarian reading," tend to look at politics in terms of explicating "a shared form of life or collective identity" and thus to treat political questions as "ethical questions where we, as members of a community, ask ourselves who we are and who we would like to be." Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1, 4 (1994). He objects because he thinks these ethical questions are "subordinate to moral questions . . . in the narrow sense of the Kantian tradition," that is, "questions of justice." *Id.* at 5. Philip Pettit also rejects this culturalist view and distinguishes it from his use of the term "republican":

> I should mention that the tradition with which we identify is not the sort of tradition—ultimately, the populist tradition—that hails the democratic participation of the people as one of the highest forms of good . . . . [T]he term 'republican' has come to be associated in many circles, probably under the influence of Hannah Arendt, with a communitarian and populist approach. Such an approach represents the people in their collective presence as master and the state as servant . . . .

PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 7–8 (1997) [hereinafter PETTIT, REPUBLICANISM] (citations omitted). I'm with Arendt, though not necessarily in considering political participation to be the highest good. My view is that the use of political power in a democratic society must—in most ways and most of the time—reflect and express "We the People," and there is no way in that process of reflection and expression to keep the political separate from the cultural.

[71] *See supra* note 35 and accompanying text.

[72] The work is in two volumes, and the very titles reveal Habermas's Weberian inheritance and normative concern for the rise of bureaucratization that Weber brought to light: 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy trans., Beacon Press 1984) (1981); 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON (Thomas McCarthy trans., Beacon Press 1987) (1981).

idea is that the bureaucratization of political and economic processes splits modern societies into more and less bureaucratized parts. On the one hand, governments and markets create a set of institutional structures that operate according to the technical expertise and instrumental rationality of officials, experts, and administrators; this is the system world, the world of Weberian bureaucracy.[73] On the other hand, we create through discourse and social practice a cultural world of shared meanings and values, which are either assumed and unexamined (in which case they are part of the lifeworld) or consciously contested (in which case they shift from the lifeworld to the sphere of communicative action and thus, in political contexts, to the public sphere).[74] For example, it might be assumed in one phase of a society's history that some linguistic convention is used to indicate respect for social superiors; the convention is at that time part of the lifeworld. If in a later phase of that society's history, the linguistic convention and the assumption on which it is based come in for challenge, a deliberative conversation begins among members of the society in the public sphere. Habermas's central normative idea in *Theory of Communicative Action* is that, in contemporary societies, the system world is increasingly colonizing the lifeworld—or, roughly translated, bureaucratic modes of thought are invading domains of cultural life that should be approached in nonbureaucratic ways.[75] An example would be running universities according to the market principles of business. It was later in Habermas's career that this view blossomed into a theory of democracy, but blossom it did: in a democratic society, he argues, the public sphere of communication and discourse exercises directive authority over law and policy, and thus over the system world of markets and government.[76] If we think of the combination of lifeworld and public sphere as, in essence, a community's *culture*, then one way to summarize Habermas's thought is simply to say this: a democratic society is one in which the culture directs the government or, similarly, the community directs the bureaucracy.[77] For an

[73] *See* 2 HABERMAS, *supra* note 72, at 118, 172–79.

[74] *See id.* at 118–40, 324–26.

[75] *See* 1 HABERMAS, *supra* note 72, at xl (stating that the two volumes aim to provide "a theory of modernity that explains the type of social pathologies that are today becoming increasingly visible, by way of the assumption that communicatively structured domains of life are being subordinated to the imperatives of autonomous, formally organized systems of action"); 2 HABERMAS, *supra* note 72, at 323 (describing "a one-sided style of life and a bureaucratic desiccation of the political public sphere" when "the functional imperatives of highly formalized domains penetrate into the private and public sphere, that is, into spheres of the lifeworld in which sociation proceeds mainly by communicative means").

[76] *See supra* notes 59–70 and accompanying text.

[77] Note again, however, that Habermas later expressed opposition to extending his ideas about deliberative democracy to culture in this enlarged sense. *See supra* note 70.

anti-bureaucratic perspective like that of criminal justice democratizers, deliberative democracy is a good fit.

We turn now from deliberative democratic theory to participatory democratic theory for an insight so startlingly simple that it might escape mention were it not for the fact that so many putatively democratic political theorists and governments have minimized it. The insight is just this: democracy means self-government.[78] That is, democracy requires conveying government *into the hands* of the population living under that government—into the hands of "We the People"—for popular sovereignty implies a measure of popular rule, with all its attendant majoritarian implications and risks. The origins of this participatory conception of democracy are in ancient Athens, and the idea is radical in the way ancient Athenian democracy was radical. It carries implications well beyond the merely abstract idea of a government that *represents* its people or *derives legitimacy from* the people. Democracy etymologically means that the people *rule*; it requires that the people living under a government play a part in governmental decisionmaking and administration. If deliberative democracy illuminates the idea of government *of* the people, participatory democracy illuminates the idea of government *by* the people.[79] The enduringly radical character of this idea is, I suspect, why so many politicians and theorists who claim to be democratic insist on elaborating the concept of democracy in ways that evade its popular-majoritarian implications. Yet radical or not, participatory democracy captures core elements of democratic practice, at least in the United States, among them jury service, occasional referenda, and direct rule in local settings (both governmental and nongovernmental). If we expand our concept of participatory democracy to include certain kinds of elections—admittedly not citizens making governmental decisions directly but citizens *participating* in government as voters, where the elections are of such a

[78] *See, e.g.*, BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 151 (1984) ("Strong democracy is defined by politics in the participatory mode: literally, it is self-government by citizens rather than representative government in the name of citizens. Active citizens govern themselves directly here, not necessarily at every level and in every instance, but frequently enough and in particular when basic policies are being decided and when significant power is being deployed."); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 42–43 (1970) ("The existence of representative institutions at [a] national level is not sufficient for democracy . . . socialisation, or 'social training[,'] for democracy must take place in other spheres in order that the necessary individual attitudes and psychological qualities can be developed. This development takes place through the process of participation itself . . . . Therefore, for a democratic polity to exist it is necessary for a participatory society to exist . . . .").

[79] Perhaps it is a little gimmicky, but I find it useful to think that democracy is government "by, of, and for the people" where participatory democracy tracks the "by," deliberative democracy tracks the "of," and voting in elections tracks the "for." *See supra* notes 56, 68–70 and accompanying text.

character that the winners are substantially under popular control—then participatory democracy helps explain the most basic and inescapable fact of American government: choosing leaders by majority vote. In fact, that practice might be the most basic and inescapable fact of all democratic government throughout the world. Any theory of democracy that aspires even to the most minimal descriptive joinder with the world must account for that practice somehow.

Tocqueville thought the American democratic tradition was defined by exactly these ideals of majoritarian self-governance:

> If there is any country in the world where one may hope to assess the true value of the dogma of popular sovereignty, to study its application to the affairs of society and judge its benefits and dangers, that country is surely America. . . . .
>
> In America, the people choose those who make the law and those who carry it out. They constitute the juries that punish infractions of that law. Institutions are democratic not only in principle but in all their ramifications. For example, the people choose their representatives *directly*, and in general they do so *every year*, the better to ensure their subservience. Hence it is really the people who rule, and even though the form of government is representative, it is clear that there can be no durable obstacles capable of preventing the opinions, prejudices, interests, and even passions of the people from making their influence felt on the daily direction of society.
>
> In the United States, as in every country where the people rule, it is the majority that governs in the people's name.[80]

The America Tocqueville observed was therefore profoundly egalitarian on a cultural level—as Tocqueville emphasized before all else—for popular sovereignty and self-government are profoundly egalitarian ideals.[81] Second only to this egalitarianism, American culture was majoritarian, with majority opinion commanding not just political power but "moral ascendency" and "power . . . over thought."[82] In American society, Tocqueville observed, the values and ideas that oriented public life bubbled up from the bottom and middle of the polity rather than descending from the top, and the common person rejected the intellectual dominance of an officialdom or a social elite and admitted no authority greater than his or her own.[83] Meanwhile, politically, voting was the dominant mechanism of political life, with popular control over a huge range of offices and

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[80] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 62, 197 (Arthur Goldhammer trans., Library of Am. 2004) (1835).

[81] *Id.* at 3, 60.

[82] *Id.* at 284, 292.

[83] *Id.* at 52–61.

policies.[84] Government was chiefly a local, community affair, and thus responsive to the attitudes of the immediate locale.[85] American officials were not generally a separate class from the laity; rather, lay people took temporary and partial terms of office and officials transitioned into and out of private life (just as they had in ancient Athens).[86] The jury was a vivid example. The early American jury was not the domesticated factfinder of today but, as Tocqueville argued, a governmental actor on a constitutional scale, almost a fourth branch.[87] The jury functioned within the overall framework of checks and balances as a directly popular check on all three of the other branches, an arbiter over state action by the laity at the very moment of law's application, and thus at the very moment law touched individual interests.[88]

In describing democracy in this way, Tocqueville did not mean simply to sing a song of praise. He saw a great deal to fear in majoritarian democracy: the coarsening of manners and lowering of souls, the control by majority opinion over genuine freedom of thought, and the risk of a "tyranny of the majority."[89] Yet serious as those fears were and are, they can seem almost quaint today. Tocqueville could not have imagined the extremity of the problems to which the last two centuries have exposed us. Above all, the American experience has demonstrated the possibility of white supremacy amidst popular majoritarianism, the European experience has demonstrated the possibility of elected dictatorship, and the last century has shown us depths of racial and other in-group/out-group hatred that political thinkers of the eighteenth and early nineteenth centuries were not in a position to see, and that majoritarian government can weaponize. Popular self-government involves a grant of *trust* to the populace—at least to some extent, relative to the alternatives or as a corrective or control on the alternatives—and sometimes the public cannot be trusted. Some political thinkers are so alarmed by these risks that they basically turn against self-government. Unwilling to surrender the label "democracy," they recast the concept in ways that effectively deny or dramatically minimize democracy's popular-majoritarian core. Many of these political thinkers are implicitly Schumpeterian. They distrust popular deliberation or participation and prefer elite control, though possibly accountable elite

[84] *Id.* at 197.
[85] *Id.* at 67–94.
[86] *Id.* at 232–34.
[87] *Id.* at 311–18.
[88] *Id.*
[89] *Id.* at 283–300, 816–30.

control.[90] They hold dear a set of substantive political values or a conception of justice unrelated to self-government and, if they are candid and self-aware, acknowledge that self-government is for them a secondary or instrumental good—as Schumpeter did[91]—or, if they are less candid and self-aware, redefine democracy so as to minimize the place of self-government in the concept.[92] Above all, they deny or minimize the importance of voting: fearing majorities, they long for a conception of democracy in which majority preferences and therefore majority votes are incidental, irrelevant, or highly controlled.[93]

Yet serious as the concerns that give rise to this anti-majoritarian recasting of democracy are, it is the wrong response. The lesson of popular majoritarianism's shortcomings is the need to balance majority rule with rights and the rule of law, to set up political and economic structures capable of protecting equal citizenship, to hem in populist demagogues by dividing power between multiple branches of government, and to fight for a culture of equality, freedom, and toleration. The lesson is to value *both* community self-determination *and* substantive justice, rather than to value only substantive justice and not community self-determination or to pretend that substantive justice *is* community self-determination. The lesson, in a word, is to be a pluralist about what decent government requires. This is not to say that "democracy" *is* majority rule and implies no thicker set of political values than that. Democracy does carry implications for substantive justice: to give all members of the community a voice and a vote, for example, is to insist on their equal moral standing. But the project of extracting an adequate conception of substantive justice from these

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[90] *See supra* notes 51–57 and accompanying text.

[91] *See supra* note 58 and accompanying text.

[92] There are many examples of these political thinkers, but among the most vivid and influential is the former President (Chief Justice) of the Israeli Supreme Court, Aharon Barak, one of the most important figures in Israel's political history and global legal history. Barak has, through extremely expansive interpretations of legal texts and principles, anchored the left-leaning Israeli judiciary's resistance to right-leaning Israeli electoral forces that commonly win at the ballot box. Countermajoritarian? Undemocratic? Not necessarily, says Barak:

> The judiciary must be aware of the fundamental values of the people. It must balance them in accordance with the values of the "*enlightened general public*" in Israel. It must reflect the general public's conscience, the social consensus, the legal ethics and the value judgments of society with regard to acceptable and unacceptable behavior . . . . A constitution is a living organism, and its interpretation must express the deep "I believe" of the society.

Aharon Barak, *The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law*, 31 ISRAEL L. REV. 3, 5 (1997) (emphasis added).

[93] *See, e.g.*, *id.* Providing a conception of democracy as purely an instrumental good was part of Schumpeter's genius. *See supra* notes 51–58 and accompanying text.

relatively thin democratic premises is, I think, unlikely to succeed, and the tendency to label one's political values "democratic," whatever those values are and whatever role they give or deny popular rule, is gravely misleading. "Democracy" has a meaning; it is not just a synonym for good government. Majoritarian self-government is *necessary* for democracy as such because at the irreducible core of democracy is popular sovereignty, but majoritarian self-government is not sufficient because democracy carries implications beyond majority rule. In turn, democracy is *necessary* to decent government because popular sovereignty is a treasure and a right, but it is not sufficient because decent government also requires elements of substantive justice that democracy alone does not supply. Conceptions of government that purport to be conceptions of democracy but so prioritize concern for minorities as to deny, rather than merely constrain, the right of majorities to collective self-determination have allowed the exception to swallow the rule. Conceptions of government that purport to be conceptions of democracy but so prioritize a substantive conception of justice or set of values as to render collective self-determination a secondary or merely instrumental good have failed to appreciate the normative force of the claim to popular sovereignty, or have failed the challenge of pluralism, or both. Conceptions of government that purport to be conceptions of democracy but cannot account for the absolutely central place of voting in all democracy as such—not a hypothetical consensus or "general will" but the actual rule of an actual majority after a fair vote—have lost sight, not just of a mechanism of democratic governance, but of the popular sovereignty and collective self-determination the mechanism is designed to protect. These conceptions of "democracy" are anti-democratic in fact though they are unwilling to be so in name. There is no such thing as nonmajoritarian democracy.

Anti-bureaucratic, deliberative, participatory—the three threads of democratic thought discussed thus far are naturally tied together. All three involve a conception of government in which political life is democratic insofar as it is closely linked to "We the People." The fourth and last thread is less connected to the other three, but it is necessary if our concept of democracy is to capture the full range of ideas at work in the movement to democratize criminal justice. It is essentially a constitutional vision concerned with dispersing power for the sake of preserving individual liberty. Among contemporary political philosophers, its leading advocate is Philip Pettit.

Pettit terms the view "republicanism" and it has three parts.[94] The first is a distinct conception of individual freedom, which Pettit terms "freedom as non-domination": to be free is not just an absence of interference but a right not to be subjected to the whim of any other person.[95] The Romans thought of this as the condition of living without a *dominus*, a master: a full citizen is someone protected by law from domination, someone who can look any other person in the eyes "without fear or deference."[96] Thus, rather than the traditional opposition between equality and liberty, the two here are related: equality is the root of freedom, and freedom is the consequence of equality. Furthermore, this conception of freedom and equality entails the rule of law because a *right* not to be subjected to the whim of any other person must be a legally protected condition rather than just a contingent circumstance (or it would be the mere absence of interference). Thus the root idea of freedom as nondomination brings in its train, as it were, other core values. Second is the idea of constitutionalism and, with it, the "mixed constitution": state power should not be absolute, unified, or perpetual but under the rule of law and divided among multiple officials in a position to check one another.[97] This is of course the concept of constitutional checks and balances, here enlisted in the service of the ideal of freedom as nondomination: power must be broken up and dispersed or some person, group, or entity will be in the position of a *dominus* and everyone else will be that person, group, or entity's subjects. Third and finally, the republican tradition endorses the idea of what Pettit terms "a contestatory citizenry": a public rambunctious and independent enough to serve as an ultimate check on government should government drift too far away from the people to whom it is supposed to answer, and a system of government that provides channels by which citizens can, in some form (not necessarily by voting), contest state policy and action.[98]

One might wonder: where is majoritarian self-government—or indeed any form of collective self-determination—in this version of democracy?

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[94] *See* PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 5–8 (2012) [hereinafter PETTIT, ON THE PEOPLE'S TERMS]; *see also* PETTIT, REPUBLICANISM, *supra* note 70. The term "republican" is slippery: Pettit is at pains to distinguish his republicanism from a more deliberative and participatory version that he regards as populist, *see supra* note 70 and accompanying text, and it is not clear which version, if either, corresponds to the use of that term in early America, *see supra* notes 3–4 and accompanying text.

[95] PETTIT, ON THE PEOPLE'S TERMS, *supra* note 94, at 5; *see also* PETTIT, REPUBLICANISM, *supra* note 70, at 51–80.

[96] PETTIT, ON THE PEOPLE'S TERMS, *supra* note 94, at 17.

[97] *Id.* at 5; *see also* PETTIT, REPUBLICANISM, *supra* note 70, at 171–83.

[98] PETTIT, ON THE PEOPLE'S TERMS, *supra* note 94, at 5–6; *see also* PETTIT, REPUBLICANISM, *supra* note 70, at 183–205.

The answer, alas, is that Pettit is one of those putatively democratic theorists who substantially defines self-government out of democracy.[99] Individual freedom is his quarry; "the instruments of democratic control, participatory or representative" are only "a means of furthering liberty."[100] What there is of the people's rule on his theory is to be found only in the contestability criterion:

> The non-arbitrariness of public decisions comes of their meeting, not the condition of having originated or emerged according to some consensual process, but the condition of being such that if they conflict with the perceived interests and ideas of the citizens, then the citizens can effectively contest them. . . .
>
> . . . Democracy, as ordinarily understood, is connected with consent; it is almost exclusively associated with the popular election of the personnel in government, or at least with the popular election of the members of the legislature. But democracy may be understood, without unduly forcing intuitions, on a model that is primarily contestatory rather than consensual.[101]

Contestation does provide Pettit with some elements of what is standardly understood as democratic, but "[i]t breaks with any notion of democracy that would consecrate majority opinion."[102]

Yet if one regards Pettit's version of republicanism, not as a complete theory of democracy or government, but just as a powerful insight about freedom and the constitutional conditions in which freedom can be secured, then the theory provides something quite useful to the movement to democratize criminal justice—something missing from the anti-bureaucratic, deliberative, and participatory theories of democracy discussed above. Pettit's republicanism provides a way of thinking about the place of individual freedom, the rule of law, and constitutionalism in the theory of democracy. From Pettit, we can add to our mix of ideas the notion, for example, that police and prosecutors in the contemporary operation of American criminal justice may enjoy a form of domination inconsistent with democratic freedom, that the constitutional structures undergirding American criminal justice should disperse power more than they presently do, or that the individuals and communities most hard-pressed by the criminal justice system should be better able to contest its operation than they presently can. These contentions and others like them are part of the big tent of democratic thinking in the movement to democratize criminal justice.

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[99] *See supra* notes 90–93 and accompanying text.

[100] PETTIT, REPUBLICANISM, *supra* note 70, at 30.

[101] *Id*. at 185.

[102] *Id.* at 202.

II. DEMOCRATIZATION VERSUS BUREAUCRATIC PROFESSIONALIZATION

All of these ideas—Weber's, Habermas's, Tocqueville's, and Pettit's—are complex and an extremely brief survey of the kind above of course involves extreme compression. But I like to think there is a certain poetry in brevity and something to be gained from the effort to distill simple essences from complex ideas. What is to be gained in this case is the ability to see the degree to which these four bodies of thought can be pulled together. "Democracy" as we use that term in the movement to democratize criminal justice refers to a form of criminal law and procedure that is responsive to the laity rather than solely to officials and experts; that cares about prudential, equitable, and individualized moral judgment rather than merely formal rule compliance and technical expertise; that is more value rational than instrumentally rational; that submits the law and administration of criminal justice to public deliberation and to the values embedded in the way we live together as a culture, rather than treating it mainly as a tool of social management under the control of our institutional bureaucracies; that is substantially given into the hands of local communities as an instrument of collective self-determination and cultural self-creation; but that channels popular rule into constitutional forms meant to resist domination, disperse power, and permit contestation by a restless and animated citizenry. Our conception of democracy is thus anti-bureaucratic, deliberative, and participatory under a constitutional structure. Or to put all that in as few words as I can muster: the democratization movement stands for the "We the People" principle in criminal justice.

The most accurate term for the rival of our view would be *bureaucratization*. For that is the polarity: not democracy versus tyranny but democracy versus bureaucracy. And bureaucratization, not in a pejorative sense but in the technical sense Weber identifies, is what members of the rival camp really endorse. James Whitman's *Harsh Justice*, for example, is a paean to the humaneness of strong, insulated, bureaucratic criminal administration and a condemnatory study of what he sees as the vengeful punitiveness of democratic publics.[103] A major focus of John Langbein's career is his sustained opposition to the jury and defense of criminal procedure by officials and experts—precisely because he recognizes in an uncommonly clear-eyed way that the jury is an institution of the laity, inconsistent with the rule of officials and experts, and because he acknowledges in an uncommonly candid way that he regards the laity as

[103] JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003).

ignorant and irrational and the rule of officials and experts as relatively rational and decent.[104] David Garland's *Culture of Control* and *Peculiar Institution*, while very different books, are aligned in their fear of the American public, pictured in *Culture of Control* as reactionary and in *Peculiar Institution* as bigoted.[105] My personal shorthand for their views—not wholly fair, to be sure, but I think revealing, again in the sense that extreme compression can be revealing—is that Whitman views the American public as, above all, *violent*; Langbein views the American public as, above all, *stupid*; and Garland views the American public as, above all, *racist*. Each traces the American criminal system's dysfunctions to the toxic combination of popular rule with a bad populace, and each turns to bureaucratic governance as a solution. They are far from alone in this: versions of their views can be heard in the work of Michelle Alexander,[106] Michael Tonry,[107] Nicola Lacey,[108] and many, many others, both scholarly and popular. The view is so often and so casually repeated that it has become the dominant narrative of the criminal justice crisis in American intellectual life. Our criminal system is harsh because the American public wants it that way, the narrative goes; naturally, the solution is to defang the public. But there is a counternarrative, itself with many adherents, in which the dysfunctions of American criminal justice trace back mainly to problems of bureaucratic modes of thought and governance; naturally, the solution is to curb and counterbalance the bureaucracy. Democracies as such are not relentlessly harsh on this view, nor is American democracy relentlessly harsh—in fact, the bulk of historical evidence suggests the opposite.[109] If this Symposium contributes nothing else, I hope that it at least *unsettles* the dominant narrative. Among those who have studied or worked within criminal justice professionally,

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[104] *See, e.g.*, JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS (2009); JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003).

[105] DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001).

[106] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

[107] MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE (2004).

[108] Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein's Monster?*, 126 HARV. L. REV. 1299 (2013) (reviewing STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012)).

[109] *See supra* notes 1–8 and accompanying text. It may be true that American voters turned punitive in an era of extremely high crime—rather unsurprisingly, and not unreasonably—but that is not a deeply rooted cultural feature of democracies as such, nor of Americans. *See supra* notes 9–10 and accompanying text.

there are some who agree with the dominant narrative and others who do not. The matter is not obvious; there is an argument to be had here.

The term "bureaucracy," although the most conceptually accurate characterization of what our rival view endorses, carries such negative connotations in American political culture that it seems tendentious to call our rivals "bureaucratizers." An alternative term might be "professionalizers," but that seems unfair to us, the democratizers, as we by no means oppose professionalization so long as lay voices are not suppressed. To call our rival "anti-democratizers" is perhaps acceptable if the term is taken to mean that they would not *further* democratize criminal justice and perhaps would pull back on the democratic elements already there, but many of them are, at bottom, not anti-democracy so much as Schumpeterian or otherwise in favor of some very minimal conception of democracy, at least in the criminal justice context.[110] I suggest, then, that we use for the opposition the hybrid term "bureaucratic professionalizers." So the battle is joined between democratizers and bureaucratic professionalizers. The bureaucratic professionalizers believe in a form of criminal law and procedure that reduces the role of the laity and increases the role of officials and experts; that favors formal rule compliance and/or technical expertise over prudential, individualized moral judgment; that regards criminal law and administration as properly a tool of instrumentally rational social management rather than cultural self-expression; and that regards popular, local government as inappropriate for criminal justice purposes. In so characterizing our rival's view, let me emphasize that I do not regard this view as unreasonable or without some evidentiary support, and I hope I have not characterized it unfairly. The point here is not to win the argument. The point is to get to the bottom of what the argument is about.

So much for characterizing the concept of democracy at issue in our movement and the concept of bureaucratic professionalization on the other side. Three caveats bear emphasis. First, democracy is a "more or less," not an "either/or" concept. It is coherent to think some arrangement of the criminal system, while not being *un*democratic, is *less* democratic than it should be, or vice versa. By the same token, one might be a democratizer who does not subscribe to every aspect of the multifaceted conception of democracy sketched above, or one might be a democratizer who does not think every aspect of the criminal system should be democratized. There is, in particular, a range of opinion within the democratization movement on the degree to which criminal justice should be open to the sort of popular-

[110] *See supra* notes 51–58 and accompanying text.

majoritarian control Tocqueville described. A difficulty in writing on behalf of a collective is illuminating common ground and constraining the range of within-group disagreement without thereby insisting on a false consensus. Perfect consensus here is unnecessary. People who are indubitably members of the democratization movement might, for example, trust the people's judgment on criminal matters at retail, as when serving on juries, but not at wholesale, as when voting. Some members of the movement believe in community policing while also thinking that effective and efficient community policing requires expertise, training, and social scientific knowledge (which democratizers by no means oppose). Some members of the movement think criminal justice should not necessarily be *directed* by lay citizens but simply that lay citizens should be included in dialogue with experts and officials to a greater extent than they are now. For that, in the final analysis, is the question—not "How democratic should an ideal criminal system be?" but "How democratic should the criminal system be *relative to what it is now*?" In a big tent movement, it is enough to think the arrow of reform points toward more democracy, not less.

Second, to favor democratizing *criminal* justice is not necessarily to favor democratization in all walks of life. There might be special reasons to think criminal justice ought to be more democratic than other areas of governance. Just to speak of my own views by way of example, I have argued that the criminal system has a distinctive social function: to restitch a torn social fabric in the wake of a crime, to reconstruct a community's violated normative order after wrongs that expressively attack that normative order, and thereby to secure a necessary form of social solidarity around shared norms.[111] That conception of criminal justice's purpose counsels in favor of a democratic governance structure in criminal law and procedure because the goal of cultural restitching and social solidarity ill fits technical administration; it calls for lay involvement and community values.[112] But that solidaristic purpose is the goal *of criminal law*: nothing in a view like mine suggests democratizing, say, monetary policy or environmental regulation. While I confess to radical democratic leanings across the board, on balance I think areas like monetary policy and environmental regulation are good candidates for instrumental rationality and generally good technical administration. Others have their own reasons to single out criminal justice for democratic treatment. Our question is not "How democratic should *government* be?" but "How democratic should the

[111] Kleinfeld, *Reconstructivism*, *supra* note 16.

[112] I expand on this point in Kleinfeld, *Three Principles*, *supra* note 63, a separate essay in this Symposium. This Manifesto, although a sole-authored piece, is meant to identify ideas members of the democratization movement share, while *Three Principles* is just about my own views.

criminal system be?" Or rather, to combine this point with the last one: "How democratic should the *criminal* system be *relative to what it is now*?"

Finally, it should be obvious that the robustly normative conception of democracy laid out above is not satisfied merely by observing that, say, a piece of criminal legislation survived the constitutionally mandated lawmaking process. Congress might pass a criminal statute and the president sign it into law without that statute thereby satisfying our normative conception of what it means for a criminal statute to be adequately democratic, unless one holds the view, which seems to me wildly naive, that the present state of American federal lawmaking is everything democratic governance should be. Likewise, a prosecutor who pleads out 95% of her felony cases might have won an election without that practice of plea bargaining thereby satisfying our normative conception of what it means for criminal procedure to be adequately democratic, unless one thinks both that democracy amounts to nothing more than exercising power after winning elections and that prosecutorial elections are everything they should be. A normative conception of democracy is a tool of political critique, not a positivistic legal checklist.

III. THE DESIGN OF THIS SYMPOSIUM AND SOME EMERGENT THEMES

The contributions to this Symposium fall into certain thematic groups. Those thematic groups are the basis for the organization of this Symposium into sections. They are also a guide to some of the unifying ideas at work in the democratization movement.

The first unifying idea is that the U.S. Constitution, which speaks at length to criminal law and procedure, has a design principle for the criminal system, and the principle is a *democratic* one—a principle of community voice, citizen participation, federalism, checks and balances, and fragmented powers. Laura Appleman develops this theme with reference to the criminal jury.[113] The grand jury for most of its history was not and was not meant to be a rubber-stamp, she argues, and the trial jury was not meant to be an occasional factfinder. The jury was not even viewed primarily as a right of the accused, to be asserted or foregone according to the preference of the accused. The jury was rather conceptualized in terms of a local community's right to supervise the administration of *its* criminal justice, representing the populace in approving all criminal proceedings and all criminal liability on factual, legal, and equitable grounds, with full

[113] Laura I Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413 (2017).

supervisory authority over the criminal instrument. Juries were thus part of self-government itself, a "constitutional actor,"[114] and much of our current dysfunction traces back to the loss of this institution and the vision of self-government it represents. The project of repair, Appleman argues, requires building popular participation and decisionmaking back into the criminal system, not only by renewing the grand and trial juries but also by enhancing popular participation in other criminal justice contexts, such as bail, sentencing, and plea bargaining.

Jed Rakoff—formerly both a prosecutor and a criminal defense attorney and now a trial judge—focuses on the office of the prosecutor, arguing that the growth of plea bargaining and related legal developments have made prosecutors staggeringly powerful relative to the other actors in criminal justice cases.[115] The unintended side effect of a world of plea bargaining is that, rather than the constitutionally envisioned structure of two advocates depending for decision on a neutral judge or jury, prosecutors more than anyone else now exercise the adjudicative function of determining guilt and sentence. With that dual power of pursuing cases and determining their outcome, prosecutors have come to be, not "advocates" but "rulers."[116] The resulting system bears no relation to what the citizenry envisions, what the Founders intended, or what due process should allow; it is a system of unchecked power unlike anything else in our government, and, Rakoff argues, mass incarceration is one of the results. Rakoff proposes that, other solutions having run aground, all prosecutors should be required to serve by rotation as public defenders for indigent defendants so that they might at least develop sympathies more balanced than they can in the prosecutorial role alone.

The last author on constitutional matters, Richard Bierschbach, turns from particular institutions to overall design.[117] He argues that the constitutional arrangements for determining punishment reflect a structural principle related but not identical to checks and balances and to federalism, a principle he terms "fragmentation"[118]: power to determine punishment is divided between community actors and governmental officials, divided again among multiple kinds of governmental officials, and divided in a third way among communities and officials at the local, state, and national

[114] *Id.* at 1419.

[115] Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—and What Can Be Done About It*, 111 NW. U. L. REV. 1429 (2017).

[116] *Id.* at 1430.

[117] Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437 (2017).

[118] *Id.* at 1438.

levels. Fragmentation not only controls the risk of coercive abuse but also fosters a deliberative conversation among diverse stakeholders on criminal justice issues, and thus advances a series of democratic values: that no single actor should hold too much power in determining punishments; that all those affected by the administration of punishment should have a say in it; and that the perspectives and values represented in decisions about punishment should be pluralistic in the way American culture is pluralistic. By thus fostering deliberation among diverse perspectives, Bierschbach believes that punishment can be made to reflect what Madison called the "cool and deliberate sense of the community"[119]—that is, the community *when* it is cool and deliberate, for Bierschbach is a committed but quite moderate democratizer. Among the things that have gone wrong in American criminal justice, Bierschbach argues, is that fragmentation's democratic promise has been stymied and punishment policy has fallen under the control of a subset of powerful, self-interested, and one-sided interest groups. But we "cannot and should not abandon the Constitution's fragmented approach to crime and punishment."[120] Rather, through policy intervention and, particularly, through well-crafted constitutional law doctrine, we can "look for ways to make different loci of influence and representation more meaningful . . . to do more to make sure that multiple voices are heard."[121]

Missing from this constitutional conversation, a founding father of the democratization point of view, is Bill Stuntz. He would have been among us had he lived.[122] In any case, these constitutional arguments, which have a lawyerly character befitting the Constitution's foundational position in American law, comprise the first section of the Symposium: "Constitutional Foundations: Institutional Design and Community Voice."

The second unifying idea is philosophical: it is that criminal justice must have a communitarian character in virtue of the distinctive role it is

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[119] *Id.* at 1454 (quoting THE FEDERALIST NO. 63, at 327 (James Madison) (Gideon ed., 2001)).

[120] *Id.* at 1450–51.

[121] *Id.* at 1451.

[122] Consider, for example, Stuntz's arguments that the cause of American criminal justice's severity is not chiefly voters' harshness but prosecutors' incentives; that common law *mens rea* standards, because of their moralistic and open-ended character, open up a necessary space for nontechnical argumentation about culpability and equity in criminal justice trials; that criminal justice should generally be in the hands of local neighborhoods; that, in particular, prosecutors should be elected from highly local community units like neighborhoods rather than from large counties; that it is juries' role to use the power of nullification to exercise mercy and keep state officials in line; that criminal law's expressive qualities are key to its proper functioning; that one of the problems with excessive criminalization is the diminishment of that expressive function; and that alienation is key to the crime/race problem. WILLIAM J. STUNTZ & JOSEPH L. HOFFMAN, DEFINING CRIMES 104, 181–82, 190–201 (2011); STUNTZ, *supra* note 1, at 283–87, 305–07; Stuntz, *supra* note 22, at 520–23.

called upon to play in society's basic structure. Antony Duff arrives at this theme by approaching criminal theory as a subset of political philosophy: his mission for many years has been to uncover the principles of criminal law and procedure entailed if we start from our prior commitment to living as citizens of a liberal and democratic republic.[123] With respect to criminalization, he draws on liberalism's traditional concern for the distinction between the public and private realms to argue that criminal law should define as offenses only those acts of wrongdoing that breach the values governing *public* life, and thus properly concern the community as a whole. With respect to procedure, he defends a normative ideal of the trial as a method by which a community calls offenders to account before the community for wrongs to the community, thus giving "concrete form to the citizens' collective commitment to the polity's self-defining values" and recognizing one another "as fellow members of the normative political community."[124] With respect to punishment, he argues that principles of equal citizenship constrain the manner in which a democratic community punishes, requiring that we find modes of punishment that, because they reflect the offender's status as a member of the community bearing the respect due that civic status, condemn without excluding. Throughout, his larger theme is that criminal law in a democracy must be something a community of equal citizens can call their own—"a common law in the sense that it belongs to the citizens as an expression and implementation of their shared public values" and an element of "self-governance" in the sense that "lay citizens . . . have active roles to play" because "democracy should be participatory rather than merely representative."[125] This is a normative ideal; it has not been realized in practice. Its point is to provide normative direction for practice.

John Braithwaite, a leading figure in the restorative justice movement, argues here that a restorative criminal system would be both democratic itself and "a key institution for renewing the democratic character of a society" more broadly.[126] Restorative justice has always had communitarian roots: it sees the problem of crime not in terms of positivistic legal violations but in terms of fractured relationships, and it thus focuses on bringing the ordinary people involved in crimes (offenders, victims, their families, etc.) together to repair those relationships. Braithwaite here argues that restorative justice has, in particular, a special relationship to

[123] R A Duff, *A Criminal Law We Can Call Our Own?*, 111 NW. U. L. REV. 1491 (2017).

[124] *Id.* at 1499.

[125] *Id.* at 1501, 1503.

[126] John Braithwaite, *Criminal Justice That Revives Republican Democracy*, 111 NW. U. L. REV. 1507, 1521 (2017).

deliberative and participatory democracy because, in restorative proceedings, stakeholders exercise "participatory process control" in criminal matters rather than relying wholly on state officials and formal legal structures.[127] He also argues that the prospects of democracy on a broader level, outside the criminal justice context, require bringing democracy into the judicial branch—fostering "democracy in the administration of the rule of law," giving "citizens some meaningful democratic empowerment over matters they care about and care to participate in."[128] He urges us to see the criminal justice system "as more than a check and balance, more than a protection against crime" but as a "frontline institution of struggle for democracy without domination," because it is in the criminal context that people experience the most direct forms of domination (victims by crime and offenders by police and punishment), and it is in the criminal context that victims, offenders, and others most want and need voice.[129] Criminal law at its best is thus "a seedbed of democracy."[130]

I write separately in this section to defend my theory of criminal law as "normative reconstruction," which is in some respects a way of pushing Duff's and Braithwaite's communitarian ideas of criminal law to a higher level of abstraction.[131] Criminal law has a distinctive social function, I argue, oriented to maintaining social solidarity in the wake of conduct whose nature is such as to attack the normative foundations on which social life is based. If criminal law is to perform that social function, it must have a democratic organization. I then try to articulate three principles of a democratic criminal system—one for criminalization (the "moral culture principle"), one for punishment (the "principle of prosocial punishment"), and one for procedure (the "We the People" principle).[132] Our three philosophical arguments comprise the second section of the Symposium: "Philosophical Foundations: Criminal Law's Democratic Nature."

The third and fourth unifying ideas are empirical: first, that compliance with criminal law depends on the people subject to it seeing that the law substantively comports with their sense of justice and procedurally comports with their sense of fairness, and, second, that the lay sense of justice and fairness is not inordinately punitive or otherwise unreasonable. The first point about the conditions of compliance is crucial

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[127] *Id.* at 1521.
[128] *Id.* at 1519.
[129] *Id.* at 1523.
[130] *Id.* at 1522.
[131] Kleinfeld, *Three Principles*, *supra* note 63, at 1458, 1463–64.
[132] *Id.* at 1456–57.

because there may be no solution to American criminal law's punitiviteness if we cannot also control the country's tendency to very high rates of crime—for no democratic society can be expected simply to endure extreme levels of personal insecurity without trying to get a hold of the situation somehow. Proposals to reform American criminal justice must not be indifferent to the crime rate. The second point about the reasonableness of lay intuitions is crucial because the anti-democratization narrative vitally depends on the belief that Americans *want* punitiviteness, that American law is harsh because ordinary Americans are harsh, which is why the criminal system cannot be in ordinary Americans' hands. What the empirics essentially show is that controlling the crime rate is impossible without normative buy-in from the community and that the norms at work in the community are not crazy, cruel, or dangerous. Procedurally, what people want is to be treated with dignity. And substantively, what they want is a fairly mild form of proportional punishment.

Tom Tyler, a leading voice in the procedural justice movement, focuses on the procedural side: what makes people respect legal, and in particular, police authority enough to comply with it, he finds, is *legitimacy*, which depends centrally on police going about their jobs in ways that the community regards as procedurally fair.[133] Police should thus focus not just on fighting or preventing crime but on winning communities' trust by exemplifying procedural justice. Tracey Meares, another leading voice in the procedural justice movement, also thematizes procedural justice and the police but in a different way: people regard police as representatives of the state, and thus how police treat them sends messages about whether they are full citizens. These messages are key to understanding *why* procedural justice matters so much to people. The "centerpiece" of decades of research on procedural justice "is that people are motivated to comply with the law, cooperate with authorities, and engage with them when they are treated fairly," and indeed that such procedural fairness has "much more" effect on compliance, cooperation, and engagement than either "favorable outcomes or the effectiveness of authorities at combatting crime."[134] The reason procedural justice has such effects, Meares argues, is that fair treatment transmits a message of *membership*, of *belonging*, which matters to people's sense of identity, relationship to the state, and relationship to other groups within society. Too often in American society, the way police interact with members of

[133] Tom R. Tyler, *From Harm Reduction to Community Engagement: Redefining the Goals of American Policing in the 21st Century*, 111 NW. U. L. REV. 1537 (2017).

[134] Tracey L. Meares, *Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111 NW. U. L. REV. 1525, 1531–32 (2017).

marginalized groups conveys a "hidden curriculum" that those members are "an undesirable and dangerous class of people different from everyone else—'anti-citizens.'"[135] Reversing that message—creating an atmosphere of common citizenship by training police to treat people according to principles of procedural justice—is key to controlling the crime rate and building a more equal society. Meares and Tyler are empirical social scientists, not philosophers, but their views are amenable to a philosophical characterization. The foundations of procedural justice are *communitarian* and *solidaristic*. Philosophy and empirics are aligned: what most predicts legal compliance is democratic citizenship—the rationally grounded sense of oneself as a full and equal member of society with a non-alienated relationship to the state and its law.

Paul Robinson turns from procedure to substantive criminal law and punishment and emerges—after decades of empirical research—with four basic findings, which are clearly true of Americans and appear to be widely true of diverse peoples throughout the world (although for present purposes I will focus on Americans). First, Americans across all demographic divisions exhibit a staggering degree of agreement about the relative blameworthiness of different crimes, and their judgments of relative blameworthiness respond to changes in the underlying facts of the crimes in ways that are both highly nuanced and highly consistent across diverse test subjects. Second, Americans want the law to punish in accord with relative blameworthiness, which they consider a basic requirement of justice. Third, Americans' willingness to *comply* with the law depends on whether they believe punishment accords with justice, that is to say, with whether they think punishment in their society is proportional to relative blameworthiness. And fourth, crucially, Americans favor much less draconian levels of punishment than American law currently prescribes, provided the issues are presented outside of the kind of bumper-sticker political context that leads people simply to declare (and vote) their partisan identities.[136] Robinson's, Meares's, and Tyler's findings comprise the third section of the Symposium: "Empirical Foundations: Shared Norms, Lay Intuitions, Compliance, and Legitimacy."[137]

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[135] *Id.* at 1529–30.

[136] Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565 (2017).

[137] Note that historical and comparative research supports these psychological findings. In particular, Randolph Roth's magisterial analysis of homicide rates across time and place concludes that four factors are decisive in bringing or keeping homicide rates down:

> 1. The belief that government is stable and that its legal and judicial institutions are unbiased and will redress wrongs and protect lives and property. 2. A feeling of trust in government and the officials who run it, and a belief in their legitimacy. 3. Patriotism, empathy, and fellow

These constitutional, philosophical, and empirical arguments might persuade no one if democratization were unable to offer an adequate response to the problem of racial justice, for that problem runs to the very roots of the anti-democratization point of view. The historical link between racism and populism in the Jim Crow Era is imprinted on American lawyers' souls. It was federal judges and other national, appointed officials who fought racist, local communities in that era; it was racist, local communities that enlisted the police and other instrumentalities of criminal law as white supremacy's enforcement arm.[138] And today, the racialized patterns in American policing and punishment spur many to conclude that racism is still *the* core wrong of American criminal justice and *the* core cause of the criminal system's dysfunction.[139] No wonder the dominant narrative of American criminal justice reform is an anti-democratic one.

This brings us to the fifth unifying idea of the movement: that democratic values and institutional arrangements represent the best hope for the future of racial justice in criminal law. Bill Stuntz argued in his last work that a racially oppressive criminal system presents racial justice advocates with a choice: to place control over the criminal system in the hands of national officials and experts, trusting that those national officials and experts will oppose (and succeed in combating) the racial oppression, or to place control over the criminal system in the hands of local communities, including poor, black neighborhoods, on the grounds that a just and functional criminal system means making those communities masters of their own fates.[140] Stuntz thought the latter presented the best prospects for racial justice in criminal law. In this Symposium, Jocelyn Simonson constructs a related argument for fighting racial injustice, not by relying on the "privileged insiders" who run the system already, but through local, participatory democracy within precisely those "poor populations of color most likely to come into contact with the system as

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feeling arising from racial, religious, or political solidarity. 4. The belief that the social hierarchy is legitimate, that one's position in society is or can be satisfactory and that one can command the respect of others without resorting to violence.

ROTH, *supra* note 25, at 17–18. It is remarkable how closely this historical and comparative research affirms the social scientific, psychological research on criminal law compliance that Meares, Tyler, and Robinson develop. And it is remarkable how closely both sets of empirical findings support the philosophical communitarianism that Duff, Braithwaite, and I defend.

[138] FRIEDMAN, *supra* note 7, at 93–97, 187–92, 374–80.

[139] ALEXANDER, *supra* note 106, at 2 (arguing that "[w]hat has changed since the collapse of Jim Crow" is that "it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt," so "we use our criminal justice system to label people of color 'criminals' and then engage in all the practices we supposedly left behind").

[140] STUNTZ, *supra* note 1, at 15–40.

arrestees, defendants, or victims."[141] Her vision is one of democratic contestation at a grassroots level through such practices as copwatching, courtwatching, and community bail funds: "If I can insert one idea into this Symposium issue . . . it is that we should not be content with inviting the voices and viewpoints of the marginalized into our existing institutions; we also need to support outside mechanisms of agonistic participation and create new spaces for contestation."[142] For it is from those "most harmed by the punitive nature of our criminal justice system that we can hear the most profound reimaginings of how the system might be truly responsive to local demands for justice and equality."[143]

To Stuntz's and Simonson's arguments, I would like to append my own conviction that the poor, black neighborhoods most affected by crime are also the neighborhoods most affected by excessive punishment and policing, and if anyone is to calibrate the costs and benefits of both aright, it is those same neighborhoods. The costs and benefits of crime and punishment must fall together into the hands of those with control over the criminal system. That is a version of the democratic principle that those affected by a decision should have a voice in the decision. The people arresting and imprisoning an offender who frightens or angers them must also recognize the offender as an intelligible part of their cultural universe; that local knowledge and understanding will lead to smarter, more discerning punishment. The people arresting and imprisoning an offender should also experience the offender as a person who matters to them and whose loss therefore matters to them—not a distant "other" but a son, brother, father, member. The local community will typically be more measured in its response to such offenders than distant officials accountable to expert communities or independent voting blocs. Occasionally, the local community might also be more severe. That is its right. The goal is not just less severity but less reckless severity.

Another part of the concept of democracy in racial justice is the idea of equal citizenship. It is this idea that Dorothy Roberts highlights with her eloquently simple point that "my criminal law scholarship over the last twenty-six years has been a democratizing project."[144] The demand that animates Roberts's work—the demand for equal citizenship—*is* the demand for democracy. It is not a demand for majority rule, but it is a

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[141] Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1610 (2017).

[142] *Id.* at 1613.

[143] *Id.*

[144] Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1598 (2017).

demand for democracy's premise: the premise of equal standing and equally sharing in the political community. To this argument I would like to add my own conviction that for democratization of criminal justice to work, federal judges will need to interpret the Equal Protection Clause in the criminal justice context much more broadly, and enforce it much more vigorously, than they presently do. Even a committed democratizer can recognize the need for checks and balances, and the most important check and balance on majority rule in the criminal context is to require that the law for thee is also the law for me. Furthermore, a strong Equal Protection Clause in criminal justice is not just a control on democracy's excesses. It is part of democracy itself, recognizing, in the tradition of John Hart Ely, that there are certain forms of democratic failure that afflict majoritarian systems and require judicial correction, particularly where minorities are concerned.[145] Such judicial correction is not undemocratic; it is the perfection of democracy.

Finally, Jonathan Simon and Jocelyn Simonson both highlight democracy's transformative potential in the racial justice context. Simon argues that the carceral state has a racial character that a majority of Americans, including a slim majority of white Americans, have come to regard as illegitimate.[146] This growing public conviction presents a possibility of radical change that could never be achieved through bureaucratic mechanisms alone. Likewise, Simonson argues that only democratic forces would or, in the United States, could abolish and remake the criminal landscape.[147]

The sixth unifying idea of the movement is that, while the criminal justice clock cannot and, on balance, should not be wound back to a pre-bureaucratic era, it is realistically possible to inject democratic elements into a bureaucratized system. Stephanos Bibas argues that the quest for efficiency is the defining feature of our time, and there is no overcoming something so epochal.[148] But the quest comes with costs. Criminal law was traditionally a "democratic morality play" that "taught lessons, expressed

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[145] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (reconciling judicial review with the democratic character of American government by holding that courts in their constitutional role should not enforce contested value judgments but instead protect the conditions of representative and participatory democracy itself, crucially though not exclusively through the Equal Protection Clause).

[146] Jonathan Simon, *Racing Abnormality, Normalizing Race: The Origins of America's Peculiar Carceral State and Its Prospects for Democratic Transformation Today*, 111 NW. U. L. REV. 1625 (2017).

[147] Simonson, *supra* note 140.

[148] Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677 (2017).

outrage, healed social and psychic wounds, and empowered victims, defendants, jurors, and the public."[149] The "fundamental problem" with abandoning the morality play in favor of a "bureaucratic plea bargaining machine" is that the machine "has lost sight of why and how We the People should punish" at all.[150] So the question is how to mitigate the criminal machine's costs without quixotically wishing away the modern order. Bibas proposes midlevel institutional interventions that would add democratic features to otherwise bureaucratic processes, as by empowering lay citizens to oversee the plea bargaining process to some extent, to work cooperatively with police, and to play a part in sentencing. In the same vein, Josh Bowers argues that juries at their best can be an indispensable source of moral and prudential deliberation in the criminal system: lay bodies are well-suited to the kind of "moral particularism" and "equitable discretion" necessary to make good judgments about "when and whether it is equitably appropriate to arrest, charge, brand, and punish."[151] But juries are not well-suited to applying formal legal tests, and it is that sort of technical analysis—not the judgments of "normative guilt" that were once the hallmark of the criminal trial but technical findings of "legal guilt"—that juries are asked to do in contemporary trials, at least on the rare occasions that they are asked to do anything at all.[152] Bowers thus suggests redirecting jury practice from the criminal trial to other adjudicatory sites, introducing "normative juries" to, for example, decisions about charging, plea bargaining, and sentencing.[153]

Notice how these six ideas complement and enhance one another in combination. The Founders' constitutional vision of criminal justice proves to be closely aligned with the philosophers' communitarian view. That same constitutional–communitarian view proves to be the most powerful tool available to control the crime rate. This same constitutional–communitarian–empirical view offers radically new ideas for racial justice. And the tools by which to advance this constitutional–communitarian–empirical–racially-conscious view do not require an unrealistic reversion to a premodern era but significant yet practicable changes in existing institutions. Democratization as a school of thought and political program combines these perspectives. They are aligned—sometimes unexpectedly so—and they are stronger in combination.

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[149] *Id.* at 1678.
[150] *Id.*
[151] Josh Bowers, *Upside-Down Juries*, 111 NW. U. L. REV. 1655, 1657, 1659 (2017).
[152] *Id.* at 1658–59.
[153] *Id.* at 1659.

CONCLUSION

I began by cataloguing the crisis. I'd like to close on a note of hope. The history of America's criminal system is a history of upheavals: periods of normal science are periodically overthrown by paradigm-shifting revolutions, often through sudden and far-reaching democratic political interventions. The country seems to be at the cusp of such a moment. We are in the midst of a potentially significant period of criminal justice reform. The former President addressed the need for reform in multiple contexts; many of the recent presidential candidates of both parties affirmed the need for criminal justice reform while on the campaign trail; members of both parties in Congress have recently floated bills proposing major changes in federal criminal law; the U.S. Supreme Court has been more vigilant in overseeing prosecutions than at any other time in recent memory, as have other federal judges; and many governors and other state officials are joining in the overall reformist ferment.[154] Something is afoot. As the crisis is not just one of political will but also of ideas, scholars have something distinctive to contribute to this reformist ferment. The present moment may be one of those rare occasions in which ideas can spill out from the community of scholars into the broader polity and carve out far-reaching changes in how the country operates. If that is so, there is no better time than this one to make our democratization side of the conflict of visions heard.

[154] *See supra* note 28 and accompanying text.