DEMOCRACY ENHANCEMENT IN CRIMINAL LAW AND PROCEDURE

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ABSTRACT

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

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Introduction

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

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

Inhofe’s bill was quickly backed by sixty-four co-sponsoring Senators8 and organizations comprising more than half a million “single-issue people who fly airplanes.”9 Even Indiana Jones joined the fight. Lobbying on this “real justice issue,” actor Harrison Ford decried agency treatment of private pilots as the sole exception to “the standard that we face everywhere else for justice.”10

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

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2 Id.
4 Lowy, supra note 1.
5 Id.
6 Id.
8 S. 1335, supra note 3.
9 Lowy, supra note 1.
11 Id. The Bill mandates FAA release of data, including investigative reports, “that would facilitate the individual’s ability to productively participate in the
Senator Inhofe introduced it. Thus proceeds the campaign to open the black box – not the flight recorder that explains pilot error or equipment malfunction, but its cognate, the investigative file that can help a pilot defend against agency allegations of wrongdoing.

John Thompson shares Senator Inhofe’s interest in checking government power over the individual -- and in ensuring accuracy and reliability in adjudications -- by mandating enforceable governmental discovery duties. Thompson was not ordered to take remedial flying lessons. He was sentenced to death. For fourteen of the eighteen years that he was incarcerated, Thompson spent 23 hours a day on solitary confinement in a windowless six-by-nine-foot cell. A few weeks before his final execution date, a last-ditch investigation unearthed the microfiche copy of a laboratory report never previously disclosed by prosecutors or law enforcement. The exculpatory evidence in that report eventually led to Thompson’s release.

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

No single-issue lobby, group of legislators, or movie star reacted to the experiences of John Thompson or Richard Ceballos by demanding nationally-applicable, mandatory criminal discovery reform along the lines of Senator Inhofe’s Bill of Rights for private pilots.  

And when a few United States Senators recently sought criminal discovery reform, their proposal fell far short of the expansive provisions in the Pilot’s Bill of Rights.

The Fairness in Disclosure of Evidence Act of 2012 responded to highly publicized *Brady* violations that occurred during the federal prosecution of former Alaska Senator Ted Stevens. The Act was proposed by Stevens’ colleague from Alaska, Senator Lisa Murkowski. Where Inhofe had dozens of senatorial co-sponsors for his reform bill, Murkowski had two. Where a half million single-issue voters backed the Pilot’s Bill of Rights, the Fairness in Disclosure Act won the imprimatur of a whopping 143 lawyers and law enforcement officers. Murkowski’s Act, while improving on *Brady*, also would have required far narrower disclosure than the Pilot’s Bill of Rights. Nevertheless, after a single hearing, the Act died in committee.

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20 *Democracy and Discovery*, supra note **ERROR! Bookmark not defined.**, at 1377 & n.346 (discussing the death, by the secret vote of a single Senator, of federal whistleblower legislation designed in part to protect prosecutors who strive to comply with discovery duties); see also John Thompson, *The Prosecution Rests, but I Can’t*, N.Y. TIMES, Apr. 9, 2011, available at http://www.nytimes.com/2011/04/10/opinion/10thompson.html?pagewanted=all (describing case and aftermath).


22 *In re* Special Proceedings, 842 F.Supp.2d 232, 241-242 (D.D.C. 2012). A 500-page investigative report found that Stevens’ prosecution was "permeated by the systematic concealment of significant exculpatory evidence." *Id.* at 235. But the judge accepted the special investigator’s decision not to recommend contempt proceedings. *Id.* at 244. On the lack of sanctions for *Brady* violations, see, e.g., *Democracy and Discovery*, supra note **ERROR! Bookmark not defined.**, at 1341–1371.

23 S. 2197, supra note 21.


25 As discussed in *Democracy and Discovery*, supra note 13, at 1339–1341, *Brady*’s materiality prejudice test hamstrings the doctrine’s enforceability by
Mukowski’s Act also did not begin to approach existing state models for broad criminal discovery. For example, North Carolina pioneered the nation’s only mandatory, state-wide, full open file reform model. These statutes mandate disclosure to the defense of all information obtained in the state’s investigation of a criminal case. They require recordation of oral statements that are critical for impeaching prosecution witnesses, for evaluating and negotiating plea offers, and for counseling defendants on whether to testify. Willful violators of these discovery statutes face criminal penalties.

Several factors drive the wide variance in discovery duties owed by government actors to an accused. Obviously a federal regulatory action against a private pilot gives rise to very different concerns than those at issue in a criminal prosecution. The civil rights claims raised by John Thompson and Richard Ceballos under 42 U.S.C. § 1983 also raised distinctive stakes in the contest between federal deference to local authority on one hand and the vindication of federal constitutional rights on the other. But the magnitude of the respective threats by the FAA and federal prosecutors to the interests of Senators Inhofe and Stevens is minuscule compared with the very nearly successful attempt of New Orleans prosecutors to “fry” John Thompson, a young, low-income African American man accused of murdering the wealthy white son of a prominent

requiring proof that disclosure of exculpatory or impeachment information would have created a reasonable possibility of a different outcome. The federal Fairness in Disclosure Act would significantly strengthen discovery duties by defining them more broadly and by shifting the burden of proof, requiring prosecutors to prove that nondisclosure of information that “may reasonably appear to be favorable” to the defendant was harmless beyond a reasonable doubt. S. 2197, supra note 21, §§ 2(a)(1), (h). The Act also improves upon Brady by requiring disclosure “before the entry of any guilty plea.” Id. § 2(c)(1); but see Democracy and Discovery, supra note Error! Bookmark not defined., at 1343–1346 (discussing doctrine limiting Brady disclosure duties to trial).

26 See supra note 22.
28 Id. at 1332–1333 (discussing N.C. Gen. Stat. § 15A-903(a)(1)(a) (2012)).
29 Id. (discussing N.C. Gen. Stat. § 15A-903(a)(1)(c) (2012)).
local businessman.\footnote{Connick v. Thompson, 131 S. Ct. 1350, 1374 & n.7 (2011) (Ginsburg, J., dissenting). As the Fifth Circuit Court of Appeals noted in upholding Thompson’s multi-million dollar jury verdict, such elevated victim status tends to “receive[] a lot of attention.” Thompson v. Connick, 553 F.3d 836, 843 (5th Cir. 2008), vacated and aff’d en banc, 578 F.3d 293 (5th Cir. 2009), reversed, 131 S. Ct. 1350. Empirical research reveals that victim status, including racial or ethnic identity, is a significant contributor to outcome severity in criminal cases. Cassia Spohn, Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process, 3 CRM. JUSTICE 427, 428 (2000).} The disparate responses to these cases might be dismissed as illustrating a political principle so basic as to be banal: Them as has, gets. Sharp systemic disparities enhance (for some) and hinder (for others) access to the political influence necessary to drive change. Senator Inhofe occupies one end of the spectrum. His speed and strength in manipulating the levers of power appear steroid-enhanced.

John Thompson’s case arose at the other end of the spectrum—amid the democracy deficit at an intersection of crime, race, and poverty.\footnote{See, e.g., Robert J. Sampson and Lydia Bean, Cultural Mechanisms and Killing Fields: A Revised Theory of Community-Level Racial Inequality, in THE MANY COLORS OF CRIME 8, 11 (Ruth D. Peterson, et al., eds., 2006) (“It is unambiguously the case in meta-analysis[] that concentrated neighborhood disadvantage is the largest and most consistent predictor of violence”); Travis C. Pratt and Francis T. Cullen, Assessing Macro-Level Predictors and Theories of Crime: A Meta-Analysis, 32 CRIME & JUST. 373, 378–79 (2005) (“the strongest and most stable macro-level predictors of crime include racial heterogeneity . . . poverty, and family disruption—factors typically treated as indicators of ‘concentrated disadvantage.’”).} That intersection is structured by concentrated disadvantage.\footnote{See, e.g., U.S. v. Bannister, 786 F.Supp.2d 617, 628–45, 670–88 (E.D.N.Y. 2011) (discussing factors affecting defendants’ lives, choices, and probabilities of successful reentry into society after imprisonment, such as segregated housing,} The multidimensional and recalcitrant resource disparities that characterize and in some sense serve as the foundation upon which criminal justice systems rest also raise hurdles to creating and maintaining coalitions across lines.

of race and class.\textsuperscript{38} Crime, hyperincarceration,\textsuperscript{39} and their causes and consequences are felt most directly and disproportionately by those least likely to mount an effective oppositional politics and oversee the formation and implementation of criminal law and procedure -- poor people and people of color.\textsuperscript{40}

For some, the democracy deficit at the intersection of crime, race, and poverty supports skepticism if not despair toward litigation, legislation, and activism as avenues toward sustainable reform.\textsuperscript{41} But disparity need not breed despairity.\textsuperscript{42} This Article argues that the democracy deficit calls for a democracy-enhancing theory of criminal law and procedure, which inadequate schooling, unmet physical and mental health needs, and missing, dysfunctional, and violent family relationships).

\textsuperscript{38} See, e.g., Derrick A. Bell, Jr., \textit{Racial Realism, in \textsc{The Legal Studies Reader: A Conversation & Readings About the Law}} 250, 253 (George Wright & Maria Stalzer Wyant Cuzzo, eds., 2004) (“Black people will never gain full equality in this country” due to adaptability of white dominance; resistance “itself has meaning and should give us hope for the future.”); see also Stephen M. Feldman, \textit{Do the Right Thing: Understanding the Interest-Convergence Thesis}, 106 NW. U. L. REV. COLLOQUIY 248, 250–252 (2012) (critiquing failure to distinguish Bell’s interest-convergence and racial realism theories in Justin Driver, \textit{Rethinking the Interest-Convergence Thesis}, 105 NW. U. L. REV. 149 (2011)).

\textsuperscript{39} Loïc Wacquant correctly rejects the term “mass incarceration.” It is precisely because unprecedented incarceration rates disproportionately affect low income people and people of color while leaving the majority either unscathed or in some respect well-served that those rates are less readily remedied through the democratic process. Loïc Wacquant, \textit{Class, Race & Hyperincarceration in Revanchist America}, \textsc{Daedalus} 74, 78–79 (Summer 2010).


\textsuperscript{41} See infra Part I.B.

\textsuperscript{42} See, e.g., NICOLA LACEY, \textsc{The Prisoners’ Dilemma: Political Economy and Punishment in Contemporary Democracies} xv, 156–69 (2008) (noting but contesting the “general and depressing” scholarly agreement that globalization of the United States’ distinctively punitive “penal populism” is inevitable).
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refocuses the traditional justifications of retributivism, deterrence, and rehabilitation by prioritizing self-governance.

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

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

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

Part V acknowledges that motives for North Carolina’s constellation of criminal justice reforms have been as mixed as their effectiveness and abilities to survive reaction and repeal. This Part interrogates the conditions that allowed these reforms to occur and occasionally to survive counterattack. Distinguishing characteristics include institutionalized capacities for critical reflection and collaboration on hot-button criminal justice issues. Oppositional politics also play a role. They are informed by relatively robust and proactive indigent defense functions and diverse mechanisms for the collection, assessment, and strategic use of criminal justice data.

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

43 Cf. EDWARD HALLETT CARR, WHAT IS HISTORY? 153 (1961) (“[N]o sane person ever believed in a kind of progress which advanced in an unbroken straight line without reverses and deviations and breaks in continuity so that even the sharpest reverse is not necessarily fatal to the belief.”).
I. DESPAIRITY IN CONTEXT

This Part contextualizes the despairity narrative in criminal law and procedure within a broader and cyclical retrenchment across movements for racial and economic justice. Part IA discusses sources of the democracy deficit at the intersection of crime, race, and poverty. Part IB focuses on the despairity motif among criminal justice scholars. Part IC situates that motif amidst an old and ongoing struggle to fulfill what historian John Hope Franklin describes as this country’s broken “promise of real equality.”

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

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

First, Bannister’s opening lines transform a mine-run federal sentencing decision into a cri de coeur over lives impaled at the intersection of crime, race, and poverty. The judiciary is generally uninclined to detail the recalcitrant links between racially disparate rates of undereducation, unemployment, poverty, substance abuse and addiction, family instability and violence on one hand, and criminal victimization, offending, incarceration, and recidivism on the other. Bannister comprises over seventy pages of historical, legal, and socioeconomic analysis on those issues. That analysis was informed by the highly unusual

46 But see Kowalski v. Tesmer, 543 U.S. 125, 140 (2004) (Ginsburg, J., dissenting) (noting that 70% of defendant represented by appointed counsel plead guilty; 70% of those plea-convicted defendants serve time in jail or prison; nearly 70% of incarcerated inmates failed to graduate high school and are in the lowest two of five literacy levels—and therefore unable, for example, to “use a bus schedule.”). Public defense cases also disproportionately involve defendants suffering from mental illness. See Justice Denied: America’s Continuing Neglect Of Our Constitutional Right To Counsel, THE CONSTITUTION PROJECT 75 (2009), http://www.constitutionproject.org/pdf/139.pdf.
personal visit of a presiding judge to the neighborhood in which defendants lived and committed their crimes.\textsuperscript{47}

The opinion’s findings and conclusions are also noteworthy. The court found “substantial evidence” that mandatory minimum sentences for crack cocaine charges are the unconstitutional result of racial prejudice.\textsuperscript{48} The court further concluded that factors shaping defendants’ lives and opportunities rendered several of the mandatory minimum prison sentences excessive.\textsuperscript{49} Finally, the court acknowledged the improbability that scarce public funds will support the rehabilitation programs required by the sentencing order or that the defendants’ imprisonment will yield any positive outcome whatsoever. To the contrary, the court observed that the defendants are likely condemned upon completion of their sentences to lives in “a permanent underclass with almost no opportunity to achieve economic stability, let alone the American dream of upward mobility.”\textsuperscript{50}

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

are hemmed in by circumstances, the law must believe that free will offers an escape. Otherwise, its vaunted belief in redemption and deterrence – both specific and general – is a euphemism for cruelty. These defendants are not merely criminals, but human beings and fellow American citizens, deserving of an opportunity for rehabilitation. Even now, they are capable of useful lives, lived lawfully.\textsuperscript{51}

\textit{Bannister’s} parting words embody the court’s relentlessly grim inability to match the defendants’ capacities for “useful lives, lived lawfully” with even a remote likelihood that opportunities for rehabilitation will find any actualization. The court’s felt need to expressly affirm not only the defendants’ citizenship but their humanity speaks volumes about their exclusion from approved structures of self-governance, their deviance from a norm so elusive as to approach the chimerical.\textsuperscript{52}


\textsuperscript{48} 786 F.Supp.2d at 666–67.

\textsuperscript{49} Id. at 670, 674, 680-88.

\textsuperscript{50} Id. at 689.

\textsuperscript{51} Id. at 690.

\textsuperscript{52} See, e.g., Lacey, \textit{supra} note 41, at 27-35, 116–118 (contrasting exclusionary and degrading criminal justice systems with inclusionary and rehabilitative systems). On the psychosocial need to define and exclude an Other, see, e.g., JULIA KRISTEVA, \textit{POWERS OF HORROR: AN ESSAY ON ABJECTION} 65–66 (Leon S. Roudiez, tr.1982); Sampson & Bean, \textit{supra} note 37, at 26–27 (discussing “symbolic violence” through which “people try[] to establish a worthy identity by drawing symbolic boundaries” between themselves and lower-caste Others).
B. From Disparity to Despairity

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

Of course historical comparisons must be approached with caution. As Marie Gottschalk notes, “the creation of the carceral state was more subtle and complex than just drawing a straight line from the plantation to Jim Crow to the ghetto to the prison-industrial complex today.” Whether the democracy deficit at the intransigent intersection of race, class, and crime is described in terms of the New Jim Crow or hyperincarceration the upshot is the same. The United States’ myriad local, state, and federal

53 See supra note 41 and accompanying text.
56 See, e.g., Carr, supra note 45, at 34–35 (“the historian is engaged on a continuous process of moulding his facts to his interpretation and his interpretation to his facts. It is impossible to assign primacy to one over the other.”).
59 See Wacquant, supra note 39, at __.
criminal justice systems impose incarceration levels and lengths that are nearly unparalleled around the globe. The cost in tax dollars and wasted lives is astounding. With a few important exceptions, the literature that documents these phenomena appears as empirically unassailable as the possibilities for criminal justice reform through democratic avenues of litigation, legislation, and activism appear dismal.

As noted above, Bannister is unusual in its extensive judicial discussion of these issues. The opinion also is remarkable in being so thoroughly unremarked. Months after the decision issued, it has received virtually no citation or commentary from jurists, scholars, practitioners, and the press. This silence may be partly ad hominem. Some view the opinion’s author, the Honorable Jack B. Weinstein, as “a legal maverick” whose “liberal decisions have angered conservatives and run afoul of appellate courts.”

But Bannister’s silent treatment also may illustrate disparity’s begetting despairity. To be sure, disproportionate arrest, conviction, and sentencing rates along lines of race, ethnicity, and class are not confined to the United States. Nevertheless, the intractability of this country’s

60 See, e.g., Lacey, supra note 43, at xv.
61 See Forman, supra note 58, at 45–64 (critiquing elision of complex roles of socioeconomic class and violent intraracial crime in some New Jim Crow scholarship); Cooper & Smith, supra note 53; Harrell, supra note 53.
63 But see Democracy and Discovery, supra note Error! Bookmark not defined., at n.395.
65 A Google search revealed no coverage of the decision by any media outlet. Google, http://www.google.com/#hl=en&client=psy-ab&um=1&hl=en&sa=X&ved=0ahUKEwiM87NPzYyLAhWgO2wKHQqTDgsQ_AUICjAC&ei=naL7U_dHsYj7eABg7OG4BQ&biw=1366&bih=652 (last visited Feb. 2, 2013).
66 Hays, supra note 48; but see, e.g., Jack B. Weinstein Receives ALI’s John Minor Wisdom Award, AM. LAW INST., http://www.ali.org/ali_old/R3102_04-Jackweinstein.htm (last visited Feb. 2, 2013) (describing recipient as ‘a legal polymath’—a creative jurist, a productive scholar, a pioneering civil-rights advocate, and ‘one of the few judges whose achievements warrant mention in the same breath as the achievements of Judge Wisdom.’

67 Lacey, supra note 43, at 148–65 (discussing increased incarceration rates of foreign nationals in the United Kingdom and several European Union members); Loïc Wacquant, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 277 (2009) (discussing incarceration rate for low-income, less-educated foreign nationals and first-generation descendants in France); Molly
distinctive inequalities at the intersection of crime, race, and poverty often lead to skepticism if not despair toward litigation, legislation, and activism as quintessentially democratic avenues toward sustainable reform in criminal law and procedure. In addition to the structural factors tallied up in Bannister, commentators have noted the unprecedented concentration of power in the prosecution function, 68 consistent underfunding of indigent defense services, 69 years of racially coded tough-on-crime politics, 70 and heightened federal judicial deference to local authority 71 as circumstances limiting opportunities to improve the fairness, efficiency, and transparency of criminal justice systems.

Nicola Lacey has observed the rise of this country’s distinctively harsh “penal populism” from the other side of the Atlantic, noting wide agreement on the “depressing conclusion” that other nations “are constrained to tread the same path[.]” 72 The law-and-economics analysis of the late William Stuntz struck a similarly bleak tone. This leading scholar launched a jeremiad against the “pathological politics” infecting the


70 See supra note 58.


formulation and implementation of criminal law and procedure.\textsuperscript{73} As he observed with characteristic ascerbity, “organized interest group pressure to narrow criminal liability is rare.”\textsuperscript{74}

Given the improbability of a broad-based movement to reverse the disproportionate criminal victimization and incarceration of poor people and people of color, Stuntz offered a distinctive recipe for promoting more broadly democratic decision making in criminal cases. He argued for more policing and prosecution of more cases before more locally-drawn venires exercising broader discretion in applying fewer and more vaguely-drawn criminal statutes.\textsuperscript{75} He conceded that such developments are unlikely.\textsuperscript{76}

Stuntz was not alone in presenting a truncated view of democracy’s possibilities in the context of criminal justice reform. Twenty years ago, Donald Dripps used public choice theory to ask and answer the question “Why Legislatures Don’t Give a Damn” about the rights of criminal defendants.\textsuperscript{77} More recently, Marc Miller and Ronald Wright cited tough-on-crime politics as justifying the subordination of litigation and legislation in favor of internal bureaucratic reform as the most effective avenue for


\textsuperscript{74} \textit{Pathological Politics}, supra note 73, at 553. See also Marc Galanter, \textit{Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change}, in \textit{The Legal Studies Reader: A Conversation & Readings About the Law} 199, 207–208, 218–220 (George Wright & Maria Stalzer Wyant Cuzzo, eds., 2004) (identifying structural barriers to “have-nots” achieving reform through litigation); Joshua Cohen, \textit{Procedure and Substance in Deliberative Democracy, in Democracy and Difference: Contesting the Boundaries of the Political} 110 (Seyla Benhabib, ed. 1996) (“There is no natural tendency for an emergence of secondary associations to correct for inequalities of political opportunity due to underlying economic inequalities”).

\textsuperscript{75} Stuntz, \textit{Unequal Justice}, supra note 73, at 1974, 2031–39; but see, e.g., IRWIN WALLER, LESS LAW, MORE ORDER xi–xvi (2006) (citing empirical research showing that investments in “police, courts and corrections is not the way to prevent and reduce” crime).


\textsuperscript{77} Donald A. Dripps, \textit{Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?}, 44 Syracuse L. Rev. 1079, 1089–92 (1993). See also Craig S. Lerner, \textit{Legislators As the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants}, 2004 U. Ill. L. Rev. 599, 604–613 (2004) (surveying public process and public choice explanations for the fact that “Legislators have declined to protect criminal defendants, except in rare and narrowly circumscribed circumstances when powerful constituencies (the press, lawyers) have been threatened.”).
regulating prosecutorial decision making.\textsuperscript{78} And the New Jim Crow scholarship, while offering the most recent analysis of penal politics as a mechanism for caste construction and control, points to little empirical or theoretical ground from which to reclaim law and politics as viable avenues toward sustainable reform.\textsuperscript{79} That scholarship calls for a mass movement but fails to engage the historical difficulty of building and sustaining coalitions across lines of race, ethnicity, and socioeconomic class.\textsuperscript{80}

So the lack of commentary on \textit{Bannister} may stem from a perception that the opinion carries coal to Newcastle. The dominant narrative contains good reasons for skepticism toward litigation, legislation, and activism as meaningful avenues for reducing the footprint of the carceral state while obtaining greater transparency, accountability, and fairness in the formation and implementation of criminal law and procedure. The hurdles to reform are daunting. Nor is the desperation narrative confined to theorists and practitioners who work on criminal justice issues. Similar retrenchment also is evident in broader movements for racial\textsuperscript{81} and economic justice.\textsuperscript{82}

\textit{C. Despairity’s Broader Context}


\textsuperscript{79} \textit{See}, e.g., Alexander, \textit{supra} note 58, at 242–46 (suggesting that successful multiracial oppositional politics in this context may require surrendering affirmative action-based advocacy); Andrew E. Taslitz, \textit{The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration}, 9 OHIO ST. J. CRIM. L 133, 185–191 (2011) (promoting deliberative democracy’s promotion of empathy across difference).

\textsuperscript{80} For example, released prisoner and longtime criminal justice reformer Susan Burton suggests that defendants “crash the system” by refusing plea offers and taking cases to trial, but acknowledges that such collective action imposes significant risks to individual defendants. Michelle Alexander, \textit{Go to Trial: Crash the Justice System}, \textit{N.Y. TIMES}, Mar. 10, 2012, available at http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html.

\textsuperscript{81} \textit{See}, e.g., Bell, \textit{supra} note 39.

\textsuperscript{82} \textit{See}, e.g., \textit{GARY DORRIEN, RECONSTRUCTING THE COMMON GOOD: THEOLOGY AND THE SOCIAL ORDER} vi–vii (1990) (Although the “ravages . . . of poverty have not diminished with the triumph of liberal capitalism . . . [t]he language of socialism has become severely problematic, and not only because it was perverted long ago by totalitarians.”).
Retrenchment within and across justice movements is a predictable response to postindustrial economic dislocation\(^3\) accompanied by widening and increasingly unbridgeable gaps between haves and have-nots – including, importantly, increasing geographic segregation by socioeconomic class.\(^4\) Intensifying concentration of economic power in fewer hands\(^5\) conjoins degraded opportunities for social mobility\(^6\) and the flourishing of state capitalism as taxpayers rescue deregulated industries deemed Too Big To Fail\(^7\) and Too Big To Prosecute.\(^8\) The rightward

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\(^3\) See, e.g., Lacey, supra note 43, at 21–22; Harry J. Holzer, Workforce Development as an Antipoverty Strategy: What Do We Know? What Should We Do? (Institute for the Study of Labor Discussion Paper Series No. 3776) (Oct. 2008), at 6 (tracking 87% decline in federal workforce development funds from 1979, with “even greater” reduction in spending on disadvantaged populations); \textit{id.} at 7 (spending on employment and training in U.S. is “just over 0.1% of GDP – a smaller fraction than is spent … virtually anywhere else in the industrial world.”).

\(^4\) See, e.g., Sean F. Reardon and Sandra Bischoff, \textit{Income Inequality and Income Segregation}, 116 AM. J. SOCIOLOGY 1092, 1094–96 (2011) (documenting “U-shaped” U.S. income inequality trend, with 2006 rates returning to disparity levels of 1920s, “exceptional rise” in upper-income increases, and top decile receiving 45% of national income); Pedro Carneiro and James J. Heckman, \textit{Human Capital Policy}, in \textit{INEQUALITY IN AMERICA: WHAT ROLE FOR HUMAN CAPITAL POLICIES?} 77, 84–85 (Benjamin M. Friedman, ed., 2003) (“declining real wages for low-skilled workers and increasing real returns to college graduation” combined with differential in high school dropout and college attendance rates will make “the America of tomorrow even more unequal than the America of today and the America of the past”); Lawrence F. Katz, \textit{Comment, in id.} at 269, 276–77 (discussing growing geographic concentration of poverty in United States).

\(^5\) Reardon and Bischoff, supra note 84 (discussing increased residential segregation by income level, particularly between highest and lowest rungs of economic ladder and with highest rates of change occurring within black and Latino sectors).


ideological shift across branches of state and federal government, including the federal courts, prioritizes the market over the commons and the individual over the collective. Retreat from social welfare guarantees and the dead end of federal constitutional avenues toward poverty relief accompany the advance of an ostensibly “race-blind” public ethos and jurisprudence.

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

one of the world’s largest banks, for (inter alia) laundering money for terrorists and drug dealers).

89 On alternatives to the hegemony of homo economicus, see, e.g., Janet Moore, Covenant and Feminist Reconstructions of Subjectivity Within Theories of Justice, 55 LAW & CONTEMP. PROBS. 159 (1992) [hereinafter Covenant and Subjectivity].
93 THE DECLARATION OF INDEPENDENCE para. 24 (U.S. 1776).
94 U.S. CONST. art. I, § 2.
95 Franklin, supra note ___.
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This tension between liberatory promise and reneging is “so fundamental – and so morally embarrassing – that we have gone to [great] lengths to obscure it.” But cycles of reform and reaction are traceable in thirty- to fifty-year segments. At the birth of the new republic, even within the confines of propted white male privilege, the transition from the post-Revolutionary Articles of Confederation to the Constitution was hotly contested by Antifederalists opposed to a dangerous new concentration of political authority. There was particular concern that the new structure was designed to benefit commercial elites at the expense of the yeoman farmer and a broader common good. Passions lingered after the Constitution’s ratification and ignited uprisings such as the Whiskey Rebellion.

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

Each oppositional movement met with co-optation, reaction, and, in some instances outright revolution and repeal. From the Whiskey Rebellion to the Aliens and Sedition Acts; from the ethnic and sectarian riots of the 1820s and ‘30s through the horrifying violence of the Civil War and the

98 See, e.g., CENTINEL, LETTER I, THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION 16 (Herbert Storing ed., 1985) (“[T]he proposed plan . . . is the most daring attempt to establish a despotic aristocracy among freemen that the world has ever witnessed.”)
100 Daniel Walker Howe, What Hath God Wrought: The Transformation of America, 1815–1848 at 643–56 (2007) (discussing confluence and divergence of interests between abolitionists, transcendentalists, and early feminists); see also Theodore Parker, Of Justice and Conscience, in THE COLLECTED WORKS OF THEODORE PARKER, SERMONS. PRAYERS 48 (1853) (“I do not pretend to understand the moral universe; the arc is a long one, my eye reaches but little ways . . . from what I see I am sure it bends towards justice.”)
white supremacy movement’s murderous overthrow of Fusionist governments at the turn of the century; from the pitched battles between capital and labor in the 1920s and ’30s to the most recent Civil Rights era and its aftermath, efforts to actualize the liberatory potential inherent in aspects of this nation’s founding have collided with the determination of elites to obtain, retain, or regain privilege.

As the oscillation between these opposing interests continues, some see bright spots on the horizon. In light of trends favoring globalization, deregulation, tax reduction and diminution of government, “new governance” scholars discount the adversarial pursuit and vindication of rights through litigation and legislation in favor of local collaboration and internal agency self-reform. Others see opportunities in the retreat from social welfare commitments to incorporate, through state constitutions and statutes, international human rights models for securing socioeconomic prerequisites to meaningful participation in democratic self-governance. And from an increasingly dominant “race-blind” civil rights jurisprudence, Professor Reva Siegel wrestles a core commitment to the vindication of individual human dignity and community harmony (or at least to the minimization of intergroup resentment).

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

But there may be some whistling past the graveyard in all of the foregoing scholarship. “New governance” theories are challenged as masking old patterns of deference to market-driven paradigms, and as failing to account for the barriers to expanding deliberative democracy

104 Siegel, supra note 91, at 1298–1303, 1352.
106 See Miller, Sentencing Information Systems, supra note 78; Wright, Parity, supra note 78; Wright, Counting the Cost, supra note 78.
108 Democracy and Discovery, supra note Error! Bookmark not defined., at 1371–1377 (detailing legislative history).
beyond the usual cadre of elites. Theologian Gary Dorrien questions the possibility of meaningful poverty reduction in a polity that often brands analysis of income disparity as class warfare and views discussion of income guarantees or other significant resource redistribution as socialist anathema. And it is reasonable to worry that antibalkanization analysis embodies an uncomfortably familiar solicitude for the feelings of wounded white privilege.

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

This Article responds to these deeply-rooted tensions and recurring oscillations by arguing for the development of a democracy-enhancing theory of criminal law and procedure as a more stable ground—at least complementary if not philosophically and strategically superior to budget-driven interest convergence—for sustainable reform at the intransigent intersection of crime, race, and poverty that Bannister maps so vividly. Part II explains the attraction of a democracy enhancement theory and sketches

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111 See DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW 21 (2008) (discussing civil rights jurisprudence that measures relief “less by the character of harm suffered by blacks than the degree of disadvantage the relief sought will impose on whites.”); cf. REINHOLD Niebuhr, MORAL MAN AND IMMORAL SOCIETY xvii (1932) (“[W]ill a disinherit ed group, such as the Negroes for instance, ever win full justice in society [through accommodation]? Will not even its most minimum demands seem exorbitant to the dominant whites, among whom only a very small minority will regard the inter-racial problem from the perspective of objective justice?”).


114 See Wright, Parity, supra note 78, at 253–262.

115 Democracy and Discovery, supra note Error! Bookmark not defined..
its contours. While roughly honed, this theoretical lens is adequate for the analytical and normative work undertaken in Parts III through V.

II. DEMOCRACY ENHANCEMENT IN CRIMINAL LAW AND PROCEDURE

This Part sketches the contours of a democracy-enhancing theory of criminal law and procedure. Part I.A defines “democracy” as it is used in the ensuing argument. Part I.B anticipates and responds to some objections against the democracy-enhancement frame. Part I.C clarifies distinctions between democracy enhancement and the major deontological-retributive and teleological-consequentialist strands of criminal justice theory. Part I.D identifies some resources for fleshing out the theory.

A. Defining Democracy

Nicola Lacey frames democracy as a set of core values embodying “the will of citizens” enacted through their “participation . . . in decision-making” along with “accountability of officials for proper conduct and effective delivery of policies in the public interest[,] adherence to the rule of law and respect for human rights.”116 Working within that framework, this article defines democracy enhancement as the promotion of individual and communal self-governance. Minimally, self-governance means exercising rational and emotional intelligence to check concentrated power. Maximally, democracy enhancement promotes the exercise of moral imagination through equal participation by individuals-in-community in the pursuit of equal dignity and human flourishing.117

The metaethical stance is pragmatic and eclectic, aiming to bridge oppositions between deontological rules and teleological goals. Kantian respect for the equal dignity of persons unites with critical theory’s recognition that communicative action necessarily entails intersubjectivity. Appreciation for classical virtues – courage, temperance, prudence, justice – is tempered by Niebuhrian suspicion of hubris, perfectionism, and end-of-history narratives.118

The subject of self-governance, the individual-in-community, is more than a consumer or producer of goods.119 Self-governance is an activity occurring simultaneously and in multiple spheres. At the level of individual

119 Moore, Covenant and Subjectivity, supra note 89, at ____.
impulse, self-governance involves interaction between the amygdala and the frontal lobe. Self-governance also unfolds in contests and collaboration between and among individuals, groups, institutions and other collective interests.

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

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

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

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

B. Why Democracy?

120 Cf. Sheldon S. Wolin, *Fugitive Democracy*, in *Democracy and Difference*, supra note 74, at 43 (“Democracy needs to be reconceived as something other than a form of government: as a mode of being that is conditioned by bitter experience, doomed to succeed only temporarily, but is a recurrent possibility as long as the memory of the political survives.”)
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The call for a democracy-enhancing theory of criminal law and procedure raises important questions. First, is democracy enhancement too narrow a lens through which to reimagine and refocus criminal law and procedure? Does this focus foreground procedure at the expense of substantive justice? Conversely, is democracy enhancement too protean a concept to be useful? Does this approach improperly discount interest convergence and cost-benefit analysis as effective reform tactics?

Future work will undertake comprehensive identification and discussion of such questions. A few important preliminaries are addressed below.

1. **Is Democracy Too Small?**

Allegra McLeod helpfully raises the first questions about the limits of a democracy-enhancing focus, noting that attempts to improve criminal justice systems are often merely ameliorative, and can even make things worse.\(^\text{121}\) McLeod rightly insists that reformers must keep their eyes unwaveringly on the decarceration prize.\(^\text{122}\) To that end, she argues for an imaginative stance that identifies and pursues “unfinished alternatives” to the carceral state.\(^\text{123}\)

The carceral norm is a national addiction. Reformers too readily serve as enablers. But McLeod’s decarceration proposals require more than expanded “imaginative horizons.”\(^\text{124}\) They require revised patterns of resource allocation.\(^\text{125}\) Those revisions in turn require a robust and sustainable oppositional politics.

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

But that participation is not merely procedural. Nor is it an end in itself. The animating principle and goal of a democracy-enhancing theory is the actualization of equal human dignity. Essential prerequisites include reducing criminal offending and victimization as well as the predictable causes and consequences of crime discussed in Bannister. Thus, a


\(^{122}\) Id. at 1362; see also Allegra McLeod, *Confronting Criminal Law’s Violence: The Possibilities of Unfinished Alternatives*, 8 HARVARD’S JOURNAL OF THE LEGAL LEFT: UNBOUND ___ (2013) (arguing for regrounding of social controls outside of criminal justice apparatuses).

\(^{123}\) McLeod, supra note 122, at ___.

\(^{124}\) Id. at ___

\(^{125}\) Id. at ___. 
democracy-enhancing theory bridges dichotomies pitting procedural versus substantive justice; utilitarian goals versus deontological rules; and the exercise of free will by autonomous individuals versus the collective generation and enforcement of norms and identities.

2. **Is Democracy Too Large?**

A democracy-enhancing theory of criminal law and procedure acknowledges cost-benefit analysis and interest convergence as useful reform tactics. But there are good reasons to maintain an arm’s-length partnership with *homo economicus.* Some of these reasons are empirical.

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

Such decision making belies rational choice theory in part because the theory rests on a flawed account of human subjectivity. On that account, the subject is first and foremost a consumer of goods -- a radically individuated, calculating self-interest maximizer. Yet according to Daniel Kahneman, co-winner of a Nobel Prize in economics, it is “self-evident that people are neither rational nor completely selfish, and that their tastes are anything but stable.” Emotion regularly trumps critical analysis. Fear and anger over crime, and over representations or perceptions of crime, override data-driven policy making.

Moreover, to the extent that self-interested rationality is at work, cycles of criminogenesis, victimization, arrest, prosecution, incarceration, and recidivism feed too many families. Interests converging around cost-cutting inevitably collide with countervailing converging interests of myriad stakeholders. These include law enforcement officers and forensic

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126 I thank Mike Cassidy for inspiring this analysis.
128 See infra Part IV(B)(1).
130 Daniel Kahneman, Thinking Fast and Slow 269 (2011).
131 See, e.g., id. at 252–253 (discussing optimistic bias); id. at 380–85 (discussing the peak-end rule and duration neglect).
analysts; prosecutors and victim advocates; judges and court personnel; probation and parole officers; defense attorneys and paralegals; layers of administrators who keep the machinery running; employees of jails and of prisons – the latter of which are increasingly for-profit and are often sited in low-income rural areas; and universities and nonprofit organizations, which receive millions of dollars annually in tax and foundation dollars to evaluate, critique, advise, and attempt to reform these stakeholders and the systems in which they are mutually embedded.

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

3. *Is Democracy Just Right?*

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

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

Steven L. Winter’s archeology of democratic theory is helpful in unpacking these points. Winter highlights the critical role of interpersonal respect in the classical conception of *isonomia*. Following Arendt, Winter contrasts democracy’s philosophical and etymological roots, which are grounded in the power (kratos) of the masses (demos), with those of *isonomia*, which references equal participation in the generation and administration of law.

Winter’s discussion of *isonomia* points to an underlying historical shift from *thesmos* to *nomos* – from the external to the internal generation

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132 See Moore, *Covenant and Subjectivity*, supra note 89 at ____.
134 Cf. JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT*, 1870–1920 373 (1986) (only deeply norm-driven reforms can “be more than cosmetic”).
136 *Id.* at 237.
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of perceived obligation. Legitimacy means lawfulness. That meaning derives from mutuality.

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

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

C. Democracy Enhancement and Criminal Theory

Retributivism insists that “free will offers an escape” from circumstances, such as resource disparities, that provide contexts for and shape decision-making. On this theory, it is the ineluctably moral decision of an autonomous individual to do an illegal act that warrants condemnation and punishment. Retributivism’s focus on individual moral desert allows for consideration of resource disparities (whether capital, human, or social) at various pivot points in the system. Existing data collection and assessment limit analysis of the degree to which those factors affect declination by crime victims, law enforcement officers, and prosecutors, respectively, to accuse, arrest, or charge. Consideration of these factors is most regularized in the application of rules that mitigate charge level and sentence.

A blunter instrument is the Supreme Court’s recent use of developmental neurobiology to draw bright-line sentencing limits under the Eighth Amendment.

But retributivism is itself profoundly immoral to the extent that it fails to account for and remediate structural disparities that significantly enhance

137 Id. at 237 & n.118.
138 Id. at 240–41.
139 Id. at 237–38 & n.123.
141 See, e.g., Causes and Consequences, supra note 40 (discussing Vera’s work); Miller & Wright, supra note 78; Spohn, supra note 34.
the rewards of criminal offending on one hand, and, on the other, inhibit participation in policy formation and implementation – that is, the definition of crime and the oversight of its enforcement – by the low-income people and people of color who are have disproportionate contact with crime and criminal justice systems. A democracy-enhancing theory of criminal law and procedure should focus like a laser on the concentrated disadvantage that characterizes the intersection of crime, race and poverty to promote the development and exercise of personal and communal self-governance.

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

D. Resources for the Theory-Building

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


144 On the debate over racial invariance in the relationship between concentrated disadvantage and crime, contrast Sampson & Bean, supra note 37, at 8, 11 (discussing “resilient” invariance findings related to “factors representing disadvantage, e.g., differing combinations of poverty, income, family disruption, and joblessness/unemployment”) with Jeffery T. Ulmer, et al., Racial and Ethnic Disparities in Structural Disadvantage and Crime: White, Black, and Hispanic Comparisons, 93 SOC. SCI. Q. 799, 800 (2012) (“the degree to which differences across groups in structural disadvantage predict racial or ethnic differences in violence is far from settled”).

145 See, e.g., M.E.M. Haglund et al., Psychobiological Mechanisms of Resilience:
implications of implicit or unconscious bias—whether those biases are rooted in differences between racial or ethnic groups, socioeconomic classes, or gender identities.¹⁴⁶

As a leading skeptic on the role of both implicit bias and conscious discrimination in causing racial disparities in the workplace, Amy Wax notes that calls for the redress of underlying “pervasive substantive inequalities” tend to “say very little about how to do that.”¹⁴⁷ In addition to the resources noted above, the scholarship of Matthew Adler in social welfare economics and that of Iris Marion Young and Seyla Benhabib in political philosophy offer useful framing devices to at least begin saying more “about how to do that” descriptive and normative work.

Development of a democracy-enhancing theory of criminal law and procedure resonates with Adler’s pathbreaking work on fair distribution as central to inequality-averse social welfare economic theory.¹⁴⁸ Adler’s framing of social welfare economic theory emphasizes the discipline’s normative clout.¹⁴⁹ He resists the prevalent cabining of utilitarian well-being to the satisfaction of personal preference. He deduces a formula for evaluating the contribution of decision outcomes to enhanced individual well-being with priority given to improving the lot of the less well-off. Significantly for purposes of developing a democracy-enhancing theory of criminal law and procedure, Adler acknowledges the need to account for the extent to which individuals shape their own opportunities and life histories.¹⁵⁰ Personal responsibility, or free will, must be incorporated as a variable in his economic calculus.

In the field of political philosophy, Young and Benhabib provide feminist revisions of critical theory’s discourse model. These scholars work with that theory’s three core commitments: (1) communication and, more specifically, rational argument is constitutive of human identity; (2)
an ideal speech situation requiring commitment to consensus, such that all who are affected by a discourse outcome agree to that outcome (the universalization principle); and (3) all interested parties must have equal and unhindered access to full participation in the conversation (the discourse principle). Young and Benhabib insist that the intersubjective communication that is the core of democratic processes and outcomes requires mining messy, highly particularized, real-world differences among people. That process in turn requires satisfaction of basic material needs that are prerequisites to participation.

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

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

By retaining discourse theory’s dual emphases on equal access to deliberative processes and the production of genuine consensus, Young distinguishes her “agonistic” description of democratic formation as struggle from liberal theory’s “aggregative model.” In her view, the latter entails zero-sum, majoritarian competition among ostensibly morally neutral policy preferences – a competition that fails to afford adequate

152 See, e.g., YOUNG, INCLUSION AND DEMOCRACY, supra note 151 at 37-44.
153 Iris Marion Young, Communication and the Other: Beyond Deliberative Democracy, in DEMOCRACY AND DIFFERENCE, supra note 76, at 121; Seyla Benhabib, Toward a Deliberative Model of Democratic Legitimacy, in id. at 67, 84.
154 YOUNG, INCLUSION AND DEMOCRACY, supra note 151 at 23-25, 37-44.
156 IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 50-51 (2000).
157 Id. at 49-51.
structural protections against the perpetuation and reinforcement of “might makes right” dominance. In contrast, a theory that is fully attentive to particularized differences of other-regarding equals obtains a richer capacity for intersubjective transformation and the reshaping of “private, self-regarding desire into public appeals to justice.”

It is in this possibility of intersubjective transformation that the messy struggle toward democracy – power of the people – converges with the elusive goal of isonomia – mutuality in generation and administration of the law. Critics question whether that possibility can be actualized on any meaningful scale. There are challenges to the real-world efficacy of both social welfare economics and critical theory’s discourse model as avenues toward change.

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

But a more pointed criticism highlights the challenges and failures of efforts to empower those at the receiving end of systems – here, the low-income and minority communities most directly and disproportionately affected by crime, its causes, and its consequences – to participate actively in the formation, implementation, and oversight of the policies and

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158 Id. at 50-51.
159 Id.
160 See, e.g., G Forces, supra note 116, at ____ (engaging critiques of Adler’s work).
161 See, e.g., Christopher H. Schroeder, Deliberative Democracy’s Attempt to Turn Politics into Law, 65 L. & CONTEMP. PROBS. 95 (2002).
162 Id.
163 Young, supra note 131.
164 Taslitz, supra note 79.
165 See, e.g., Benhabib, supra note 129; Jane Mansbridge, et al., The Place of Self-Interest and the Role of Power in Deliberative Democracy, 18 J. POLITICAL PHILOSOPHY 64, 73–74 (2010); Michael A. Neblo et al., Who Wants to Deliberate – and Why?, 104 AM. POL. SCI. REV. 566, 567, 570-574 (2010) (younger people, lower-income people, minorities more willing to deliberate than predicted).
institutions that create and maintain those systems. Parts III through V respond to that concern by testing the rudimentary democracy-enhancement theory sketched here. They do so by mapping a previously unnoticed constellation of criminal justice reforms in a single and improbable jurisdiction, the border-south state of North Carolina.

III. A PRETTY QUESTION: WHY NORTH CAROLINA?

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

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

167 See, e.g., Bach, supra note 90.
169 See, e.g., The Decline of North Carolina, THE NEW YORK TIMES (July 9, 2013) (discussing “Moral Monday” protests against “the grotesque damage that a new Republican majority is doing to a tradition of caring for the least fortunate”).
170 Aspects of the analysis in this Part are drawn from Brief for Amici Curiae Historians and Law Professors, State v. Al-Bayyinah (Davie County No. 98 CrS 836, 1009, filed Sept. 15, 2010), which the author researched and wrote.
171 Democracy and Discovery Reform, supra note ___ at 1378–1379.
172 Id. at 1379.
173 Id. at 1379–1384. That trend is due in part to legislative accommodation of prosecutorial concerns for fair accountability and enforceability with respect to investigative agencies that possess discoverable material without prosecutors’ knowledge or control. Id.
But full open file discovery is just one of several pioneering criminal justice reforms in this single and unlikely jurisdiction. As discussed in more detail in Part IV, other cutting-edge reforms have focused on identification and reduction of wrongful convictions; on efficiency and cost reduction; and on curing demographic disparities in criminal offending and victimization as well as in the processing of criminal cases. Before describing that constellation of reforms, this Part searches the state’s socioeconomic and political history for some clues about their genesis. Scrying for hints of democracy enhancement at the intersection of race, crime, and poverty reveals a pattern better described as democracy-assaulting.

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

North Carolina’s previously unheralded leadership in criminal justice reform raises what historian V.O. Key, Jr. described in 1949 as the “pretty question” regarding jurisdictional motivations and aptitudes for change. Key’s opus, *Southern Politics in State and Nation*, is best known for developing racial threat analysis and linking it to what was then a distinctively weak adversarial partisan politics across southern states. Key labeled North Carolina as the South’s “Progressive Plutocracy.” He saw the state as “far more ‘presentable’ than its southern neighbors” in business, education, “race relations … [and] scrupulously orderly” political processes. He praised the state’s “consistently sensitive appreciation of Negro rights” and “spirit of self-examination” driven in part by a strong commitment to public education.

Key left much untold. He ignored or belittled the active role African Americans played in crafting their own political and economic destiny.

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174 V.O. Key, Jr., *SOUTHERN POLITICS IN STATE AND NATION* 208 (“What moves a people to action . . . is a pretty question.”) [hereinafter *SOUTHERN POLITICS*].
176 *Id., SOUTHERN POLITICS*, *supra* note 234, at 205.
177 *Id.* In Key’s view, the state’s political leadership was “stodgy and conservative” but never “scoundrels or nincompoops.” *Id.* at 211.
178 *Id.* at 208–209.
179 Kari Frederickson, *World War II, White Violence, and Black Politics in V.O.Key Jr.’s Southern Politics*, in UNLOCKING KEY, *supra* note 235, at 39–41 (chiding Key’s “secondary interest” in “[w]hat actual black people might have been doing” to shape the political landscape); Carter, *supra* note 235, at 129–130 (describing Key’s treatment of African American southerners as passive victims
He papered over the state’s history of murderous racial violence.\(^\text{180}\) He was inattentive to class differences and elided the conditions of the working poor who operated the textile and tobacco mills owned by the state’s “economic oligarchy.”\(^\text{181}\) He failed to account for the pivotal role of evangelical Christianity in the formation of southern politics, and also ignored the role of women.\(^\text{182}\)

Despite these omissions, aspects of Key’s description accurately reflect a powerful mythos that continues to shape perception and action in North Carolina.\(^\text{183}\) A broad progressive streak runs sometimes beneath, sometimes alongside, and almost always against strains of conservatism and reactionary extremism. Key emphasized the former aspect of the state’s Janus-faced sociopolitical culture.\(^\text{184}\) Two men typically identified with this lesser-known aspect are Frank Porter Graham and Terry Sanford.\(^\text{185}\) But for many, the state’s dominant aspect is indelibly embodied in Jesse Helms, “an unyielding icon of conservatives and archenemy of liberals.”\(^\text{186}\)

and his failures to account for the role of women); id. at 138 (describing interlocking roles of race and class in southern political culture).

\(^{180}\) Key, Southern Politics, supra note 234, at 208 (describing violent white supremacist revolution against biracial Fusionist governments as a “bitter” campaign through which Democrats redeemed the state from “shameless corruption.”). Reconstruction-era corruption in North Carolina was dominated by whites and was no respecter of political party. See, e.g., Eric Foner, Reconstruction: America’s Unfinished Revolution 387–389 (1988).

\(^{181}\) Key, Southern Politics, supra note 234, at 211–215.

\(^{182}\) Charles Reagan Wilson, The Morality-Driven South: Populists, Prohibitionists, Religion, and V.O.Key Jr.’s Southern Politics, in Unlocking Key, supra note 235, at 3–5 (critiquing Key’s failure to account for the role of evangelical Christianity in the formation of southern politics).

\(^{183}\) Mythos is not “something antithetical to fact . . . opposed to reality . . . primitive or arbitrary.” Martin L. Bowles, Myth, Meaning, and Work Organization, 10 Organization Stud. 405, 406–408 (1989). Mythology comprises deeply-rooted interpretive constructs invoked to make sense of the world and one’s role within it. See id. The concept poses no challenge to sociologists’ view of culture as practice. See Sampson and Bean, supra note 37, at 27–28.


\(^{185}\) Christensen, supra note 244; Robert R. Korstad & James L. Lealoudis, To Right These Wrongs: The North Carolina Fund and the Battle to End Poverty and Inequality in 1960s America 12 (2010).

DEMOCRACY ENHANCEMENT IN CRIMINAL LAW AND PROCEDURE

For thirty years, North Carolina voters sent Jesse Helms to the United States Senate as a champion of low taxes, small government, free markets, and traditional social values. As one voter put it, it was impossible to “get to the right of Helms without falling plumb off the Earth.” Some put Helms alongside Ronald Reagan as a key catalyst and communicator of conservatism’s resurgence in the late 20th and early 21st centuries. Nationally-syndicated political columnist David Broder also described Helms as the nation’s “last prominent unabashed white racist politician.”

The roots of North Carolina’s racialized politics run deep, and are particularly tangled at the intersection of race, crime, and poverty. Historically, the state’s formation and application of criminal law and procedure, like the use of extralegal violence, have been closely focused on the intersection of race, class, and gender hierarchies. Colonial slave codes morphed into 19th century black codes, which sprang into new life in post-Reconstruction Jim Crow laws. Such shape-shifting typically responded to socioeconomic and political advances by African Americans. The pattern is evident in North Carolina’s racialized application of court-sanctioned and extralegal executions as well as in other instances of mass political violence. As discussed below, that pattern began in the colonial period and developed in an economy dependent on low-cost labor.

B. From Slave Codes to the Wilmington Massacre

dyn/content/article/2008/07/06/AR2008070602321.html (quoting THE BOSTON GLOBE).
190 “[T]he black man has functioned in the white man’s world as a fixed star, as an immovable pillar: and as he moves out of his place, heaven and earth are shaken to their foundations.” James Baldwin, My Dungeon Shook: Letter to My Nephew on the One Hundredth Anniversary of the Emancipation, in THE PRICE OF THE TICKET: COLLECTED NONFICTION, 1948–1985 336 (1985).
During North Carolina’s 235-year colonial history, more than 70% of the nearly 800 court-sanctioned executions were carried out against slaves and free blacks. In the same period, by contrast, there were three judicially-sanctioned executions of whites for crimes against African Americans. Aggravated forms of execution, including burning at the stake, were reserved for “petit treason” — the uniquely threatening offenses of slave revolt and husband-killing.191 The imbalanced application of capital punishment was so profound and long-standing that even after the advent of the electric chair one white man slit his own throat instead of becoming “the first white man electrocuted in North Carolina.”192

In the antebellum era, Gabriel’s uprising, Nat Turner’s rebellion, and the circulation of David Walker’s revolutionary Appeal to the Coloured Citizens of the World led to slaveowner hysteria.193 Tortured slaves “confessed” to plotting rebellion. Some were burned at the stake or beheaded. The decapitated heads were mounted on stakes to inspire terror and submission.194 The state legislature soon stripped free blacks of voting rights. Additional new laws forbade slaves and free blacks from preaching, teaching, or public speaking in any forum. Teaching literacy to African Americans became a crime.195

Reactionary violence also marred Reconstruction. For example, freed blacks and whites formed Union Leagues in the pursuit of political and economic self-education and advocacy (as well as in self-defense).196 Klan thuggery soon eliminated that cooperation.197 Despite such violent suppression, in the 1870s, while other southern states fell to Redemptionist takeovers, North Carolina retained a Republican governor and rejected a revanchist white-supremacist constitution.198

Then in 1892 and 1894 low-income farm workers and other rural white Populists joined with black and white Republicans to take the

192 Kotch & Mosteller, supra note 207, at 2039, 2043–51.
196 Tyson, supra note 255, at 282–85; see also Foner, supra note 240, at 283 (citing North Carolina Union League chapter as exemplifying the “remarkable degree of interracial harmony” that existed within some local leagues).
197 Foner, supra note 240, at 344, 427–31 (describing reports from one North Carolina judicial district of murders, rapes, arson, and hundreds of beatings in anti-Union League violence).
198 Id. at 444.
governor’s mansion, the state legislature, and several local governmental councils, commissions, and appointed positions from Democrats. These Fusionists sought to increase “the liberty of the laboring people, both white and black.” They “capped interest rates on personal debt, increased expenditures for public education, shifted the weight of taxation from individuals to corporations and railroads, and made generous appropriations to state charitable and correctional institutions.” They also expanded voting rights and local democracy, instituting city and county elections in place of legislatively-appointed authorities.

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

Local whites plotted a violent resurgence. Like their counterparts across the state and nation, they drew on nascent theories of social Darwinism and “scientific” racism to insist that “North Carolina is a WHITE MAN’S STATE, and WHITE MEN will rule it[.]” The media added fuel to the fire. In the runup to the 1898 elections, newspapers put racist cartoons on the front page. Examples included a black vampire labeled “NEGRO RULE” emerging from a Fusionist ballot box to ensnare fleeing white victims in fearsome claws:

199 Korstad & Leloudis, supra note 245, at 12.
200 Id.
201 Id.
202 David S. Cecelski & Timothy B. Tyson, Preface to DEMOCRACY BETRAYED, supra note 94, at xiv.
204 WILMINGTON REPORT, supra note 264, at 52.
205 Id.
206 Raymond Gavins, Fear, Hope, and Struggle: Recasting Black North Carolina in the Age of Jim Crow, in DEMOCRACY BETRAYED, supra note 91, at 188.
On the eve of the 1898 election, Alfred C. Waddell, a former United States Congressman, incited murder: “You are Anglo-Saxons. You are armed and prepared . . . if you find the negro out voting, tell him to leave the polls, and if he refuses, kill him.” Across the state the Klan and the Red Shirts – organized gangs of working-class whites – used rifles and shotguns to turn the election. The Wilmington faction issued a “White Declaration of Independence,” destroyed the local black newspaper, and began killing “every damn nigger in sight.” Estimated death tolls range from 90 to 300 or more. All elected Fusionist leaders were forced to resign at gunpoint, marched to the train station, and banished from the city. Local Christian pastors praised the homicidal violence as “God’s work” and “a mere incident,” reasoning, “You can’t make an omelet without breaking an egg.”

C. Resurgent White Supremacy

With the Democrat-white supremacist takeover complete, statewide regulations soon disenfranchised blacks, barred them from jury service, and replaced previously common patterns of integrated housing with systematic

211 Id. at 12 (quoting the Reverend J.W. Kramer).
212 John Haley, Race, Rhetoric, and Revolution, in Democracy Betrayed, supra note 91, at 209 (quoting Reverend Calvin S. Blackwell of Wilmington’s First Baptist Church).
apartheid that “thoroughly sorted along lines of race and class.” Supp. Support for black schools dropped from parity to 30 cents on the dollar. A key booster of the Red Shirt revolution, Raleigh News & Observer publisher Josephus Daniels, celebrated such developments as “permanent good government by the party of the White Man.” The new governor, Charles Brantley Aycock, explained that the rule of law required the “white man’s party . . . to disfranchise the negro . . . while we work out the industrial, commercial, intellectual and moral development of the State.”

That working out took some time. Half a century later, black veterans of World War II came home intent on a “double-V” campaign to defeat oppression at home as well as overseas. As race riots exploded in other cities, Governor J. Melville Broughton warned against protests linked to racial integration. He chose an auspicious site to give his speech. At the mouth of the Cape Fear River in Wilmington – the same river that Red Shirt revolutionary Alfred Waddell had threatened to choke with black bodies – the Governor reminded the crowd that “blood flowed freely in the streets of this city” in 1898 and might again if “agitators” did not cease efforts whose “ultimate conclusion would result only in a mongrel race.”

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

213 Korstad & Leloudis, supra note 245, at 17; Gavins, supra note 267, at 190–91.
217 Id. at 22; see also Kari Frederickson, World War II, White Violence, and Black Politics in V.O. Key Jr’s Southern Politics, in Unlocking Key, supra note 235, at 39–46.
same public transit, studying in the same schools, and sleeping in hotels and hospitals “with you, your wife and daughters.”

The civil rights era saw continued hardening of political rhetoric and action in North Carolina as in other parts of the nation. In the 1960 gubernatorial race, the campaign of segregationist candidate Beverly Lake vowed not to “sit idly by … and let the NAACP and other evil outside influences make a mockery of North Carolina [and] our way of life.” By 1965, North Carolina had more Klan activity than any other state, with a larger dues-paying membership than Alabama and Mississippi combined.

North Carolina’s Klan has remained active in the late 20th and early 21st centuries. In the 1980s, fifteen robed Klansmen gathered outside a county jail to offer the $50,000 bond for a black man charged with raping a white victim. A local pastor spoke out publicly against the Klan. A cross was burned on his lawn and 19 shots were fired into the home where he and his family were sleeping. When Klansmen killed four anti-Klan protesters in Greensboro all-white juries acquitted the charged defendants. More recent strange fruit includes an Imperial Wizard’s May, 2012 homage to “white unity” at a cross-burning and new-member induction ceremony near the small town of Harmony, North Carolina.

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220 Korstad & Leloudis, supra note 245, at 26. In turn, flyers supporting Graham warned that Smith’s election would return white workers to 12-hour days at pennies per hour and lead to reinstitution of child labor. See also Gavin Wright, Cheap Labor and Southern Textiles, 1880-1930, 96 Q. J. ECON. 605, 609–11 & Tables I–III (1981) (documenting use of child labor in North Carolina textile mills between 1880 and 1920); see id. at 607, 626–29 (attributing industry decline to “dramatic increase in real wage costs” with decline of child labor).


Of course such conduct is not confined to North Carolina, or to the South. But it was one of North Carolina’s Supreme Court Justices who observed during lynching’s 20th century heyday that “the Lynch law of our country has a very ancient and respectable pedigree.” In the same era, the state’s Chief Justice expressly and repeatedly urged speedier judicially-sanctioned executions as a cure for lynching. At the time, North Carolina tracked trends around the country in that nearly 90% of the state’s 168 recorded lynchings between 1865 and 1941 victimized black men, with at least sixty lynched between 1900 and 1943 alone. And in North Carolina as elsewhere the line separating court-sanctioned executions from extralegal vigilantism often blurred.


228 State v. Lewis, 55 S.E. 600, 610 (N.C. 1909) (Brown, J., dissenting) (quoting “[a] most interesting writer in the American Law Register, (Mr. John Marshall Gest”)). Justice Brown would have affirmed the trial court’s quashing of the indictment on the basis that lynching was neither a common-law nor a statutorily-defined offense. Id.

229 State v. Cole, 44 S.E. 391, 397 (N.C. 1903) (Clark, C.J., dissenting); State v. Rhyne, 33 S.E. 128, 135 (N.C. 1899) (Clark, C.J. dissenting); State v. Cameron, 81 S.E. 748, 751 (N.C. 1914); State v. Neville, 95 S.E. 55, 59 (N.C. 1918); True Remedy for Lynch Law, 28 AM. L. REV. 801 (1894); but see Joseph Edwin Proffit, Lynching: Causes and Cure, 7 YALE L.J. 264 (1898). Such views were far from idiosyncratic. Decades later, then-Associate Justice William Rehnquist also promoted court-ordered executions as a bulwark against “anarchy … self-help, vigilante justice, and lynch law.” Coleman v. Balkcom, 451 U.S. 949, 961 (1981) (Rehnquist, J, dissenting from denial of certiorari) (internal citation and quotation marks omitted).


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

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

The tobacco industry was integrated, but shop foremen were white and the dirtiest work was reserved for African American employees. Black tobacco workers did engage in significant union organizing. These efforts included self-education projects and voter drives that shifted the balance in some local elections. Occasionally there was some interracial cooperation within and across these movements.

But labor organizing hit the skids repeatedly in North Carolina. Milder union-busting tactics in 1900 included owners closing mills, company stores, and housing to union members. Workers were blacklisted and their families left homeless, without “provisions [or] contact with the outside world, for the post office was in the company store.”236 Strikes in 1929 were crushed in violent melees that led to criminal convictions of union workers and nolle prosse decisions or acquittals for those accused of attacking or killing strikers. The latter group of defendants often comprised local Sheriff’s deputies or state National Guardsmen.

That antunion fervor was formalized in 1947, as North Carolina pioneered “right to work” statutes that criminalized “closed shop” agreements between business and labor. In 1949, the United States Supreme Court gave those laws a constitutional stamp of approval. Thereafter the Congress of Industrial Organizations mounted an aggressive seven-year organizing campaign called “Operation Dixie” -- but deliberately retreated from previously active recruitment across racial lines. Ultimately anti-union regulations, the segregated workforce, tensions between the black laboring and middle classes, and the real and imaginary

233 See, e.g., Korstad & Leloudis, supra note 245, at 100–101.
234 Id. at 17.
236 Lahne, supra note 296, at 186–87.
237 Id. at 216–221, 227, 230–31.
links between unions and the Communist Party combined to hinder the development of organized labor in North Carolina.\textsuperscript{240}

The War on Poverty hit similar walls in the 1960s. As in the earlier Progressive and Fusion eras, there was some significant cooperation across color lines. Striking examples of such cooperation included Klan leaders Lloyd Jacobs and C.P. Ellis. Jacobs, an ex-convict, recruited NAACP members, student activists, and low-income people to join him in protesting prison conditions through an organization called the North Carolina Justice Committee.\textsuperscript{241} Ellis was a vocal opponent of school integration, the civil rights movement, and War on Poverty efforts to aid blacks. He was astonished to be elected co-chair of a community council responsible for creating a school desegregation plan – particularly because he shared the role with black activist Ann Atwater. Until then, Ellis and Atwater had only “cussed each other, bawled each other, [] hated each other.” But when forced into a working relationship with Atwater, Ellis found “a whole world was opening up … I was learning new truths that I had never learned before.” Among other things, he realized that structural disadvantages “shut out” low-income people of all races from economic and political opportunity.\textsuperscript{242}

But such interracial, intraclass cooperation remained rare and evanescent. So were attempts to fulfill demands for maximum feasible participation (“MFP”) by low-income people in designing and overseeing poverty-reduction programs. Those requirements were built into federal legislation such as the Economic Opportunity Act [“EOA”] and the Model Cities Act.\textsuperscript{243} The MFP mandate was modeled on the North Carolina Fund. This unique antipoverty project was initially supported by state and national philanthropic foundations. Only later, after the EOA was crafted to follow the Fund’s model, did the Fund distribute federal dollars.\textsuperscript{244}

Tara Melish focuses blame for the demise of the EOA’s MFP mandate – and for much of the antipathy toward the War on Poverty – on the “increasingly belligerent, extreme, and confrontational demands” of

\textsuperscript{240}Korstad & Leloudis, supra note 245, at 28–29, 168–69; see also Korstad & Lichtenstein, supra note 296, at 801–806 (1988) (discussing class tensions and role of NAACP and Urban League in rise and fall of union drive by black workers in Winston-Salem); Risa Lauren Goluboff, "Let Economic Equality Take Care of Itself": The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s, 52 UCLA L. REV. 1393, 1422–27 (2005) (discussing NAACP’s waxing and waning interest in black labor movement); Lahne, supra note 296, at 216–221 (discussing violence against communist-backed and noncommunist union workers and organizers).

\textsuperscript{241}Korstad & Leloudis, supra note 245, at 315–16.

\textsuperscript{242}Id. at 316–18 (quoting STUDS TERKEL, AMERICAN DREAMS: LOST AND FOUND 201–209 (1980)).

\textsuperscript{243}Id. at 166–67, 306, 340–41.

\textsuperscript{244}Id. at 82–92, 166–67, 172–73.
welfare rights activists for resource redistribution. Professors Korstad and Leloudis describe a more complex set of tensions at work in North Carolina. Their research shows that MFP drew consistent fire from the outset as white supremacists, farm and business owners, local governments, and nonprofits – with varied motives – resisted the mandate as a direct challenge to their power and authority.

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

Thus, even before the 2008 recession, North Carolina consistently ranked among the lowest ten states, near Texas and Mississippi, for per-pupil spending on public education. Conversely, the state ranked sixteenth and fourteenth highest among the states, respectively, for highest overall and child poverty rates. These rates spike in several urban and rural areas and are sharply skewed by race and ethnicity. For example, the median net worth of minority to white households in the state is 14 cents on the dollar. To translate these numbers into the civil legal setting, approximately eighty per cent of the low-income population that is eligible for and in need of legal services has no access to an attorney. The state ranks thirtieth in support for civil legal services; Florida invests twice as much and Maryland three times as much in services per eligible client. As another point of comparison, while there is one attorney for every 442 North Carolinians, the legal aid attorney-client ratio is 1:15,500.

246 Id. at 328–335.
247 Id. at 325–53; see also Bach, 2010 WISC. L. REV. at 243–250.
250 Id. at 11–14.
In addition, conservative populism retains deep and vibrant roots in North Carolina. Recent developments are typical of national trends. In 2010, millions of dollars from inside and outside the state were targeted to seat the first Republican-majority General Assembly since Reconstruction. The legislature joined others around the country in a flurry of proposed restrictions on voting, seized opportunities to cut taxes and spending. Those initiatives track legal and political shifts occurring across the country. As discussed below, they include resurgent “tough on crime” rhetoric and legislation that threatens North Carolina’s improbable role as a criminal justice reform pioneer.

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

This Part maps North Carolina’s distinctive cluster of cutting-edge criminal justice reforms in light of the democracy-enhancement theory sketched in Part II. The first “innocentric” category of reforms focuses on improvements that identify and reduce wrongful convictions. The second category targets efficiency and cost reduction.

These reforms are laudatory. Several directly redress power disparities that undermine system fairness, reliability, and legitimacy. But it is the third category of reforms that more directly addresses the democracy deficit at the intersection of crime, race, and poverty.


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

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

The foregoing categorization of North Carolina’s reforms is not hard and fast. Motivations for these reforms overlap and vary. Also mixed are their abilities to withstand reaction and repeal.

A. Innocentric Reforms

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

Full open file discovery cannot compensate for prosecutors’ superior investigative resources and ability to select the number and level of charges against a particular defendant. But access to the full investigative file can empower defendants to exercise a greater level of autonomy. The decision to enter a plea or exercise the right to trial is more likely to be fully informed and voluntary when the defendant knows the strengths and weaknesses of the state’s case. In the minority of cases that go to trial, full open file discovery helps to ensure that the defendant’s voice is heard through the full and fair airing of the evidence. Fact-finders, who speak for the community either as elected judges in bench trials or as jurors exercising a quintessentially democratic check on concentrated government power, are likewise more fully able to undertake deliberations with confidence and to issue reliable judgments. Thus discovery reform enhances democracy while simultaneously promoting efficiency and finality of case processing and verdicts.

Full open file discovery also spun off additional pioneering reforms in North Carolina. Newly-opened prosecution files revealed still more wrongful convictions in a number of high-profile cases. Two types of responsive “innocentric” reforms bolstered full open file mandates by seeking to prevent erroneous convictions. First, the state pioneered the creation of an independent Innocence Commission to investigate and

257 Democracy and Discovery Reform, supra note ____ at 1371-84.
258 Id. at 1333-34, 1371-84.
259 Id. at 1379 & n.360.
correct wrongful convictions. Second, North Carolina joined the minority of states undertaking reform of forensic investigation procedures.

1. The Innocence Commission

North Carolina’s Innocence Commission is the only state agency in the country with the authority to refer prisoners with colorable innocence claims to court for potential exoneration and release. The Commission has a uniquely nonadversarial, tiered-review structure. As was the case with mandatory statewide full open file discovery reform, implementation of the new Innocence Commission statutes led to another spate of high-profile exonerations.

There also was predictable pushback. One amendment to the Innocence Commission statutes mandated that crime victims receive notice and an opportunity to attend Commission proceedings. Prosecutors unsuccessfully sought other amendments that would have barred claims by prisoners who plead guilty or no contest, required prosecutors’ participation in adversarial hearings, and trimmed witness immunity protections. The legislature rejected these proposals, but agreed to exclude exonerated individuals who plead guilty from obtaining state compensation for their wrongful convictions. Theoretically, these amendments marginally enhance individual voices vis-à-vis concentrated authority. Their practical effect is open to question.

The first amendment offers victims a place at the table -- but only as observers. To be sure, increased transparency improves procedural justice. New information can change victim perceptions about defendants’ guilt.

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260 Innocence Inquiry Commission Act, N.C. GEN. STAT. §§ 15A-1460 to -1475 (as amended 2012); see Norris, et al., supra note 176, at 1355 & Table 5 (listing jurisdictions with innocence commissions and dates of establishment).
265 Act of June 7, § 11 (amending N.C. GEN. STAT. § 148-82(b)).
266 See, e.g., JENNIFER THOMPSON, RONALD COTTON, AND ERIN TORNEO, PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION (2009) (discussing experience of rape victim and defendant from her mistaken eyewitness identification through his conviction and exoneration).
But victims who are not called as witnesses or otherwise engaged by the Commission’s investigation and review process may be frustrated by the real or perceived inability to shape the outcome. This limitation is driven by the Commission’s uniquely nonadversarial structure.267

With respect to the second amendment, some defendants might strengthen either a pretrial innocence claim or plea bargaining position by pointing to the compensation exclusion as warranting concessions from the prosecution. But given the institutional pressures facing charged defendants,268 including pressures on overloaded defense attorneys,269 it is unlikely that many defendants will know that this exclusion is an automatic collateral consequence of any guilty plea. It is more likely that the exclusion will operate as intended: as a complete bar to any plea-convicted innocent from obtaining compensation for his or her wrongful imprisonment. Thus, the amendment exacerbates the power disparities that drive the plea process and yield wrongful convictions in the first place.

2. Forensic Science Reforms

Mounting evidence of wrongful convictions and exonerations also led the General Assembly to mandate improvements in eyewitness identification procedures that have been cited as the nation’s “most comprehensive.”270 Addressing other predictable sources of error, the state mandated recordation of interrogations in felony cases,271 along with the preservation of biological evidence for future testing.272

In 2011, North Carolina also joined a minority of states in reforming procedures governing its forensic science laboratory.273 This reform followed a chilling indictment of national forensic capabilities by the National Academy of Sciences, which stated that

the existing legal regime—including the rules governing the admissibility of forensic evidence, the applicable standards governing appellate review of trial court decisions, the limitations of the adversary process, and judges and lawyers who often lack the scientific expertise necessary to comprehend and evaluate forensic evidence—

267 See Wolitz, supra note 179 at ___.
268 Bibas, supra note ___, at ____.
269 Moore, supra note 68, at ____.
271 N.C. GEN. STAT. § 15A-211 (2013); see also Norris, supra note 269, at 1330–41 (discussing varying recordation requirements in the nineteen states that regulate interrogation).
273 Id. § 114-16.1 (2013).
is inadequate to the task of curing the documented ills of the forensic science disciplines.\textsuperscript{274}

In addition to the NAS critique, North Carolina’s Innocence Commission proceedings and other litigation revealed flaws in the qualifications, evaluations, and testimony of State Bureau of Investigation (SBI) forensic sciences staff. Among other things, previously unknown records demonstrated that SBI employees had provided biased or false testimony favoring the prosecution.\textsuperscript{275}

Responsive legislation created an independent state oversight authority and specified qualification and evaluation standards to increase transparency and accountability.\textsuperscript{276} The full open file discovery statutes were amended to specifically require disclosure not only of forensic test results but also of all underlying or preliminary notes and results.\textsuperscript{277} Legislators also created the position of forensic science ombudsman, tasked to work with all stakeholders including “the general public to ensure all processes, procedures, practices, and protocols at the State Crime Laboratory are consistent with State and federal law, best forensic law practices, and in the best interests of justice in this State.”\textsuperscript{278}

Despite demonstrated and systemic flaws in the SBI’s forensic analysis department, North Carolina did not follow other states in creating an independent watchdog.\textsuperscript{279} Instead, after passage of this reform legislation, a retired judge was appointed to clean house at the SBI lab. All forensic workers for whom accreditation methods existed were tested to determine their competence. A number failed those tests.\textsuperscript{280}

In a highly significant development, prosecutors recognized that news as impeachment information, which they had a duty to turnover to


\textsuperscript{275} Norris, supra note ____\textsuperscript{Error! Bookmark not defined.}, at 1321–22.

\textsuperscript{276} N.C. GEN. STAT. § 114-16.1 and Editor’s Note (citing Session Laws 2011-19, s. 4, as amended by Session Laws 2011-307, s. 8, and as amended by Session Laws 2012-168, s.6.1.

\textsuperscript{277} N.C. GEN. STAT. § 903(a)(1)(a) (2013).

\textsuperscript{278} Id. § 114-16.2 (2013). The state Indigent Defense Services agency also created a Forensic Resource Counsel position to help defenders “understand[] and … chelleng[e] forensic science evidence” by providing a database of information about forensic experts as well as training programs, research updates, and “other resources to support litigation.” See evidence.http://www.ncids.com/forensic/.


the defense under *Brady* and the state’s full open file discovery statutes. To the astonishment of many, the judge presiding over the SBI’s reformation refused to reveal specific test results of individual forensic examiners to the prosecutors. Instead of complying with *Brady*, the judge insisted that the information was protected by a personnel records exception. The prosecutors subpoenaed the information, and the SBI was forced to reveal it.  

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

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

**B. Focusing on the Bottom Line**

1. **The Sentencing Commission and Justice Reinvestment**

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

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

The original vision of justice reinvestment entailed redirection of criminal case processing dollars to rebuild “the schools, healthcare facilities, parks, and public spaces [] of neighborhoods devastated by high levels of incarceration.” But consistent with this grassroots-driven initiative in other states, North Carolina’s reinvestment focused instead on expanding surveillance and control of released prisoners through increased probation and parole oversight – albeit with “evidence-based” risk assessment protocols driving the categorization of people and programming.

2. Collateral Consequences

North Carolina also is one of a handful of states to tackle the jungle of collateral consequences that block access to the jobs, housing, education, and transportation that released prisoners need to reintegrate successfully into their communities. But the state has yet to follow the lead of other jurisdictions by eliminating collateral consequences outright or “banning

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


the box” to limit potential employers’ access to applicants’ criminal histories.293

Instead, North Carolina joined the very small group of states that grant certificates of rehabilitation to people with convictions who meet specified criteria that predict successful reentry.294 A state law also has been cited as a national model for limiting future liability for employers who hire people with criminal records, should that hiring decision cause future harm.295 Both of these mechanisms are viewed as reducing barriers to employment. Finally, the state is one of only two in the country to have constructed a collateral consequences database through which defendants and complaining witnesses as well as prosecutors, defense attorneys, and judges can become fully aware of the collateral costs and benefits of specific charges, plea offers and sentences.296

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

1. Human Beings and Citizens: Isomoiria and Democracy Enhancement

The foregoing constellation of reforms addresses the mechanics of criminal justice systems traditionally conceived. A democracy-enhancing theory of criminal law and procedure should address causal factors driving the disproportionate representation of low-income and minority individuals in criminal justice systems – whether as crime victims, as offenders, or, as is too often the case, as individuals with dual victim/offender identities. Bannister traces the cradle-to-prison pipeline that disproportionately funnels low-income African American children, particularly boys, from low literacy levels in racially and socioeconomically segregated early elementary school settings to dropping out in middle or early high school, then into juvenile systems and on to contact with criminal law and procedure as adults.297

294 Radice, supra note 196, at 724.
295 NELP Report, supra note 197, at 6 (discussing N.C. GEN. STAT. § 15A-173.5 (2011)).
297 See Hinds Cnty. Sch. Dist. Bd. of Trs. v. R.B., 10 So. 3d 387, 411–12 (Miss. 2008) (Graves, J., dissenting); Re: Findings Regarding Department of Justice Investigation of Lauderdale County Youth Court, Meridian Police Department, and Mississippi Department of Youth Services, U.S. DEP’T OF JUSTICE 2–3 (Aug.
Nobel Prize-winning economist and law professor James Heckman reports that early intervention programs divert those pipelines by empowering families to improve their own prenatal care, parenting and communication skills, health and nutrition, and literacy. Available data indicate that these programs reduce the risk of offending while conserving increasingly scarce tax dollars. Conversely, popular programs like DARE and Scared Straight appear to have no effect or even to cause harm. Heckman describes successful early intervention as investment in human capital. Those initiatives are as readily viewed as enhancing individual and community self-governance.

Such empirical data hold promise for a democracy-enhancing approach to criminal law and procedure. They highlight strategies for improving self-governance at the individual and community level. Democracy enhancement there can reduce the risk of criminal justice involvement before the mill begins its crushing cycle of offense and harm.


300 Soler, et. al., supra note 153, at 491–92.

victimization, arrest, charge, conviction, incarceration, reentry, and recidivism.  

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

A number of early intervention programs have been tested over time in terms of their payoff in reducing the risk of criminal justice involvement. One top-performing example is the Nurse-Family Partnership. The program pairs a registered nurse with low-income, first-time mothers during pregnancy and for the first two years of the baby’s life. Economists at the RAND Corporation calculated that each dollar invested in NFP involvement with a high-risk family saves more than five dollars in social services, health care, and criminal justice expenditures.

One might fruitfully compare the economic impact of early intervention and prevention with the cost of processing criminal cases – the bulk of

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302 Forman, supra note 55, at 52 & n.118. Forman points to improved educational opportunities, programs, and services for incarcerated youth and adults. Id. at n.119.

303 Cunha, et. al., supra note 153, at 1.

304 Id.

305 Id.

306 Id.; see also Soler, supra note 153, at 489–91 (describing testing methodology and results of Colorado’s Blueprints for Violence Prevention initiative); Philip J. Cook, Denise C. Gottfredson, and Chongmin Na, School Crime Control and Prevention, 39 CRIME & JUST. 313, 317, 377, 391 (2010) (“[T]his field is burdened by a lack of timely policy research and a tendency to launch major initiatives without first (or ever!) doing a high-quality evaluation.”).

307 Soler, supra note 153, at 490; see also Sharon Mihalic, et al., U.S. DEPARTMENT OF JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION REPORT: BLUEPRINTS FOR VIOLENCE PREVENTION 1–20 (2004), available at https://www.ncjrs.gov/pdffiles1/ojjdp/187079.pdf. Other highly effective model programs that are more resource-intensive than the Nurse-Family Partnerships include Functional Family Therapy, Multisystemic Therapy, and Multidimensional Treatment Foster Care. Id. at 26–28; see also Soler, supra note 153, at 491.

308 David L. Olds, et al., Taking Preventive Intervention to Scale: Nurse-Family Partnerships, 10 COG. & BEH. PRACTICE 278, 281-82 (2003). Further research is needed to determine the extent to which NFP’s commitment to voluntary and mutually respectful relationships between nurses and mothers prevents the degradation critiqued by, e.g., Khiara M. Bridges, Privacy Rights and Public Families, 34 HARVARD J. L. & GENDER 113 (2011).

which are low-level misdemeanors.\textsuperscript{310} Accounting solely for personnel and physical plant investments, an estimate from one jurisdiction concluded that flooding courtrooms with these cases is the criminal justice equivalent of swamping intensive care units with nosebleeds -- at a cost to taxpayers of approximately $40,000 per hour.\textsuperscript{311}

North Carolina has promoted NFP in association with a twenty-year-old state legislative initiative called Smart Start.\textsuperscript{312} Begun in 1993, Smart Start is a multipronged strategy to improve life outcomes by increasing low-income children’s preparation for kindergarten. "We want to develop their brains. We want them to start school healthy and ready to learn," explained then-Governor Jim Hunt.\textsuperscript{313} Because NFP is an evidence-based model, fidelity to program design and structure is a prerequisite for accreditation. North Carolina was approved to begin an NFP program in one county in 2000 and has since expanded to 10% of the state’s 100 counties.\textsuperscript{314}

That rate of expansion belies claims of social scientists that “the public is nearly universal in its support for early intervention—so much so that ‘child saving’ can be considered a core cultural belief.”\textsuperscript{315} Moreover, despite investing in early empowerment through Smart Start, and despite overall improving test scores, North Carolina still ranks third from the bottom among states for SAT scores. The state also ranks second-highest for teenage dropout rates.\textsuperscript{316}

NFP designer David Olds also notes that the program grew during the economic boom years of the 1990s. He was prescient in predicting that continued support would be uncertain in harder times despite the fact that “it is during periods of economic stagnation and high unemployment that the program of this kind is needed most.”\textsuperscript{317}

Smart Start has come under repeated attack in recent years, including cuts to its $300 million annual


\textsuperscript{313} Id.


\textsuperscript{317} Olds, \textit{supra} note 163, at 288.
state funding. Nor did the 2008 economic crisis spare the foundations that have supported North Carolina’s NFP programs from the outset.318

2. Indigent Defense Services

The “basic facts” linking poverty with harm to healthy human development are “increasingly well known.”319 So too is the failure of “political will” in the United States “to invest in programs that work” and address the “moral scandal” of a the highest child poverty rate in the Western industrialized world by bringing those rates in line with nations averaging “between one eighth and one half” that rate.320 As these policy decisions feed predictable patterns of criminal victimization and offending, the public defender occupies a unique role in the struggle for expanded self-governance. This role’s “peculiar sacredness” derives from the duty to give voice to, and vindicate the interests of the disproportionately low-income and minority individuals who face government prosecution.321

Despite recent attacks on its independence, North Carolina’s Indigent Defense Services system (“IDS”) remains relatively well-positioned to fulfill this role. The state enjoys one of the better-developed public defender programs in the country. Four components of the state’s Indigent Defense Act have been critical. The first three fulfilled the American Bar Association’s Ten Principles for public defense delivery systems, which are widely acknowledged as establishing best practice standards for structuring indigent defense.322

First, at the statutes’ inception their express purpose prioritized quality of service and independence of counsel.323 Second, that independence was secured through system governance by a relatively broad-based commission that was not beholden to any branch of government.324 Third,

318 See Hunt Back for Smart Start, supra note 167, at PIN (describing 2011 budget negotiations and conservative criticism of Smart Start’s “wasting money” and having “overpaid” leadership).
320 Id. at 124–125.
321 See Moore, G Forces, supra note 116 at ____ (quoting Avery v. Alabama, 308 U.S. 444, 447 (1940)).
323 N.C. GEN. STAT. § 7A-498.1 (2012) (Act’s purpose is to “[e]nhance oversight” and “[i]mprove the quality … and … independence” of defense representation “in the most efficient and cost-effective manner without sacrificing quality representation”).
324 Id. § 7A-498.4 (2012).
that commission was empowered to establish and enforce detailed, state-wide standards for attorney qualification, training, and performance for attorneys in all indigent defense practice areas ranging from termination of parental rights to death penalty cases.\textsuperscript{325}  

Finally, and perhaps uniquely among jurisdictions in the United States, IDS has enjoyed relatively robust data collection, assessment and research capacities.\textsuperscript{326} Reports have tracked per-case costs, identified avenues for improving efficiency without sacrificing quality of service, and highlighted opportunities to obtain more effective criminal justice policies.\textsuperscript{327} The IDS research division is the first in the nation to undertake broad-based, empirical examination of best-practice standards for public defender training and performance.\textsuperscript{328}  

IDS also enhances client service through listserv and other web-based training and communication networks. These resources create communities of knowledge and support among lawyers in various specialty areas ranging from juvenile and parental rights cases through capital trial and general appellate practices. In addition to offering a rich intellectual, practical, and emotional resource for practitioners struggling with demanding caseloads, this communications network reciprocally helps IDS administrators respond to concerns of lawyers in the trenches.  

In terms of more traditional exercises of oppositional politics, the state-wide IDS communications network also keeps the public defense bar alert and responsive to pending legislative changes – but apparently with diminishing effect. For example, recent cost-cutting and “tough on crime” legislative proposals required low-bid contracting of public defense services, with quality issues to be resolved by local judges.\textsuperscript{329} Another amendment politicized the appointment of regional chief defenders by removing that authority from IDS and returning it to elected local judges.\textsuperscript{330}


\textsuperscript{326} See id. § 7A-498.1 (Act’s purpose includes “[g]enerat[ing] reliable statistical information in order to evaluate the services provided and funds expended.”


\textsuperscript{330} Id. § 18A.5(a) (amending N.C. Gen. Stat. § 7A-498.7(b)).
As when prosecutors pushed proposals to weaken the state’s pioneering criminal discovery reform statutes, there was defense-led opposition. That opposition was ultimately thwarted, however. The legislature rejected amendments that would have maintained compliance with the ABA Ten Principles by requiring IDS to ensure that low-bid contracts provide quality representation and to retain authority over public defender appointments.

3. The Racial Justice Act

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

In addition, Professors Mosteller, Grosso, and O’Brien have highlighted the state’s innovative Racial Justice Act (“RJA”). This legislation was the first in the nation to open meaningful avenues toward relief from capital prosecutions and death sentences based on statistical evidence that race was a substantial factor in discretionary decision making by prosecutors and jurors.

As these scholars explain, the RJA moved significantly beyond the limited constitutional protections against race bias afforded to prospective

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331 See Moore, Democracy and Discovery Reform, supra note ___, at ___.
333 See Pratt & Cullen, supra note 37, at PIN.
335 Miller & Wright, The Black Box, supra note 78, at 162–63.
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jurors by *Batson v. Kentucky* and to capitaly-charged defendants under *McClesky v. Kemp* in part by allowing defendants to prove the existence and effect of bias through statistical evidence. The RJA also expanded significantly beyond the only prior statutory model from Kentucky. And the RJA was the first law of any kind to result in judicial findings that a death penalty system was infected by the intentional, statewide, race-based discrimination by prosecutors against African Americans in jury selection.

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

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

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344 *Id.* at 6 (quoting Rose v. Mitchell, 443 U.S. 545, 566 (1979)).
345 *Id.*; see also *id.* at 87–91 (discussing history of *de jure* and *de facto* exclusion of African Americans from jury service).
Instead the second RJA order was “based primarily on the words and deeds of the prosecutors” constituting “powerful evidence of race consciousness and race-based decision making.”  

The prosecution provided what the court found to be the most compelling evidence of their own intentional discrimination.

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

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

The RJA rulings are hardly the end of this particular democracy-enhancement story. They came at a cost to murder victims’ survivors who saw execution as just punishment despite the race-based elimination of prospective jurors. On April 11, 2013, the state Supreme Court granted the state’s petition for discretionary review of the order vacating Marcus

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347 Id. at 2, 112-120.
348 Id. at 80.
349 Id. at 4-5, 73-77.
350 Id. at 121-124 (citing proffered justifications such as jurors’ military service, affiliation with the state government, and church attendance).
351 Id. at 2, 50–54, n.11 (stating that disappearance of prosecutor’s notes from file “could easily support the inference that the State intentionally destroyed the[m]”; declining to so find due to sworn testimony by local judges regarding the prosecutor’s “excellent reputation for truthfulness and integrity”).
352 Id.
DEMOCRACY ENHANCEMENT IN CRIMINAL LAW AND PROCEDURE

Robinson’s death sentence. On June 19, 2013, RJA was repealed entirely and retroactively in a legislative and executive act aimed at speeding state-sanctioned executions.

D. Constellation-Mapping and Circumspection

To map the foregoing constellation of reforms in North Carolina is to reveal cycles of reform, reaction, retrenchment, and repeal that warrant considerable circumspection. First of all, other states may achieve similar or better outcomes through other means. There also is no question that North Carolina has failed to fully exploit all available reform opportunities. A salient example relates to a recent nationally-publicized decision of Governor Beverly Purdue. Just before leaving office in January 2013, the Governor issued pardons of innocence for Ben Chavis and other civil rights activists known as “The Wilmington Ten.”

These cases arose forty years earlier at the intersection of crime, race, and poverty. The defendants were civil rights and antipoverty activists convicted of firebombing a white-owned grocery store in North Carolina’s largest port city – the site of the infamous Wilmington Massacre during the white supremacy campaign of the 1890s. The grocery store fire occurred amid protests over the closure of the local African American high school and dispersal of the black students to white schools.

The case of the Wilmington Ten, like other cases that ultimately motivated North Carolina’s enactment of mandatory statewide full open file criminal discovery, involved years of post-conviction litigation and a federal appellate court vacating the convictions based on Brady violations. The Fourth Circuit reached “inescapable” conclusion that the Wilmington Ten prosecutor knew his key witness committed perjury while suppressing the witness’ contradictory prior statement from the defense (along with other material exculpatory evidence).

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354 State v. Marcus Reynard Robinson, No. 411A94-5 (North Carolina Supreme Court April 11, 2013). The author prepared and filed an amicus brief in the case on behalf of qualified African American jurors who were excluded from serving on capital juries based on their race.
356 Id. §§ 1-4.
357 See supra Part III.B.
358 See Democracy and Discovery, supra note ____, at 1377–1379.
360 See supra Part III.B.
362 Id.
Yet the taint of prior conviction and imprisonment still hung over the Wilmington Ten until Governor Perdue issued the pardons of innocence. The Governor’s signing statement cited the recantation of prior witnesses as a reason for issuing the pardons. But the signing statement emphasized newly discovered evidence of the prosecutor’s reliance on race in jury selection.363

The Governor decried the latter conduct as

utterly incompatible with basic notions of fairness and with every ideal that North Carolina holds dear. The legitimacy of our criminal justice system hinges on it operating in a fair and equitable manner … not based on race or other forms of prejudice. …[T]hese convictions were tainted by naked racism and represent an ugly stain on North Carolina’s criminal justice system that cannot be allowed to stand any longer.364

Governor Perdue was not alone in condemning the infection of criminal proceedings with racially-biased juror exclusion. She was joined by Wilmington’s prosecutor – the same man who as President-elect of the state Conference of District Attorneys publicly called for innovative responses to “a great social issue that has been years in the making and is bigger than any of us: race and justice”365 The prosecutor was quoted as saying

When jurors are excluded from the judicial process on the basis of race … the defendant and the entire community are denied a fair trial. … Where, as here, the process that was in place to search for the truth is determined to be so fundamentally flawed that we cannot know it, the verdict cannot stand the test of time.366

Such statements might have inspired hope that the RJA orders finding state-wide infection of capital jury selection with comparable race bias would inspire gubernatorial disapprobation and even conversion of

363 The local newspaper published the full text of the Governor’s signing statement, which was deleted from the gubernatorial website after Perdue left office. See Special to The Wilmington Journal From the Governor of the State of North Carolina, Governor Beverly Perdue, WILMINGTON J., Jan. 1, 2013, available at http://wilmingtonjournal.com/gov-perdue-issues-pardon-of-innocence-for-wilmington-10/.
365 David, supra note 334, at PIN.
366 Blythe, supra note 364, at PIN.
existing death sentences to RJA-mandated sentences of life imprisonment without parole. At minimum, such sentiments might have been expected to stem the tide toward RJA’s repeal. Future research should explore the reasons that any such aspirations were so completely thwarted. Some preliminary thoughts are offered here.

First, the cases of the Wilmington Ten and RJA litigants stood in a very different procedural posture. For the former, forty years of litigation and extrajudicial advocacy revealed the unfairness under settled federal constitutional law and perhaps the factual wrongfulness of both convictions and sentences. In contrast, the ink was barely dry on the RJA amendments, orders, and petitions for appellate review, none of which implicated any of the innocentric interests that garner (relatively) ready popular support.

Second, as the foregoing analysis of North Carolina’s criminal justice reforms demonstrates, change is seldom insulated from reaction and repeal. It was precisely the effectiveness of RJA’s systemic assault on the infection of race bias in capital cases that proved to be the statute’s undoing. Other categorical interventions to halt executions have had mixed long-term results, including backlash against judicial, executive, and legislative decision makers and increased popular support for capital punishment.367

Put bluntly, RJA leaped onto the political third rail at the intersection of crime, race, and poverty.

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

Viewed through the lens of a democracy-enhancement theory discussed in Part II, therefore, North Carolina’s reforms present a decidedly mixed picture. The next section digs below the surface to examine the state’s institutional culture in light of the outlines of a democracy-enhancement theory, probing for causal explanations behind the

constellation of cutting-edge criminal justice reforms and their occasional capacity to withstand reaction and repeal. To that end, Part V focuses particularly on the institutionalization of capacities for critical reflection and action through oppositional politics.

V. DEMOS, DELIBERATORS, AND DEFENDERS

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

A. Demos

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

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

368 Key, supra note 234, at 219.
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Nevertheless, both before and after the Red Shirt revolution, the African American population in North Carolina enjoyed strong, well-educated, business-oriented, politically active leadership.\(^{370}\) During Jim Crow blacks developed independent institutional structures in addition to businesses and schools – “churches, newspapers, fraternal lodges, and women’s clubs” – and hammered out new coalitions with partners inside and outside the state. Those resources provided a foundation for oppositional politics in the most recent Civil Rights era and beyond. Exemplary leaders include nationally renowned historian John Hope Franklin and leading civil rights attorneys such as Julius L. Chambers and James E. Ferguson II.\(^{371}\) As Professors O’Brien and Grosso explain, such leadership energized similar coalition-building that led to the near-success of a legislative moratorium on executions and, in turn, to passage of the Racial Justice Act.\(^{372}\)

C. Deliberators

Despite the state’s halting progress on education, there is at least one distinctive example of an “honest broker” deliberative function served by a public university in the context of criminal law and procedure. Professors at the University of North Carolina-Chapel Hill School of Government evaluate and interpret legislation and case law as part of their duties in training prosecutors, judges, and indigent defense attorneys from all corners of the state’s unified court system. Because institutions and individual actors are mutually constitutive,\(^{373}\) leadership development is critical. Critiques of criminal justice systems, agencies, and agents often emphasize the powerful impact of institutional culture on stakeholders’ identity formation, including through the (intentional and unintentional) shaping of next-generation leadership.\(^{374}\) It appears that relatively few states have similar evaluation, interpretation, training and research

\(^{370}\) Korstad & Leloudis, supra note 245, at 81, 189-90 (discussing black leadership in Durham); id. at 206-208 (same, in “The Black Second,” comprising several northeastern North Carolina counties).


\(^{372}\) O’Brien & Grosso, supra note 207, at 496-98.


\(^{374}\) See, e.g., Miller & Wright, supra note 78, at PIN.
functions that are embedded in their local universities and focused on
criminal law and procedure.\textsuperscript{375}

Foundations and nonprofits also provide some institutionally
independent space to improve the quality of deliberation and decision-
making on criminal law and procedure. As discussed in Part IV.A, Key and
other scholars overstate the scope and direction of the North Carolina’s
progress on education.\textsuperscript{376} There is a bitter irony in the fact that one of the
state’s leading white supremacists simultaneously oversaw the violent
overthrow of elected Fusionist governments, the development of Jim Crow,
and the biggest investment the state’s history to improve public education
for both black and white students. Significantly, it was investments from
northern foundations that supported the white supremacist movement’s
“school-building campaign of staggering proportions: during the period
1902-10, the state erected on average more than one new schoolhouse a
day.”\textsuperscript{377}

Foundations and nonprofits also help expand opportunities and
capacities for oppositional politics at the intersection of crime, race, and
poverty. Like other states, North Carolina has a long history of such
public-private partnerships. In the antebellum, Reconstruction, and Jim
Crow eras, black leaders tapped northern philanthropists and mission
societies to build educational and business infrastructure.\textsuperscript{378} As noted
above, a white supremacist Governor used foundation funds to support a
school-building campaign in the first part of the 20th century. In the early
1960s, then-Governor Terry Sanford obtained funding from the Ford
Foundation, as well as from North Carolina’s Z. Smith Reynolds and Mary
Reynolds Babcock Foundations, for a homegrown War on Poverty. The
resulting North Carolina Fund became a model for the federal War on
Poverty, particularly in emphasizing maximum feasible participation by
low-income and minority individuals and communities in program
development, implementation, and oversight.\textsuperscript{379}

As discussed in Part III, the Fund saw limited success, but African
American leadership (both grassroots and elite) was critical to the Fund’s

\textsuperscript{375} One corollary to North Carolina’s School of Government is Washington’s state
Institute for Public Policy. See, e.g., Steve Aos, \textit{et al.}, \textit{Evidence-Based Public
Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and
\textsuperscript{376} Key, \textit{supra} note 234, at 208-209 (emphasizing educational advances under
white supremacist rule); \textit{but see supra} note 275 and accompanying text.
\textsuperscript{377} At the same time, per-pupil funding for black and white students dropped from
parity to 30 cents on the dollar. Korstad & Leloudis, \textit{supra} note 245, at 59. See
also J. Morgan Kousser, \textit{Progressivism-For Middle-Class Whites Only: North
(contesting definition of “progress” in early-20\textsuperscript{th} century educational funding;
“Increasing inequality in services [...] inevitably spawned increasing inequality in
income and wealth--a peculiar definition of progress.”).
\textsuperscript{378} Korstad & Leloudis, \textit{supra} note 245, at PIN.
\textsuperscript{379} \textit{Id.} at 59-66, 79-82.
Local philanthropists have continued to support research on the concentrated disadvantage that exists at the intersection of crime, race, and poverty. For example, the Z. Smith Reynolds Fund recently provided support to the School of Government to create the state’s pioneering web-searchable collateral consequences database. In the wake of negative reaction by prosecutors and the public to litigation under the Racial Justice Act, the Fund is also supporting the development of training materials for justice system personnel on detecting and eliminating racial bias from criminal proceedings.

B. Defenders

Such training may be one of the most important factors in achieving reform that is sustainable over the long term. This is particularly true when training is directed through a state-wide indigent defense services system that is bolstered by collaboration between the criminal defense and plaintiff’s bars to obtain adequate resources and to drive policy change. Other free-standing defense-oriented institutions such as the Center for Death Penalty Litigation also make major contributions to strengthening oppositional politics in the context of criminal law and procedure.

It is perhaps this combination of factors that distinguishes North Carolina from other jurisdictions in terms of grounding an effective oppositional politics in the context of the formation and implementation of criminal law and procedure. To be sure, other jurisdictions have unified defender systems, excellent defender training programs, and partnerships between the criminal defense and plaintiffs’ bars. But North Carolina appears to be a fairly rare example where these factors coincide.

As noted in Part IV.C.2, other crucial components of effective indigent defense reform include the capacities to establish and enforce state-wide standards for attorney qualification, performance and workload;

380 Id. at 81-82.
383 See supra Part IV.C.2.
384 See Wright, Parity, supra note 78, at 231-242 (2004) (describing successful state legislative efforts to balance prosecutorial and defense resources through parity assessment); see also Moore, Democracy and Discovery, supra note __, at 1378 (describing role of defense bar in shaping legislative history of full open file discovery).
385 See O’Brien and Grosso, supra note 207, at 486-487.
386 Colorado, Montana, New Hampshire are examples.
387 Kentucky’s Department of Public Advocacy, the Public Defender Services of Washington, D.C., and Colorado’s Public Defender system are examples.
to create and maintain state-wide training and listserv programs that empower attorneys to meet those standards and to demand the resources necessary to do so; and to collect, assess, and use state-wide data on outcomes in promoting system improvements. Access to data is enhanced where, as in North Carolina, the state has merged case processing into a state-wide, unified court system. Although far from comprehensive, such data-collection and assessment capacities are prerequisites to politically effective action based on fairness, transparency, accountability, efficiency.\textsuperscript{389}

At the back end, statutes permit self-correction of indigent defense service failures by providing post-conviction counsel with ability to investigate and litigate post-conviction motions involving ineffective assistance on direct appeal instead of being limited to local trial courts.\textsuperscript{390} North Carolina also has benefited from pockets of strong investigative reporting by major media outlets. Detailed analysis of wrongful convictions has played an especially critical role in expanding public awareness of and receptivity to broader concerns about fairness and accountability in criminal proceedings.\textsuperscript{391}

\textbf{C. Diversity and Deep Analogies}

The foregoing discussion does not exhaust prerequisites for creating and sustaining oppositional politics in the context of criminal law and procedure. Nor are the structural and institutional factors touched on above idiosyncratic to any single jurisdiction. Moreover, any circumstance that supports oppositional politics in the context of criminal law and procedure must be augmented with vision, opportunism, and tenacity. There also must be cracks in the mortar that open up wiggle room for “political entrepreneurs.”\textsuperscript{392} Another characteristic that helps to drive and sustain reform is diversity within institutions, and the embedding of institutions

\textsuperscript{390} Eve Brensike Primus, \textit{Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims}, 92 CORNELL L. REV. 679 (2007) (arguing for procedures allowing litigation on direct appeal of claims that trial counsel were constitutionally ineffective); \textit{but see} N.C. GEN. STAT. § 15A-1415(b)(3), -1415(c), -1418, -1419(a)(1) (2012) (since 1977, allowing appellate lawyers to litigate constitutional claims through post-conviction motions filed on direct appeal, with no procedural bar to subsequent litigation of other constitutional claims post-appeal).
\textsuperscript{392} Clemens & Cook, \textit{supra} note 325, at 453.
themselves in broader “networks that crosscut important … boundaries.” Professors O’Brien and Grosso describe how that networking-across-diversity occurred in movements leading to enactment of the Racial Justice Act.

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

The state’s progressive sociopolitical subtext is discernible even in recent events. The May 2012 Klan rally outside Harmony, North Carolina may have drawn more protesters than participants. In response to the pardon of the Wilmington Ten, due in part to the past prosecutor’s race-based discrimination during jury selection, the current prosecutor stated publicly that such conduct denies both the defendant and the community a fair trial. And “Moral Monday” protests against the new conservative legislative agenda are drawing national attention, particularly as law professors and pastors join the hundreds of protesters who have been arrested.

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

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393 *Id.* at 449, 453, 460 (describing “multivocality – that fact that single actions can be interpreted coherently from multiple perspectives simultaneously” as a requirement for “robust action”).

394 *See supra* note 207, at PIN.


396 *KKK Hold Rally, supra* note 286, at PIN.

397 Blythe, *supra* note 232, at PIN.


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

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

CONCLUSION

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

Such conditions embed greater opportunities for meaningful self-reflection into discourse on criminal justice issues than can exist in jurisdictions lacking those capacities. Concededly, where such conditions promote opportunities for criminal justice reform, they tend to privilege grassroots over grassroots advocacy and might be dismissed, like Senator Inhofe’s Pilot’s Bill of Rights, as still more superfluous examples of “them as has, gets.” Nor are these movements immune from predictable backlash. Nevertheless, engaged scholarship may enhance attempts to wrest greater transparency and accountability from concentrated government power – including attempts like the Senator’s – by expanding avenues toward more broadly democratic and effective demands for reform.

One focus for such additional research is analysis of effective activism by those most directly affected by crime and criminal justice systems – poor people and people of color. Michelle Alexander has noted the suggestion of longtime justice activist Susan Burton that defendants and defenders “crash the system”—that is, collectively monkeywrench the machinery by refusing plea offers and insisting on taking cases to trial. Other scholars have noted the productive work of organizations such as All

400 Id. at 87.
401 Id. at 88-89, 92.
402 Alexander, supra note 80, at ___.

of Us or None and Families Against Mandatory Minimums. But legal scholars have yet to assess the democracy-enhancing potential, strategies, or influence of other solo and small-organization efforts such as Silicon Valley Debug, which trains families and communities in strategies to improve case outcomes. Innovative peace-making movements such as Cease-Fire and the violence interrupters also hold promise for scholarly investigation, as does the grassroots activism of John Thompson and other exonerated prisoners.

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

Through these and other practical applications, scholars and practitioners can concretize a democracy-enhancing theory of criminal law and procedure that empowers the low-income and minority individuals who are most directly and disproportionately affected by the causes and consequences of crime to ask their own policy questions, build their own coalitions, and advocate for their own solutions. These are the crucial voices without which meaningful and sustainable criminal justice reform will remain elusive. They are the source of dangerous hope—dangerous because it is more often than not likely to be disappointed, and because when linked with vision, opportunism, and tenacity, it can at least occasionally level power disparities instead of ameliorating, reproducing, or augmenting them.

406 THE INTERRUPTERS (Kartemquin Films 2011).
408 Cf. Bell, supra note 39, at ___.