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Playing Fair with Imprisonment

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CHAPTER 4 | Playing Fair with Imprisonment

RICHARD DAGGER

Introduction

This chapter rests on two assumptions, at least one of which is controversial.¹ The first is that something is wrong when a society imprisons as many people as the United States now does. According to a widely published columnist, George Will, the rate of imprisonment was about 100 per 100,000 Americans until the 1970s. Since then the rate has shot up, to the point where “700 per 100,000” are now in prison; “America,” Will reported in 2013, “has nearly 5 percent of the world’s population but almost 25 percent of its prisoners.”² It is possible, of course, that these figures are just where they ought to be, or even too low. When a professed conservative such as Will takes them to be alarming, however, there seems little need to defend the assumption that something is amiss.

The second assumption is that the principle of fair play underpins the justification of legal punishment. This assumption is clearly controversial, for only a few scholars nowadays justify punishment in terms of fair play.³ For present purposes, however, I shall simply point to the defenses I have offered elsewhere and respond to criticisms of the fair-play approach only in passing.⁴ In effect, I shall be presenting an oblique defense of this approach by demonstrating how it provides a helpful way of addressing the problem of excessive incarceration. In doing so, I shall also address the concern that democratic societies are especially prone to this problem because of their tendency to foster what has come to be known as *penal populism*. My argument is that democracy leads to mass imprisonment only when an otherwise democratic polity neglects what Albert Dzur calls the “moral dimension” of democracy: “Because citizens are lawgivers

as well as law abiders, they have a special obligation in a republic to be vigilant to the possibility that their laws are unfairly burdening some over others, that their laws are exclusionary or discriminatory.”⁵ Dzur makes no explicit reference to the principle of fair play here or elsewhere in his book, but I hope to show that the vigilance he calls for requires attention to that principle.

Analyzing Excessive Incarceration

From a purely analytical point of view, there seem to be four possible reasons for excessive incarceration. These are:

1. Too many people are committing crimes.
2. Too many activities count as criminal.
3. Too many criminals are imprisoned.
4. Too many prisoners are imprisoned for too long.

Any one of these reasons, or any combination of them, could account for overimprisonment, as a brief elaboration should make clear.

First, there is a sense in which the statement “too many people are committing crimes” is self-evidently true: even one crime is a crime too many. If we proceed from some sense of what a normal or tolerable level of crime is, however, we can make realistic judgments of whether we have reason to worry that too many people are committing crimes. If such judgments are warranted, we then need to ask why so many are engaging in criminal activity, and one possibility is that some kind of social failure is at work. This could be a failure of prevention in the straightforward sense of not putting enough police on the streets, for example, or not training them properly. Or it could be a failure to cultivate the appropriate attitudes of respect for law and other persons through family discipline, civic education, and other forms of socialization. Or it could be a failure to provide sufficient opportunities for people to live a decent life without resorting to crime. In any or all of these ways, a society may unwittingly contribute to the high crime rates that lead to high rates of incarceration.

The second analytical possibility—and probably the one scholars most frequently cite—is that too many activities are classified as criminal. The leading example of this tendency “to criminalize too much and to punish too many,” as Douglas Husak contends, is “the crime of illicit drug possession.”⁶ “Nearly one of every five prisoners in America,” he notes, “is

behind bars for a nonviolent drug offense.”⁷ Simply repealing the laws that make the possession of various drugs illicit would apparently lead to a significant drop in the rate of incarceration. But repealing such laws is not a simple matter. In addition to the problem of persuading legislators to take steps that may make them appear to be “soft on crime,” there is the difficulty of determining exactly what the law ought and ought not to proscribe. This is a difficulty, though, that anyone who attributes mass incarceration to excessive criminalization must face. At the least, we should acknowledge that the spirit of fair play cannot countenance much harsher sentences for the possession of a relatively inexpensive drug, such as crack cocaine, than for its possession in purer and more expensive forms.

To be sure, conviction of a criminal offense need not entail a prison sentence. There are alternatives, such as probation, community service, and restitution to the offender’s victims.⁸ That is why the third possible reason for excessive incarceration is that too many criminals are imprisoned. Instead of locking up so many of them, perhaps we would do better to punish offenders in another way.⁹ Here, though, we face the difficulty of determining what kinds of crimes warrant what kinds of punitive responses—of how to make the punishment fit the crime, in the standard phrase. Hardly anyone would say that supervised community service is proper punishment for a serial killer or that a prison term is fitting for someone who steals an apple from a store (setting aside possible three-strikes-and-you’re out complications).¹⁰ There are plenty of hard cases between these extremes, however, and some principled means of sorting them out will be required if we are to reduce incarceration.

Similar considerations bear on the fourth possibility. If we believe that excessive incarceration is largely the result of too many prisoners being imprisoned for too long, then we will need to find some way to determine the proper length of the sentences that attach to the various crimes warranting imprisonment. We will also need reasons for deciding whether determinate sentencing or mandatory-minimum sentences or three-strikes-and-you’re-out laws, all of which may boost the length of prison terms, are justified. We will need, in short, a theory of criminal law and punishment.

Such a theory will not provide straightforward answers to every practical question that arises with regard to mass incarceration. No theory can tell us exactly how many days, months, or years is condign punishment for a certain criminal. Theories do provide necessary guidance, however, perhaps most notably by focusing our attention on a certain consideration, such as one or the other of those venerable rivals, deterrence or retribution, or by promising a harmonious blend of the two. In the remainder

of this chapter, I shall try to show how the principle of fair play provides such guidance. In particular, I shall try to show how it grounds a theory of criminal law and punishment that is broadly retributive, communicative, and sensitive to democratic considerations. This last point is important because of the previously mentioned worry that democracy, in the form of penal populism, is somehow to blame for mass incarceration. Indeed, all but the first of the four analytical possibilities I have traced may well stem from the popularity of “get tough” policies as responses to crime.¹¹ If so, then it will be necessary “to educate democracy,” as Tocqueville said, in order to resolve the problem of mass incarceration.¹² Reinforcing the value of fair play is essential to this education.

Crime, Punishment, and Fair Play

As children are quick to learn, any activity that requires cooperation is likely to give rise to complaints of unfairness. Sometimes the complaint will be about the unfairness of those who do not do their part; at other times it will focus on the supposedly unfair distribution of the benefits that cooperation produces. In either case the core idea is that cooperative activities provide benefits to the participants, with the benefits ranging from the pleasure of playing a game to those of sharing in the profits of a commercial enterprise or enjoying the protection afforded by a system of mutual defense. These benefits are not without costs, however, and those who participate in the activity are expected to bear a fair share of its burdens. Punishment enters the picture because cooperative endeavors usually produce the desired benefits even if some of the participants shirk their responsibilities. To prevent these potential free riders from taking advantage of the cooperative efforts of others, the participants invoke the threat of punishment. When the threat is not successful, then actual punishment is justified because the offenders have violated the principle of fair play.

For this account of fair play to provide a plausible theory of legal punishment, we must be able to conceive of a polity as a cooperative enterprise—in John Rawls’s words, as “a fair system of cooperation over time, from one generation to the next.”¹³ To some extent this is to conceive of the polity as an ideal, and some countries will fall so far short of the ideal that we cannot reasonably judge their oppressed and exploited subjects to be participants in cooperative practices that entail duties of fair play. To the extent that the rule of law is in force, however, we can hold that a country’s people are

receiving the benefits of a cooperative enterprise and owe it to their fellow citizens to bear a fair share of the burdens of the enterprise—that is, to obey the law.¹⁴ Everyone will find that obeying the law is at least occasionally burdensome, but good citizens will not leave it to others to shoulder this burden while they ride free. To assure these citizens that their cooperative efforts will not be in vain, those who break the law should be punished.

Much more needs to be said to fill out and defend this sketch of fair-play theory, but I can touch on only two points here. One is that violations of the law are not equal in weight or character. There is a difference between civil and criminal disobedience, for instance, that any theory of punishment should recognize. There is also a significant difference between offenses that are straightforward failures to play fair, such as tax cheating, and crimes such as murder, rape, and robbery. Fair-play theory can acknowledge these differences, however, while insisting that every crime is in part a crime of unfairness—a failure to restrain one’s conduct in ways necessary for the success of “a fair system of cooperation over time, from one generation to the next.” Although the severity of the punishment should match the gravity of the crime, it is the offense against fair play that justifies the legal authorities in administering the punishment. Some wrongs are wrongs regardless of what the law says, of course, and others are wrong only because the law says so. We need law and legal authorities to define and pronounce wrongs of both kinds, however, lest we face the “inconveniencies” of the state of nature, with its “irregular and uncertain exercise of the power every man has of punishing the transgressions of others,”¹⁵ or the hazards of a society riven by blood feuds and the private enforcement of unsettled norms.

The second point to note is that fair-play theory is both retributive and communicative. It is retributive because punishment is a way of paying back those who do not play fair. Beyond retribution, fair play also calls for the communication of disapproval to the offender, in part as a way of reinforcing the importance to all participants of respecting the rules, but also in hopes of encouraging the offender to regret the wrong done and repair the damaged relationship with the law-abiding participants in the practice.¹⁶ This is to say that fair-play theory not only has the backward-looking aspect characteristic of retributive approaches to punishment, which insist that punishment should be imposed only on those who have broken the law; it also has a forward-looking aspect usually associated with consequentialist approaches. That is, fair-play theory holds that punishment must serve to maintain the polity as a fair system of cooperation under law—or, more likely, to move the polity closer to that ideal.

That is a point to be elaborated shortly. First, though, it will be useful to apply this sketch of the argument from fair play to the four analytical considerations set out in the previous section. In doing so, I will be relying on the example of fair play in sports. Whether games and sports are suitably analogous to politics and law is a topic I turn to in the following section.

Regarding the first consideration—that is, the possibility that too many crimes are being committed—the straightforward application of the principle of fair play suggests that crimes are like violations of the rules of a game. If we find that the play of the game is suffering because too many players are in the penalty box, or suspended, or outright expelled from the sport, then we may want to know why so many players are opening themselves to sanctions—and jeopardizing the sport as a whole—by violating the rules. If it seems that they are simply cheating in order to gain an unfair advantage for themselves by free-riding on the cooperative efforts of others, then we will need to take the kinds of preventive steps I mentioned earlier—that is, stepped-up policing of the game and efforts to cultivate the sense of sportsmanship or fair play on which the game depends.¹⁷ But we should also consider whether there may be something wrong with the rules themselves. There may be some rule, for example, that works systematically to the advantage of some players or teams, and the disadvantage of others, but is not important to the game itself. A case in point could be a game in which the players must equip themselves and only the wealthy can afford the most advanced equipment, thus giving them a significant advantage while playing. If we find that violations of the rules increase because less affluent players or teams are trying to compensate for their disadvantage, we should consider whether a change in the rules regarding equipment may be in order. Fair play is largely a matter of respecting the rules, to be sure, but we should not overlook the possibility that rules may be more or less encouraging of fair play.

In the case of the second analytical consideration, we may think of the possibility that too many activities are counted as criminal by way of an analogy with a sport that imposes too many rules on its players. Sports leagues and associations typically regulate the kind of clothing and gear players may wear, for example, and they do so in some cases for reasons closely related to the play of the game itself—not allowing football players to wear clothing studded with metal spikes or baseball pitchers to wear mirrors that reflect light into the batters' eyes—and in other cases for reasons that have little or no bearing on its play. Some clothing regulations aim at insuring that players project what the league officials think is the proper image; others ban clothing that advertises a product not approved

by, or contributing to the coffers of, the league. Players who break these rules have been penalized in various ways for their activities, even though the activities seem to have no bearing on the play of the game. Is this fair? Are the nonconformist players taking unfair advantage of the players who conform to the regulations? Or would the sport benefit if rules that are not truly necessary to the play of the game were eliminated? Is it possible that an excess of rules—especially rules that seem petty, trivial, or pointless—will in fact undermine the sport by leading players to lose respect for the rules of the game? If the answer to these last two questions is “yes,” then the rules in question should be abolished.¹⁸

What of the third analytical consideration—that is, the possibility that too many criminals are being imprisoned? In this case the analogy with a game raises questions about the severity of offenses and penalties. There are many offenses that occur inadvertently in the course of play, usually called “fouls,” and in some cases players are allowed to accumulate fouls until they reach a set number, at which point they have “fouled out” and are expelled from the game. But some fouls are considered worse than others, such as intentional fouls, and some intentional fouls—flagrant fouls, in particular—may be cause for immediate ejection from the game and perhaps suspension from future games. There are also offenses against the referees, umpires, and officials who supervise the play of the game to make sure that the rules are followed—offenses that can pose a direct threat to fair play. It is no surprise, then, that those who govern sports leagues and associations devote considerable attention to determining the appropriate penalties for the various offenses that arise in the course of play. Nor is it surprising that the gauge they typically employ is the tendency of the penalty to assure the fair play of the game.

This same point carries over to the final consideration, which is that too many prisoners may be imprisoned for too long. In the case of sports, the question is not only whether some rule breakers are treated unfairly but also whether they are punished too severely for the good of the sport itself. Gambling presents a case in point. Both players and spectators need to believe in the fair play of the game, but it is difficult to sustain that belief when there are reasonable suspicions of “point shaving” or attempts to “throw”—that is, deliberately lose—a game or match in exchange for money from gamblers. As a result, sports organizations typically have rules that limit the gambling of those involved in the sport, or even prohibit contact with gamblers. Violations of these rules have led to suspensions for lengthy periods, even to the point of banishment for life. The result may be to promote confidence in the fair play of the game, but there also may

be reason to question the justice of the sanctions imposed on people who may have failed to understand or appreciate what they were doing—as in the case of “Shoeless Joe” Jackson of baseball’s notorious Chicago “Black Sox” Scandal of 1919. There are also reasons to question the wisdom, and fairness, of penalties that remove excellent players from competition. Surely those who grievously violate the rules deserve punishment; that is the retributive aspect of fair play. But they should be punished in a way, and to an extent, that holds the promise of restoring the offenders, when possible, to the status of full participants in the game. That is part of the communicative aspect of fair play.

This last point suggests a direct connection to one controversial question about what constitutes fair or unfair treatment of criminal offenders. I refer here to the question of whether convicted felons should lose their voting rights while serving their sentences, and perhaps even forever. Fair-play theorists may differ on the justice of disenfranchising felons while they are in prison, but they will hold that fairness requires the restoration of voting rights to those who have served their time. Again, this is in keeping with the communicative aspect of fair-play theory. Those who have paid their debts to society—and presumably learned to appreciate the importance of respecting the rule of law—should be restored to full citizenship in the polity. I return to this point below, when I defend disenfranchisement while imprisoned as an appropriate form of civic punishment.

This one example, however, is hardly typical of what the fair-play approach to the four analytical considerations reveals. In most cases, the principle of fair play does not supply a clear and distinct answer to the questions that follow from these considerations. But it does provide a unified approach to these questions that concentrates on the need to establish and enforce rules, and punish those who break them, in order to secure the fair play of the game. This still leaves us, though, with the question of whether this approach has any real bearing on law and punishment in the world beyond the sports arena.

Fair Play and the Polity

The question, in short, is whether the analogy between games and legal systems is sound. After all, one might object, the polity is not a game. The kinds of games I have been discussing take place within the larger framework of a legal order, which means that the legal order cannot be understood simply as a game itself. If someone playing ice hockey stabs an opponent with a knife, he has certainly failed to play fair; but we will not

be content with sending him to the penalty box or even expelling him from the game. Justice requires a legal response in this case, not one governed by the rules of hockey. Moreover, the paradigm cases of crime—assault, robbery, rape, murder—are not simply violations of the rules or failures of fair play. To think of them as analogous to cheating in a game is to misunderstand them altogether.¹⁹

These are serious objections. Before responding to them directly, though, it is important to note the ways in which the analogy is illuminating. One way is that respect for the rules is vital to both the play of a game and the survival of a polity. There may be political and legal systems in which brute force seems to be the prevailing cause of obedience, but even tyrants rely on some degree of respect for their authority. Besides, in any system that professes to follow the rule of law, respect for the rules themselves is necessary. They need not be regarded as sacred or immutable, but neither should the citizens dismiss the rules out of hand as nothing more than arbitrary commands or regulations. When laws encourage that kind of attitude, they stand in need of reform.

A second strength of the analogy between games and legal systems is that the communicative aspect of rules and rule enforcement is vital to both. Laws are guides to conduct, and they cannot serve that purpose if they are not communicated to the people whose conduct they are supposed to guide. That is why Thomas Aquinas included *promulgation* among the defining features of law.²⁰ Punishment, too, serves a communicative function, as I have noted. So much is as true of politics as it is of games.

A third point of analogy—and one with particular significance for democratic theory—is that both games and legal systems rely on the ideal of equality. In competitive games, we do not expect that the competitors always will be equally matched. We do want them to have an equal chance to display their talents, however, as the familiar metaphor of the level playing field attests. The same is true within legal systems, where the ideal is for everyone to be equal before (or in the eyes of) the law. In neither games nor legal systems is the ideal always achieved, to be sure, and in some cases the actuality is a travesty of the ideal. But we can only recognize it as a travesty if we have the ideal to animate and inspire us.

These points connect to the principle of fair play in two ways. First, they represent aspects of that principle. To play fair is to treat participants as equally worthy of respect qua participants in a cooperative, rule-governed enterprise and to communicate to them both what the rules are

and the consequences of violating them. Second, the three points of analogy indicate the *public* aspect of fair play. Rules and laws are matters of public concern. They cannot guide conduct and contribute to the play of the game, or the good order of a polity, if they are not made public. Furthermore, they benefit from being *made publicly*—a point I return to in the conclusion to this chapter.

But what of the two objections to the analogy on which fair-play theory rests that I mentioned earlier? The short answer—I have offered longer ones elsewhere²¹—is that the analogy need not be exact. It is true that the political and legal system must be larger and more encompassing than any of the games that take place within its boundaries. But that means that we should think of the polity as a special kind of game—that is, as a *super-* or *meta-*game that encompasses and governs other games and activities. It is a cooperative practice nevertheless, even though we may occasionally need to think of it as a meta-practice that is a necessarily public matter.²²

The second point in defense of the analogy has to do with the nature of crime. Some crimes, according to the objection, are indeed violations of fair play. Tax evasion is a standard example, and some would include *mala prohibita* offenses in general.²³ For *mala in se* offenses, however, considerations of fair play are simply beside the point. My short answer is to concede that fair play does not capture the full wrongfulness of murder, rape, robbery, and assault, but to insist that it need not do so. What fair play does is to justify the *legal* punishment of the wrongdoers, whose actions not only injure their specific victims but threaten the cooperative order in general. That is why punishment is in the hands of “the authorities.” Moreover, considerations of fair play can also help us to understand how some failures to play fair are more serious than others. The basketball player who intentionally fouls an opponent deserves a penalty; the player who flagrantly fouls an opponent deserves a harsher penalty; the player who pulls a gun on an opponent deserves not only an extremely harsh penalty from the game’s officials but also punishment under the laws of the meta-practice. There is a violation of fair play in each instance, but the violation is progressively more serious in the latter two instances because the offender acts in such a way as to make it difficult or impossible for his opponent to continue to participate in the game—or even in the meta-practice of which the game is a part. Fair play may not tell us everything we need to know about an offense, but it tells us enough to justify legal punishment and to give us some sense of why some crimes are worse than others.

Democracy, Fair Play, and Imprisonment

What, though, does this talk of games and fair play have to do with the topics of this volume, democratic theory and excessive incarceration? One answer is that fair-play considerations help to explain why we are right to worry about the rates of imprisonment in the United States, and perhaps elsewhere, these days. For we have reason to believe that we are falling short of the standards implicit in the principle of fair play. When rates of incarceration are as high as they have been recently, we must ask how reasonable it is to regard the United States as a cooperative practice. Fair-play theory contains critical and aspirational elements, in other words, that point toward an ideal of a fully fair practice and demand attention to the ways in which a practice, including the meta-practice of the polity, falls short of that ideal. Mass incarceration is evidence that there is much to criticize in the current practice of criminal law in the United States.

Such criticism should lead us back to the four analytical possibilities I raised earlier. My claim is that fair play can help us to formulate responses to the problems that arise in all four cases. Are too many crimes being committed? Yes, certainly, but it is far from clear that spending more money on policing is the only answer. More needs to be done to encourage potential offenders to play fair by obeying the law and to provide them with opportunities to participate more fully, and fairly, in their society. Before we punish someone, as the philosopher T. H. Green long ago remarked, we should be sure that “the social organization in which a criminal has lived and acted is one that has given him a fair chance of not being a criminal.”²⁴ Among other things, steps should be taken to reduce recidivism; for if it is true that too many crimes are being committed, it is also true that the same people are committing many of them. From the standpoint of fair-play theory, a particularly promising effort to reduce recidivism is the “social enterprise approach” sponsored in the United Kingdom by the Royal Society for the Arts, which aims to engage prisoners in paid work for social enterprises while they are in custody, then to continue their employment in a supervised Transition Zone before their full release into society.²⁵

What of the other analytical considerations? Are too many activities classified as criminal? Yes, certainly, to the point where the criminalization of activities that do not amount to violations of fair play is probably undermining respect for law. Laws against gambling are a case in point, and especially so when they exist alongside state-sponsored lotteries. If we want to discourage people from risking their money on wagers, we

should rely on education rather than coercion—and avoid the hypocrisy of encouraging them to take their chances in public lotteries all the while. Hypocrisy and unfairness also come quickly to mind with regard to drug laws, and their highly unequal enforcement, in the United States.²⁶

Are too many convicted criminals imprisoned, as the third consideration asks? Yes, because there are other forms of punishment that are likely to do more to help criminals comprehend the cooperative nature of society and their duties of fair play. Community service is especially worthy of consideration, as is service that can provide some restitution to the particular victims of an offender's crimes.²⁷ And finally, are too many prisoners imprisoned for too long? Yes again, because of mandatory-minimum sentences and laws such as three strikes that do little or nothing to restore criminals to the status of law-abiding citizens—and less than nothing to promote fairness in the form of keeping the punishment in proportion to the offense. There is more, obviously, to be said to clarify and defend every one of these responses, but the point for now is that fair play provides the orientation we need as we work toward the answers.

This orientation is complementary, moreover, to democratic theory. Worries about penal populism have some basis in fact, in my view, but only to the extent that a society is democratic in a simplistic and perhaps corrupt way. On the simplistic view, democracy is merely a matter of majority rule, no matter how majority opinion is formed or what course it takes. Taking this view to its extreme, today's majority could vote to deny the franchise henceforward to those in today's minority, or even to enslave them. No democratic theorist endorses this simplistic view, however, because it fails to respect the fundamental democratic commitment to equality, here understood as a right to the equal consideration of everyone's interests.²⁸ If the problem of mass incarceration is in large part the result of penal populism, it is because those who make the laws are playing to an audience that is insufficiently concerned with equal consideration—and therefore with playing fair. In these circumstances, it is reasonable to speak of the corruption of democracy.

A well-functioning democracy, in contrast, is a cooperative enterprise. It must have rules, and it must have means of dealing with those who break the rules, including punishment. But the rules must be fair and so must the punishment. One sign of their fairness is that they must aim to do only what is necessary to secure and strengthen the cooperative enterprise. That means, among other things, that punishment must proceed in a manner that is likely to restore the offenders to full participation in the democracy. Those who have paid their debts to society by undergoing punishment that

communicates to them and their fellow citizens the importance of abiding by the laws of a cooperative society ought to be able to regain the status of full citizenship. Mass incarceration and high rates of recidivism are signs that democracy in the United States is not proceeding in this manner—and is not, therefore, the cooperative practice it ought to be.

This claim turns on a distinction between two conceptions of democracy. One is the conception on which I have been drawing, which takes democracy to be a cooperative venture aiming to realize a common good; the other conception, and perhaps the more familiar and apparently realistic one, takes democracy to be a kind of machine for aggregating the personal preferences of the populace. The two conceptions share a commitment to equality and fairness, but what counts as fairness differs from one conception to the other; and only the first generates a sense of fair play robust enough to make clear the undemocratic character of mass incarceration.

The preference-aggregation conception of democracy is well known from the writings of Joseph Schumpeter and others who draw an analogy between economic and electoral competition.²⁹ As they see it, individual citizens bring their preferences into the political arena in much the same way that consumers enter the economic marketplace, with the primary difference being the kind of currency in use. Otherwise, candidates and parties compete for the voter's attention and support much as producers of goods compete for the consumer's money. Once in office, successful candidates do what they can to satisfy those who voted for them and to attract new supporters whenever possible, all in the hope of being returned to office at the next election. Not every voter wins, of course, in the sense of seeing her preferred candidates elected to office; but everyone eligible to vote at least has a chance to register her preferences, which the political system aggregates first by way of electoral results and second by way of the policies and laws enacted by those who win office.

What makes this preference-aggregation view a conception of democracy is its commitment to regarding everyone's preferences equally. You may care enough to go to the polls and vote while I do not, but your vote would count for no more than mine were I to cast one. Besides, my failure to vote is itself a statement of my preferences: you prefer voting to other activities available at the time, but I prefer other activities to voting. To be sure, you may exercise more influence over the outcome than I do even if I cast my vote, but that is probably because you expend more of your other resources—time, persuasive power, and perhaps money—than I do in the attempt to influence how others vote. So far as votes themselves are concerned, in a majority-rule system you and I are equal not only to each

other but to every other potential voter.³⁰ In that sense, the preference-aggregation conception is clearly democratic.

It also reflects a sense of fairness. Just as fraud, theft, collusion, and other violations of fair competition in the economic marketplace must be guarded against, so must electoral fraud and political corruption. If the system is to aggregate personal preferences in a way that treats everyone equally, then someone will have to hold the authority to proscribe cheating and to punish those who do not play fair. Fair play in politics thus requires neutral officials to ensure that the competition takes place on the equivalent of a level playing field. Political competition shares this reliance on fair play with competition in both the marketplace and the sporting field.

What, then, are the implications of this preference-aggregation conception of democracy for the understanding of mass incarceration? The answer turns entirely on the preferences of the voters. Whether rates of incarceration are or are not excessive, according to this conception, will depend upon what the voters hope to accomplish by imprisoning offenders. Economic considerations surely will come into play here, for anyone who believes that prisons are necessary or desirable responses to crime will want them to operate efficiently. Other things being equal, the voters will prefer not to go to the extra expense of building more prisons to accommodate more prisoners. But they may also decide that the perceived gains in personal safety or the satisfaction of exacting retribution are worth the extra expense. These preferences may well lead them to vote for politicians who continue to insist on the tough-on-crime policies that lead to mass incarceration. Penal populism is thus fully at home within the preference-aggregation conception of democracy.

Taking democracy to be a cooperative venture in pursuit of a common good, however, produces a much different result. On this conception, the voter is expected to act as a citizen rather than a consumer, and democracy is less a matter of eliciting personal preferences than of evoking civic judgments. The two considerations, however, are not mutually exclusive. Like the preference-aggregation conception, the cooperative-venture understanding of democracy holds that everyone's interests are to be accorded equal consideration, and every member of the polity should have opportunities to express his preferences. But the cooperative-venture conception also holds that citizens should look beyond their personal preferences to what is good or best for the polity as a whole. This conception thus accords with the belief that every citizen holds office or, as John Stuart Mill put the point, stands in a position of public trust.³¹

Both conceptions share, as I have noted, a commitment not only to equality but to fairness. On either conception, democracy requires electoral competition, and that competition must proceed in accordance with regulations that ensure the fair conduct of elections. However, the cooperative-venture conception does not stop at this point; for competition itself must be understood as an element of what is a fundamentally cooperative enterprise. We may be tempted to think of competition in the marketplace or the sporting arena as a matter of winning at all costs, but it is nevertheless true that unbounded competition will lead to the destruction of both the market and the sport. If all that matters is winning, then there is no reason not to cheat and steal at every opportunity, and even to dispense with those whose office is to protect personal property or to uphold the rules of the game. In such cases, though, property rights will count for nothing and the game will no longer be recognizable as baseball or cricket or football. In such cases, both markets and sports will degenerate into something resembling Hobbes's state of nature. To avoid this outcome, the participants must find ways to underpin their competition with a cooperative commitment to playing fair—a commitment that includes the appointment of officials whose duty is to elaborate and enforce the rules of fair play.

This cooperative commitment also includes a commitment to regard the other participants as contributors to a common enterprise. We have a duty to treat them fairly, therefore, and encourage reciprocity on their parts. In a democracy, according to the cooperative-venture conception, there is a corresponding duty to regard every member of the polity as a potential contributor to the cooperative enterprise of self-government. There is also a duty to encourage reciprocity and to promote the virtues of citizenship among the members. In Rawls's terms this is "a natural duty of civility," which requires citizens, among other things, "not to invoke the faults of social arrangements as a too ready excuse for not complying with them, nor to exploit inevitable loopholes in the rules to advance our interests."³² In order to sustain the cooperative enterprise, in other words, we must play fair even when personal advantage would have us do otherwise. Because we cannot count on everyone always to play fair, we need the police and judges and other officials to provide the security necessary to assure those who are willing to abide by the rules that their cooperative efforts will not be wasted. But we also need to do what we can to promote Rawls's natural duty of civility. Other things being equal, willing cooperation is better than coerced.

Another implication of the cooperative-venture conception of democracy has to do with the rules that govern the enterprise. In a democracy,

these rules are themselves a matter of public choice, and the duty of civility extends to the framing of these rules. Before we enact a law, then, we must be sure that it is a law that does not impose an unfair burden on other members of the polity. In the context of this chapter, this means that we must determine what is to count as a crime in this light. The answer is clear enough in the standard cases of assault, murder, rape, and robbery, for we do not impose unfair burdens on our fellow citizens when we proscribe those actions. Indeed, the unfair burdens would fall on the victims of those crimes, whose suffering would make it difficult, at best, to continue to play the part of the cooperative citizen. There are many other activities, however, that democratically elected legislatures have outlawed even though these activities fall outside the standard cases. Whether they should or should not be outlawed is a matter to decide, on the cooperative-venture conception of democracy, in light of their bearing on fair play and civility. Some of these cases should be easy to settle. Suborning witnesses and threatening judges are actions that strike at the rule of law, and any burden that anyone suffers as a result of their proscription is hardly an unfair burden. *Mala prohibita* offenses, such as those involving traffic and environmental regulations, are likely to be justified as a means of ensuring cooperation in a collective enterprise; but if it becomes clear that the proscription in question places an unfair burden on some members of the polity, then either the proscription should be altered or the activity in question should be allowed.

From the standpoint of the cooperative-venture conception, in short, the question is not whether the aggregated preferences of the people, either directly or through their elected representatives, should or should not designate a certain activity as criminal. The question, instead, is whether the activity in question inhibits the fair play of the democratic game. If it does, then the question becomes one of efficacy—in other words, whether the criminal sanction is the best way to deal with those actions that interfere with democratic fair play or whether there are better alternatives. If the activity in question poses no threat to democratic fair play, then it should not be proscribed. In some cases this approach leads to straightforward decisions. For instance, anyone who proposes to make a crime of some form of sexual activity between consenting adults would have to show that the activity in question poses a serious threat to democracy understood as a cooperative venture, and that will be a difficult case to make. In many cases, though, the decision will not be at all straightforward. One could argue, for instance, that the production or consumption of any drug that renders people incapable of fair play or of carrying out their duties of

civility should be a crime. Couched in those terms, the proposal is perfectly acceptable under the cooperative-venture conception of democracy. But those who are charged with determining what is to count as a crime would then have to make an informed judgment as to which drugs, if any, do in fact have those antidemocratic and unfair propensities. Once they have identified such drugs, if any, they would then have to make the further determination of whether the criminal sanction is the appropriate way to deal with the problem and, if it is, whether a blanket prohibition or a more limited response is better. In the case of alcohol, there is little doubt that its consumption at some point inhibits civility and the sense of fair play. Laws against public drunkenness and enhanced punishment for those who harm or endanger others while drunk, though, seem likely to address the problem more effectively than outright prohibition of the production, sale, or consumption of alcohol. Nor would such laws place an unfair burden on anyone, such as those who consume alcohol without endangering anyone or threatening democratic fair play. Extending this reasoning to drugs that are widely proscribed at present would almost certainly result in a dramatic reduction of drug crimes and a similar reduction in the prison population. Such a change by itself would not be enough to solve the problem of mass incarceration in the United States, but it surely would be a major step in that direction.

In this way the conception of democracy as a cooperative venture reinforces my earlier point about the connection between fair play and the reduction of the number of actions and activities that should be designated criminal. The conception also speaks to the concern that too many criminals are being imprisoned and too many are being imprisoned for too long. If the polity is a cooperative venture, then it is perfectly reasonable to discourage its members from engaging in actions that harm those whose law-abiding conduct sustain the venture or otherwise threaten to undermine it. It is also reasonable to punish those who have, despite the discouragement, committed such acts. Except in extraordinary cases, however, the aim should be to restore the offenders to full participation in the democratic venture, not to banish them forever. Again, there will be difficult judgments to make about whether imprisonment is the proper sentence for certain offenses and, if it is, how long the term should be. Even so, there is little doubt that the lengthy sentences that have contributed to the explosion of the prison population in the United States cannot be justified under the cooperative-venture conception of democracy. Such sentences unfairly burden those on whom they are imposed, and they do

nothing to restore the offender to a place in society as a full participant in the cooperative venture.

With that point in mind, I return briefly to the controversy over the disenfranchisement of felons.³³ One issue here concerns whether imprisonment for a criminal offense should ever carry with it the loss of the offender's vote. In my view, as I stated earlier, it should. There are some cases—treason, electoral fraud, and attempting to bribe officers of the law are clear examples—in which loss of the vote seems appropriate because the offender has directly threatened the cooperative venture of the polity. But depriving the offender of the franchise is also fitting in the case of any offense serious enough to be considered a felony. Even if the offense is arson or burglary or some other crime that has no direct bearing on the conduct of elections or the functions of the government, it nevertheless constitutes a significant violation of fair play and civility. In addition to his imprisonment, then, the criminal should suffer a loss of status. He has breached a civic trust, and it is only fair that he surrender his vote as a result. This is not to say that the convicted criminal should be treated as an outcast who is altogether excluded from the polity. But neither should he be regarded as a member in good standing. In keeping with the communicative aspect of punishment, this diminution of his civic status should be reflected in the temporary loss of a fundamental civic or political right. Once again, however, the aim should be to restore him to full participation in the democratic venture, which entails the restoration of the franchise when he has completed his sentence. To do otherwise would be to impose an unfair burden on him while doing nothing to promote the spirit of democratic fair play among others.³⁴

Fair Play and the Educated Democracy

Earlier in this chapter I quoted Tocqueville's remark, in his introduction to the first volume of *Democracy in America*, that it is necessary to educate democracy. By this Tocqueville meant that, if we are to live in a society governed by the common people—as he thought was inevitable—then it behooves the leaders of society to take measures that will prepare the people to govern democratically. Put simply, this education must comprise not only the standard subjects taught in schoolhouses but also education in the responsibilities of democratic citizenship. For this latter sort of education, the schoolhouse would be insufficient. Other venues, such as the

town meeting and the courthouse, where citizens would sit in jury duty, would help to complete this education in democracy.³⁵

Another way to put Tocqueville's point is to say that democracy is a matter of self-government in two senses of that word. It is, first, self-government in the sense that the people rule. But this is not to be the kind of rule in which the people, as a collective, simply do whatever they please, so that democracy becomes the tyranny of the majority that Tocqueville feared. It must also be self-government in the sense that the people *govern* themselves—that is, exercise self-restraint—in a thoughtful, prudent manner. In the terms of this chapter, that self-restraint, or self-government, is largely a matter of respecting the rule of law—laws that are to be made publicly, to serve the public good—and the principle of fair play. But that is not to say that self-government is a kind of altruism. Every citizen has a right to care for her own interests and to demand equal consideration of those interests from her fellows. That much the cooperative-venture conception of democracy shares with the preference-aggregation model. But equality of consideration requires her to extend this same consideration to all of the others. When she votes or otherwise contributes to the making of laws and policies, then, the citizen is to do so in a way that accords this equal respect to all citizens. She must, in short, act on the principle of fair play by bearing her share of the burdens of social cooperation and imposing no more than a fair share on others.

Republican theory also contributes to an educated democracy through its traditional emphasis on vigilance. As Philip Pettit notes in an essay that brings republicanism to bear on issues in criminal law, a vigilant citizenry has long been held to be necessary to the health and safety of the body politic; for “the citizenry should be ever vigilant of public power and be ready to contest and challenge it at the slightest suspicion or sign of abuse.”³⁶ To Pettit's observation I would add that the citizens' vigilance ought to be aimed not only at those who hold positions of formal authority but also at themselves. Citizenship itself is a kind of public office, and failure to play fair with one's fellow citizens should count as an abuse of public power. An educated democracy is one that takes the task of encouraging this kind of civic vigilance seriously. It will look, therefore, to its political, legal, and educational institutions—to these and other *civic* institutions—to foster a citizenry that is vigilant in maintaining fair play within the polity. In particular, to return to a passage of Albert Dzur's quoted at the beginning of this chapter, citizens must “be vigilant to the possibility that their laws are unfairly burdening some over others.”³⁷ Their laws, that is, and the forms of punishment that support and follow from them, must

respect the principle of fair play, and the citizenry must be self-policing in this regard.

As the evidence of excessive incarceration suggests, the United States is not the educated democracy it should be. There is reason, though, to hope and work for improvement. Particularly encouraging in this regard are the results of a “deliberative poll” on issues in criminal justice that James Fishkin and his colleagues conducted in England—results that showed an overall shift from simple get-tough-on-crime attitudes toward the more flexible and less harsh responses that criminologists tend to favor.³⁸ If this small experiment in educating democracy is truly indicative of what more thorough efforts could achieve, then there is reason to believe that penal populism need not be a lasting curse of democracy in America.

Another reason to be hopeful is the simple recognition that there are plenty of other democracies in the world, few of which seem to be following the United States’ example with regard to mass incarceration. In 2006, for example, incarceration rates “across the developed world . . . ranged from 36 per 100,000 (in Iceland) to 737 in the USA, with England and Wales, at a rate of 148, . . . having one of the highest incarceration rates in the EU.”³⁹ Exactly how to account for these differences is a matter I must leave to social scientists. But there are two points worth noting here, for both connect rather directly to fairness. The first is the single-member, simple-plurality system of electing representatives to most offices—national, state, and local—in the United States. This is not only a respect in which the United States differs from most other democracies; it also seems to be related to higher rates of incarceration than those found in democracies that employ proportional representation.⁴⁰ The single-member system also plays a large part in the artful redistricting that makes representation in the United States less than democratic or fair.⁴¹

The second point to note is that economic inequality in the United States is generally greater than in other advanced democracies—and the gap between rich and poor continues to grow.⁴² Whether there is a direct connection between economic inequality and mass incarceration is not clear. It is clear, however, that the poor in the United States account for a disproportionately high percentage of both the victims of crime and of those who commit crimes.⁴³ If nothing else, these figures suggest that there are likely to be better ways to address the problems of crime—ways that speak to the fairness and cooperative nature of the polity—than that of locking up as many offenders as possible.

There is, of course, something paradoxical in taking the existence of proportional representation and lesser degrees of economic inequality in

other democracies to be a hopeful sign for the United States. There are, after all, great obstacles in the way of the adoption of proportional representation or a reduction of economic inequality in the United States. Nevertheless, they provide focal points for those who would work to educate democracy in America. They also indicate that the fair-play approach has something to contribute to the practice as well as the theory of criminal justice.

Notes

1. For helpful comments on previous drafts of this chapter, I am grateful to R. A. Duff, S. E. Marshall, and the editors of this volume.

2. George Will, "Seeking Sense on Sentencing," *Richmond Times-Dispatch*, June 7, 2013, A11. Will's unattributed data are consistent with those published in the *Sourcebook of Criminal Justice Statistics* (www.albany.edu/sourcebook/pdf/t6132011.pdf). Will also notes that "African-Americans are 13 percent of the nation's population but 37 percent of the prison population, and one in three African-American men may spend time incarcerated." For more recent but no less alarming figures, see Jed Rakoff, "Mass Incarceration: The Silence of the Judges," *New York Review of Books* 62 (May 21, 2015): 14–17, at 17.

3. For example, Michael Davis, *To Make the Punishment Fit the Crime: Essays in the Theory of Criminal Justice* (Boulder, CO: Westview Press, 1992); John Finnis, "Retribution: Punishment's Formative Aim," *American Journal of Jurisprudence* 44 (1999): 91–103; Herbert Morris, "Persons and Punishment," *The Monist* 52, no. 4 (1968): 475–501; and George Sher, "Deserved Punishment Revisited" in his *Approximate Justice: Studies in Non-Ideal Theory* (Lanham, MD: Rowman & Littlefield, 1997), 165–180.

4. See my "Playing Fair with Punishment," *Ethics* 103, no. 4 (April 1993): 473–488, and "Punishment as Fair Play," *Res Publica* 14, no. 4 (2008): 259–275. Note also R. A. Duff, "The Incompleteness of 'Punishment as Fair Play': A Response to Dagger," *Res Publica* 14, no. 4 (2008): 277–281; and Matt K. Stichter, "Rescuing Fair-Play as a Justification for Punishment," *Res Publica* 16, no. 1 (2010): 73–81.

5. Albert Dzur, *Punishment, Participatory Democracy, and the Jury* (New York: Oxford University Press, 2012), 87.

6. Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: Oxford University Press, 2008), 16.

7. *Ibid.*, 16.

8. Whether restitution ought to be regarded as a form of punishment or as an alternative to it is a controversial matter. I defend the former position against advocates of the latter in "Restitution: Pure or Punitive?," *Criminal Justice Ethics* 10, no. 2 (1991): 29–39.

9. For the purposes of this chapter I ignore arguments holding that something other than punishment—therapy, perhaps, or a system of pure (rather than punitive) restitution to crime victims—is the proper way to treat criminals. For a leading example of the first sort of argument, see Karl Menninger, *The Crime of Punishment* (New York: Viking

Press, 1968); for the second, see Randy Barnett, "Restitution: A New Paradigm of Criminal Justice," *Ethics* 87, no. 4 (1977): 279–301.

10. It is also important to recognize that not all forms of incarceration are equivalent—for example, a year in solitary confinement in a "supermax" prison is hardly the same as a year in a minimum-security prison. The difference will not bear on the rate of incarceration, however, unless it turns out that some forms of imprisonment are more likely to encourage or discourage recidivism than others.

11. Even the first possibility may relate to penal populism. This could happen, as Ian Loader has remarked to me, if crime rates rise because get-tough policies soak up resources that might otherwise fund preventive work and agencies.

12. Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence, ed. J. P. Mayer (Garden City, NY: Doubleday, 1969), 12.

13. Rawls, *Political Liberalism*, expanded ed. (New York: Columbia University Press, 2005), 15.

14. Whether this duty of fair play extends to matters of crime and punishment, especially with regard to those living in disadvantaged or unjust conditions, is a much-discussed question. For different responses from within the broad framework of fair-play theory, see Jeffrie G. Murphy, "Marxism and Retribution," *Philosophy and Public Affairs* 2, no. 3 (1973): 217–243, and Michael Davis, "Criminal Desert, Harm, and Fairness," in Davis, *To Make the Punishment Fit the Crime*, esp. 219–221. For more broadly retributive positions, see Okeoghene Odudu, "Retributivist Justice in an Unjust Society," *Ratio Juris* 16, no. 3 (2003): 416–431, and Stuart Green, "Just Deserts in Unjust Societies: A Case-Specific Approach," in R. A. Duff and S. P. Green (eds.), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011).

15. John Locke, *Second Treatise of Government*, §127.

16. The importance of this communicative function to punishment, and to criminal law in general, is a point many philosophers have emphasized in recent years, notably R. A. Duff in his *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001). Other noteworthy statements of this point include Herbert Morris, "A Paternalistic Theory of Punishment," *American Philosophical Quarterly* 18, no. 16 (1981): 263–272, and Jean Hampton, "An Expressive Theory of Retribution," in W. Cragg (ed.), *Retribution and Its Critics* (Stuttgart: F. Steiner, Verlag, 1992).

17. Strictly speaking, those who seek an unfair advantage may be *parasites* rather than free riders. That is, the cheater is not only trying to *take advantage* of those who abide by the rules; he is also trying to *gain an advantage* over them. If successful, the cheater's actions will worsen the situation of his opponents in the game, whose fair play makes them vulnerable and his parasitical efforts possible. Free riders, by contrast, do not directly worsen the condition of others. On this distinction, see David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1987), 96. The cheater's situation in my example is complicated, however, in two ways. First, his cheating may not worsen the situation of his rule-following teammates; and second, his cheating may fail to worsen the situation of his opponents, who may win despite his violation of the rules. In these cases, it seems proper to refer to him as a free rider.

18. There will be cases, of course, in which clear answers to these questions will be hard to find, such as the one that led to the US Supreme Court's ruling in favor of Casey Martin in *PGA Tour, Inc. v. Martin* (2000). The initial question was whether Martin, a

professional golfer whose congenital leg disease made it painful for him to walk, should be allowed to use a golf cart while competing in the Professional Golf Association Tour, thereby exempting him from the requirement that competitors in these events walk from hole to hole throughout the course. Whether Martin's use of a cart would constitute an unfair advantage over the other competitors or fair compensation for his disability became a controversial question. The case also raised questions about the nature of golf itself. For discussion, see Michael Sandel, *Justice: What's the Right Thing to Do?* (New York: FSG, 2009), chap. 8.

19. This seems to be why Victor Tadros finds it "very difficult to believe that just punishment is based on unfairly benefiting from a system of rules"; see his *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), 27. For perhaps the best statement of this objection, see R. A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986), 211–217.

20. According to Aquinas's definition, law is "an order of reason for the common good by one who has the care of the community, and promulgated"; *On Law, Morality, and Politics*, trans. R. J. Regan, 2nd ed. (Indianapolis: Hackett, 2002), 15.

21. See my "Republicanism and the Foundations of Criminal Law," in R. A. Duff and S. P. Green (eds.), *Philosophical Foundations of the Criminal Law* (Oxford: Oxford University Press, 2011), 61–64, and "Punishment as Fair Play," esp. 269–273.

22. Avihay Dorfman and Alon Harel make a similar point when they refer to government as an "integrative practice" in "The Case against Privatization," *Philosophy & Public Affairs* 41 (Winter 2013): 67–102, at 84.

23. But cf. Husak, who holds that fair play can "ground the wrongfulness of pure *mala prohibitiva* offenses" in only "a small number of cases" (*Overcriminalization*, 118–119).

24. Green, *Lectures on the Principles of Political Obligation*, §189 (Ann Arbor: University of Michigan Press, 1967 [1882]), 190.

25. See Rachel O'Brien, *RSA Transitions: A Social Enterprise Approach to Prison and Rehabilitation* (November 2011); available at www.thersa.org/globalassets/pdfs/rsa_transitions_report.pdf.

26. As noted, e.g., in Ekow N. Yankah, "Legal Vices and Civic Virtue: Vice Crimes, Republicanism, and the Corruption of Lawfulness," *Criminal Law and Philosophy* 7, no. 1 (2013): 80–81.

27. On this point, see my "Restitution, Punishment, and Debts to Society," in J. Hudson and B. Galaway (eds.), *Victims, Offenders, and Alternative Sanctions* (Lexington, MA: Lexington Books, 1980), 3–13.

28. For the link between democracy and the "principle of intrinsic equality," see Robert Dahl, *On Democracy* (New Haven, CT: Yale University Press, 1998), esp. chap. 6.

29. Schumpeter, *Capitalism, Socialism, and Democracy*, 3rd ed. (New York: Harper & Row, 1950), esp. chaps. 21–23.

30. Here I set aside the various complications of electoral systems in representative democracies, such as first-past-the-post elections and districts composed on something other than a one-person, one-vote basis, that give greater weight to some votes than to others. I also ignore eligibility requirements that prevent some people from voting at all.

31. Note in this regard Mill's claim that the citizen's vote "has no more to do with his personal wishes than the verdict of a jurymen." Indeed, Mill went so far as to oppose

the secret ballot on the ground that every citizen should stand ready to take public responsibility for how he or she voted. Mill, *Considerations on Representative Government*, in Mill, *On Liberty and Other Essays* (Oxford: Oxford University Press), 353–355 (354 for the quoted passage).

32. Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), 312. For development of this and related points, see my “Citizenship as Fairness: John Rawls’s Conception of Civic Virtue,” in *A Companion to Rawls*, ed. J. Mandle and D. Reidy (New York: Wiley, 2014), 297–311.

33. See, e.g., the symposium on “Crime and Citizenship,” *Journal of Applied Philosophy*, 22, no. 3 (2005): 211–273.

34. The position I take here is identical in most respects to that which Mary Sigler advances in “Defensible Disenfranchisement,” *Iowa Law Review* 99, no. 4 (2014): 1725–1744. Sigler, however, takes the disenfranchisement of imprisoned felons to be “a means of regulating electoral eligibility in a liberal-democratic polity” (1728) that serves as “a regulatory counterpart to the institution of criminal punishment” (1744); but I regard disenfranchisement itself as a form of punishment.

35. For elaboration of this argument, see Dzur, *Punishment, Participatory Democracy, and the Jury*, chap. 4: “The Jury as a Civic Schoolhouse.”

36. Pettit, “Criminalization in Republican Theory,” in R. A. Duff, L. Farmer, S. E. Marshall, M. Renzo, and V. Tadros (eds.), *Criminalization: The Political Morality of the Criminal Law* (Oxford: Oxford University Press, 2015), 136.

37. Dzur, *Punishment, Participatory Democracy, and the Jury*, 87.

38. Robert C. Luskin, James S. Fishkin, and Roger Jowell, “Considered Opinions: Deliberative Polling in Britain,” *British Journal of Political Science* 32, no. 3 (2002): 455–487.

39. Nicola Lacey, *The Prisoner’s Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge: Cambridge University Press, 2008), 27.

40. *Ibid.*, 76. For the anomalous case of New Zealand, where the rate of incarceration increased after it switched from the single-member system to proportional representation, see Lacey, “The Prisoner’s Dilemma and Political Systems: The Impact of Proportional Representation on Criminal Justice in New Zealand,” *Victoria University of Wellington Law Review*, 42, no. 4 (2011): 615–638.

41. For evidence in support of this conclusion, see Douglas Amy, *Real Choices/New Voices: How Proportional Representation Could Revitalize American Democracy*, 2nd ed. (New York: Columbia University Press, 2002), *passim*.

42. Green, “Just Deserts in Unjust Societies,” 374, cites several studies to this effect.

43. *Ibid.*, 354–355.