

Democracy as a Cause of and a Solution for Hyper-Incarceration

Author : Christopher Slobogin

Date : April 15, 2015

Andrew E. Taslitz, [The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration](#), 9 **Ohio St. J. Crim. L.** 133 (2011).

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

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

In making this case, Taz relied on five sources. He first compared the U.S. to Europe, where incarceration rates and sentences are much lower, despite roughly equivalent crime rates. Most relevant here is Taz's description of the contrast between what comparativists like Michael Cavadino, James Dignan and Nicola Lacey call "liberal market economies," of which the U.S. is a prime example, and "coordinated market economies," which predominate in Europe. A liberal market economy aims at a free-market "characterized by vibrant economic and political competition in a relatively regulatory-free world," and thus tends to generate a distrust of government intervention and produce adversarial and polarized legislatures and bureaucracies. A coordinated market economy, in contrast, is more heavily regulated, in an effort to please a wide array of groups; it tends to be associated with proportional representation and multi-party governance. According to Taz, the impact of a coordinated economy and more diffuse democratic process on criminal justice policies is at least two-fold. First, "[t]he broad-based, coalitional nature of the electoral system . . . makes it harder for any one social group to use criminal justice as a way to wage war on another such group." (P. 156). Second, the same coalition-seeking reduces the ability of any given party to control policymaking, which, together with a greater trust in government generally, increases deference to relatively lenient criminal justice experts. The result, borne out by data comparing criminal justice systems in liberal market and coordinated market economies, is less severe punishment.

Taz also delved into the research contrasting democratic proclivities *within* the United States. For instance, Vanessa Barker looked at the criminal justice systems and associated politics of three states: California, Washington and New York. As Taz notes, Barker found that, while Californians' easy access to the referenda process is highly populist, their democracy is not "deliberative" in the PDD sense, but

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

The third area Taz examined—the study of local politics and criminal justice—picks up the same themes. Here Taz relied on the work of another political scientist, Lisa Miller, who looked at data from Pennsylvania, and in particular Philadelphia and Pittsburgh. According to Taz, Miller found that anti-incarceration groups tend to come from the most heavily-policed and most crime-ridden neighborhoods (which also tend to be populated mostly by minority groups), because “their experience teaches them that crime is a multi-faceted problem that requires multi-faceted solutions” and the rejection of retribution-centered approaches. These findings led Taz to conclude that “giving local urban racial communities in heavily-policed areas more of an ‘effective’ voice in state and federal legislatures—a voice prompting serious deliberation and having the prospect of altering criminal justice policy—should serve as an anti-incarceration counter-force.” (P. 173).

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

Finally, Taz gleaned what he could from “happiness jurisprudence,” a diffuse body of research, which he claims supports the conclusion, “with little to challenge it,” that PDD promotes happiness. That state of mind in turn reduces both criminality and “the emotional need to strike back at perceived threats to safety by means of severe sentences of incarceration.” (P. 178). The primary manner in which PDD produces these results is, once again, through providing a means of giving people effective voice. Voice promotes esteem-building perceptions of autonomy and competence, and thus counters crime-inducing factors. More importantly in terms of affecting attitudes toward incarceration, Taz argues that, because PDD requires listening and acquiring information, it promotes empathy, which is a key requisite for compassion and the willingness to mitigate in cases involving people from “outside” groups.

Taz’s article makes a convincing case for PDD as a mechanism for rethinking hyper-incarceration policies. American democracy—Taz’s raw populism—is not incapable of changing incarceration-friendly policies; in recent years several states, reacting primarily to fiscal concerns or judicial mandates, have enacted laws that have the effect of reducing the prison population. But our criminal justice system is still more punitive by several orders of magnitude than Europe’s. If dramatic change is to occur, something more fundamental than an economic downturn is required. In that regard, local deliberations by informed citizens from all walks of life, informed by experts, could be part of the recipe for a more empathetic, less prison-heavy regime.

As Taz recognized, however, instituting PDD throughout the country—even at the level experienced in

Washington state, much less to the ideal extent he envisions—is a “daunting” task. He does not flesh out his thoughts on that subject. In a recent in a symposium tribute to Taz, I use Taz’s work as a springboard for explaining why, in contrast to European culture, American culture is unfortunately particularly infertile ground for PDD. In the meantime, *The Criminal Republic* should be read by everyone interested in criminal justice, both for its intrinsic worth and as a reminder of our friend, and great scholar, Andrew Taslitz.

Cite as: Christopher Slobogin, *Democracy as a Cause of and a Solution for Hyper-Incarceration*, JOTWELL (April 15, 2015) (reviewing Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 **Ohio St. J. Crim. L.** 133 (2011)), <https://crim.jotwell.com/democracy-as-a-cause-of-and-a-solution-for-hyper-incarceration/>.