

**THEY DON'T DO IT LIKE MY CLIQUE: HOW GROUP LOYALTY
SHAPES THE CRIMINAL JUSTICE SYSTEMS IN THE UNITED
STATES AND NORWAY**

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I. INTRODUCTION

The United States is infected with a curiously persistent disease: rampant prison recidivism—the rate at which formerly imprisoned offenders re-offend. In the United States, 43% of former inmates re-offend within one year of their release.¹ Within five years, 77% of former inmates re-offend.² It is among the

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highest rates in the world; an unsightly jewel in the iron crown the country bears as the holder of both the world's largest prison population and highest rate of incarceration per capita.³ In Norway, by contrast, a mere 20% of its released prisoners re-offend within two years.⁴ That rate is among the lowest in the world, accompanying an incarceration rate of only 72 prisoners per 100,000 people.⁵

It is troubling that United States, the self-styled "Leader of the Free World," has an oppressive, cancerous, dysfunctional, and self-perpetuating system of corrections. But more troubling is the fact that the causes of recidivism and the negative consequences of mass incarceration are well known.⁶ Intellectuals and experts are generally in agreement that the Scandinavian approach to criminal justice is much more effective.⁷ So, if the United States knows exactly what it is doing wrong, why have its correctional policies remained the same? The answer is that broader social, economic, and political forces created constituents that, beholden to their social identities as members of discrete cultural groups,

will always look back on with pride. Thank you to my family, whose love and support has made me everything that I am. Most of all, thank you so much to the love of my life, Natalie Finley, for her unwavering belief in me even when my own runs out.

¹ MATTHEW R. DUROSE, ET AL., BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010* 8 (2014), <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

² *Id.*

³ CAROLYN W. DEADY, PELL CENTER FOR INT'L RELATIONS AND PUBLIC POLICY, *INCARCERATION AND RECIDIVISM: LESSONS FROM ABROAD* 2 (2014), http://www.salve.edu/sites/default/files/filesfield/documents/Incarceration_and_Recidivism.pdf; INTERNATIONAL CENTRE FOR PRISON STUDIES, http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All (last visited Feb. 28, 2016) (listing total U.S. prison population at 2,228,424. China listed second at 1,701,344); NATIONMASTER, <http://www.nationmaster.com/country-info/stats/Crime/Prisoners/Per-capita> (last visited Feb. 28, 2016) (listing U.S. incarceration at 715 prisoners per 100,000 people. Russia listed second at 584 prisoners per 100,000 people).

⁴ Ragnar Kristoffersen, *Relapse Study in the Correctional Services of the Nordic Countries. Key Results and Perspectives*, 2 *EUROVISTA* 170 (2013), <http://eurovista.org/wp-content/uploads/2015/01/EuroVista-vol2-no3-6-Kristofferson-edit.pdf>.

⁵ Deady, *supra* note 3, at 1.

⁶ See, e.g., Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 *CRIME & JUST.* 115 (2009); Michael Edmund O'Neill et al., *Past as Prologue: Reconciling Recidivism and Culpability*, 73 *FORDHAM L. REV.* 245 (2004); Robert Coupe, *Department of Correction: A New Vision* 23 *DEL. LAW.*, Summer 2014, at 14; Mandeep K. Dhami et al., *Prisoner's Positive Illusions of Their Post-Release Success*, 30 *LAW & HUM. BEHAV.* 631, 633 (2006).

⁷ See, e.g., Katie Ward et al., *Incarceration Within American and Nordic Prisons: Comparison of National and International Policies*, *ENGAGE* 1 (2013), http://www.dropoutprevention.org/engage/edition/ENGAGE_1.1-web.pdf; RAM SUBRAMANIAN & ALISON SHAMES, VERA INSTITUTE OF JUSTICE, *SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES* 3 (2013), <http://www.vera.org/sites/default/files/resources/downloads/european-american-prison-report-v3.pdf>; Christopher Moraff, *Can Europe Offer the U.S. a Model for Prison Reform?*, *NEXT CITY* (June 19, 2014).

consistently advocate for, or at least acquiesce to, this dysfunctional system of criminal justice.

The text that follows first discusses the phenomenon of prison recidivism, the methods proven to reduce it, and how those methods in practice resemble other typical government welfare programs. This Note then contrasts the different structures and policies of the prison systems in United States and Norway, noting whether the system in each country conforms to the methods proven to be effective in minimizing prison recidivism. It then looks to the social phenomenon of group loyalty and its effect on a population's support for welfare programs to explain, by extension, why rehabilitative correctional policies found traction in Norway, but not in the United States. Finally, this Note considers whether the domineering influence of group loyalty on the political process renders any efforts at prison reform in the United States hopeless.

II. STATE OF THE LAW

A. What is Recidivism?

“Recidivism” has been defined in many ways. For our purposes, its most straightforward meaning is the rate at which convicted criminals go on to commit another offense after they have served their sentences.⁸ Recidivism is “an existential test of the criminal justice system generally.”⁹ That is to say that a country's rate of recidivism is indicative of the overall effectiveness of its prison systems, its programs, and its support and treatment available to inmates and former inmates.¹⁰ If a convict commits another offense after serving her sentence, then the system has failed to achieve its principal goal of reducing crime. Instead, it has established only a brief interlude in the convict's criminal activity. Of course, one could argue that the punishment of one person deters a number of others. But logically, if the sufferer of a sentence herself is not deterred, then the punishment cannot be of much deterrent value. Moreover, when a former inmate is undeterred, she displays to others that a sentence is so easy to bear, at least once borne, that the prospect of subsequent sentences is nothing to fear. Thus whatever deterrent value a sentence carries, its capacity to encourage crime equals or exceeds that value. For this reason, recidivism has been called “a key indicator of a corrections system's performance.”¹¹

⁸ See BUREAU OF JUSTICE STATISTICS, 3 IN 4 FORMER PRISONERS IN 30 STATES ARRESTED WITHIN 5 YEARS OF RELEASE (Apr. 22, 2014, 10:00 AM), <http://www.bjs.gov/content/pub/press/rprts05p0510pr.cfm>.

⁹ Robert Weisberg, *Meanings and Measures of Recidivism*, 87 S. CAL. L. REV. 785, 788 (2014).

¹⁰ *Id.*

¹¹ SUBRAMANIAN & SHAMES, *supra* note 7, at 3.

1. Causes and Cures

The driving force behind an offender's propensity to recidivate is her inability to normalize—to re-integrate into society. Thus, the more a prison system isolates an individual from societal norms, the more likely that prison will prompt its inmates to re-offend, making it ineffective in reducing crime. Successful normalization begins while the offender is still incarcerated. For example, one study found that 36% of inmates had less than a high school diploma, which is 17% higher than the portion of the general U.S. population without high school diplomas over age 16.¹² The study examined the normalizing effect of educational programs within prisons and found that prisoners who participated in educational programs were 43% less likely to re-offend.¹³

After release, the programs most strongly correlated to reduced recidivism are those that expose convicts to a positive community influence while protecting them from circumstances that are likely to prompt the convict to offend again.¹⁴ One study found that “community-based, structured, cognitive-behavioral intervention” reduced the likelihood of recidivism between 53-70%.¹⁵ There is a strong correlation between former inmates' reduced identification with criminal peers and a reduction in recidivism.¹⁶ There is also “an inverse relationship between rates of recidivism and level of education.”¹⁷ Other such programs include treatment of substance abuse, psychological therapy and treatment, and domestic violence education.¹⁸

Studies also link engagement in meaningful employment to reduced recidivism.¹⁹ Job training in the community was found to reduce recidivism by 4.3%, while vocational training in prison yielded a 9% reduction.²⁰ Another study found that offenders involved in vocational programs while in prison are 13% more likely to get a job upon their release.²¹ Such programs alter the external influences upon a former inmate's behavior. As a whole, these programs

¹² RAND CORP., *Education and Vocational Training in Prisons Reduces Recidivism, Improves Job Outlook* (Aug. 22, 2013), <http://www.rand.org/news/press/2013/08/22.html>.

¹³ *Id.*

¹⁴ Daryl G. Kroner et al., *Changing Risk Factors That Impact Recidivism: In Search of Mechanisms of Change*, 37 *LAW & HUM. BEHAV.* 323 (2013).

¹⁵ *Id.* at 331.

¹⁶ *Id.* at 323.

¹⁷ Ward et al., *supra* note 7, at 40.

¹⁸ Roger K. Warren, *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism*, 82 *IND. L.J.* 1307, 1312 (2007).

¹⁹ U.S. PROBATION OFFICE, EXECUTIVE SUMMARY: RESEARCH SUPPORTING EMPLOYMENT AS AN IMPORTANT COMPONENT OF EVIDENCE-BASED PRACTICE (May 5, 2014) <http://nicic.gov/library/028146>.

²⁰ *Id.* (noting also that community job training yielded a cost benefit of \$4,359 per participant, while in-prison training yielded \$13,738 per participant).

²¹ RAND CORP., *supra* note 12.

normalize the former inmate's circumstances. They place the convict in a lifestyle similar to that of a typical citizen, which is a person unlikely to commit a crime.

Other techniques focus on the individual. These programs may be less effective because they seek to catalyze behavioral change through *ex post* attitude adjustment.²² Conversely, community-based cognitive behavioral techniques attempt to strike at the source of anti-social behavior, which may very well be the same source as the individual's anti-social attitudes.²³ Indeed, antisocial attitudes may be nothing more than proxies for the psychologically meaningful risk factors noted in the above studies.²⁴ "Antisocial attitude change" has been associated with only a 10% reduction in recidivism, making the community based cognitive-behavioral approach "more effective."²⁵ Nonetheless, anti-social attitudes do have a "robust relationship with criminal recidivism."²⁶ Thus, adjusting those attitudes through pro-social modeling will have a positive impact on the likelihood of an individual to recidivate. Pro-social modeling involves techniques that attempt to reverse a former inmate's negative attitudes by emphasizing "fairness, reliability and non-criminal lifestyle and reinforcing statements and activities of offenders that reflect those values."²⁷ Other programs emphasize the development of personal skills, which has been linked to reduced recidivism.²⁸ Such skills include problem-solving as well as verbal and non-verbal communication.²⁹

The end of each sort of program is the same: to provide the offender with the means to think, plan, and behave like a non-criminal. Successful reduction in recidivism is thus most strongly related to the implementation of cognitive techniques and models, rather than implementation of reinforcement and disapproval or the use of authority.³⁰ A comprehensive program that effectively combats recidivism will rely on both pro-social modeling techniques as well as community based cognitive-behavioral approaches.³¹ So, broadly speaking, the root cause of recurring criminal behavior is punishment coupled with treatment and perception of convicts as criminals.³² "Inmates who are not treated properly in custody will likely continue to have the same problems that resulted in their

²² Kroner et al., *supra* note 14, at 329.

²³ *Id.*

²⁴ *Id.* at 331.

²⁵ *Id.* at 329.

²⁶ *Id.* at 330.

²⁷ Chris Trotter, *Reducing Recidivism Through Probation Supervision: What We Know and Don't Know from Four Decades of Research*, 77 FED. PROBATION 43, 46 (2013).

²⁸ *Id.*

²⁹ *Id.* at 45.

³⁰ *Id.* at 46.

³¹ Kroner et al., *supra* note 14, at 330 ("Anti-social attitudes fit well into a cognitive-behavioral intervention approach.").

³² U.S. PROBATION OFFICE, *supra* note 15 ("The scientific evidence is remarkably consistent that people who desist from crime are those who are better integrated into pro-social roles in the family, workplace, and community.").

arrest once they are back in the community.”³³ In short, a rehabilitative system of corrections reduces recidivism, while a punitive system does not.

2. Criminal Rehabilitation as a Welfare Program

A prison system implementing the above methodology would be a sort of welfare program. The Oxford Dictionary defines welfare as “the statutory procedure or social effort designed to promote the basic physical and material well-being of people in need.”³⁴ In a rehabilitative system—that is, one employing the techniques discussed above—a corrections facility is not a penitentiary, but a behavioral hospital. The state devotes its resources to providing the inmate with the tools necessary to overcome the circumstances that led to her criminal behavior and achieve a comfortable quality of life upon return to the community. The rehabilitative system does not see criminals as bad eggs that need to be cracked, but as people whose physical and material well-beings are in jeopardy.

B. Criminal Justice in Action: Norway and the United States

A comparison of the criminal justice systems in Norway and the United States is a living case study in how implementation of these techniques, or lack thereof, impacts recidivism. The Norwegian corrections system sticks closely to the ideal of normalization. Its sentencing laws ensure that when the state detains a person, isolation is brief.³⁵ Its prisons are structured and operated to ensure that the prisoner’s brief isolation from the world is as normal as possible.³⁶ On the other hand, the deprivation inmates suffer at the hands of the U.S. system of corrections is all but maximal.³⁷

³³ MARK D. MARTIN, U.S. DEP’T OF JUSTICE, JAIL STANDARDS AND INSPECTION PROGRAMS 3 (2007), <http://static.nicic.gov/Library/022180.pdf> (“Jails do not simply lock inmates up and toss away the key.”).

³⁴ OXFORD ENGLISH DICTIONARY, http://www.oxforddictionaries.com/us/definition/american_english/welfare (last visited Jan. 22, 2016). Merriam-Webster defines welfare as “aid in the form of money or necessities for those in need.” MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/welfare> (last visited Jan. 22, 2015).

³⁵ GENERAL CIVIL PENAL CODE [CIVIL CODE] §§ 17, 39 (c)-(f) (Nor.) (capping the maximum sentence at 20 years in most cases, and 21 or 30 years in special cases. In exceptional circumstances, at the end of a sentence a court may, after social or forensic psychiatric inquiry and a hearing in the District Court, extend the sentence for five years. The convict may apply for probation once each year during those five years).

³⁶ *Id.* at §§ 29, 33-33(a).

³⁷ *See infra* § II.B.2.

1. Norway's Criminal Justice System

Norway runs its system under a “guiding principle of normality.”³⁸ This principle drives the government to foster prison environments that resemble life on the outside as closely as possible.³⁹ Thus, prisoners retain their full range of rights, other than absolute freedom of movement, while they are incarcerated.⁴⁰ This principle of normality and rehabilitation, rather than punishment, along with the preservation of civil rights for inmates has produced perhaps the best prison system in the world. One of its most prominent corrections facilities, Bastoy, has been called the “world’s nicest prison.”⁴¹ Another, Halden, has been called the “world’s most humane prison.”⁴²

a. The Life of a Norwegian Inmate

Those two facilities are the most prominent exemplars of a system governed by a principle of normality—each is a far cry from the cold concrete and iron cages typical in the U.S. system. Bastoy is located on a scenic island.⁴³ At Halden, large trees obscure the would-be imposing walls.⁴⁴ Inmates at Bastoy live in cottages, to which they themselves hold the key.⁴⁵ Halden’s living spaces resemble college dorms more than prison cells: large windows maximize sunlight and each group of “cells” shares a common living room and kitchen.⁴⁶ Inmates are not locked away but rather have the freedom to invest their time in an array of self-fulfilling activities.⁴⁷ Prisoners at Bastoy can relax on the beach, fish, or play tennis.⁴⁸ Those at Halden spend 12 hours each day exercising, playing various sports, or working on various crafts.⁴⁹

³⁸ Gerhard Ploeg, *Norway's Prisons Are Doing Something Right*, N.Y. TIMES, Dec. 18, 2012, <http://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/norways-prisons-are-doing-something-right>.

³⁹ *Id.*

⁴⁰ KRIMINALOMSORGEN, <http://www.kriminalomsorgen.no/information-in-english.265199.no.html> (last visited Jan. 10, 2016) (“The punishment is the restriction of liberty; no other rights have been removed by the sentencing court. Therefore, the sentenced offender has all the same rights as all other [sic] who live in Norway.”).

⁴¹ John D. Sutter, *Welcome to the world's nicest prison*, CNN, May 24, 2012, 5:36 PM, <http://www.cnn.com/2012/05/24/world/europe/norway-prison-bastoy-nicest/>.

⁴² *Inside the World's Most Humane Prison*, TIME, 2010, <http://content.time.com/time/photogallery/0,29307,1989083,00.html>.

⁴³ Sutter, *supra* note 41.

⁴⁴ William Lee Adams, *Sentenced to Serving the Good Life in Norway*, TIME, Jul. 12, 2010, <http://content.time.com/time/magazine/article/0,9171,2000920-1,00.html>.

⁴⁵ Sutter, *supra* note 41.

⁴⁶ Adams, *supra* note 44.

⁴⁷ *Id.*; Sutter, *supra* note 41.

⁴⁸ Sutter, *supra* note 41.

⁴⁹ Adams, *supra* note 44.

Inmates at Bastoy must report to work every day from 8:30 A.M. to 3:30 P.M.⁵⁰ Their jobs include the simple tasks common to any small village: gardening, farming, chopping trees for firewood, or tending to the horses that cart supplies on and off the island.⁵¹ For their efforts, the inmates earn the equivalent of \$10 per day, which they can spend at a local shop.⁵² At Halden, inmates work in the facility's professional training kitchen, hone their skills in the woodshop, or gain experience at the prison's professional recording studio.⁵³ Facilities throughout the system provide vocational courses in carpentry, hotel and food processing trades, construction, agriculture, and many others.⁵⁴

Norway's prisons also provide inmates access to education up to the university level.⁵⁵ Of the 42 prisons in the country, 34 of them had schools as of 2005.⁵⁶ Inmates have a choice in their curricula.⁵⁷ Over half choose courses in upper secondary school on topics such as business, engineering, and administrative studies.⁵⁸ Others opt for short-term classes like arts and crafts, computer studies, music, and language skills.⁵⁹ These courses encourage a higher self-esteem and confidence in the participants and motivate them to pursue their studies further.⁶⁰ To provide the best services possible, Norwegian prisons import educators from the surrounding community rather relying on their own staff.⁶¹

b. Violence in Norway's Prisons

Violence is practically non-existent in Norwegian prisons. Prisoners must attend anti-violence seminars.⁶² At Halden, they have open access to a full kitchen, which includes metal knives and forks, as well as to a full array of carpentry tools.⁶³ Despite this, Halden's governor reported that he could not

⁵⁰ Sutter, *supra* note 41.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Adams, *supra* note 44.

⁵⁴ NORDEN, NORDIC PRISON EDUCATION: A LIFELONG LEARNING PERSPECTIVE 82 (2005), http://www.epea.org/uploads/media/Nordic_Prison_Education_A_lifelong_learning_perspective.pdf.

⁵⁵ Ward et al., *supra* note 7, at 41.

⁵⁶ NORDEN, *supra* note 54, at 81.

⁵⁷ *Id.*

⁵⁸ *Id.* at 82.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ KRIMINALOMSORGEN, *supra* note 40.

⁶² Christian Storm, *Norway's Island Prison For Violent Criminals Looks Like No Prison We've Ever Seen*, BUSINESS INSIDER, Oct. 28, 2014, <http://www.businessinsider.com/bastoy-prison-tour-2014-10?op=1>.

⁶³ Christina Sterbenz, *An American Warden Visited A Norwegian Prison, And He Couldn't Believe What He Saw*, BUSINESS INSIDER, Oct. 20, 2014, <http://www.businessinsider.com/an-american-warden-visited-a-norwegian-prison--and-he-couldnt-believe->

remember the last time there was a fight of any kind.⁶⁴ Moreover, the culture of violence inherent in the prototypical prisoner-guard relationships of other countries is alien to the Norwegian system.⁶⁵ Neither prisoners nor guards wear uniforms.⁶⁶ The guards are unarmed and participate in activities with the inmates, calling them by their first names.⁶⁷ It is a relationship of civility, kindness, and respect.⁶⁸ The guards' "relentless presence" is not a symptom of tension and violence, but rather the result of the staff's desire to "talk [to] and help inmates."⁶⁹ Halden's guards must take a year of theoretical training and a second year of practical training.⁷⁰ Those at Bastoy report going through three years of training.⁷¹ During that time, guards learn psychology and criminology.⁷²

c. Psychological Care

Corrections officials are highly aware of the psychological conditions associated with criminal behavior. The governor of Bastoy Prison is a clinical psychologist.⁷³ When a prisoner is diagnosed with a severe mental illness, she is transferred to health authorities for treatment, rather than remaining under the responsibility of corrections officers.⁷⁴ Treatment is readily available for inmates; one study found that 25% of the inmates questioned had some form of psychiatric intervention.⁷⁵ Less than 1% participated in group therapy, while 20% received individual psychotherapy.⁷⁶

what-he-saw-2014-10 (reporting that a visiting American warden joked, "You don't have to bake 'em [files potentially used as weapons] in a cake").

⁶⁴ Amelia Gentleman, *Inside Halden, the most humane prison in the world*, THE GUARDIAN, May 18, 2012, <http://www.theguardian.com/society/2012/may/18/halden-most-humane-prison-in-world>.

⁶⁵ *Id.*

⁶⁶ Sutter, *supra* note 41.

⁶⁷ Adams, *supra* note 44.

⁶⁸ Gentleman, *supra* note 64.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Erwin James, *The Norwegian prison where inmates are treated like people*, THE GUARDIAN, Feb. 25, 2013, <http://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people>.

⁷² KRIMINALOMSORGEN, *supra* note 40.

⁷³ James, *supra* note 71.

⁷⁴ *Id.*

⁷⁵ Ellen Kjelsberg et al., *Mental health consultations in a prison population: a descriptive study*, 6 BMC PSYCHIATRY 1 (2006), <http://www.biomedcentral.com/content/pdf/1471-244X-6-27.pdf>.

⁷⁶ *Id.*

d. Privatization

Norway, notably, has no privately run prisons.⁷⁷

2. Criminal Justice in the United States

a. Living Conditions

Without a centralized inspection agency, conditions in the typical U.S. prison are more difficult to ascertain. Coalescing reports from various sources, though, it is clear that overcrowding, emotional collapse from solitary confinement, and substandard medical care are typical within the U.S. system. Take, for example, California's Monterey County Jail. The facility is designed to accommodate 825 prisoners.⁷⁸ In reality, inspectors found that it housed 1,000 to 1,144 prisoners.⁷⁹ Thus understaffed, the Monterey County Jail employees performed duties poorly or did not do them at all.⁸⁰ In turn, prisoners did not receive adequate medical care or mental health treatment and were susceptible to injury.⁸¹ As a result, many inmates *died* unnecessarily from preventable disease and suicide.⁸² Similarly, Tent City Jail in Phoenix, Arizona is nothing more than a compound of several hundred Army surplus tents.⁸³ Prisoners live without any climate control in the middle of a desert where the temperature regularly breaks 100 degrees Fahrenheit.⁸⁴ Medical care is nearly nonexistent and meals are spartan.⁸⁵ A district court even found the conditions unconstitutional.⁸⁶ Nonetheless, Maricopa County continues to operate the facility with pride.⁸⁷

⁷⁷ Richard Orange, *Norway Conservatives want private prisons*, THE LOCAL, Aug. 27, 2013, <http://www.thelocal.no/20130827/norway-conservative-wants-private-prisons>. For the problematic consequences of private prisons, see *infra* at § II.B.2.d.

⁷⁸ ACLU, *Reports by Neutral Experts Condemn Monterey County Jail as Violent, Unconstitutional, and Lacking Basic ADA Protections*, ACLU (Apr. 29, 2014), <https://www.aclu.org/prisoners-rights/reports-neutral-experts-condemn-monterey-county-jail-violent-unconstitutional-and>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ James Ridgeway & Jean Casella, *America's 10 Worst Prisons: Dishonorable Mentions*, MOTHER JONES (May 15, 2013, 5:00 AM), <http://www.motherjones.com/politics/2013/05/america-10-worst-prisons-dishonorable-attica-angola-san-quentin-ely>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ ACLU, *Judge Calls Maricopa County Jail Conditions Unconstitutional*, ACLU (Oct. 22, 2008), <https://www.aclu.org/prisoners-rights/judge-calls-maricopa-county-jail-conditions-unconstitutional>.

⁸⁷ MARICOPA COUNTY SHERIFF'S OFFICE, JAIL INFORMATION, <http://www.mcso.org/JailInformation/TentCity.aspx> (last visited Feb. 28, 2016).

Isolation and forced inactivity are also common in the U.S. system.⁸⁸ A death row inmate reports 12 years without contact with the outside world and 22 to 24 hours per day alone in his bunk.⁸⁹ His case is typical of the experience of death row inmates in 93% of state prisons.⁹⁰ A class action lawsuit brought on the behalf of prisoners at the U.S. Penitentiary Administrative Maximum in Florence, Colorado, reports a facility that created isolated conditions that drove inmates insane and caused rampant suicide.⁹¹ Thus, overcrowding, excessive solitary confinement, and failure to provide adequate medical care are hallmarks of the conditions prisoners face in the U.S. correctional system.⁹² Obviously, these conditions are a far cry from those an average U.S. citizen enjoys in her daily life.

b. Violence in U.S. Prisons

The U.S. prison system is also rife with violence. A report on the Georgia prison system found that since 2010, prisoners were responsible for 33 murders of other inmates.⁹³ The report found prisoner supervision so lax that guards fail to witness many of the assaults.⁹⁴ The guards' chief responsibility is to patrol the facility, ensure the inmates' safety, and maintain order.⁹⁵ Failure to perform this duty provides gangs the opportunity to fill the void.⁹⁶ The report also notes that stabbings "are a regular occurrence" because inmates "have easy access to lethal weapons such as knives, shanks, and machetes."⁹⁷ During 2012, incidents of violence at the Orleans Parish Prison sent 23 prisoners to the emergency room with severe injuries.⁹⁸ Guards regularly "stand by during a melee and let inmates fight themselves bloody."⁹⁹ In Los Angeles County jails, "deputy violence against inmates is routine."¹⁰⁰ "Deputies slam inmates' heads

⁸⁸ Anthony Graves, *When I Was on Death Row, I Saw a Bunch of Dead Men Walking. Solitary Confinement Killed Everything Inside Them.*, HUFFINGTON POST (Jul. 23, 2013, 10:41 AM), http://www.huffingtonpost.com/anthony-graves/when-i-was-on-death-row-i_b_3639541.html.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Graves, *supra* note 88.

⁹² Ridgeway & Casella, *supra* note 83.

⁹³ SOUTHERN CENTER FOR HUMAN RIGHTS, THE CRISIS OF VIOLENCE IN GEORGIA'S PRISONS 7 (2014), <https://www.schr.org/files/post/files/Crisis%20of%20Violence%20in%20Prisons-9%20reduced%20FINAL.pdf>.

⁹⁴ *Id.* at 9.

⁹⁵ *Id.*

⁹⁶ *Id.* at 11.

⁹⁷ *Id.* at 9.

⁹⁸ Ridgeway & Casella, *supra* note 83.

⁹⁹ *Id.*

¹⁰⁰ SARAH LIEBOWITZ ET AL., ACLU, CRUEL AND USUAL PUNISHMENT: HOW A SAVAGE GANG OF DEPUTIES CONTROLS LA COUNTY JAILS 3 (2011), https://www.aclu.org/files/assets/78162_aclu_jails_r2_lr.pdf.

into walls and windows,” “kick them with boot-clad feet,” and “shoot unresisting inmates with Tasers.”¹⁰¹ These acts of violence are considered “badges of honor.”¹⁰²

Equally problematic in the U.S. system is the prevalence of sexual assault.¹⁰³ In 2011, an estimated 80,600 inmates were victims of sexual assault either by other inmates or prison staff.¹⁰⁴ Other reports record the number at close to 10% of all inmates in state prisons, local jails, and post-release facilities.¹⁰⁵ More troubling is the fact that inmates brought almost half of all their sexual assault accusations against the prison guards themselves.¹⁰⁶ Of those guards, less than half were prosecuted and 22% were able to keep their jobs.¹⁰⁷ Some analysts fear that even these figures may severely under-represent reality.¹⁰⁸ A prisoner filing a report against a guard must first secure knowledge that he or she will suffer no retaliation.¹⁰⁹ Further, the inmate must believe that he or she will actually get relief, which is unlikely given the anemic response by prison officials and state prosecutors.¹¹⁰ As a result, prisoners find staff just as threatening as other inmates.¹¹¹

c. Behavioral Programs and Psychological Therapy

The system also does not provide programs that could normalize inmate experience, outlook, and behavior. In the United States, only one third of offenders receive educational training during their time in prison.¹¹² States are currently spending less on prison education programs than they did in 1982, even

¹⁰¹ *Id.*

¹⁰² *Id.* at 8.

¹⁰³ Arjun Sethi, *Americans' Complicity in the Prison Rape Crisis*, AL JAZEERA, Apr. 28, 2014, <http://america.aljazeera.com/opinions/2014/4/united-states-prisonrapesexual-assaultovercrowdedprisons.html> (“Rape and sexual assault are as basic to the American prison experience as bars and bunk beds.”).

¹⁰⁴ ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12 8 (2013), <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>.

¹⁰⁵ Kari Huus, *Report: Nearly 10 Percent of Inmates Suffer Sexual Abuse*, NBC NEWS, May 17, 2012, http://usnews.nbcnews.com/_news/2012/05/17/11745732-report-nearly-10-percent-of-inmates-suffer-sexual-abuse.

¹⁰⁶ Kelly Riddell, *Shades of Shawshank: Guards, Staff Committed Half of All Prison Sex Assaults*, THE WASHINGTON TIMES, Jan. 23, 2014, <http://www.washingtontimes.com/news/2014/jan/23/staff-members-committed-half-sexual-assaults-priso/?page=all> (based on accusations reported in U.S. correctional facilities in 2011, an 18% increase since 2006).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Riddell, *supra* note 106.

¹¹² Ward et al., *supra* note 7, at 41.

though overall spending on corrections has increased since then.¹¹³ Prisoners with no financial support from the outside must labor while incarcerated to purchase basic necessities such as food, clothes, and toiletries.¹¹⁴ Without any sort of compensation for attending educational programs during their sentences, these prisoners are faced with the choice of sacrificing fundamental well-being to attend the programs or performing the labor that pays them just enough to meet their basic survival needs.¹¹⁵

Worse still, “psychotherapy is essentially nonexistent for individual prisoners.”¹¹⁶ To receive psychological treatment, prisoners generally have no choice other than to attend group sessions.¹¹⁷ Unfortunately, honestly divulging such personal information is seen as a sign of weakness, and prisoners fear that they will become targets of abuse by other inmates if they communicate openly during group sessions.¹¹⁸

Rather than provide appropriate therapy, prison officials are more likely to exacerbate or even create psychological illness.¹¹⁹ Officials increasingly wield solitary confinement as a punishment for prisoners, not only in high-security prisons but throughout the remainder of the prison system as well.¹²⁰ Solitary confinement “can be as clinically distressing as physical torture.”¹²¹ It is linked to a wide variety of psychological effects from anxiety and depression to paranoia and psychosis.¹²² This treatment is especially damaging to individuals who already suffer from mental illness.¹²³ This is significant because 8-19% of inmates have disabling psychiatric disorders, and 15-20% of inmates will require some psychiatric treatment during their sentences.¹²⁴ One inmate reports that in solitary confinement, “you start to play tricks with your mind just to survive. This is no way to live.”¹²⁵ Other inmates dropped appeals of their death sentences because execution would allow them to escape the conditions in solitary

¹¹³ Allie Bidwell, *Report: Prison Education Programs Could Save Money*, U.S. NEWS & WORLD REPORT, Aug. 22, 2013, <http://www.usnews.com/news/articles/2013/08/22/report-prison-education-programs-could-save-money>.

¹¹⁴ Matthew Fleischer, *U.S. Prisons Don't Fund Education, and Everybody Pays a Price*, TAKEPART (Mar. 1, 2013), <http://www.takepart.com/article/2013/03/01/americas-in-mates-education-denied-everybody-pays-price>.

¹¹⁵ *Id.*

¹¹⁶ Ward et al., *supra* note 7, at 42.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY & L. 104 (2010).

¹²⁰ *Id.* at 104.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 105.

¹²⁴ Metzner & Fellner, *supra* note 119, at 105.

¹²⁵ Graves, *supra* note 88.

confinement “that killed everything inside of them.”¹²⁶ Thus the U.S. prison system not only provides inadequate care for inmates that already have or are developing mental illness during their incarceration, it actively aggravates those illnesses.¹²⁷

d. Privatization

The private prison industry is exacerbating the problematic conditions in U.S. prisons. Owners and operators of private prisons, as a natural consequence of running a business, have a profit motive. This means that privately run prisons have an incentive to cut costs wherever possible, while having little incentive to actually reduce the criminal population.¹²⁸ Private prisons negotiate with government officials for occupancy guarantees.¹²⁹ Such guarantees come in the forms either of quotas for the number of prisoners convicted and sentenced to the prison, or as “low-crime taxes,” where the government pays the prison tax revenue as compensation for empty cells.¹³⁰

One of the most significant effects of cost-cutting prerogatives is a high rate of staff turnover, which leads the prisons to be either understaffed, staffed by severely inexperienced individuals, or both.¹³¹ The result is that private prisons are characterized by staff misconduct, escapes, mistaken releases, riots, and inadequate or negligent medical care.¹³² As bad as the public prison system is in the United States, “private prisons experienced 49% more assaults on staff and 65% more inmate-to-inmate assaults than public prisons.”¹³³ A recent investigation into the East Mississippi Correctional Facility, a private prison,

¹²⁶ *Id.*

¹²⁷ Metzner & Fellner, *supra* note 119, at 105.

¹²⁸ Because private prisons sell incarceration, profits would dwindle with a decrease in states’ need to incarcerate.

¹²⁹ IN THE PUBLIC INTEREST, CRIMINAL: HOW LOCKUP QUOTAS AND “LOW-CRIME TAXES” GUARANTEE PROFITS FOR PRIVATE PRISON CORPORATIONS 12 (Sept. 2013), <http://www.inthepublicinterest.org/wp-content/uploads/Criminal-Lockup-Quota-Report.pdf>. See also April M. Short, *6 Shocking Revelations about How Private Prisons Make Money*, SALON, (Sep. 23, 2013, 5:22 AM), http://www.salon.com/2013/09/23/6_shocking_revelations_about_how_private_prisons_make_money_partner/.

¹³⁰ *Id.*

¹³¹ GRASSROOTS LEADERSHIP, THE DIRTY THIRTY: NOTHING TO CELEBRATE ABOUT 30 YEARS OF CORRECTIONS CORPORATION OF AMERICA 4 (2013), http://grassrootsleadership.org/sites/default/files/uploads/GRL_Dirty_Thirty_formatted_for_web.pdf; ACLU, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 23-28 (2011), https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf.

¹³² *Id.*

¹³³ IN THE PUBLIC INTEREST, PRISON PRIVATIZATION, PRISON PRIVATIZATION: BAD FOR FLORIDA, BAD FOR TAXPAYERS 2 (2011), <http://www.inthepublicinterest.org/wp-content/uploads/floridaprivateprisonsfactsheet42111.pdf>.

revealed the consequences of a profit-driven corrections system.¹³⁴ Prisoners were underfed and held in “rat-infested cells without working toilets or lights.”¹³⁵ The facility was “hazardously understaffed.”¹³⁶ As a result, inmates “routinely set fires to attract the attention of officers to respond to emergencies,” and “rapes, beatings, and stabbings [were] rampant.”¹³⁷ Worse, the overmatched and inexperienced staff inflicted “some of the most sadistic violence” on the prisoners.¹³⁸ Not surprisingly, private prisons are linked to increased recidivism rates in a statistically significant way.¹³⁹

C. Summary

In the most basic terms, the difference between the two countries’ correctional systems is that the U.S. system is based on punishment, while the Norwegian system is focused on rehabilitation. That is to say, the U.S. system is focused narrowly on individuals, relying on violence and fear to readjust the particular attitudes of each individual person. The Norwegian system, by contrast, considers the criminal as a symptom of a diseased environment. It seeks to remedy the criminal’s attitudes by normalizing the criminal’s circumstances. In other words, Norway implemented those rehabilitative methodologies discussed above and all but eliminated inmate recidivism. Meanwhile, the United States continues to ignore the research, and its citizens bear the scars.

III. ANALYSIS

The widely available research and the success of the Norwegian prison system make it obvious that the U.S. correctional regime is critically flawed. So why then does the United States refuse to follow Norway’s lead and implement the reforms that have been so beneficial there? Why does the country continue to insist upon its highly dysfunctional system? To get at the answer, we cannot continue to consider the two correctional systems out of context. We must instead examine each as a product of the environment in which it developed. To understand and repair the U.S. system, we must look to the conditions that shaped and continue to shape it. Are those conditions also present in a country, like

¹³⁴ Jeff Roberts, *The Disturbing & Inhumane Conditions in Prison: Why the System Isn’t Working*, BEFORE IT’S NEWS (Feb. 5, 2014), <http://beforeitsnews.com/alternative/2014/02/the-disturbing-inhumane-conditions-in-prison-why-the-system-isnt-working-2891352.html>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ PRIVATE CORRECTIONS INSTITUTE, INC., http://www.privateci.org/private_pics/Private%20prison%20fact%20sheet%202009.pdf (last visited Nov. 12, 2015).

Norway, that has a system that is actually effective in reducing the rate of recidivism? If not, what conditions *are* present? And what does that mean for the future of the U.S. regime?

Because the two countries are democracies, the question of why each developed such distinct corrections systems is one of national identity. Why was the rehabilitative system so popular in Norway as to become the norm? And why are U.S. citizens, by contrast, so complacent in their support of a system that is obviously dysfunctional? One answer lies in the way group identity shapes the human capacity for empathy.

A. Racial Group Loyalty

1. Racial Group Loyalty, Reciprocity, and Welfare

Studies show that welfare contributions are marked by “a clear pattern of racial group loyalty,” finding that an increase in the number of welfare recipients in one ethnic group reduces the support for welfare by people outside of that ethnic group.¹⁴⁰ “Race is among the strongest predictors for welfare support.”¹⁴¹ Countries with “more racial or ethnic fractionalization have less governmental redistribution.”¹⁴² Researchers call this phenomenon “reciprocity.”¹⁴³ Reciprocity in this context refers to a person’s “propensity to cooperate and share with others similarly disposed, even at personal cost.”¹⁴⁴ For example, one study found that racial bias heavily affects a person’s perception of whether someone is deserving of welfare.¹⁴⁵ The study asked respondents to rate the worthiness of welfare recipients after seeing pictures of those recipients.¹⁴⁶ Respondents rated the recipients in their own racial group as more worthy than those outside of that demographic.¹⁴⁷

The notion of reciprocity in support for welfare policies is critical here because as noted above, a rehabilitative system of corrections is really a species of welfare. It is therefore subject to this social phenomenon of reciprocity. Thus, the inherent and inexorable racial loyalties at work in an individual’s calculus for

¹⁴⁰ Erzo F.P. Luttmer, *Group Loyalty and the Taste for Redistribution*, 109 J. OF POL. ECON. 500, 508 (2001).

¹⁴¹ *Id.* at 511.

¹⁴² Christina M. Fong & Erzo F.P. Luttmer, *Do Race and Fairness Matter in Generosity? Evidence from a Nationally Representative Charity Experiment 1* (Nat’l Bureau of Econ. Research, Working Paper No. 15064, 2009), <http://www.nber.org/papers/w15064.pdf>.

¹⁴³ *Id.*

¹⁴⁴ CHRISTINA M. FONG ET AL., RECIPROCITY, SELF-INTEREST, AND THE WELFARE STATE 5 (2003), <http://www.umass.edu/preferen/gintis/Reciprocity%20and%20the%20Welfare%20State.pdf>.

¹⁴⁵ Fong & Luttmer, *supra* note 142, at 3.

¹⁴⁶ *Id.* at 20.

¹⁴⁷ *Id.*

other welfare policy decisions are every bit as influential in that individual's perception of the current state and role of his or her country's corrections system. Reciprocity is most apparent to a member of a racial group when welfare is distributed across that same racial group.¹⁴⁸ In other words, it is easier for a person to see the social, reciprocal benefit of a welfare program when the recipients of that program are members of the same group as that person.¹⁴⁹ This makes voting for and supporting welfare programs second nature.¹⁵⁰ Likewise, a rehabilitative system will have difficulty gaining support from the voting population in racially fractionalized countries.¹⁵¹ These loyalties make the individual voter disinclined to support policies that will benefit members of other demographic groups.¹⁵² Thus, racial group loyalties inhibit the population's capacity to vote for reform as a unified front.¹⁵³

2. Racial Group Loyalty and Reciprocity at Work

Ethnically, Norway is almost completely homogenous—94.4% of its population is Norwegian (Caucasian), with another 3.6% labeled as other European (Caucasian).¹⁵⁴ That is to say, only 2% of Norway's population is non-white.¹⁵⁵ While 70% of Norwegian prisoners are Norwegian citizens, citizens of other European countries make up another 17% of the prison population.¹⁵⁶ So, the demographics of the Norwegian prison system are roughly aligned with that of the country itself, at nearly 85% Caucasian.¹⁵⁷ On the other hand, in the United States whites make up 78% of the general population.¹⁵⁸ Yet, whites comprise

¹⁴⁸ *Id.* at 20-21.

¹⁴⁹ Luttmer, *supra* note 140, at 519.

¹⁵⁰ *Id.* at 521.

¹⁵¹ Alberto Alesina et al., *Why Doesn't the United States Have a European-Style Welfare State?*, 2 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 1, 43, 60-61 (2001), http://scholar.harvard.edu/files/alesina/files/423_0332-alesina11.pdf.

¹⁵² *Id.* ("States that are more ethnically fragmented spend a smaller fraction of their budget on social services and productive public goods."); Luttmer, *supra* note 140, at 519.

¹⁵³ *Id.*

¹⁵⁴ CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/no.html> (last visited Jan. 21, 2016).

¹⁵⁵ *Id.*

¹⁵⁶ *Imprisonments, 2012*, STATISTISK SENTRALBYRÅ (Jul. 4, 2014), <http://www.ssb.no/en/soziale-forhold-og-kriminalitet/statistikker/fengsling/aar/2014-07-04#content>.

¹⁵⁷ Taking 98% of the 70% of Norwegian citizens plus the 17% of other Europeans, who are mostly Caucasian as well. INFOPLEASE, <http://www.infoplease.com/ipa/A0855617.html> (last visited Feb. 28, 2015).

¹⁵⁸ U.S. CENSUS BUREAU, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_1YR_B02001&prodType=table (last visited Jan. 24, 2015).

only 31% of its prison population.¹⁵⁹ Thus, not only is the U.S. general population much more fractious than Norway's, the U.S. prison population is very nearly the demographic inverse of its general population.

It is therefore easy to see why Norway has had so much more success than the United States in reducing recidivism. Norway is among the least racially fractionalized countries in the world. Thus, each member of the Caucasian racial group that makes up 98% of the country's population has an innate loyalty to the other members of that group, simply by virtue of sharing the same racial characteristics.¹⁶⁰ So, the reciprocal nature of the country's welfare policies is salient to virtually every individual member of Norway's voting public. It is then far easier, perhaps even second nature, to drum up support for a comprehensive system of welfare like a rehabilitative system of corrections. The product is the aforementioned "guiding principle of normality," and a penal code that carefully ensures that a prisoner retains most of the fundamental rights that the general population enjoys.¹⁶¹

When a nation is as racially diverse as the United States, it becomes nearly impossible for policymakers to present solutions that can overcome these loyalties and gain the widespread support necessary for reform.¹⁶² Complicating matters is the great disparity between the demographics of the U.S. general population and its prison population. The groups most afflicted by the deleterious effects of the country's dysfunctional prison system are thus political minorities.¹⁶³ The result is that the majority of the U.S. population is, because of the distorting effects of racial group loyalty, less likely to see the reciprocal value in investing in a more effective prison system based on principles of rehabilitation.¹⁶⁴ As a result, that majority sees less value in prison reform and finds prisoners to be less deserving of increased support.

This creation of in-group and out-group classes based on race helps to explain not only why the United States has failed to implement rehabilitative policies, but also why the system became so harshly retributive. When people form these group divisions, they tend to favor members of their own group while becoming increasingly hostile towards the members of other groups.¹⁶⁵ As the group bonds grow stronger, individuals become more critical and detached from

¹⁵⁹ E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 9 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

¹⁶⁰ Alesina et al., *supra* note 151, at 61; Luttmer, *supra* note 140, at 519.

¹⁶¹ KRIMINALOMSORGEN, *supra* note 40; GENERAL CIVIL PENAL CODE, *supra* note 35.

¹⁶² Alberto Alesina et al., *supra* note 151, at 42-44.

¹⁶³ John Tierney, *Prison and the Poverty Trap*, N.Y. TIMES, Feb. 18, 2013, http://www.nytimes.com/2013/02/19/science/long-prison-terms-eyed-as-contributing-to-poverty.html?pagewanted=all&_r=0 (noting that one in four African Americans has had a parent behind bars and that the incarceration rate for African American males between ages 20 and 30 is 40%).

¹⁶⁴ Luttmer, *supra* note 140, at 519.

¹⁶⁵ Alesina et al., *supra* note 151, at 41-42 (referencing an experiment wherein boys were split into rival teams).

those they categorize as members of out-groups.¹⁶⁶ These divisions promote “ethnocentric conflict” and serve as the basis for “out-group hostility.”¹⁶⁷ In an ethnically homogenous state like Norway, the entire country is the in-group, so hostilities do not significantly taint the political system.¹⁶⁸ But in an ethnically fractionalized state like the United States, the opposite is true. Here, a white political majority forms a tightly bound in-group that views the out-groups, the country’s large racial minorities, with antipathy.¹⁶⁹ The majority’s negatively distorted perception of these out-groups thus justifies to that majority a punitive criminal justice system, the force of which is brought to bear on those racial minorities.

B. Group Loyalty and Economic Class

There are of course other social groups besides race to which an individual may attach her loyalties.¹⁷⁰ If racial differences establish roadblocks in the way of a person’s ability to empathize with others, there is no reason to think that these loyalties would be any less an impediment to reciprocity. In fact, “as demographic heterogeneity increases, on average, the share of beneficiaries belonging to one’s own group declines. Thus average support for redistribution declines as heterogeneity increases.”¹⁷¹

In addition to Norway’s racial homogeneity, its population is nearly financially homogenous as well. As of 2011, the country’s *Gini Coefficient*¹⁷² was 24.7,¹⁷³ which is among the lowest values for countries that have reported the relevant data since 2010.¹⁷⁴ The social, cultural, and psychological bifurcation that occurs as a country is divided between the wealthy and the impoverished is therefore virtually non-existent in Norway. As a result, these economic group loyalties also yield support for a rehabilitative prison system—a welfare-style

¹⁶⁶ Daniel Druckman, *Nationalism, Patriotism, and Group Loyalty: A Sociological Perspective*, 38 MERSHON INT’L STUDIES REV. 43, 45 (1994).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Luttmmer, *supra* note 140, at 520.

¹⁷¹ *Id.* at 519.

¹⁷² This number is a measure of statistical dispersion that tracks inequality in distribution. A value of zero represents complete equality, while a value of 100 represents total inequality. THE WORLD BANK, <http://data.worldbank.org/indicator/SI.POV.GINI> (last visited Feb. 10, 2016).

¹⁷³ CHARTBOOK OF ECONOMIC INEQUALITY, <http://www.chartbookofeconomicinequality.com/inequality-by-country/norway/> (last visited Feb. 10, 2015).

¹⁷⁴ The World Bank, *supra* note 172. While this number represents income inequality, which can mask underlying wealth inequality, Norway stands out as a country with fairly equal wealth distribution as well: the top 1% of the population accounted for 18.9% of the country’s wealth as of 2011. CHARTBOOK OF ECONOMIC INEQUALITY, *supra* note 173.

system of corrections—because there is, again, effectively only one group to which individual voters can attach their loyalties.¹⁷⁵ In other words, the Norwegians in prison are part of the same economic class as the voters that support and advocate for the policies that will determine how a prison sentence plays out.

Across the Atlantic, the United States is currently experiencing its most severe wealth inequality since the Great Depression.¹⁷⁶ The wealthiest 160,000 U.S. families now own as much wealth as the country's 145,000,000 poorest families.¹⁷⁷ The United States's *Gini Coefficient* was 41.1 as of 2010—nearly double that of Norway.¹⁷⁸

After a period of substantial wealth democratization following World War II, the wealth gap began to widen anew at the start of the 1980s.¹⁷⁹ While the seeds of the mass-incarceration era, the time marked by rampant recidivism, were planted in the 1970s, the prison boom itself got under way in the early 1980s when Ronald Reagan declared war on drugs.¹⁸⁰ The causes of the prison boom are varied and complex. But the question here is not whether income inequality was the cause of this current era of mass incarceration. Instead, we are asking why the U.S. population is so acquiescent to this system of perpetual mass incarceration when it is well known that other systems exist, and that those systems are much more efficient at reducing crime and the criminal population.

In that light, the relationship between the two phenomena is more transparent. While one did not necessarily cause the other, the two have occurred roughly along the same timeline. As wealth increasingly divided the United States population, that same population grew increasingly heterogeneous in its socio-economic classes. “Americans think of the poor as members of some different group than themselves, whereas Europeans think of the poor as members of their own group.”¹⁸¹ As heterogeneity increases, support for welfare policies declines.¹⁸² Thus, as the population became increasingly divided along the lines of economic status, its capacity to understand, care about, and advocate against the concurrent phenomenon of mass-incarceration decreased.¹⁸³

The counter-argument is that as the wealth gap increased, the wealthy comprised an increasingly smaller percentage of the population.¹⁸⁴ Therefore, the

¹⁷⁵ FONG ET AL., *supra* note 144, at 17-18.

¹⁷⁶ Chris Matthews, *Wealth inequality in America: It's worse than you think*, FORTUNE, Oct. 31, 2014, <http://fortune.com/2014/10/31/inequality-wealth-income-us/>.

¹⁷⁷ *Id.* And no, the author did not accidentally type too many zeroes.

¹⁷⁸ THE WORLD BANK, *supra* note 172.

¹⁷⁹ *Id.*

¹⁸⁰ JUST. POL'Y INST., http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_poster_final.pdf (last visited Feb. 12, 2016).

¹⁸¹ Alesina et al., *supra* note 151, at 43.

¹⁸² Luttmer, *supra* note 140, at 519.

¹⁸³ Alesina et al., *supra* note 151, at 61.

¹⁸⁴ Alan Dunn, *Average America vs the One Percent*, FORBES (Mar. 21, 2012, 5:17 AM), <http://www.forbes.com/sites/moneywisewomen/2012/03/21/average-america-vs-the-one-percent/>.

majority of the population became increasingly comprised of the impoverished. So, the majority of the population should then empathize with the plight of those in their socioeconomic status, correct? And, as the argument goes, if there is such an empathetic majority, we should see political change brought on by the force of that majority, right?

But of course, in reality, raw numbers do not always carry the day in a democracy. In fact, the wealthy minority actually has a louder political voice than that of the impoverished majority. At the most basic level, members of lower socio-economic classes are less likely to vote.¹⁸⁵ Additionally, voting is correlated to education level,¹⁸⁶ which is in turn correlated to economic status.¹⁸⁷ The population of current and former inmates is mostly comprised of people in lower socio-economic classes, and likely to stay there.¹⁸⁸ Moreover, a common consequence of imprisonment is disenfranchisement.¹⁸⁹ In 48 states, inmates are banned from voting.¹⁹⁰ In 35 states, parolees are banned from voting.¹⁹¹ Four states have outright bans on voting for any person with a felony on her record, while eight others conditionally ban certain convicts from the polls.¹⁹² Thus, those most empathetic to the troubles of the U.S. inmate are actually those with the least political power to effect change.

Additionally, economic group loyalty does not exist independent of racial group loyalty. Thus, even if the lower economic classes did possess the political strength to overcome the wealthy elite by sheer numbers, reform would still be difficult. Lower socio-economic classes are more racially divided than the general U.S. population.¹⁹³ Racial group loyalties operate within this impoverished majority to divide and disrupt just as they do within the general population.¹⁹⁴ Racial group loyalties, then, interfere with the ability of this would-be political

¹⁸⁵ PEW RESEARCH CENTER, <http://www.people-press.org/2014/10/31/the-party-of-nonvoters-2/> (last visited Feb. 28, 2015) (45% of nonvoters had difficulty paying their bills and were more likely to borrow money from peers and receive government benefits.).

¹⁸⁶ *Id.* (72% of likely voters have completed at least some college and 54% of nonvoters have not attended college.).

¹⁸⁷ AM. PSYCHOL. ASS'N, <http://www.apa.org/pi/ses/resources/publications/factsheet-erm.aspx> (last visited Feb. 28, 2015) (noting that areas of low socioeconomic status are characterized by “low levels of educational attainment”).

¹⁸⁸ Tierney, *supra* note 163.

¹⁸⁹ THE SENTENCING PROJECT 1, http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf (last visited Feb. 12, 2016).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Inequality.org Staff, *Poverty More than a Matter of Black and White*, INEQUALITY.ORG (Oct. 8, 2012), <http://inequality.org/poverty-matter-black-white/> (Whites make up only 41.5% of the United States’s poor, while blacks comprise 25.4% and Hispanics make up 28.6% of that population); U.S. CENSUS BUREAU, *supra* note 158.

¹⁹⁴ Alesina et al., *supra* note 151, at 61.

majority to present the unified political front necessary to enact meaningful change.

Finally, the private prison industry has a large political influence that impedes the political power of the voting public and distorts the political landscape. “In the past decade, three major private companies spent \$45 million on campaign contributions and lobbyists,” at both the state and federal levels.¹⁹⁵ These efforts went towards advancing legislation to increase sentences and inmate populations as well as stricter immigration laws to increase states’ needs to incarcerate.¹⁹⁶

“When people blame the poor for their poverty, they support less redistribution than when they believe that the poor are poor through no fault of their own.”¹⁹⁷ These class divisions destroy the feelings of reciprocity that drive support for welfare policy because they cause more socially and politically powerful to “other-ize” the impoverished.¹⁹⁸ Moreover, the members of the white middle and upper class often conflate race and poverty, reinforcing their perception of the poor as an out-group because “minorities are disproportionately represented among the poor.”¹⁹⁹ The wealthy therefore find it difficult, if not impossible, to see the value in supporting the downtrodden and unfortunate.²⁰⁰ Thus, those of higher socio-economic status do not fully, or may even lack the capacity to, comprehend the revolving-door nature of the prison cell and the broad social, economic, and political forces that lead to crime.²⁰¹

C. Group Loyalty and Empathy

Reciprocity is the willingness of individuals within a country to care for and support those similarly situated to themselves. It is, in other words, a population’s capacity for empathy. An individual’s support for welfare is strongest when the programs will support people like that individual precisely because that individual perceives that the program’s beneficiaries *are like herself*.²⁰² That is to say, helping someone like me is almost like helping myself, and gives me a like satisfaction.²⁰³ Assisting someone in my same socio-cultural situation creates and solidifies the bonds that those common circumstances have

¹⁹⁵ Aviva Shen, *Private Prisons Spend \$45 Million on Lobbying, Rake In \$5.1 Billion for Immigrant Detention Alone*, THINKPROGRESS (Aug. 3, 2012, 12:00 PM), <http://thinkprogress.org/justice/2012/08/03/627471/private-prisons-spend-45-million-on-lobbying-rake-in-51-billion-for-immigrant-detention-alone/>.

¹⁹⁶ *Id.*

¹⁹⁷ FONG ET AL., *supra* note 144, at 2.

¹⁹⁸ *Id.* at 21.

¹⁹⁹ Alesina et al., *supra* note 151, at 43-44.

²⁰⁰ *Id.* at 43 (“A large majority of white Americans believe that African-Americans would be as wealthy as white if they tried hard enough.”).

²⁰¹ See e.g. Anne Campbell & Steve Muncer, *Causes of Crime: Uncovering a Lay Model*, 4 CRIMINAL JUSTICE AND BEHAVIOR 415-17 (1990) (finding that more societal, external factors led to criminal behavior than did psychological or personal motives.).

already established. It affirms the expectations I have that arise from the security of being a member of a discrete, cohesive group. In a way not unlike how a sister would support her brother despite whatever personal and financial detriment she herself might suffer, voters support their broader cultural groups as though part of some massive extended family. Support for welfare is actually greater for those that live close to welfare recipients of the same race.²⁰⁴ Thus, the homogeneity of the Norwegian population makes it easy, even natural, for Norwegian citizens to understand and support a caring, rehabilitative system of criminal justice.²⁰⁵ The people benefiting from the fruits of that system are kin. The cultural bonds that span across both the general and inmate populations justify the expense of providing the proper care.

In the United States, the situation is almost completely turned on its head. The prison population is mostly comprised of racial groups and economic classes that lie outside those that comprise the majority of the voting public. As a result, an individual U.S. citizen cannot see the reciprocity in extending the resources necessary to reform the system of corrections. That citizen is without empathy, and without empathy there can be no support for rehabilitative criminal justice.

That is the fundamental reason for the stark contrast between the U.S. and Norwegian correctional systems. In Norway, crime and incarceration happen to Norway and to the Norwegian people.²⁰⁶ In response, the voters took to the polls to elect the representatives that would protect their own and heal the wounds that an ineffectual prison system causes. In the United States, the political majority considers criminals and inmates members of an alien class. Crime and punishment exist in a world apart; they rain down upon those that the majority perceives as rightfully deserving of such treatment.²⁰⁷ And so, the U.S. voter did not take to the polls to reform much of anything at all, let alone the country's prisons.

IV. IMPLICATIONS

Unfortunately, empathy is not something that legislation can produce *ex nihilo*. Policymakers cannot simply change the way their constituents think. Does this then mean that recidivism is an intractable problem? After all, the conceit of

²⁰² Fong & Luttmer, *supra* note 142, at 3.

²⁰³ Mark Van Vugt & Claire M. Hart, *Social Identity as Social Glue: The Origins of Group Loyalty*, 86 J. OF PERSONALITY & SOC. PSYCHOL. 586-87 (2004) (describing social identity within the context of group loyalty as "social glue").

²⁰⁴ Luttmer, *supra* note 140, at 514-15.

²⁰⁵ Alesina et al., *supra* note 151, at 43.

²⁰⁶ Vugt & Hart, *supra* note 203, at 587 (noting that "when people identify highly with their group, they see themselves primarily as group members" and that "in emergency situations, high group identifiers invest more of their personal resources in their group," and "group identification increases the commitment of members to their group").

²⁰⁷ FONG ET AL., *supra* note 144, at 17-19.

this Note has been that the demographics of the United States present difficulties that inhibit public support for the reforms necessary to reduce recidivism. If there is no public support, then policymakers have no incentive to institute change. Moreover, mass incarceration and recidivism are not isolated concerns. They both fuel and are fueled by many other complex and deeply-rooted U.S. problems: the wealth gap, *de facto* segregation, and ongoing racial tensions; low-quality public education and exorbitantly expensive higher education; a crude understanding of human agency and its relation to biology, neurology, and evolution; and an even cruder understanding of psychological illness—to name just a few. Thus, attempting to address recidivism out of context will almost certainly prove fruitless. True reform of the U.S. system of corrections will only come as the country itself matures and overcomes petty prejudices and base human instinct.

A. Recidivism in the United States as an Intractable Problem

The unfortunate answer is yes: today recidivism is probably an intractable problem. Group loyalty is a deeply ingrained psychological framework that develops from birth and is rooted in the evolutionary development of the human race. “Building attachments to groups is part of the normal socialization process.”²⁰⁸ As a child grows to adulthood, she develops from being egocentric and focused on herself to socio-centric and focused on herself “as part of a large social setting.”²⁰⁹ During this progression, individuals distinguish their own groups from others, “becoming more attached and sympathetic to some and more critical and detached from others,” such that their group membership from birth and childhood experiences is largely determinative of their perception of in-groups and out-groups.²¹⁰ This likely developed as a survival mechanism: groups comprised of cooperative members were more successful than those that were not, and group loyalties provided a sense of identity with which to distinguish between friends and foes.²¹¹ Thus, those that attached to and identified with a discrete group survived, and those that did not were selected out. So, to overcome one’s group loyalty and find a reciprocal relationship with members of perceived out-groups, one must overcome deeply ingrained psychology, socialization, and human evolutionary biology.²¹² Unfortunately, when 42% of a nation’s population does not even believe in evolution,²¹³ and the public remains unfairly

²⁰⁸ Druckman, *supra* note 166, at 45.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Luttmer, *supra* note 140, at 521.

²¹³ Frank Newport, *In U.S., 42% Believe Creationist View of Human Origins*, GALLUP (Jun. 2, 2014), <http://www.gallup.com/poll/170822/believe-creationist-view-human-origins.aspx>.

skeptical of psychological study,²¹⁴ overcoming the restrictive effects of group loyalty is probably an insurmountable task.²¹⁵

B. Surmounting the Insurmountable

1. Group Loyalty is Malleable

However, the situation is not hopeless. First and foremost, once an individual has attached her loyalty to a certain group such that she begins to identify with it, she is likely to “engage in activities to help the group even if it would involve making a personal sacrifice.”²¹⁶ Additionally, there is evidence that group definitions are malleable.²¹⁷ “Race may serve as a marker for in-group status, *but it need not be such a marker.*”²¹⁸ Thus, U.S. citizens, like anyone, have the capacity to redefine their group attachments. If a majority of U.S. Americans were able to overcome their traditional group loyalties—to identify themselves as *Americans*, rather than as members of White America or Wealthy America—then the country as a whole would reap the benefits associated with in-group status, namely perceived reciprocity, just as racially and economically homogenous states like Norway already do. Egalitarian social reforms, like a rehabilitative system of criminal justice, would grow out of that change in perspective.

2. Bipartisan Support

Furthermore, in a country that is often sharply divided along political lines, the issue of prison reform generally has bipartisan support.²¹⁹ Economic conservatives and even Evangelical Christians and libertarians have voiced their

²¹⁴ See Scott O. Lilienfeld, *Public Skepticism of Psychology: Why Many People Perceive the Study of Human Behavior as Unscientific*, AM. PSYCHOLOGIST (2011). A recent study found that only 30% of respondents believed that “psychology attempts to understand the way people behave through scientific research,” and that “few participants seemed aware of psychology’s impact on myriad applied domains.” *Id.*

²¹⁵ Jim Taylor, *Understanding Cognitive Bias*, HUFFINGTON POST (Jul. 22, 2011, 8:28 AM), http://www.huffingtonpost.com/dr-jim-taylor/cognitive-biases_b_896421.html (noting that cognitive biases affect even scientists employing the scientific method, remarking, “there is no magic pill that will inoculate use from these cognitive biases”).

²¹⁶ Vugt & Hart, *supra* note 203, at 586.

²¹⁷ Alesina et al., *supra* note 151, at 42.

²¹⁸ *Id.* (emphasis added).

²¹⁹ Keith Humphries, *The U.S. Imprisonment Rate has Fallen for the Fifth Straight Year. Here’s Why.*, THE WASH. POST, Sep. 16, 2014, <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/09/16/the-u-s-imprisonment-rate-has-fallen-for-the-fifth-straight-year-heres-why/> (though noting, “[t]he U.S. incarceration rate is still remarkably high.”).

support for correcting our correctional system.²²⁰ Additionally, because states rather than the federal government control most of the prison policy throughout the United States,²²¹ the political numbers needed to institute reforms are significantly smaller, while the meaningful access of constituents to policymakers is much greater. Thus, although human biology and fundamental psychology stand as a barrier to public support for change, the typical political roadblocks that present themselves before other issues would not necessarily stand in the way of change once public awareness and support passed the inflection point.

3. Social Trends Present Unique Opportunities for Reform

One way to take advantage of this relatively favorable political landscape would be to ride new social trends in the voting population that present reformers with the opportunity to display the power of changing perspective. For example, the recreational use of marijuana is now legal in Washington, Colorado, Alaska, Washington D.C., and soon, Oregon.²²² The positive effects of this legislative change are well documented. Most notably, Colorado earned \$76 million in total revenue from the new cannabis industry in 2014.²²³ At the same time, the harmful effects that critics forecasted never materialized.²²⁴ Colorado's legalization of marijuana suggests that the correctional policies in vogue in the 1980's may be holding the country back from realizing the mass benefits of a modern and realistic approach to crime. Advocates of prison reform can point to Colorado's success to show how a shift in public perception can yield significant fiscal and social benefits.²²⁵ This analogy is especially powerful given that the current correctional infrastructure costs taxpayers \$39 billion *without significantly reducing the prison population.*²²⁶

²²⁰ *Id.*

²²¹ *Id.*

²²² Matt Ferner, *Recreational Marijuana Now Legal in D.C.*, HUFFINGTON POST (Feb. 26, 2015, 12:05 AM), http://www.huffingtonpost.com/2015/02/26/marijuana-legalization-dc_n_6753554.html.

²²³ Kristen Wyatt, *Colorado pulls in \$76M in marijuana taxes and business fees for 2014*, THE CANNABIST (Feb. 10, 2015, 5:02 PM), <http://www.thecannabist.co/2015/02/10/colorado-pot-tax-44-million-recreational-taxes-2014/29510/>.

²²⁴ Josh Voorhees, *A Blazing Start*, SLATE (Jan. 16, 2015, 5:40 PM), http://www.slate.com/articles/news_and_politics/politics/2015/01/one_year_in_colorado_s_great_pot_experiment_has_been_a_sweeping_success.html.

²²⁵ *Id.*

²²⁶ CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INSTITUTE OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 6 (2012), <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>; JUST. POL'Y INST., *supra* note 180 (illustrating the steep increase in the inmate population since 1970).

4. Grass Roots

But in the end, individuals can do little more than give voice to the politically voiceless in traditional ways like scrutinizing candidates and then voting for those that are likely to be amenable to prison reform or contacting legislators to apply pressure. Lobbying legislatures for incremental reforms such as the repeal of laws that disenfranchise convicts could also have a dramatic impact over time. By allowing inmates and parolees to vote, those closest and most empathetic to the plight of the U.S. prisoner would at last have a chance to politically advocate for reforms to the system that failed them. But, given the sociological nature of the conundrum, perhaps the most important thing any individual can do is to discuss these issues openly to challenge the apathy of peers and combat the deleterious effects of fractious group loyalties.

Of course, in these discussions one may find that many fear that this “softer” approach to crime is acquiescence to criminal behavior.²²⁷ However, treating inmates humanely is not a statement that society finds crime acceptable. Because rehabilitation is more effective than punishment at reducing the crime rate, the willingness of a state to invest the resources necessary to achieve such a corrections system displays a deeper dedication to the eradication of crime. On the other hand, a punishment-based system of nominal “deterrence” that fails to address inmate recidivism shows instead that the persistence of criminal behavior is acceptable so long as the up-front appearance of corrections satisfies the casual observer. Additionally, the humane treatment of prisoners signals that the community does not tolerate violence and unequal treatment in any form, whether state or civilian, and regardless of perceived desert. A punitive system breeds a culture of violence and contempt by condoning the infliction of pain and suffering so long as the state wields them as punishment.

V. CONCLUSION

Prison recidivism is as intractable as any of the problems that plague a country with a population as racially and financially fractious as our own. As the comparison of the U.S. and Norwegian prison systems shows, the driving force for reform is public sentiment. Public sentiment begins at the level of the individual. We cannot snap our fingers and transform our nation into an egalitarian utopia. We cannot hold hands and pray away irrational prejudice, stereotyping, and defunct social mores. There can be no change until we each, on our own, transcend our base human nature to develop true empathy for all those around us.

Recidivism is thus not the disease from which our country suffers. It is a symptom of a much deadlier malady—one that cannot be cured without a total

²²⁷ Nikola Milanovic, *Norway's New Prisons: Could They Work Here?*, STAN. PROGRESSIVE (Aug. 2010), <http://web.stanford.edu/group/progressive/cgi-bin/?p=653>.

paradigm shift away from general disregard for, and marginalization of, the country's political minorities. The only immediate solution lies within each person to make an individual choice: to choose to understand and empathize rather than maledict and cast judgment; to choose to experience the reality of life outside one's own narrow demographic; to choose to educate oneself about the true meaning of personhood and the significance of upbringing and environment; to choose to vote to give voice to the voiceless; and most importantly, to admit that the attitudes and infrastructures that appeared adept in the 1950s and 1980s are no longer tenable. There is, after all, no moon that moves the tides of change. They rise instead only with a groundswell of individuals wielding justice and empathy to take a stand for compassion, equality, and human dignity.

