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Molly Townes O'Brien  
*Australian National University College of Law*

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# Criminal Law's Tribalism

MOLLY TOWNES O'BRIEN<sup>†</sup>

*Science advanced, knowledge grew, nature was mastered,  
but Reason did not conquer and tribalism did not go away.*<sup>1</sup>

## I. INTRODUCTION

In every country where the question has been studied, incarceration rates for members of some minority groups greatly exceed those for the majority population. Disproportionate incarceration is not a problem of a single ethnic group or one of a set of historical circumstances. It is a global problem that is fundamentally connected to social group identity. This Article explores the role that criminal law serves in group-identity formation. It suggests that although in-group bias is a deeply embedded aspect of criminal justice systems, it may have outlived its usefulness on an increasingly small planet. Building a common or super-group identity may be necessary to achieve greater justice in increasingly multi-ethnic and mobile societies.

From the available data on the race or ethnicity of the world's prisoners,<sup>2</sup> it is possible to discern a global tendency of each population to imprison a disproportionate percentage of some minority groups.<sup>3</sup> African-Americans and Hispanics are disproportionately represented in American prisons.<sup>4</sup> Aboriginal Australians are incarcerated at fourteen times the rate

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<sup>†</sup> Associate Professor of Law, ANU College of Law, Australian National University. I would like to thank Hollie Kerwin for her excellent research assistance and Charles Lineweaver for his comments and inspiration.

<sup>1</sup> HAROLD R. ISAACS, *IDOLS OF THE TRIBE: GROUP IDENTITY AND POLITICAL CHANGE* 25 (1975).

<sup>2</sup> Many countries do not keep data on the race or ethnicity of prisoners. In those countries that do keep data, the differing definitions of racial and ethnic groups make it difficult to draw transnational comparisons. Nevertheless, in every country where data is available, it appears that some minority groups are disproportionately imprisoned. See generally *World Prison Brief*, INTERNATIONAL CENTRE FOR PRISON STUDIES (Aug. 30 2011) (providing international prison statistics by country), <http://www.prisonstudies.org/info/worldbrief/>; see also Roy Walmsley, *Global Incarceration and Prison Trends*, 3 FORUM ON CRIME AND SOCIETY 65, 65–69 (2003) (providing data on international imprisonment rates and trends).

<sup>3</sup> Within any society, not all minority groups experience higher levels of incarceration. Rather, higher levels of incarceration are found to apply to stigmatized or oppressed minorities. For an excellent discussion of racial stigma, see generally R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004).

<sup>4</sup> According to the U.S. Bureau of Justice Statistics, at midyear 2010, “whites represented 44.3% of all jail inmates, blacks represented 37.8%, and Hispanics represented 15.8%. These jail inmate distributions have remained nearly stable since midyear 2000.” Todd D. Minton, *Jail Inmates at Midyear 2010 – Statistical Tables*, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, 1 (April 14, 2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim10st.pdf>. Of the total population in

of white Australians.<sup>5</sup> In New Zealand, where Maori make up 15 percent of the population, they make up 51.2 percent of the prison population.<sup>6</sup> Unequal imprisonment of minority groups has also been documented in the Czech Republic, Britain, France, Israel, Sweden, Canada, and Germany.<sup>7</sup> As Michael Tonry points out,

What is most striking about [the data demonstrating overrepresentation of minorities in prison] is that they come from so many countries. They apply to many groups and many countries, suggesting that bias, disparities, and disparate impact policy dilemmas are not uniquely the characteristics and problems of any particular minority groups or countries but are endemic to heterogeneous developed countries in which some groups are substantially less successful economically and socially than the majority population.<sup>8</sup>

Further, incarceration rates around the globe are rising, making the disproportionate impact of criminal punishment on minority groups a matter of growing importance.<sup>9</sup>

Data demonstrating the disproportionate imprisonment of oppressed minority populations abounds as does empirical research that seeks to explain the data. Much of this research focuses on the issue of what has been described as the “elevated rates of offending (according to official statistics) among oppressed racial minorities . . . .”<sup>10</sup> In other words, for

2010, blacks represent only 12.6%. *Overview of Race and Hispanic Origin: 2010*, 4 tbl.1, U.S. CENSUS BUREAU (AUG. 30, 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

<sup>5</sup> The age standardised imprisonment rate for Aboriginal and Torres Strait Islander prisoners at 30 June 2010 was 1,892 Aboriginal and Torres Strait Islander prisoners per 100,000 adult Aboriginal and Torres Strait Islander population. The equivalent rate for non-Indigenous prisoners was 134 non-Indigenous prisoners per 100,000 adult non-Indigenous population.

The rate of imprisonment for Aboriginal and Torres Strait Islander prisoners was 14 times higher than the rate for non-Indigenous prisoners at 30 June 2010, no change from the rate in 2009.

*Prisoners in Australia, 2010*, AUSTRALIAN BUREAU OF STATISTICS (Dec. 9, 2010), <http://www.abs.gov.au/ausstats/abs@.nsf/Products/12CF5E952D0E70C6CA2577F3000F0AEC?opendocument>.

<sup>6</sup> *Facts and Statistics, March 2011*, N.Z. DEP'T OF CORR., [http://www.corrections.govt.nz/about-us/facts\\_and\\_statistics/prisons/march\\_2014.html#total](http://www.corrections.govt.nz/about-us/facts_and_statistics/prisons/march_2014.html#total) (Aug. 30 2011); Simone Bull, *The Land of Murder, Cannibalism, and All Kinds of Atrocious Crimes? Maori and Crime in New Zealand, 1853–1919*, 44 BRIT. J. CRIMINOLOGY 496, 496 (2004).

<sup>7</sup> Michael T. Costelloe, et al., *The Social Correlates of Punitiveness Toward Criminals: A Comparison of the Czech Republic and Florida*, 23 JUST. SYS. J. 191, 207–09 (2002) (Gypsies in the Czech Republic); Alina Korn, *Rates of Incarceration and Main Trends in Israeli Prisons*, 3 CRIME & JUSTICE 29, 37–41 tbl. 1 (2003) (Palestinians in Israel). See generally 21 CRIME & JUSTICE (Michael Tonry, ed. 1997) (immigrants in Germany, England and Wales, Sweden, Canada and France).

<sup>8</sup> Michael Tonry, *Ethnicity, Crime, and Immigration*, in 21 CRIME & JUSTICE 1, 19 (1997).

<sup>9</sup> Walmsley, *supra* note 2, at 70 (describing global trends in increasing incarceration).

<sup>10</sup> Coretta Phillips & Benjamin Bowling, *Racism, Ethnicity and Criminology: Developing Minority Perspectives*, 43 BRIT. J. CRIMINOLOGY 269, 269 (2003).

many researchers the question is: Why do minority group members commit more crimes? Pursuing the answer to this question has led researchers to explore the criminogenic influence of socioeconomic deprivation and social disorganization.<sup>11</sup> Others have considered whether crime may have genetic or biological factors.<sup>12</sup>

At the other end of the spectrum are researchers who question whether the official crime rate and imprisonment statistics are reflective of actual rates of criminal behavior. These scholars have considered whether discriminatory law enforcement, criminal justice processing, or sentencing patterns account for elevated levels of minority imprisonment.<sup>13</sup> Similarly, researchers have also considered whether the law itself contributes to the disproportionate imprisonment of minority groups through the establishment of behavioral norms that do not reflect the values of the minority culture.<sup>14</sup>

The debate, which has sometimes been characterized as “polemical” and “sterile”,<sup>15</sup> has not ignored the possibility that the causes of disproportionate incarceration are not mutually exclusive—that is, that a variety of factors may all contribute to the overrepresentation of some minorities in prison.<sup>16</sup> Much of the research, however, has focused predominantly on one nation or one criminal justice system.<sup>17</sup> Studies

<sup>11</sup> ELLIOTT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* 131 (Metropolitan Books et al., 1st ed. 1998); Travis C. Pratt & Francis T. Cullen, *Assessing Macro-Level Predictors and Theories of Crime: A Meta-Analysis*, in 32 *CRIME & JUSTICE* 373, 373–79 (2005); CLIFFORD R. SHAW ET AL., *DELINQUENCY AREAS* 8–9 (1929).

<sup>12</sup> Thomas A. Regulus, *Race, Class and Sociobiological Perspectives on Crime*, in *ETHNICITY, RACE AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE* 46–47 (Darnell F. Hawkins ed., 1995); JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 62 (1985).

<sup>13</sup> Hans-Jorg Albrecht, *Ethnic Minorities, Crime, and Criminal Justice in Germany*, in 21 *CRIME AND JUSTICE* 31, 69–85 (Michael Tonry ed., 1997) (examining research in Germany relating to discriminatory processing and sentencing of foreigners); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 *U. PA. J. CONST. L.* 296, 303 (2001) (examining discriminatory processing of African Americans in the U.S.); William J. Stuntz, *Race, Class, and Drugs*, 98 *COLUM. L. REV.* 1795, 1825 (1998) (discussing the frequent police presence and arrests in predominately poor black communities due to elevated risks of illegal drug trade); P.A. J. Waddington et al., *In Proportion: Race, and Police Stop and Search*, 44 *BRIT. J. CRIMINOLOGY* 889, 890, 911 (2004) (considering police stop and search procedures in the United Kingdom).

<sup>14</sup> Zoann K. Snyder-Joy, *Self-Determination and American Indian Justice: Tribal versus Federal Jurisdiction on Indian Lands*, in *ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE* 310, 316–18 (Darnell F. Hawkins ed., 1995); THORSTEN SELLIN, *CULTURE CONFLICT AND CRIME: A REPORT OF THE SUBCOMMITTEE ON DELINQUENCY OF THE COMMITTEE ON PERSONALITY AND CULTURE* (1938).

<sup>15</sup> Phillips & Bowling, *supra* note 10, at 270.

<sup>16</sup> Theodore G. Chiricos & Charles Crawford, *Race and Imprisonment: A Contextual Assessment of the Evidence*, in *ETHNICITY, RACE AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE* 281, 281 (Darnell F. Hawkins ed., 1995).

<sup>17</sup> There are some notable exceptions. *See, e.g.*, Costelloe, et al., *supra* note 7, at 191–92 (comparing sentencing patterns and ethnic antipathy in the Czech Republic and Florida); Pratt & Cullen, *supra* note 11, at 375 (comparing criminological from multiple jurisdictions); David Jacobs & Richard Kleban, *Political Institutions, Minorities, and Punishment: A Pooled Cross-National Analysis*

therefore present findings that may appear to be limited to the particular racial groups or ethnic minorities studied. Each study, taken alone, may create a false perception that the problem of disproportionate incarceration is a characteristic of one minority group, one historical or political situation, or one kind of culture clash. The problem may therefore be falsely perceived as one of “Aboriginal criminality” or “racism in the United States.” Thus, a potential risk of looking at a single nation or criminal justice system is that the research itself may contribute to existing stereotypes, misconceptions and biases against the oppressed minority.<sup>18</sup> This risk is not, of course, a sufficient reason not to perform the research; a significant body of work addresses the issues of racialized punishment without falling into the trap of stereotyping.<sup>19</sup> Such work may be extremely useful, not only to improve understanding of the problem of over-incarceration of certain minority groups, but also to assist in formulating strategies for reducing minority imprisonment rates within one culture or country. It is limited, however, in scope and implication to the culture or cultures studied.

Some scholars advocate taking a comparative or cross-national approach to considering the problem of overrepresentation of certain ethnic minorities in prison, but do so only with great caution.<sup>20</sup> There are good reasons to proceed with caution into the realm of making cross-national generalizations or undertaking studies of ethnic minority incarceration. Differences in the history of various minority groups and their relationships with majority cultures, differences in the economic and political structure of various societies, and differences in the criminal justice systems of each country, all undoubtedly play an important role in producing outcomes that are idiosyncratic and not susceptible to a single explanatory theory. Further, empirical research faces enormous difficulty in collecting and comparing data from sources that use differing definitions of minority or ethnic group status, and of criminal behavior, etc.<sup>21</sup>

It is nevertheless important to explore the implication of what has been

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*of Imprisonment Rates*, 82 SOC. FORCES 725, 726 (2003) (a cross-national analysis of theories of ethnic crime); Rick Ruddell & Martin G. Urbina, *Minority Threat and Punishment: A Cross-National Analysis*, 21 JUST. Q. 903, 904 (2004).

<sup>18</sup> Darnell F. Hawkins, *Ethnicity, Race, and Crime: A Review of Selected Studies*, in ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE 11, 35–36 (Darnell F. Hawkins ed., 1995).

<sup>19</sup> See, e.g., CHRIS CUNNEEN, CONFLICT, POLITICS AND CRIME: ABORIGINAL COMMUNITIES AND THE POLICE 24–25 (Allen & Unwin eds., 2001); Angela Yvonne Davis, *Race and Criminalization: Black Americans and the Punishment Industry*, in THE ANGELA Y. DAVIS READER 61, 62–63 (Joy James ed., 1998).

<sup>20</sup> Robert F. Sampson & Janet L. Lauritsen, *Ethnicity, Crime, and Immigration: Comparative and Cross National Perspectives*, in 21 CRIME & JUSTICE 311, 312 (1997) (discussing the perils of research on race, ethnicity and crime in the United States); Tonry, *supra* note 8, at 4–11 (pointing out problems in multi-national comparisons).

<sup>21</sup> Tonry, *supra* note 8, at 1–6.

demonstrated in numerous single-nation studies: In every country where the question has been studied, the “crime and incarceration rates for members of some minority groups greatly exceed those for the majority population.”<sup>22</sup> If disproportionate incarceration (or punishment) of some disfavored minorities is found everywhere, the obvious implication is that the problem is not particular to one ethnic group. Nor is it fundamentally a problem of one race or one historical racial conflict. The members of oppressed minority groups around the world include not only African Americans, Maori, Australian Aboriginals and other people of color, but also Turks (in Germany), Roma people, and Armenians, who are “white.”<sup>23</sup> Disproportionate punishment impacts immigrant groups, but also extends to first peoples who have occupied the territory where they live for thousands of years, including Native Americans, Kurdish people, Australian Aboriginals, and Torres Strait Islanders.<sup>24</sup> Neither is disproportionate imprisonment found only in the wake of capitalist post-industrialism or post-colonialism, as demonstrated by the high rate of incarceration of Uyghur people in China.<sup>25</sup> The disproportionate imprisonment of some disfavored minorities appears to be a global phenomenon. While theories of disparate incarceration that focus on racism, immigration, capitalism and colonialism may have strong explanatory power at the level of a single legal system, they cannot explain the global phenomenon.

One may argue that any attempt to understand disparate punishment at a global level must founder on the rocks of particularized histories, individual cultural and legal differences, and varying economic and political circumstances. It would not be possible to gather appropriate data or test a global theory of disproportionate incarceration. Such a global theory would be vulnerable to the same critique that has been leveled at conflict theory: It would “explain everything and predict nothing.”<sup>26</sup> On the other hand, it may be that criminology has already grasped the global nature of disproportionate punishment, but has not made it a point of emphasis because of the difficulties of studying global phenomena.

This Article does not attempt to create a grand theory for understanding disparate imprisonment in all of its various historical and

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<sup>22</sup> *Id.* at 12.

<sup>23</sup> See generally CRIME & JUSTICE, *supra* note 7 (discussing the disproportionate punishment of minorities in various countries).

<sup>24</sup> Tonry, *supra* note 8, at 6; Thomas J. Young, Commentary, *Native American Crime and Criminal Justice Require Criminologists' Attention*, 1 J. CRIM. JUST. EDUC. 111, 111–12 (1990).

<sup>25</sup> See *Uyghur Rights and Writers*, INTERNATIONAL PEN UYGHUR CENTER (Aug. 28, 2011, 1:48 PM), <http://www.uyghurpen.org/writers-in-prison.html>. Chinese imprisonment rates are very difficult to study because of the lack reliable statistical information. The discrimination against Uyghur people is, however, widely acknowledged and is described to include disproportionate incarceration.

<sup>26</sup> CHARIS E. KUBRIN ET AL., RESEARCHING THEORIES OF CRIME AND DEVIANCE 239 (2009).

cultural manifestations. Rather it suggests that by shifting focus from the particular to the global, from the cultural or racial to the human, it may be possible to gain new insights. Turning to some of the traditional and basic building blocks of criminology—anthropology and psychology—this paper draws attention to the fact that, although certain ethnic, racial and migrant groups are at the receiving end of disparate punishment, the problem is global. It may be beneficial to address the problem from a global or human, rather than jurisdictional perspective.

## II. HUMAN UNIVERSALS AND GROUP IDENTIFICATION

Anthropologists tell us that some things are universal to all humans. For example, all human societies have language, dance, music, jokes. In all human societies, people suck their wounds. We show surprise, fear and happiness through facial expressions. More fundamentally for this discussion, human beings are not solitary dwellers. We live in groups, develop group identity, and maintain group unity.<sup>27</sup> In George Vold's description of human nature, "people are fundamentally group-involved beings whose lives are both a part of and a product of their group associations."<sup>28</sup>

Although human groups may be structured in a wide variety of ways, an "important consequence of group structuring is the delineation of *in-group* from *out-groups*."<sup>29</sup> According to Isaacs, "[t]his fragmentation of human society is a pervasive fact in human affairs and always has been."<sup>30</sup> Sumner, who contributed the concept of ethnocentrism to social science, conceived of it first in the context of a "primitive society."<sup>31</sup>

The conception of the "primitive society" which we ought to form is that of small groups scattered over a territory. . . . A group of groups may have some relation to each other (kin, neighborhood, alliance, connubium and commercium) which draws them together and differentiates them from others. Thus a differentiation arises between ourselves, the we-group, or in-group, and everybody else, or the others groups, out-groups. The insiders in a we-group are in a relation of peace, order, law, government, and industry, to each other . . . .Each

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<sup>27</sup> DONALD E. BROWN, HUMAN UNIVERSALS 130–37 (1991).

<sup>28</sup> GEORGE B. VOLD & THOMAS J. BERNARD, THEORETICAL CRIMINOLOGY 271 (3rd ed. 1986).

<sup>29</sup> Muzafer Sherif, *A Preliminary Experimental Study of Inter-group Relations*, in SOCIAL PSYCHOLOGY AT THE CROSSROADS 388, 395 (John H. Rohner & Muzafer Sherif eds., 1951).

<sup>30</sup> ISAACS, *supra* note 1, at 2.

<sup>31</sup> WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS MORES, AND MORALS 12 (1979).

group nourishes its own pride and vanity, boasts itself superior, exalts its own divinities, and looks with contempt on outsiders. Each group thinks its own folkways [are] the only right ones, and if it observes that others have other folkways, these excite its scorn. Opprobrious epithets are derived from these differences. “Pig-eater,” “cow-eater,” “uncircumcised,” “jabberers,” are epithets of contempt and abomination.<sup>32</sup>

Since 1906, Sumner’s description of “primitive society” has attracted the criticism of anthropologists, who point out that group alliances and ethnic identities are unstable in some societies, and sociologists, who note that individuals may belong to more than one group and may admire some out-groups.<sup>33</sup> The boundary, influence, and meaning of Sumner’s “ethnocentrism” are contested in the social sciences. Nevertheless, the phenomenon of self-categorization and establishment of in-group and out-group identities is widely accepted and has been demonstrated in dozens of psychological studies in a variety of cultures.<sup>34</sup> In-group self-categorization can be thought of as pro-social, providing for group cohesion, cooperation, and political agency.<sup>35</sup> It is also present at the core of inter-group conflict, stigmatization of minority group members, and social alienation.<sup>36</sup>

A salient aspect of group identification is that, once we identify as a group member, we immediately form an in-group preference.<sup>37</sup> We derive part of our self-esteem from group membership and tend to ascribe positive characteristics to our own group and negative characteristics to others.<sup>38</sup> As we identify with a group organized around any value, activity or status, we not only automatically attribute positive qualities to our own group and negative qualities to the out-group, but also act in ways that favor our own group.<sup>39</sup> Surprisingly, experiments in social psychology demonstrate that even when people are assigned *randomly* to a group—in other words, when

<sup>32</sup> *Id.* at 12–13.

<sup>33</sup> Robert A. LeVine, *Ethnocentrism*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 4853 (Neil J. Smelser & Paul B. Baltes eds., 2001).

<sup>34</sup> *See, e.g.*, ROGER BROWN, SOCIAL PSYCHOLOGY 541–42 (2nd ed. 1986) (describing self-categorization); SHELLY E. TAYLOR, ET AL., SOCIAL PSYCHOLOGY 186–88 (12th ed. 2006) (discussing a variety of studies relating to in-group and out-group categorization).

<sup>35</sup> JOHN C. TURNER, ET AL., REDISCOVERING THE SOCIAL GROUP: A SELF-CATEGORIZATION THEORY 3 (1987); *see also* LISA GARCÍA BEDOLLA, FLUID BORDERS: LATINO POWER, IDENTITY, AND POLITICS IN LOS ANGELES 3–17 (2005) (illustrating group dynamics in the Latino population).

<sup>36</sup> *See* ROBERT A. LEVINE & DONALD T. CAMPBELL, ETHNOCENTRISM: THEORIES OF CONFLICT, ETHNIC ATTITUDES AND GROUP BEHAVIOR 143–44 (1972).

<sup>37</sup> John C. Turner, *Towards a Cognitive Redefinition of the Social Group*, in SOCIAL IDENTITY AND INTERGROUP RELATIONS 15, 34–35 (Henri Tajfel, ed., 1982).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 35.



the subject has no basis on which to differentiate between her own group and another group, in-group preference is still shown.<sup>40</sup> According to Roger Brown, individuals show a consistent preference for “maximal in-group advantage over the out-group.”<sup>41</sup> In-group members will, for example, forego receiving a reward if their group will thereby gain greater comparative advantage over the out-group.<sup>42</sup>

Moreover, subjects who demonstrated in-group preference were not aware of their bias and believed that they had behaved fairly.<sup>43</sup> Most subjects “tr[ie]d to introduce some level of fairness by rewarding both in-group and out-group members” but nonetheless favored their own group.<sup>44</sup> Despite systematic biases toward providing greater rewards for their own group, subjects were *unaware* that they had, for example, assigned more points to members of their own group.<sup>45</sup>

Similarly, cognitive processes linked to stereotyping and discrimination may be unconscious. While some racism or discrimination is intentional, recent social science research reveals that unconscious bias is much more prevalent than intentional discrimination.<sup>46</sup> Although people notice differences and naturally separate people and things by category, some differences form part of the “perceptual foreground” while others are part of the “perceptual background” which do not necessarily become part of conscious thought.<sup>47</sup> Split-second decisions are often made on the basis of perceptual background categorizations. Thus, we are susceptible to what has been termed “implicit bias”—the tendency to unconsciously associate our own group with pleasant traits and other groups with unpleasant ones, especially in split-second decision-making processes.<sup>48</sup> The phenomenon of “implicit bias” has been shown to be “extremely widespread” in psychological testing.<sup>49</sup>

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<sup>40</sup> BROWN, *supra* note 34, at 544–45.

<sup>41</sup> *Id.* at 550.

<sup>42</sup> *Id.* at 549–50. Group processes are also susceptible to a host of cognitive errors, including overgeneralization, over confidence, group polarization, miscalculation of risk, and others. Sara Sun Beale, *What’s Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 57–60 (1997).

<sup>43</sup> See BROWN, *supra* note 34, at 544–48.

<sup>44</sup> TAYLOR, *supra* note 34, at 187.

<sup>45</sup> BROWN, *supra* note 34, at 545; TAYLOR, *supra* note 34, at 190.

<sup>46</sup> Lenhardt, *supra* note 3, at 847.

<sup>47</sup> Stephen C. Ainlay & Faye Crosby, *Stigma, Justice and the Dilemma of Difference*, in THE DILEMMA OF DIFFERENCE 17, 21–22 (Stephen C. Ainlay, et al. eds. 1986).

<sup>48</sup> Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 971–96 (2006).

<sup>49</sup> *Id.* at 971. There are opportunities for in-group favoritism at virtually every level of the criminal justice process. These opportunities exist at the creation of criminal law’s substantive norms, where the morality of the dominant group is encoded into legal proscription; at the creation of enforcement procedures and policies, where the dominant group’s perceptions about crime and criminality will control the allocation of resources, the methods of training police, prosecutors and

Of course, most in-groups are not created at random by social scientist researchers. The phenomenon of group-identity creation takes place in society in the context of history and culture. Real world in-groups and out-groups may derive from a wide variety or combination of factors: birthplace, name, language, physical characteristics, history and origins, religion, and nationality.<sup>50</sup> More importantly, real world manifestations of group-identity have real world effects, contributing to nationalism, patriotism, group cohesiveness, homogeneity, group solidarity, and social cooperation within the in-group; and stereotyping, prejudice, dehumanization, stigmatization and discrimination against the out-group.<sup>51</sup>

As psycho-social processes of group identification and ethnocentrism combine with historical circumstance, economics and politics, dynamic social groups and inter-group relationships take form. Kotkin has used the term “global tribe” to refer to groups like the British, Japanese, Chinese, Indians, and Jews who have dispersed around the globe, but maintain a sense of group-identity.<sup>52</sup> These metaphorical “tribes” have a sense of common origin and values, even though they are genetically diverse and live in many different climates, contexts and nations.<sup>53</sup> Similarly, the metaphor of tribalism has been used to connote the process of group-formation or de-individualization.<sup>54</sup> “Tribalism”, “racism”, “ethnocentrism”, “nationalism”, “patriotism” all refer to various types of group identity formation. Group identity formation and in-group preference is not a trait of any particular ethnic, racial, economic, or political group. Rather, the motives are “deeply rooted”; they are “motives that are primitive and universal.”<sup>55</sup>

Although the motivation for forming group identity is “deeply rooted,”<sup>56</sup> the boundaries of the group may be fluid.<sup>57</sup> Moreover, an individual is likely to be a member of numerous groups simultaneously (e.g., gender, family, clan, club, neighborhood, nation) and in the

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judges; and the rules that govern police interaction with the public; and at the enforcement of substantive criminal norms, which necessarily give a decision-making discretion to police (to stop, search, investigate, arrest), prosecutors (to charge), judges (in bail and sentencing) and correctional institution officials (prison accommodations and parole).

<sup>50</sup> ISAACS, *supra* note 1, at 39–40.

<sup>51</sup> See generally LEVINE & CAMPBELL, *supra* note 36.

<sup>52</sup> See generally JOEL KOTKIN, TRIBES: HOW RACE, RELIGION, AND IDENTITY DETERMINE SUCCESS IN THE NEW GLOBAL ECONOMY (1st ed. 1993).

<sup>53</sup> *Id.* at 4–5.

<sup>54</sup> Michael Maffesoli, *Juex des Masques: Postmodern Tribalism*, 4 DESIGN ISSUES 141, 141–44 (1988).

<sup>55</sup> See BROWN, *supra* note 34, at 542.

<sup>56</sup> Group identification systems may have been central to the evolution of multicellular life. See LUIS P. VILLARREAL, ORIGIN OF GROUP IDENTITY: VIRUSES, ADDICTION AND COOPERATION v–vi (2009) (tracing the evolution of group identification systems from molecules to microbes and on through animals to the human social structure).

<sup>57</sup> BEDOLLA, *supra* note 35 at 3, 73.

interaction between the individual and social contexts, a sense of group identity may change over time.<sup>58</sup> Group identity is thus neither fixed nor unitary, but flexible and layered.

### III. FROM TRIBAL JUSTICE TO MODERN CRIMINAL LAW?

Criminologists have long acknowledged the role that group conflict plays in the operation of the criminal law, but there is a tendency to place a conceptual distance between modern criminal law and “tribal justice.” In *The Social Reality of Crime*, Richard Quinney traces the history of criminal law to the emergence of state power in Greek and Roman times, and again in the early twelfth century in England.<sup>59</sup> As he describes it:

The law of the Anglo-Saxons was originally a system of tribal justice. Each tribe, as a group of kinsmen, was controlled by its own chief and armed warriors who met and, among other things, passed laws. Any wrong was regarded as being against or by the family; and it was the family that atoned or carried out the blood-feud if an offense occurred between kinship groups.<sup>60</sup>

According to Quinney, tribal justice yielded to a modern system of criminal law as the power of various feudal lords was consolidated under one king, united by Christianity, and finally brought under the control of a unified state.<sup>61</sup> An alternate view of the same history suggests continuity rather than change.<sup>62</sup> The size of the tribe and the factors unifying it changed, but the basic tribal form did not disappear. The family-based tribe, held together by loyalty to a family group and a feudal lord, was replaced with a state-based tribe, held together by a common religion and loyalty to a king.

The first two core characteristics of modern criminal law that are traditionally cited as distinguishing “true criminal law” from “elementary tort,” “primitive law” or tribal justice are (1) the transition from private to public justice in which offenses against individuals are conceived as offenses against the public; and (2) the transition to a system in which the state provides the means of punishment.<sup>63</sup> The qualities of group decision-making about social norms and aggregation of effort for enforcement are

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<sup>58</sup> See *id.* at 73; See LEOPOLD J. POSPISIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY 97–98 (1971).

<sup>59</sup> RICHARD QUINNEY, THE SOCIAL REALITY OF CRIME 44–48 (2001).

<sup>60</sup> *Id.* at 48.

<sup>61</sup> *Id.*

<sup>62</sup> See *id.* at 49.

<sup>63</sup> *Id.* at 44.

both present in pre-modern justice systems. The transitions to a public, state-run system can be seen as a shift in the size of the polity, rather than a change in the conceptual framework. Even in feudal times or in places where human groups lived in loosely organized hunter-gatherer societies, individuals were not left alone to avenge wrongs against them.<sup>64</sup> Rather, the family, clan or chief, or feudal lord provided the social organization that supported punishments or restitution.<sup>65</sup> A wrong against an individual was taken as a wrong against the family, clan, or tribe.<sup>66</sup> Social control and order is critical to the continued existence of any society, not merely those that are organized around state systems.<sup>67</sup>

The third core characteristic of modern criminal law traditionally cited as distinguishing it from tribal justice is its ready availability “to the entire body politic, and not restricted to particular groups or classes of citizens.”<sup>68</sup> But, contrary to this optimistic view, modern criminal law, like its tribal predecessors, always serves a defined in-group. Criminal law is traditionally jurisdictional and draws its protective boundaries around the members of the tribe. Until the recent advent of transnational and international criminal law, criminal law enforcement has operated almost exclusively within the borders and norms of one jurisdiction and tribe.<sup>69</sup> In this sense, it has been asserted that “law is an intragroup phenomenon.”<sup>70</sup> Moreover, when a single jurisdiction has been home to multiple groups, the protection of criminal law enforcement has not always guaranteed to minority resident groups. As illustrated in the recent report dealing with sexual abuse of Aboriginal children in the Northern Territory of Australia, crimes may go unreported and reported crimes may go unprosecuted. Problems of communication, culture, and mutual suspicion may make it

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<sup>64</sup> See POSPISIL, *supra* note 58, at 79 (describing decision-making in Eskimo, Papuan, Cheyenne and Australian Aboriginal societies).

<sup>65</sup> *Id.* at 79.

<sup>66</sup> QUINNEY, *supra* note 59, at 48.

<sup>67</sup> *Id.* at 118. That is not to say that the size of the tribe (or state) is unimportant. As the size of the tribe increases, the size of the in-group increases. The beneficiaries of the restorative efforts of the body politic are more numerous. A larger group may also increase the possibility that there will exist within the tribe a sufficient sense of “secure disinterestedness on the part of key social groups” to allow for a sense of fairness and intra-group solidarity to determine criminal legal outcomes. See David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth Century America*, 39 LAW & SOC’Y REV. 793, 830 (2005) (describing what may be required for “civilized sensibilities” about punishment to emerge). A large tribe has the potential to benefit from the full-time legislative, research and reform efforts of public servants, criminologists, jurists, and advocates, in ways that a small tribe may not. The organization of the state also changes the dynamics of tribal power. In other words, size matters—but size alone does not eliminate the in-group quality of the body politic.

<sup>68</sup> GEORGE M. CALHOUN, *THE GROWTH OF CRIMINAL LAW IN ANCIENT GREECE* 5 (1927).

<sup>69</sup> With the advent of transnational and international criminal law enforcement, the tradition appears to be on the wane somewhat. See, e.g. The Rome Statute for the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90; Statute for the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/Res/827 (May 25, 1993).

<sup>70</sup> POSPISIL, *supra* note 58, at 343.

difficult for citizens to report and for police and prosecutors to do their jobs.<sup>71</sup>

Further, when the minority group is viewed as less than human, the protection of the minority group members may not be a law enforcement priority. Anthropologists have repeatedly observed a “double standard in traditional morality”—with “one set of ethics for ingroup members [and] a lower set or no restraints for outgroup members”.<sup>72</sup> Crimes against outgroup members do not carry the same moral weight as crimes committed against in-group members.

In its protection of and preference for members of the tribe, modern criminal law is not necessarily so distant in concept and practice from ancient forms of tribal justice.<sup>73</sup>

#### IV. THE ROLE OF GROUP IDENTITY IN THE CRIMINAL LAW

By identifying the disproportionate incarceration of some minority groups as a phenomenon, we implicitly accept and call attention to a minority group identity. What may be less obvious, but no less important, is that we also imply a majority or dominant group identity. In 1958 George Vold presented his group conflict theory of crime, which conceived of the “whole [social] process of law making, law breaking and law enforcement” as a direct reflection of “deep-seated and fundamental conflicts” between interest groups and their “more general struggles among groups for control of police power and the state.”<sup>74</sup> In succeeding years, conflict theorists have argued that “crime is a reality that exists primarily as it is created by those in society whose interests are best served by its presence.”<sup>75</sup> If one considers criminal law from a group identity perspective, however, crime or criminal law is not only the product of dominant interests, but also a force that fosters group identity formation itself. Criminal law plays a role in defining and reinforcing the identities and the power relationships of both the in-group and the out-group(s).

##### A. *Criminal Law is In-Group Self-Defining*

Criminal law can be seen as a tool for de-individualization or the collectivization of the ideals, aspirations, and power of a group. In the

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<sup>71</sup> NORTHERN TERRITORY BOARD OF INQUIRY INTO THE PROTECTION OF ABORIGINAL CHILDREN FROM SEXUAL ASSAULT, AMPE AKELYERNEMANE MEKE MEKARLE “LITTLE CHILDREN ARE SACRED” 1, 112–14, 116, 235 (2007).

<sup>72</sup> LEVINE & CAMPBELL, *supra* note 36, at 16.

<sup>73</sup> *But see* Garland, *supra* note 67, at 796–97. This is not intended to refute narratives of historical change that suggest “that violent public punishments tended to decline from the late eighteenth century onward” or that the modern state has privatized and civilized punishment.

<sup>74</sup> GEORGE B. VOLD & THOMAS J. BERNARD, *THEORETICAL CRIMINOLOGY* 274 (3d ed. 1986).

<sup>75</sup> KUBRIN, *supra* note 26, at 228.

United States, it is commonly said, “[t]his is a [nation] of laws, not of men.”<sup>76</sup> Law can be seen as collectivizing the ideals, aspirations and power of a group of people. The criminal law is, among other things, an expression, albeit a compromised and incomplete expression, of the shared meanings, morality and aspirations of the tribe.<sup>77</sup>

There is another, more concrete sense in which criminal law is group self-defining. Every group has “law” or rules (whether written or unwritten) for membership in the group and rules that describe the rights and obligations of group members. The criminal law, in particular, places behavioral prerequisites on inclusion in the group: *If you are to be a member of this tribe, you must not do X (e.g. murder, rape, steal, etc.) If you violate this rule, you will no longer be a member of this tribe.* In other words, criminal law, in setting the boundaries of acceptable behavior within the group, draws a demarcation line around the group. Violations of those boundaries result in symbolic or actual exclusion from the tribe—“whether by expulsion, incarceration, ostracism or execution.”<sup>78</sup>

Banishment, deportation, imprisonment, and execution all require literal exclusion of the rule-breaker from the group. Other punishments may remove only some aspect or privilege of group membership, e.g., a license to drive, the right to vote, or the right to child custody.<sup>79</sup> Branding and shaming punishments symbolically strip the offender of their humanity. The dehumanization of those who violate our group’s criminal law is well-illustrated in the metaphors of slime and filth applied to convicts and prisoners in cases that span more than one hundred years.<sup>80</sup> Even the attachment of the label “criminal” to the person who has committed the prohibited act constitutes symbolic exclusion from the tribe. The *criminal* is an outcast. The criminal is a public enemy. The criminal is sub-human. Using the label “criminal” (or “thief”, “junkie”, etc.) to describe the wrong-doer symbolically deprives the individual of his or her humanity and group membership.<sup>81</sup>

This is important because it not only identifies him or her as a person worthy of punishment and/or ostracism, but also identifies him or her as someone who is not worthy of the concern or care of the in-group members. Notice that the conditions of imprisonment—“cold, remorseless

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<sup>76</sup> JOHN ADAMS AND JONATHAN SEWELL, *NOVANGLUS AND MASSACHUSETTENSIS, OR POLITICAL ESSAYS PUBLISHED IN THE YEARS 1774 AND 1775* 84 (1819). *See also* MASS. CONST. art XXX, pt. 1.

<sup>77</sup> DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 57 (1990).

<sup>78</sup> BROWN, *supra* note 27, at 138.

<sup>79</sup> *See, e.g.*, Deborah Ahrens, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737,748–50, 764 (2000).

<sup>80</sup> Walter O. Weyrauch, *Unconscious Meanings of Crime and Punishment*, 2 BUFF. CRIM. L. REV. 945, 947–948 (1999) (reviewing MARTHA GRACE DUNCAN, *ROMANTIC OUTLAWS, BELOVED PRISONS: THE UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT* (1996)).

<sup>81</sup> HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 34 (1963).

deprivation”—generally do not worry the general public when the person being treated in this way has been labeled a “criminal.”<sup>82</sup> Group members are freed from guilt or remorse about the treatment of the convicted person by the thought that the “criminal” deserves punishment and is not human, not my tribe, not like me. As David Garland points out in his exploration of public torture lynchings, “we tend to underestimate the extent to which socially adjusted ‘normal’ people can be indifferent to, or take vicarious pleasure in, the suffering of others with whom they do not identify. . . .”<sup>83</sup>

It is easier to punish members of the out-group. A recent cross-national analysis of imprisonment rates in 140 nations concluded that social heterogeneity (based on race, ethnicity, religion and language) was positively associated with imprisonment rates.<sup>84</sup> Similarly, lesser diversity was associated with the abolition of capital punishment.<sup>85</sup> Another study of thirteen progressive democracies concluded that “expansions in minority presence and the resulting threats to majority group dominance combine to produce increasingly punitive outcomes.”<sup>86</sup> Similarly, a recent comparative study of community attitudes toward punishment in the Czech Republic and Florida found that “antipathy toward minority ‘others’ is a strong predictor of punitiveness . . . .”<sup>87</sup> The study considered attitudes toward African Americans in Florida and Gypsies and refugees in the Czech Republic. In spite of the vast cultural and historical differences between the minority groups in these communities, members of both majority tribes exhibited a more punitive attitude toward the minority “other.”<sup>88</sup>

Punishment itself works to establish and maintain group identity and to reinforce group values. Denunciation of the criminal act (and the “criminal”) reinforces group identity and group values. According to Garfinkel, the moral indignation of the tribe is expressed through a “status degradation ceremony.”<sup>89</sup> The attributes of a “successful degradation ceremony,” require the denouncer to “make the dignity of the supra-personal values of the tribe salient and accessible to view, and his denunciation must be delivered in their name.”<sup>90</sup> Punishment separates the group from the punished person and helps to maintain positive group identity. Among the “beneficial side-effects” of criminal punishment is the

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<sup>82</sup> JOHN PRATT, PUNISHMENT AND CIVILIZATION: PENAL TOLERANCE AND INTOLERANCE IN MODERN SOCIETY 10 (2002).

<sup>83</sup> Garland, *supra* note 67, at 830.

<sup>84</sup> Ruddell & Urbina, *supra* note 7, at 924.

<sup>85</sup> *Id.*

<sup>86</sup> Jacobs & Kleban, *supra* note 17, at 746.

<sup>87</sup> Costelloe, *supra* note 7, at 210.

<sup>88</sup> *Id.*

<sup>89</sup> Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420, 420 (1956).

<sup>90</sup> *Id.* at 423.

restoration of social cohesion “which may be threatened or disturbed by certain sorts of offending . . . .”<sup>91</sup> Although social cohesion may be construed as a social good, Garland points out that punishment produces “a distinctive form of solidarity: ‘the emotional solidarity of aggression.’”<sup>92</sup> This particular solidarity has been termed “a form of tribal group hostility.”<sup>93</sup>

Further, criminal prosecution creates a sense of group well-being by placing the blame for harmful or painful events on an individual. This allows the in-group to be a victim rather than a perpetrator of evil (the bad thing that happened is not *our* fault, it is the fault of the criminal). Placing the blame on the individual exonerates the in-group from responsibility for criminogenic social conditions. In this way the “features of the mad-dog murderer reverse the features of the peaceful citizen”<sup>94</sup> and the in-group members are permitted to maintain a positive group identity. By placing the blame for harmful or painful events on an individual, by denouncing a “perpetrator” and indentifying a “victim,” the group is distanced from the harm, absolved of any potential blame, and made to feel safe again.

#### *B. The Creation of an Oppositional Minority*

Because the criminal law represents the stated ideology and morals of the majority group, the law itself may evoke oppositional ideology within the minority.

When a group perceives (correctly or not) that it is the object of repression, it responds by opposing the moral categories and social meanings of the repressive group. Groups, defined by class or other status categories, engage in struggles to vindicate ideological systems and so to vindicate themselves.<sup>95</sup>

Minority groups are their own in-group. For the minority, majority is the out-group, whose rules may not be considered legitimate or requiring of obedience. When the minority group perceives the law as a tool of oppression, mistrust not only makes individuals less likely to assist law

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<sup>91</sup> NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 183 (Ted Honderich ed., 1988).

<sup>92</sup> DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 77 (1990).

<sup>93</sup> Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467, 591 (2003).

<sup>94</sup> *Id.* at 423.

<sup>95</sup> Ted Sampsell-Jones, *Culture and Contempt: The Limitations of Expressive Criminal Law*, 27 SEATTLE U. L. REV. 133, 171–72 (2003).



enforcement, but also more likely to disobey legal commands.<sup>96</sup> Rather than produce the desired deterrent effect for the minority group, the law backfires. Butler argues, for example, that the high incarceration rate of African Americans has led some, particularly the “hip-hop community” to “interrogate the social meaning of punishment.”<sup>97</sup>

To say that hip-hop destigmatizes incarceration understates the point: Prison, according to the artists, actually stigmatizes the government. In a culture that celebrates rebelliousness, prison is the place for unruly “niggas” who otherwise would upset the political or economic status quo. In this sense, inmates are heroic figures.<sup>98</sup>

Intergroup conflict, competition, antagonism or lack of understanding can make it easier for either group to disrespect the norms and liberty of members of the other group.

#### V. BUILDING SUPER-TRIBAL GROUPS AND NORMS

Writers on ethnocentrism are divided on the question of whether in-group preference produces primarily positive or negative effects. In-group favoritism and out-group antagonism may have helped our ancestors “protect limited resources and increase the survival rate of one’s own family.”<sup>99</sup> If we re-envision the criminal law in the context of a human species that existed for more than a hundred thousand years in semi-isolated, small, roving bands, that has lived together in concentrated and semi-permanent groups for only tens of thousands of years,<sup>100</sup> and that now finds itself crowded into an increasingly small planet, the diminishing value of in-group loyalty and out-group antagonism becomes apparent. As the world becomes a smaller neighborhood, the societies that develop ways to diffuse intergroup conflict and forge inclusive group identities are more likely to achieve greater justice.

The problem of developing multicultural or super-tribal norms is both difficult and important. As McNamara points out, the concept is often greeted as a call for the minority group to receive “special treatment.”<sup>101</sup>

<sup>96</sup> Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 727 (2005).

<sup>97</sup> Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 997 (2004).

<sup>98</sup> *Id.*

<sup>99</sup> TAYLOR, ET AL., *supra* note 34, at 188.

<sup>100</sup> See PETER J. WILSON, *THE DOMESTICATION OF THE HUMAN SPECIES* 9 (1988).

<sup>101</sup> Luke McNamara, ‘Equality Before the Law’ in *Polyethnic Societies: The Construction of Normative Criminal Law Standards*, *eLaw Journal*: 11(2) MURDOCH U. ELEC. J. L. ¶ 20 (June 2004), <http://www.murdoch.edu.au/elaw/issues/v11n2/mcnamara112.html>.

The idea of using different norms to apply to different cultural groups within one society runs afoul of the concept of the rule of law and “principles of equality before the law and equal protection before the law.”<sup>102</sup> On the other hand, the norms and values of sub-groups or sub-cultures may be irreconcilable. Further, in practice, extending the protection of the dominant tribe’s criminal law to minority groups has raised troubling issues. The extension of police protection to minority neighborhoods may require the police to increase patrols and, consequently, increase the probability of abrasive encounters.<sup>103</sup> Some of the resulting conflicts have been notorious. For example, in Chicago during the early 1960s and again a quarter of a century later, police made a practice of picking up African American youth, whom they suspected of criminal activity, and dropping them off in white neighborhoods where they were likely to be beaten up by local residents.<sup>104</sup>

Nevertheless, building a more inclusive tribe is not necessarily a utopian dream. The point is illustrated in an editorial by an American journalist:

There was a time in [the US] when we accepted a separate standard of justice for whites and blacks, and a time when we rarely bothered to prosecute an immigrant so long as his crime was committed against one of his own kind. Whatever they did in Chinatown or Little Italy on a Saturday night—whatever they did to their wives and daughters, in particular—was their business. As a society, we gradually turned against that approach, accepting, in the name of fundamental fairness and our common humanity, the notion that a black American, or a Greek, or an Irish or a Chinese immigrant who falls victim to a crime is entitled to the same safeguards as a native-born white.<sup>105</sup>

Notice that, for this writer, the concession that the minority group members deserved the protection of the criminal law required an affirmation of their “common humanity.” Extending the protection of the law to immigrants required bringing them within the boundaries of the group.

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<sup>102</sup> *Id.* at ¶ 21 (citing Australian Law Reform Commission, *Multiculturalism and the Law*. Report No 57, (1992) [171]).

<sup>103</sup> See generally Harlan Hahn, *Ghetto Assessments of Police Protection and Authority*, 6 *LAW & SOC’Y REV.* 183, 183 (1971).

<sup>104</sup> John Hagan & Carla Shedd, *A Socio-Legal Conflict Theory of Perceptions of Criminal Injustice*, 2005 *U. CHI. LEGAL F.* 261, 276 (2005).

<sup>105</sup> Margaret Talbot, *Baghdad on the Plains*, *THE NEW REPUBLIC*, Aug. 11, 1997, at 18, available at <http://jummahcrew.tripod.com/baghdad.htm>.

This Article does not propose to solve the difficult problem of how to reconcile cultural conflicts. It does propose, however, that the first step toward being able to deal with any problem is to recognize and understand it. The temptation to characterize the criminal law systems of nation-states as “modern” or “civilized” may shield some of the aspects of those systems from scrutiny and give them pride of place in contests between the norms of sub-national groups. It may also support an unjustified assumption that modern legal systems are insulated from basic human drives and emotions. Acknowledging criminal law’s tribalism—that is, acknowledging the continuity of in-group preference and identity formation in the dynamics of criminal law and justice systems—may serve to put the norms of various sub-groups on a more level playing field and open the discipline to broader scrutiny.

Considering the law in light of group behavioral science, for example, opens the door to further thinking about the impact of psychology on group decision-making processes. Can criminal legal processes be insulated from implicit bias? In the context of civil law, Sunstein favors procedures that introduce more deliberation in legal decision-making and to insulate the process from implicit bias or flawed group decision-making.<sup>106</sup> In the context of criminal law legislation, that might mean delaying the enactment of new criminal legislation until a minority impact report can be debated and drafted. In the context of criminal procedures, it may be possible to devise other ways to insulate decision-making from in-group bias. Strategies for building intergroup solidarity may emerge from a variety of sources. At least one social psychology study of intergroup relations has found that the development of a common group identity diffuses the effects of stigmatization and improves intergroup attitudes.<sup>107</sup> Strategies for building multi-ethnic affinity and super-group solidarity may come from anywhere in the world and from a variety of disciplines.<sup>108</sup>

## VI. CONCLUSION

A number of studies have looked for and failed to find empirical evidence to demonstrate that disproportionate incarceration rates are caused by biased decision-making on the part of police, prosecutors, and

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<sup>106</sup> See generally Cass R. Sunstein, *The Law of Group Polarization* (John M. Olin Law & Econ., Working Paper No. 91, 1999), <http://www.law.uchicago.edu/lawecon/wp51-100>.

<sup>107</sup> John F. Dovidio, et al., *Racial, Ethnic, and Cultural Differences in Responding to Distinctiveness and Discrimination on Campus: Stigma and Common Group Identity*, 57 J. SOC. ISSUES 167, 179 (2001).

<sup>108</sup> See, e.g., Scott Paauw, *One Land, One Nation, One Language: An Analysis Of Indonesia's National Language Policy* 1–10 (Univ. of Rochester Working Papers in the Language Scis., Working Paper No. 1, 2009), [www.bcs.rochester.edu/cls/s2009v5n1/Paauw.pdf](http://www.bcs.rochester.edu/cls/s2009v5n1/Paauw.pdf). (discussing the role of language policy in developing national identities in Indonesia, Malaysia and the Philippines).

judges.<sup>109</sup> On the other hand, research has documented that increased minority presence or minority threat to group dominance is strongly correlated with imprisonment rates.<sup>110</sup> Based on current sociological data, it is not possible to quantify how discriminatory processing affects minority imprisonment. On the other hand, given the apparent disproportionate imprisonment of minority groups around the world, it is fair to say that every justice system around the globe *operates* in a way (or perhaps in a context) that favors the in-group over the out-group. Disproportionate punishment of some minority groups is a global phenomenon that may operate without the conscious awareness of the participants. The particular in-group preference may be manifest through the institutionalized operation of racialized power, class distinction, ethnic or religious animosity, or anti-immigrant sentiment. All of these, however, are species of an ethnocentric impulse which constitutes part of the traditional role and function of the criminal law itself: to define and reinforce in-group identity.

Criminal law and justice systems evolve and change, but have not lost their tribal quality. The attribution of modernity to contemporary Western criminal legal systems may provide the appearance of distance from tribal manifestations of unequal justice, but may, in fact, perpetuate its own kind of color line—separating the “modern, enlightened West” from the “tribal, religious” others.<sup>111</sup>

Identifying the continuity of tribalism in criminal law across time and cultures is not meant as an apology or justification of it. Instead, it sets out an agenda of building the super-group norms of a global tribe of interconnected humanity. This may be seen as a core task of the internationalist legal agenda. On a smaller scale, however, it is the responsibility of each multi-ethnic society.

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<sup>109</sup> See, e.g., Waddington, *supra* note 13, at 910; Tonry, *supra* note 8, at 14.

<sup>110</sup> See Ruddell, *supra* note 7, at 924.

<sup>111</sup> See Sherene H. Razack, Abstract, *The 'Sharia Law Debate' in Ontario: The Modernity/Premodernity Distinction in Legal Efforts to Protect Women from Culture*, 15 FEMINIST LEGAL STU. 3, 6 (2007).

