

RESTORING DEMOCRATIC MORAL JUDGMENT WITHIN BUREAUCRATIC CRIMINAL JUSTICE

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ABSTRACT—While America's criminal justice system is deeply rooted in the ideal of a popular morality play, it has long since drifted into becoming a bureaucratic plea bargaining machine. We cannot (and would not want to) return to the Colonial Era. Even so, there is much more we can do to reclaim our heritage and incorporate popular participation within our lawyer-run system. That requires pushing back against the relentless pressures toward efficiency and maximizing quantity, to ensure that criminal justice treats each criminal with justice, as a human and not just a number. The criminal justice system must narrow its ambitions and scope, counteract professionals' tunnel vision, make punishment more productive, and make criminal procedure more transparent and participatory. This Essay ends by gesturing towards how the United States might start to tackle these kinds of reforms.

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INTRODUCTION

The roots of America’s criminal justice system are deeply populist and moral. In the colonies, the whole community participated in doing justice. Criminal justice was an essential part of democratic self-government: it taught lessons, expressed outrage, healed social and psychic wounds, and empowered victims, defendants, jurors, and the public. In other words, it was a communal morality play.¹

Over the course of four centuries, professionals have displaced this democratic morality play with a bureaucratic plea bargaining machine. Lawyers speak for and silence parties, judges have developed rules too technical for laymen to navigate or understand, plea bargains bypass juries, and prisons hide punishment. Plea bargaining is a hidden and often skewed process, in which non-merits factors such as wealth, bail, risk aversion, and attorney skill loom large.² The public may see plea bargaining as cheapening and hiding justice.³

America cannot return to the Colonial Era; the plea bargaining assembly line is here to stay. Even so, we can do much more to reclaim our heritage and incorporate popular participation even within our lawyer-run system.

The most fundamental problem with bureaucratic criminal justice is that it has lost sight of why and how We the People should punish. Bureaucratization breeds an intense concern for efficiency, measured quantitatively as the number of arrests, charges, and convictions.⁴ That is a recipe for “mass incarceration,” not moral judgment or public safety. The

¹ STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 1 (2012).

² See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1153–58 (2011).

³ BIBAS, *supra* note 1, at 51, 196 n.49.

⁴ See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1139 (2008) (“The traditional conception of prosecutors as sentence-maximizers . . . recognizes that efficiency . . . is the chief justification for plea bargaining. Prosecutors craft pleas to ensure the greatest number of convictions, with each conviction garnering the highest possible sentence.” (footnote omitted)).

citizens whom the bureaucracy is supposed to serve, by contrast, care about more qualitative goals too: not only maximizing deterrence and incapacitation, but also tailoring punishment to individual retributive desert and exploring prospects for reform. And laymen care more than criminal justice professionals about process values, such as having their day in court and being treated fairly and respectfully.⁵ So the bureaucratic reality neglects the public's ideals. Criminal justice could do much more to treat each criminal with justice, as a human and not just a number.

I. THE MORAL ROOTS OF AMERICAN CRIMINAL JUSTICE

In the legal academy, there is a marked disconnect between scholarship on substantive criminal law and scholarship on criminal procedure. While criminal law often begins with reflecting on retribution and rehabilitation, criminal procedure all but ignores such moral and philosophical issues. And neither field steps back to first principles, to ask when and how a democracy should punish as a matter of political theory, with the consent of the governed.

Police and prosecutors are agents of the American people. They punish in the name of We the People: criminal cases are captioned *People of the State of X v. David Defendant*, not *The King* or *Director of Public Prosecutions v. David Defendant*. A crime is a public wrong against the entire community affected by the crime. And while the victim has a stake in the crime, the particular police officer, prosecutor, or judge does not and is merely an agent of the people. The agent should faithfully serve the principals' interests and deepest values, but often does not.

In colonial America, however, there was no principal-agent disconnect because there were few if any agents. The people not only saw justice done but did justice themselves. Victims typically prosecuted their own cases *pro se*, telling their own stories. Defendants likewise defended themselves *pro se*, challenging victims' accounts by offering their own, or pleading for mercy. Trials were thus shouting matches, telling dueling stories in simple terms. Judges refereed these shouting matches, offered their own views, and recommended mercy in appropriate cases. In most colonies, laymen sat in judgment both on juries and in the town square during public punishment.⁶

⁵ See generally Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for “Process Values,”* 60 CORNELL L. REV. 1, 3, 20–27 (1974) (discussing and cataloguing criminal justice “process values”).

⁶ See BIBAS, *supra* note 1, at 3–6, 9–11; GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 19, 246 n.1 (2003) (noting that Middlesex County, Massachusetts did not receive its first county prosecutor until 1807); ALLEN STEINBERG, THE

The jury trial and ensuing punishment were a morality play: a form of educational social theater.⁷ Trial and punishment were didactic, teaching and reinforcing citizens' understandings of right and wrong.⁸ They were expressive, condemning the guilty and vindicating victims or innocent defendants. They were cathartic, purging the criminal's debt to society and to his victims. And they were restorative, paving the way for remorse, apology, forgiveness, and reconciliation.⁹

Sanctions were very public but very temporary.¹⁰ American criminal justice was in many ways less bloody than the English system; the death penalty and disfiguring punishments were infrequently imposed and even less often carried out.¹¹ Fines and shaming were probably most common, as well as restitution, though whipping and other corporal punishments were used too.¹² Once wrongdoers had paid their debts to society and victims, they were forgiven and welcomed back—there was no permanent underclass of ex-cons.¹³

Lay involvement and control were crucial to colonial criminal justice's efficacy. Crimes were defined by the common law, not a technical penal code, and were *mala in se*. They accorded with widely shared intuitions about justice and punishment, giving potential violators ample

TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880, at 38 (1989) (“During the first half of the nineteenth century, private prosecution dominated criminal justice in Philadelphia. . . . [M]ost criminal prosecutions were initiated by private citizens.”); *see also* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 11–16 (2003) (describing eighteenth-century English criminal trials, which were procedurally similar to early colonial criminal trials).

⁷ LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 25 (1993) (“[The trial] was a public, open affirmation of the rules and their enforcement; a kind of divine social theater.”).

⁸ *See id.*

⁹ *See id.* at 37, 39–40.

¹⁰ *See id.* at 37–41.

¹¹ *See id.* at 41 (“By the standards of the times, and by English standards, the colonies were far from bloody.”); *id.* at 41–44 (noting that it was extremely rare to hang colonial convicts for burglary, robbery, or theft, and that each year, on average, the colony of Pennsylvania convicted fewer than two defendants of capital crimes and executed only about one). *See generally* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 6–8, 65–68 (2002) (giving a brief history of the death penalty and its evolution in the colonies and England in the seventeenth and eighteenth centuries, and noting that the northern colonies were more sparing in authorizing the death penalty for violent and property crimes and in practice rarely executed convicts for morals offenses).

¹² *See* FRIEDMAN, *supra* note 7, at 37–41 (discussing common methods of punishing criminals in the colonies).

¹³ WILLIAM M. OFFUTT, JR., OF “GOOD LAWS” AND “GOOD MEN”: LAW AND SOCIETY IN THE DELAWARE VALLEY, 1680–1710, at 186–91 (1995) (presenting empirical evidence of criminal-offender reintegration in the colonies in the Delaware Valley (now Pennsylvania and New Jersey)); Eli Faber, *Puritan Criminals: The Economic, Social, and Intellectual Background to Crime in Seventeenth-Century Massachusetts*, in 11 PERSPECTIVES IN AMERICAN HISTORY 83, 137–44 (Donald Fleming ed., 1978) (describing criminal-offender reintegration in Puritan Massachusetts).

notice. Those intuitions, rooted in Christian faith, emphasized that each of us is sinful, fallen; there but for the grace of God go we. All classes, not just the poor, fell afoul of the law. But Christian optimism tempered the colonists' pessimism. That same faith saw in each defendant the image and likeness of God, seeking to condemn the wrong while loving and welcoming back the prodigal son. Thus, the system respected every participant's intrinsic moral worth and dignity.¹⁴

Trials were likewise commonsense matters of hearing each side's story and assigning not only factual and legal but also moral blame. That meant they were simultaneously backward- and forward-looking, adjudicating the past with an eye toward the future. Juries often selected among multiple possible gradations of offenses, tailoring their convictions to the particular defendant's culpability and equities. Judges and juries could thus show mercy or recommend clemency in proportion to each defendant's fault, dangerousness, and amends.¹⁵

The entire criminal process was transparent and participatory. Transparency and participation kept the substance of criminal law, enforcement, and punishment in accord with popular morality. Procedurally, transparency and participation empowered victims, defendants, and citizens. Everyone had his day in court, told his story, and saw justice done by doing it himself. Aggrieved or innocent parties were vindicated, and guilty parties condemned, in the public eye. Participation empowered victims and citizens, counteracting many victims' feelings of powerlessness.

The roots of American criminal justice embody the thought of Emile Durkheim and Alexis de Tocqueville. In his *Division of Labor in Society*, Durkheim wrote that reforming defendants and deterring imitators are only incidental benefits of criminal justice; its core function is to reinforce society's solidarity.¹⁶ When a criminal transgresses the criminal law, society must denounce the wrong and punish the wrongdoer to reinforce its basic moral norms.¹⁷ In Durkheim's words, "[w]ithout this necessary act of satisfaction[,] what is called the moral consciousness cannot be

¹⁴ BIBAS, *supra* note 1, at 2–3, 11–12. The biblical reference is to the Parable of the Prodigal Son, found at *Luke* 15:11–32. In that parable, the prodigal son stands ready to admit his profligacy and to say that he deserves to be treated as a servant, not a son. But as soon as the father sees his son from a great distance, he has compassion, runs to kiss him, and rejoices over his return to life.

¹⁵ BIBAS, *supra* note 1, at 7–9.

¹⁶ EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 62–63 (W. D. Halls trans., The Free Press 1984) (1893).

¹⁷ *Id.* at 63.

preserved. . . . [Punishment] serves to heal the wounds inflicted upon the collective sentiments”¹⁸

Durkheim’s social solidarity helped to sustain the democratic self-government praised by Tocqueville.¹⁹ The colonists’ commonsensical system was a living, functioning part of democratic self-government. Citizens took turns serving on grand and petit juries, seeing first-hand justice in practice and so educating themselves and their neighbors. They applied the law to the facts and equities of particular cases, balancing freedom and security, justice and mercy. There were few if any technical rules of procedure or evidence to obscure or obstruct public understanding and moral judgment.²⁰ And there were plenty of lay checks upon official overreaching, ranging from tort liability for overzealous searches to grand jury presentments for official malfeasance.²¹

To be fair, the social conditions of the sixteenth, seventeenth, and eighteenth centuries were far more conducive to running criminal justice as a morality play. The colonies were small, close-knit communities—“tight little islands” in Lawrence Friedman’s phrase.²² They were very religiously and ethnically homogeneous, and much less diverse in race, education, and wealth.²³ (Where there were slaves and other minorities, they suffered second-class justice or worse.) People were much less mobile. State and government apparatus were much less developed, and there was far less professionalization.²⁴ There were no law schools or even indigenous law books in the English colonies, and there were no professional police forces.²⁵ And the lack of professional governmental apparatus carried substantial costs. For instance, night watchmen, constables, and other untrained volunteers and conscripts were hardly a match for dangerous professional criminals.²⁶

¹⁸ *Id.*

¹⁹ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 442–50 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1835) (discussing the role of the jury in self-governance).

²⁰ BIBAS, *supra* note 1, at 4–6.

²¹ See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 786–87 (1994) (tort liability); Renée B. Lettow, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1354–56 (1994) (grand jury presentments).

²² FRIEDMAN, *supra* note 7, at 17.

²³ See BIBAS, *supra* note 1, at 14. Conversely, these generalizations were probably less true of larger, more urban, more heterogeneous colonies such as New York.

²⁴ BIBAS, *supra* note 1, at 3, 14.

²⁵ WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 2 (1975) (discussing the absence of indigenous law books in the colonies); FRIEDMAN, *supra* note 7, at 27–29, 67 (discussing the absence of professional police forces).

²⁶ See FRIEDMAN, *supra* note 7, at 28.

Nevertheless, the colonists had something we lack today: a participatory, democratic justice system, attuned to local needs and moral intuitions. The next Part explores how professionalization came at the cost of democracy, as efficiency supplanted morality.

II. PROFESSIONALIZATION AND ITS DISCONTENTS

After the American Revolution, lawyers steadily displaced lay participation in criminal justice. Over the course of the nineteenth century, public prosecutors displaced victims. Then, defense lawyers increasingly represented defendants, speaking for and silencing their clients. Prosecutors and defenders were of course lawyers, agents of the public or defendants. That meant they lacked a personal stake in convictions and sentences, let alone in each side's having its day in court.²⁷

As agents, they did have interests in clearing their own dockets, minimizing their workloads, and avoiding the expense and possible embarrassment of losing at trial. Judges share most of these interests as well. So prosecutors, defense lawyers, and soon judges began to cooperate to trade less severe punishments for certain convictions. This was the rise of plea bargaining, which manipulated charges, convictions, and sentences outside the public's view.²⁸

From a Weberian bureaucratic perspective, plea bargaining makes perfect sense. Repeat players soon learn the value of recurring cases, developing a market with going rates and standardized terms. Risk-averse parties can cap their exposure and avoid worst-case outcomes as well as expense and delay.²⁹ The judge and lawyers clear their dockets and move the business, following the bureaucratic imperative to process cases quickly and cheaply. By saving the cost and drama of adversarial combat, plea bargaining makes each of the criminal justice insiders better off.³⁰

Moreover, if one defines criminal justice's aims narrowly as just efficient case processing, plea bargaining seems to make the system work

²⁷ BIBAS, *supra* note 1, at 16.

²⁸ See FISHER, *supra* note 6, at 62–90, 121–24, 129–36 (discussing prosecutors' use of dismissals, early probation, and later sentence recommendations as plea bargaining tools to lighten prosecutors' and judges' busy dockets, particularly once the Industrial Revolution clogged courts with tort suits).

²⁹ See BIBAS, *supra* note 1, at 32; MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 110–14 (1978) (explaining pressures on prosecutors to engage in plea bargaining).

³⁰ BIBAS, *supra* note 1, at 32–33; see HEUMANN, *supra* note 29, at 66, 144–48, 156–57 (1978); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1379–82 (2017).

better too.³¹ The system as a whole maximizes speed and quantity, optimizing general deterrence (as well as incapacitation).³² In an overwhelmed world of too much crime, the plea bargaining assembly line eventually seems to be the best that we can do.

When one removes these blinders, however, efficiency looks very costly. First, professionalization entails very substantial agency costs. Prosecutors and defense lawyers have substantial interests in reducing their own workloads and minimizing the chance of embarrassing defeats at trial. None of these actors feels his client's pain. That can rein in excessive vengefulness, but it can also soften the vigorous adversarial combat that is supposed to elicit the truth.

Second, the punishment assembly line loses sight of the purpose of punishment. The overriding objective is to do what it takes to get a conviction and get the case off the prosecutor's plate. That means that prosecutors make offers defendants cannot refuse, using whatever leverage they have to induce guilty pleas. These punishment threats and inducements rarely reflect retribution, deterrence, incapacitation, or reform. They are simply instrumental tools to induce pleas. And their instrumental value comes precisely in bypassing the morality play for which many victims and citizens thirst.³³

Punishment markets are amoral, divorced from punishment principles and only indirectly concerned with factual guilt. Non-merits factors such as defense counsel overwork, underfunding, and pretrial detention often drive bargains. Psychological biases and heuristics like overoptimism, discounting, framing, anchoring, risk aversion, and loss aversion skew punishments too.³⁴

Third, bureaucratic efficiency is at odds with checking governmental power. The Framers were deeply suspicious of state actors abusing criminal punishment. They built in democratic checks and balances such as grand and petit juries, sacrificing efficiency for public accountability.³⁵ But plea bargaining's efficiency depends upon bypassing or subverting these checks and balances. The result is concentrated power, empowering prosecutors to

³¹ See Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1978 (1992) ("Plea bargains are compromises. Autonomy and efficiency support them.").

³² See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 296–300 (1983) (discussing plea bargaining as a means of maximizing general deterrence).

³³ See BIBAS, *supra* note 1, at 39–40 (describing how the process values of outsiders to the criminal justice system differ from those of insiders).

³⁴ See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2530, 2496–519 (2004).

³⁵ See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1182–85 (1991).

exercise much hidden discretion with little accountability. Criminal justice professionals are thus insulated from meaningful oversight.³⁶

Fourth, insulation from the public breeds suspicion. Criminal justice depends on its legitimacy in the eyes of the public. When it comes to seem unconcerned with justice, criminal justice loses its claim upon citizens' voluntary cooperation. They are less likely to comply voluntarily with the law when no one is looking, and less willing to report crimes or otherwise cooperate with police and prosecutors.³⁷ This problem is akin to the Stop Snitching Movement and widespread protests against police shootings: large segments of the public no longer feel that law enforcement is on their side.³⁸ Moreover, poor people are disproportionately arrested and charged, and they suffer most from inadequate funding of indigent defense counsel.³⁹ These disparities exacerbate poor people's disadvantage and distrust of the system.

Fifth, in exalting quantity *über alles*, our system degrades the quality of criminal justice. The system seems callous, inhumane, deaf to the emotional and psychological needs of victims, defendants, and the public. Victims feel victimized again, disempowered, shut out, and silenced. People feel treated as fungible widgets to be hurried along the plea bargaining assembly line, not humans who have stories to tell and need a sympathetic ear.

Finally, speeding defendants along to prison treats them as less than human. Punishment is now little more than warehousing outcasts in internal exile. There is no serious effort to reform or rehabilitate them. Instead, their prolonged isolation and criminal records brand them as a permanent caste of ex-cons. Though America once embraced wrongdoers as errant brethren

³⁶ BIBAS, *supra* note 1, at 52.

³⁷ Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 949–51 (2006).

³⁸ Patrice Morris & Vivian Pacheco, *Stop Snitching Campaign*, ENCYCLOPEDIA OF RACE AND CRIME 773, 773 (Helen Taylor Greene & Shaun L. Gabbidon eds., 2009); *see* Bibas, *supra* note 37, at 951 (“Perhaps because of these factors, nearly three-quarters of Americans lack much confidence and trust in the criminal justice system.” (citing Lydia Saad, *Military Again Tops “Confidence in Institutions” List*, GALLUP POLL NEWS SERV. (June 1, 2005), <http://www.gallup.com/poll/16555/military-again-tops-confidence-institutions-list.aspx> [https://perma.cc/2RD8-JKTA])).

³⁹ *See* KAREN DOLAN & JODI L. CARR, INST. FOR POLICY STUDIES, THE POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY 11 (2015), <http://www.ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf> [https://perma.cc/DR2E-Q2BS] (reporting that each of the fifteen states with the largest prison populations “had a practice of arresting people because they were unable to pay fines, fees, debts or because they did not attend hearings about these debts”); A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 7–14 (2004), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [https://perma.cc/FM87-8P5K].

to be reclaimed, we now treat them as rabid dogs to be caged or as garbage to be thrown away.

One would think that the philosophical aims of criminal punishment would drive the procedures of criminal justice. But simplistic metrics of efficiency have taken on a life of their own. In substance, we seek to maximize the crudest measures of general deterrence and incapacitation by promoting the greatest imprisonment for the greatest number. Retribution filters into the system only in a truncated form, looking at the severity of crimes and criminal records but neglecting intent, motive, and character. There are pockets of treatment courts for juveniles and the lowest-level nonviolent crimes, particularly for drug-addicted defendants. But otherwise, reform and rehabilitation are all but absent from serious consideration.

In recent years, activists and policymakers have finally paid some attention to inequality of punishment, a consideration that is absent from the punishment assembly line. Even so, when the system tries to promote equality at all, in practice it focuses on mathematical equality of outcomes, not moral equality sensitive to each defendant's intent, background, reform, and other justifications for punishment.⁴⁰ Concern for victims and procedural fairness are almost entirely eclipsed by this equality calculus. The reign of quantity is a sign that the punishment machine has abdicated popular moral judgment.⁴¹

III. THE AMBITIONS AND LIMITS OF REFORMS

Confronted with the scale of the problem, one is sorely tempted to “abandon every hope” upon entering here.⁴² Dynamiting the plea bargaining edifice is futile. American criminal justice processes more than a million felony cases per year and more than ten million misdemeanors, not to mention many millions of traffic violations and tickets.⁴³ Crime is a

⁴⁰ See, e.g., Michelle S. Phelps & Devah Pager, *Inequality and Punishment: A Turning Point for Mass Incarceration?*, 663 ANNALS ACAD. POL. & SOC. SCI. 185, 196–97 (2016) (studying correlations between states' income inequalities and imprisonment rates, and between states' racial composition and imprisonment rates).

⁴¹ See Richard A. Bierschbach & Stephanos Bibas, *What's Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1459–62, 1469–74 (2016).

⁴² DANTE ALIGHIERI, *THE DIVINE COMEDY VOLUME I: INFERNO* 89 (Mark Musa trans., Penguin Books 1984) (Canto III, l. 9).

⁴³ SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 1* (2009), <https://www.bjs.gov/content/pub/pdf/fs06st.pdf> [<https://perma.cc/77C9-63PY>] (“In 2006, state courts sentenced an estimated 1,132,290 persons for a felony conviction.”); ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR*

perennial worry, and the mediating social institutions that restrained and handled much of it have frayed, forcing increasing reliance on what used to be the system of last resort.

Moreover, trial procedures have hypertrophied, making it too cumbersome to try more than a fraction of cases. Much of this overproceduralization has been constitutionalized, and much more is entrenched in technical rules of evidence and procedure. Old habits die hard, and it is difficult to imagine trying every case or declining to prosecute 80% or more of crimes.

Caution is warranted, but despair is not. Reining in agency costs and refocusing criminal justice on its moral ends and procedural values remain imperative, even if these goals are ambitious and only partly achievable. First, police and prosecutors have vast power that is now essentially unchecked, thanks to the withering of grand juries, petit juries, and judicial sentencing discretion. That unchecked discretion contrasts sharply with the administrative state and its extensive apparatus of standards, notice and comment, government in the sunshine requirements, and judicial review.⁴⁴

In addition, American criminal justice runs largely on autopilot. The goals it pursues reflexively diverge widely from the public's intuitive sense of justice. Paul Robinson and his coauthors' scholarship has impressively demonstrated how many common liability and punishment rules are greatly at odds with survey respondents' sense of deserved punishment.⁴⁵ The same is true of our plea and punishment procedures, which deny victims, defendants, and members of the public their say and day in court.

Criminal justice is a subject about which the public has great concern. Given its deeply moral content, the public is also unwilling to defer to technical experts. Repeated efforts to insulate criminal justice from popular input and opinion have backfired, as Rachel Barkow and others have shown.⁴⁶ Squelched and deprived of other outlets, eruptions of populist

COURTS 11 (2009), <https://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808> [<https://perma.cc/A383-K2FC>] (estimating that American courts handle roughly 10 million misdemeanor cases per year).

⁴⁴ Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976); see Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1020–31, 1041–50 (2006) (explaining the lack of administrative, judicial, and political oversight of police and prosecutors; contrasting this with ample oversight present in other administrative spheres; and discussing the plea bargaining consequences of such broad prosecutorial discretion).

⁴⁵ See Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1961–78 (2010).

⁴⁶ See, e.g., Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 798–800 (2005) (“[A]gencies responsible for regulating criminal justice issues are under enormous political pressure, regardless of their design. . . . [I]t is largely up to legislatures to determine how much influence sentencing commissions will have, and features designed to promote independence are of little consequence in this context.”).

outrage only make things worse. Voters turn for instance to tools of direct democracy such as initiatives and referenda, adopting bumper-sticker slogans such as three-strikes laws and mandatory minima. Yet prosecutors and other insiders routinely subvert these laws, turning them into more plea bargaining chips and so further fueling popular outrage and learned helplessness.⁴⁷

The ultimate goal here is to refocus from quantity to quality. That means first and foremost taking seriously the principle of parsimony. Criminal stigma and punishment should as a rule be reserved for the most serious *mala in se*. We need more triage mechanisms, to better sift out and divert smaller and less blameworthy wrongs. Most wrongs should be resolved civilly, administratively, or by arbitration, mediation, or diversion accompanied by restitution and possible treatment.

Declination should become the norm for matters that are smaller, less blameworthy, amenable to noncriminal resolution, or not readily provable beyond a reasonable doubt. That would require more investigation up front to vet the strength of the evidence and likely defenses, instead of trusting in the ability to bargain away weaknesses later.⁴⁸ One important benefit of ferreting out and declining to prosecute weak cases is that it will disproportionately benefit innocent defendants, clearing their names earlier and preventing wrongful convictions.

This legal change requires an accompanying cultural change to the American expectation that “there oughta be a law” or “there oughta be a prosecution.” Many other societies use many other ways to mediate conflicts and ensure restitution and apologies. The growing restorative justice movement exemplifies these lessons.⁴⁹ America’s litigious culture could learn a lot from them.

Narrowing criminal justice’s ambitions will husband its stigma and its resources, conserving its credibility. It will also allow for more thorough and considerate procedures, better ensuring factual, legal, *and* moral accuracy. Slowing cases down will allow more care, more caution, and more thorough deliberation about guilt, blame, and the need to condemn and punish. Judges should once again judge, not just rubber stamp.

⁴⁷ Bibas, *supra* note 37, at 939–45.

⁴⁸ See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 49, 61–64 (2002) (discussing “hard screening” policies as an alternative to later charge-related negotiations, and describing the prosecutorial screening practices that Orleans Parish District Attorney Harry Connick put in place to reduce plea bargaining).

⁴⁹ See BIBAS, *supra* note 1, at 94–101, 222–26 & nn.26–37 (collecting sources); Erik Luna, *Introduction: The Utah Restorative Justice Conference*, 2003 UTAH L. REV. 1.

Finally, improving the quality of criminal justice means caring not only about *why* and *how much* we punish but also *how* we get there. Procedural justice means treating victims, defendants, and citizens as stakeholders, not just nuisances or informational resources. It requires soliciting their views and knowledge and listening to them fairly and respectfully. Talking and listening in turn require time: it is hard for a defense lawyer to build rapport and trust with a client if he has only five minutes to speak with him in the holding cells outside the courtroom and instantly presents him with a plea offer as a *fait accompli*. “Meet ‘em and plead ‘em” lawyering must end. So must the most coercive punishment threats, such as using the death penalty as a plea bargaining chip. Criminal justice needs to tend to humans humanely—as people, not widgets or statistics.

IV. RETURNING SOME POWER TO THE PEOPLE

Any problem this gigantic and longstanding resists pat solutions in the last few pages of a law review essay. That difficulty warrants caution, but not despair. Some reforms are easier and less costly, especially in the short term, while others are longer-term ambitions. This Part sketches out a rough ladder of types of reform, from those that work within a fundamentally professionalized system to those that transform it by bringing in the public.

The *first* cluster of reforms seeks to change professionals’ perspective. Prosecutors, police, and other professionals wear blinders, focusing narrowly on maximizing quantity and speed and minimizing cost. Arrests, charges, and conviction statistics dominate budgeting, promotion decisions, and boasting.

A series of reforms could combat this professionalized tunnel vision. Prosecutors’ offices could hire from a broader variety of backgrounds, including former defense lawyers and victims’ advocates. Their training could incorporate lay voices, psychological perspectives, and concern for victims. Salary and promotion decisions could look beyond quantity to reflect quality as well.⁵⁰

To do all of this, we need better metrics of success. Right now, an enormous amount rides on the crudest of measures: arrest, charge, and conviction statistics. Quantity is obvious and easy to measure; quality is all but absent. But police and prosecutors can take a page from businesses, which have found many ways to measure quality. Customer satisfaction

⁵⁰ See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1007–14 (2009).

surveys, for instance, provide rich qualitative information about the purchasing process as well as the product's performance. More broadly, 360-degree feedback aggregates information from an employee's supervisor, subordinates, peers, and customers. Police and prosecutors' offices could expand these email or automated telephone surveys to include victims, defendants, witnesses, judges, and opposing counsel. Supervisors could use this information in training and performance evaluations, to ferret out not only legal violations, negligence, and abuses of power, but even rudeness and thoughtlessness. More comprehensive, real-time feedback would greatly reduce professionals' agency costs, forcing agents to be far more responsive to all their principals' interests and needs. Serving the interests of victims, defendants, and the public would be not just a gauzy ideal, but a concrete, measurable standard.⁵¹

These steps would improve the principal-agent problem at the level of line prosecutors, police, and judges. Improving accountability of head prosecutors and police chiefs is a tougher nut to crack. Prosecutorial elections are notoriously uncompetitive, driven by poor information, particularly scandals or a handful of high-profile trials.⁵² Better metrics of success could help somewhat. But, as David Schleicher and Elina Treyger explain, local prosecutorial elections are afflicted by apathy and low information, and that pathology is structural.⁵³ Our best bet is probably to put less faith in periodic elections and more in ongoing community-policing and community-prosecution meetings and partnerships.

A *second* cluster of reforms should try to make punishment more productive, populist, and prosocial. Rather than spending years in idleness, able-bodied prisoners should be able to work, earning pay, making restitution, and developing marketable skills. One could even experiment with allowing able-bodied inmates without serious violent tendencies to enlist in the military, gradually earning the rank and privileges of ordinary enlisted soldiers and sailors. Inmates should make restitution to victims and support their own families, to the extent feasible. And this restitution should include not only monetary compensation and help undoing physical damage, but also expressions of remorse and apologies.⁵⁴

A particularly thorny issue is the extent to which punishment should incorporate shaming. On the one hand, shaming seems to involve the

⁵¹ See *id.* at 1011–15.

⁵² See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 592–606 (2009).

⁵³ David Schleicher & Elina Treyger, *The Case Against the DA* 24–26 (Sept. 30, 2016) (unpublished manuscript) (on file with the *Northwestern University Law Review*).

⁵⁴ See BIBAS, *supra* note 1, at 133–40.

community, allowing it to denounce the wrong and see justice done. On the other hand, shaming seems to unleash the worst passions of the mob, objectifying and scapegoating the wrongdoer. One might productively follow John Braithwaite in distinguishing reintegrative from disintegrative shaming, favoring temporary shame followed by forgiveness and reintegration.⁵⁵ The goal is to make punishment more visible but also more local and more temporary, so it is more accountable but also more measured.

Third, reformers should strive to improve public oversight by making American criminal justice more transparent. The public knows and sees little of what police, lawyers, and judges actually do each day, so it can do little to guide or rein them in. Investigative reporters could do much more to research and publicize aggregate statistics as well as typical cases, not just the sensational, atypical ones that grab headlines. Legislative oversight hearings should likewise attend to everyday cases, not just exceptional ones. Criminal court observers can assist, as could broadcasting court proceedings and filming police interactions with citizens.⁵⁶

But I am skeptical about using new media as a substitute for day-to-day democratic oversight and engagement. All too often, electronic media elicit not reasoned deliberation but rather mob passions. It is simply hard, if not impossible, to recreate bygone eras when everyone in a small town knew everything about the criminal trial that was in their midst and consumed all their attention. There is a huge difference between knowing about individual cases at the retail level and hearing abstract statistics about wholesale criminal justice patterns. By itself, transparency risks promoting the latter without the former.

Even so, some oversight is better than none at all. Prosecutors, currently accountable to almost no one in practice, will behave differently if they have some awareness of being watched. Police ordinarily behave differently when they know they are being filmed.⁵⁷ The agency costs are so large, and so unchecked, that more transparency cannot hurt.

⁵⁵ *Id.* at 141; JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 54–107 (1989).

⁵⁶ Bibas, *supra* note 37, at 955–59; see Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2177–78 (2014) (finding a “right to a public criminal adjudication” and explaining “the constitutional importance of the audience in the nontrial courtroom”); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 391 (2016) (“This Article explores the phenomenon of organized copwatching—groups of local residents who wear uniforms, carry visible recording devices, patrol neighborhoods, and film police-citizen interactions in an effort to hold police departments accountable to the populations they police.”).

⁵⁷ See LINDSAY MILLER & JESSICA TOLIVER, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED, POLICE EXECUTIVE RESEARCH FORUM 5–7 (2014), <https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf> [<https://perma.cc/4C8L->

Fourth, reforms should strive to create more opportunities for the public to participate in criminal justice. This is most feasible at the lowest level of government, the neighborhood or police precinct: community-policing and community-prosecution meetings can explain priorities and promote cooperation with neighborhood residents, while reciprocally soliciting and listening to residents' priorities.⁵⁸

There are also ways to institutionalize participation within criminal justice institutions. Citizen volunteers could rotate through police departments and prosecutors' offices, consulting on enforcement priorities. Revived grand juries, or plea juries, could play more meaningful roles in the most serious criminal cases. These juries could check prosecutorial charging and bargaining decisions, especially the (ab)use of mandatory minimum penalties.⁵⁹

Jury-like bodies could also play roles after conviction. Restorative sentencing juries could listen to victims' and defendants' stories and weigh reasons and appropriate penalties, instead of being bound by prosecutors' unilateral charging decisions. And citizen input into clemency, including both pardon and commutation decisions, could revive a historic safety valve that has fallen into disuse in the hands of nervous bureaucrats.⁶⁰

CONCLUSION

America's plea bargaining assembly line is far removed from its colonial roots in a cathartic morality play. The modern amoral criminal justice bureaucracy is cut off from the wellsprings of democratic legitimacy and popular moral judgment. Rather than continuing to ignore or squelch democratic input, we would do better to welcome it back in, tempering efficient case processing with humane, equitable discretion. Insiders and outsiders, lawyers and laymen, should once again cooperate, balancing their perspectives as part of a broader morality play.

VD7T] (reporting on studies showing that police officers who wore body cameras were involved in fewer use-of-force incidents and received fewer complaints).

⁵⁸ BIBAS, THE MACHINERY, *supra* note 1, at 146–47; Bibas, *Transparency and Participation*, *supra* note 37, at 959–60.

⁵⁹ BIBAS, THE MACHINERY, *supra* note 1, at 147–49; Bibas, *Transparency and Participation*, *supra* note 37, at 959–60.

⁶⁰ BIBAS, THE MACHINERY, *supra* note 1, at 156–64.