

CRIMINAL JUSTICE THAT REVIVES REPUBLICAN DEMOCRACY

John Braithwaite

ABSTRACT—Criminal justice seems an implausible vehicle for reviving democracy. Yet democracy is in trouble. It is embattled by money politics and populist tyrannies of majorities, of which penal populism is just one variant. These pathologies of democracy arise from democracy having become too remote from the people. A new democracy is needed that creates spaces for direct deliberative engagement and for spaces where children learn to become democratic. A major role for restorative justice is one way to revive the democratic spirit through creating such spaces.

AUTHOR—Professor and Founder of the School of Regulation and Global Governance (RegNet) at the Australian National University.

NORTHWESTERN UNIVERSITY LAW REVIEW

INTRODUCTION..... 1508

I. DEMOCRACY’S DISAPPOINTMENTS AND DEMOCRATIC HOPES FOR THE JUDICIAL
BRANCH..... 1508

II. IN THE FOOTSTEPS OF CYRUS: LEARNING FROM TYRANTS 1510

III. DEMOCRACY’S DISAPPOINTMENTS AFTER WAR: THE CASE OF JAMMU AND
KASHMIR..... 1513

IV. DEMOCRACY CAUSING DOMINATION ON A WIDE FRONT 1516

V. GROWING DEMOCRACY IN THE JUDICIAL BRANCH..... 1519

VI. DEMOCRATICALLY DISMANTLING CRIMINAL LAW’S DOMINATIONS 1522

CONCLUSION..... 1522

INTRODUCTION

Democracy is virtuous because it can increase freedom, particularly when we conceive freedom as nondomination. Unfortunately, however, democracy often reduces freedom and has become more systematically an enabler of domination. Domination of women in criminal justice is one kind of un-freedom considered in this Essay. Criminal justice, like democracy, is systemically dangerous when it increases domination. Criminal justice can be reformed to reduce the domination of women and men. Reformed republican criminal justice, however, can reduce the dominations of criminal justice and reduce the dominations of criminality, while advancing liberty through democracy. Indeed, criminal justice is a strategic institution for salvaging contemporary corrosion of democracy, unleashing the potential of democracy for advancing liberation. Electoral populism is the key risk for criminal justice becoming a tyranny of the majority. Money politics is the most poisonous risk of electoral democracy as it drives up domination instead of freedom.

One reason the judicial branch is the most hopeful branch for renewing the jaded circumstances of democracy is that the judiciary can be easier to proof against money politics and populism than the legislative or executive branches. Money power is, much more insidiously, the worm in the apple of the legislature and executive; the judicial branch can choose to use its greater freedom from money politics, power politics, and populist politics to better institutionalize freedom and enrich democracy.

I. DEMOCRACY’S DISAPPOINTMENTS AND DEMOCRATIC HOPES
FOR THE JUDICIAL BRANCH

Democracy accumulates tarnish in the eyes of the young. Trust in democracy and its key institutions has been in decline across all the

decades since trust has been measured systematically.¹ This is one reason I have argued that the project of repairing a jaded democracy in the legislative and executive branches of government is a less important project than reviving democracy through the judicial branch.² There are things we can do to rescue the legislative and executive branches from subservience to money politics and remoteness from the people that are identified here as their fundamental problems. Yet no society finds it easy to stop money from talking in politics and surveying histories of failures to do so is not the topic of this Essay.

Many political philosophers have argued that democracy is good because it advances certain values, as opposed to being good in itself. This explains our moderation in the use of democracy. If elections were so good, why not hold them annually? Why not provide every citizen a referendum app to participate in a citizens' vote on every question before legislatures? The answer is that decision by vote destabilizes in ways that can threaten other values, including truth. This is because politicians often win by being more adept at lying than their adversary.

The judicial branch can better enable deliberative democracy than other government branches because deliberation is more feasible over finite legal issues within the confines of a courtroom or restorative justice circle than it is across the many agencies of executive government and the houses of legislatures as they choose among a wide range of possible priorities. Votes are easier to buy than judicial decisions, and executive governments are easier to buy than "not guilty" verdicts. That is why everywhere in the world, with the sometime exception of Afghanistan,³ people in opinion polls perceive police to be more often corrupt than judges. One reason for this is that judges are more sensitive to the professional self-regulation of the legal profession than they are to opportunities to make money on the side. They understand that their success depends on their reputation within the profession more than anything else. This bulwark against judicial corruption is reinforced by norms that the full reasoning behind their decisions must be made public, in open court or in written decision, as must the process by which they reached their decision: who received access to the court and who was denied leave to testify—something far less true

¹ See WHY PEOPLE DON'T TRUST GOVERNMENT (Joseph S. Nye, Jr. et al. eds., 1997); OECD, GOVERNMENT AT A GLANCE 2013, at 19–35 (2013).

² See JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 130–34 (2002); John Braithwaite, *Deliberative Republican Hybridity Through Restorative Justice*, 59 RAISONS POLITIQUES 33 (2015).

³ John Braithwaite & Ali Wardak, *Crime and War in Afghanistan: Part I: The Hobbesian Solution*, 53 BRIT. J. CRIMINOLOGY 179 (2013); Ali Wardak & John Braithwaite, *Crime and War in Afghanistan: Part II: A Jeffersonian Alternative?*, 53 BRIT. J. CRIMINOLOGY 197 (2013).

among executives and legislators. Judges' professional reputations are vulnerable to panels of their peers on appellate courts finding fault with the public account of their reasoning. Finally, in serious criminal law cases in common law countries, money power may have to buy twelve jurors, as well as a judge. It can be difficult to do both. Judges sometimes become as corruptly intoxicated as politicians with accumulating money and power. But this happens much more rarely for the foregoing reasons.

This Essay argues that the problem is not just that money politics corrupts democracy. It is that democracy engenders money politics and thereby drives up domination, destroying the very freedom of citizens that is democracy's rationale. I argue here that, unfortunately, well-funded campaigns to spread lies on social media are just one way that contemporary politics has become progressively more sophisticated in its openness to corruption by the drive to accumulate money and power. This passes to the judicial branch a responsibility to renew the promise of democracy for citizens in ways we might not have seen as the judiciary's responsibility in previous centuries.

II. IN THE FOOTSTEPS OF CYRUS: LEARNING FROM TYRANTS

This Essay defends the republican tradition⁴ that has roots as early as the Code of Hammurabi in Babylon and the freeing of slaves, most famously the liberation and return to Jerusalem of the Hebrew slaves by Cyrus the Great of Persia.⁵ Thomas Jefferson owned two copies of Xenophon's *The Education of Cyrus*,⁶ one heavily annotated in his hand as he toiled as a Founder.⁷ The Roman Empire was, however, the most germinal incubator of the kind of contemporary civic republicanism that is

⁴ While Antony Duff in his contribution to this special Issue articulates the republican tradition in different terms from these (more liberal terms less focused on domination), they are terms that can be consistent with the account presented here.

⁵ It is important to note that Cyrus not only lifted the domination of many types of slaves captured in previous wars; his project was also to afford a decent life of nondomination for underclasses of all kinds. So Persepolis came to be built by workers who were paid enough to lift them out of utter poverty, with unprecedentedly moderate working hours compared to previous ceremonial capitals. Moreover, Cyrus not only freed the Hebrew slaves to return home, he actively assisted with transport for their return and provided them resources to help rebuild their ravaged temple in Jerusalem. His project was not only a proto-republican one, it was also a proto-restorative project. See SAMUEL WILLARD CROMPTON, *CYRUS THE GREAT* (2008).

⁶ XENOPHON, *THE EDUCATION OF CYRUS* (Wayne Ambler trans., Cornell Univ. Press 2001).

⁷ Harrop claims that, in addition to Jefferson, Benjamin Franklin, James Madison, and other Founders were familiar with Xenophon's *The Education of Cyrus*. Wm. Scott Harrop, *Cyrus and Jefferson: Did They Speak the Same Language?*, PAYVAND (Apr. 16, 2013), <http://www.payvand.com/news/13/apr/1111.html> [https://perma.cc/2BAF-NPAU].

an intellectual thread through J.G.A. Pocock,⁸ Quentin Skinner,⁹ to Philip Pettit.¹⁰ Pettit conceived freedom as nondomination as the core political value, where nondomination was initially conceived in Rome in terms of the condition of liberation from slavery. Democracy in this tradition is not good in itself; it is constitutive of public value only when it advances freedom as nondomination.

A paradox of the most vibrant developments in institutionalized democracy is that these democracies so depend on the creation of widely pacified spaces, on what Norbert Elias calls the civilizing process.¹¹ They incubate in some of the most genocidal empires the world has seen: Cyrus's ancient Persian empire and Rome even as they razed cities that resisted them, like Carthage; the British and French colonial empires, which slaughtered Aboriginal populations in continents beyond Australia and Africa; and the American empire, built on genocide against indigenous people and grown on the back of the British slave trade.

One reason it is important to see this paradox sharply is that, as in the time of Cyrus, it remains important today to see how we can learn to better democratize justice from countries like Iran whose regimes have some tyrannical features. It is important for feminists to be open to considering that we can learn things we cannot learn in the West about how to advance the liberation of women by observing male-dominated tribal jirgas in the Pashtun lands of Afghanistan and northwest Pakistan.¹² Yet, there is a profound reluctance to learn feminist or democratic lessons from such contexts. Between 1978 and 1992, the Communist regime in Afghanistan accomplished much more equality between men and women than our NATO invasion has accomplished this century.¹³ Despite Laura Bush's pitch that an invasion of Afghanistan would liberate women, by 2014 Afghanistan ranked 101st out of 102 countries on the OECD Development

⁸ J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

⁹ QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1998).

¹⁰ PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997).

¹¹ NORBERT ELIAS, *THE CIVILIZING PROCESS: SOCIOGENETIC AND PSYCHOGENETIC INVESTIGATIONS* (rev. ed. 2000).

¹² Jirgas are traditional Pashtun deliberative circles for settling disputes, as discussed in John Braithwaite & Ali Gohar, *Restorative Justice, Policing and Insurgency: Learning from Pakistan*, 48 *LAW & SOC'Y REV.* 531 (2014); Braithwaite & Wardak, *supra* note 3; Wardak & Braithwaite, *supra* note 3.

¹³ Stephen Gowans, *Women's Rights in Afghanistan*, WHAT'S LEFT (Aug. 9, 2010, 10:27 PM), <https://gowans.wordpress.com/2010/08/09/women%E2%80%99s-rights-in-afghanistan/> [<https://perma.cc/K5JF-FUH6>].

Centre's Social Institutions and Gender Index.¹⁴ Indeed, we must question the entire narrative of feminist advance as occurring in two major waves, one starting in the late nineteenth century that resulted in votes for women, the second flowing from the pens of great feminist writers and activists from the 1970s.

Afghanistan is not unique. Between the two waves of the Western narrative, Soviet and Maoist Communism were doing more to equalize educational, workplace, judicial, and participatory rights for men and women¹⁵ than the West.¹⁶ Communist women even came to break through capitalist glass ceilings more than women from the capitalist world: by 2011, half of the fourteen billionaires on Forbes' list of the world's richest self-made women were from mainland China.¹⁷ Comparatively greater women's equality is more present at some peripheries of late Communist empires, such as Nepalese Maoism,¹⁸ than at its cores in Russia and China. Most provocatively, some Mongolian feminists advance a revisionist narrative of the most genocidal ruler in human history (in terms of the proportion of the world's population he slaughtered), Genghis Khan.¹⁹ They see him as opening spaces for women's participation in the rule of history's largest empire; Genghis Khan as an incipient feminist who suffered a "bad press" in the West. It is hard to judge if these claims are exaggerated, but they do help make the point that it is a grave error to discount what we can learn about democracy and nondomination from societies that are less democratic or decent than our own. This is especially so when many of the most noble accomplishments of our own democracy were forged by

¹⁴ *Gender Equality in Afghanistan*, SOCIAL INSTITUTIONS AND GENDER INDEX (2016), <http://www.genderindex.org/country/afghanistan> [<https://perma.cc/68S9-WXLD>].

¹⁵ They were also institutionalizing reforms like the abolition of brideprice (buying brides).

¹⁶ This is even true today in a Communist society like Cuba where 49% of seats in the national legislature are held by women, higher than for all Western capitalist societies, according to the World Bank. *Proportion of Seats Held by Women in National Parliaments*, WORLD BANK, <http://data.worldbank.org/indicator/SG.GEN.PARL.ZS> [<https://perma.cc/MT3U-9ZRJ>].

¹⁷ That remained the case in the 2016 ranking: the two richest women were mainland Chinese, with a big gap having opened up between them and better-known Western entries like Oprah Winfrey and Guiliana Benetton. This gap exists because the Chinese accomplishments were in core capitalist industries like information technology, as opposed to accomplishments in entertainment and fashion among some Western entries. See *The Richest Self Made Women in the World 2016*, FORBES, <http://www.forbes.com/pictures/heik45id/zhou-qunfei/#6c1104ce3506> [<https://perma.cc/ND8Q-NFES>].

¹⁸ John Braithwaite, *Gender, Class, Resilient Power: Nepal Lessons in Transformation* (RegNet Research Paper No. 92, 2015), http://johnbraithwaite.com/wp-content/uploads/2016/04/2015_Gender-Class-Resilient-Power.pdf [<https://perma.cc/BVS3-2NUJ>].

¹⁹ JACK WEATHERFORD, *THE SECRET HISTORY OF THE MONGOL QUEENS: HOW THE DAUGHTERS OF GENGHIS KHAN RESCUED HIS EMPIRE* (2010). I am grateful to ANU colleague Narantuya Ganbat, whose grandmother was one of the most influential women in the history of the Mongolian Communist Party, for this revisionist Mongolian take on the history of feminism.

patriarchal, westward-ho, genocidal slave owners like the great civic republican who laid the foundations of the Democratic Party, Thomas Jefferson. Likewise, we can learn much about democracy and women's rights from patriarchal justice institutions of Polynesian and Melanesian societies across the Pacific, from patriarchal jirgas in Central Asia, and from the progressive way Iranian law criminalizes the profound domination involved in failures to pay alimony by husbands who walk away from their wives and children. If we do not have an attitude of learning from the best and worst of both our own society and every other society on the planet, we will be poor custodians of democracy's promise.

Before hastily concurring that pursuit of democracy is not in itself a good thing for liberation from patriarchy, slavery, or any other form of domination, the next Part puts more meat on the bones of this hypothesis. Westerners who live comfortable lives do not grasp the depth of the crisis of democracy globally. This is another imperative for us to shift our gaze east and south. Yes, we see the corrosion of public trust in the West. But those of us in the peacebuilding community of scholars who work in places like the Democratic Republic of Congo almost universally now see a deeper pathology of democracy.²⁰ This is more than just the ills in the United States of jaded cynicism about the political class and the decency of truthful electoral competition. It is a pathology of elections doing more harm than good in the very places where, according to our political theories, democracy is the imperative remedy.

III. DEMOCRACY'S DISAPPOINTMENTS AFTER WAR: THE CASE OF JAMMU AND KASHMIR

A revealing method for evaluating a theory is to road test it in the "most likely case" for its success.²¹ If the theory fails in the "most likely case," then it probably should be discarded.

India might be considered a "most likely case" for democracy succeeding. There was no other country liberated from colonialism after World War II that remained as consistently democratic as India, even in the face of division by more multiplex ethnic and religious cleavages than most states. India has consistently been by far the largest democracy in the world

²⁰ The first free multiparty election for forty-six years in the Democratic Republic of Congo occurred in 2006. The intention was to withdraw United Nations peacekeepers immediately after the election. But unfortunately, the election institutionalized the criminalization of the state into the hands of the winning family. See JOHN BRAITHWAITE & BINA D'COSTA, *CASCADES OF VIOLENCE* (forthcoming).

²¹ Harry Eckstein, *Case Study and Theory in Political Science*, in *HANDBOOK OF POLITICAL SCIENCE*, VOL. 7: STRATEGIES OF INQUIRY (F. Greenstein & N. Polsby eds., 1975).

even as it was profoundly buffeted by Cold War schisms and held together in the most difficult of circumstances. Even compared to the most important postcolonial democratic success story of previous centuries—the United States—India has not suffered convulsion similar to the American Civil War (where almost half the population rejected its democratic constitution). India has also sustained a more independent and activist judiciary than many Western democracies; its judiciary would never have tolerated a Guantanamo Bay. There is a special kind of democracy in the reinvigoration of Mahatma Gandhi’s “village republicanism” of Panchayats (“assembly of elders”) through the world’s largest anti-poverty program, the Mahatma Gandhi National Rural Employment Guarantee Act. It operates in 778,000 villages to guarantee 100 days of publicly funded work every year, mostly on water conservation projects in rural areas, to the poorest people of India.²² One-third of Panchayat members are constitutionally mandated to be women, as in the Maoism-led Panchayat reforms in Nepal.²³ There is also an emergent tradition of Indian criminal law concerned with Panchayats as incipient vehicles for a more democratic and restorative criminal justice at the village level where most Indians still live.²⁴

Yet, within this “most likely case” for democracy’s success, democracy failed to secure freedom in the very circumstances when democratic integrity is most needed.²⁵ This is in Jammu and Kashmir, the only Indian state that emerged from partition with Pakistan as a majority Muslim state. Domination of Muslims in Kashmir by Delhi Hindu elites fueled many waves of nonviolent civil disobedience pleading for *azadi* (freedom as the condition of not being a slave) and many waves of civil war.²⁶ This is not just a story of democracy as an institution that failed to prevent domination in Kashmir when it was most needed; it is one of democracy as a cause of domination.

There has been a total failure of democracy in Jammu and Kashmir from early on through rigged elections, corruption, removal of elected officials who threatened the perceived interests of the ruling party in Delhi, and other blatant strategies to kill democracy.²⁷ In more recent times, India

²² For discussion of critical accounts of this program, see Braithwaite, *supra* note 2, at 38–44.

²³ *Id.* at 38; Braithwaite, *supra* note 18, at 10–12.

²⁴ S. Latha & R. Thilagaraj, *Restorative Justice in India*, 8 ASIAN J. CRIMINOLOGY 309 (2013); M.Z. KHAN & K. SHARMA, *PROFILE OF A NYAYA PANCHAYAT* (1982).

²⁵ BRAITHWAITE & D’COSTA, *supra* note 20.

²⁶ This began the destabilization of Afghanistan from Kashmir decades ago. Kashmir was the early birthplace of Islamic terrorism that spread afar. Many South Asian scholars argue that peace cannot be secured in Afghanistan without securing peace in Kashmir first. *See id.*

²⁷ *Id.*

has found it important to sustain the appearance of democracy by reporting key performance indicators (KPIs) valued by the international democracy industry. One KPI is the percentage of electors who turn out. Part of the contrivance of democracy in Kashmir is reports of high voter turnouts: State-backed militias take people at gunpoint to the polling booth to get up the turnout percentage and to increase the odds of favored candidates. Then the state is able to announce her democracy is working. So democracy increases domination.²⁸

Another informant described an incident in 2008 where the local military commander abducted the wife of the village headman to the military post. She was kept there all night. People assumed she was being raped. The village head banged on the door of the post through the night. In the morning his wife was released to him. The military commander asked her to say if anyone had harmed her during the night. She said she had not been touched. Then the commander told the village head to put aside his resistance to getting the village vote out for a favored candidate on election day. If he did not, his wife would be picked up again and this time would be raped all night by all his men. Democracy increasing domination again.²⁹

Another Kashmir respondent summarized the situation this way: “New Delhi preaches democracy, but on the ground practices occupation . . . Control is routed through democratic practices . . . Disempowerment through democracy.”³⁰

A senior bureaucrat said that in some situations, the “village votes partly to protect the headman. . . . The military is generally not bothered by who wins. They are only interested in the show of it. The army is in power regardless of which party governs.”³¹ Our Kashmiri informants reported dismay at the way Western diplomats praise India for high voter turnouts in recent Jammu and Kashmir elections. A former senior Indian defense official argued that rewards by the military are more important than force in getting villages out to vote: “I don’t have a responsibility to give you medical care or repair your roads and don’t come asking me to do that if you don’t get out and vote.”³² There is a systematic policy of rewarding with the bribe of development assistance those villages and headmen that are subservient to the appearance of Indian democracy.

²⁸ Interview 101210, in Srinigar, India (2012) (on file with author). All research interviews have been collated and coded for anonymity, unless otherwise requested, and filed in a series of unpublished and confidential Kashmir field notes.

²⁹ John Braithwaite and Bina D’Costa’s Kashmir field notes (on file with author).

³⁰ Interview 101209, in Srinigar, India (2012) (on file with author).

³¹ Interview 101229, in Srinigar, India (2012) (on file with author).

³² Interview 101208, in New Delhi, India (2012) (on file with author).

IV. DEMOCRACY CAUSING DOMINATION ON A WIDE FRONT

If democracy is a sprinkler system that switches off when the flames of domination flash fiercely, if it fails in a theoretically “most likely case” like India, then it may be a dubious political theory. We should not be content with diagnoses of the exceptionalism of large cases like India (or the United States). Now we turn to a wide variety of less likely cases for democratic success, but cases where democracy is unusually important to secure by the lights of democratic theory. The largest class of cases where democracy seems critically important to build is countries that have suffered a major armed conflict.

At the turn of this century, most peacebuilding scholars believed that building democracy was an urgent priority for societies recovering from war. The influence of the democratic peace theory was at its height.³³ When international peacekeepers helped war-torn states secure a peace, returning democratic sovereignty to the people from the hands of foreign troops as quickly as possible was the objective for democratic reasons but also for cost containment. Today that consensus has reversed among peacebuilding scholars who believe that from recent cases like Libya to older ones like the Democratic Republic of Congo, too hurried a rush to elections has caused more problems than it has solved.³⁴ As with sudden decolonization, quick fix elections allowed populist tyrants to garner votes by sowing ethnic division, thereby seizing power in the aftermath of conflict, criminalizing the state, and fomenting future coups and civil wars. A high-water mark of this folly was the 2003 Bush Administration conceiving regime change in Iraq as a way of demonstrating to the entire Middle East how democratization could build security and prosperity. It built ISIS instead. Likewise, with the nonviolent transition in Egypt after the Arab Spring, sequencing an election before renewal of rule of law and a participatory constitutional debate was a fatal error.

The first priority after conflict is not to establish electoral democracy, but to build a rule of law. Transitional states are best denied electoral democracy until the foundations of the judicial branch of the state are built,

³³ The democratic peace theory is the false belief that democracies have never been to war against each other. For a summary of the key works and critiques on the democratic peace theory, see Nils Petter Gleditsch, *Democracy and Peace*, 29 J. PEACE RES. 369 (1992). The idea could be traced to Kant’s 1795 contention that when citizens can vote to determine political outcomes, they would not vote for war unless their country were under attack. See IMMANUEL KANT, PERPETUAL PEACE (Lewis White Beck trans., Liberal Arts Press 1957) (1795).

³⁴ The most influential scholarly discussions of these failed democratic transitions to be discussed below are PAUL COLLIER, WARS, GUNS, AND VOTES: DEMOCRACY IN DANGEROUS PLACES (2009); EDWARD D. MANSFIELD & JACK SNYDER, ELECTING TO FIGHT: WHY EMERGING DEMOCRACIES GO TO WAR (2007); ROLAND PARIS, AT WAR’S END: BUILDING PEACE AFTER CIVIL CONFLICT (2004).

alongside what we might call the regulatory branch (an independent electoral commission, an Auditor-General, an Ombudsman, an Anti-Corruption Commission, an independent Human Rights Commission).

One purpose of this Essay is to tweak that view by arguing that a transitional government of national unity negotiated through a peace process and heavily influenced by apolitical technocrats is not really an anti-democratic policy preference for two reasons. First, in any contemporary society, because of the tragic path of corroded trust that electoral democracy has taken, the judicial branch is more important for building democracy than the elected legislature in any case. Second, short-termism in commitment to electoral democracy leads to long-term criminalization of the state that crushes long-term democracy in all branches of governance.

My Peacebuilding Compared project³⁵ is coding many variables about all major wars since the end of the Cold War. This is one of the coded variables:

Democracy can be a driver of domination and violence. Electoral competition can widen cleavages and create niches for violent groups to be enrolled by political parties to intimidate voters and opponents.

For only twelve of the thirty-eight armed conflicts coded so far has this factor been coded as unimportant in the onset of armed conflict. Before the late twentieth century, before politicians learnt to be as expert as they are today in corrupting democracy, this result might have been quite different. Peace deals work best when transitions are long and are crafted to prevent dominations of democracy.³⁶ Peacebuilding must be an accomplishment of networked governance of separations of powers if it is to institutionalize the prevention of domination.³⁷

This is similar to Roland Paris's conclusion on the limits of a liberal peace and on the virtues of institutionalization before liberalism, before democracy and markets.³⁸ This is also Mansfield and Snyder's empirical conclusion that when domestic institutions are weak, the process of democratization promotes war,³⁹ and that of Paul Collier's empirical studies on the impact of democracy on violence.⁴⁰ They all conclude that checks

³⁵ See JOHN BRAITHWAITE, PEACEBUILDING COMPARED, JOHNBRAITHWAITE.COM, <http://johnbraithwaite.com/peacebuilding/> [<https://perma.cc/DR6J-E9JN>].

³⁶ The next few paragraphs lean heavily on our forthcoming book, *Cascades of Violence*. See BRAITHWAITE & D' COSTA, *supra* note 20.

³⁷ JOHN BRAITHWAITE ET AL., NETWORKED GOVERNANCE OF FREEDOM AND TYRANNY (2012).

³⁸ PARIS, *supra* note 34.

³⁹ MANSFIELD & SNYDER, *supra* note 34.

⁴⁰ COLLIER, *supra* note 34.

and balances in institutions—like the rule of law—help democracies prevent civil war.⁴¹ However, “[i]t has proved much easier to introduce elections than checks and balances.”⁴² Moreover, “taken together, the results on elections and democratization are consistent: if democracy means little more than elections, it is damaging to the [good government] reform process.”⁴³ The reason is that good government is not the most cost-effective way of benefiting from power. If you can get away with buying elections, corrupting an electoral commission, intimidating or killing opponents, scapegoating a minority to cultivate majoritarian support, jailing strong opponents for corruption and running against weaker ones, or simply miscounting the votes, once in government you can reimburse these costs by pillaging the state. Incumbents do this by embezzlement from state coffers, favoring cronies and family members with government contracts, welcoming foreign investors in proportion to their political donations to the regime, and other strategies of state criminalization. If politicians try to win elections with good government, their capacity to benefit from power plummets. This is because good government means rule of law and checks and balances on abuse of power that place limits on their crimes, or even prevent them. The best way to accumulate power and cash is to win elections by methods that require the winner to misgovern.

Of course, once in place, constraint by an effective rule of law and checks and balances *does* become a good way to win elections. Ultimately, the package of balanced democracy constrained by the rule of law conduces to good government and prevents tyranny, civil war, and interstate war against other democracies. But unconstrained populist democracy has the opposite effect.

This insight offers a constructive strategy for the international community to create a more peaceful world with less domination, less criminalization of states, and sustainable democracy. After civil wars that tear a country apart, the United Nations can put in place UN transitional administrations that are hybrids of local and UN governance where both the local and the international install checks and balances. Success at this is difficult and a matter of degree, as revealed in the cases we have documented for my Peacebuilding Compared work.⁴⁴ Once networked

⁴¹ See also Håvard Hegre & Håvard Møkleiv Nygård, *Governance and Conflict Relapse*, 59 J. CONFLICT RESOL. 984, 990–91 (2015).

⁴² COLLIER, *supra* note 34, at 44.

⁴³ *Id.* at 45.

⁴⁴ Examples are UN transitional governance in Timor-Leste and transitional governance hybrids with regional organizations of states in Bougainville and Solomon Islands as discussed in BRAITHWAITE ET AL., *supra* note 37.

republican institutions take root, pillaging the state through bad government becomes a way to lose elections. Opposition political parties then acquire enough clout—with support from the separation of powers, from a semi-autonomous legal profession, accounting profession, civil service, and vibrant civil society—to protect the established checks and balances against political leaders who seek advantage by eroding them. The difficult part is the transition to path dependency upon a polity with checks and balances. Semi-democracies that are in transition to fully rounded democracy are fragile and vulnerable to tyrants who turn them back to autocracy. Restorative justice can help in post-conflict situations, but it is no panacea.⁴⁵ Even so, the fact that restorative justice can help builds a bridge between our foregoing pessimistic analysis of depending too heavily on elections and our optimistic analysis in the remainder of the Essay of the possibilities for energizing democratic reform in the judicial branch.

V. GROWING DEMOCRACY IN THE JUDICIAL BRANCH

So far, this Essay has argued that in building new democracies, the first priority is to lay foundations, a freedom-enhancing constitutional settlement, an independent judiciary, and a prosecution service that can enforce the rulings of an independent electoral commission. With established democracies, the priority is not to have more democracy⁴⁶ in the legislative branch, but to strengthen checks and balances against corrosion of its integrity.

Instead, this Part argues for more democracy in the administration of the rule of law. Restorative justice⁴⁷ is advanced as a practical means of giving citizens some meaningful democratic empowerment over matters they care about and care to participate in. Restorative justice now has four decades of road testing. It has been more thoroughly researched than other innovations in the judicial branch during this period. The empirical record is that while the majority of citizens in *all* countries where research of this kind has been conducted are deeply dissatisfied with their electoral democracy, the majority of citizens—almost always more than 80% of

⁴⁵ See JOHN BRAITHWAITE ET AL., RECONCILIATION AND ARCHITECTURES OF COMMITMENT: SEQUENCING PEACE IN BOUGAINVILLE (2010); Braithwaite & Gohar, *supra* note 12; Braithwaite & Wardak, *supra* note 3; Wardak & Braithwaite, *supra* note 3.

⁴⁶ Such as more frequent elections or more referendums on more issues.

⁴⁷ Restorative justice is conceived here as a process where all the stakeholders in an injustice have an opportunity to discuss who has been hurt, and what might be done to repair that harm and meet the needs of all stakeholders. It is a relational justice process. At the level of values, healing and empowerment are fundamental. Because crime hurts, justice should heal, and those harmed should have a say in how that healing should happen.

them—are satisfied with restorative justice that they have experienced.⁴⁸ If they are victims of crime, they also feel safer after restorative justice.⁴⁹ They experience reductions in post-traumatic stress disorder symptoms⁵⁰ and feel less vengeful.⁵¹ All kinds of participants feel their rights are more respected than in alternative modalities of justice (such as a court hearings); restorative justice is better in terms of discrimination based on race, sex, or religion; and that restorative justice is fairer and more likely to reduce crime.⁵² Generally, these participants seem to be correct in these beliefs—although the impact of restorative justice in reducing crime on its own, while well-established now, is modest.⁵³ Moreover, while democratized justice on average has all these benefits, many individual victims and offenders are worse off after restorative justice. That is, while the evaluations show that variables like victim anger are lower after restorative justice as a statistical average, we do commonly see individual cases where the way the offender or the police behave in a conference leaves them much angrier than they would have been had a restorative conference never occurred.

There are reasons for hope that the right sort of combination of restorative justice and formal litigated justice might be more effective in crime reduction than restorative justice on its own.⁵⁴ But our empirical understanding of how productive synergies form between formal justice and restorative justice is still immature. While the evidence demonstrates that restorative justice is systematically less punitive than courtroom justice,⁵⁵ penal populism poses a danger to all forms of justice becoming tools of domination. Hence, the most interesting challenge for restorative justice is how to integrate it with judicial justice so that courts can check penal populism within restorative justice, and vice versa.

⁴⁸ BRAITHWAITE, *supra* note 2, at 47–51.

⁴⁹ *Id.* at 51–52.

⁵⁰ Caroline M. Angel et al., *Short-Term Effects of Restorative Justice Conferences on Post-Traumatic Stress Symptoms Among Robbery and Burglary Victims: A Randomized Controlled Trial*, 10 J. EXPERIMENTAL CRIMINOLOGY 291, 302–03 (2014).

⁵¹ Heather Strang et al., *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review*, 9 CAMPBELL SYSTEMATIC REVIEWS 1, 42–43 (2013).

⁵² BRAITHWAITE ET AL., *supra* note 37, at 45–72.

⁵³ John Braithwaite, *Restorative Justice and Responsive Regulation: The Question of Evidence* (RegNet Working Paper No. 51, 2016), http://johnbraithwaite.com/wp-content/uploads/2016/11/figures-JBdotcom-SSRN_2016_BraithwaiteJ-revised-51.pdf [<https://perma.cc/K4KY-8K23>].

⁵⁴ Strang et al., *supra* note 51, at 47.

⁵⁵ BRAITHWAITE, *supra* note 2, at 146–50.

Restorative justice helps to repair citizens' concern for the procedural justice Tom Tyler discusses.⁵⁶ Among the many facets of procedural justice that predict citizen satisfaction with restorative justice, the most important one is the democratic control (participatory process control rather than outcome control) of citizens over the justice process.⁵⁷ Restorative justice processes in Canberra provide more equal air time for the voices of women than do criminal trials.⁵⁸ The reason restorative justice is particularly important with children—both for minor misdemeanors that occur in schools, as well as in the justice system—is *not* that restorative justice is more effective with youth than with adults. Rather, the reason is that because people are not born democratic, children must learn to be democratic, to be active rather than passive in the face of serious problems, and to discuss problems rather than be quiescent.⁵⁹

It is best for this learning to occur during childhood, through the ways children learn to solve children's problems, especially domination of children by other children. The empirical record is that adult bullies who destroy workplace democracy and wider political democracies of the adult world learn to get away with bullying at school.⁶⁰ Schools are where the project of protecting democracy from the domination of bullies begins, where the mouse race can be redesigned to enable a rat race that does not ravage democracy.

Because most adjudications of criminality concern adolescents and young adults, criminal adjudication can substantially contribute to continuing the project of educating the young in how to be democratic. More than that, older citizens value the opportunity to participate in decisionmaking when young people they love jeopardize their futures by getting in trouble with the police. Hence, both the motivation to be democratic and the need for learning to become democratic peak in the criminal law institutions of governance. In old democracies as in new ones, criminal law becomes a key institution for renewing the democratic character of a society. Salvaged legitimacy for democracy is best advanced by giving citizens genuine voice in something they deeply care about—the

⁵⁶ Tom Tyler, *From Harm Reduction to Community Engagement: Redefining the Goals of American Policing in the 21st Century*, 111 NW. U. L. REV. 1537 (2017).

⁵⁷ BRAITHWAITE, *supra* note 2, at 78.

⁵⁸ *Id.* at 154–58.

⁵⁹ *See id.* at 130–33.

⁶⁰ E.g., Jacqueline B. Homel, *Does Bullying Others at School Lead to Adult Aggression? The Roles of Drinking and University Participation During the Transition to Adulthood*, 65 AUSTRALIAN J. PSYCH. 98 (2013); Peter K. Smith et al., *Victimization in the School and the Workplace: Are There Any Links?*, 94 BRIT. J. PSYCH. 175 (2003).

future of their children, grandchildren, siblings and friends—when they are in trouble.

VI. DEMOCRATICALLY DISMANTLING CRIMINAL LAW'S DOMINATIONS

At the outset, this Essay briefly prioritized minimization of domination over maximization of democracy by referring to the research of republican philosophers.⁶¹ There is a stronger case for this framework with criminal law compared to other institutions. Braithwaite and Pettit have argued that domination is the best way of describing what criminal law prevents.⁶² Rape, murder, assault, robbery, and burglary are acts of domination. When the law criminalizes acts that involve no domination—e.g., consenting sexual behavior between adults, vagrancy, abuse of a judge being construed as contempt—the law should change and these acts should be decriminalized. Conversely, Braithwaite and Pettit argue that domination is the best way of describing what disturbs us about bad criminal justice. Unfair trials, excessive police use of force, detention without trial, capital or corporal punishment, and prison terms that exceed upper sentencing limits are all acts of domination that strike dread into timorous hearts.

If it is true that domination is the best way of describing what good criminal law prevents and what bad criminal law threatens, then minimizing domination is a good target for continuous improvement of criminal justice institutions. My argument here has simply been that the process of pursuing that target will grow democracy and make criminal law a seedbed of democracy that equally empowers people of different genders, religions, races, and ages.

CONCLUSION

More than war from without, crime from within citadels of the state is the profound threat to democracy. Preventing criminalization of the state helps prevent war; preventing war helps prevent criminalization of the state.⁶³ Most of the democratization projects attempted around the world collapse through the criminalization of states by elected leaders, often in

⁶¹ Particularly PETTIT, *supra* note 10.

⁶² Actually, Braithwaite and Pettit initially framed republican theory in terms of the maximization of dominion (nondomination). But with Braithwaite's absolute concurrence, Pettit later opted for a simpler usage of domination and nondomination. *See, e.g.*, JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 54–86 (1990).

⁶³ BRAITHWAITE & D' COSTA, *supra* note 20.

concert with a shadow state of organized or corporate criminals.⁶⁴ Most states get themselves into wars eventually. When they do, opportunities for state criminalization peak. At the same time, violence and domination by criminal justice systems in all societies, but particularly in criminalized states, add greatly to the woes of peoples dominated by corrupted electoral democracy.

A remedy is to conceive the criminal justice system as more than a check and balance, more than a protection against crime. Rather, it is a frontline institution of struggle for democracy without domination. My favorite moments in restorative justice conferences have been where mothers have admonished the police for using excessive force in arresting their child.⁶⁵ The virtue in such encounters is more than empowering the voice of mothers. It is about mothers educating the police, but more importantly their own children, about how to be democratic citizens who resist domination. The criminal justice system, more than other institutions, can add value to the resilience of democracy, not just to grow democracy, but to save it from itself.

Criminal justice is at the front line of saving democracy after the populism of war and during the quietude of peace with domination. Our justice institutions can be crafted as engines of democracy-building that help our children to learn to be democratic, and that check abuse of power by democracy's enemies within the citadel. The so-called spread of democracy around the world is as delusional as the fine phrases about freedom in the old Soviet constitution. Much of it is diffusion of domination by democracy. There is an important role here for restorative justice that injects a deliberative democracy that can work better in the micro judicial deliberations of the polity than in legislatures.⁶⁶

Robust separations of powers within the criminal justice system itself are also important. This means engaging affected citizens with more effective self-regulation of judicial abuses, more prosecution of judges for corruption, more prosecution of prosecutors by independent anti-corruption commissioners, and more impeachment of anti-corruption commissioners by human rights commissions. Criminalized states can never be made democratic while accountability within the state works only hierarchically. If the only remedy to corruption of one guardian is hierarchical accountability to a guardian above it, then states will be like fish that rot from the head down. Accountability must be organized in a more circular

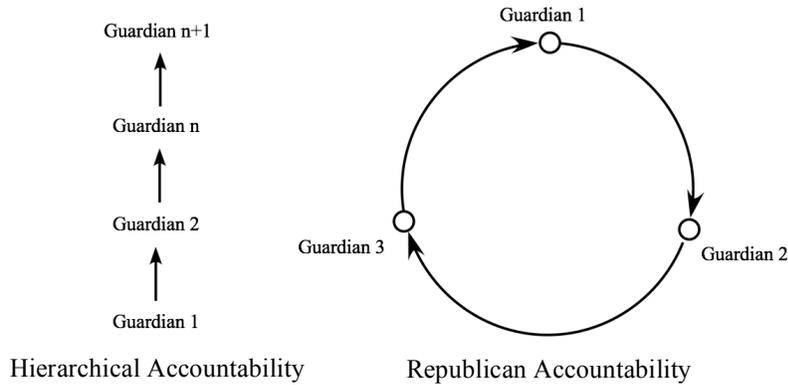
⁶⁴ WILLIAM RENO, *WARLORD POLITICS AND AFRICAN STATES* (1998); WILLIAM RENO, *CORRUPTION AND STATE POLITICS IN SIERRA LEONE* (1995).

⁶⁵ See, e.g., BRAITHWAITE, *supra* note 2, at 164.

⁶⁶ Braithwaite, *supra* note 2.

fashion where the separated powers of every accountability institution are held to account by other accountability institutions.⁶⁷ Figure 1 illustrates this vision for nonhierarchical restorative accountability in a republican polity where all key actors must be accountable to one another⁶⁸:

FIGURE 1: FORMAL MODELS OF HIERARCHICAL FIDUCIARY AND REPUBLICAN CONCEPTIONS OF ACCOUNTABILITY



A critical role for restorative justice is to give direct voice to those people who claim to have been adversely affected in the adjudications by each of those institutions. Restorative justice can help arrange the chairs in many virtuous circles of democratic accountability. Circuits of deliberative accountability can be checked by citizens' voices in the restorative justice circle of judicial self-regulation, prosecutorial self-regulation, regulation of the judiciary by the prosecution, and vice versa. When democracy is being corrupted, citizen participation in restorative justice circles convened by judges and prosecutors to regulate the integrity of independent electoral commissions is important. Such circuits of deliberative accountability can be foundational steps toward democracy's promise.

⁶⁷ John Braithwaite, *Accountability and Responsibility Through Restorative Justice*, in *RETHINKING PUBLIC ACCOUNTABILITY* (Michael Dowdle ed., 2006).

⁶⁸ Figure 1 was originally produced in John Braithwaite, *Institutionalizing Distrust: Enculturating Trust*, in *TRUST AND GOVERNANCE* (Valerie Braithwaite & Margaret Levi eds., 1998).