



*Stephanos Bibas*

# THE MACHINERY OF CRIMINAL JUSTICE

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Stephanos Bibas

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Stephanos Bibas is a professor of law and criminology at the University of Pennsylvania and director of its Supreme Court Clinic. A graduate of Columbia, Oxford, and Yale, he clerked for Judge Patrick Higginbotham on the U.S. Court of Appeals for the Fifth Circuit and for Justice Anthony Kennedy on the Supreme Court of the United States. As a federal prosecutor in New York City, he successfully investigated, prosecuted, and convicted the world's leading expert in Tiffany stained glass for hiring a grave robber to loot priceless Tiffany windows from mausolea. He teaches and writes about criminal procedure, especially plea bargaining and sentencing, and litigates a wide range of cases before the Supreme Court. He lives in Philadelphia with his wife and three children.

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## INTRODUCTION

### THE DIVERGENCE OF THEORY, REALITY, AND MORALITY

In popular imagination, criminal justice is a morality play, a form of educational social theater. As Thurman Arnold put it, “Trials are like the miracle or morality plays of ancient times. They dramatically present the conflicting moral values of a community in a way that could not be done by logical formalization.” When values conflict, trials help to air and reconcile them; even when the values are settled, as they often are, trials teach and reinforce them. “In its very detail and drama . . . the trial becomes a morality play which impresses upon the public that the law is being enforced and that justice is being fairly administered.” Crime thrillers, movies, and television portray courtroom dramas culminating in jury trials. In some, falsely accused defendants speak their piece and clear their names publicly. In others, victims have their days in court, literally see justice done, and sometimes even receive apologies from those who have wronged them. The jury serves as the chorus of a Greek tragedy, “the conscience of the community.”<sup>1</sup> It applies the community’s moral code, pronounces judgment, and brands or exonerates the defendant. Jury trials sort out who did what, what retribution (payback) wrongdoers deserve, and how to denounce crimes and vindicate victims. Ordinary citizens are key players, as victims and defendants have their say and jurors and the public sit in individualized judgment. They suffer, they make amends, and sometimes they even apologize or heal. Viewers evaluate who was right and wrong, empathize with the protagonists, and await catharsis and resolution by the end of the show.

Law students think they know better. The vision of criminal justice taught in most law schools emphasizes adversarial combat between prosecutors and defense lawyers at trial. On this account, lawyers duke it out over the facts and the law, and their combat separates the innocent from the guilty. Prosecutors seek to maximize convictions and punishment, to deter (scare off) and incapacitate (lock up) as many wrongdoers as possible.

Defense lawyers seek the opposite, to get their clients acquitted or at least the lowest possible sentence. They insist on procedural fairness and rights, questioning whether there is proof beyond a reasonable doubt. Victims are largely absent from this picture, defendants are pushed to invoke their rights to remain silent, and jurors meekly follow judges' technical instructions. Instead, lawyers run the show.

Newly minted lawyers soon find that the reality in the criminal justice trenches differs from both of these pictures. Unlike the popular imagination, the real world does not have much use for laymen. Victims rarely get to say much in court, certainly not at crucial proceedings such as bail, charging, and plea bargaining. Defendants stay silent, letting their lawyers do the talking for them. Discussions of right and wrong, of pain and blame, are almost absent. There is rarely a morality play. Punishment is largely hidden in far-away prisons, out of sight and out of mind.

Nor do new lawyers find much glamorous trial-lawyer combat in the real world. Indeed, plea bargaining is the name of the game. Many criminal lawyers assume that nearly everyone in the system is guilty and so negotiate settlements instead of fighting it out. Cookie-cutter plea bargains struck in conference calls or hallway conversations resolve most cases, so jurors and the public see few of them. These mass-produced bargains short-circuit elaborate constitutional procedures such as discovery, cross-examination, and jury instructions and deliberation. Lawyers trade defendants' constitutional rights, such as *Miranda* warnings and search-warrant requirements, as plea-bargaining chips for lower sentences. Some relevant factors, such as the badness of the crime and the defendant and the strength of the evidence, do influence plea bargains. But so do irrelevant factors such as the prosecutor's and defense lawyer's salaries and caseloads and the defendant's ability to afford bail. In other words, lawyers seldom seem to vindicate the innocent, vindicate the Constitution, weigh wrongdoers' just deserts, reform defendants, or heal victims. About all they do is move the plea-bargaining machinery as quickly and cheaply as possible, which maximizes the number of people the system can deter and incapacitate. The machinery of criminal justice, and its need for speed, has taken on a life of its own far removed from what many people expect or want. Efficiency has all but killed the morality play the public craves.

How did this happen in a democracy? After all, most criminal cases are titled something like *People of the State of X vs. John Q. Defendant*. Prosecutors still prosecute cases in the name of The People, and the public is passionately interested in them. How, then, did the criminal justice system become so far removed from The People, who are nominally

in charge? How did it become so amoral, hidden, and insulated? And is there anything we can or should do about it?

To some extent, this distance between voters' interests and public officials' actions pervades representative government. Insiders' control of government is a chronic source of friction in a democracy, but the problem is most acute in criminal justice. In other areas of government, rational apathy and faith in expertise leads voters to defer to experts about, say, regulating fungicides or pension plans.<sup>2</sup> (No one would bother to watch reality television about tax auditors or dramas about public housing.) In contrast, many ordinary citizens do not defer to criminal justice experts but show passionate interest in how insiders handle criminal cases. Indeed, public outrage flares when politicians or the media sporadically bring perceived injustices to light.

In addition, the Sixth Amendment to the Constitution guarantees local, public jury trials. In other words, the public has a constitutional right to know about and take part in criminal trials, though in practice plea bargaining subverts those rights. The stakes are high as well: defendants' lives, liberties, and reputations compete with victims' rights, the public's security, and the law's expressive and moral messages. Also, crime victims, bystanders, and ordinary citizens have few procedural and no substantive legal rights in criminal justice. Judges, police, and prosecutors are not constrained by identifiable clients in the ways that, for example, teachers and welfare case workers are.<sup>3</sup> Thus, both the need for and the limits on democratic participation are particularly acute in the criminal arena.

Many scholars have written histories of plea bargaining, but that is not my precise focus here. As chapters II and III discuss, plea bargaining is part of a larger series of trends that have professionalized and mechanized the criminal justice system so much that it is out of touch with ordinary people's expectations and desires. Various explanations for these trends are partly true but incomplete. For example, some blame the Warren Court's creation and expansion of defendants' constitutional rights.<sup>4</sup> These rights ranged from *Miranda* warnings, to exclusion of evidence seized without search warrants, to habeas corpus petitions challenging final criminal convictions. These technicalities are often far removed from guilt, so factual guilt and innocence matter somewhat less to cases' outcomes. And these new rights gave prosecutors additional incentives to plea bargain, in exchange for defendants' surrendering of their rights. The plea-bargaining machinery, however, long predates the 1950s, and prosecutors were the ones who created it. These new defense rights created new bargaining chips and fueled prosecutors' incentives to bargain; these rights may have accelerated the machinery but did not start it.

Others lay the blame at the feet of rising crime and increased caseloads.<sup>5</sup> There is truth to this explanation as well. As courts became busier, they struggled to find faster ways to dispose of their business. Plea bargaining circumvented increasingly formal trials, allowing courts to move more criminal and civil cases. This partial explanation, however, leaves lawyers out of the picture. If victims and defendants were still handling their own cases amidst today's caseloads, they would not plea bargain in the same way that prosecutors and defense counsel do. Lawyers' outlooks, interests, and lack of accountability to laymen are integral to the mechanical mentality. Rising caseloads do not capture these factors.

Today, many people reflexively view this history as progress, as criminal justice moved from the bloody dark ages of our past to the more rational, enlightened present. The increases in lawyers, procedures, and plea bargaining have indisputably brought some benefits: they have increased some safeguards and accommodated staggering caseloads. Without denying these benefits, I want to critique these transformations and expose their overlooked costs. When one takes a few steps back to reflect on these developments, they appear far more troubling and costly. We cannot simply wax nostalgic for a bygone era, as the plea-bargaining machinery is not about to disappear, but we must see the past and present landscape clearly. Criminal justice used to be individualized, moral, transparent, and participatory but has become impersonal, amoral, hidden, and insulated from the people. It has thus lost some of its popular democratic legitimacy and support. Appreciating what we have lost can inspire reforms to revive these classic values in the modern justice system. Defendants, victims, and communities can play larger roles through grand juries, consultation with prosecutors, rights to be heard in court, restorative justice conferences, and requiring defendants to work to support their families and victims.

The ideal of the individualized morality play and personal confrontation lives on in our culture, waiting to be revived in practice. That does not mean we should or even can abolish plea bargaining and lawyers' leading role in criminal justice; they bring some benefits and are here to stay. But it does mean that we can attack the machinery's excesses. That means giving outsiders more information, more voice, and more influence, reintroducing key aspects of the redemptive morality play. Instead of remaining outsiders, victims, defendants, and ordinary citizens should actively participate as stakeholders alongside insiders.

## OVERVIEW OF THE BOOK

Chapter I of this book retells the history of the criminal justice machine. Colonial Americans saw criminal justice as a morality play. Victims initiated and often prosecuted their own cases *pro se* (without lawyers), and defendants often defended themselves *pro se*. Laymen from the neighborhood sat in judgment as jurors, and even many judges lacked legal training. Trials were very quick, common-sense moral arguments, as victims told their stories and defendants responded without legalese. Communities were small, so gossip flew quickly, informing neighbors of what was going on. Even punishment was a public affair, with gallows and stocks in the town square. True, punishments could be brutal, procedural safeguards were absent, and race, sex, and class biases all clouded the picture. Nonetheless, the colonists had one important asset that we have lost: members of the local community actively participated and literally saw justice done.

Various forces changed this picture. Lawyers' dominance rose hand in hand with caseloads. Judges developed technical rules of evidence, boilerplate jury instructions, and procedure in tandem with the lawyers who were equipped to handle them. Lawyers are agents who are supposed to serve their principals: prosecutors are supposed to represent the public's and victims' interests in justice, while defense lawyers are supposed to represent defendants' interests. But lawyers had and still have strong self-interests in disposing of cases to lighten their own workloads and to avoid risky trials, and they tend to focus on quantifiable benefits.<sup>6</sup>

The rise of lawyers not only excluded victims, silenced defendants, and bypassed jurors through plea bargaining; it also hid criminal justice outside open court, just as prisons hid punishment behind high walls. Thus the system became not only less participatory, but also less transparent. Professionals greased the plea-bargaining machinery, speeding it up by bypassing laymen. In the process, the lawyers promoted case-processing efficiency and let the morality-play aspect wither. Laymen who encounter criminal justice for the first time see a yawning gulf between their popular

expectation of justice and the lawyerized reality of amoral, cookie-cutter plea bargaining.

The point here is not to romanticize the past, to suggest that it binds us, or to advocate bringing back whipping or lynch mobs. But it helps to know where we have come from, if only to understand why we have expectations that our justice system does not satisfy. This historical account also illuminates some of the forces that continue to shape our system to this day, so that we can critique it and consider possible reforms.

Some readers may wish to skip the historical overview and begin directly with the problems as they stand today, in chapter II. That chapter addresses the gulf between criminal justice insiders and outsiders. The insiders are the judges, prosecutors, defense counsel, police, and probation and parole officers who dominate criminal justice day to day. They are knowledgeable, powerful repeat players with distinctive senses of justice. They value disposing of cases efficiently over the means used to reach that result. The insiders can predict what that result will be, so they can strike bargains that reflect those expectations and save everyone time and money. Speedy bargains make all the insiders happy: prosecutors, defense lawyers, and judges all lighten their own workloads and move on to the next case. Insiders, then, see little reason to go through the motions of courtroom ritual just to reach predictable convictions and sentences. Nor do they see much need to include outsiders; as they see it, they themselves are professionals who know best how to run criminal justice to serve outsiders' interests.

Outsiders, in contrast, are laymen, not lawyers: victims, members of the public, and even to an extent defendants. To them, criminal justice seems opaque, technical, and amoral. Most of what they know is from sensational news anecdotes and glamorous crime dramas, which are far removed from the humdrum plea bargaining of open-and-shut smaller cases. They have few ways to participate in criminal cases. Finally, outsiders lack insiders' self-interests in clearing their dockets, and they do not grow jaded or mellow. Their dominant concern is to do justice.

To outsiders, doing justice does not mean inflicting the greatest punishment on the greatest possible number of defendants. While the public is often misinformed about average sentences, when properly informed it often finds actual sentences sufficient or even excessive. One cannot assume that current laws are harsh because that is what the public really wants; these laws often result from a warped, dysfunctional political process. Distortions arise in part because frustrated outsiders vent their dissatisfaction in the abstract by clamoring for more toughness in wholesale-level reforms. When they are given concrete cases, however, average

citizens favor sentences as low as or even markedly lower than those required by a variety of criminal laws. A number of empirical studies by Julian Roberts, Paul Robinson, and others, discussed in chapter II.A.2, confirm this striking finding. At the individual, retail level, outsiders' judgments are far more nuanced and less harsh overall. Unfortunately, now that outsiders rarely serve on juries but instead influence legislation and referenda, the abstract, wholesale perspective has largely supplanted the contextualized, retail one. In addition to substantively just convictions and sentences, outsiders also want to see defendants held publicly accountable through fair, participatory procedures.

These differences in information, participation, and values create an enduring tension between self-interested insiders and excluded outsiders. The result is a game of tug-of-war. Insiders manipulate substantive rules and low-visibility procedures to dispose of cases as they like. Outsiders try to constrain insiders by changing substantive policy, say by creating new crimes and sentences. Insiders then subvert these constraints procedurally, and so on. Because insiders are better informed and continually involved, outsiders find it hard to win enduring victories but are periodically provoked to rise up in outrage.

This tug-of-war hurts criminal justice in many ways. It provokes voters to enact simplistic, crude laws. It makes it hard for outsiders to monitor insiders' performance. Insiders are thus too free to follow their own desires instead of victims' and the public's interests, which subverts democracy. The problem is particularly acute for insiders who are insulated from the decisions they make: a federal prosecutor or judge who commutes from the suburbs does not live with or hear from urban victims or defendants' families. The gulf between insiders and outsiders can cloud criminal law's efficacy, making the law too unclear to deter and condemn crimes effectively. It hinders criminal justice's ability to vindicate, heal, and provide catharsis to victims and the public. And it can sap public faith and trust in the law, making citizens less willing to follow the law.

There are also significant gaps between defense lawyers and their clients. Insider defense lawyers have strong interests in getting along with prosecutors and judges and disposing of their huge caseloads, particularly because most are overworked and underfunded. Defendants are overoptimistic, in denial, and prone to take risks. Huge differences in education, language, class, race, and sex impede communication. Defendants distrust their appointed lawyers because they are not paying for them. Defense lawyers do all the talking, effectively silencing and disempowering their clients. Lawyers see it as their job to minimize punishment and dispose of cases, but in doing so they can overlook clients' needs to express

themselves, apologize, and heal. No political tug-of-war erupts, as defendants have little political or economic power, but these huge differences impair representation, oversight, and trust.

Chapter III focuses on one of the most serious failings of mechanical criminal justice: its failure to vindicate and heal. The professionals who run the machinery see their job as dispensing impersonal punishment, not sending moral messages or healing wounded relationships. The swiftness of the plea-bargaining machinery disposes of large caseloads quickly and cheaply, but at the expense of many other criminal justice values. Plea bargains and sentences reflect the individual defendant's badness, as well as the lawyers' interests, abilities, and workloads. At best, the question is how much retribution, deterrence, and incapacitation this defendant needs. While these factors are relevant, they are static, overlooking the dynamic potential of criminal justice to transform those who take part. Criminal justice could not only reduce future crimes, but also restore the relationships ruptured by crime. Currently, however, it largely ignores these goals.

In particular, criminal procedure enables defendants to remain in denial and does almost nothing to cultivate their expressions of remorse and apologies and victims' forgiveness. A criminal defendant who is in denial about his guilt may still be able to plead guilty and receive a guilty-plea discount; at most he need admit guilt only grudgingly. These equivocal guilty pleas deprive defendants, their families, victims, and the public of clear resolutions. They leave defendants in denial and more likely to repeat their crimes, and deprive victims of vindication. In contrast, jury trials and unequivocal guilty pleas vindicate victims, denounce crimes, and teach lessons. Defendants who remain in denial need jury trials to condemn or exonerate them, driving home clear messages to defendants, victims, and the public.

Criminal procedure has the same blind spot for expressions of remorse and apology. Crime is about more than just individual wrongdoing; it harms social relationships. Criminal procedure uses remorse and apology merely as poor gauges of how much retribution, deterrence, and incapacitation individual defendants need. But these tools have great power to heal wounded relationships, vindicate victims, and educate and reintegrate wrongdoers into the community.

Likewise, forgiveness used to play a much larger role in criminal procedure. But today, the state and its professionals dominate criminal procedure and largely exclude outsiders. They leave little room for outsiders such as victims and defendants to tell their stories, grieve, apologize, and forgive.

Part of the problem is that insiders' individual-badness model sees defendants as separate from the web of relationships and communities they have wounded. Another problem is that criminal procedure ignores many of the substantive justifications for punishment, such as educating defendants and the public and vindicating victims. In law school, we teach criminal law and criminal procedure as completely separate fields, but of course procedure exists to serve and implement substance. Criminal procedure needs to take more seriously the many values underlying the substantive criminal law, which it is supposed to serve. Right now, it does little more than minimize cost and maximize speed, incapacitation, and perhaps deterrence. Those aims are indeed substantively valuable, but procedure overlooks many other substantive values.

Chapter IV considers correcting these defects by adding new and different lay voices to criminal justice. The state's monopoly on criminal justice blinds it to the valuable human interests and needs that outsiders have. Crimes harm not just an impersonal state, but real people—people who deserve more consideration and power in criminal procedure. Mediation and other face-to-face interactions between victims and wrongdoers offer this hope. The state deserves a role and is useful in tempering vengeance and ensuring equality. But state control should not squeeze out the human needs and voices of real victims, defendants, and the public. Each ought to be able to have a say. That does not mean giving victims vetoes; neutral judges and juries must retain the final say. Victims and members of the public could check prosecutors at least by expressing their views. Empowering victims need not license vengeance. Victims care much less about controlling outcomes than about being heard and having a role in fair processes.

My suggestions for an individualized, participatory criminal justice system bear some resemblance to three recent criminal justice movements: victims' rights, restorative justice, and therapeutic jurisprudence. Each of these movements has valuable insights but offers only a part of the morality play for which the public thirsts. First, the victims' rights movement restores a crucial focus on the needs of victims, who often get lost in lawyer-dominated criminal procedure brought in the name of the state. Some victim advocates rightly emphasize the need to treat victims respectfully and hear their voices. But much of what passes for victims' rights rhetoric is unbalanced and vengeful, a cloak for law-and-order toughness. It often suggests that the only way to make victims happier is to punish defendants more, even though victims often care more about respectful treatment and apologies. Second, restorative justice emphasizes mediation to let victims, defendants, and their families confront and

talk with one another. The idea of transcending a one-dimensional, zero-sum struggle between prosecutor and defense counsel is attractive, and participants seem to come away more satisfied. The difficulty is that most restorative justice enthusiasts, such as John Braithwaite, leave too little role for the state, blame, or punishment. Finally, the therapeutic jurisprudence movement rightly focuses on how the legal system's procedures can serve as (or obstruct) emotional and psychological therapy for wrongdoers, victims, and others. On the other hand, the rhetoric of therapy and psychology has a clinical ring, eschewing blame in favor of treatment. Here, as with restorative justice, the reluctance to blame and speak moral language leaves therapeutic jurisprudence incomplete.

All this moralistic talk may leave many readers uneasy. Our pluralistic society comprises a wide range of religious and moral beliefs, so we are uncomfortable engaging in morality-speak. It seems safer instead to rely on neutral criteria such as speed, cost, and numbers of cases processed. Lawyers can then run the system to maximize efficiency, obscuring the thorny moral judgments that are better suited to juries.

Chapter V addresses criminal procedure's embrace of efficiency as the antidote to moralizing. Criminal procedure tries to maximize efficiency, but lawyers rarely consider what it is supposed to be doing so efficiently. Criminal justice, more than almost any other area of law, is morally freighted in the popular imagination, and its moral significance is linked closely to its legitimacy. While controlling crime is one important concern of both insiders and outsiders, outsiders also want much more. They expect the criminal law to vindicate the innocent defendant or the wronged victim and denounce the guilty.

Why, then, is legal discourse about criminal procedure so divorced from popular moral discourse about the same subject? Some of the blame rests upon the artificial academic separation of criminal procedure from substantive criminal law. Some rests upon insiders' bureaucratic outlook and emphasis on quantity, speed, and cost. More of the blame, though, stems from intellectuals' fear that moral judgments are at best contentious, at worst arbitrary and intolerant. In contrast, the scientific language of efficiency and deterrence appears objective and indisputable. Academics and lawyers also fear that popular moralizing will be harsh and merciless; some prefer to trust their own sense of mercy and kindness.

Notwithstanding academic skepticism, however, Americans share a healthy enough moral consensus on the basic issues of criminal justice to support robust moral appeals and discourse, as chapter V.B shows. First, empirical research by Paul Robinson and others shows that laymen's

judgments about crime emphasize retribution and show remarkable consensus in ascribing and ranking blame. The moral consensus about when and how much to blame is strongest for crimes against persons and property, but there is also substantial agreement even about so-called victimless and morals offenses. Second, when discussing hot-button topics such as the death penalty, laymen think it more polite to invoke neutral deterrence-speak than contentious moral language. What really drives their views, however, are expressive moral judgments about crime. Third, laymen bring these moral expectations to criminal procedure. They care not only whether legal procedures reach the right outcomes, but also whether they are fair and legitimate and whether they give laymen enough voice and control. They expect to have their say and their day in court, to be able to blame, grieve, and perhaps apologize and forgive. The machinery ignores these expectations. Fourth, laymen are not nearly as harsh as lawyers assume. Popular moral discourse accommodates both justice and mercy, punishment and forgiveness.

Taking these considerations more seriously, and bringing them out into the open, should enhance citizens' perceptions of the justice system's legitimacy without leading to excessive conflict over values. Fear of conflict over values should not lead us to squelch moral discourse, driving it underground into coded references and vigilantism. On the contrary, healthy moral discourse can strengthen, refine, and reinforce the community's moral code and expectations. Taking these ideas seriously, however, would require substantial reforms to the machinery of criminal justice.

Readers who are already convinced that the system is broken and out of touch may wish to skip ahead to the final chapter, which discusses how to solve these problems. Chapter VI begins to consider how one could return power to laymen within a lawyer-driven system. We cannot dynamite the entire machine and go back to lay-run criminal justice. The American criminal justice system could not handle its staggering caseloads that way, and the cost of sacrificing all procedural rights and expertise would be intolerable. But it is worth thinking seriously about how laymen could play more substantial and active roles in criminal justice.

First of all, punishment could be more visible, more focused on making amends, and better at reintegrating convicts after they have paid their debts to society. All able bodied inmates should have to work to repay victims, the state, and their own families. Work, perhaps even in the military or a civilian corps, would be prosocial, offsetting wrongdoers' antisocial crimes and teaching good habits. Likewise, mandatory educational and vocational training and drug treatment would teach valuable skills and

help them to reintegrate as law-abiding citizens after release. Relaxing the collateral consequences of convictions would likewise promote inmates' reentry into society.

Alas, the macro-level reforms just suggested would collide head on with institutional barriers. Military leaders would resist admitting large numbers of poorly skilled convicts with disciplinary problems, and unions and businesses would oppose having to compete against prison labor. In the face of these entrenched barriers, the prospects for a national top-down fix are dim. Moreover, the problem is too diverse for a single national fix. No one statute or Supreme Court decision, or even a sequential reform program, will fix our broken system from above. Rather, we need bottom-up populism to pursue a multi-faceted approach. Reform is more likely to happen at the mid-level of counties, cities, and neighborhoods, and the micro-level of individual criminal cases. A variety of outsider pressures, organized and amplified through social-networking technology, can marshal outsiders' voices and their desire to participate at the retail level.

In criminal proceedings, defendants could be offered greater speaking roles, instead of having their defense counsel say everything while they remain mute. The system might encourage them to speak more, particularly after they plead guilty, when they need not worry about self-incrimination. Plea colloquies, sentencing hearings, and victim-offender mediation conferences before or after sentencing could offer defendants more opportunities to listen and speak. They could make public apologies and could pay back their families and victims through mandatory work. Having been held publicly accountable and paid their debts, defendants would be ready to be reintegrated rather than permanently shunned.

Victims too could play larger roles. From investigation onwards, police and prosecutors could use automated computer systems to notify victims of arrests, bail status and hearings, charges, plea discussions and bargains, and sentencings. Victims could have rights to consult with prosecutors throughout investigations and prosecutions. They could also have the option of greater speaking roles at these court hearings and in face-to-face conferences with defendants. Restorative procedures are possible, though imperfect, ways to give victims and defendants greater voices.

Even members of the public could receive better information and broader rights to consult with prosecutors and police, both in individual cases and through community-policing and -prosecution forums. And new restorative sentencing juries could blend restoration, retribution, and expressive condemnation. Victims and defendants would speak, prosecutors would justify their plea bargains, and juries would ultimately decide what sentences and discounts were deserved. That would radically change

current law. Prosecutors could no longer bargain over the crime charged or over the facts. A plea bargain could recommend a lower sentence, but first a prosecutor would have to persuade a community jury that the punishment fit the crime. Thus, plea bargains would no longer be raw exercises of prosecutorial power, but persuasive public justifications ratified by juries.

Empowering victims could shift enforcement priorities toward violent and property crimes and away from so-called victimless crimes, except when particular indirect victims are aggrieved and complain. For example, drug enforcement might focus more on neighborhoods where gunfire, disorder, and other spillover effects harm the community. Police and prosecutors should not be completely beholden to victims, especially when they ask for disproportionate harshness or leniency. One does not want to give domestic abusers the power to get charges dropped by intimidating their victims into submission. But law-enforcement officials should heed and give more weight to victims' concerns.

These solutions, of course, carry costs. Including more parties will slow down proceedings, cost more, and reduce the volume of criminal cases that the system can process. In other words, reforms may reduce the aggregate amount of retribution, deterrence, and incapacitation that the system can mete out. But sometimes it is worth sacrificing quantity for quality. Some defendants or victims might receive better treatment than others, particularly those who are white, female, articulate, well-educated, and well-off. Greater personalization risks reducing formal equality and neutrality, which raises fears of bias. Many defendants will seek to game the system, feigning remorse and apology to win sentencing discounts. Yet many of these problems already exist in the status quo, and bringing them out into the open is likely to alleviate them. And one can at least hope that these short-term costs would be justified by the long-term benefits of restoring communities and ultimately bringing down crime.

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## THEMES OF THE BOOK

The overview exposes deep fault lines within criminal justice. Several themes recur in the account above. One pervasive theme is the divide between lawyers and laymen. Because lawyers tend to write the accounts of the legal system, they sometimes overlook this gulf, or else attribute it to the ignorance of non-lawyers. They trust themselves as the guardians of the rule of law and suspect public input as antithetical to law, equality, and reasoned moral judgment. From their internal point of view, which emphasizes quantity and results, they see themselves as doing as much justice as the system can handle.

But the insider-outsider gulf is too deep and too serious to dismiss so quickly. Insiders take for granted their own knowledge and power, forgetting that their dominance of the system is a relatively recent development. Thus, proposals for public disclosure seem to intrude upon sacred prosecutorial secrecy. Victims' rights seem like newfangled threats to lawyers' turf, instead of a re-empowerment to serve deeply felt needs once again. Likewise, insiders can overlook their self-interests. They are agents of principals, namely their clients or constituents. Yet insiders may not feel much pressure to conform to outsiders' expressed desires or interests because outsiders have so little power. There is no effective feedback loop nor check on agents' behavior. And because they are insulated from outsiders, insiders may not appreciate that their utilitarian emphasis on efficiency conflicts with outsiders' expressive, moralistic interests. Or insiders may dismiss outsiders' moralism as benighted and crude, instead of grappling seriously with outsiders' interests in quality and not just quantity. Outsiders are not irrational in seeking procedural justice in addition to substantive outcomes. They care about increasing the number of defendants punished, but they also care about the message expressed by the process. Nor are they wrong to think that their input can enrich dry legal processes. They understandably want to *see* justice done and take part in it, rather than taking insiders' word for it. The ailment of criminal justice is not excessive populism per se, as many scholars argue,<sup>7</sup> but

insiders' excessive agency costs and outsiders' lack of healthy outlets, especially in individual cases.

As a matter of political theory, insiders ought to heed and hear the outsiders for whom they supposedly work. Insiders must not simply foist on the public their sense of efficiency, or crime control, or justice. In a democracy, outsiders' sense of justice must be central to both the substance and the process of criminal justice. For substantive criminal law, that means respecting what Paul Robinson calls empirical desert, the liability and punishment intuitions that most community members share upon reflection. The analogue in criminal procedure is procedural justice, the public's sense that procedures must treat people fairly and with respect and should give them a voice. Tom Tyler and other scholars explore what the public expects procedural justice to look like.<sup>8</sup> As chapter II explains, the reality has drifted far from the public's sense of procedural and substantive justice. It needs to be brought back into line. Thus, this book's normative argument is primarily populist and democratic. It advocates criminal procedures that reflect the enduring moral intuitions of the electorate, rather than some abstract philosophical theory. The pendulum should swing away from the rationalism, centralization, and statism that have come to dominate criminal justice since Cesare Beccaria wrote more than two centuries ago. Criminal justice insiders are fundamentally Weberian bureaucrats, but my emphasis is Tocquevillean.

A second theme of the book is the divorce between the values of criminal procedure and the values of substantive criminal law. Procedure is supposed to serve substance. But instead of weighing many substantive justifications for punishment, procedure emphasizes largely procedural values. For nearly half a century, criminal procedure scholars have debated within the famous dichotomy of procedural models sketched out by Herbert Packer. In Packer's scheme, the (softer) Due Process Model stresses fairness, rights, defendant autonomy, and accuracy in freeing the innocent. The (law-and-order) Crime Control Model emphasizes accuracy in convicting the guilty, speed, cost, finality, and efficiency.<sup>9</sup> Both ends of Packer's spectrum slight the substantive reasons why we punish and the roles victims and communities should play in criminal justice.

I do not want to overstate my case. Speeding up the machinery will maximize total years of imprisonment, thus promoting crime control through incapacitation and deterrence. And accuracy, emphasized by the Due Process Model, is essential to deter, incapacitate, and inflict retribution on the right people. Nevertheless, these substantive values are hardly overt, and other important substantive values drop out entirely. In practice, efficiency serves only the handful of values that are easy to quantify,

like incapacitation. Missing is much discussion of retribution, vindicating victims, educating the public, or reconciling and healing defendants, victims, and communities. In other words, criminal procedure is largely divorced from the sibling it is supposed to serve, namely substantive criminal law. Our procedures maximize the quantity of output and slight the quality of the process and its softer goals.

Moreover, as Packer acknowledges, both models assume that the adversary clash of lawyers is central. Both thus implicitly buy into the insider world-view. Both also seem to treat criminal justice as a tug-of-war, a zero-sum contest between conservatives and liberals, prosecutors and defense counsel. Of course there is a zero-sum aspect: victims want some punishment, and defendants would prefer not to suffer it. But, I hope to show, there are changes that could make both sides better off, as victims, defendants, and communities often need to heal together. Sometimes this aspiration will prove too idealistic, but in other situations it can work.

This healing aspiration relates to a third theme of the book: a move from the individual-badness model to a more relational approach to crime. In gauging punishment, recent criminal procedure focuses on the individual defendant's badness: how much deterrence and incapacitation does he need? It draws a mechanistic picture of deterrence as pain and incapacitation as physical constraint. This approach is not so much wrong as incomplete. It ignores the other substantive-criminal-law values discussed above. Deterrence is not simply about pain and threat, but about reinforcing social norms and communicating public messages that discourage crime in other ways.

Equally, the individual-badness focus ignores the relational aspect of crime. Crime is not simply a discrete violation, a physical or monetary injury. It wounds relationships. Very often, wrongdoers, victims, and neighbors know one another, and crime estranges and embitters them. Even stranger-on-stranger and some victimless crimes tear the social fabric, sowing fear and distrust in neighborhoods and communities. In many situations, criminal justice has the potential to heal these wounded relationships, at least if the parties are willing to talk. Sometimes wrongdoers will admit guilt, accept blame, profess remorse, apologize, and make amends. Sometimes victims are willing or eager to tell their stories, vent, listen, accept apologies, and forgive, particularly if they see justice done. In other cases, all we can do is deter and incapacitate wrongdoers and inflict punishment. But in the right cases, criminal procedure can do more, helping to vindicate and heal the parties and their wounded relationships.