

---

# OPENING KEYNOTE ADDRESS

## HOW TO THINK ABOUT CRIMINAL COURT REFORM

MALCOLM M. FEELEY\*

INTRODUCTION .....	674
I. REFORM EFFORTS OVER THE YEARS .....	678
A. <i>Bail Reform</i> .....	682
B. <i>Pretrial Diversion</i> .....	686
C. <i>Current Bail Reform Efforts</i> .....	689
D. <i>Lessons Learned from Past Bail Reform Efforts</i> .....	694
E. <i>Pretrial Diversion and Electronic Monitoring</i> .....	696
F. <i>The New Diversion: Electronic Monitoring</i> .....	698
G. <i>How the Adversarial System Shapes Our Criminal Process</i> .....	703
H. <i>Fragmented Structures</i> .....	705
II. PUTTING THE ADMINISTRATION INTO THE ADMINISTRATION OF JUSTICE.....	707
A. <i>The Supreme Court’s False Starts and Wrong Turns</i> .....	709
B. <i>The ABA and DOJ Projects</i> .....	710
C. <i>The Law Enforcement Assistance Administration</i> .....	711
D. <i>Other Ideas on the “Administration” of Justice</i> .....	713
E. <i>Farther Afield: Colonial Administration</i> .....	722
F. <i>Real Administration of Criminal Justice</i> .....	724
III. THE HISTORICAL FALLACY AND FAILURE OF COMPARATIVE ANALYSIS .....	726
A. <i>The Historical Fallacy</i> .....	726
B. <i>Failure of Comparative Context</i> .....	727
CONCLUSION.....	730

---

\* Claire Sanders Clements Dean’s Professor of Law, University of California at Berkeley School of Law. I would like to thank the organizers of the *Misdemeanor Machinery: The Hidden Heart of the American Criminal Justice System* conference held at Boston University School of Law for the invitation to organize my thoughts on the process of reforming the criminal courts. I would also like to thank Hadar Aviram, Paul Frymer, Rosann Greenspan, Roger Hanson, David Johnson, Issa Kohler-Hausmann, and Lisa Miller for incisive comments and observations about various aspects of my arguments. I also want to express my appreciation to the editors of the *Boston University Law Review* for helping me turn a rambling presentation into a tighter article. Needless to say, any of the errors that remain are my own.

## INTRODUCTION

The American criminal court system rests upon the quest for perfection.<sup>1</sup> Like the image of a “City on a Hill,” it is a noble but flawed ideal. We aspire to have the Rolls Royce of criminal justice systems, and while a Toyota Corolla would suffice, what we have is a wreck. In this Article, I explore the reasons why this quest for an exceptional justice system has gone so wrong. In so doing, I set aside the problems of racism, carelessness, mean-spiritedness, incompetence, and inadequate funding—each of which is an extremely serious issue that exacerbates problems and undermines even the pretense of justice in many American communities.<sup>2</sup> Instead, I want to focus on the “machinery of criminal justice,” to draw on Stephanos Bibas’s revival of an old phrase.<sup>3</sup> This Article argues that the institutional design of the adversarial process fundamentally fails to provide a workable system of misdemeanor justice, and that this problem is compounded by the American governmental structure. Put simply, the institutional design of the criminal justice system is not up to the task of delivering justice to those charged with misdemeanors.

In the United States, we now have a unified theory of criminal justice. Almost all rights and guarantees that apply when a person is charged with armed robbery apply when a person is charged with shoplifting, breach of the peace, or trespassing.<sup>4</sup> There were once many more differences, but colonial and early-nineteenth century magistrate courts gave way to police courts, which, in turn, gave way to a system of county, state, and federal courts.<sup>5</sup> Similarly, throughout the twentieth century, criminal due process rights were significantly expanded, and then imposed on state prosecutions.<sup>6</sup> Our legal system holds out the promise

---

<sup>1</sup> MACKLIN FLEMING, *THE PRICE OF PERFECT JUSTICE: THE ADVERSE CONSEQUENCES OF CURRENT LEGAL DOCTRINE ON THE AMERICAN COURTROOM* 3-9 (1974) (“The fuel that powers the modern theoretical legal engine is the ideal of perfectibility—the concept that . . . it is possible eventually to achieve perfect justice in all legal process.”).

<sup>2</sup> See, e.g., Asher D. Grunis, *Incompetence of Defence Counsel in Criminal Cases*, 16 CRIM. L.Q. 288, 288 n.1 (1974); Cecilia Klingele, Michael S. Scott & Walter J. Dickey, *Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 955 & n.1; William Quigley, *Racism: The Crime in Criminal Justice*, 13 LOY. J. PUB. INT. L. 417, 417 (2012); Don Terry, *Prison as Usual/a Special Report.; More Familiar, Life in a Cell Seems Less Terrible*, N.Y. TIMES, Sept. 13, 1992, § 1 (Late Edition), at 1.

<sup>3</sup> See generally STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012).

<sup>4</sup> See, e.g., U.S. CONST. amend. VI; *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966) (requiring suspects be warned regarding their rights against self-incrimination and other constitutional rights); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (establishing right to counsel in all criminal prosecutions).

<sup>5</sup> William Raftery, *Unification and “Bragency”: A Century of Court Organization and Reorganization*, 96 JUDICATURE 337, 338-41 (2013).

<sup>6</sup> See, e.g., Louis D. Billionis, *Criminal Justice After the Conservative Reformation*, 94 GEO. L.J. 1347, 1347-54 (2006); Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 494 (2009) (describing Warren Court’s willingness to apply federal constitutional procedural requirements in state prosecutions).

of a just process for anyone charged with a crime, and, on the surface, it is designed to permit, if not provide, it.<sup>7</sup> Two questions guide my analysis: whether the institutional design of the adversarial system is capable of delivering on its promise of justice, and whether this institutional design fits within the hyper-fragmented American governmental system.

Conceivably the moving parts of the adversarial process might work well if they functioned of their own accord, but they are placed within a fragmented governmental system in which the different parts are maintained by different levels of government, and allied institutions, such as police, jails, and prisons, are maintained by still other levels. Frank Zimring reminds us that the United States has fifty-plus separate criminal justice systems, each of which is essentially a separate sovereign.<sup>8</sup> But this is just the beginning.

There are 3141 separate counties in the United States,<sup>9</sup> and most of them select and finance their own prosecutors. We therefore have about that many separate judicial systems, though states now finance most courts. We have a bizarre mixture of public defense systems, which scrape by on various forms of funding. Almost everywhere, police are organized and financed at the municipal level, which means that the United States has over ten thousand separate law enforcement agencies. And, for the most part, jails are organized at the county level and run by elected sheriffs, while prisons are administered and financed by state or federal governments. It is as if the separate parts of the machinery of justice were manufactured by one group, assembled by another, and operated by still a third, all working without a common blueprint or meaningful coordination, let alone oversight. Add to this a multiplicity of municipal, county, and state budgets that finance the machinery of justice as well as elections that select a fair number of those who run the machinery, and the picture is complete.

This fragmentation of function is not distinctive to the administration of criminal justice. It reflects the administration of American education, welfare, public health, and transportation policies. However dysfunctional this might be, it is by design and not default. It is the much flaunted localism built into the U.S. constitutional tradition and widely celebrated here and abroad.<sup>10</sup>

Students of American public policy widely acknowledge this feature of the American governmental structure and emphasize that fragmentation stifles

---

<sup>7</sup> See, e.g., U.S. CONST. amend. VI.

<sup>8</sup> Franklin E. Zimring, *The Complications of Penal Federalism: American Exceptionalism or 50 Different Countries?*, in *AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT* 181, 181-82 (Kevin R. Reitz ed., 2018).

<sup>9</sup> *How Many Counties Are There in the United States*, U.S. GEOLOGICAL SURVEY, <https://www.usgs.gov/faqs/how-many-counties-are-there-united-states> [<https://perma.cc/FA/S6-PJWN>] (last visited Apr. 28, 2018).

<sup>10</sup> See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Francis Bowen ed., Henry Reeve trans., Dover Publ'ns, Inc. 2017) (1863).

reform when efforts are mounted.<sup>11</sup> They consistently reveal that, in contrast to more centralized polities with a more robust public sector, policy changes in the United States take longer to design, are more expensive to implement, and are less effective than comparable policy initiatives in other advanced democratic countries.<sup>12</sup>

Indeed, over the past thirty years, a new field in the study of American politics—American Political Development (“APD”)—has emerged to address such concerns. Its objective is to account for the United States’ failure to develop robust and efficient social welfare policies in contrast with other wealthy democracies. APD scholars’ explanations are almost always anchored in fragmentation and a “weak state.”<sup>13</sup> However, the APD field has yet to produce much work on the criminal process or the criminal courts. While studies over the course of decades recount the same predictable problems with the machinery of justice,<sup>14</sup> few of them emphasize the weak governmental structures and institutions on which the system is constructed and few anchor their analysis in the APD literature. And, of course, it is dangerous to generalize about criminal justice administration across the United States because there are so many local jurisdictions. There are significant variations across jurisdictions, with some doing a better job than others.

Still, the question is the same throughout the United States: How do criminal courts, which are defined in large part by their adversarial nature, operate in a highly fragmented governmental system? The theory that the adversarial proceeding is the preferred vehicle for discovering truth and delivering justice is taken for granted, so baked into the DNA of criminal justice officials, law professors, and observers, that the problems it precipitates are all but invisible and consistently ignored. Similarly, the acceptance of local and fragmented administration of justice is taken for granted and is not sufficiently problematized as a cause of failure. Even when confronted with the wreck these notions produce, observers find it impossible to learn the obvious lessons. Adversarial theory and taken-for-granted assumptions about localism and

---

<sup>11</sup> For a classic study in this vein, see generally JEFFREY L. PRESSMAN & AARON B. WILDAVSKY, *IMPLEMENTATION* (2d ed. 1979). Another such study is Sean Farhang & Miranda Yaver, *Divided Government and the Fragmentation of American Law*, 60 AM. J. POL. SCI. 401, 403-05 (2016).

<sup>12</sup> In a series of paired comparisons on various types of regulatory activities, the authors of thirteen case studies almost always find that American practices are less effective, less efficient, and take longer to implement. See generally REGULATORY ENCOUNTERS: MULTINATIONAL CORPORATIONS AND AMERICAN ADVERSARIAL LEGALISM (Robert A. Kagan & Lee Axelrad eds., 2000).

<sup>13</sup> See generally Suzanne Mettler & Richard M. Vallely, *Introduction to THE OXFORD HANDBOOK OF AMERICAN POLITICAL DEVELOPMENT 1* (Richard M. Vallely, Suzanne Mettler & Robert C. Lieberman eds., 2016).

<sup>14</sup> E.g., Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 851 (2011); Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161, 209 (2017).

fragmentation blind us to the reality of the contradictions within the criminal process and thus blinds us to the possibility of effecting significant reforms. Let me address this issue of blindness first. Then, with eyes wide open, we can explore the nature of the issues created by fragmentation and the adversarial process.

I illustrate my point through an allegory recently examined by Issa Kohler-Hausmann. Drawing on a scene in a film based on Herman Melville's short story, *Bartleby*, Kohler-Hausmann calls our attention to a bored office manager who winds up a toy rabbit and then sets it down on the table.<sup>15</sup> After a momentary pause, the bunny jumps up and down and then comes to rest. The man is surprised and delighted, rewinds the toy, and the action is repeated again and again. With each jump, the man exhibits the same surprise. We are, she not so subtly tells us, just like this man. Just as he is endlessly surprised at the boringly predictable behavior of the jumping bunny, criminal justice scholars are endlessly surprised at the mind-numbing repetition of failures in the criminal process. The manager has an excuse: he is bored, so he wills himself to be surprised. But it is strange, Kohler-Hausmann gently reminds us, that so many practitioners, reformers, and scholars express surprise at the regularity of failure in the criminal process—year after year, decade after decade.<sup>16</sup> At some point, “unanticipated” failures should evolve into the predictable norm. The manager reacted to the jumping bunny through the lens of his ennui; criminal justice scholars react to “unexpected failure” through faulty assumptions about the adversarial process and the structure of American government. We should do better than the manager.

Thus, my task here is to explore how our quest for excellence in criminal justice resulted in such an inadequate system and to gauge our understanding of the failure. The broken system is not a result of unanticipated consequences so much as it is a predictable consequence of institutional design and governmental structure. In examining these issues, I want to draw on lessons reported in three books I published between 1979 and 1983.<sup>17</sup> I will examine how these lessons hold up and apply some of them to current challenges facing criminal courts and court reformers. In those books, I identified what I thought were core structural features of the criminal process that shaped the administration of justice and were likely to systematically undermine reform efforts. Now, forty years later,

---

<sup>15</sup> See generally Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, in *THE NEW CRIMINAL JUSTICE THINKING* 246, 246 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

<sup>16</sup> *Id.*

<sup>17</sup> See generally MALCOLM M. FEELEY, *COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL* (1983) [hereinafter FEELEY, *COURT REFORM ON TRIAL*]; MALCOLM M. FEELEY & AUSTIN D. SARAT, *THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, 1968-1978* (1980); MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER COURT* (1979) [hereinafter FEELEY, *THE PROCESS IS THE PUNISHMENT*].

after examining more recent reform efforts, I am even more confident in my claims. Indeed, I have identified ways in which my past conclusions are even more apt than I had originally thought.

### I. REFORM EFFORTS OVER THE YEARS

The period from the mid-1960s to mid-1970s was a time of ambitious reform in American criminal courts.<sup>18</sup> And today, after an expensive and failed war on crime, we are engaged in another period of ambitious reform.<sup>19</sup> Indeed, the reform efforts of today are largely the same as those of the past. To compare reform efforts past and present, I want to set the *Bartleby*-like analysis aside, and explore not only the reform efforts, but also the underlying structure in which reform efforts take place.

Of course, not everything has remained the same. There has been both continuity and change over the last half century. Despite concerted efforts to ameliorate problems, we witnessed an unprecedented rise and fall in crime rates, an unprecedented increase in imprisonment and probation rates, and continuing and perhaps deepening racism. We witnessed prosecutorial power expand as defense and judicial authority receded.<sup>20</sup> We also saw broken windows policing<sup>21</sup> and evidence-based policymaking<sup>22</sup> come and go with little to show in the way of results.<sup>23</sup> Perhaps the single most significant structural change in the past fifty years has been the institutionalization of the victims' rights

---

<sup>18</sup> Billionis, *supra* note 6, at 1347-54.

<sup>19</sup> See, e.g., Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1457 (2016) (discussing post-Ferguson criminal law reform efforts and some intractable issues not considered by reform advocates).

<sup>20</sup> See FEELEY & SARAT, *supra* note 17, at 3-4.

<sup>21</sup> See James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/9NVQ-37X6>] (discussing policy rationales for New Jersey's "Safe and Clean Neighborhoods Program" in mid-1970s).

<sup>22</sup> See FEELEY & SARAT, *supra* note 17, at 113-32 (discussing experimentation among states with rigorous evaluation processes with intent of creating policies that would reduce crime rates).

<sup>23</sup> There are numerous criticisms on the efficacy of "broken windows" policing. See, e.g., Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows Theory: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 483 (2000) (arguing that empirical evidence shows that stop-and-frisk policies improperly categorize individuals based on race, not propensity to engage in disorderly conduct); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Concept of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 295 (1998); Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2248, 2256 (1998) (arguing that broken windows policing gives police officers too much discretion about when and where to enforce law).

movement,<sup>24</sup> whose representatives now have a permanent seat at the criminal justice stakeholders' table. This new interest group has also been responsible for energizing prosecutors and lobbying for harsher sentences.<sup>25</sup> While the public salience of the victims' rights movement has declined since the turn of the new century, it remains, though now more quietly, a permanent component of the criminal justice policymaking complex.<sup>26</sup>

In *The Process Is the Punishment: Handling Cases in a Lower Criminal Court*, I examined a lower criminal court in New Haven, Connecticut, focusing on what I was confident were generic features of the criminal process, rather than idiosyncratic features or ephemeral follies (of which there were plenty).<sup>27</sup> I identified a number of counterintuitive features of the criminal process and court reform: arrestees plead guilty in order to get out of jail,<sup>28</sup> delay helps as often as it hinders the accused,<sup>29</sup> the most highly regarded defense attorneys plea bargain as often as schlock lawyers,<sup>30</sup> and the press of heavy caseloads does not explain perfunctory courtroom practices. I also found that several well-regarded and well-funded reform efforts either failed to achieve their objectives or were counterproductive.<sup>31</sup> At times, increased access to defense counsel resulted in more problems for the accused.<sup>32</sup> Of course, New Haven is not Every City and

---

<sup>24</sup> See Alice Koskela, Comment, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 163-67 (1997).

<sup>25</sup> Cf. Brian L. Vander Pol, *Relevance and Reconciliation: A Proposal Regarding the Admissibility of Mercy Opinions in Capital Sentencing*, 88 IOWA L. REV. 707, 709 (2003) ("With prosecutors under acute (and ever intensifying) political pressure to seek the death penalty, the families of murder victims who oppose capital punishment are being ignored. Despite the recent emergence of the victim's rights movement, it appears such rights are recognized only when doing so would lead to harsher punishment for the capital defendant." (citations omitted)).

<sup>26</sup> See Megan A. Mullett, *Fulfilling the Promise of Payne, Creating Participatory Opportunities for Survivors in Capital Cases*, 86 IND. L.J. 1617, 1647 (2011) (concluding that "[s]ince the emergence of the victims' rights movement, states have been grappling with how best to accommodate victims' desires to participate in the criminal justice system. The Supreme Court's decision in *Payne* further complicated the field by ruling that the admissibility of victim impact evidence in capital cases is a matter of state law. This has left states in a double bind," which in turn has created uncertainty about public's role in victims' rights).

<sup>27</sup> See FEELEY, *THE PROCESS IS THE PUNISHMENT*, *supra* note 17, at 62-93.

<sup>28</sup> *Id.* at 205-11 ("Of the 102 people who were detained until deposition and pleaded guilty, only a small handful of them received substantial jail sentences.").

<sup>29</sup> *Id.* at 175-77, 222-24.

<sup>30</sup> *Id.* at 143-45 ("In short, defendants without counsel were confined neither to those charged with minor offenses nor to those who received more lenient sentences, and the presence or absence of an attorney made *no measureable impact* on the severity of the sentence.").

<sup>31</sup> *Id.* at 108-11, 232-34.

<sup>32</sup> *Id.* at 221-22.

its courtroom practices are not universal. But I am confident that I identified dynamics and structural relations common to lower criminal courts.

Some colleagues who reviewed a draft of my book manuscript took me to task for not underscoring pervasive due process violations and singling out the officials responsible. I demurred. I was an anthropologist in a foreign setting trying to understand the natives, and I tried to understand the process from the perspectives of the various actors, including the criminally accused. Unlike law professors, the lawyers I followed did not always wear glasses with due process lenses. Indeed, it was somewhat unusual for them to *interpret* and *apply* the law. Typically, they used provisions of both criminal procedure and criminal law as tactical resources. Prosecutors did not “apply” the law, defense attorneys did not insist upon the application of “procedure,” and judges almost never interpreted the law to find someone guilty.<sup>33</sup> Of course, criminal law and procedure were of importance—they defined the arena of conflict and shaped debates, but only occasionally did they prescribe or define the nature of the decision making.<sup>34</sup>

Similarly, the adversarial process did not define or prescribe the behavior of the principal actors so much as it shaped the perspective they often (but not always) adopted in their mixed game of conflict and cooperation.<sup>35</sup> It empowered them to seek advantages when they could.<sup>36</sup> It might be described as “rule by law,” not “rule of law.” This is why it would have been difficult, if not impossible, to assess practices in the court through the lens of due process. If I had worn due process lenses and used them to assess the practices I witnessed, I would have been like the character in *Bartleby*, surprised again and again at the same predictable behavior.<sup>37</sup>

In my follow-up book, *Court Reform on Trial: Why Simple Solutions Fail*, I pursued some of my concerns about boringly normal failures in more depth.<sup>38</sup> I examined four sets of well-conceived, well-received, and well-funded reform efforts—bail reform, pretrial diversion, speedy trial rules, and sentencing reform.<sup>39</sup> I found that even the best of them had little long-term positive impacts, and most efforts were probably counterproductive from the outset.<sup>40</sup> There was no evidence that the massive effort at bail reform in the 1960s produced a

---

<sup>33</sup> FEELEY, COURT REFORM ON TRIAL, *supra* note 17, at 184 (noting one judge who suggested that “any defense attorney worth his salt will use whatever tactics within his means to further the interests of his clients” even if this means waiving common procedure, such as speedy trial provisions); *see also id.* at 187.

<sup>34</sup> *Id.* at 11.

<sup>35</sup> *Id.* at 22.

<sup>36</sup> *See id.* at 187.

<sup>37</sup> *See generally* HERMAN MELVILLE, *Bartleby*, in THE PIAZZA TALES (1856).

<sup>38</sup> FEELEY, COURT REFORM ON TRIAL, *supra* note 17, at 198.

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

<sup>40</sup> *See id.* at xiv (“[E]ach [reform] has to varying degrees and in different ways been based upon erroneous assumptions and exaggerated expectations and, as a consequence, is something of a failure.”).



lasting—or even temporary—effect in reducing reliance on money bail or in reducing pretrial detention.<sup>41</sup> Similarly, everywhere I looked, pretrial diversion did not do what it promised to: divert jail-bound offenders into community-treatment and service alternatives.<sup>42</sup> The aim of the sentence reforms I examined was to reduce disparity in sentencing and end other objectionable practices, but here too there was no evidence they accomplished these objectives.<sup>43</sup> And various types of speedy trial rules were not so much counterproductive as futile.<sup>44</sup> In some courts, these rules decreased the length of time to some dispositions, but increased the length of time to others.<sup>45</sup> In some courts, defense attorneys routinely waived their clients' rights and things went on as usual.<sup>46</sup> Here, I will restrict myself to an examination of bail reform and pretrial diversion, two of the most promising innovations of the late 1960s and early 1970s.

In examining the impact of these reforms, I set out to explore something of a best-case analysis. Public administration in a great many cities and towns borders on the dysfunctional, and it is easy to reveal shortcomings owing to racism, disorganization, incompetence, lack of funding, and the like.<sup>47</sup> I wanted to do something more: to explore structural factors that inhibited systematically planned change. Consequently, I selected from among the best and brightest innovations that were well-conceived, well-supported, and championed by talented and creative leaders.<sup>48</sup> I wanted to watch what happened at each stage of the development of a new idea once it began to be put into practice. I followed them through the different stages of development: diagnosis, initiation, implementation, routinization, and evaluation. At each stage, distractions, obstacles, and misinformation led reformers astray.<sup>49</sup> At each stage, the dynamics of a protean adversarial system twisted reformers this way and that.<sup>50</sup>

---

<sup>41</sup> *Id.* at 67-68 (finding that cities with no special pretrial release programs had similar release rates as those cities with large and active programs).

<sup>42</sup> *Id.* at 57-58.

<sup>43</sup> FEELEY, *COURT REFORM ON TRIAL*, *supra* note 17, at 191-207 (“[S]entence reforms . . . certainly missed their mark entirely on minimizing racial disparities.”).

<sup>44</sup> *Id.* at 156 (“[T]o date, formal speedy trial provisions have had limited impact because they have not reached those who move cases through courts, and because they have done little to alter the incentives of the defense bar which . . . finds delay functional.”).

<sup>45</sup> *Id.* at 178-82.

<sup>46</sup> *See id.* at 169 (noting that state courts “have almost uniformly been liberal in granting waivers [requested by defense attorneys] . . . to nullify state time-limit requirements”).

<sup>47</sup> CHARLES T. GOODSSELL, *THE CASE FOR BUREAUCRACY: A PUBLIC ADMINISTRATION POLEMIC* 3 (4th ed. 2004).

<sup>48</sup> FEELEY, *COURT REFORM ON TRIAL*, *supra* note 17, at 35-39.

<sup>49</sup> *Id.* at 191-207.

<sup>50</sup> *Id.*

---

And at each stage, the hyper-fragmented structure of local government further distorted the meaning of the program.<sup>51</sup>

The criminal process is an ecology of games, with each agency or set of actors pursuing and protecting its own narrow set of interests. The local government, in which the criminal justice system sits, is another ecology of games that can further mystify and distort reality. The resulting failures I recorded were not the consequences of unanticipated obstacles, backtracking, sudden withdrawals of support, or the mobilization of opposing forces. Good ideas put through a meat grinder reappeared unrecognizable.

#### A. *Bail Reform*

In the late 1950s, Herbert Sturz, a young social worker in New York City, convinced a philanthropist friend to give him some money to establish a pretrial release program that depended not upon money bail, but release on recognizance (“ROR”) with a promise to appear at trial.<sup>52</sup> Sturz maintained that his staff could collect information about the accuseds’ ties to the community and determine who could be released with only the assurance that they would subsequently appear for their court date. The program attracted widespread attention, as well as support from prominent judges; prominent local and state politicians; the Ford Foundation; and, in the early 1960s, influential officials in the Department of Justice (“DOJ”), including Attorney General Robert Kennedy, Daniel Freed, and Patricia Wald.<sup>53</sup>

This group was guided by a pioneering study of bail by Arthur Beeley who, in 1927, reported that a high proportion of arrestees could not afford to post even nominal bail amounts and thus remained in jail.<sup>54</sup> It was also inspired by two more recent studies of bail administration in New York City and Philadelphia by Caleb Foote, which also found that a substantial number of arrestees were unable to procure funds to secure their release and often ended up pleading guilty in order to get out of jail.<sup>55</sup> Reinforced by these findings, the group mounted a campaign for bail reform that led to federal and state legislation, as well as the establishment of the Vera Institute and its ROR program in New York City.<sup>56</sup>

---

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 44-53.

<sup>53</sup> *See id.* at 47 (describing how enthusiastic response to project helped precipitate widespread interest in bail reform).

<sup>54</sup> ARTHUR L. BEELEY, *THE BAIL SYSTEM IN CHICAGO* 29, 155 (Univ. of Chi. Press 1966) (1927) (describing how approximately twenty percent of arrestees were unable to post bail set in 1923 Chicago).

<sup>55</sup> Caleb Foote, *Foreword: Comment on the New York Bail Study*, 106 U. PA. L. REV. 685, 686 (1958); *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1048 (1954).

<sup>56</sup> Candace McCoy, *Caleb Was Right: Pretrial Decisions Determine Mostly Everything*, 12 BERKELEY J. CRIM. L. 135, 138 (2008).

Eventually, these efforts spread across the country and became one of the principal criminal justice reforms of the 1960s and early 1970s.<sup>57</sup>

Despite the support, immense talent, and momentum, Vera's bail reform project—and the many created in its image—had only a limited effect.<sup>58</sup> Assessments of courts with ROR programs and those without, as well as before-and-after studies, support this judgment.<sup>59</sup> At best, New York City's bail reform project had minimal influence in its early stages, during which it benefited from energetic and charismatic leadership, a dedicated staff, and support from prominent judges and other public officials.<sup>60</sup> But, as its spotlight inevitably dimmed, the program's effectiveness declined, and at times its practices were even regressive.<sup>61</sup> The project found itself in a precarious position, becoming a new and “neutral” program inserted into a competitive adversarial system which had already divided territory, function, and budget.<sup>62</sup> It was consequently unable to successfully compete for funding with well-established agencies.<sup>63</sup> But, even if it had, there is no evidence that the project's actions actually reduced pretrial detention.<sup>64</sup>

Indeed, there is some evidence that bail reform programs were victims of their own success. Some ROR programs developed increasingly complicated predictive models and claimed they could accurately predict who would appear in court if released on their own recognizance.<sup>65</sup> As a result, the more information the programs used in their models, the greater the likelihood they could not obtain all this information in any given case.<sup>66</sup> When this occurred, they were reluctant to claim “good risk” and recommend release.<sup>67</sup> The absence

---

<sup>57</sup> *Id.* at 139 (“The reforms in pretrial procedure that Foote and others championed in the 1970s evolved from the powerful observation that the primary purpose of bail is to assure a defendant's appearance at trial . . .”).

<sup>58</sup> *Id.* at 139-40; *see also* FEELEY, COURT REFORM ON TRIAL, *supra* note 17, at 56-57 (reporting results of 1977 study showing that ROR had little effect in New York City, with overall release rate in Queens increasing one percentage point without ROR programs).

<sup>59</sup> FEELEY, COURT REFORM ON TRIAL, *supra* note 17, at 53-59, 64-68.

<sup>60</sup> *Id.* at 51.

<sup>61</sup> *Id.* at 51-53 (“[O]ut of every 100 interviews conducted by the [probation] office, only 25 led to positive recommendations for ROR, and fewer than half actually obtained ROR.”).

<sup>62</sup> *Id.* at 52.

<sup>63</sup> *Id.* at 72 (“Once initial sources of ‘free’ or ‘outside’ funds [were] exhausted, the agencies [were] left to fight for far fewer, and more difficult to obtain, local tax funds.”).

<sup>64</sup> *Id.* at 68 (underscoring minimal effect of ROR program given findings that cities like “Baltimore, with a pretrial release agency, had a higher detention rate than Chicago and Detroit, without agencies”).

<sup>65</sup> *Id.* at 69.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 64.

of a recommendation was viewed by the court as a recommendation of “no.”<sup>68</sup> Thus, at times, the ROR program unwittingly contributed to increases in detention.<sup>69</sup>

Bail reform generated still other forms of consequences. Federal funding transformed some pretrial release programs into “pretrial service agencies,”<sup>70</sup> and, consequently, programs initially responsible for informing courts about arrestees’ ties to their communities morphed into programs responsible for pretrial “supervision,” including administering drug tests; running drug treatment programs; and monitoring attendance at school, work, and treatment programs.<sup>71</sup> In effect, these programs became pretrial probation for accused persons. As the tough-on-crime movement gained momentum, the mission of these agencies was reshaped once again. Officials reasoned that if they could predict court appearance, they could also predict risk of dangerousness, and so they morphed into pretrial risk assessment and supervision agencies.<sup>72</sup> Virginia has institutionalized such an expanded program statewide, and it is widely regarded as a model for other state and local jurisdictions.<sup>73</sup> Virginia’s pretrial release program has become, in effect, a series of mini-pretrial probation agencies, which regularly violate clients’ privacy for technical violations, even though the clients regularly appear in court.<sup>74</sup>

---

<sup>68</sup> *Id.* at 63-64 (noting that Oakland ROR unit, which “leaned in the direction of detention in order to minimize the likelihood of *identifiable* errors,” resulted in defendants being released on their own recognizance less frequently than they would have otherwise).

<sup>69</sup> *Id.* at 63 (“The decision not to make recommendations in the absence of complete and verified information was premised in part on a desire to reduce error; yet the only type of error considered was that of recommending ROR for someone who subsequently would fail to appear. Errors caused by nondecisions—resulting in detention of those who would have appeared had they been released—were not considered.”).

<sup>70</sup> Carole Wolff Barnes, Rodney Kingsnorth & Tina Hodgins, *The 1984 Bail Reform Act: Organizational and Mandated Factors in the Decision to Detain*, 3 CRIM. JUST. POL’Y REV. 257, 258 (1989).

<sup>71</sup> *Id.* at 259 (noting that “major responsibility” of pretrial service agencies has become “supervision of conditional release”).

<sup>72</sup> FEELEY, COURT REFORM ON TRIAL, *supra* note 17, at 75 (“Some pretrial release programs are . . . providing judges with estimates of likely dangerousness, and some are now trying to develop predictors of future dangerousness as an extension of their research on predictors of future court appearance.”).

<sup>73</sup> See BRIAN J. OSTROM ET AL., NAT’L CTR. FOR ST. CTS., OFFENDER RISK ASSESSMENT IN VIRGINIA: A THREE-STAGE EVALUATION 12 (2002), [http://www.vcsc.virginia.gov/risk\\_off\\_rpt.pdf](http://www.vcsc.virginia.gov/risk_off_rpt.pdf) [<https://perma.cc/9347-MFQH>]; see also John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 393-94 (2008).

<sup>74</sup> See MARIE VANNOSTRAND, KENNETH J. ROSE & KIMBERLY WEIBRECHT, VA. PRETRIAL SERVS. AGENCIES, IN PURSUIT OF LEGAL AND EVIDENCE-BASED PRETRIAL RELEASE RECOMMENDATIONS AND SUPERVISION 3 (2011), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/pursuit-legal-and-evidence-based-pretrial-release-re>

Though the number of responsibilities assigned to pretrial service agencies has grown, they remain faithful to their original mission of increasing the number of arrestees released prior to adjudication.<sup>75</sup> But the evidence from recent studies does not indicate that more people are being released prior to adjudication now than sixty years ago.<sup>76</sup> Also, the evidence indicates that many of those who are released prior to the disposition of their cases are subject to more constraints, and this, in turn, increases the chances that they will commit technical violations and be returned to custody.<sup>77</sup>

One might be tempted to blame the failure of these programs on the crushing increase in arrests and caseloads that have swamped the courts as a result of the war on crime. But the failure predated the run-up of misdemeanor arrests<sup>78</sup> and continues today after the great decline.<sup>79</sup> The failure stems not only from a lack of resources; it is also a cultural and structural problem.

---

commendations-and-supervision.pdf [<https://perma.cc/EHQ3-V49J>]; John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. (forthcoming 2019) (manuscript at 53), <https://ssrn.com/abstract=3041622> [<https://perma.cc/8Y7P-5EGP>] (explaining that large percentage of violations committed by defendants on pretrial release are technical violations).

<sup>75</sup> FEELEY, COURT REFORM ON TRIAL, *supra* note 17, at 68-79 (describing pretrial release agencies' continued attempts to increase number of defendants released in face of increased fundraising responsibilities). For an assessment of the activities of one such agency, see generally John S. Goldkamp & Michael D. White, *Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments*, 2 J. EXPERIMENTAL CRIMINOLOGY 143 (2006).

<sup>76</sup> Compare data from the 1960s with data from the 1990s and early 2000s. In a prior work, I found that roughly fifty-nine percent of defendants in the Vera Institute's initial pretrial release program were released. FEELEY, COURT REFORM ON TRIAL, *supra* note 17, at 50. According to Thomas Cohen and Brian Reaves, between 1990 and 2004, sixty-two percent of felony defendants in the seventy-five largest counties were released prior to trial. THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T JUST., OFF. JUST. PROGRAMS, STATE COURT PROCESSING STATISTICS, 1990-2004: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (2007), <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf> [<https://perma.cc/MLW3-Q6K6>]; see also John S. Goldkamp, *Philadelphia Revisited: An Examination of Bail and Detention Two Decades After Foote*, 26 CRIME & DELINQ. 179, 186-87 (1980).

<sup>77</sup> Koepke & Robinson, *supra* note 74, at 55-56 (explaining that, as number of non-financial conditions imposed upon defendants rise, technical violations also rise).

<sup>78</sup> FEELEY, COURT REFORM ON TRIAL, *supra* note 17, at 52-53 (explaining that, despite initial success of Vera Institute's pretrial release program, by 1967 judges in New York City were granting only thirty-two percent of probation office's requests for pretrial release).

<sup>79</sup> See generally COHEN & REAVES, *supra* note 76.

### B. *Pretrial Diversion*

Pretrial diversion programs were also pioneered by the Vera Institute in the 1960s.<sup>80</sup> They took off in the 1970s and now there are hundreds, if not thousands, of diversion programs across the country.<sup>81</sup> The concept is simple: these programs intervene to divert selected types of arrestees—first time, non-violent arrestees charged with misdemeanors and similar petty offenses—away from convictions and jail sentences.<sup>82</sup> The idea is to direct these arrestees to an alternative to incarceration like community service or a supervised release program that provides treatment, counseling, and educational programs.<sup>83</sup> This idea is obviously attractive. But, virtually every evaluation of pretrial diversion programs I have read reveals that diversion programs do not work well.<sup>84</sup> Prosecutors use diversion programs to “pil[e] up sanctions” and impose additional controls on arrestees whose charges would have been otherwise dropped.<sup>85</sup>

While diverting some people charged with petty offenses may seem simple and appealing, so too is the imposition of some constraints on careless people who are charged with nuisances not worth prosecuting. This is the way many prosecutors view diversion—a useful new tool for supervising people who could use more discipline in their lives. So while diversion expanded social control, and thus was a failure in the eyes of some,<sup>86</sup> it was a wonderful new resource in

---

<sup>80</sup> SALLY T. HILLSMAN & SUSAN SADD, VERA INST. JUST., *THE DIVERSION OF FELONY ARRESTS: AN EXPERIMENT IN PRETRIAL INTERVENTION: A REPORT OF THE VERA INSTITUTE'S EVALUATION OF THE COURT EMPLOYMENT PROJECT* i (1980), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-diversion-of-felony-arrests-an-experiment-in-pretrial-intervention/legacy\\_downloads/1466.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-diversion-of-felony-arrests-an-experiment-in-pretrial-intervention/legacy_downloads/1466.pdf) [<https://perma.cc/F38A-LXGJ>].

<sup>81</sup> See, e.g., Cory R. Lepage & Jeff D. May, *The Anchorage, Alaska Municipal Pretrial Diversion Program: An Initial Assessment*, 34 ALASKA L. REV. 1, 5 (2017) (noting that forty-four states statutorily authorize some type of pretrial diversion).

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> FEELEY, *COURT REFORM ON TRIAL*, *supra* note 17, at 102.

<sup>85</sup> See Thomas G. Blomberg & Julie Mestre, *Net-Widening: Past, Present, and into the Future*, in 1 THE ENCYCLOPEDIA OF THEORETICAL CRIMINOLOGY 574, 574 (J. Mitchell Miller ed., 2014). See generally Thomas Blomberg & Karol Lucken, *Stacking the Deck by Piling up Sanctions: Is Intermediate Punishment Destined to Fail?*, 33 HOW. J. CRIM. JUST. 62 (1994).

<sup>86</sup> See, e.g., Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 316 (1993) (“Diversion programs fail the abuser by not demanding that he acknowledge any wrongdoing for his violence and by providing scant follow-up if he drops out of the program.”); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1527 (1998) (“The rationale for disallowing diversion programs is that they fail to demand that the batterer acknowledge any wrongdoing.”).

the eyes of others.<sup>87</sup> And in the case of the diversion programs of the 1970s and 1980s, the others clearly prevailed.<sup>88</sup>

That was in the past. Have things changed since? Owing to continued pressure from jails and courts, there has been a renewed interest in bail reform and diverting offenders from jail.<sup>89</sup> The same sets of concerns about over-prosecution have led to a renewed interest in diversion. I do not believe these efforts have been any more successful than previous efforts. Because today's efforts are subject to the same institutional dynamics and structural features as their counterparts from forty years ago, today's results should be more or less the same.

Now, as then, reforms have emerged as a result of a coalition which derives support from foundations, the justice system, and the federal government, among others.<sup>90</sup> Frustrated by the succession of failed war on crime and concerned with the continuing high costs of incarceration even in the face of a plummeting crime rate, a new generation of reformers now champions bail reform and other alternatives to incarceration.<sup>91</sup> One must ask whether the efforts of such groups are currently faring any better than those of their earlier counterparts.

There are, however, some important differences between the old era of reform and this new one. Some new initiatives rely on sophisticated risk assessment instruments derived from "big data" sources, which promise to predict court appearance and risk of dangerousness.<sup>92</sup> Furthermore, the administration of

---

<sup>87</sup> See, e.g., Liesel J. Danjczek, *The Mentally Ill Offender Treatment and Crime Reduction Act and Its Inappropriate Non-Violent Offender Limitation*, 24 J. CONTEMP. HEALTH L. & POL'Y 69, 74 (2007) ("Allowing violent mentally ill offenders to be [sic] participate in diversion programs would result in a safer society due to decreased recidivism rates; less suffering for people with serious mental illnesses; financial savings from reduced incarceration and medical fees; and greater benefits from many mentally ill offenders becoming productive members in society."); Diane M. Ellis, *A Decade of Diversion: Empirical Evidence that Alternative Discipline Is Working for Arizona Lawyers*, 52 EMORY L.J. 1221, 1221 (2003) (discussing benefits of diversion, including its appeals to "common sense" and "business sense" and its emphasis on attorney communication and increased engagement with clients).

<sup>88</sup> See FEELEY, COURT REFORM ON TRIAL, *supra* note 17, at 84.

<sup>89</sup> See, e.g., Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 776 (2011) (arguing Fourteenth Amendment due process guarantees right to pretrial release on bail); Mary Fan, *Street Diversion and Decarceration*, 50 AM. CRIM. L. REV. 165, 166-67 (2013) (describing Seattle's diversion program).

<sup>90</sup> See generally DAVID DAGAN & STEVEN MICHAEL TELES, PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION (2016).

<sup>91</sup> See, e.g., Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 MARQ. L. REV. 1551, 1630 (2012).

<sup>92</sup> The literature in this field is growing rapidly. For an overview and meta-analysis of pretrial risk assessment instruments, see generally Kristin Bechtel et al., *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions* (Mar. 6, 2016)

diversion programs by private contractors adds an additional layer of complication.<sup>93</sup> Private contractors now do everything from running jails and prisons, to running electronic monitoring programs, to supplying algorithms used to predict dangerousness in pretrial release, sentencing, and probation and parole decisions, to collecting fees and fines for local courts.<sup>94</sup>

All this is promising. New ideas, programming, sources of funding, and players have been assembled, and major new efforts are being introduced.<sup>95</sup> Certainly, there have been substantial advances in prediction technology, and there is ample evidence that private contractors can be more efficient and effective than some public agencies.<sup>96</sup>

Increased interest by the private sector has other potential benefits as well. Fragmentation in the criminal justice system discourages innovation.<sup>97</sup> For this reason, and no doubt for others, the traditional criminal justice system is bereft of any real research and development functions, so new ideas from entrepreneurs on the outside should be encouraging.<sup>98</sup> In fact, recall that the two reforms discussed above—bail reform and pretrial diversion—were both products of an “outside” organization, the Vera Institute, which was initially funded by Louis

---

(unpublished manuscript), <https://ssrn.com/abstract=2741635> [<https://perma.cc/MKD9-X8YD>].

<sup>93</sup> See, e.g., Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES, Dec. 12, 2016, at A1 (profiling person whose diversion was overseen by private company claiming that “one in four of its cases was returned to court, often for failure to pay”).

<sup>94</sup> See Malcolm M. Feeley, *Entrepreneurs of Punishment: How Private Contractors Made and Are Remaking the Modern Criminal Justice System—an Account of Convict Transportation and Electronic Monitoring*, 17 CRIMINOLOGY CRIM. JUST. L. & SOC’Y, no. 3, at 1, 13 (2016); Issie Lapowsky, *One State’s Bail Reform Exposes the Promise and Pitfalls of Tech-Driven Justice*, WIRED (Sept. 5, 2017, 7:00 AM), <https://www.wired.com/story/bail-reform-tech-justice/> [<https://perma.cc/R6SK-K94D>]; OFFICE OF THE INSPECTOR GEN., U.S. DEP’T JUST., REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS i-iii (2016), <https://oig.justice.gov/reports/2016/e1606.pdf> [<https://perma.cc/PQD6-LXNJ>] (“As of December 2015, contract prisons housed roughly 22,660 of these federal inmates, or approximately 12 percent of the BOP’s total inmate population.”).

<sup>95</sup> See, e.g., Feeley, *supra* note 94, at 12-16.

<sup>96</sup> See *id.* But see U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-6, COST OF PRISONS: BUREAU OF PRISONS NEEDS BETTER DATA TO ASSESS ALTERNATIVES FOR ACQUIRING LOW AND MINIMUM SECURITY FACILITIES (2007), <https://www.gao.gov/new.items/d086.pdf> [<https://perma.cc/87WK-MA4P>] (“Without comparable data, BOP is not able to evaluate and justify whether confining inmates in private facilities is more cost-effective than other confinement alternatives such as building new BOP facilities.”). It should be noted that the same risk assessment instruments are used for predicting dangerousness for both pretrial release and detention decisions as well as sentencing. See generally John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCHOL. 489 (2015).

<sup>97</sup> See, e.g., Feeley, *supra* note 94, at 15.

<sup>98</sup> *Id.* at 16.



Schweitzer.<sup>99</sup> Today, other private institutions have stepped in to foster innovation: New York City's Center for Court Innovation is now the premier private institution and the Arnold Foundation has replaced the Ford Foundation in supporting new experiments with pretrial release.<sup>100</sup> However, the most far-reaching change is the expanded involvement of for-profit companies, which both design and operate a host of new and innovative programs.<sup>101</sup>

Despite all this, there is no reason to believe that these new programs will succeed where their predecessors failed, because institutional and structural conditions remain unchanged. Current bail reform initiatives picked up where the last failed efforts left off. It is not clear that things have changed much, if at all; pretrial detention rates today may be higher than what Foote and others found in the 1950s, and what I found in the 1970s—even after a decade of continuous reform.<sup>102</sup> The descriptions of practices are similar across the time spans, and the analysis of the causes and consequences is all too familiar.

There are, of course, differences as well. The earlier efforts at bail reform relied on simple models based on strength of community ties to predict the likelihood of defendants making court appearances.<sup>103</sup> Some of them were drastically cut back or died, and most that survived took on new functions and morphed into programs concerned with preventive detention and pretrial probation.<sup>104</sup>

### C. *Current Bail Reform Efforts*

More recent efforts rely on sophisticated technology—models derived from algorithms and huge data sets, which their architects maintain can produce

<sup>99</sup> FEELEY, COURT REFORM ON TRIAL, *supra* note 17, at 45.

<sup>100</sup> See Alex Calabrese, “*Team Red Hook*” Addresses Wide Range of Community Needs, 72 N.Y. ST. B.J. 14, 18 (2000); Jason Tashea, *Calculating Crime*, 103 A.B.A. J. 54, 58 (2017).

<sup>101</sup> See generally OFFICE OF INSPECTOR GEN., *supra* note 94 (studying involvement of for-profit companies in incarceration).

<sup>102</sup> JACOB KANG-BROWN & RAM SUBRAMANIAN, VERA INST. JUST., OUT OF SIGHT: THE GROWTH OF JAILS IN RURAL AMERICA 10 fig.1 (2017), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/out-of-sight-growth-of-jails-rural-america/legacy\\_downloads/out-of-sight-growth-of-jails-rural-america.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/out-of-sight-growth-of-jails-rural-america/legacy_downloads/out-of-sight-growth-of-jails-rural-america.pdf) [<https://perma.cc/FH4A-BKHN>] (finding that national pretrial incarceration rate more than tripled from 1973 to 2013); Issie Lapowsky, *Incarceration Is Skyrocketing in Rural America*, WIRED (June 13, 2017, 12:01 AM), <https://www.wired.com/story/why-incarceration-is-skyrocketing-in-rural-america/> [<https://perma.cc/7VPC-MQ26>].

<sup>103</sup> See AMANDA ZANIEWSKI, MASS. DEP'T. CORRECTIONS, BAIL IN THE UNITED STATES: A BRIEF REVIEW OF THE LITERATURE 3 (2014), <http://www.mass.gov/eopss/docs/doc/research-reports/briefs-stats-bulletins/bail-in-united-states-literature-review.pdf> [<https://perma.cc/3495-WJPD>].

<sup>104</sup> See Timothy P. Cadigan, *Pretrial Services in the Federal System: Impact of the Pretrial Services Act of 1982*, 71 FED. PROBATION, Sept. 2007, at 10, 10.

reliable predictions of risk of dangerousness and court appearance.<sup>105</sup> Since the early 2000s, the Arnold Foundation has earmarked millions of dollars for criminal justice reforms, especially those which draw on cutting-edge technology.<sup>106</sup> It is too early to tell, but its campaign to be “smart on crime” and to introduce cutting edge technologies is reminiscent of the enthusiasm for technological fixes in the 1970s.<sup>107</sup> Indeed, their statements on the subject could easily have been adapted from Ford Foundation pronouncements in the 1960s. Algorithms are the new silver bullet of criminal justice reform; they promise to decrease pretrial detention, increase the number of people on probation and parole, and lower the number of incarcerated people—that is, to do more good at less cost.<sup>108</sup>

One of the most well-known of the newer risk assessment programs was established by the Virginia Criminal Sentencing Commission, and it provides statewide services for pretrial release and sentencing decisions.<sup>109</sup> This program has run for more than twenty years and is now well-established in local courts, but only after local judges and prosecutors mounted a sustained campaign to assure that the recommendations flowing from the use of the model were only advisory and could be overruled by judges in cases before them.<sup>110</sup>

Thus, Virginia should be somewhat of a best case. It has succeeded in developing a sophisticated risk assessment instrument to predict dangerousness to be used in pretrial release decisions.<sup>111</sup> To a large extent, local judges and prosecutors follow the Commission’s recommendations. Despite this, the

---

<sup>105</sup> MARIE VANNOSTRAND, VA. DEP’T CRIM. JUST. SERVS., *ASSESSING RISK AMONG PRETRIAL DEFENDANTS IN VIRGINIA: THE VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT 5* (2003), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/assessing-risk-among-pretrial-defendants-virginia-virginia-pretrial-risk-assessment-instrument.pdf> [<https://perma.cc/N4EE-ZHCK>].

<sup>106</sup> *See, e.g., Public Safety Assessment: A Risk Tool that Promotes Safety, Equity, and Justice*, LAURA & JOHN ARNOLD FOUND. (Aug. 14, 2017), <http://www.arnoldfoundation.org/public-safety-assessment-risk-tool-promotes-safety-equity-justice/> [<https://perma.cc/NKY5-RK8E>].

<sup>107</sup> *See supra* text accompanying notes 55-65.

<sup>108</sup> *See, e.g.,* CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, LAURA & JOHN ARNOLD FOUND., *THE HIDDEN COSTS OF PRETRIAL DETENTION 3-4* (2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf) [<https://perma.cc/854M-D8V3>] (reporting on results of study connecting length of pretrial detention and failure to appear at trial).

<sup>109</sup> *See* VANNOSTRAND, *supra* note 105, at 2-3.

<sup>110</sup> *See id.* This makes evaluation difficult.

<sup>111</sup> MARIE VANNOSTRAND & KENNETH J. ROSE, VA. DEP’T CRIM. JUST. SERVS., *PRETRIAL RISK ASSESSMENT IN VIRGINIA 7-10* (2009), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/virginia-pretrial-risk-assessment-report.pdf> [<https://perma.cc/ZU63-M5KN>].

overall pretrial detention rate in Virginia (fifty-three percent)<sup>112</sup> is higher than the average for felony defendants in state courts in the seventy-five largest counties in the United States (thirty-eight percent).<sup>113</sup> There are any number of possible reasons for this. Perhaps it is because recommendations are only advisory,<sup>114</sup> an arrangement that plays havoc with any effort to nail down both the reliability and validity of the prediction instrument.

One can hope that the newer algorithms will help, but we have heard that story before. Perhaps the new predictive models to be used for deciding release or detention are more reliable than the old ones. Certainly, they do have a long history of successful use in the insurance industry where they are used to set premiums based on predictions of life expectancy and accident rates.<sup>115</sup> Still, their use poses special problems in criminal justice. Algorithms in insurance are more than advisory and their focus is on the aggregate—that is, they establish “types” or “models”. In contrast, the criminal law focuses on individuals.<sup>116</sup> Indeed, it is radically individualistic in its focus on responsibility, guilt, mens rea, and proportionality. Thus, actuarial models pose a major challenge to traditional Kantian-based values on which much of western criminal law rests.<sup>117</sup> Furthermore, some private algorithm model providers, like their insurance company counterparts, regard their models as proprietary products. As a result, they will not share their contents with criminal justice agencies who wish to examine them and determine their suitability for use or make an independent assessment of their reliability.<sup>118</sup>

Work to date suggests that these concerns are more than speculative. Independent studies have dissected some pretrial release and sentencing

<sup>112</sup> VA. DEP’T OF CRIMINAL JUSTICE SERVS., OCTOBER STUDY—2012, at 1 (2012), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/october-study-pretrial-screenings-2012.pdf> [<https://perma.cc/TX5S-RRCU>].

<sup>113</sup> See COHEN & REAVES, *supra* note 76, at 2.

<sup>114</sup> See generally VA. DEP’T OF CRIMINAL JUSTICE SERVS., *supra* note 112 (reporting data on how determinations match up with predicted risk).

<sup>115</sup> See Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 CRIME & JUST. 1, 14 (1985).

<sup>116</sup> See Norval Morris & Michael Tonry, *Presiding in Criminal Court: An Introduction*, 72 JUDICATURE 7, 8 (1988).

<sup>117</sup> See generally H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (2d ed. 2008). For a discussion of departures from this view, see, for example, Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 452 (1992) (“A central feature of the new discourse is the replacement of a moral or clinical description of the individual with an actuarial language of probabilistic calculations and statistical distributions applied to populations.”).

<sup>118</sup> See *Algorithms in the Criminal Justice System*, ELECTRONIC PRIVACY INFO. CTR., <https://epic.org/algorithmic-transparency/crim-justice> [<https://perma.cc/NG93-R9QB>] (last visited Apr. 28, 2018) (“[B]ecause such algorithms are proprietary, they are not subject to state or federal open government laws.”).

actuarial models, revealing them to be error-prone in the extreme.<sup>119</sup> Perhaps the single best piece critiquing the use of risk assessment instruments in the pretrial process is an article written by Logan Koepke and David Robinson. They have coined the term “zombie predictions” to describe most models of risk assessment in use today because the models rely on out of date data that overstate risk. They go on to underscore the fact that risk assessment models employ crucial moral judgments, that for the most part, escape public scrutiny.<sup>120</sup> It is not clear how widespread such problems are, but I am not familiar with any good controlled evaluations assessing their efficacy. And, if these pretrial release and sentencing models are good, we may never know. Troublingly, at least one state supreme court has ruled that the contents of algorithms that make up the predictive model are proprietary information and that a defendant’s lack of access to the algorithm’s contents did not violate due process.<sup>121</sup>

This is only part of the problem. Algorithmic risk assessments might turn out to be reliable and useful and still present problems. For instance, in the 1970s, in New York City, the Manhattan Bail Re-Evaluation Project (“MBRP”) redeveloped a model to predict subsequent court appearance.<sup>122</sup> However, the model required significant information on arrestees’ backgrounds.<sup>123</sup> As information requirements increased, so too did missing data—information could not be obtained.<sup>124</sup> If the MBRP could not obtain the data, it gave a “no

---

<sup>119</sup> See, e.g., Koepke & Robinson, *supra* note 74, at 36-54. For a wide-ranging discussion of big data, artificial intelligence, and the future of the criminal law and procedure, see Mariano-Florentino Cuellar, *A Simpler World? On Pruning Risks and Harvesting Fruits in an Orchard of Whispering Algorithms*, 51 U.C. DAVIS L. REV. 27, 35-41 (2017).

<sup>120</sup> Koepke & Robinson, *supra* note 74, at 36-49.

<sup>121</sup> *State v. Loomis*, 2016 WI 68, ¶¶ 46-53, 881 N.W.2d 749, 760-61, *cert. denied*, 137 S. Ct. 2290 (2017) (finding that defendant’s due process rights were not violated because, “[a]lthough [the defendant] cannot review and challenge how the [risk assessment] algorithm calculates risk, he can at least review and challenge the resulting risk scores set forth”).

<sup>122</sup> See Hal R. Greenberg, *The Manhattan Bail Re-Evaluation Project: A Post-Arrest Program that Worked*, 3 NEW ENG. J. PRISON L. 503, 511 (1977); see also MARY T. PHILLIPS, N.Y.C. CRIM. JUST. AGENCY, *A DECADE OF BAIL RESEARCH IN NEW YORK CITY* 1, 2 (2012), <https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf> [<https://perma.cc/QJ6J-AS7B>] (discussing iterations of bail reform projects in New York City throughout 1960s and 1970s and noting that Manhattan Bail Project in 1960s led to practice of “interviewing virtually every defendant shortly after arrest to collect information that [wa]s used to calculate an objective score reflecting the estimated risk of nonappearance,” which was later used in “assigning a recommendation category, which is provided to the court to assist in the release decision at arraignment”).

<sup>123</sup> See Greenberg, *supra* note 122, at 511; Donna Makowiecki & Thomas J. Wolf, *Enter . . . Stage Left . . . U.S. Pretrial Services*, 71 FED. PROBATION, Sept. 2007, at 7, 7.

<sup>124</sup> To determine whether a defendant should be rejected or whether the MBRP should send a recommendation to the court, “the Project used a system where the defendant had to meet a minimum number of points to be eligible for a recommendation.” Greenberg, *supra*

recommendation.”<sup>125</sup> But a “no recommendation” was the functional equivalent of a negative recommendation and the person was detained.<sup>126</sup> A simpler model would have used less information and had less missing data, and in turn, would have led to more pretrial releases.<sup>127</sup> Current actuarial models require even more background information, and as information demands increase, fully completed forms will decrease, and “no recommendations” may increase.<sup>128</sup> Will this occur for sure? I do not know. But it has occurred in the past and logic suggests that it could happen again.

It is certain, however, that external support to develop and run these programs is fleeting. As I have said, the criminal justice system has no research and development function of its own.<sup>129</sup> Good ideas are usually funded by external sources, including foundations, federal grants, and one-shot state appropriations.<sup>130</sup> Ideas are most likely to be introduced—perhaps imposed—by external institutions and adopted in crisis-management mode: throw money at the problem, develop a comprehensive solution, and attract talented people to design and staff it. But splashy new programs quickly become old.<sup>131</sup> Both foundations and the feds migrate to new frontiers. Talented staff move on. Money dries up. Prominent officials who introduced the new program retire or

---

note 122, at 513. The point system “was based upon the answers to the interview questions and was used in conjunction with the subjective views of the interviewer and director.” *Id.*

<sup>125</sup> *See id.* at 512-13 (noting that if MBRP determined that there was low “likelihood of the defendant making all his future court appearances” based on point system and determination of Project’s director, MBRP would not give defendant low cash bail or parole recommendation).

<sup>126</sup> *See id.* at 513 (noting that while specific contents of “no recommendations” were never provided to court, “no recommendation” did mean that MBRP would not advocate for low cash bail or parole recommendation on defendant’s behalf).

<sup>127</sup> *See* FEELEY, *COURT REFORM ON TRIAL*, *supra* note 17, at 52 (noting that Office of Probation’s takeover of Manhattan Bail Project in 1964 “altered point scales” used during initial project and resulted in “tenfold increase in the number of interviews” from 1964 to 1970, but “ROR releases attributable to the Office of Probation decreased, as a proportion both of those interviewed and those released”). It is not clear whether this is a reason why Virginia, despite its sophisticated pretrial risk assessment and institutional commitment to rational practices, detains a markedly higher proportion of arrestees than the big counties in other states. *See supra* text accompanying note 112.

<sup>128</sup> Today, the Criminal Justice Agency—another successor to the Manhattan Bail Project—gives a “no recommendation” when the defendant’s “rap sheet is unavailable, the defendant is charged with murder, or the interview is incomplete.” *See* PHILLIPS, *supra* note 122, at 158.

<sup>129</sup> *See supra* text accompanying note 98.

<sup>130</sup> For instance, the MBRP’s “seed money . . . was provided by the Fund for the City of New York.” Greenberg, *supra* note 122, at 507-08.

<sup>131</sup> The Vera Institute established a bail re-evaluation program in Manhattan in 1966, but it was “[f]unded for only fourteen months” as “it apparently failed to convince the public officials that this procedure should be permanently adopted.” *Id.* at 506.

move on, lose interest, or are ignored by subordinates. When this occurs, newly established reform programs—however productive they are—may close up shop; remain as pale reflections of their former selves; or be transferred to other agencies that lack the zeal, commitment, and resources necessary to continue the program's original mission.

To survive, a remnant of the reformist program may adapt to take on new functions. We saw this with bail reform and diversion in the 1960s and 1970s, and there is some evidence that the dynamic continues with programs such as the one used in Virginia.<sup>132</sup>

Generally, as we have seen in the discussion above, pretrial release rates have not changed much in recent years, and some seem to have increased when sophisticated risk prediction tools have been introduced. One can always hope that when the problem is rediscovered all over again, a new and more effective “solution” will, in fact, be found. However, I am not holding my breath. Still, some reforms do seem to have a marginal impact. In the 1970s, several of the cities with elaborate pretrial release service agencies accompanied their high-tech efforts with telephone calls, which reminded their clients of upcoming court appearance dates and nudged them to show up.<sup>133</sup> Now, with modern technology, a call could be made cheaply, or indeed a robocall reminder could be programmed for the next court appearance.<sup>134</sup>

#### D. *Lessons Learned from Past Bail Reform Efforts*

Last time around, bail reform was driven by idealism, and some of the programs developed under hot-house conditions—high-powered and charismatic leadership, ample external funding, highly motivated staffs—leaving them with limited and short-term successes.<sup>135</sup> Today's cost-benefit campaigns, on the other hand, focus on reducing the cost of pretrial detention.<sup>136</sup> The “smart on crime” campaign focuses on risk and preventive detention, and seeks a technocratic fix, not a moral imperative.<sup>137</sup>

---

<sup>132</sup> See *supra* text accompanying notes 109-14.

<sup>133</sup> BARRY MAHONEY ET AL., U.S. DEP'T JUST., OFF. JUST. PROGRAMS, PRETRIAL SERVICES PROGRAMS: RESPONSIBILITIES AND POTENTIAL 15, 16 (2001), <https://www.ncjrs.gov/pdffiles1/nij/181939.pdf> [<https://perma.cc/KXR6-ACWP>] (describing such programs in Florida and Arizona); PRETRIAL JUSTICE INST., 2009 SURVEY OF PRETRIAL SERVICES PROGRAMS 51 (2009), <https://www.pretrial.org/download/pji-reports/new-PJI%202009%20Survey%20of%20Pretrial%20Services%20Programs.pdf> [<https://perma.cc/2398-7L79>].

<sup>134</sup> MAHONEY ET AL., *supra* note 133, at 60.

<sup>135</sup> See *supra* text accompanying notes 52-61.

<sup>136</sup> See LOWENKAMP, VANNOSTRAND & HOLSINGER, *supra* note 108, at 3-4.

<sup>137</sup> For a study of the cost-benefit analysis underlying much contemporary criminal justice reform, see generally HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT (2015). See Koepke & Robinson, *supra* note 74, at 59-60 (arguing that data used for most risk assessment tools does not reflect actual dangerousness).

Perhaps the Arnold Foundation will succeed where the Ford Foundation failed, and we will witness great breakthroughs with algorithms that will create new agencies, which in turn will transform the nature of decision making for pretrial release, sentencing, probation, and parole. Still, I doubt it. Uncompetitive in the struggle for local governmental funds, “new” agencies and new functions, even if successful, are likely to disappear, shrink, or, in the time-honored tradition of organizations, shift their missions in order to survive.<sup>138</sup> The structure on which they are erected is not conducive to long-term stability. Further, not without reason, prosecutors and judges are concerned that they will release someone who then commits a heinous crime. Despite the emergence of laws in the 1970s that explicitly provided for preventive detention, it remains far easier to simply set bail beyond reach than conduct a tortuous preventive detention hearing and turn pretrial services agencies into pretrial probation departments. This dynamic is likely to repeat itself. While algorithms may appear to lend credibility, or even actually facilitate pretrial release decisions, hard cases will continue to be hard, and things are likely to revert to normal. In sum, reforms may or may not work well during their formative start-up phase. They almost always are initiated by extraordinary entrepreneurs with compelling ideas who can assemble a committed team and attract “free” money from external sources. But, in the long run, it is next to impossible for them to become institutionalized.

Some tests of this proposition may be on the horizon. The Center for Court Innovation in New York has been responsible for developing a host of innovative programs and promoting problem-solving courts. It is this quintessential good-government, innovative, entrepreneurial organization that has promoted numerous valuable programs in New York and beyond. Two of its premier creations are the Midtown Manhattan Community Court and the Red Hook Community Court. Anyone who has spent a day in either one of these courts—including this author—comes away impressed. Adversarial legalism has been tampered down and a group of professionals—assuming different roles—work together. The judges preside; the courtroom is theirs, and they assume responsibility for the business of the court. Impressive. What is the problem? When one reads the annual reports on the administration of the courts in New York City, these two courts warrant special budgetary lines. Everyone acknowledges that the Red Hook Court is not cost-effective and the Manhattan Court is in a space provided rent free by a local alliance of businesses. When Judge Calabrese retires in Red Hook or when the business alliance no longer

---

<sup>138</sup> For the seminal work on organizational mission and goal displacement, see generally PHILIP SELZNICK, *TVA AND THE GRASS ROOTS: A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION* (1949). See FEELEY, *COURT REFORM ON TRIAL*, *supra* note 17, at 72 (“Once initial sources of ‘free’ or ‘outside’ funds are exhausted, the agencies are left to fight for far fewer, and more difficult to obtain, local tax funds. This has caused some agencies to lead on-again/off-again existences, others to experience dramatic expansions and contractions, and all to worry constantly about survival.”).

wants to fund this cost-inefficient court, one wonders what the fates of these two fantastic experiments will be.

The hope remains that the idea of problem-solving courts will take root the same way that drug courts, domestic violence courts, and veteran's courts have. Inspired by Herman Goldstein's pioneering work on problem-oriented policing, problem-solving courts have been embraced by judges throughout the United States and indeed around the world.<sup>139</sup> Although no one should yet pronounce them a permanent feature of contemporary criminal process, they do seem to have taken root. One possible reason for this success is that the reform is organic to the courts. Judges themselves have led the way; some have come to reject their standard role as passive umpires in the adversarial process in at least certain types of cases, and instead want to see themselves as active problem-solvers. It is too early to determine whether these courts are a passing fad or a new institution that will stand next to an important innovation of one hundred years ago—the juvenile court. But if they do succeed, it will probably be because they emerged (with a little help from organizations like the Center for Court Innovation) organically from within the judiciary itself.

E. *Pretrial Diversion and Electronic Monitoring*

The 1970s was also the decade of pretrial diversion.<sup>140</sup> Along with bail reform, pretrial diversion became the focus of the President's Crime Commission, which maintained that many criminal cases involved people with chronic problems that could be addressed more successfully by social service programs rather than the criminal process.<sup>141</sup> Once a few programs were up and running, the idea caught on like wildfire.<sup>142</sup> It promised a definitive way to reduce caseloads in overburdened criminal courts, free up precious space in jail, and provide a better way of dealing with large numbers of problems, which, while technically criminal matters, were better dealt with as social problems.<sup>143</sup> Diverting arrestees from the criminal justice system into an alternative system

---

<sup>139</sup> See generally, e.g., GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* (2005); HERMAN GOLDSTEIN, *PROBLEM-ORIENTED POLICING* (1990); JAMES L. NOLAN, JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* (2001).

<sup>140</sup> PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 82 (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf> [<https://perma.cc/4AZY-486D>] (“[I]t is clear to the Commission that informal pre-judicial handling is preferable to formal treatment in many cases and should be used more broadly. The possibilities for rehabilitation appear to be optimal where community-based resources are used on a basis as nearly consensual as possible.”).

<sup>141</sup> The Commission recommended “[e]arly identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal disposition does not appear required.” *Id.* at 134.

<sup>142</sup> See *id.* at 81-84.

<sup>143</sup> See *id.* at 81.



of social control where they might receive more meaningful sanctions and useful counseling without the stigma of a criminal convictions was a win-win situation.<sup>144</sup> Everyone was better off—courts, victims, and arrestees.<sup>145</sup> At least in theory.

But prosecutors have always dropped huge numbers of cases for reasons that extend well beyond the strength of evidence.<sup>146</sup> Pretrial diversion promised to cut even deeper into the jail-bound portion of arrestees. It promised that some of them could avoid the stigma of conviction records and jail sentences, but still would be expected to pay their debts through community service and benefit from counseling and treatment.

Diversion programs took off, many modeled after programs in New Haven and New York City.<sup>147</sup> Within a few years, thanks to federal funding and good publicity, there were dozens, perhaps hundreds, of pretrial diversion programs across the country.<sup>148</sup> They were accompanied by evaluation researchers—often local researchers attached to local universities and operating independently of each other—who assessed the claims of the diversion programs.<sup>149</sup>

By the late 1970s, dozens of diversion programs had been evaluated, and there was a library of research reports on them.<sup>150</sup> Two repeated findings stand out. First, very few participants were, in fact, diverted from jail because most would have had their cases dropped regardless.<sup>151</sup> Second, many of those whose charges were not dropped would have received unconditional probation instead of jail time.<sup>152</sup> In other words, pretrial diversion programs merely expanded the scope of social control.<sup>153</sup> Perhaps more substantial forms of intervention and

---

<sup>144</sup> *See id.* (listing therapy, job training, job placement, and welfare referral as alternative systems of social control and discussing theory that labeling individuals as deviants results in deviant behavior).

<sup>145</sup> *See id.* at 80.

<sup>146</sup> *See, e.g.,* VERA INST. OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS 1, 3 (1981), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/felony-arrests-their-prosecution-and-disposition-in-new-york-citys-courts/legacy\\_downloads/1410.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/felony-arrests-their-prosecution-and-disposition-in-new-york-citys-courts/legacy_downloads/1410.pdf) [<https://perma.cc/3WLH-D562>] (reporting that forty-four percent of all felony arrests in New York City were dropped outright, a figure not dissimilar to those found in other cities).

<sup>147</sup> *See* FEELEY, COURT REFORM ON TRIAL, *supra* note 17, at 90, 102.

<sup>148</sup> *See id.* at 80-102. There were so many that a professional association for program directors was formed. *See* John A. Carver, *Pretrial Drug Testing: An Essential Step in Bail Reform*, 5 BYU J. PUB. L. 371, 381 (1991).

<sup>149</sup> *See* FEELEY, COURT REFORM ON TRIAL, *supra* note 17, at 105-06.

<sup>150</sup> *See id.* at 105-07.

<sup>151</sup> *Id.* at 105.

<sup>152</sup> *Id.*

<sup>153</sup> Thomas G. Blomberg, *Beyond Metaphors: Penal Reform as Net-Widening*, in PUNISHMENT AND SOCIAL CONTROL 45, 54-55 (Thomas G. Blomberg & Stanley Cohen eds., 1995).

supervision are needed; however, this was not the stated objective of the diversion movement.<sup>154</sup>

Explanations for these failures similarly missed the mark. Reports tended to provide “local” explanations (distinctive features of the particular setting), such as difficulties in intervening early enough to identify the right candidates, misunderstandings among program personnel and prosecutors and judges, overly stringent criteria for participation that excluded too many candidates, inadequate funding, and lack of space.<sup>155</sup> The collective message implicit in these explanations was that, “but for” unanticipated obstacles, the programs would have been successful.<sup>156</sup> At first, this conclusion seems plausible; however, a closer look reveals that failure was routine, perhaps inevitable, and rooted in institutional design and organizational structure.

F. *The New Diversion: Electronic Monitoring*

In recent years, diversion has taken a high-tech turn. Potentially the most significant new option in criminal justice is electronic monitoring. It promises to revolutionize the criminal process by substituting electronic monitoring for jail and dramatically reducing the cost of sanctions.<sup>157</sup> Mark Kleiman argues that it is the single most important development in criminal justice administration since the establishment of the mass prison in the early nineteenth century.<sup>158</sup> Unconfined by walls and wire but monitored by sophisticated GPS units, offenders can be sentenced to virtual prison, required to be in certain places at certain times, in effect watched around the clock.<sup>159</sup> By all accounts, this technology works well and is constantly being improved; electronic monitoring units can now detect alcohol and drug levels and even measure anxiety levels.<sup>160</sup>

One can get an impression of just how important this development is by perusing the vendors’ displays at annual meetings of state prosecutors or sheriffs,<sup>161</sup> or simply by Googling “electronic monitoring” or “alternatives to incarceration.” You will be swamped by claims that electronic monitors can

---

<sup>154</sup> PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, *supra* note 140, at 134.

<sup>155</sup> See FEELEY, COURT REFORM ON TRIAL, *supra* note 17, at 88-108.

<sup>156</sup> *See id.*

<sup>157</sup> See Feeley, *supra* note 94, at 13 (noting yearly costs of \$35,000 to \$50,000 contrasted with only \$1500 to \$3000 for electronic monitoring).

<sup>158</sup> Mark A.R. Kleiman, Angela Hawken & Ross Halperin, *We Don’t Need to Keep Criminals in Prison to Punish Them*, VOX (Mar. 18, 2015, 10:00 AM), <https://www.vox.com/2015/3/18/8226957/prison-reform-graduated-reentry> [<https://perma.cc/FB66-EFHS>].

<sup>159</sup> See Feeley, *supra* note 94, at 13.

<sup>160</sup> *Id.* at 12-13.

<sup>161</sup> See MATTHEW DEMICHELE & BRIAN PAYNE, U.S. DEP’T JUST., BUREAU JUST. ASSISTANCE, OFFENDER SUPERVISION WITH ELECTRONIC TECHNOLOGY 132-45 (2d ed. 2009), [https://www.appa-net.org/eweb/docs/APPA/pubs/OSET\\_2.pdf](https://www.appa-net.org/eweb/docs/APPA/pubs/OSET_2.pdf) [<https://perma.cc/62A8-U2YM>].

reduce reliance on custody,<sup>162</sup> cost only ten percent the price of prison,<sup>163</sup> enhance deterrence,<sup>164</sup> facilitate rehabilitation,<sup>165</sup> guarantee incapacitation,<sup>166</sup> and facilitate almost any other criminal justice objective one can think of.

In theory, all this is good: virtual prisons at a tiny fraction of the cost of brick and mortar prisons—and with constant surveillance to guarantee safety and security—even as offenders have greater liberty. Furthermore, evidence from early evaluations seems to bear out these claims: vast numbers of people on electronic monitoring and no appreciable increase in recidivism or major problems with absconding.<sup>167</sup> In addition, private contractors who supply the hardware can also provide monitoring services and connect with public officials only to onboard users and report violations, at which point law enforcement can take over and intervene.<sup>168</sup>

If all this seems almost too good to be true, it is. Evaluations of the use of electronic monitoring in England and Wales and in the United States repeatedly find that, while electronic monitoring is initially sold as a too-good-to-be-true alternative to incarceration, almost everywhere it is used as an enhancement to conditions of probation, parole, or pretrial release.<sup>169</sup> Across the United States, contractors are promoting their product as a cost-effective alternative to imprisonment, and evaluators have followed in their tracks.<sup>170</sup> Here too, we get jumping bunny-like responses: report after report reveals that electronic monitoring rarely diverts anyone from jail,<sup>171</sup> and in fact it constitutes a

---

<sup>162</sup> See, e.g., Darrell M. West, *How Digital Technology Can Reduce Prison Incarceration Rates*, TECHTANK (Mar. 31, 2015), <https://www.brookings.edu/blog/techtank/2015/03/31/how-digital-technology-can-reduce-prison-incarceration-rates/> [<https://perma.cc/FN27-Z7VX>].

<sup>163</sup> Feeley, *supra* note 94, at 13.

<sup>164</sup> E.g., JOHN K. ROMAN ET AL., URB. INST., *THE COSTS AND BENEFITS OF ELECTRONIC MONITORING FOR WASHINGTON, D.C.* 4 (2012), <https://www.urban.org/sites/default/files/alfresco/publication-pdfs/412678-The-Costs-and-Benefits-of-Electronic-Monitoring-for-Washington-D-C-.PDF> [<https://perma.cc/Z9N3-J3NK>].

<sup>165</sup> E.g., Randy R. Gainey & Brian K. Payne, *Understanding the Experience of House Arrest with Electronic Monitoring: An Analysis of Quantitative and Qualitative Data*, 44 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 84, 86 (2000).

<sup>166</sup> See Feeley, *supra* note 94, at 15. See generally Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321 (2008) (discussing rise of electronic monitoring as non-physical incapacitation alternative).

<sup>167</sup> Feeley, *supra* note 94, at 19-22 (summarizing results from study of electronic monitoring in Florida).

<sup>168</sup> DEMICHELE & PAYNE, *supra* note 161, at 151 (discussing four different contracting options with regards to electronic monitoring including ability to outsource almost all services except final decision-making authority).

<sup>169</sup> Feeley, *supra* note 94, at 13-21.

<sup>170</sup> E.g., ROMAN ET AL., *supra* note 164, at 3.

<sup>171</sup> Feeley, *supra* note 94, at 21.

substantial invasion of privacy and cumbersome additional sanction.<sup>172</sup> Again, most studies cite a host of local explanations to account for its failures. Still, the practice appears to be a *general* pattern, not a consequence of hiccups in a few pilot programs.<sup>173</sup>

This issue can be seen most clearly in Florida where the state department of corrections initiated an ambitious program for electronic monitoring in order to reduce prison overcrowding.<sup>174</sup> Numerous evaluations produced by a team of researchers at Florida State University revealed little evidence that electronic monitoring has achieved this objective.<sup>175</sup> My estimate is that electronic monitoring served as an “alternative” for only ten percent of the Florida participants, despite its backing from the State.<sup>176</sup> The reasons? The same familiar set of factors account for its failure as a meaningful alternative to prison: pervasive risk aversion, adaptation, and adjustment—all normal and expected given the adversarial culture and fragmented organization of the justice system. Here, however, we also have the additional claims of the private contractors who run electronic monitoring programs and have an incentive to claim that their products work wonders.

My reaction to the assessments of recent bail reform efforts and diversion programs is one of *déjà vu*. The same institutional and structural arrangements have erected seemingly permanent barriers to change in these areas. In some respects, these impediments have grown. Over the past twenty years, private contractors have gained a toe-hold in the reform business and may, in fact, be responsible for much of its growth. More recently, since the turn of the century, private contractors have developed a variety of innovative programs in partnership with local criminal courts and their auxiliary institutions.<sup>177</sup>

The District Attorney in Orange County, California, has partnered with a local company to circumvent California’s restrictive law that limits collection of DNA samples only to those charged with serious violent felonies.<sup>178</sup> His prosecutors

---

<sup>172</sup> For a review of the literature, see generally Marc Renzema & Evan Mayo-Wilson, *Can Electronic Monitoring Reduce Crime for Moderate to High-Risk Offenders?*, 1 J. EXPERIMENTAL CRIMINOLOGY 215 (2005).

<sup>173</sup> Feeley, *supra* note 94, at 22.

<sup>174</sup> *Id.* at 18-19 (“Florida’s experience with electronic monitoring is probably something of a best case scenario.”).

<sup>175</sup> WILLIAM BALES ET AL., U.S. DEP’T JUST., A QUANTITATIVE AND QUALITATIVE ASSESSMENT OF ELECTRONIC MONITORING 148 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/230530.pdf> [<https://perma.cc/X8EU-L5RB>] (“Overall, the responses from numerous offenders and officers suggest that [electronic monitoring] does achieve the goal of resulting in lower levels of absconding, violations of court imposed conditions of supervision, and re-offending.”).

<sup>176</sup> See Feeley, *supra* note 94, at 15-21.

<sup>177</sup> See generally Andrea Roth, *Spit and Acquit: Prosecutors as Surveillance Entrepreneurs*, 107 CALIF. L. REV. (forthcoming 2019) (on file with author).

<sup>178</sup> Feeley, *supra* note 94, at 17.

now routinely take a DNA sample from virtually every arrestee who comes through the office. They voluntarily provide it, pay \$75, and are generally happy because the prosecutor has reduced their charges and recommended a lenient sentence, or dropped them altogether.<sup>179</sup> It is of no real concern to these arrestees that before the program, they would probably have had their charges dropped or downgraded. The scandal in Ferguson, Missouri, has revealed that, in recent years, local governments, often in partnership with debt-collection agencies, have expanded the use of fees and fines in order to help cover the cost of local services.<sup>180</sup> My hometown of Berkeley, California, has partnered with a company that installed and now monitors cameras at every major intersection free of cost and splits the enhanced revenues with the city. In the mid-2010s, with the rediscovery of rehabilitation, for-profit and non-profit substance abuse programs that contract with local courts began sprouting up like mushrooms after rain.<sup>181</sup>

The entrepreneurial spirit of the times has even rubbed off on some jurisdictions. Some smaller counties throughout the West appoint “contract” prosecutors and assess them in terms of the amount of fines and fees they can produce.<sup>182</sup> Some jurisdictions have learned how to use mini-RICO statutes, originally designed with organized crime and big-time drug dealers in mind, to go after low-level offenders in ways that allow them to reap substantial profits for their law enforcement agencies.<sup>183</sup> A friend of mine who works at the Alameda County Department of Probation in California informed me that some juvenile courts are toying with the idea of providing free cell phones to every kid who is picked up by the police, thereby greatly expanding their electronic

---

<sup>179</sup> *Id.* at 20-21.

<sup>180</sup> See U.S. COMM’N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS 12 (2017), [http://www.usccr.gov/pubs/Statutory\\_Enforcement\\_Report2017.pdf](http://www.usccr.gov/pubs/Statutory_Enforcement_Report2017.pdf) [<https://perma.cc/Q452-WKGE>] (discussing DOJ’s investigation into problematic law enforcement practices undertaken by Ferguson Police Department and highlighting DOJ’s findings that “revenue collection, not public safety, was the primary impetus behind the collection of fines and fees, as “[c]ity, police, and court officials for years [had] worked in concert to maximize revenue at every stage of the enforcement process”” (alterations in original)).

<sup>181</sup> *Drug Courts*, NAT’L INST. JUST., <https://www.nij.gov/topics/courts/drug-courts/pages/welcome.aspx> [<https://perma.cc/99WU-FEG5>] (last updated Jan. 10, 2017) (“As of June 2015, the estimated number of drug courts operating in the U.S. is over 3,000.”).

<sup>182</sup> Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161, 200-03 (2017) (describing how contract prosecutors were encouraged to seek maximum fines and fees whenever possible in order to raise revenue).

<sup>183</sup> Emily L. Mahoney & Agnel Philip, *Profits of Policing*, ARIZ. CTR. FOR INVESTIGATIVE REPORTING (2017), <https://azcir.org/news/2017/01/10/arizona-asset-rico-seizures-net-200m-in-past-five-years/> [<https://perma.cc/8WC4-Q32T>] (“[RICO] laws allowed Arizona law enforcement agencies to seize nearly \$200 million in personal property during the past five years—almost all of it cash—from people who may never be charged or convicted of a crime.”).

monitoring program. In a number of communities, prosecutors have developed a new form of plea bargaining by encouraging probation and parole officers to work in tandem with the police.<sup>184</sup> Probation and parole officers can conduct searches of their charges without a warrant or probable cause.<sup>185</sup> If they find something, their police partners are there to make the arrest. In the courthouse the next morning, prosecutors can strike a deal: waive your right to a revocation hearing and we will drop the charges. Parolees and probationers are on their way back to prison to serve out the balance of their terms in a matter of minutes, without a hearing of any sort or even a consultation with a lawyer.

By now, I have made my point. Failure is the norm, not the exception, for both bail reform and diversion, as well as a great many other innovations and practices. It is the norm because some—enough—people in the process do not see it as a failure. If they are risk averse, prosecutors, judges, and probation officers do not regard detaining arrestees prior to trial as a failure; they regard it as prudent. Similarly, using diversion instead of dropping the charges outright may seem socially useful rather than oppressive. Or, insisting that chronic offenders contribute some portion of the cost of their troublesome behavior might be seen as good sense, not exploitation. And so it goes. Add racism to the mix and it becomes toxic.

Such attitudes and practices are not anomalies. Rather, they flow from an institutional design that facilitates—if not encourages—them and a governmental structure that exacerbates them. Adversarial theory fosters process values, not substantive values. Furthermore, no one is in charge, sets priorities, or regulates the process, allowing actors to import and implement their own values. This discretion, which we may think applies only to the thrust of trial, extends to the criminal process.

This division of labor in the adversarial system is compounded by the fragmentation of political forces and governmental structure. Our presidential electoral policies, for example, fan the sparks that ignite the war on crime, which local and state governments must then pay for, and whose officials, who often know better, are drafted to fight.<sup>186</sup> Our fragmented structure of financing further encourages irresponsibility.

---

<sup>184</sup> Cynthia Dizikes & Todd Lighty, *Warrantless Searches Draw Criticism*, CHI. TRIBUNE (May 21, 2014), [http://articles.chicagotribune.com/2014-05-21/news/ct-probation-searches-met-20140521\\_1\\_probation-department-searches-probationers](http://articles.chicagotribune.com/2014-05-21/news/ct-probation-searches-met-20140521_1_probation-department-searches-probationers) [https://perma.cc/VCU6-M6VG].

<sup>185</sup> *Id.*

<sup>186</sup> See generally LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* (2008).

G. *How the Adversarial System Shapes Our Criminal Process*

Increasingly, we are informed that our adversarial system is on its last legs, that it has been replaced by a bureaucratic or administrative process.<sup>187</sup> There is some truth to this claim. The prevalence of jury trials now approaches zero in most American courts, and the rapid-fire handling of cases in lower courts may give the appearance of assembly-line justice. But, in reality, courts are far from bureaucratic. Bureaucracy implies rational organization, hierarchy, shared mission, oversight, and accountability—someone in charge. Courts possess none of these characteristics. Their fragmentation permits and reinforces different values, different interests, and the pursuit of different objectives. No common set of incentives binds courthouse officials into a coherent group with a common purpose. And certainly there is no grand coordinator or central authority to articulate missions, resolve disagreements, or even intervene to break up log jams. There is no one to order the participants to embrace shared goals. Indeed, there is no one who can even try to cajole participants towards a shared perspective. There is not even a common funding source. States fund prisons;<sup>188</sup> states and counties fund judges;<sup>189</sup> counties fund prosecutors;<sup>190</sup> counties, cities, and towns fund police.<sup>191</sup> This is not an oversight—it is by design. The theory of the adversarial process envisions three core actors: prosecutor, judge, and defense counsel. Its success depends upon the thrust and parry of prosecution and defense counsel, and the judge as referee. “It is, in the words of Richard Posner, as if the court were ‘in the position of a consumer forced to decide between the similar goods of two fiercely determined salesmen,’ each pointing out the benefits of his own product and the deficiencies of his competitor’s.”<sup>192</sup>

<sup>187</sup> On collapse, see, for example, Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation as a Profession*, 1 LAW & SOC. REV. 15, 21 (1967) (“The client . . . becomes a means to other ends of the organization’s incumbents.”). See generally WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011) (noting as causes of collapse lack of rule of law, discrimination against black suspects and victims, and volatility in extent to which justice system is lenient during some periods and harsh in others). On the administrative replacement, see generally Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

<sup>188</sup> See Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, 25 FED. SENT’G REP. 68, 68 (2012).

<sup>189</sup> See GEOFFREY MCGOVERN & MICHAEL D. GREENBERG, WHO PAYS FOR JUSTICE? PERSPECTIVES ON STATE COURT SYSTEM FINANCING AND GOVERNANCE 14 (2014), [https://www.rand.org/pubs/research\\_reports/RR486.html](https://www.rand.org/pubs/research_reports/RR486.html) [<https://perma.cc/BD6E-LDKX>].

<sup>190</sup> See, e.g., Robert R. Rigg, *The Constitution, Compensation, and Competence: A Case Study*, 27 AM. J. CRIM. L. 1, 29-30 (1999).

<sup>191</sup> See, e.g., CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 119-20 (1999) (“[W]hen the money from D.C. runs dry the city pays up . . .”).

<sup>192</sup> FEELEY, COURT REFORM ON TRIAL, *supra* note 17, at 13 (quoting RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 321 (1973)).

This may work well if each of these components is in proper balance—the process may whirl along like a Rolls Royce. When it works, it works because of division of labor, conflict, and fragmentation, not despite it. It is not a well-oiled system, but a tournament. While this is readily recognizable with respect to challenges over interpretations of facts and rules, adversarial theory equally applies to all facets of the process. The objective is to win (within the rules), and so every aspect of the criminal process can be, and is, viewed tactically. If there is a proper balance and resources to enable it, it can produce the aspired-to Rolls Royce. But if the parts are not balanced, there is fragmentation without function. The parts do not spar in an adversarial trial, but they press their advantages when and where they can. And increasingly, prosecutors dominate the process through their power to charge the assumed judicial-like power to sentence.<sup>193</sup> This may be particularly true for low stakes, high-volume cases in misdemeanor courts, where process costs loom large.

Just as there is market failure at times, so too there can be adversarial system failure. While we have theories and well-recognized institutions to prevent or correct for market failure—public finance theory, public utilities, regulatory agencies, and the like—we have no equivalent safeguards for adversarial failure. At best we have some crude stop-gap measures, such as chronically underfunded public defender systems. But we have few mechanisms to balance the advantage in the adversarial process, and in my view this is not even possible for many misdemeanors.

The fact that so many of the impediments to reform are built into the very theory of the adversarial system is difficult to comprehend. The fragmentation dictated by the theory of the adversarial system is ignored, overlooked, or underestimated in explanations of demonstrable failure.<sup>194</sup> Yet the theory and the institutional arrangement that flows from it go a long way towards accounting for failure.<sup>195</sup> In an adversarial setting, it is difficult to assume that the prosecutor

---

<sup>193</sup> See JOAN E. JACOBY & EDWARD C. RATLEDGE, *THE POWER OF THE PROSECUTOR: GATEKEEPERS OF THE CRIMINAL JUSTICE SYSTEM 2* (2016) (“Prosecutors can . . . make sentence recommendations or perform other activities that influence the sanctions imposed.”). For a recent review of problems with prosecutors, see generally David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451 (2018).

<sup>194</sup> See Mary Sue Backus, *The Adversary System Is Dead; Long Live the Adversary System: The Trial Judge as the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945, 952-61 (explaining issues with “patchwork” indigent defense systems across country but not addressing fragmented nature of system itself as root cause); cf. Andrew Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589, 1595 (2006) (remarking that “fragmented, nonhierarchical nature” of adversarial system makes it susceptible to particular interest groups).

<sup>195</sup> See Taslitz, *supra* note 194, at 1595 (“Adversarialism also stems from state, federal, and municipal governmental structures designed to fragment and limit power through institutional checks and balances . . .” (internal quotation marks omitted) (footnote omitted)).



will embrace the role of the defense attorney or judge.<sup>196</sup> And when the adjunct, auxiliary, or supplementary institutions I have just examined are grafted onto a protean, dysfunctional adversarial system, it is not surprising that things do not go as planned.<sup>197</sup> In the long, if not short, run, they contribute to further dysfunctional fragmentation.

I invite the law professors among my readers to think about imposing new institutions onto the criminal courts in the way Lon Fuller invites us to think about polycentric problem solving by courts.<sup>198</sup> Intervene by pulling a single strand on a spider's web; you cannot predict how it will affect the web as a whole.<sup>199</sup> Or rather, he suggests, we can predict that we cannot predict the consequences.<sup>200</sup> Such is the case with reform efforts in criminal courts, and perhaps especially misdemeanor courts.<sup>201</sup> Impose an adjunct institution on a protean adversarial process in a misdemeanor court. It may work for a while, but it probably will not work as intended or in the long run. Or for that matter, urge a prosecutor to be creative. She may come up with Orange County's "spit and acquit" DNA program.<sup>202</sup> Or she may see the value of using a diversion program to impose greater controls on those who would not go to jail in any case.<sup>203</sup>

#### H. *Fragmented Structures*

Fragmentation flowing from the structure of the adversarial process is just one of several forms of fragmentation that frustrate reformers. There are fifty states and over three thousand one hundred counties in the United States. Although the theory of the adversarial system informs the legal process in all of them, other features of criminal law and criminal procedure vary by state, and funding and political accountability vary widely.<sup>204</sup> There are no national, state, or county

---

<sup>196</sup> James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1557-58 (1981).

<sup>197</sup> David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2587-91 (2013).

<sup>198</sup> Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978).

<sup>199</sup> *Id.* at 395 ("A pull on one strand [of a spider web] will distribute tensions after a complicated pattern throughout the web as a whole . . . This is a 'polycentric' situation because it is 'many centered'—each crossing of strands is a distinct center for distributing tensions.").

<sup>200</sup> *Id.* at 395-96.

<sup>201</sup> See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 687 (2014).

<sup>202</sup> See generally Roth, *supra* note 177, at 21-32 (describing Orange County's "spit and acquit" policy by which accused criminals may receive reduced charges or even dismissal for voluntarily submitting their DNA to database).

<sup>203</sup> Blomberg, *supra* note 153, at 54-55.

<sup>204</sup> See text accompanying notes 188-91.

ministries of justice. There are not even any meaningful local criminal justice coordinating councils.<sup>205</sup>

Thus the system of criminal justice is fragmented both horizontally and vertically: adversarial theory fragments it horizontally and political structure fragments it vertically. In light of this, it is heroic to expect planned changes to be implemented as expected. No one is in charge because each office is accountable to a different set of stakeholders. This does not mean that there is no order in the court, only that the order is not fully shaped by the criminal law and theory of the adversarial process.

Ethnographic accounts of courts emphasize the importance of courthouse culture.<sup>206</sup> By definition, culture is the sum of deeply ingrained values and institutionalized practices,<sup>207</sup> and while culture can change, the reasons for change are not well understood. Those who have focused on local legal culture emphasize its rootedness and seeming intransigence.<sup>208</sup> Culture, this work informs us, is even likely to outlast crusading district attorneys and powerful presiding judges, and make short shrift of reforms introduced by legislatures, federal funding agencies, foundations, and research and development organizations at the periphery of the criminal justice system.<sup>209</sup> The library of research identifying the consequences of reforms almost always emphasizes practices that are anchored in culture.<sup>210</sup> Change agents fail to anticipate the depth of opposition or indifference to their ideas.<sup>211</sup>

---

<sup>205</sup> Cf. Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 271, 316-23 (2006) (advocating for institution of criminal justice coordinating councils and noting that few states have established such councils).

<sup>206</sup> See, e.g., Thomas W. Church, Jr., *Examining Local Legal Culture*, 10 AM. B. FOUND. RES. J. 449, 450 (1985) (“[A] court’s existing pace is supported and influenced by shared local norms regarding how fast criminal cases *ought* to move.”).

<sup>207</sup> The literature on “culture” in anthropology is immense. For a useful introduction, see generally JOHN MONAGHAN & PETER JUST, *SOCIAL AND CULTURAL ANTHROPOLOGY: A VERY SHORT INTRODUCTION* (2000). For an extended study that examines the “culture” of courts, see BRIAN J. OSTROM ET AL., *TRIAL COURTS AS ORGANIZATIONS* 22-45 (2007).

<sup>208</sup> Church, *supra* note 206, at 508; see also Ronald F. Wright & Kay L. Levine, *Place Matters in Prosecution Research*, 14 OHIO ST. J. CRIM. L. 675, 675 (2017) (arguing there is “feedback loop” between institutional design and prosecutorial culture). See generally ROY B. FLEMMING, PETER F. NARDELLI & JAMES EISENSTEIN, *THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES* (1992); OSTROM ET AL., *supra* note 207.

<sup>209</sup> See, e.g., Church, *supra* note 206, at 508.

<sup>210</sup> See, e.g., DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 167-92 (2001).

<sup>211</sup> This does not mean “nothing works.” Culture is malleable and constantly changing, in both behavior and meaning. Certainly criminal sentencing became more draconian over the past thirty years and is now becoming less harsh. But change came about after years-long campaigns at the national and state levels by newly mobilized victims’ rights groups. It was not the result of rational planning, but a reaction to tectonic shifts in the social order and the

Fragmentation extends beyond the theory of the adversarial process and governmental structure.<sup>212</sup> Professional autonomy wages a constant war with bureaucracy, and in criminal courts—as in universities and hospitals—professional autonomy prevails.<sup>213</sup> So with few exceptions, neither prosecutors nor public defenders nor the judiciary have meaningful, internal oversight.<sup>214</sup> Auxiliary personnel, probation, pretrial services, and diversion programs occupy a netherworld, ambiguously dependent upon the goodwill and patronage of local judges, prosecutors, and various stakeholders, and of course the vagaries of local governments who pay for them.<sup>215</sup> It is no surprise that these institutions do not operate as theory dictates. No single institution is in a position to impose order and oversight, and different agents are dependent upon different levels of government for funding.<sup>216</sup>

## II. PUTTING THE ADMINISTRATION INTO THE ADMINISTRATION OF JUSTICE

This is not news. History is replete with complaints about the lack of systemic oversight and accountability in criminal justice. For instance, there have been calls for more coordination, for greater oversight, to “tame the system,” and the like.<sup>217</sup> Along with calls for reduced caseloads and increased salaries, these ideas are staples of recommendations flowing from white papers reporting on the

---

efforts of a mobilized social movement. For discussion on how cultural shifts led to criminal justice changes, see *id.* at 75-102; STUART A. SCHEINGOLD, *THE POLITICS OF LAW AND ORDER* 59-88 (1984); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 101-06 (2007), all of which explain harsher sentences in terms of major cultural shifts, not a deliberate policy process.

<sup>212</sup> See, e.g., SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990*, at 13 (1993) (“[F]ragmentation is intellectual as well as institutional. The leaders of criminal justice institutions, and their respective professional associations, are extremely isolated.”).

<sup>213</sup> See MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 190-94* (1977). The tension between professionalism and bureaucracy has long been noted in studies of universities and hospitals and has been used to account for the inefficiencies and high levels of decentralization. But a similar body of work examining the same tensions in criminal courts has never developed. One notable exception is WOLF HEYDEBRAND & CARROLL SERON, *RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS* (1990). Some scholars have touched on the issue with regard to criminal courts, see, for example, Kay L. Levine, *Can Prosecutors Be Social Workers?*, 40 *STUD. L. POL. & SOC’Y* 125, 127-54 (2007) (examining prosecutors’ conflicting role perceptions). David Johnson also underscores the differences between prosecutors’ role perceptions in the United States and Japan in his book, DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 147-59 (2002).

<sup>214</sup> See WALKER, *supra* note 212, at 6-12.

<sup>215</sup> See *id.* at 57-63.

<sup>216</sup> See, e.g., BIBAS, *supra* note 3, at 153-55.

<sup>217</sup> See, e.g., *id.* at 109-27; WALKER, *supra* note 212, at 12-14.

problems of criminal justice in America. Throughout the twentieth century, accounts of the failings of the administration of criminal justice have fingered fragmentation as the culprit with better administration as the answer.<sup>218</sup> Historians note that in seventeenth and eighteenth century England, failure to reform the criminal process was due in part to the stand-off between the Crown and local officials.<sup>219</sup> Each wanted the other institution to pay for them.<sup>220</sup> It is beyond the scope of this Article to review this long history here, but it does make sense to review some of the more recent efforts at imposing greater order on our fragmented criminal justice system.

By now, there is a substantial literature complaining about our “non-system” of criminal justice. Most lament the situation,<sup>221</sup> some explore the deep structural connections between American crime policy and political structure,<sup>222</sup> and some have identified the glimmers of a foundation for an administrative system of criminal justice.<sup>223</sup> This Part explores some of the major efforts to address what appears to be a disjuncture between institutional design (fragmentation and autonomy) of the adversarial process and governmental structure and a well-functioning criminal process. There have been at least three major efforts to create and/or understand the criminal process as an administrative system: (1) the Warren Court’s criminal procedure revolution, (2) the American Bar Association’s (“ABA”) Minimum Standards of Justice and the DOJ’s Standards and Goals Projects, and (3) the federal Law Enforcement Assistance Administration established by the Safe Streets Act of 1968. Following a review of these efforts, I turn to still more recent discussions about taming the system.

---

<sup>218</sup> See, e.g., Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 196-204 (2017).

<sup>219</sup> Stephan Landsman, *Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 508-09 (1990) (describing tensions between king’s priorities and local communities’ priorities as impediments to change in seventeenth century English criminal justice).

<sup>220</sup> See David D. Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 U. CHI. L. SCH. ROUNDTABLE 475, 495 (1995) (suggesting English government was reluctant to reform criminal punishment in part because of cost of imprisonment).

<sup>221</sup> There is a small library on the U.S. “non-system” of criminal justice. See *infra* note 231 (listing sources that critique American legal profession); see also Alvin W. Cohn, *Criminal Justice Nonsystem*, in CRIME AND THE CRIMINAL JUSTICE PROCESS 114, 116 (James A. Inciardi & Kenneth C. Haas eds., 1978); Sara Mayeux, *The Idea of “the Criminal Justice System,”* AM. J. CRIM. L. (forthcoming) (manuscript at 6-8), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3050263](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050263) [<https://perma.cc/8YPQ-YFVW>].

<sup>222</sup> See MILLER, *supra* note 186, at 53; SCHEINGOLD, *supra* note 186, at 23-28.

<sup>223</sup> See Lynch, *supra* note 187, at 2145-49 (recommending reforms in criminal prosecutorial practice based on standards in administrative law); see also Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 177, 197 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (drawing on policymaking in federal administrative agencies to explore proposal that prosecutors become policymakers in criminal justice system).

A. *The Supreme Court's False Starts and Wrong Turns*

The late Bill Stuntz reviewed the development of the Supreme Court's constitutional criminal procedure and concluded that it was a failure insofar as it was meant to be a regulatory apparatus for the criminal process in the states.<sup>224</sup> In my view, he is quite correct in this, but naïve to think that a court—even the Supreme Court—could ever have played such a role. Appellate court judges are too far removed from the day-to-day activities of police, prosecutors, and trial courts to even become informed observers, let alone exert meaningful oversight. Successful oversight requires continuous and proactive review, and appellate courts lack the capacity to do either. Courts are reactive, and guilty pleas virtually eliminate the possibility of oversight and supervision through the appellate process.

Of course, the central institution for oversight in the administration of criminal justice in any *particular* case is the trial, which is facilitated by transparency and the adversarial process. But with the decline of the trial as an adjudicative device, judges cannot even manage what takes place under their noses. Defense attorneys fear reprisals if they file motions to exclude evidence and there is little that judges can do to allay their concerns. Even where they have near complete authority to act, judges are reluctant to do so. Judges routinely lament the large numbers of pretrial detainees unable to post bail and acknowledge the Alice-in-Wonderland-like phenomenon of arrestees pleading guilty to obtain release. But release is within a judge's power. They alone set conditions of release. Still, neither state nor local judicial conferences have acted on their own to reform pretrial release in meaningful ways. Nor have many individual judges had the courage to do so. One judge who tried some time ago was the notorious and celebrated Manhattan Judge Bruce "Turn 'em Loose" Wright, who found himself vilified by prosecutors and transferred by the presiding judge to the civil division.<sup>225</sup> Similarly, judges have vast discretion in sentencing, but in face of clamor for harsher sentences rarely see themselves as a brake on public opinion. Usually, they go along with public sentiment even before it has been translated into new and harsher sentencing laws. For the past thirty years, I have regularly taught a short course for general jurisdiction trial court judges every summer. Almost all of them are elected, and many of them report that they try to transfer to civil divisions during the year before their reelection so as to avoid any unwanted attention for their bail and sentencing decisions. So even when judges have undisputed formal authority to act, the courthouse and community culture discourages them from doing so.

I do not dispute the value of appellate courts clarifying constitutional criminal procedure—this is one of their important jobs. But to view this as a meaningful form of administrative oversight of the criminal process is, in my view, laughable and naïve in the extreme. Consider this: how many police officers or

---

<sup>224</sup> STUNTZ, *supra* note 187, at 226.

<sup>225</sup> FEELEY, COURT REFORM ON TRIAL, *supra* note 17, at 55.

prosecutors have ever been dismissed or even disciplined following a judge's order to exclude evidence? It is common knowledge that police officers who repeatedly are found to have used excessive force and prosecutors who have willfully and repeatedly withheld exculpatory evidence from defense counsel rarely suffer any career threatening consequences, if any. Court findings of unprofessional or unconstitutional conduct on the part of criminal justice officials are in all but the rarest cases, at most, gentle slaps on the wrist with no real consequences. Criminal procedure scholars should move out of the appellate court reporters and into the courthouses when they start to write about "administrative control" of the criminal process. And they might even read some elementary texts on leadership in administration. If they read such books on the police, they would find their favorite cases discussed, but these cases would be in the background; the central focus would be on command, control, and training, as well as increasing police professionalism that flows from changing currents within police departments and the community and, at best, only marginally from pressures exerted by court decisions.<sup>226</sup>

B. *The ABA and DOJ Projects*

Both the ABA and DOJ envisioned professionalism as an important form of control. The ABA launched its Minimum Standards of Justice Project in 1964 in hopes of sharpening the sense of professional responsibility so that the profession could police itself.<sup>227</sup> ABA officials reasoned that if they could spell out the nature of professionalism in more detail, self-imposed obligations, professional peer pressure, and internal grievance procedures could go a long way towards establishing a well-run, self-policed legal process.<sup>228</sup> A follow up effort, the Standards and Goals project was launched by the DOJ in the 1970s.<sup>229</sup> The DOJ spent millions of dollars and engaged thousands of lawyers and judges

---

<sup>226</sup> See generally, e.g., SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* (2005).

<sup>227</sup> Tom C. Clark, *The American Bar Association Standards for Criminal Justice: Prescription for an Ailing System*, 47 NOTRE DAME L. REV. 429, 429 (1972).

<sup>228</sup> Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST., no. 4, Winter 2009, at 10, 10, [https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_magazine/makingofstandards\\_marcus.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/makingofstandards_marcus.authcheckdam.pdf) [<https://perma.cc/4JYX-S5A8>] ("When the final volume of the first edition of the Standards was published in 1974, Warren Burger, chair of the Standards project until his appointment as chief justice of the U.S. Supreme Court in 1969, described the Standards project as 'the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history' and recommended that '[e]veryone connected with criminal justice . . . become totally familiar with [the Standard's] substantive content.'" (quoting Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 253 (1974)) (alterations in original)).

<sup>229</sup> NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, *CORRECTIONS* (1973), <https://www.ncjrs.gov/pdffiles1/Digitization/10865NCJRS.pdf>.

who spent countless hours developing standards for the administration of justice in the hope that the legal profession, legislators, and courts would embrace the standards, and that policymakers and administrators would adopt and enforce them.<sup>230</sup> However, an article of faith among students of the profession is that professionalism itself is primarily a means of enhancing social status and asserting monopoly rights to protect incomes, and that professional standards and codes of ethics are little more than self-promotional investments in public relations and have little effect.<sup>231</sup> In this case, the ABA and DOJ projects may have aspired to a bit more. Both projects were part of a broader attempt to take the wind out of the Warren Court's sails when it came to governing law enforcement. The profession was claiming that it—and not the Supreme Court—was in the best position to know what local criminal justice institutions needed and that the Court should stop interfering. The Court eventually did, but not because of these efforts. Still, the voluminous reports produced by these two projects have had some limited impact. Courts and legislative committees cited them from time to time in boilerplate sections of their opinions and commentary.<sup>232</sup> But whatever impact they did have, they did little to spur the profession to regulate the criminal courts in any meaningful way.

### C. *The Law Enforcement Assistance Administration*

The single greatest and most explicit effort to address problems with the fragmentation of the American criminal justice system was set out in the Omnibus Crime Control and Safe Streets Act of 1968.<sup>233</sup> The Act was anchored in the same “systems” perspective that had been the centerpiece of the report of the President's Commission on Law Enforcement and Administration of Justice established by President Lyndon B. Johnson in July 1965.<sup>234</sup> Both the Act and its major products—several Commission reports—asserted that fragmentation

---

<sup>230</sup> NAT'L LEGAL AID & DEF. ASS'N, *National Advisory Commission on Criminal Standards and Goals, The Defense* (1973), <http://www.nlada.org/defender-standards/national-advisory-commission> [<https://perma.cc/X9ST-HW9F>] (last visited Apr. 28, 2018).

<sup>231</sup> The book that launched the new realism movement in studies of the professions (law and medicine in particular) is MAGALI SARFATI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1976). Richard Abel embraced Larson's perspective to inform a series of important studies on the legal profession, which maintain that the English and American legal professions are organized to enhance the incomes of the members and maintain monopoly rights. *See generally* RICHARD L. ABEL, *AMERICAN LAWYERS* (1989); RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* (1988).

<sup>232</sup> *See* Clark, *supra* note 227, at 429.

<sup>233</sup> Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (repealed 1984) (establishing Law Enforcement Assistance Administration, which was abolished in 1982).

<sup>234</sup> PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 140, at 23-24 (depicting famous flow chart drawn from “systems” perspective in Commission report).

was the central cause of the failings of the American criminal process.<sup>235</sup> The Act's ambition was to foster more centralization within each state by establishing Statewide Planning Agencies ("SPAs"), which would embrace a systemwide perspective and thus be able to provide more rational assessments of problems and develop more rational remedies.<sup>236</sup> The Act established the Law Enforcement Assistance Administration ("LEAA") and provided funds for it to distribute to the states in order to foster this objective.<sup>237</sup>

To its most idealistic supporters, the SPAs may have been a first step in the establishment of a proto-ministry of justice in each state with direction provided by Washington.<sup>238</sup> Throughout the twentieth century, there was a pattern of creeping centralization of criminal justice functions within the states.<sup>239</sup> Over the course of the twentieth century, states first assumed the cost of corrections and then began to assume judicial costs as well as some public defender costs.<sup>240</sup> Budgets for sheriffs, jails, and prosecutors remained with counties and budgets for police with municipalities.<sup>241</sup> With its establishment in 1968, the LEAA mandated the establishment of SPAs, which were expected to engage in rational systemwide planning and promote innovation by supporting proposals for innovative new programs that forced the parts to work in tandem to pull the whole.<sup>242</sup>

Had the LEAA provided vastly more funds, SPAs might have succeeded in becoming proto-ministries of justice. But resistance to "federal control" and centralization within the states, paltry funding, the escalating costs of the war in Vietnam, and still other issues doomed the program at the outset.<sup>243</sup> Over the course of its lifetime, the LEAA doled out hundreds of millions of dollars. Still, they were only a tiny drop in the bucket of the overall criminal-justice budget. The director of an SPA was in no position to tell a county sheriff—let alone a district attorney, judge, or big city police chief—what to do. Presumably, she would have been out of a job had she tried. SPAs simply had no leverage and ended up doling out funds on a formulaic basis.<sup>244</sup> In retrospect, the structure and mission of the LEAA were dead on arrival, at odds with the larger structure

---

<sup>235</sup> *Id.* at 117-21.

<sup>236</sup> Omnibus Crime Control and Safe Streets Act of 1968, § 202, 82 Stat. at 197.

<sup>237</sup> See FEELEY & SARAT, *supra* note 17, at 46-47; see generally VICTOR S. NAVASKY, THE TWENTIETH CENTURY FUND, LAW ENFORCEMENT: THE FEDERAL ROLE (1976).

<sup>238</sup> See FEELEY & SARAT, *supra* note 17, at 54.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 84.

<sup>241</sup> *Id.*

<sup>242</sup> Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 201-205, 82 Stat. 197, 197-98 (repealed 1984) (establishing planning grants to create new law enforcement programs).

<sup>243</sup> See FEELEY & SARAT, *supra* note 17, at 21.

<sup>244</sup> *Id.* at 83-90.



of government budgeting and accountability in the states.<sup>245</sup> If anything, the LEAA and SPAs' actions may have reinforced the fragmentation the Act sought to overcome since, in short order, stakeholders in each of the functional components entered the fray to fight for their fair share.<sup>246</sup> Further fragmentation was the result.<sup>247</sup>

The LEAA died and was buried in 1982.<sup>248</sup> However, it was immediately resurrected as the Office of Justice Programs ("OJP"), complete with the same staff, offices, and furniture.<sup>249</sup> OJP gave up on central planning, cut out the middle man, and began funding individual criminal justice agencies,<sup>250</sup> though it did continue to emphasize grants for innovative and best practice projects.<sup>251</sup> It also beefed up support for nationally directed research, data collection, and dissemination of funds to establish programs to help victims of crime and funds to establish statewide sex-offender registration programs.<sup>252</sup> It threw money at still other popular programs (one hundred thousand new police officers), and identified "best practices" projects, which it then promoted in other jurisdictions.<sup>253</sup> But daydreams of proto-ministries of justice evaporated.

#### D. *Other Ideas on the "Administration" of Justice*

The search for "real" administration of justice continues. In recent years, perhaps by default, prosecutors have come to be seen as a regulatory agency in the criminal courts.<sup>254</sup> In two well-known articles, Gerard Lynch and Rachel Barkow each pronounced that we are witnessing the dawn of a new administrative system of criminal justice and point to its origins in the Southern District of New York.<sup>255</sup> Lynch examines the ways federal prosecutors in the

---

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 145.

<sup>247</sup> *Id.*

<sup>248</sup> Peter Haynes, *Measuring Financial Support for State Courts: Lessons from the LEAA Experience*, 11 JUST. SYS. J. 148, 149 (1986).

<sup>249</sup> OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T JUST., LEAA/OJP RETROSPECTIVE: 30 YEARS OF FEDERAL SUPPORT TO STATE AND LOCAL CRIMINAL JUSTICE 6 (1996), <https://www.ncjrs.gov/pdffiles1/nij/164509.pdf> [<https://perma.cc/AA9Z-XSPH>] (noting former OJP administrator's statement that "case can be made that we just changed the boxes or moved the boxes around").

<sup>250</sup> Jimmy Gurulé, *Office of Justice Programs: Helping Law Enforcement Combat Crime*, 62 F.B.I. L. ENFORCEMENT BULL. 12, 12 (1993).

<sup>251</sup> *Id.* at 13.

<sup>252</sup> *Id.*

<sup>253</sup> OFFICE OF JUSTICE PROGRAMS, *supra* note 249, at 3.

<sup>254</sup> *See* Lynch, *supra* note 187, at 2129.

<sup>255</sup> *See* Barkow, *supra* note 223, at 196; Lynch, *supra* note 187, at 2127.

Southern District of New York pursue white collar criminals.<sup>256</sup> He describes an office that is structured hierarchically, whose leadership sets priorities, and whose assistant prosecutors then pursue these priorities under the supervision of experienced prosecutors who have helped establish and embrace these priorities.<sup>257</sup> Prosecutors are motivated not so much by maximum enforcement of the law as they are by increasing compliance among their targets and the finance industry.<sup>258</sup> They are on a mission: to maximize compliance with the complex of financial regulatory laws whose violation can trigger either civil or criminal prosecution.<sup>259</sup> They investigate vigorously and are willing to charge aggressively, but they are also willing to drop charges and settle cases if companies demonstrate remorse and take meaningful steps to change their ways—admitting to wrongdoing, firing problematic employees, making restitution, and paying civil penalties.<sup>260</sup> This, Lynch asserts, is an administrative process in everything but name only.<sup>261</sup> It is virtually indistinguishable from the Securities and Exchange Commission (“SEC”), which operates out of the office up the street.<sup>262</sup> The major difference is that federal prosecutors have both criminal and civil enforcement authority, whereas the SEC’s authority is limited to civil enforcement.<sup>263</sup>

This is a far cry from many district attorneys’ offices, where the perception is that, apart from a handful of salient cases and ongoing investigations, prosecution is reactive and most decisions are made by line staff with little oversight from above and with no overall strategy or objectives in mind. If anything, their objective is to seek convictions whenever they can unless there are compelling reasons not to.<sup>264</sup>

---

<sup>256</sup> Lynch, *supra* note 187, at 2128 (explaining process as akin to administrative lobbying with prosecutor’s “ex parte contacts” between police and defense counsel leading to non-neutral decision-making by prosecutors).

<sup>257</sup> *Id.* at 2127 n.9.

<sup>258</sup> *See id.* at 2140-41.

<sup>259</sup> *Id.*

<sup>260</sup> *See* Barkow, *supra* note 223, at 178.

<sup>261</sup> *See* Lynch, *supra* note 187, at 2120.

<sup>262</sup> Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS., no. 3, Summer 1997, at 23, 24 (“[I]n cases arising under the securities laws, and under many other regulatory regimes, there is often no distinction between what the prosecutor would have to prove to establish a crime and what the relevant administrative agency or a private plaintiff would have to prove to show civil liability.”).

<sup>263</sup> Compare 28 U.S.C. § 547 (2012) (authorizing U.S. Attorneys to prosecute criminal, as well as civil, suits), with 15 U.S.C. § 77t(b) (2012) (requiring that SEC refer suspected criminal offenses to Attorney General for criminal proceedings).

<sup>264</sup> Indeed, convictions and punishment are important metrics by which prosecutors are assessed. *See* Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors’ Offices*, 22 CORNELL J.L. & PUB. POL’Y 53, 65 (2012) (noting that quantitative standards for measuring prosecutorial success “for the explicit

Lynch's federal prosecutor's office may be a model for other prosecutors. Lynch makes a convincing case that the criminal process is an administrative process. But the lessons are limited. Lynch bases his claims primarily on an examination of a federal prosecutor's office that almost exclusively handles white collar organizational crime cases.<sup>265</sup> This is a small world where everyone knows everyone. Furthermore, prosecutors there often operate in close proximity to, and often in conjunction with, investigators from the SEC or other regulatory agencies who focus on the same institutions. Given their parallel responsibilities, it is not surprising that federal prosecutors may take on the features of SEC officials. Some have even suggested that both bodies have been captured by the institutions they monitor.<sup>266</sup>

The argument advanced by Lynch dissolves when it is applied to street and not suite crime. Here, both victims and the public are inclined to want law enforcement, not compliance management. Furthermore, an administrative process which focuses only on prosecutors' offices is not a very substantial administrative process. After all, the hallmark of modern administrative agencies is that they possess law making, law enforcement, and adjudicatory functions.<sup>267</sup> The SEC, for example, not only investigates and enforces, but also promulgates rules and has adjudicative responsibilities.<sup>268</sup> As such, any comparison of the criminal court system to administrative agencies would have to incorporate legislators and judges, if not the police and corrections officers, as well.

Another way of thinking about the criminal process as an administrative system is to examine the literature on the theories of public administration and organizational effectiveness to determine if they have anything to say about managing the criminal process. Such lessons have been learned and absorbed when considering police<sup>269</sup> and corrections departments<sup>270</sup> as self-contained

---

purposes of job evaluation and remuneration, is now measured by the number of convictions and amount of punishment").

<sup>265</sup> Lynch, *supra* note 187, at 2117.

<sup>266</sup> See generally JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* (2017). For another take, see Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted*, N.Y. REV. BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/> [<https://perma.cc/2C49-QFPX>].

<sup>267</sup> See Cynthia R. S. Schiesswohl, *Judicial Autonomy in the Immigration Adjudicatory System*, 21 U. DAYTON L. REV. 743, 749 (1996).

<sup>268</sup> 15 U.S.C. § 77s(a) (granting SEC rulemaking authority).

<sup>269</sup> Both Charles Epp and Samuel Walker have written books showing how police departments in the United States have become more professionalized by becoming more bureaucratic since the 1960s. See generally CHARLES R. EPP, *MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE* (2009); WALKER, *supra* note 226.

<sup>270</sup> The classic study is JOHN J. DI IULIO, JR., *GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT* (1987). For an early history of bureaucratizing correctional

public agencies, and the question is: Are there also lessons to be learned when applying them to the courts?

In his book, *The Machinery of Criminal Justice*, Stephanos Bibas explores this precise question.<sup>271</sup> He summarizes the chaotic history of efforts to tame the criminal process and asks what techniques for oversight, if any, we can glean from modern theories of public administration.<sup>272</sup> He then dutifully marches through a number of them to determine how they might apply. Bibas's concern is quite different from the concerns of Lynch and Barkow. His concern is how to reign in overly zealous prosecutors.<sup>273</sup> He considers several alternatives. For example, certain types of organizations can be guided and restrained by robust boards of directors who represent stakeholder interests.<sup>274</sup> Such boards offer advice, review practices, and, at times, intervene in an effort to assure acceptable performance. A variation on this is a board of external overseers, something that has not been associated with courts, but is common enough, though controversial, when trying to foster police accountability.<sup>275</sup> Another variation Bibas considers is greater judicial oversight of prosecutor discretion—particularly in plea bargaining—on the ground that, after all, judges are supposed to be the umpires in the system.<sup>276</sup> But as soon as Bibas floats these balloons, he shoots them down as unworkable and “contrary to the settled judicial tradition.”<sup>277</sup>

Still another option Bibas considers is the use of the organized bar to regulate the activities of prosecutors (and perhaps other officials as well).<sup>278</sup> This harks back to the ABA's Minimum Standards of Justice, which Bibas ignores. But, he does turn to language in the Model Rules of Professional Conduct to suggest that they encourage such an approach.<sup>279</sup> Here again, paraphrasing Kenneth Culp Davis, he reminds us that this is contrary to the settled practice of the bar.<sup>280</sup> Furthermore, as I noted above, there is no evidence that the ABA's Minimum Standards of Justice and the DOJ's Standards and Goals projects of the 1960s and 1970s had any effect in mobilizing the bar towards this end, except perhaps

---

administration, see generally JAMES B. JACOBS, *STATEVILLE: THE PENITENTIARY IN MASS SOCIETY* (1977). There are no comparable studies of courts, in large part because structurally, they are so fragmented.

<sup>271</sup> See BIBAS, *supra* note 3, at 133.

<sup>272</sup> See *id.*

<sup>273</sup> *Id.* at 158-59.

<sup>274</sup> *Id.* at 145.

<sup>275</sup> See *id.*

<sup>276</sup> See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 962 (2009).

<sup>277</sup> *Id.* at 969 n.35 (quoting KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 207-14 (1969)); *id.* at 972.

<sup>278</sup> *Id.* at 963.

<sup>279</sup> See *id.* at 975.

<sup>280</sup> *Id.* at 975-78.

in extreme cases. The organized bar and appellate courts have been reluctant to comment on judges and defense attorneys who take naps during proceedings in capital cases and have remained largely silent on the onerous caseloads of public defenders.<sup>281</sup> They also have not had much to say in response to revelations in some communities that prosecutors have repeatedly withheld exculpatory evidence from the defense. Professionalism as a mode of social control, as I suggested earlier, is a non-starter for all professions, but perhaps especially for lawyers.<sup>282</sup>

As a “middle ground” regulatory regime, Bibas considers the possibility that empowering stakeholders might be a way to regulate prosecutorial discretion.<sup>283</sup> Stakeholders include the electorate—given that ninety-five percent of the district attorneys in the United States are elected—and victims.<sup>284</sup> These groups certainly have been active over the past thirty years, though in the view of a great many, they are responsible for much of the predicament in which the criminal justice system now finds itself. Stakeholders are as likely to be the source of the problem as its solution. It is true that the City Attorney in Ferguson, Missouri, was forced to step down, but only after the DOJ issued a report condemning his actions. Perhaps from time to time stakeholders can be mobilized to their advantage, but I cannot imagine them being a central part of any meaningful system of oversight. Similarly, grand juries might perform this function if they could be extricated from beneath the heavy thumb of the prosecutor.

This exercise fails in still another way. Bibas, like Lynch and Barkow, claims to examine our administrative system of criminal justice, but in fact focuses his attention almost exclusively on prosecutors’ offices.<sup>285</sup> Any meaningful administrative approach must deal with all its component parts since the one thing that everyone agrees on is that hyper-fragmentation exists to the detriment of the system. Furthermore, none of these approaches reveals a robust embrace of administrative and organizational theory.

Consider the defining features of an administrative or regulatory organization. They include a process that blends rule making, enforcement, and adjudication within one institution; an organization characterized by hierarchy, bureaucracy, supervision, and accountability; and an institution charged with a defined mission and organized to pursue it.<sup>286</sup> Effective organizations might be structured in any number of ways (e.g., centralized or decentralized), but they

---

<sup>281</sup> See generally Matthew J. Fogelman, *Justice Asleep Is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and Should Be Deemed Per Se Prejudicial*, 26 J. LEGAL PROF. 67 (2002).

<sup>282</sup> See *supra* text accompanying note 231.

<sup>283</sup> BIBAS, *supra* note 3, at 122 & n.98.

<sup>284</sup> *Id.* at 125-36.

<sup>285</sup> *Id.* at 18-20, 41-42, 115, 158-59.

<sup>286</sup> See generally CHARLES PERROW, *COMPLEX ORGANIZATIONS: A CRITICAL ESSAY* (1972); PHILIP SELZNICK, *LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION* (1957).

are likely to have compelling strong leadership that embodies a sense of mission. Their task is to harness diverse interests to a common purpose, admittedly a challenge in the adversarial process, which is supposed to operate on the expectation of equal and opposing forces with truth emerging as a byproduct.

Of course, the internal structure of police and correctional departments fit comfortably within an administrative structure and have long been subject to such analysis.<sup>287</sup> And while these departments continue to face serious problems, organizational theory, applied to their structure, can point the way—through variations in the form of their command and control structures. Courts on the other hand lack these structural advantages. Chief judges handle routine administrative matters and do not really oversee their colleagues.<sup>288</sup> So few cases are appealed that appeal is not a meaningful form of supervision. Prosecutors' offices are decentralized, and, except for rare exceptions of the type that Lynch and Barkow focus on, individual prosecutors or small teams exercise vast discretion with little or no supervision.<sup>289</sup> Defense attorneys are almost by definition solo practitioners. This is not by default; it is by design.

However, if we cast our net farther, we can see some real administrative systems of justice in the United States. It is worthwhile to examine them. They might serve as models for criminal justice, but my hunch is that many lawyers and law professors would dismiss such models out of hand because they challenge the professional autonomy of lawyers and core features of the adversarial process. Still, let us take a look.

The modern state is the administrative state, and disputes involving the government are likely to be heard by hearing officers or administrative law judges. In the federal system there are many more administrative law judges ("ALJs") and hearing officers than Article III judges,<sup>290</sup> and states have vast numbers of hearing officers. What is the difference between these administrative

---

<sup>287</sup> See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 358-60 (1993) (discussing "professionalization" of police forces); SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 131-41 (2d ed. 1998). For an example of the development of correctional departments, see *id.* at 175-76.

<sup>288</sup> See generally FED. JUDICIAL CTR. DESKBOOK FOR CHIEF JUDGES OF U.S. DISTRICT COURTS (4th ed. 2014), <https://www.fjc.gov/sites/default/files/2017/Deskbook-Chief-Judges-US-District-Courts-4th-Public-FJC-2014.pdf> [<https://perma.cc/2U98-BH3G>].

<sup>289</sup> See JOHNSON, *supra* note 213, at 119-20 ("The United States has some three thousand discrete prosecutors offices, each with its own chief, structure, police, and practice. Japan has one: a national, centralized, hierarchical, career procuracy whose structure corresponds to that of the judiciary." (citation omitted)); Barkow, *supra* note 223, at 178-79; Lynch, *supra* note 187, at 2136-41 (discussing how process of white-collar criminal investigations and generally larger resources of these defendants lead to such events as defense counsel going over head of any given prosecutor to higher authorities when their contentions are not accepted).

<sup>290</sup> See Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1652 (2016) (tallying number of administrative law judges, administrative judges, and Article III judges). Barnett defines administrative judges as "all non-[administrative law judges] who oversee oral hearings." *Id.* at 1660.

adjudicators and Article III or state judges? One obvious difference is that most ALJs and hearing officers work within an agency, which not only is charged with resolving disputes, but enacts policies, administers them, enforces its rules, and resolves disputes.<sup>291</sup> Another distinctive feature is that adjudication within agencies is often made with an eye towards responsible administration and resource allocation. It goes without saying that neither social security hearing officers nor ALJs can award more money for disability payments than is held in the Social Security Trust Fund. Hearing officers in welfare rights cases must be aware of the financial implications for the agency. Housing court judges cannot order an agency to make an apartment available if none exists. As a consequence, agency heads, not adjudicators, often have the last word since they are responsible for the ultimate allocation of scarce resources.<sup>292</sup>

At first blush, this appears to undermine the autonomy or independence of ALJs,<sup>293</sup> and perhaps it does. But perhaps this sacred principle should be relaxed. Consider these facts: Judges set conditions of pretrial release that cannot be met.<sup>294</sup> They send arrestees to woefully over-crowded jails.<sup>295</sup> They assign poor defendants to legal aid lawyers with crushing caseloads.<sup>296</sup> Wouldn't it be nice to have a responsible institution that could consider such factors and take a different tack?

What is wrong with someone—an institution with synoptic vision—looking over the shoulder of decisionmakers and, at times, saying “no,” or insisting upon equalizing treatment and burden? In theory, appellate courts could and should straighten out some of these issues, but in reality they cannot.<sup>297</sup> No one goes to trial, so no one can appeal. And besides, appeals are reactive.<sup>298</sup> Bail agencies are supposed to help in situations like this, but, compared to prosecutors and

---

<sup>291</sup> *See id.* at 1652-53.

<sup>292</sup> *Office of Administrative Law Judges, SEC. & EXCH. COMM'N*, <https://www.sec.gov/page/aljsectionlanding> [<https://perma.cc/M4QE-M2R4>] (last visited Apr. 28, 2018)

<sup>293</sup> Editorial, *Decisional Independence of Administrative Law Judges*, 98 JUDICATURE, no. 1, Aug. 2014, at 5, 5.

<sup>294</sup> Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges 1* (Nat'l Bureau of Econ. Res., Working Paper No. 22511, 2016), <http://www.nber.org/papers/w22511.pdf> [<https://perma.cc/86ZV-J5FA>].

<sup>295</sup> Press Release, Peter Wagner & Bernadette Rabuy, Prison Policy Initiative, Mass Incarceration: The Whole Pie 2017, (Mar. 14, 2016), <https://www.prisonpolicy.org/reports/pie2017.html> [<https://perma.cc/XAR5-CAGL>] (noting that overcrowding can be attributed to high number of individuals who have yet to be convicted).

<sup>296</sup> Alexa Van Brunt, Opinion, *Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them*, GUARDIAN (June 17, 2015, 7:30 AM), <https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked> [<https://perma.cc/7FBJ-VHSA>].

<sup>297</sup> Vander Pol, *supra* note 25, at 16 n.103.

<sup>298</sup> *See id.* at 16.

judges, they are powerless.<sup>299</sup> Sentencing commissions were supposed to help, but they have not proved to be the panacea they were once thought to be.<sup>300</sup> Quite simply, there is no adult in the room. So strange things happen again and again.

From time to time, isolated actors within the American criminal justice system have tried to address some of these problems. The Supreme Court has taken on the unenviable challenge of trying to rationalize the administration of the death penalty, but while it has stanching the flow, the effort elsewhere has been underwhelming.<sup>301</sup> After wading into the issue of proportionality in noncapital state court sentencing under the Eighth Amendment, the Court recognized the magnitude of the swamp it had entered and quickly retreated.<sup>302</sup> In Los Angeles, the sheriff's department joined with the American Civil Liberties Union to sue municipal court judges to force lower bail in order to, in turn, relieve overcrowding in the county jails.<sup>303</sup> Multiple public defenders' offices have sued local courts to limit the numbers of cases assigned to them.<sup>304</sup> My neighbor in Berkeley, Judge Thelton Henderson of the United States District Court for the Northern District of California, ordered the release of forty-six thousand inmates from state prisons<sup>305</sup>—but only after ten years of pretrial negotiations and another ten years of litigation, appeals, special masters, and receivers.<sup>306</sup> The California Department of Corrections and Rehabilitation was largely in agreement with his ruling. Still, the result has been a mess, and one wonders if we will not see the same problem reappear all over again in a few years.

The situations leading to these legal actions are dire, and the objectives are worthy. But litigation, or as my colleague Bob Kagan might say, adversarial legalism is a woefully ineffective way to oversee the administration of a complex

---

<sup>299</sup> Joshua Page, *Desperation and Service in the Bail Industry*, CONTEXTS (June 19, 2017), <https://contexts.org/articles/bail/> [<https://perma.cc/VLH8-ZBDS>] (“After all, bail agencies are stigmatized in the legal field; judges, lawyers, and court staff typically do not view them as part of the courtroom workgroup.”).

<sup>300</sup> Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 101, 106 (2005).

<sup>301</sup> See *Excerpts from Decisions by Supreme Court Justices on Death Penalty Cases*, N.Y. TIMES, July 3, 1976, at 6.

<sup>302</sup> *Compare Solem v. Helm*, 463 U.S. 277, 290 (1983), with *Bordenkircher v. Hayes*, 434 U.S. 357, 363-65 (1978).

<sup>303</sup> Dennis Romero, *L.A. County Considers Letting More Arrestees Go Free*, LA WEEKLY (Mar. 9, 2017, 6:07 AM), <http://www.laweekly.com/news/la-county-considers-letting-more-arrestees-go-free-8006562> [<https://perma.cc/X9RY-NVR4>].

<sup>304</sup> Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1.

<sup>305</sup> The ruling that was eventually handed down by the Supreme Court is *Brown v. Plata*, 563 U.S. 493, 517-22 (2011).

<sup>306</sup> For an account of this case, see generally JONATHAN SIMON, *MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA* (2014).



problem.<sup>307</sup> Kagan’s call is for better administration, less litigation, and the establishment of stronger agencies that can bring stakeholders to the table to hammer out binding agreements.<sup>308</sup> The structures of most social service agencies in the United States pale in comparison to their European counterparts, and this is especially true in the administration of criminal justice.<sup>309</sup> Most countries have a meaningful ministry of justice; the United States does not—at the national, state, or local levels.

Still, the United States does have some points of comparison. The Judge Advocate General’s (“JAG”) Corps oversees the administration of criminal justice for the military and is responsible for operating, staffing, and overseeing trial and appellate courts, including judges, prosecutors, and defense attorneys under the Uniform Code of Military Justice (“UCMJ”).<sup>310</sup> The JAG Corps also occupies the lead role in considering and proposing updates and changes to the UCMJ.<sup>311</sup>

In 1970, Robert Sherrill published *Military Justice Is to Justice as Military Music Is to Music*, whose thesis is proclaimed in the title.<sup>312</sup> This book could not be written today, not because military music has changed, but because military justice has improved. Despite constraints on due process and other widely cherished features of criminal justice administration, military justice is a model of efficiency and fairness. Military justice’s effectiveness stands in sharp contrast to what passes for justice in many civilian courts in America, and so we might consider it as a model for American criminal justice. There are other less flattering forms of “administration” that have been compared to American criminal justice administration. Let us briefly look at three such comparisons.

---

<sup>307</sup> Cf. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 4 (2001). This is not to say that courts cannot and have not been effective in bringing about substantial changes in America’s prisons. See generally MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1998). My point is that federal courts cannot be effective administrators, overseeing the administration of prisons in the long run. Like other “outsiders,” they might be able to impose changes in an organization, but they cannot guarantee that these changes will stick.

<sup>308</sup> KAGAN, *supra* note 307, at 229-33. See generally JOHN J. DI IULIO JR., *BRING BACK THE BUREAUCRATS: WHY MORE FEDERAL WORKERS WILL LEAD TO BETTER (AND SMALLER!) GOVERNMENT* (2014).

<sup>309</sup> See *infra* Section III.B.

<sup>310</sup> U.S. DEP’T OF DEF., *MANUAL FOR COURTS-MARTIAL UNITED STATES* § 109(c)(6)(A) (2016), <http://jsc.defense.gov/Portals/99/Documents/MCM2016.pdf?ver=2016-12-08-181411-957> [<https://perma.cc/X4JP-G5JD>]; see also 10 U.S.C. § 806(a) (2012) (granting JAG supervision of military justice); *id.* § 866 (granting JAG the role of establishing “Court of Criminal Appeals”); *id.* § 869 (explaining JAG scope of review); *id.* § 870 (giving JAG role of commissioner officers as “appellate Government Counsel”).

<sup>311</sup> See 10 U.S.C. § 946 (creating committee that annually reviews UCMJ).

<sup>312</sup> See generally ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY IS TO MUSIC* (1970).

E. *Farther Afield: Colonial Administration*

From time immemorial, colonial administrators have been charged with maintaining safety and security in unfamiliar lands. A colonial administrator's job is to maintain order, or at least enough order to allow the colonials to extract the natural resources that brought them to that land.<sup>313</sup> Styles of colonial administration vary, but one common feature is that the administrators are not so much concerned with even-handed enforcement of the law as they are with keeping the peace. The mission is to manage mayhem, not foster fidelity to the occupier's law.<sup>314</sup> The British policy of indirect rule is often regarded as a model of colonial administration: leave the natives alone to manage themselves, and only intervene if the interests of the state or those representing the state are threatened.<sup>315</sup>

Not surprisingly, commentators on American criminal justice often draw on the colonial experience. In one of his first columns for the *Nation*, James Baldwin described in colonial terms law enforcement in New York City's African-American neighborhoods.<sup>316</sup> More recently, Chris Hayes wrote *A Colony in a Nation*.<sup>317</sup> The title explains his thesis: The United States has established reservations where disruptive minorities are herded and intensively policed in order to preserve peace for the majority.<sup>318</sup> Still others have examined the American criminal justice system as an administrative system for managing potentially unruly African Americans.<sup>319</sup>

Within African-American scholarship, and in the spirit of Frantz Fanon, Michael Hardt and Antonio Negri, have connected the African-American experience with colonialism, including its order-maintenance functions.<sup>320</sup> Recent discussions of stop and frisk police practices are replete with comparisons to South Africa and colonial settings.<sup>321</sup>

---

<sup>313</sup> See James M. Doyle, "It's the Third World Down There!": *The Colonialist Vocation and American Criminal Justice*, 27 HARV. C.R.-C.L. L. REV. 71, 79-80 (1992) (characterising role of colonial administrator as "hold[ing] the native down while the businessmen went through his pockets").

<sup>314</sup> See *id.* at 79.

<sup>315</sup> See STANLEY DIAMOND, IN SEARCH OF THE PRIMITIVE: A CRITIQUE OF CIVILIZATION 50, 87 (1974).

<sup>316</sup> James Baldwin, *A Report from Occupied Territory*, NATION (July 11, 1966), <https://www.thenation.com/article/report-occupied-territory/> [<https://perma.cc/9NWM-Q4W7>] (describing police presence in Harlem as occupied territory).

<sup>317</sup> See generally CHRIS HAYES, A COLONY IN A NATION (2017).

<sup>318</sup> *Id.* at 32.

<sup>319</sup> See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 4 (2012).

<sup>320</sup> See, e.g., MICHAEL HARDT & ANTONIO NEGRI, EMPIRE 193-95 (2000).

<sup>321</sup> See, e.g., Gloria J. Browne-Marshall, *Stop and Frisk: From Slave-Catchers to NYPD*, A Legal Commentary, 21 TROTTER REV. 98, 98 (2013); cf. Lance Hannon, *An Exploratory Multilevel Analysis of Pedestrian Frisks in Philadelphia*, 20 RACE & JUST. 1, 3 (2017).

Another recent body of research fits comfortably within literature on colonial administration. Anthropologist Stanley Diamond explains that colonial administrators everywhere were preoccupied with shifting administrative costs onto the natives.<sup>322</sup> This colonial perspective is unwittingly captured in various descriptions of practices in Ferguson, Missouri, and a great many other communities in Missouri, as well as Georgia and elsewhere.<sup>323</sup> Criminal fines, fees, and forfeitures are used to keep property taxes low, especially in communities where racial minorities have low levels of home ownership.<sup>324</sup>

Still, others have seized upon the colonial metaphor in characterizing criminal justice administration in the United States. In past articles, Jonathan Simon and I maintained that, more frequently than ever, criminal justice is not about arresting suspects, determining guilt or innocence, and holding the guilty accountable, but it is about managing risk in order to keep society safe from danger.<sup>325</sup> The articles written more than twenty years ago take on new meaning in the light of racial profiling and the use of algorithms in release and sentencing decisions.<sup>326</sup>

Finally, Issa Kohler-Hausmann's and Nicole Gonzalez Van Cleve's recent work on criminal courts easily fits into the colonial metaphor.<sup>327</sup> Kohler-Hausmann provides a convincing account that officials in New York City have abandoned an adjudicative model of criminal law administration for misdemeanors—concerned with adjudicating specific cases—and replaced it with a mass misdemeanor management system designed to mark individuals in ways that eventually will allow them to identify and detain the handful of higher

---

<sup>322</sup> DIAMOND, *supra* note 315, at 8 (discussing how “majority of the people [in native communities] were always taxed in goods and labor far more than they received from the state in the form of protection and services”).

<sup>323</sup> *E.g.*, Renee C. Hatcher, *The Everyday Economic Violence of Black Life*, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 275, 279 (2017) (“From the slave codes to the Black codes to the excessive fines and fees and predatory policing, the law in the United States has been used to extract value from Black citizens to the benefit of whites who are embedded in the power structure.”).

<sup>324</sup> *See* U.S. COMM’N ON CIVIL RIGHTS, *supra* note 180, at 189 (noting that certain states require popular referendum or other strict limitations to raise taxes, while criminal fees may be raised more easily).

<sup>325</sup> Malcolm Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, in *THE FUTURES OF CRIMINOLOGY* 173, 173 (David Nelken ed., 1994); Feeley & Simon, *supra* note 117, at 465.

<sup>326</sup> *See, e.g.*, Nicole Gonzalez Van Cleve & Lauren Mayes, *Criminal Justice Through “Colorblind” Lenses: A Call to Examine the Mutual Constitution of Race and Criminal Justice*, 40 LAW & SOC. INQUIRY 406, 411 (2015); Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 546 (2015).

<sup>327</sup> *See* Issa Kohler-Hausmann, *supra* note 201, at 613. *See generally* ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018); NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT* (2016).

risk individuals.<sup>328</sup> Although this is the result of the mutual adjustment of court officials in light of dramatic changes in police practices, Kohler-Hausmann finds that the pattern is persistent and strong enough to be labeled a policy.<sup>329</sup> Regardless of the severity and the manner in which an arrest is disposed, each arrest is a marker, and if an arrestee has accumulated enough markers, she will eventually be treated severely.<sup>330</sup> Van Cleve's book recounts in chilling detail how an almost all white staff in the massive fortress-like Cook County Courthouse manages huge numbers of predominantly black defendants, victims, and witnesses in a demeaning manner designed to foster obsequiousness. It may not be Joseph Conrad's *Heart of Darkness*, but her book conjures up the same reaction in my mind.

F. *Real Administration of Criminal Justice*

On a global scale, we can easily find places where the administration of justice is more than a term of convenience, and where justice is actually "administered." Ministries of justice in many countries do, in fact, oversee the administration of justice. There are many countries with parliamentary systems that have ministries with far-reaching responsibilities for overseeing police, prosecutors, judges, corrections, and other auxiliary agencies.<sup>331</sup> Ministries are headed by members of parliament who have been appointed by the government and who are usually assisted by permanent under-secretaries who handle day-to-day matters and are experts in their areas of activity.<sup>332</sup> Countries with strong parliaments are usually said to have "responsible government," which means that ministries make policies for and oversee all government activities within their jurisdiction.<sup>333</sup> The obvious advantage of a ministry of justice in a system of responsible government is that it can actually administer the criminal justice system. A proposed change in any part will be assessed for its likely systemwide

---

<sup>328</sup> Kohler-Hausmann, *supra* note 201, at 624.

<sup>329</sup> *Id.* at 633.

<sup>330</sup> *Id.* at 643.

<sup>331</sup> See, e.g., NAT'L AUDIT OFFICE, A SHORT GUIDE TO THE MINISTRY OF JUSTICE 5 (2017), <https://www.nao.org.uk/wp-content/uploads/2017/10/A-Short-Guide-to-the-Ministry-of-Justice.pdf> [<https://perma.cc/DH5E-C7YB>] ("The Ministry of Justice sets and carries out government policy for the criminal, civil and family justice systems in England and Wales. It is responsible for provision of legal aid, administration of justice through courts and tribunals, and detention and rehabilitation of offenders.").

<sup>332</sup> *Id.* ("As government's Principal Accounting Officer for the Ministry of Justice, the Permanent Secretary is personally responsible and accountable to Parliament for managing the Ministry.").

<sup>333</sup> HOUSE OF COMMONS, PARLIAMENT OF CAN., *Responsible Government and Ministerial Accountability*, [https://www.ourcommons.ca/About/Compendium/ParliamentaryFramework/c\\_d\\_responsiblegovernmentministerialaccountability-e.htm](https://www.ourcommons.ca/About/Compendium/ParliamentaryFramework/c_d_responsiblegovernmentministerialaccountability-e.htm) [<https://perma.cc/9WF4-SEHG>] (last visited Apr. 28, 2017).

consequences.<sup>334</sup> And any proposed increase in expenses will be assessed in light of the government's budgetary priorities.<sup>335</sup>

Most European countries have ministries with sweeping responsibilities for administering the various components of their criminal justice systems.<sup>336</sup> Those with responsible governments will have still stronger parliaments that are able to coordinate among the several components of the criminal justice system. Admittedly, none of these countries face the same magnitude of crime challenges that the United States does, but those most deeply versed in European-American comparative criminal justice almost without exception prefer the European machinery of criminal justice to the American model.<sup>337</sup> The Japanese system is also touted as a model.<sup>338</sup> Most parliamentary systems with strong governments do not have adversarial systems; there is, in fact, an affinity between parliamentary systems and inquisitorial justice systems.<sup>339</sup>

All of this may sound vaguely un-American. It opens the prospect of creating real assembly-line justice designed and run by bureaucrats with the goal of maximizing efficiency—or safety. In light of these prospects, a sputtering and inefficient adversarial system might appear to be a godsend. But even a cursory review of differing schools of comparative law reveals a near consensus that other countries do a better job of administering criminal justice than we do.<sup>340</sup>

<sup>334</sup> NAT'L AUDIT OFFICE, *supra* note 331, at 17.

<sup>335</sup> *Id.* at 12 (“More than 80% of the Ministry's budget is spent through its agencies and arm's-length bodies . . .”).

<sup>336</sup> *See id.* at 37.

<sup>337</sup> *E.g.*, James Q. Whitman, Opinion, *When the Focus Is Retribution*, N.Y. TIMES (Jan. 21, 2011, 12:16 PM), <https://www.nytimes.com/roomfordebate/2011/01/20/who-qualifies-for-the-insanity-defense/when-the-focus-is-retribution>.

<sup>338</sup> *See* JOHNSON, *supra* note 213, at 280.

<sup>339</sup> *See* MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 3-6 (1986) (comparing adversarial and inquisitorial systems). Although it is worth noting that while Japan has an adversarial system, it is a robust parliamentary system with a strong Ministry of Justice that manages the criminal process despite the built-in fragmentation of the adversarial system. *See* JOHNSON, *supra* note 213, at 120-21. Great Britain until quite recently had no Ministry of Justice at all, and historically the Home Office had limited authority over police, probation, and corrections, with no oversight of the courts. NAT'L AUDIT OFFICE, *supra* note 331, at 6.

<sup>340</sup> John Langbein and Mirjan Damaška, two of the most prominent American scholars of comparative law, emphasize the vast differences between American and continental criminal procedure and ministerial oversight of the criminal process and disparage the American system as hopelessly fragmented and chaotic, with Langbein holding it incapable of rendering meaningful justice. *See* DAMAŠKA, *supra* note 339, at 231-33; John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 225 (1979). Robert Kagan's *Adversarial Legalism* shares much in common with the writing of Langbein and Damaška. *See generally* Kagan, *supra* note 307. Any serious discussion of criminal court reform in the United States should, in my view, be deeply informed by the perspectives of these three authors. I do not suggest that they have a blueprint to be followed, but they have

## III. THE HISTORICAL FALLACY AND FAILURE OF COMPARATIVE ANALYSIS

A. *The Historical Fallacy*

A greater historical sensibility and more comparative analysis makes clear that the hyper-adversarial, hyper-fragmented system of criminal justice in the United States is a problem of long duration and that there are better ways of managing the criminal process. My discussion of the American Political Development (“APD”) movement at the outset was an effort to establish the context for a more historically and institutionally nuanced analysis of the adversarial process and fragmented governmental structure in which it operates. But there is a dearth of such historical and institutional analysis of the courts. And what little there is, is neither addressed to, nor read by, architects of court reform who continue to conjure up non-existent yesterdays to which we can return if we just put our minds to it. One popular genre of scholarly research on the criminal process in the United States employs such titles or subtitles as “The Collapse of American Criminal Justice”<sup>341</sup> and “The Twilight of the Adversary System.”<sup>342</sup> On the surface, studies with such titles conjure up hope—all we have to do is turn the clock back and reset it. But a careful—even a casual—analysis of such arguments should find them wanting. If we are witnessing the twilight of the adversarial system, when was its dawn? When was its high noon? If it has now collapsed,<sup>343</sup> when was it healthy and robust? In my view, as bad as the American criminal justice system is, it is probably as good as it has ever been—which, in my opinion, is clearly not good.

How can I be sure of my claim? One way is to read the work of contemporary commentators on the administration of criminal justice and that of observers other than de Tocqueville. You will find that in every age, commentators were using descriptors like failing, near collapse, and catastrophe.<sup>344</sup> Specific terms may come and go, but the assessment remains pretty much the same. Still, if observations seem grimmer today, it may be because our sensibilities are more

---

an appreciation for institutional history and context that is lacking in most American literature on criminal court reform. An example of an APD-inspired examination of factors that have shaped American prison policies is Marie Gottschalk, *Hiding in Plain Sight: American Politics and the Carceral State*, 11 ANN. REV. POL. SCI. 235 (2008). To my knowledge, no such study exists for American criminal courts. There are excellent histories of criminal courts in some jurisdictions, but none attempt what Gottschalk has sketched out in her essay—to understand current practices and institutional arrangements in light of the contingencies of institutional histories and political context. She does not argue that policies are inevitably determined by a path dependency, but she does say that prior path dependency is a powerful shaper of future development.

<sup>341</sup> STUNTZ, *supra* note 187, at iii.

<sup>342</sup> ABRAHAM S. BLUMBERG, CRIMINAL JUSTICE: ISSUES & IRONIES 154 (2d ed. 1979).

<sup>343</sup> STUNTZ, *supra* note 187, at iii.

<sup>344</sup> See, e.g., *id.* at 1.

refined or our expectations higher. It is beyond the scope of this Article to develop this argument at length, but I offer some examples.

It is true that once upon a time there were trials, but in a typical big city court in the early nineteenth century, a jury might be empaneled in the morning, hear five or six cases, and then adjourn for lunch to deliberate on all of them. Trials might have lasted only half an hour or less. Furthermore, we hear complaints about the quality or workload of public defenders (genuine and real problems, I admit), but the nineteenth century counterpart of today's arrestee was not likely to have been represented by counsel at all. Or, even if represented, she was not afforded time for an informed defense.<sup>345</sup> And she was much more likely to be subject to the death penalty. In contrast, a contemporary plea bargaining process might involve a lawyer appointed for the accused, take a total of two or three hours, and possibly involve an earlier motion asserting procedural protections, which did not exist before.<sup>346</sup> My point is not to defend today's practices by showing that they are better than yesterday's. Rather, it is to say that this sort of historical assertion inhibits understanding. This is also a good place to pause and insert the caveat I have made once or twice before: place matters. The United States is a huge country and its criminal process is highly decentralized.<sup>347</sup> Things work better in some places than others.

#### B. *Failure of Comparative Context*

There is very little writing about the American criminal justice system in comparative perspective, and what little there is usually contrasts American structure and practices with those in England, France, or Germany.<sup>348</sup> Or perhaps the Netherlands or the Nordic countries, especially if we include crime rates and sentencing policies.<sup>349</sup> This choice of comparisons is compelling. We have a common law system and an adversarial process, so comparison with England makes sense. Further, we are an advanced industrialized country with a liberal

---

<sup>345</sup> For a description of the American criminal trial in the early to mid-1800s, see LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 235-38 (1993).

<sup>346</sup> See, e.g., Alexandra Natapoff, *Misdemeanors*, in *REFORMING CRIMINAL JUSTICE* 71, 75 (Erik Luna ed. 2017).

<sup>347</sup> See, e.g., *id.* ("Misdemeanor reform is a quintessentially local affair. States, counties, and municipalities control every aspect of the petty-offense system, from defining and decriminalizing offenses, setting penalties, providing counsel, running jails and probation programs, to collecting fines and fees.").

<sup>348</sup> See, e.g., Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find out, and Why Should We Care*, 78 CALIF. L. REV. 539, 544 (1990); David Nelken, *Comparative Criminal Justice: Beyond Ethnocentrism and Relativism*, 6 EUR. J. CRIMINOLOGY 291, 293 (2009).

<sup>349</sup> Nelken, *supra* note 348, at 294-95 (including in comparative discussion, statistics from Netherlands and Nordic countries).

democratic tradition, and this too links us with western Europe. So here too, the comparison seems to make sense.<sup>350</sup>

But in light of my comments at the outset of this Article, let me suggest that there are other comparisons that, while more painful, might be more helpful in diagnosing the ills of the American criminal justice system, particularly when we consider governmental structure and setting.

Political scientists often distinguish between two types of states, “strong states” and “weak states.”<sup>351</sup> Strong states are animated by a quest for nationhood—a sense that their residents are not only citizens, but that they constitute a people with a common past and a shared future—a destiny.<sup>352</sup> In such a case, the state is the means by which personhood is realized.<sup>353</sup> The state makes the person in a very real sense. When the French Minister of Justice can point to his watch and assert, “It is 10:58; all the children in the eighth form are reading Victor Hugo,” it may be an indication of officious bureaucracy, but it is also a sign that the purpose of the French schools is to turn unformed children into French men and women. In contrast, American education emphasizes freedom, liberty, independence, and self-fulfillment through self-discovery.<sup>354</sup> France is an example of a strong state; the United States, a weak state.<sup>355</sup> Yale Law School comparativist Mirjan Damaška has picked up on this distinction and worked through it in any number of dimensions, including law, courts, and the criminal justice system.<sup>356</sup> Strong states, precisely because they are strong, have inquisitorial legal systems; weak states—Britain and its former colonies—have adversarial systems.<sup>357</sup> Legal institutional design nests within national political culture and structure.<sup>358</sup> Of course, he emphasizes, these are ideal types and most states have a mishmash of both.<sup>359</sup> Still, he and many others maintain that the distinction is useful.<sup>360</sup>

---

<sup>350</sup> *Id.* at 296-97.

<sup>351</sup> *See generally, e.g.*, JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE (1996); THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE (Charles Tilly ed., 1975); Kenneth N. Waltz, *Structural Realism After the Cold War*, 25 INT’L SECURITY 5 (2000).

<sup>352</sup> *See generally* Arthur Edwards & Peter Hupe, *France: A Strong State, Towards a Stronger Local Democracy?*, in CITIZEN AND CITY: DEVELOPMENTS IN FIFTEEN LOCAL DEMOCRACIES IN EUROPE 129 (Harry Daemen & Linze Schaap eds., 2000).

<sup>353</sup> *See generally id.*

<sup>354</sup> *See* Robert M. Hutchins, *Ideals in Education*, 43 AM. J. SOC. 1, 2 (1937).

<sup>355</sup> *See supra* text accompanying notes 352-55.

<sup>356</sup> Inga Markovits, *Playing the Opposites Game: On Mirjan Damaška’s The Faces of Justice and State Authority*, 41 STAN. L. REV. 1313, 1319-21 (1986).

<sup>357</sup> DAMAŠKA, *supra* note 339, at 69.

<sup>358</sup> *Id.* at 16-18.

<sup>359</sup> *Id.* at 10.

<sup>360</sup> *See id.*



There are still other dimensions: developing states and developed states. Developing states lack fully realized state infrastructure and institutions;<sup>361</sup> developed states possess them.<sup>362</sup> Here too, these are ideal types and there are no or few pure examples. Still, political science has been successful in using the distinction to classify a substantial number of countries, dividing them into “developing” and “developed” or some other similar pair of distinctions. An alternative phraseology is Global North and Global South. This categorization works as well, especially if we shift Australia and New Zealand to the North, and possibly place Georgia and Albania in the South. The Global South or developing states struggle with basic social deficits: literacy, educational opportunities, rates of mortality, access to clean water, highway and transportation systems, accessible health care, corruption, a competent civil service, and good government practices.<sup>363</sup> A central task of government is to develop its structural capacity in order to deliver these basic services. Developed states of the Global North also want better services, but usually possess the capacities to deliver them.<sup>364</sup>

Those who use these distinctions go on to note that developing countries are likely to be politically unstable.<sup>365</sup> They experience high levels of violence and have not achieved a monopoly on the use of lethal force,<sup>366</sup> have a segmented society,<sup>367</sup> may have histories of slavery and racial oppression, and have wide gaps in income.<sup>368</sup> Politically, developing states, such as countries in Africa and Latin America, are more likely to be presidential and federal, while developed states, such as countries in western Europe, have parliamentary systems and a unitary structure.<sup>369</sup> Indeed, some of them have explicitly adopted American-style governmental systems.<sup>370</sup> By many of the indicators I have set out above,

---

<sup>361</sup> U.N. COMM. FOR DEV. POLICY, HANDBOOK ON THE LEAST DEVELOPED COUNTRY CATEGORY: INCLUSION, GRADUATION AND SPECIAL SUPPORT MEASURES, Pub. No. E.15.II.A.1, at 4 (2d ed. 2015), <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/2015cdphandbook.pdf> [<https://perma.cc/V5TE-NM4A>].

<sup>362</sup> *Id.*

<sup>363</sup> See INDEPENDENT COMM’N ON INT’L DEV. ISSUES, NORTH-SOUTH: A PROGRAMME FOR SURVIVAL 48-63 (1980).

<sup>364</sup> *Id.* at 31.

<sup>365</sup> See Seymour Martin Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69, 90 (1959).

<sup>366</sup> Richard Sandbrook & David Ramano, *Extremism and Violence in Poor Countries*, 25 THIRD WORLD Q. 1007, 1009 (2004).

<sup>367</sup> *Id.* at 1015.

<sup>368</sup> Lipset, *supra* note 365, at 76-79.

<sup>369</sup> Eunyoung Ha, *Globalization, Government Ideology, and Income Inequality in Developing Countries*, 74 J. POL. 541, 544 (2012).

<sup>370</sup> See David S. Law & Mila Vertsteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 765 n.5 (2012).

the United States is ranked well below western Europe, and towards the the Latin American end of the spectrum.

I invite us to think of the Unites States as a developing country, one whose weak governmental structure constitutes a major reason for our failure to administer criminal justice. In proposing this comparison I want to make a rhetorical point: Yes, things are that bad. However, I also want to underscore a deeper concern: Any meaningful understanding of the machinery of justice in the United States requires an understanding of political culture and the fragmented structures on which the machinery is erected. By itself, tinkering with the machinery won't accomplish much. Nor will contrasting American criminal justice institutions with those in Europe be particularly helpful. By this, I do not mean that reformers should do nothing until basic structures change—we would be waiting forever. Rather, my point is that when we diagnose the challenges of criminal justice administration, we must dig deeper and seek to understand them in light of culture and governmental structure. No serious diagnosis of the problems of education, public health, and criminal justice administration in developing countries occurs without its being anchored in an appreciation for the weaknesses in governmental structures. Similarly, too, I suggest, diagnosis of the obstacles in the American criminal process must be anchored in a broader understanding of the failures of public administration and governmental structures.

#### CONCLUSION

I want to return to my opening theme. We have a long history of reform in the American criminal justice system. Yet, we have failed to diagnose the obstacles to change accurately and develop and institutionalize meaningful reforms. The reasons for this are related to institutional design, political structure, and an inability to create responsible institutions. I offer no blueprint as to how to do this. But I do suggest that we start looking in the right places; or at least stop looking in the wrong places. While we flatter ourselves with comparisons to western Europe, more meaningful and helpful comparisons are probably associated with developing countries whose structural deficits we share. Like them, we face a two-fold task: to envision substantive criminal justice reforms while at the same time addressing the structural deficits that frustrate meaningful reform.