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Is FINRA a State Actor? A Question that Exposes the Flaws of the State Action Doctrine and Suggests a Way to Redeem IT

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ESSAY

In Defense of American Criminal Justice

*Hon. J. Harvie Wilkinson III**

I.	INTRODUCTION	1099
II.	THE INDICTMENT.....	1101
III.	A DEFENSE OF AMERICAN CRIMINAL JUSTICE.....	1108
	A. <i>The Inevitability of Tradeoffs: Wrongful Convictions</i>	1108
	B. <i>Tradeoffs in Criminal Adjudication: The Right to Counsel</i>	1119
	C. <i>Prosecutorial Discretion: The Overlooked Benefits</i>	1129
	D. <i>Plea Bargaining: The Pluses</i>	1138
IV.	THE DEMOCRATIC VIRTUES OF OUR CRIMINAL JUSTICE SYSTEM	1145
	A. <i>Democratic Control over Crime and Punishment</i>	1145
	B. <i>Democratic Input Through the Criminal Jury</i>	1157
	C. <i>Democratic Accountability in State Judiciaries</i>	1165
V.	CONCLUSION	1168

I. INTRODUCTION

The American criminal justice system is on trial. A chorus of commentators—often but not exclusively in the legal academy—has leveled a sharp indictment of criminal process in our country. The

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indictment charges that large flaws infect nearly every stage of the adjudicatory process. And the prescriptions are equally far-reaching, with calls for abolition of many current practices and an overhaul of the entire system. What is more, the critics issue their condemnations essentially as givens, often claiming that all reasonable people could not help but agree that fair treatment of the accused has been fatally compromised. For these critics, "We live in a time of sharply decreasing faith in the criminal justice system."¹

As a judge with faith in that system, I am dismayed by the relentless insistence that we have it all wrong. Of course the system, like all human institutions, has its share of flaws. But the attacks have overshadowed what is good about the system and crowded out more measured calls for reform. The critics claim that major aspects of American criminal justice work to the detriment of defendants, when actually the reverse is often true. It is time for a more balanced view of our criminal process, which in fact gets a lot of things right.

A brief word as to the scope of this Essay. I have focused mainly on the adjudicatory process and on the criminal trial. I have not sought to explore police investigatory procedure on the one hand, or issues of detention and incarceration on the other, except insofar as they bear on the adjudicatory process in some way. They are vast topics in themselves, and the terrain I have covered is large enough.

My own reaction to the critics is one of gratitude for their contributions but dismay that they have allowed the pursuit of perfection in criminal justice to become the enemy of the good. Much about American criminal justice is indeed good. The system provides considerable protections for the accused and sets proper limits on the brutality and deceit that human beings can inflict upon each other.

Simply put, in calling for an overhaul of our criminal law and procedure, the critics have failed to appreciate the careful balance our criminal justice system strikes between competing rights and values. They have failed to respect the benefits of the system's front-end features—namely, early process and early resolution. Moreover, they have sold short the democratic virtues of our system. The sensible tradeoffs reflected in American criminal justice are worthy of respect, and the system's democratic tilt is deserving of praise. The critics have extended neither. Ultimately, the often harsh tone of their indictment has done an injustice to the system of criminal justice itself.

1. Harvey A. Silverglate, *The Tyranny of Good Intentions: How Prosecutors and Bureaucrats Are Trampling the Constitution in the Name of Justice*, 20 CATO J. 291, 292 (2000) (book review).

II. THE INDICTMENT

It is an article of faith among the legal intelligentsia that criminal justice is almost a contradiction in terms. The indictment of our criminal justice system contains a staggering number of charges, and attempting to catalogue them all would be impractical and tiresome. Instead, I offer a brief sketch of the prevailing portrayal of our system. It is a dark picture indeed.

At the heart of the indictment is the charge that our procedures fail to achieve the most basic task of a just system—the protection of the innocent from a fate that should be reserved only for the guilty. The accusers have used specific examples of wrongful conviction to advance the belief that our entire system is fatally flawed. Organizations like the Innocence Project claim that well over 20,000 Americans could be in jail for crimes they did not commit.² In response, the Innocence Project aims to “leverage the power of these remarkable stories to bring about fundamental improvement in our deeply flawed criminal justice system.”³ It claims to have “steadily convinced the nation that innocent lives are being destroyed by a system that must be fixed.”⁴ Not content with particularized prescriptions for improvement, the organization argues that the system “must be completely overhauled.”⁵

Prominent academics similarly transform individual instances of exoneration into ammunition for wide-scale attacks. Beginning with Edwin M. Borchard’s 1932 study,⁶ scholars have written numerous articles reporting instances of wrongful conviction and concluding that the criminal justice system is broken.⁷ One scholar, for instance, claims that mistaken convictions “will continue to happen with some regularity” and asserts that “most miscarriages of justice in capital cases never come to light.”⁸ Other critics similarly conclude that

2. BENJAMIN N. CARDOZO SCH. OF LAW, YESHIVA UNIV., *THE INNOCENCE PROJECT ANNUAL REPORT 7* (2010), available at <http://perma.cc/X5ZH-54RB>.

3. *Id.* at 3.

4. *Id.*

5. *Id.*

6. EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE 1* (1932).

7. See, e.g., Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1321 (1997) (arguing that “America’s criminal justice system creates a significant risk that innocent people will be systematically convicted”).

8. Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 472, 497 (1996).

exonerations “have challenged the traditional assumption that the criminal justice system does all it can to accurately determine guilt, and that erroneous conviction of the innocent is, as the Supreme Court has assumed, ‘extremely rare.’”⁹ Likewise, a review of a recent study of DNA exonerations declares that “the wrongful convictions were not idiosyncratic but resulted from a series of flawed practices that the courts rely on every day, namely, false and coerced confessions, questionable eyewitness procedures, invalid forensic testimony and corrupt statements by jailhouse informers.”¹⁰ Commentators have praised this study, calling it “a gripping contribution to the literature of injustice, along with a galvanizing call for reform.”¹¹

The critics also charge that unjust outcomes are a product of shortchanging the accused at every turn.¹² The principal culprit is the contemporary Supreme Court, which supposedly has eviscerated the panoply of rights available to criminal defendants. Indeed, commentators have accused the Court of “encourag[ing] police practices that have gutted *Miranda’s* safeguards,”¹³ nearly “abandon[ing]” the exclusionary rule,¹⁴ and creating a body of Fourth Amendment case law that protects only “middle-class homeowners.”¹⁵

In a similar vein, many critics believe that our criminal justice system fails to provide effective legal representation to indigent defendants, as the Sixth Amendment requires. As one scholar puts it, “No constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel.”¹⁶ The American Bar Association likewise declares that “indigent defense in the United

9. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 291–92.

10. Jeffrey Rosen, *The Wrongful Conviction as Way of Life*, <http://perma.cc/4MB4-5ULK> (nytimes.com, archived Mar. 12, 2014) (reviewing BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 1* (2011)).

11. *Id.*

12. See Silverglate, *supra* note 1, at 291 (“A tyranny of law has replaced the citizen’s protection of law . . .”).

13. Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1521 (2008).

14. Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 361 (2011).

15. See William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1287 (1999) (arguing that Supreme Court case law leads to better protection for middle-class rights than those of the poor in the context of search and seizure).

16. Stephen B. Bright, *Gideon’s Reality: After Four Decades, Where Are We?*, 18 CRIM. JUST. 5, 5 (2003).

States remains in a state of crisis.”¹⁷ Like-minded critics point to disparities in funding, such as the claim that indigent defendants “receive only an eighth of the resources per case available to prosecutors.”¹⁸ Others paint a bleak picture of a criminal defense bar “where advocacy is rare and defense investigation virtually nonexistent,” and where “individualized scrutiny is replaced by the indifferent mass-processing of interchangeable defendants.”¹⁹ “[A]ll too often, there are long delays before those accused of crimes are provided lawyers, and the lawyers appointed have excessive caseloads, do not have the investigative and expert assistance essential to defend a case, or lack the skill, knowledge, and inclination to provide competent representation.”²⁰ And some claim that the only possible justification for the current system is either a naive faith in the virtue of public defenders or a cynical assumption “that almost all indigent defendants are guilty.”²¹

Rather than ameliorating this sorry state of affairs, the Supreme Court has allegedly made the problem worse through its demanding standard for ineffective-assistance-of-counsel claims under *Strickland v. Washington*.²² According to one critic, “[n]o one believes” that *Strickland* “improves the trial process beyond a few rare cases of error.”²³ Instead, it has resulted in “a lesser standard for judging the competence of lawyers in a capital case than the standard for malpractice for doctors, accountants, and architects.”²⁴ And by accepting “the status quo as ‘effective,’ [*Strickland*] creates no

17. STANDING COMM. ON LEGAL AID & INDIGENT DEF., AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE*, at v (2004), available at <http://perma.cc/8FSU-FS23>.

18. DEBORAH L. RHODE, *ACCESS TO JUSTICE* 123 (2004).

19. David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1762 (1993); see also David Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1688 (2009) (“[P]ublic defenders and other court-appointed counsel . . . are so chronically and drastically underfunded that there is strong reason to doubt the vigor and effectiveness of the advocacy they can provide, in plea bargaining or at trial.”).

20. Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 703 (2012).

21. Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 122 (1993).

22. 466 U.S. 668, 686 (1984).

23. Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 308 (1997).

24. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1858 (1994).

incentive for states to improve on existing standards of legal representation for the poor.”²⁵

Under this view, the high bar for ineffective-assistance claims is but one example of the purportedly larger failure of appellate and collateral review to correct the grievous mistakes made at trial. The application of the harmless error doctrine allegedly shows that “judges are unwilling” to “respect the rights of criminal defendants whom they believe to be guilty,”²⁶ and the Court’s habeas jurisprudence promises to “stifle the development of due process and criminal process rights well into the future.”²⁷ Several advocates go as far as to charge that postconviction review “unacceptably hinder[s] claims of innocence.”²⁸

The story gets worse. In stark contrast to the plight of defendants stands the unbridled power of the prosecutor. The notion that “[n]o government official in America has as much unreviewable power and discretion as the prosecutor”²⁹ is a source of acute discomfort for the critics. They decry prosecutorial discretion as “unchecked by law and . . . barely checked by politics,”³⁰ “stand[ing] in sharp tension with the separation of powers,”³¹ and “inconsistent with the most fundamental principles of our system of justice.”³² Instead of monitoring this power, legislators have enhanced it by providing a broad menu of crimes that prosecutors can selectively enforce.³³ The profusion of criminal law has served to empower both prosecutors and police, “who can pick and choose among the multiple and overlapping related offenses that may apply.”³⁴ Moreover, the Sentencing Reform Act was a “decades-long enterprise provid[ing] prosecutors with

25. David Cole, *Gideon v. Wainwright and Strickland v. Washington: Broken Promises*, in *CRIMINAL PROCEDURE STORIES* 101, 114 (Carol S. Steiker ed., 2006).

26. Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1195 (1995).

27. Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 800–01 (1992).

28. Philip G. Cormier et al., *Federal Habeas Corpus & Actual Innocence*, NAT’L L.J., May 16, 2011, at 34.

29. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009).

30. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 840 (2006).

31. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1044 (2006).

32. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1554 (1981).

33. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509–10 (2001) (positing several theories for why the scope of criminal codes continues to broaden).

34. Paul H. Robinson et al., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. CRIM. L. & CRIMINOLOGY 709, 712 (2010).

indecent power relative to both defendants and judges, in large part because of prosecutors' ability to threaten full application of the severe Sentencing Guidelines.³⁵ Finally, the "diffuse and elastic" concepts of "public interest or justice" supposedly furnish no constraints on prosecutorial caprice,³⁶ and the lack of any significant form of review "raises the prospect that . . . racial and ethnic minorities, social outcasts, [and] the poor . . . will be treated most harshly."³⁷

According to many commentators, the dangers inherent in this discretion have only increased with the burgeoning rate of plea bargaining. The wide array of overlapping criminal offenses, coupled with "savagely excessive sentences,"³⁸ have given prosecutors an arsenal with which to bully defendants into "trad[ing] excess charges for a guilty plea" or "accept[ing] lesser punishments to avoid a substantial risk of a much greater" one.³⁹ By forcing defendants to bargain away their only possible check on prosecutorial power—judicial oversight—the prosecutor "combines both executive and judicial power—posing the very danger the Framers tried to prevent."⁴⁰

Going further, many critics bemoan the very presence of plea bargaining in the criminal justice system. With the criminal jury trial becoming "almost as rare as the spotted owl,"⁴¹ the vast majority of criminal cases are handled through these ostensibly contractual arrangements. To many, this is a travesty. The critics accuse plea bargaining of meting out criminal sanctions "without full investigation, without testimony and evidence and impartial factfinding";⁴² allocating punishment based "on wealth, sex, age, education, intelligence, and confidence" rather than culpability;⁴³ and pushing innocent defendants to accept punishments for crimes they

35. Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 *YALE L.J.* 1420, 1425 (2008).

36. Bibas, *supra* note 29, at 961–62.

37. Vorenberg, *supra* note 32, at 1555.

38. Luban, *supra* note 19, at 1744.

39. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 *STAN. L. REV.* 29, 33 (2002).

40. Barkow, *supra* note 31, at 1048.

41. Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 *STAN. L. REV.* 1721, 1721–22 (2005) (reviewing GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003)); *see also* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992) (Plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system").

42. Scott & Stuntz, *supra* note 41.

43. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *HARV. L. REV.* 2464, 2468 (2004).

did not commit, without the full discovery and safeguards of a criminal trial.⁴⁴ Worse still, say various commentators, this state of affairs is the result of “systemic” problems rather than private ordering⁴⁵ and is linked to the fact that “we punish people . . . simply for going to trial.”⁴⁶ Little room is left for respectful disagreement. As one observer has asserted, “I assume rather wide agreement that, in an ideal world, plea bargaining would be infrequent or nonexistent.”⁴⁷ Across the spectrum, critics have decried plea bargaining as “unconstitutional,”⁴⁸ a “disaster,”⁴⁹ and a “dreadful monster[] of American criminal justice.”⁵⁰

Implicit in the denunciation of prosecutorial discretion and plea bargaining is the assumption that Congress “criminalizes too much and sentences too harshly.”⁵¹ Criminal punishment is not only “getting harsher,”⁵² the narrative goes, but is “more degrading”⁵³ than the punishment meted out by most European countries. The fact that punishment is in part a product of the democratic process has not given the detractors pause. Quite the opposite. Some scholars dismiss the public’s “views regarding the crime rate and the need to control criminal activity” as “notoriously inaccurate and overblown.”⁵⁴ Moreover, the critics seem impervious to the possibility of another point of view, or at the very least the merits of a more nuanced critique. Even where the charges contain real elements of truth, they tend to be framed in sweeping terms. According to one scholar, “Experienced practitioners, policy analysts, and researchers have long agreed that mandatory penalties in all their forms . . . are a bad

44. See Stephanos Bibas, *Harmonizing Substantive Criminal Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1383–85 (2003) (criticizing other commentators’ conceptions of the plea bargaining process as fair to criminal defendants).

45. Timothy Lynch, *The Case Against Plea Bargaining*, REG., Fall 2003, at 24, 27.

46. *Berthoff v. United States*, 140 F. Supp. 2d 50, 68–69 (D. Mass. 2001) (Young, C.J.).

47. Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1039 (1984).

48. Lynch, *supra* note 45, at 24.

49. Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2009 (1992).

50. Albert W. Alschuler, *Plea Bargaining and the Death Penalty*, 58 DEPAUL L. REV. 671, 671 (2009).

51. Stuntz, *supra* note 30, at 844.

52. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 3 (2005).

53. *Id.* at 17.

54. PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN’T GIVE PEOPLE WHAT THEY DESERVE* 4 (2006).

idea.”⁵⁵ And another, bemoaning high rates of imprisonment, suggests that “[t]heorists of nearly every ideological stripe are . . . united in their support for alternative sanctions”⁵⁶ for many crimes.

Not all counts in the indictment are the same. The historic mistreatment of African-Americans at the hands of the criminal justice system is widely acknowledged, and no one would contend that the vestiges of those tragic practices have all been removed. How best to overcome this historic stain on the system remains a matter of debate. It is apparent, however, that the charge of racial disparity is an undercurrent of the entire assault on the system and of the attack on the death penalty in particular. Racial disparities are often explained as intentional and deep-rooted features of the system, for example, as the result of a “combination of police practices and legislative and executive policy decisions that systematically treat black offenders differently, and more severely, than whites.”⁵⁷ And legal scholarship is rife with the accusation that “the practice of imposing and executing death sentences preponderantly upon African-American defendants and those convicted of crimes against white victims has become a ubiquitous, deeply entrenched feature of the American courthouse scene.”⁵⁸

What is more, according to the critics, there has been little to no sign of progress. In fact, “[T]he advent of mandatory guidelines and mandatory minimums created a new kind of racial unfairness that did not previously exist.”⁵⁹ As a recent op-ed author charged, the death penalty “remains as racist and as random as ever.”⁶⁰ For many academics, therefore, the only remedy is its abolition. And with respect to racial inequities more generally, the call for abolition, not reform, is often the course of first resort. As one scholar suggests, racial disparities should be addressed through “radical decarceration; fundamental changes in drug policy; [and] repeal of mandatory minimum, three-strikes, and life without possibility of parole laws.”⁶¹

55. Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 *CRIME & JUST.* 65, 65 (2009).

56. Dan M. Kahan, *Punishment Incommensurability*, 1 *BUFF. CRIM. L. REV.* 691, 691–92 (1998).

57. Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 *CRIME & JUST.* 273, 274 (2010).

58. E.g., Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 *COLUM. HUM. RTS. L. REV.* 34, 37 (2007).

59. Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 *U. PA. L. REV.* 1631, 1686 (2012).

60. David R. Dow, *Death Penalty, Still Racist and Arbitrary*, *N.Y. TIMES*, July 9, 2011, at A19.

61. Tonry, *supra* note 57, at 307.

Some of the above critiques have an element of truth. But if the critics are correct, our criminal justice system is not only broken, but very nearly beyond repair. Instead of possessing both strengths and weaknesses, it fails us in every respect. If people knew of American criminal law only through modern commentary, they could be forgiven for thinking it is impossible for a defendant ever to get a fair trial. Judging by the critics' descriptions, the accused face a justice system that the centuries have done little to improve; the process the accused receive will be now, as always, "nasty, brutish, and short."⁶² For the life of me, I cannot see how this bleak picture accords with reality. Whatever problems our system has, it cannot be as bad as all that.

III. A DEFENSE OF AMERICAN CRIMINAL JUSTICE

In light of this sweeping and skewed indictment, it is time to provide a fairer appraisal of the American criminal justice system. The wisdom of its tradeoffs, the value of its front-end features, and the vitality of its democratic taproots make our criminal justice system worthy of admiration and respect. Many of our system's supposed deficiencies—from convicting the innocent to inadequately defending the accused—are the result of difficult but necessary tradeoffs between competing values. The great strength of the system is that it ensures that many of the most contestable choices are made democratically, and not imposed by elites who operate outside the political arena and whose perspective, while valuable, has slipped too uncritically into a collective one-sidedness. By acknowledging the virtues of our institutions, we can begin to approach their inevitable failings with the recognition that neither diagnosis nor cure is all that simple.

A. The Inevitability of Tradeoffs: Wrongful Convictions

Why are tradeoffs between the claims of society and rights of the accused both necessary and beneficial? Because when a country fails to enforce vigorously its criminal law, it sacrifices both its moral and legal fiber. But when a country countenances sloppiness and shortcuts in the execution of its criminal proscriptions, it sacrifices its sacred heritage of liberty under law. A tension between these two supreme values cannot be resolved other than through compromise,

62. THOMAS HOBBS, *LEVIATHAN* 89 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

and the American criminal justice system has for the most part managed these essential tradeoffs well.

Let us begin with the charge of wrongful convictions, a perennial issue that the critics have cleverly used as the drumbeat for reform. Of course, this accusation is hardly novel. Nor is the counterargument that it is much exaggerated. In 1923, Judge Learned Hand expressed his skepticism: “Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”⁶³ We need not go so far as to say the concern is unreal—it suffices to respect Judge Hand’s observation that “we must work with human beings and we can correct such errors only at too large a price.”⁶⁴ Systems of criminal justice depend inescapably on the judgment of *people*—be they judges, jurors, prosecutors, or defense attorneys—and so the system will necessarily have much the same capacity for error as the people who comprise it. The proper question is not, as so many critics would have it, “What parts of the system must be overhauled to reduce conviction of the innocent?” Rather, it must be, “How can we calibrate the balance struck by our system so as to avoid the concededly deplorable outcomes of conviction of an innocent man and exoneration of the guilty?”

This notion of proper balancing has a long history in our conception of criminal justice. It dates at least to Abraham’s colloquy with God over how many innocent citizens of Sodom and Gomorrah must exist to spare the cities from destruction.⁶⁵ This parable evolved into the familiar criminal law teaching of the “Blackstone ratio,”⁶⁶ derived from that venerable author’s admonition that it is “better that ten guilty persons escape, than that one innocent suffer.”⁶⁷ At its core, the ratio is not about the proper statistical distribution of convictions and acquittals; despite the best efforts of scholars,⁶⁸ the true question defies mathematics. The ratio is about balancing the twin aims of our criminal justice system: How do we punish as many of the deserving guilty as possible while ensnaring as few of the innocent as possible? Or, more simply: How does a civilized society remain both safe and free?

63. *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

64. *Id.*

65. *Genesis* 18:23–32.

66. Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997).

67. 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

68. See, e.g., Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 75–80 (2008) (attempting to create formulas assessing the rates of false convictions and false acquittals).

Critics threaten to upset this balance in addressing the two most frequently cited causes of wrongful convictions: mistaken eyewitness identifications and false confessions. In a recent decision overhauling its state's procedures for eyewitness identifications, the New Jersey Supreme Court declared "eyewitness misidentification [to be] the leading cause of wrongful convictions across the country."⁶⁹ The court based this conclusion on a review of scientific literature purporting to establish the fallibility of eyewitnesses' memories and the cognitive biases that prevent jurors from properly weighing eyewitness testimony.⁷⁰ Importantly, the U.S. Supreme Court has held that due process requires an eyewitness identification to be excluded only if it was tainted by "suggestive" police conduct *and* it lacks sufficient indicia of reliability.⁷¹ But the critics would go further and subject all allegedly "suggestive" identifications to pretrial admissibility hearings⁷² or even categorically exclude all identifications elicited under conditions that fail to comport with certain procedural safeguards.⁷³

Critics perceive a similarly dire threat in—and call for similarly sweeping solutions to—the problem of false confessions. They acknowledge that coerced confessions and those obtained in the absence of *Miranda* warnings are already subject to exclusion under the Fifth Amendment.⁷⁴ Involuntariness and alleged unreliability, however, do not seem quite the same. The former speaks to constitutionality; the latter to the quintessential jury question of whether a confession is more or less true. Even as the critics concede that "we still do not know (and probably will never know) the

69. *New Jersey v. Henderson*, 27 A.3d 872, 878 (N.J. 2011).

70. *See id.* at 894–912 (discussing scientific studies on eyewitness testimony and juror understanding of eyewitness reliability). For an overview of this literature, see GARRETT, *supra* note 10, at 45–83.

71. *Perry v. New Hampshire*, 132 S. Ct. 716, 720 (2012) (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

72. This was the approach adopted by the New Jersey Supreme Court in *Henderson*. *See* 27 A.3d at 878.

73. *See, e.g.*, Timothy P. O'Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 136–39 (2006) (suggesting an alternative to existing eyewitness identification rules).

74. *See Arizona v. Fulminante*, 499 U.S. 279, 302 (1991) (granting a new trial with exclusion of coerced confession); *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (establishing exclusionary rule for confessions obtained without warnings); Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2014–20 (1998) (discussing the post-*Miranda* voluntariness test).

incidence of false confessions,”⁷⁵ they insist that “the empirical evidence shows that standard [police] interrogation techniques are likely to lead to untrustworthy confessions in a significant number of cases.”⁷⁶ In light of this evidence, critics not only would reform police interrogation procedures but also would require pretrial hearings to assess the reliability of confessions in light of the circumstances in which they were made.⁷⁷ Such an approach would have trial judges exclude many more confessions rather than allow jurors to make their own determinations.

I do not deny the existence of mistaken eyewitness identifications and unreliable confessions. And I of course support the efforts of legislatures, law-enforcement agencies, and the criminal defense bar to enhance the accuracy and reliability of such evidence. Photo lineups in particular need some tightening up, with blind lineups—where the officer directing the lineup is not aware of the suspect’s identity—being a frequently suggested improvement.⁷⁸ But the critics’ proposed solutions—a significant increase in cumbersome pretrial hearings and the outright exclusion of relevant evidence—go too far. Our criminal justice system does not attempt to avoid wrongful convictions at all costs, but rather balances this imperative against the need to protect public safety by punishing people who commit crimes. In striking this balance, the system depends on the adversarial process to test the reliability of evidence. As the Supreme Court recently put it, “The Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit.”⁷⁹ The appropriate way to prevent wrongful convictions based on allegedly mistaken identifications and allegedly unreliable confessions is rigorous adversarial testing, not additional pretrial screening and exclusion. In urging the latter

75. Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 515.

76. Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 110 (1997).

77. See, e.g., Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1109–13 (2010) (suggesting ways to regulate the substance of confessions); Leo et al., *supra* note 75, at 531–35.

78. See Spencer S. Hsu, *9 in 10 Va. Police Agencies Fall Short of Photo Lineup Guidelines Meant to Reduce Mistakes*, <http://perma.cc/T9R9-Z8TH> (washingtonpost.com, archived Mar. 12, 2014) (discussing failure of police departments to implement improved guidelines for lineups despite misidentification problems).

79. *Perry v. New Hampshire*, 132 S. Ct. 716, 723 (2012).

course, critics ignore the fact that the whole reason for a trial is to determine how persuasive the evidence actually is.

Perhaps the most telling example of our system striking a balance between punishing the guilty and protecting the innocent is the instruction that jurors must find criminal defendants guilty as charged “beyond a reasonable doubt.” This illustration is of course linked to Blackstone’s ratio, since “one of the major variables in achieving that ratio is the degree of certainty we impose on factfinders.”⁸⁰ It bears noting what “reasonable doubt” is not: it is decidedly not the same as “by a preponderance of the evidence” (a simple more-likely-than-not standard),⁸¹ or even “clear and convincing evidence” (somewhere between the preponderance standard and that of reasonable doubt).⁸² The adoption of differing standards of proof for civil and criminal cases acknowledges what social scientists call “different disutilities for errors in different situations.”⁸³ Or as John Rawls put it, “[T]he correct regulative principle for anything depends on the nature of that thing.”⁸⁴ We acknowledge that wrongfully depriving an innocent man of his liberty is a worse outcome than wrongfully picking his pocket with an erroneous civil judgment,⁸⁵ so we strive to find a balance that does not tip too far in favor of a crime control policy that depends on incarcerating the blameless.

And yet “reasonable doubt” does not require absolute certainty. Jeremy Bentham voiced the concern that “[a]ccording to [Blackstone’s] maxim, nobody ought to be punished, lest an innocent man be punished.”⁸⁶ Bentham was right to be worried, because society pays a

80. Jon O. Newman, Chief Judge, U.S. Court of Appeals for the Second Circuit, Madison Lecture: Beyond “Reasonable Doubt” (Nov. 9, 1993), in 68 N.Y.U. L. REV. 979, 981 (1993).

81. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993).

82. *In re Davis*, 565 F.3d 810, 818 (11th Cir. 2009) (noting that “clear and convincing evidence” is a more rigorous standard than simply “more likely than not”).

83. Michael J. Saks & Samantha Neufeld, *Convergent Evolution in Law and Science: The Structure of Decision-Making Under Uncertainty*, 10 LAW, PROBABILITY & RISK 133, 135 tbl.1 (2011).

84. Mark C. Murphy, *Natural Law and the Moral Absolute Against Lying*, 41 AM. J. JURIS. 81, 84 n.15 (1996) (quoting JOHN RAWLS, A THEORY OF JUSTICE 29 (1st ed. 1971)).

85. In addition, the more punitive the nature of the civil judgment, the more demanding the standard of proof. See Geoffrey C. Hazard, Jr. & Dana A. Remus, *Advocacy Revalued*, 159 U. PA. L. REV. 751, 763 n.50 (2011) (“In certain civil cases where the stakes are higher, such as where punitive damages may be awarded, courts may require facts against the defendant to be established by clear and convincing evidence.”). The standard further illustrates the use of differing burdens of proof to reflect different degrees of perceived harm from an erroneous outcome.

86. James R. Acker & Catherine L. Bonventre, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245, 1253 n.35 (2010) (quoting M.

price every time a guilty criminal walks our streets, a cost too often overlooked by those preoccupied exclusively with the conviction of the innocent. As early as 1969, the singular focus on wrongful convictions in the indictment of our criminal justice system had become so insistent that it led Justice Black to quip that “[i]t is seemingly becoming more and more difficult to gain acceptance for the proposition that punishment of the guilty is desirable.”⁸⁷ In reality, “there is and must be a limit to our willingness to protect the innocent at the expense of public safety,”⁸⁸ for as much as innocent defendants are horribly victimized by wrongful convictions, so too are innocent citizens victimized a second time by the failure to punish those who commit horrible crimes against them.⁸⁹ My point is ultimately a simple one: the beyond-a-reasonable-doubt standard balances our concern about doing injustice to innocent defendants against our concern about doing injustice to the victims of crime. Each of these concerns seeks to ward off deeply inhumane inflictions on innocent citizens at the hands of, or as a result of, the erroneous actions of the state.

Beyond a reasonable doubt seems to me a particularly elegant way to strike this balance. Not only does the reasonable-doubt standard seek a rhetorical equilibrium between the government’s “moral obligation to protect its people from crimes . . . and [its] . . . moral obligation to respect various constraints placed on its power, including desert-based limitations on punishment.”⁹⁰ It also frames the balancing test in terms of the real world inhabited by the jurors asked to apply it. Judges occasionally describe the government’s burden in terms that make the decision to convict a personal one for jurors, instructing them, “Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.”⁹¹ While I believe any elaboration upon the reasonable-doubt standard is a dangerous instructional exercise, I

DUMONT, A TREATISE ON JUDICIAL EVIDENCE, EXTRACTED FROM THE MANUSCRIPTS OF JEREMY BENTHAM, ESQ. 198 (1825)).

87. Kaufman v. United States, 394 U.S. 217, 240–41 (Black, J., dissenting).

88. Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 134 (2008).

89. Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 695–96 (1999).

90. Youngjae Lee, *Deontology, Political Morality, and the State*, 8 OHIO ST. J. CRIM. L. 385, 402 (2011).

91. 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS X 4.02, Instruction 4-2 (1993).

have little doubt that the standard itself leads jurors to a thorough examination of the evidence and encourages them to strike the balance according to their highest sense of duty, not the questionable math of Blackstone's ancient aphorism.

The genius of the reasonable-doubt formulation and the sense of balance and duty it brings to jury deliberations can, of course, be overstated. But though relatively few cases go to trial, the standard serves as a welcome backdrop to pretrial investigations and plea negotiations, warning prosecutors off a flimsy case. And though the standard may not serve to rescue every inadequately defended case, it doubtlessly adds to acquittals in a good many circumstances, especially when coupled with the requirement that a jury be unanimous. For notwithstanding the benefits of federalism, a constitutional requirement of jury unanimity is indispensable to reducing the rate of error in criminal cases, thereby raising confidence in the system. I have come to believe that the Supreme Court's decisions in *Johnson v. Louisiana*⁹² (holding that a state law allowing conviction by only nine of twelve jurors does not violate due process) and *Apodaca v. Oregon*⁹³ (conviction by ten of twelve) were serious mistakes. Most jurors who hold out do so for acquittal, and the need to convince the remaining one or two doubters helps ensure that verdicts adverse to the defendant have been carefully thought through. The reasonable-doubt standard in fact poses a substantial enough burden upon the prosecution that it often leads to frustration over high profile acquittals: the O.J. Simpson and George Zimmerman trials are prime examples. But that the jury takes the standard seriously should be cause for respect, not anger or alarm.

In some respects, the burden of beyond a reasonable doubt is itself part of a larger equipoise within our criminal justice system: the emphasis on vindicating the rights of the accused early, through the trial process, rather than late, through endless collateral attack. This too is a balance the critics would upset in favor of extended collateral review, believing that an "inmate's best chance of having his . . . constitutional rights vindicated traditionally occurs after filing a writ of habeas corpus in federal court."⁹⁴ It is no accident that collateral review gives learned judges greater opportunities to vacate lay jury verdicts for a variety of alleged errors. I suspect that many of

92. 406 U.S. 356, 362 (1972).

93. 406 U.S. 404, 406 (1972).

94. Kenneth Williams, *The Deregulation of the Death Penalty*, 40 SANTA CLARA L. REV. 677, 681 (2000).

the critics would admit to a greater affinity for judges than for jurors and for federal more than for state courts. Be that as it may, the action of a single federal district judge overturning, say, a seven-member state supreme court, or overriding twelve jurors who actually sat through trial, is something that should occur less rather than more frequently. Among judges, what is or is not a wrongful conviction is often less a matter of timeless truth than what lies in the eye of the beholder. And it is no knock on American criminal justice that it declines to allow the most minor doubts about conviction to devalue the common sense of juries or to undermine the utility of finality in expressing the firmness of social judgment and in allowing a true rehabilitation process to begin.

Those who bemoan American criminal justice can hardly doubt its amplitude of process. Judge Henry Friendly lamented that “[a]fter trial, conviction, sentence, appeal, affirmance, and denial of certiorari by the Supreme Court, . . . the criminal process, in Winston Churchill’s phrase, has not reached the end, or even the beginning of the end, but only the end of the beginning.”⁹⁵ The tradeoff for this abundant process must be that the later stages of review adopt a genuinely deferential posture to the earlier, reversing a conviction only when the outcome “was contrary to, or involved an unreasonable application of, clearly established Federal law,”⁹⁶ or when the accused presents facts “sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”⁹⁷ Were it otherwise, the foundational concepts of trial and direct appeal would be reduced to near meaninglessness. That such eminently sensible tradeoffs should be a source of consternation—characterized by one critic as “flawed procedures that ultimately blur the line between rational justice and irrational vengeance”⁹⁸—deals the system still another bad academic rap.

The Bill of Rights accords with the view I share with Judge Friendly, that due process is early process, not perpetual review. The initial constitutional emphasis in our system is upon constraints on the collection of evidence in the first place, either through

95. Henry J. Friendly, Judge, U.S. Court of Appeals for the Second Circuit, Ernst Freund Lecture: Is Innocence Irrelevant? Collateral Attack on Criminal Judgments (1970), in 38 U. CHI. L. REV. 142, 142 (1970).

96. 28 U.S.C. § 2254(d)(1) (2012).

97. *Id.* § 2254(e)(2)(B).

98. Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 795 (2002).

unreasonable searches or coercive interrogation. The Constitution's second great emphasis is upon trial. It must be "speedy and public."⁹⁹ The accused possesses the right to "the Assistance of Counsel for his defence,"¹⁰⁰ the right not to be compelled to give evidence against himself,¹⁰¹ the right to confront the evidence and witnesses against him before a jury of his peers, and the right to compel the production of evidence in his defense.¹⁰² And should he be acquitted, he has the right to leave the courthouse secure in the knowledge that he may not be placed in jeopardy again.¹⁰³ Should the prosecution later acquire damning evidence, too late and too bad.

This litany—however familiar—bears repetition, because notably absent from the express enumerations of the Framers is much of an emphasis upon collateral review.¹⁰⁴ The presence of federal habeas review as a necessary backstop of last resort can hardly obscure the fact that the Bill of Rights writ large represents a system of criminal justice designed to emphasize trial and the heavy presumption of validity of the judgment rendered therein. This emphasis upon early resolution and early vindication ultimately serves the interests of the accused in the most practical way. For federal habeas relief comes, if at all, very late in the day. The writ may serve as something of a vindication, but only a partial and belated one. Years generally elapse between the conclusion of trial and the termination of collateral proceedings, and in noncapital cases, habeas relief may be little more than a salve or palliative for an inmate whose sentence has already been substantially served.

It is worth spending time upon the whole issue of collateral review because it is here—in a quest for virtually *de novo* collateral proceedings—that critics have staked their hopes that the underlying errors and injustices of American criminal justice can be at least partially corrected. Thus we have witnessed the ubiquitous ineffective-assistance-of-counsel claim. Such claims are occasionally justified. Far more often, though, they render an acute disservice to attorneys in the trial arena whose professional judgment is questioned whenever, in hindsight, it did not lead to an optimal outcome, even in a hopelessly suboptimal case. We have likewise witnessed the effort to

99. U.S. CONST. amend. VI; Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-74 (2012).

100. U.S. CONST. amend. VI.

101. *Id.* amend. V.

102. *Id.* amend. VI.

103. *Id.* amend. V.

104. *See id.* art. I, § 9 (stating that the "Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it").

constitutionalize access to DNA evidence in postconviction proceedings,¹⁰⁵ ignoring the host of difficult practical and technological questions that legislative involvement may flexibly address and that constitutionalizing the area may rigidify.

All this emphasis upon ultimate innocence has led some who discredit the American system to overlook its promise of early vindication and prompt justice. The complaint in any front-loaded system will invariably be that insufficient investigatory resources are afforded the accused, a complaint that is sometimes exaggerated, at other times just. The answer, however, is not to back up the system, and to their great credit, the Framers did not. Collateral relief from state convictions is not only late, but also unlikely, given the Antiterrorism and Effective Death Penalty Act of 1996 (commonly known as “AEDPA”). Attorneys and firms that place their often splendid talents in collateral proceedings are missing the Framers’ point. A conviction is not ipso facto the sign of a failure of the system, any more than is the fact of acquittal. Both reflect a preference for early process. The tradeoff for early process is again the quintessential one. Fresher evidence and quicker absolution (or punishment) are set against the possibilities, always present but often theoretical, that something somewhere might have been done differently and that something somewhere might have gone amiss.

The preference for fact-finding by lay juries applying standards enunciated in terms of common experience may be largely an Anglo-American phenomenon, and other nations have struck the balance differently. For example, “[T]he European judicial model[,] . . . made perhaps most famous through John Langbein’s much cited” work on German courts,¹⁰⁶ serves as a useful point of comparison. Langbein has explained that the German model relies on mixed panels of judges and jurors that need not reach a unanimous verdict in order to convict and in which the judges act as both prosecution and defense in examining witnesses.¹⁰⁷ Appellate review is concomitantly different. In some cases, complete retrial before a new panel is provided; in others, review by a large number of judges. And in all cases, the prosecution enjoys the same entitlement to appeal as the defense.¹⁰⁸ I

105. See, e.g., *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 67–75 (2009) (holding that the Due Process Clause does not create a right to DNA evidence in a postconviction context).

106. Amalia D. Kessler, *Marginalization and Myth: The Corporatist Roots of France’s Forgotten Elective Judiciary*, 58 AM. J. COMP. L. 679, 679 (2010).

107. John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195, 199–201.

108. See *id.* (describing the appeals process within German criminal courts).

offer this example not to compare the merits of the two systems—although I disagree with Langbein’s conclusion that “the presence of professional judges in deliberations” is a necessary “safeguard[] against lay inexperience”¹⁰⁹—but rather to demonstrate that the design of any system of criminal justice incorporates this notion of balance. Germany has opted for a less rigorous, less adversarial procedure at trial than we have enshrined in our Constitution, but it has complemented that with more extensive appellate review. We have chosen an inverse approach, one that gives the jury a big say, entrusting it with weighing the case for guilt or acquittal, in a trial process replete with procedural protections for the accused. Tacking on ponderous proceedings down the line upsets the balance of our system and is ill suited to the panoply of rights at trial that is the cornerstone of our constitutional design.

At the end of the day, the debate between Blackstone and Bentham over the acceptable ratio of improper acquittals to wrongful convictions is not one on which the Constitution strictly takes sides. That is to say, the Constitution does not guarantee a particular *result*; it does not guarantee that an innocent person will never be convicted or that a guilty person will never be set free. It instead guarantees a *process* that is designed to promote accuracy. To the extent the Constitution does put a thumb on the scale in either direction, the processes afforded under the Bill of Rights and the due process roots of the reasonable-doubt standard suggest that it does so in favor of the accused. But one could also read the Constitution as recognizing that perfect accuracy is impossible, for instance, through its guarantee of a “speedy and public trial,” but not a “perfect” one.¹¹⁰ Perfection cannot be a constitutional guarantee because the process involves human juries, judges, and attorneys, and human nature is not perfect. Our goal should thus be to make the process as accurate as we can, relying especially on legislative reforms and improvements in technology to bring about greater accuracy. The Constitution encourages such efforts to minimize error, but it also encourages critics to bear in mind that perfect accuracy is, at bottom, not a part of its fundamental design.

109. *Id.* at 202.

110. U.S. CONST. amend. VI.

B. Tradeoffs in Criminal Adjudication: The Right to Counsel

If the American criminal justice system is front-loaded, if it trusts more in the adversarial exchange at trial to determine guilt and innocence than in appellate and collateral review, then we must ask whether this trust is well placed. Does criminal adjudication adequately protect defendants from wrongful conviction, or does it instead stack the deck in favor of the prosecution? Most commentators argue that the current structure of criminal adjudication confers an unfair advantage on prosecutors. Foremost among the numerous counts of this indictment is the claim that criminal defendants, the majority of whom are indigent, often receive inadequate representation, rendering them vulnerable to powerful, overzealous government lawyers. Although the Supreme Court has recognized a constitutional right to counsel in *Gideon v. Wainwright*,¹¹¹ that right, in the eyes of skeptics, has proved a hollow promise. As one critic puts it, “No constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel. . . . For far too many people accused of crimes, the right to counsel is meaningless and unenforceable.”¹¹² And without a meaningful right to counsel, criminal adjudication cannot be trusted to apportion justice without regard to defendants’ financial circumstances.

Critics identify a number of supposed defects in the current system of indigent criminal defense. They begin by asserting that the lawyers who represent indigent defendants are among the least competent members of the bar. Whereas the best and the brightest law school graduates are typically thought to become corporate lawyers or prosecutors, lawyers for indigent defendants “are considered the stepchildren of the justice system and are looked upon as biding their time until they can get a ‘real job.’”¹¹³ Critics tend to attribute this dearth of talent to the compensation that lawyers for indigent defendants receive, which tends to be “at the lowest end of the professional pay scale.”¹¹⁴ More generally, they argue that *Gideon*

111. 372 U.S. 335, 342 (1963).

112. Bright, *supra* note 16, at 5.

113. Heather Baxter, *Gideon’s Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 350–51 (footnote omitted) (quoting LEE SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS* 149 (1965)).

114. Note, *Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2064 (2000) (footnote omitted) (citing *Martinez-Macias v. Collins*, 979 F.2d 1067, 1067 (5th Cir. 1992) (Higginbotham, J.)).

“has been gutted by indifference and financial neglect.”¹¹⁵ Indeed, they consider an acute lack of funding to be “[t]he central obstacle to adequate representation of indigent criminal defendants.”¹¹⁶ The Great Recession and its aftermath have only exacerbated this financial shortfall, for “when states go chopping, those who represent indigent defendants are usually at the top of the chopping block.”¹¹⁷ The system of indigent criminal defense is thus alleged to labor under severe deficits of both financial and human capital.

Even as society has supposedly denied necessary resources to the lawyers who represent indigent defendants, it has asked them to assume ever more onerous caseloads. According to the U.S. Department of Justice, “From 1999 to 2007, public-defender program caseloads increased by 20% while staffing increased by 4%.”¹¹⁸ Some critics go so far as to argue that excessive caseloads create a troublesome conflict of interest for public defenders: saddled with hundreds of cases and starved of the resources necessary to fully attend to each, public defenders have no choice but to induce their clients to accept whatever plea bargain prosecutors offer, irrespective of its terms.¹¹⁹ This conflict is allegedly even more vexing for court-appointed counsel, whose compensation, unlike that of public defenders, is often subject to a cap for each case and who thus have especially strong incentives “to push plea bargains and dispatch with cases quickly and with little investigation.”¹²⁰ Simply put, society is

115. Editorial, *Fulfilling Gideon's Promise: The Justice Department's Push for Better Legal Representation for Poor Defendants*, WASH. POST, Mar. 9, 2010, at A18.

116. Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 *FORDHAM L. REV.* 1615, 1620 (2002).

117. Baxter, *supra* note 113, at 353.

118. LYNN LANGTON & DAVID FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF PUBLIC DEFENDER OFFICES, 2007: STATE PUBLIC DEFENDER PROGRAMS 18 (2010) [hereinafter BJS STATE]; *see also id.* at 12–14 (noting that many state public defender programs exceeded recommended caseload limits); DONALD J. FAROLE, JR. & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF PUBLIC DEFENDER OFFICES, 2007: COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES 1, 8–10 (2010) [hereinafter BJS COUNTY] (discussing caseloads in county-based public defender offices).

119. *See generally* Heidi Reamer Anderson, *Funding Gideon's Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 *HASTINGS CONST. L.Q.* 421, 421–24 (2012) (arguing that underfunding public defenders creates conflicts of interest). *But see* Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 *EMORY L.J.* 753, 765–66 (1998) (noting that “[t]he quick disposition of cases allows public defenders to give more time and effort to the cases they consider more trial-worthy”).

120. Emily Giarelli, Note, *Rethinking Webb, Reallocating Resources: When Virginia's Fee Caps Create Conflicts of Interest, Public Defenders Must Provide Alternatives*, 24 *GEO. J. LEGAL ETHICS* 569, 569 (2011).

asking lawyers who represent indigent defendants to do more with less.

All these alleged defects would be somewhat less disconcerting to critics if prosecutors faced similar resource constraints. In that case, at least criminal adjudication could be said to be “fair” in the sense that neither side would enjoy a significant advantage over the other. But critics argue that prosecutors have significantly more resources and receive significantly higher levels of compensation than lawyers who represent indigent defendants.¹²¹ Indeed, “poor defendants . . . ‘receive only an eighth of the resources per case available to prosecutors.’”¹²² Because of such disparities, even the most capable defense counsel often cannot prepare their cases as thoroughly as prosecutors prepare theirs. In particular, whereas prosecutors have extensive police and other investigative resources at their disposal, public-defender offices typically have only a small handful of investigators on staff—if they have any at all.¹²³ Consequently, public defenders must, to a significant degree, rely on prosecution-conducted investigations, a reliance that critics believe undermines the adversarial presuppositions of criminal adjudication.¹²⁴

The claim that resource disparity undermines the quality of criminal defense is a recurrent one. It is true that prosecutors generally have access to more investigative resources than criminal defendants. *Brady v. Maryland*,¹²⁵ which requires prosecutors to turn over exculpatory evidence to defendants, may help to rectify this imbalance. But this cure is incomplete because what evidence

121. See, e.g., Baxter, *supra* note 113, at 362–63.

122. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1045 n.60 (2006) (citation omitted) (quoting DEBORAH L. RHODE, ACCESS TO JUSTICE 123 (2004)).

123. See BJS COUNTY, *supra* note 118, at 1, 12 (discussing the lack of investigative resources among county-based public defender offices); BJS STATE, *supra* note 118, at 1, 16 (noting that state public defender programs had “1 investigator for every 6 [full-time equivalent] litigating attorneys in 2007”).

124. See, e.g., Robert P. Mosteller, *Failures of the American Adversarial System To Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness*, 36 N.C. J. INT’L L. & COM. REG. 319, 362 (2011) (claiming “a theoretical advantage in the basic design of the more neutral inquisitorial method of fact investigation as opposed to the partisan design of the adversarial systems, which with a chronically and significantly underfunded defense effectively puts investigative control in the hands of the prosecutor”).

125. 373 U.S. 83 (1963).

qualifies as “exculpatory” or “material” is open to interpretation.¹²⁶ An open-file policy, where prosecutors make files more broadly available to defendants, is also not fully ameliorative, because such policies may be subject to exceptions with respect to sensitive witnesses and informants, and because the evidence in the open file may be gathered by investigators intent on building a case.

Still, it makes little sense to ask *whether* a differential exists (of course it does) without asking *why* it exists. It exists in good part because law enforcement is the initiator (i.e., government often has no choice but to investigate, frequently from scratch). Moreover, many law-enforcement investigations come up empty or well short of what it takes to go forward with a case. Yet even the drilling of dry holes consumes time and investigative resources. In fact, it may occasionally be a boon to suspects for law enforcement to possess the resources to investigate; a department short on such resources might be tempted to cut corners and press a half-baked case. The most beneficial question a prosecutor can pose to law-enforcement officers is, “Are you sure?” And one can often not be sure without the aid of thorough investigation.

Many critics also go so far as to blame the poor quality of indigent criminal defense for the spate of wrongful convictions that have come to light in recent years.¹²⁷ On this view, the failings of indigent criminal defense produce profound injustice. Critics worry, moreover, that such injustice will almost never be rectified on appellate or collateral review, for the constitutional standard for ineffective assistance of counsel, as articulated by the Supreme Court in *Strickland v. Washington*,¹²⁸ allegedly tolerates gross incompetence by defense lawyers. Indeed, critics claim that “the Supreme Court has set the standard of representation so low as to be virtually meaningless”¹²⁹—“effectively discard[ing] *Gideon*’s noble trumpet call

126. See *United States v. Agurs*, 427 U.S. 97, 112 (1976) (holding that the proper constitutional standard for materiality is “if the omitted evidence creates a reasonable doubt that did not otherwise exist”).

127. See, e.g., Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 802–04 (2004); see also Backus & Marcus, *supra* note 122, at 1036 (“We now have evidence that overworked and incompetent lawyers contribute to wrongful convictions”); Bright, *supra* note 16, at 7 (claiming that DNA-based exonerations have “demonstrated the most drastic consequence of inadequate representation—conviction of the innocent”).

128. 466 U.S. 668, 686 (1984).

129. Bright, *supra* note 16, at 6.

to justice in favor of a weak tin horn.”¹³⁰ In its right-to-counsel jurisprudence, critics conclude, the Supreme Court has only compounded the many shortcomings that plague our system of indigent criminal defense.

I do not deny that the foregoing indictment of indigent criminal defense contains some truth, but I part company with the critics insofar as they perceive a systemic problem of constitutional proportions. Their most elementary error is to equate any *correlation* between defective representation and wrongful convictions with a *causal* relationship between the two. Recognizing that wrongful convictions unfortunately occur, it simply does not follow that inadequate representation is the culprit; there are too many confounding variables in the criminal justice system to draw so facile an inference. Nor can we automatically pronounce a conviction suspect simply because the defendant’s counsel performed below par. The Constitution guarantees criminal defendants a fair trial, not an acquittal. That guarantee can be satisfied even when defense counsel’s performance is below average, as some performances are bound by the law of averages to be.

Moreover, there is always going to be variation in performance, and not just on the defense side. Some prosecutors are going to do an inferior job. Some judges are more on the ball than others. Some people naturally make better witnesses than others. Juries, too, are more or less acute. Variation will always be present in so human an endeavor as a criminal trial. While more money and resources will improve matters on the margins, there will remain the variation that is the source of dissatisfaction for those who wish the system to satisfy some idealized standard of identity. Hence, there will always be finger-pointing at the end of the day when, for whatever human happenstance, the verdict does not suit.

I also question whether the state of indigent criminal defense is really as dire as the critics suggest. In particular, the critics too often fail to distinguish among the various sources of criminal defense, tarring all with the same brush when each in fact has its own distinct strengths and shortcomings. Some criminal defendants, of course, can afford to hire their own counsel. To provide representation for the great majority of defendants who are indigent, jurisdictions typically employ one of two systems, or some mix thereof. One system involves public-defender offices, staffed by full-time, government-employed

130. William S. Geimer, *A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 93 (1995).

lawyers. Another relies on court-appointed private practitioners.¹³¹ Though the critics often tend to conflate these different sources of representation, the strength of their indictment actually varies with respect to each.

The indictment has the least force where defendants retain private counsel with their own resources. As the Supreme Court has recognized, “[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.”¹³² Moreover, the Court regularly holds defendants responsible for the miscalculations of their lawyers.¹³³ It is unfair, frankly, to fault the system for the failings of lawyers whom defendants themselves have chosen. The criminal justice system should not be chastised for the consequences of defendants freely exercising their constitutional rights.

To be sure, many criminal defendants, while able to afford some kind of lawyer, are too poor to hire the best. But defendants in this situation will often continue to enjoy a meaningful choice of representation and should thus bear responsibility for the consequences of that choice. The standard for determining “indigence” for purposes of state-provided counsel is sufficiently flexible that many borderline defendants will qualify as indigent and will thus have a choice between retaining their own counsel and accepting publicly funded representation.¹³⁴ For example, an empirical study of all the felony cases filed in 2002 in Denver, Colorado, found that a significant number of defendants both qualified for state-appointed counsel and

131. For more on the various sources of counsel for indigent defendants, see Baxter, *supra* note 113, at 348–49.

132. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624–25 (1989)); see also *Wheat v. United States*, 486 U.S. 153, 159 (1988) (“[T]he right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment . . .”).

133. See, e.g., *Edwards v. Carpenter*, 529 U.S. 446, 450–53 (2000) (holding that an ineffective-assistance-of-counsel claim may provide cause to excuse a different procedurally defaulted habeas claim, but only if the ineffective-assistance claim is either not procedurally defaulted or is excused by its own showing of “cause and prejudice”); *Taylor v. Illinois*, 484 U.S. 400, 416–18 (1988) (upholding the exclusion of the testimony of a defense witness as a sanction for a defense lawyer’s violation of a discovery rule).

134. The Supreme Court has never explicitly defined “indigence,” but rather has left it to the states to determine which defendants are poor enough to require state-appointed counsel. See Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 *IND. L.J.* 571, 574–76 (2005). Although a few states have adopted relatively specific criteria for making this determination, most have not, affording trial courts significant discretion to define the scope of *Gideon*’s guarantee. See *id.* at 581–84 (providing examples of states whose courts possess either “unfettered discretion,” “wide discretion,” or “[l]ow [d]iscretion” in determining whether defendants qualify as indigent).

had sufficient resources to retain private counsel; these defendants strategically chose between the two sources of representation, selecting private counsel when they faced serious charges and public defenders when they faced routine ones.¹³⁵ At least where defendants have this choice, we should not fault the criminal justice system for allowing them to exercise it.

The indictment also rings false where defendants are represented by professional public defenders. Here, the problem is one of overgeneralization. Critics often use the term “public defender” as a catchall phrase and tend to “generalize all public defenders, whether federal or state,” making “little effort . . . to distinguish between these different jurisdictions.”¹³⁶ Such generalization is problematic because, as one former federal public defender puts it, “[N]ot all defender programs are created equal.”¹³⁷ Once we recognize the considerable variation in public-defender programs, we see that the indictment is exaggerated in at least two respects. First, though some public-defender offices lack adequate resources, others can more than make do. Traditionally, the federal public-defender system has been “relatively well financed.”¹³⁸ It is true, however, that the recent sequestration has hit federal public-defender programs especially hard. Their budgets are largely consumed by personnel costs, and the reductions have thus brought the prospect of furloughs and even layoffs.¹³⁹ But neither U.S. Attorneys’ offices¹⁴⁰ nor the federal judiciary itself¹⁴¹ has been spared.¹⁴² In a time of scarce public

135. See Morris B. Hoffman et al., *An Empirical Study of Public Defender Effectiveness: Self-Selection by the “Marginally Indigent,”* 3 OHIO ST. J. CRIM. L. 223, 223, 250 (2005) (describing how the seriousness of charges impacts the choice between private counsel and public defenders for marginally indigent defendants).

136. Inga L. Parsons, “*Making it a Federal Case*”: *A Model for Indigent Representation*, 1997 ANN. SURV. AM. L. 837, 838.

137. *Id.*

138. Adam Liptak, *Public Defenders Get Better Marks When on Salary*, N.Y. TIMES, July 14, 2007, at A1.

139. Paul L. Friedman & Reggie B. Walton, *Public Defenders Offices Shouldn’t Suffer Under Sequestration*, <http://perma.cc/H89C-A6CC> (washingtonpost.com, archived Mar. 10, 2014).

140. See Lisa Rein, *Holder Says No Furloughs at Justice Department This Fiscal Year*, <http://perma.cc/SS84-CPHU> (washingtonpost.com, archived Mar. 10, 2014) (stating that Attorney General Holder “warned that if sequestration continues in the fiscal year that starts Oct. 1, ‘furloughs are a distinct possibility’”).

141. Statement by Chief Judge William B. Traxler, Chairman, Executive Committee of the Judicial Conference of the United States, Statement on Impact of Sequestration on Judiciary, Defender Funding (Apr. 17, 2013), available at <http://perma.cc/T9EE-EDFT> (“The impact of sequestration on the Judiciary is particularly harsh because the courts have no control over their workload.”).

resources, cutbacks are not welcome, but neither is a spirit of shared sacrifice too much to expect. Many of those who work in criminal justice—prosecutors, defenders, judges, and staff—could earn substantially more “on the outside.” Some portion of public compensation surely lies in the belief that financial sacrifice and long hours are well worth the satisfaction of laboring in a system that helps Americans to experience the dual blessings of basic security and constitutional liberty.

The fact that the entire third branch of government consumes such a tiny portion of the federal budget (less than 0.2 percent, to be exact)¹⁴³ argues for more funding. A small increase might do some real good in a criminal justice system that, after all, safeguards bedrock constitutional principles. And if, as I have argued, American criminal justice is and should be a front-loaded system, it becomes important to give the participants at trial the resources to do their job. In an ideal universe, the various components of the criminal justice system would get more than they now have. The point is that all phases of the criminal justice system, from investigation to incarceration, have always been subject to the laws of finite public resources. And even the most justifiable pleas for more public funding for every aspect of that system cannot change the fact that many other humane and necessary projects legitimately compete in legislatures for appropriations of their own. The criminal justice process is one voice among many. And the fact that we believe our pleas to be the most deserving does not change the fact that others think their claims are special, too.

Neither the judiciary nor the public defender program has any natural political constituency. Some legislators do not like the fact that federal judges do not have to run for reelection. And many members of Congress are not sympathetic either to criminal suspects or to those who defend them. This dynamic leads the critics to characterize the system as chronically undernourished,¹⁴⁴ but they

142. There is a difference in the source of financing for federal prosecutors and public defenders: Congress funds prosecutors through allocations to the Department of Justice and public defenders through appropriations for the federal judiciary. Compare 28 U.S.C. § 548 (2012) (federal prosecutors), with 18 U.S.C. § 3006A (federal defenders).

143. CHIEF JUSTICE JOHN G. ROBERTS, JR., 2012 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3–4 (2012) (noting that, “for each citizen’s tax dollar, only two-tenths of one penny go toward funding the entire third branch of government”), available at <http://perma.cc/F7NV-5T4J>.

144. Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 805 (2004) (“Indigent defense is widely underfunded, and the political structures through which funding decisions are made suggest little hope for improvement.”).

oversimplify the point. For once again, it is impossible to appraise the nature of American criminal justice without some understanding of the need for tradeoffs. Our Constitution has made a deep commitment to both individual *and* democratic liberty, and the benefits that flow from self-governance do not come without costs. Inevitably, citizens assail democracy for its shortsightedness and small-mindedness, and often they are right. But the criminal justice system has never existed in a vacuum. It is part of a larger social context in which elected officials are always going to play their part. And the criticism of spending priorities and resource allocations that assertedly leave criminal justice chronically shortchanged is often less a criticism of the system than it is of democracy itself. The perfect world that brings to our doorstep the fruits of democracy without its frustrations simply does not exist.

Second, the indictment's claim that resource-deprived, overworked public defenders are providing inadequate representation for their clients is called into question by recent studies. These studies show that the quality of a defendant's lawyer, relative to that of the prosecutor, has little bearing on the outcome of the defendant's case.¹⁴⁵ And even if the quality of defense counsel does make a significant difference, at least one study suggests that public defenders are just as competent and effective as prosecutors.¹⁴⁶ In one recent survey, federal judges even rated the performance of federal public defenders slightly better than that of their prosecutorial counterparts.¹⁴⁷ These results confirm that the federal public-defender system "provides competent legal services which not only fulfill the noble promise of *Gideon*, but surpass it."¹⁴⁸ Speaking anecdotally is no substitute for studies and surveys, but for what it's worth, I have found the quality of public-defender representation on appeal generally consistent and often exceptionally good. While the federal public-defender system obviously constitutes the gold standard, state systems, as one might

145. See, e.g., Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 320, 342 (2011) (finding that federal trial and appellate judges and state appellate judges share the view that "different types of criminal lawyer[s], including prosecutors, do not influence case outcomes significantly"); Jennifer Bennett Shinall, Note, *Slipping Away from Justice: The Effect of Attorney Skill on Trial Outcomes*, 63 VAND. L. REV. 267, 269–70 (2010) (arguing that "[r]egardless of their skill, criminal defense attorneys do not have a statistically significant effect on the verdict or sentencing outcomes," but that the skill of prosecuting attorneys is more likely to influence trial outcomes).

146. See Posner & Yoon, *supra* note 145, at 325–26 (noting that in the study, federal judges ranked public defenders highest, followed closely by prosecutors).

147. *Id.*

148. Parsons, *supra* note 136, at 839.

expect, show greater variation. In some localities, state public-defender offices are by any measure overburdened, and that is particularly true with respect to misdemeanor cases.¹⁴⁹ But many state systems also serve their clients well. In response to the above-mentioned survey, state judges admittedly ranked retained counsel higher than public defenders and court-appointed counsel, but the judges' "perceived differences" in the quality of prosecutors and public defenders "were small and not statistically significant."¹⁵⁰ Far from denying indigent defendants effective assistance of counsel, public defenders represent their clients, imperfectly to be sure, but often as well and sometimes even better than prosecutors represent the public.

Whereas the indictment of the criminal justice system seems strained in its condemnation of privately retained defense counsel and public defenders, it may pack a bit more punch with respect to court-appointed lawyers, who are said to lack significant criminal-defense experience,¹⁵¹ to serve only reluctantly,¹⁵² and to receive inadequate compensation.¹⁵³ Even here, however, the indictment ignores the significant variation among jurisdictions. Like their public-defender counterparts, the lawyers who serve as court-appointed counsel in the federal system are generally "highly qualified and well trained," with a reputation for real competence.¹⁵⁴ The federal system also requires that court-appointed counsel have a meaningful amount of criminal-defense experience.¹⁵⁵ Finally, to portray court-appointed counsel as unwilling conscripts is to disparage the many lawyers who volunteer for service out of a sense of duty or calling—and at a significant discount to their usual hourly rates. Appointment by a court to the solemn task of indigent representation can be quite an honor and, for younger attorneys especially, an opportunity for public service and a chance to demonstrate both zeal and skill.

149. See, e.g., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* 21 (2009), available at <http://perma.cc/7YRL-U5EU> (alleging that, in the notorious case of New Orleans, "part-time defenders are handling the equivalent of almost 19,000 cases per year per attorney, which literally limits them to seven minutes per case").

150. Posner & Yoon, *supra* note 145, at 326 & nn.32–33.

151. Bright, *supra* note 16, at 7.

152. Schulhofer & Friedman, *supra* note 21, at 93.

153. *Id.*

154. Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CALIF. L. REV. 425, 478 (2004).

155. For a list of the qualifications necessary to be a Criminal Justice Act panel attorney, see CJA PANEL MEMBERSHIP PROTOCOL AND CRITERIA (2010), available at <http://perma.cc/D7MK-4QXR>.

To be sure, we must recognize that some systems of court-appointed counsel simply fail to provide indigent defendants with the representation they deserve. Where these failures occur, it is appropriate to take ameliorative steps, such as providing better compensation and training for court-appointed counsel, and promulgating more stringent criteria for who may serve in the first place. In fact, a number of state legislatures have instituted precisely these reforms.¹⁵⁶ But even where reform is needed, it should take the form of incremental improvement rather than wholesale revision. It would be especially misguided to attempt reform through structural class action litigation.¹⁵⁷ According to one recent report, such litigation has “ended with inconsistent decisions and settlements.”¹⁵⁸ These mixed results should come as no surprise, for courts are often not empowered to make the budgetary and other policy decisions necessary for improving the representation afforded by court-appointed counsel. The case has simply not been made, moreover, that the quality of defense counsel in this country is either generally poor or responsible for wholesale miscarriages of justice that the criminal justice system itself is powerless to correct. That is not to say that the representation of defendants is all it should be in all places; it is not. It is not to say all judicial rulings are flawless; they are not. But the appropriate course is to identify those places and challenge those rulings, taking pains to improve the particulars, while acknowledging and preserving the many strengths of the American system of indigent criminal defense.

C. Prosecutorial Discretion: The Overlooked Benefits

Given that the picture of criminal defense counsel is more complex than critics suggest, what about the stereotypical image of the prosecutor's office? Commentators have made much of the allegedly unchecked power of the prosecutor, which they believe remains dangerously inconsistent with our system of checks and balances. For instance, Professor William Stuntz concluded that

156. See Backus & Marcus, *supra* note 122, at 1103–16 (discussing the legislative reforms Texas, Georgia, Virginia, Washington, and Montana have undertaken in recent years to address problems involving the right to counsel).

157. See, e.g., Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487, 487 (2010) (advocating “a new federal cause of action that allows indigent defendants to seek equitable relief for systematic Sixth Amendment violations”).

158. William Glaberson, *Suit over Legal Aid Advances in New York*, N.Y. TIMES, May 7, 2010, at A20.

“prosecutorial power is unchecked by law and, given its invisibility, barely checked by politics.”¹⁵⁹ Existing safeguards against prosecutorial misconduct are allegedly inadequate because the Supreme Court has made it exceedingly difficult to gain access to relevant internal information from a prosecutor’s office or to challenge a prosecutor’s actions if evidence of misconduct does come to light.¹⁶⁰ And for decades, critics have also assailed the grand jury system, arguing that grand juries are “the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury.”¹⁶¹ These detractors argue that unfettered prosecutorial discretion and the “relative absence of efforts to standardize and regulate charging practices”¹⁶² lead to arbitrary charging decisions, often with an outsized impact on minorities and the poor.¹⁶³ Although observers generally do not allege intentional racial or socioeconomic discrimination by prosecutors, they consistently report that “the consideration of class- and race-neutral factors in the prosecutorial process often produce[s] disparate results along class and race lines.”¹⁶⁴

Many contemporary critiques of prosecutorial discretion center on the substantive breadth of the criminal law.¹⁶⁵ Under this theory, the expansive scope of criminal law permits prosecutors, as a practical matter, to “[c]hoos[e] what people need to be made into criminals, then simply pick[] the laws necessary to make that happen.”¹⁶⁶

159. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 295 (2011).

160. *E.g.*, ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 127 (2007).

161. William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973).

162. DAVIS, *supra* note 160, at 34.

163. *Id.* at 5; see also Drew S. Days, III, *Race and the Federal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 179, 181–84 (1996) (arguing that “federal prosecution practices should be the subject of ongoing research and review to ensure that they are consistent with constitutional norms”).

164. DAVIS, *supra* note 160, at 5; see also Gary Ford, *The New Jim Crow: Male and Female, South and North, from Cradle to Grave, Perception and Reality: Racial Disparity and Bias in America’s Criminal Justice System*, 11 RUTGERS RACE & L. REV. 324, 348–50 (2010); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 797 (2012) (“[I]mplicit racial attitudes and stereotypes skew prosecutorial decisions in a range of racially biased ways.”).

165. See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717–18 (2005) (discussing various ways in which the criminal law currently exceeds its legitimate scope).

166. Radley Balko, *The Power of the Prosecutor*, <http://perma.cc/E5HP-BF5D> (huffingtonpost.com, archived Mar. 12, 2014).

Furthermore, overcharging,¹⁶⁷ which includes the practice of “stack[ing]” multiple charges for the same underlying conduct,¹⁶⁸ is said to bring undue pressure to bear on defendants to plead away their right to trial. Overcharging can also bring the feared mandatory minimums into play and deprive judges of their traditional sentencing discretion in the process.

This critique is overdone. It is odd that prosecutors should bear the brunt of criticism for the expansion of substantive criminal law that in some part is a response to the increasing sophistication of criminal activity itself. For example, the Racketeer Influenced and Corrupt Organizations Act of 1970¹⁶⁹ (more commonly known as “RICO”), gave law enforcement new tools to fight organized crime by dramatically expanding the scope of illegal activity that the federal government could prosecute.¹⁷⁰ And amidst increasing rates of cybercrime,¹⁷¹ Congress recently made it easier for prosecutors to bring charges against computer hackers and for victims of identity theft to get restitution.¹⁷²

As for overcharging, what is charged must still be proven. And if charges bring pressure on defendants, it is hard to see how it could be otherwise, unless society gives up punishing the criminal offense. There is a limit to the extent we can expect prosecutors to ignore laws that they have a duty to enforce. American criminal codes are, after all, democratic products, and the fact that some legal elites find them unduly strict or expansive¹⁷³ does not change the fact that they reflect deep-seated popular norms and communal judgments of desert and retribution. It will hardly do, therefore, to sketch stereotypical portraits of stop-at-nothing prosecutors or to advocate norms of behavior that separate prosecutors from the society of which they form a part. The fact that prosecutors are cloaked with the awesome powers

167. See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORD. L. REV.* 851, 868 (1995).

168. Balko, *supra* note 166.

169. 18 U.S.C. §§ 1961–68 (2000), amended by U.S.A. Patriot Act of 2001, Pub. L. No. 107-56, § 813, 115 Stat. 272, 382.

170. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922, 923.

171. See generally MCAFEE, *A GOOD DECADE FOR CYBERCRIME* (2011), available at <http://perma.cc/P8RX-RKH3>.

172. Identity Theft Enforcement and Restitution Act of 2008, Pub. L. No. 110-326, 122 Stat. 3560.

173. See Darryl K. Brown, *Democracy and Decriminalization*, 86 *TEX. L. REV.* 223, 228–29 (2007); Balko, *supra* note 166 (arguing that we have too many federal criminal laws and that many of them are too vaguely and broadly written).

of government and serve as officers of the court¹⁷⁴ does, however, suggest the need for restraint and balance in the exercise of their discretion. Yet the coequal fact that prosecutors are advocates in an adversary system suggests that they will—and should—pursue their most lawless quarry with some zeal.

The critics simply ignore the benefits of prosecutorial discretion, which, when used prudently, can deliver consistent results that track the public's moral intuitions more closely than any plausible alternative. It would be impossible for a criminal code to spell out crimes and punishments to fit every conceivable scenario.¹⁷⁵ It would thus be impractical to try to make the prosecutor's task mechanical. Limits on prosecutorial resources require that some crimes go unpunished so that prosecutors can attend to other, more troubling ones.¹⁷⁶ Not every violation of law merits pressing charges. Prosecutors need the discretion to forego cases with slim evidentiary foundations, those with mitigating circumstances, or those with minimal adverse public consequences. In this sense, prosecutorial discretion is an indispensable part of the front-loaded character of American criminal justice. Because elected officials recognize that inflexible rules can lead to unjust results and an unwise allocation of prosecutorial time and energy, these officials properly delegate substantial enforcement discretion to prosecutors and other actors.¹⁷⁷

In any adversarial proceeding—civil or criminal—the party filing suit has significant discretion as to the timing, forum, and legal substance of the proceeding. Civil plaintiffs, if they choose to sue, may generally pursue multiple theories of liability¹⁷⁸ and enjoy latitude as to when and where they can bring suit.¹⁷⁹ By the same token, prosecutors, as first-moving parties in criminal proceedings, logically

174. See *Imbler v. Pachtman*, 424 U.S. 409, 431 n.33 (1976) (noting that drawing a proper line between the prosecutor's functions as an administrator and an officer of the court may be difficult).

175. Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 372 (2010).

176. Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 314 (2009).

177. See Stuntz, *supra* note 33, at 546–57 (discussing the three basic ways prosecutorial discretion helps reinforce the relationship between legislators and prosecutors in shaping criminal law).

178. See, e.g., *Golden v. Den-Mat Corp.*, 276 P.3d 773, 785 (Kan. Ct. App. 2012) (noting that a “plaintiff may advance multiple theories of liability,” “may assert some available theories but not others,” and “may pick and choose at his or her discretion so long as the defendant has been fairly apprised of the circumstances”).

179. See, e.g., 28 U.S.C. § 1332 (2012) (diversity jurisdiction); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (“[A] plaintiff's choice of forum should rarely be disturbed.”).

have discretion as to (1) whether to bring charges in the first place, (2) what charges to bring, and (3) whether those charges should be brought in state court, federal court, or both. Discretion allows a civil plaintiff to sue the negligent driver who caused a serious accident while speeding but excuse the teenager who caused a fender bender on the way home from obtaining a learner's permit. All parties involved might be better off if the second incident does not lead to a lawsuit. The same reasoning applies in the criminal context: discretion allows a district attorney to throw the book at a seasoned burglar arrested during a home invasion but refrain from prosecuting a disabled youth for a minor shoplifting offense.

As with any delegation of power, there is a risk that prosecutors will abuse their authority to decide which cases deserve prosecution. The abuse can occur in several ways—in undertaking questionable prosecutions, in declining to prosecute hard cases out of laziness or timidity, or in acting from partisan or political purposes extrinsic to the case itself. Attorney General Robert H. Jackson famously stated, “While the prosecutor at his best is one of the most beneficent forces in society, when he acts from malice or other base motives, he is one of the worst.”¹⁸⁰

Once again the need for some tradeoff is apparent. Recognizing both the potential for prosecutorial misconduct¹⁸¹ and the chilling effect of judicial intrusion into the prosecutorial sphere, the Supreme Court has struck the balance in favor of prosecutorial independence. It has fashioned doctrines of prosecutorial immunity that largely insulate prosecutors from retaliatory lawsuits by defendants, while still prohibiting truly arbitrary prosecutions.¹⁸² As the Court has often noted, if prosecutors were subject to suit by those who believe they were wrongly accused, too many of the prosecutor's resources “would

180. Att'y Gen. Robert H. Jackson, U.S. Dep't of Justice, *The Federal Prosecutor* (Apr. 1, 1940), in 24 *J. AM. JUDICATURE SOC'Y* 18, 18–20 (1940).

181. *E.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (“There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse.”).

182. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 463–71 (1996) (holding that to establish entitlement to discovery on a claim of selective prosecution based on race, the defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not); *Wayte v. United States*, 470 U.S. 598, 607–08 (1985) (holding that prosecutorial discretion is broad but not unfettered, as it is subject to constitutional constraints); *Imbler v. Pachtman*, 424 U.S. 409, 424–31 (1976) (holding that a prosecutor who acted within the scope of his duties in initiating and pursuing a prosecution was absolutely immune from civil suits for damages for alleged deprivations of the accused's constitutional rights).

be diverted from the pressing duty of enforcing the criminal law.”¹⁸³ Perhaps worse, “[t]he public trust of the prosecutor’s office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.”¹⁸⁴ As a result, the Court has consistently approved of broad prosecutorial discretion,¹⁸⁵ and prosecutors enjoy absolute immunity from suits under 42 U.S.C. § 1983 related to charging decisions.¹⁸⁶ The Court has acknowledged that “[absolute] immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty.”¹⁸⁷ But the Justices have concluded that the alternative—providing only qualified immunity to prosecutors—“would prevent the vigorous and fearless performance of the prosecutor’s duty that is essential to the proper functioning of the criminal justice system.”¹⁸⁸

Notwithstanding absolute prosecutorial immunity, criminal defendants facing arbitrary prosecution are not wholly without remedy. Like all government action, prosecutorial discretion is still circumscribed by our Constitution, and “the decision to prosecute may not be ‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’”¹⁸⁹ Selective prosecution claims are governed by “ordinary equal protection standards,”¹⁹⁰ meaning that prosecutions intentionally targeting particular racial or religious groups are effectively forbidden. If a defendant can show that she was prosecuted *because* she was a certain race or religion, for instance, the charges will not stand.¹⁹¹ The prospect of redress against discriminatory prosecution, however, covers but a tiny sliver of hard-to-prove instances; it still leaves the problem of the baseless accusation hanging.

So what checks are there? Our criminal justice system has only the limited checks of potential media scrutiny and political accountability for prosecutors who for whatever reason fail to prosecute those who deserve to be charged. U.S. Attorney Rudolph Giuliani may have been grandstanding when he prosecuted the heads

183. *Imbler*, 424 U.S. at 425.

184. *Id.* at 424–25.

185. *E.g.*, *Wayte*, 470 U.S. at 607.

186. *Imbler*, 424 U.S. at 427–28.

187. *Id.* at 427.

188. *Id.* at 427–28.

189. *Wayte*, 470 U.S. at 608 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

190. *Id.*

191. *See id.* at 608–09 (citing *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

of New York City's five major organized-crime families in the Southern District of New York,¹⁹² but that is the kind of work we expect well-resourced prosecutors to roll up their sleeves and do. What of those who fail to do so? It is always tempting for prosecutors to pursue cases that are easy to work up or easy to prove—to pick only low-hanging fruit. But the larger threats to social well-being may well involve sustained and even dangerous work. Are these cases overlooked? Such acts of omission are notoriously difficult to detect.

What of errors of commission: the unfounded prosecution? Here the cumulative safeguards against prosecutorial abuse are somewhat greater. Judges, juries, and defense counsel possess, each in distinctive ways, the capacity to call prosecutorial abuses to account. Prosecutors, especially those subject to periodic elections,¹⁹³ may also be reluctant to engage in behavior that might draw negative media attention. Losing cases, moreover, is not a way to enhance one's reputation or a strategy for winning votes.¹⁹⁴ The problems with these supposed checks are, of course, threefold: plea bargaining largely takes place under the electoral radar, federal prosecutors are not elected at all, and even a trial that results in acquittal or a case that is dismissed prior to trial can damage a defendant's reputation and put him through needless trauma and expense. So while checks on prosecutorial abuses do exist, they are imperfect ones.

And yet here, once again, there is a tradeoff. The advantages of prosecutorial discretion are considerable, and the cures remain far worse than the disease. Efforts to enhance the scrutiny of the grand jury may sound fine in theory, but in practice they risk creating a trial before the trial. Other reforms have drawbacks too. The American legal regime is an adversarial one, and bringing judges into prosecutorial decisions would undermine its essential character. Adding layers of external review prior to prosecution would bring a cumbersomeness and contentiousness all its own, with no assurance that repetitive scrutiny would add the slightest measure of justice or wisdom to the decisional mix. Expanding the scope of civil damages actions for ill-founded prosecutions would implicate the Supreme

192. See Arnold H. Lubasch, *U.S. Jury Convicts Eight as Members of Mob Commission*, N.Y. TIMES, Nov. 20, 1986, available at <http://perma.cc/3932-FZM5>.

193. Over ninety-five percent of county- and municipal-level chief prosecutors are subject to popular election. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 734 (1996). Others are generally appointed by elected officials, making them indirectly accountable to the electorate.

194. Meghan J. Ryan, *Remedying Wrongful Execution*, 45 U. MICH. J.L. REFORM 261, 274–75 (2012).

Court's concern of a chilling effect on well-founded prosecutions.¹⁹⁵ Creating civilian review boards to evaluate prosecutorial decisions after the fact¹⁹⁶ is another bad, bog-the-system-down idea. Such outside reviewers might themselves be highly polarized and lack the experience that prosecutorial offices develop by working through many cases over many years. And these review boards often would not possess the essential democratic legitimacy that comes from the prosecutor's status as a public representative in court, with direct or indirect electoral accountability. Finally, as discussed above, a mechanical set of rules is simply not an adequate substitute for the discretion of a competent prosecutor: who does and does not deserve to face charges is both science and art.

Many reforms, then, would have the effect of disabling the system. Some guidance of the right sort may nonetheless be valuable. The President, through the Attorney General, sets the prosecutorial priorities of the Department of Justice, including the ninety-three U.S. Attorney's Offices ("USAOs"). Recently, examples of the lenient exercise of centralized prosecutorial discretion surfaced prominently. Attorney General Eric Holder announced that "certain drug offenders" would "no longer be charged with offenses that 'impose draconian mandatory minimum sentences'"¹⁹⁷ and that some undocumented immigrants who meet several requirements and "are younger than 30" would be eligible for "deferred action" from prosecution for two years.¹⁹⁸

Such centralized direction involving broad classes of cases are not typical, however, of the more individualized determinations made by federal and state prosecutors every day. At the federal level, many

195. See *Imbler v. Pachtman*, 424 U.S. 409, 427–28 (1976) (stating that subjecting prosecutors to liability for error or mistaken judgment in prosecution would disserve the public interest by preventing "the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system," and noting that "various post-trial procedures are available to determine whether an accused has received a fair trial.").

196. See, e.g., Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 463 (2001) (arguing that "Congress and state legislatures should pass legislation establishing Prosecution Review Boards," the purpose of which "would be to review complaints and conduct random reviews of prosecution decisions to deter misconduct and arbitrary decision-making").

197. Dan Merica & Evan Perez, *Eric Holder Seeks to Cut Mandatory Minimum Drug Sentences*, <http://perma.cc/3H59-69EQ> (cnn.com, archived Mar. 12, 2014).

198. Rebekah Metzler, *Obama Offers Two Years of 'Deferred Action' to Illegal Immigrants*, <http://perma.cc/ANA4-BTKX> (usnews.com, archived Mar. 12, 2014). The Attorney General's announcement presented an intriguing problem. The executive branch clearly possesses the power of prosecutorial discretion. The legislative branch just as clearly possesses the power to prescribe crimes and punishments. See *infra* Section IV.A. Query whether a blanket refusal to charge certain statutes or seek certain penalties impermissibly nullifies valid legislative acts.

of the baseline criteria are set out in the U.S. Attorney's Manual, a set of internal guidelines issued by the Department.¹⁹⁹ The Department has supplemented the general guidelines of the Manual with statute-specific guidelines, many of which are collected in the Criminal Resource Manual.²⁰⁰ Thus, to take but one example, the Department has issued detailed "prosecutive screening criteria"²⁰¹ to guide U.S. Attorneys bringing prosecutions for violations of the Child Support Recovery Act of 1992.²⁰²

The extent of the Department's control over the discretion of individual U.S. Attorneys is a matter of debate. Professor Dan Kahan, for instance, has argued that the "strong history and culture of independence" of U.S. Attorneys make them only "nominally subordinate to the Attorney General."²⁰³ Others, however, contend that the Department has substantial influence over individual U.S. Attorneys, given their reliance on Washington for later judicial and political appointments, and given the fragmented nature of local political elites.²⁰⁴ Within the individual USAOs, Assistant U.S. Attorneys do not go unsupervised, but they also tend to enjoy broad prosecutorial discretion. Whether this is due to their increasing length of tenure, the growth of civil service protections, or some other factor is difficult to say.²⁰⁵

More formal internal policies for the exercise of prosecutorial discretion would seem to hold especial promise in state systems where "[u]se of general written guidelines is sporadic" and "[t]here is

199. U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (1997) [hereinafter USA Manual]. See generally Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice"*, 13 CORNELL J.L. & PUB. POLY 167, 170–75 (2004) (providing an overview of the U.S. Attorneys' Manual). Unlike agency regulations, courts have consistently treated the Manual as purely internal policy and have refused to give remedies for individual-prosecutor violations of it. See *id.* at 177.

200. U.S. DEPT OF JUSTICE, CRIMINAL RESOURCE MANUAL (1997).

201. Memorandum from the Office of the Attorney General to all United States Attorneys, *Prosecutive Guidelines and Procedures for the Child Support Recovery Act of 1992* (Feb. 25, 1997), available at <http://perma.cc/G93E-4SUJ>. See generally Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 949–52 (2000) (explaining the prosecutorial screening criteria).

202. 18 U.S.C. § 228 (2012).

203. Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 486 (1996).

204. See Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271, 279–81 (2002) (discussing incentives for U.S. Attorneys to align themselves with the Department of Justice).

205. See *id.* at 281–84, 287–88 (discussing the impact of the recent trend of Assistant U.S. Attorneys' careerism).

typically no regularized or substantial training at the start of a prosecutor's career."²⁰⁶ But efforts to subject prosecutorial discretion to substantial external or post hoc review will only weigh down and bureaucratize the entire process. Indeed, related concerns with efficiency and limited resource capacity—especially surrounding the implementation of drug policy²⁰⁷—have been an important driver in increasing prosecutorial discretion in continental European countries, long considered jurisdictions with limited or even nonexistent prosecutorial discretion.²⁰⁸ Guidelines and training within the executive branch itself hold forth the promise of channeling discretion and achieving some consistency and uniformity among jurisdictions.

To go beyond that is to risk the sacrifice of a system that produces more than its share of individually humane restraint and collectively protective action. The critics harp on cases they rightly or wrongly feel should not be brought. They frequently have little interest in discovering the myriad instances of mature judgment that result in decisions not to charge or to overcharge, and not to seek the limits of permissible punishment. Is prosecutorial discretion perfect? Heavens no. But the suggested substitutes for the most part present the prospect of ceaseless wrangling or interminable decision by committee that will bring what is, after all, only the initial step in the criminal justice system to a slow crawl or virtual stop. The Framers understood the virtues of collective external deliberation in criminal justice when they provided for grand and petit juries. That they did not go further should give great pause to those who would.

D. Plea Bargaining: The Pluses

Even more abominable than prosecutorial discretion, the critics claim, is plea bargaining. Despite its ubiquity, or perhaps because of it, the common refrain condemns plea bargaining as an evil wrought by a regime overburdened with charged cases. The combined effects of

206. Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1608–09 (2010).

207. See Marianne Wade, *Prosecutors and Drugs Policy: A Tale of Six European Systems*, 2009 UTAH L. REV. 153, 169 (discussing the trend in Europe towards increased prosecutorial discretion in relation to drug offenses).

208. John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979). For arguments that prosecutors in continental European countries enjoy substantial discretion, see generally Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413 (2010); Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective*, 12 INT'L CRIM. JUST. REV. 22 (2002).

the profusion of possible charges and the increasing length of sentences allow prosecutors to pressure defendants to proclaim guilt—rightly or wrongly—in order to avoid what amounts to barbaric punishment.²⁰⁹ Likewise, many view the prosecutorial tendency to pile count upon count as mere posturing meant to punish people for claiming the practical and constitutional protections underlying a thorough investigation and trial.²¹⁰ By thus restricting judicial oversight, the prosecutor “combines both executive and judicial power—posing the very danger the Framers tried to prevent.”²¹¹ Even worse, the story goes, because bargaining behavior is a complex psychological phenomenon that varies enormously with individual circumstances, allowing negotiation over pleas ultimately promotes punishment based on such improper factors as “wealth, sex, age, education, intelligence, and confidence.”²¹² Simply put, plea bargaining permits conniving prosecutors to browbeat naïve—and often innocent—defendants into signing away their rights, freedoms, and reputations without adequate inquiry or process.²¹³ As with the portrayal of criminal defense representation and prosecutorial discretion, however, this indictment suffers from inaccuracies, hyperbole, and a refusal to grapple with the question of alternatives.

Numerous flaws undercut the vilification of plea bargaining. First, the criminal justice system incorporates multiple safeguards to ensure that defendants enjoy a meaningful choice. The Supreme Court insists that guilty pleas be intelligent and voluntary to satisfy due process,²¹⁴ and the Federal Rules of Criminal Procedure reinforce this requirement.²¹⁵ They require courts to inform defendants in open court of the rights they are waiving and the charges and penalties they are facing; in short, all the things that would promote maximum awareness both of choices and consequences. Those who dismiss such proceedings as mere ritual meant to ratify done deals simply beg the question of whether the deal gave both parties something of what they want. Defendants have a constitutional right to effective legal

209. See Wright & Miller, *supra* note 39, at 33–34 (discussing the use of overcharging by prosecutors to pressure defense attorneys to convince their clients, even those that are innocent, to accept plea bargains in order to avoid the substantial risk of greater punishment).

210. See Bibas, *supra* note 44, at 1383–85; Scott & Stuntz, *supra* note 41, at 1912.

211. Barkow, *supra* note 31, at 1048.

212. Bibas, *supra* note 43, at 2468.

213. See *supra* notes 38–40, 210–13 and accompanying text.

214. *Iowa v. Tovar*, 541 U.S. 77, 81 (2004); *Brady v. United States*, 397 U.S. 742, 748 (1970).

215. FED. R. CRIM. P. 11(b) (requiring courts to apprise defendants of their right to trial and other procedural protections before accepting guilty pleas, which the court must ensure are voluntary and factually supported).

representation during plea negotiations,²¹⁶ and these attorneys can be strong bargaining agents for several reasons. Defense counsel are often repeat players with broad knowledge of customary court practices.²¹⁷ Moreover, "When the defense attorney represents a real live human being and has a strictly adversarial responsibility, and the prosecutor represents the highly amorphous concept of 'the public interest,' the plea process tends to yield favorable results for the more adversarial participant."²¹⁸

Complementing protections specific to the plea bargaining process are structural safeguards provided by the shadow of trial itself. Ultimately, plea deals are roughly as fair as the trials they foreclose because the threat of trial pervades the entire process.²¹⁹ Both sides bring chips to the bargaining table: "The defendant has the right to plead not guilty and force the prosecutor to prove the case at trial," and the "prosecutor has the right to seek the maximum sentence for the maximum offense that can be proven."²²⁰ Under certain conditions, it may prove mutually beneficial to exchange these entitlements.²²¹ Of particular advantage to the accused, prosecutors may be hesitant to try flimsy cases because of the reputational harm accompanying litigation losses (among other, perhaps nobler concerns)²²² and may therefore offer generous compromises. Altogether, both sides make decisions based on the expected outcome of a highly regulated trial incorporating its own share of defendant-

216. *Missouri v. Frye*, 132 S. Ct. 1399, 1405–08 (2012).

217. Scott & Stuntz, *supra* note 41, at 1922–23.

218. Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 67.

219. See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309–17 (1983) (detailing the tradeoff between prosecutors and defendants in plea bargaining); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (examining the impact of the legal system on divorce negotiations and bargaining); Scott & Stuntz, *supra* note 41, at 1910 (explaining the different opinions about plea bargaining). More recently, Professor Stephanos Bibas has put forth arguments that the shadow-of-trial model is outdated and oversimplified. Bibas, *supra* note 43, at 2468. At base, though, Bibas does not reject the model as a whole but rather suggests "practicable solutions that bring plea bargains more into line . . . with trial shadows," such as "smoothly graded sentencing guidelines and better discovery" aimed at "reduc[ing] the influence of uncertainty on bargaining without creating lumpiness." *Id.* at 2469.

220. Scott & Stuntz, *supra* note 41, at 1914. The Supreme Court has explicitly endorsed the presumption of equal bargaining power on the part of both parties. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

221. Scott & Stuntz, *supra* note 41, at 1914.

222. See Ryan, *supra* note 194, at 274–75 ("Prosecutors have a professional incentive to obtain convictions because prosecutors' offices often emphasize conviction rates and tie these to a prosecutor's professional advancement.").

friendly safeguards.²²³ “Thus, the jury is not controlling merely the immediate case . . . but the host of cases . . . which are destined to be disposed of by the pre-trial process.”²²⁴

The shadow of trial also diminishes the specter of an innocent man copping a plea. Blameless defendants “have reason to believe that they are less likely to be convicted” at trial and are thus less likely to plead guilty.²²⁵ The requirement that courts assure themselves that guilty pleas possess a factual basis further undermines the attempt to discredit the plea bargaining system with the specter of innocents pleading guilty.²²⁶

Though plea bargaining has long been recognized as a form of contract,²²⁷ a comparison of the protections governing plea discussions and other negotiations proves illuminating. For instance, unlike the cryptic terms and conditions hidden within standardized contracts of adhesion, the language in plea bargains is typically clearer and more comprehensible. Moreover, commercial consumers faced with fine-print disclaimers are not guaranteed effective legal representation.²²⁸ Finally, a criminal defendant may enjoy superior bargaining power. A prosecutor aiming to avoid the time and expense of trial has far greater incentive to engage in individualized negotiations than does a company serving a multitude of consumers.²²⁹ Put simply, the plea bargaining system invests defendants with a number of advantages foreign to contract law’s normal terrain.

Faced with this dynamic, it is cynical to contend plea bargaining is corrupt. Far more often than not, agreements represent nothing more and nothing less than the best deal a lawyer can get for his client. That is the essence of what law is about. Belying the critics’ despair, the benefits of plea bargaining are manifold. The Supreme Court has extolled a variety of the practice’s positive effects, including not only the obvious efficiency gains reaped by prosecutors and the

223. See Guidorizzi, *supra* note 119, at 769 (quoting Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335, 336 (1990)) (“The ‘rigorous standards of due process and proof imposed during trials’ do not become irrelevant with plea bargaining but, in fact, influence the nature of the bargain reached.”).

224. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 31–32 (1966).

225. Timothy Sandefur, *In Defense of Plea Bargaining*, REG., Fall 2003, at 28, 31.

226. FED. R. CRIM. P. 11(b)(3) (“Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.”).

227. See, e.g., Scott & Stuntz, *supra* note 41 (using contract theory to evaluate plea bargaining).

228. *Id.* at 1922.

229. *Id.* at 1924.

judiciary²³⁰ but also the societal gains produced by criminals' forthright admissions of guilt.²³¹ Observers note that plea bargaining serves the interests of crime victims as well by providing "an immediate sense of closure along with the knowledge that the defendant will not go unpunished for the crime."²³² It also allows victims (and witnesses) to avoid the rigors—and sometimes the horror—of reliving the crime scene in open court.

The benefits of plea bargaining flow equally to the defense. Problems allocating scarce resources plague public defenders just as much, if not more, than prosecutors.²³³ Bringing losing cases to an efficient conclusion allows them to focus greater attention on more demanding or deserving matters—perhaps involving innocent defendants. And because even private defense counsel often earn relatively small fees, plea bargaining may provide the only path "to adequately represent [their] client[s] and still make a living"—and for the criminal defense bar to continue attracting talented attorneys.²³⁴ As for defendants themselves, those convicted at trial "had no right to leniency" in the first place, rendering the ability to bargain beforehand a welcome boon.²³⁵ Even beyond concrete charge and sentencing concessions, defendants reap abstract benefits like "avoid[ing] . . . the anxieties and uncertainties of a trial."²³⁶ Candid defense counsel concede the accuracy of this assessment. Defense attorney and Georgetown law professor Abbe Smith contends that plea bargaining is "a critical part of defense lawyering" because pleading guilty often serves a defendant's best interests.²³⁷ Plea bargaining is "not our favorite part," she admits, "I'd much rather go to trial. Going to trial is

230. See, e.g., *Santobello v. New York*, 404 U.S. 257, 260–61 (1971) (noting that plea bargaining helps prosecutors and the judiciary deal with their heavy workload by leading to the prompt and "largely final disposition of most criminal cases").

231. *Brady v. United States*, 397 U.S. 742, 753 (1970):

[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

232. Guidorizzi, *supra* note 119, at 767.

233. See generally Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1206–55 (1975) (describing a variety of public defenders' advantages and disadvantages in the plea bargaining system); see also *supra* Part III.B (discussing the effects of resource constraints on public defenders).

234. Guidorizzi, *supra* note 223, at 766.

235. Sandefur, *supra* note 225, at 30.

236. *Blackledge v. Allison*, 431 U.S. 63, 71 (1977).

237. Interview by Ofra Bikel with Abbe Smith, Professor, Georgetown Univ. Law Ctr. (Jan. 30, 2004), available at <http://perma.cc/J2KG-7DYH>.

fun.”²³⁸ But, she concludes, “I’m not the one that’s doing the time; my clients are doing the time. . . . [T]he only regrets I have as a lawyer are the instances in which I think I didn’t lean hard enough on a client to take a plea.”²³⁹

In sum, plea bargaining is “not only an essential part of the [criminal justice] process but a highly desirable part,” as the Supreme Court has declared.²⁴⁰ The critics simply fail to articulate how the criminal justice system could function in the absence of this much-maligned feature. Would those who bemoan the existence of plea bargaining actually welcome forcing all criminal defendants to go to trial? Individuals are—and should remain—free to relinquish the right to a jury trial when waiver is in their best interests. To constrain the autonomy of the accused in this context would disregard, rather than respect, fundamental liberties.²⁴¹ Curtailing plea bargaining would also threaten disastrous consequences for the broader criminal justice system. For example, assuming constant resource levels, limiting pretrial negotiation would almost certainly lead to a dramatic surge in the number of trials.²⁴² In order to cope with the systemic pressure of the multitude of new trials, courts would need to pare back their length and scope, resulting in the curtailment of rights and an increase in the rate of false convictions.²⁴³

A healthy dose of realism would do advocates of reform a great deal of good. Attempts to ban plea bargaining outright will likely prove futile because of the survival of “implicit plea bargaining,” whereby defendants plead guilty in expectation of lighter sentences even without expressly securing concessions from the state.²⁴⁴ The most well-known experiment in eliminating plea bargaining produced mixed results and was ultimately abandoned, seemingly at least in part for this reason.²⁴⁵ The Supreme Court has noted the specter of black-market bargaining, counseling that a “rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his

238. *Id.*

239. *Id.*

240. *Santobello v. New York*, 404 U.S. 257, 261 (1971).

241. See Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 *YALE L.J.* 1969, 1976 (1992) (arguing that defendants’ should have the right to negotiate a plea deal and regulating plea deals infringes on the defendant’s liberty).

242. *Scott & Stuntz*, *supra* note 41, at 1950.

243. *Id.*

244. See Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 *LAW & SOC’Y REV.* 247, 247 (1979) (describing implicit plea bargaining).

245. See Guidorizzi, *supra* note 119, at 775–77 (discussing Alaska’s experience between 1975 and 1993).

dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows.”²⁴⁶

The system is only as good as the people who comprise it. The abler the negotiators, the better the plea bargaining. No amount of systemic restructuring can rescue indifferent lawyering. It is always possible, of course, to propose improvements in any process. Plea agreements should generally be memorialized in writing prior to court approval.²⁴⁷ And certainly, the presence of more prosecutors and public defenders will diminish the danger that high volume will lead negotiators to shortchange the individual case or cause defendants to get lost in the shuffle.

The fact that the prosecution or defense may feel pressures to reach a deal, however, does not mean the process is an involuntary one. External circumstances bear down on negotiations all the time. The state of the battlefield influences the negotiations on a treaty. The state of parties' respective finances affects the negotiations of a commercial contract. The parties' resources pressure negotiators in a civil case to settle. The severity of the crime and strength of the evidence affects plea bargaining. Such entirely ordinary pressures are simply not tantamount to coercion.²⁴⁸ That one may have an incentive to come to terms does not mean that one is forced to do so.

In the end, plea bargaining affords yet another example of the varied benefits that a criminal justice system with front-end emphasis can deliver. The plea bargaining process, buttressed by counsel during negotiations and by the involvement of judges in plea hearings, enhances—not diminishes—human freedom. Given that society is not just going to let those who offend its criminal laws go free, liberty is best preserved by letting defendants leverage what they have.²⁴⁹ Both the volume of cases and the variation in legal capabilities will always be with us, to a greater or lesser degree. The amelioration of those conditions is desirable; the assault on a system with as many virtues as plea bargaining is not.

246. *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978).

247. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1151–60 (2011) (suggesting procedural statutory reforms based on consumer protection laws).

248. See, e.g., Scott & Stuntz, *supra* note 41, at 1920–21 (“A large sentencing differential does not imply coercion a priori. Rather, it is entirely consistent with the assumption that the right to take the case to trial is a valuable entitlement.”).

249. See, e.g., Easterbrook, *supra* note 241, at 1971 (arguing that a “good part of the practice of many defense lawyers, especially in the period before indictment, is supplying information to prosecutors” and, because “[p]rosecutors take seriously information coming from reputable counsel,” they will be less likely to conflate the guilty and the innocent).

IV. THE DEMOCRATIC VIRTUES OF OUR CRIMINAL JUSTICE SYSTEM

Once we realize that the picture of criminal adjudications is far more complex than the critics suggest, we can better understand the democratic virtues of the American criminal justice system. One of the chief features of that system is its receptivity to popular input. Of course, a system of justice can go too far in this direction. A lynching at the hands of a mob has popular participation, but no one would claim the proceeding bore the slightest resemblance to justice. Liberty, in short, is not a matter of popular sufferance. On the other hand, few things affect the public safety and ordered society so much as the system of criminal justice, and it is only right that such a public institution not become the instrument of unaccountable elites. Where to strike the balance between popular participation and insulation from popular excess is not an easy question. If the American system sometimes errs on the side of democratization, that is not always a bad thing.

A. *Democratic Control over Crime and Punishment*

The practice of entrusting legislatures with control over crime and punishment—an approach that commentators have referred to as “legislative primacy”²⁵⁰—may seem so commonplace today that its basic features may be taken for granted. But it is only upon understanding the contours of our current system that we can properly respond to its detractors. This Section therefore begins with a brief account of the way in which legislative primacy functions, examining a typical criminal statute by way of example.

Broadly speaking, legislatures set about their task of defining crime and punishment by enacting criminal statutes that share two features: the elements of a criminal offense and a range of punishments. Consider the criminal offense of burglary. The states have defined burglary using statutes that differ in their various details, but California’s burglary law, first enacted in 1872 and amended periodically since then, serves as a useful example. Section 459 of the California Penal Code provides the core prohibition: “Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel [or other specified space] with intent to commit grand or petit

250. See Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1301 (1998); Robert Weisberg & Marc L. Miller, *Sentencing Lessons*, 58 STAN. L. REV. 1, 7 (2005).

larceny or any felony is guilty of burglary.”²⁵¹ The California legislature has thus defined the elements of burglary in section 459 to include (1) entry into a specified space, with (2) the intent to commit larceny or any felony.²⁵² The California legislature then sets forth a range of punishments for burglary. Section 460 provides that “every burglary of an inhabited dwelling house” is “burglary of the first degree,” whereas “other kinds of burglary are of the second degree.”²⁵³ Section 461 explains that burglary in the first degree is punishable by a term of “imprisonment in state prison for two, four, or six years,” while burglary in the second degree is punishable by “imprisonment in the county jail not exceeding one year.”²⁵⁴

That legislatures are responsible for defining crimes and attendant punishments in this manner should not be taken to mean that our system of criminal law is altogether subject to the will of democratic majorities. Judges apply constitutional checks at sentencing, albeit not as strictly as at trial. In invalidating on Eighth Amendment grounds the imposition of mandatory life sentences on juvenile homicide offenders,²⁵⁵ the Supreme Court summed up this judicial check as follows: although “[t]he definition of the elements of a criminal offense is entrusted to the legislature,” the legislature must still act “within any applicable constitutional constraints in defining criminal offenses.”²⁵⁶ Judges possess considerable discretion in the conduct of a criminal trial on everything from jury selection, evidentiary rulings, continuances, scope of cross-examination, and much more. Their discretion at sentencing is even greater: the finding of facts and imposition of punishment within prescribed limits are both entrusted to their care. Deciding who gets to define the contours of criminal law is, in other words, not a stark either-or proposition between lawmakers and judges. Yet when it comes to deciding what primary social conduct shall be criminally proscribed in the first instance and how it shall be punished, our system locates that power squarely in the hands of elected legislatures.

251. CAL. PENAL CODE § 459 (West 2014).

252. *People v. Anderson*, 211 P.3d 584, 589 (Cal. 2009).

253. CAL. PENAL CODE § 460. The statute also provides that burglary of a vessel, floating home, or trailer coach qualifies as burglary in the first degree.

254. *Id.* § 461.

255. *See, e.g., Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (holding that statutes that impose mandatory life imprisonment without possibility of parole for juvenile homicide offenders violate Eighth Amendment).

256. *Liparota v. United States*, 471 U.S. 419, 424 & n.6 (1985).

It was not inevitable that this would be so. We could have had a system in which judges and not lawmakers define crimes and punishments through the process of adjudication. Indeed, American criminal law often followed this kind of approach, as crimes were defined as a matter of judge-made common law.²⁵⁷ Until they enacted statutes defining the elements of burglary, for instance, the states enforced the common-law version of the offense, which encompassed additional judicially created elements such as the requirement that the offense occur during nighttime.²⁵⁸

As it turns out, criticisms of the common-law system of crime and punishment are largely responsible for the most widely cited examples of the second alternative to legislative primacy: placing responsibility for setting criminal law in independent bodies of experts. At the heart of critiques against the criminal common-law system were concerns with notice, since a regime of common-law crimes “unfairly burden[s] the populace by subjecting it to prohibitions of which it [i]s unaware.”²⁵⁹ A movement thus developed towards expert-drafted comprehensive codes setting forth entire bodies of criminal law.²⁶⁰ The most prominent example was the American Law Institute’s Model Penal Code, which was drafted by a distinguished committee of “law professors, judges, lawyers, and prison officials, as well as experts from the fields of psychiatry, criminology, and even

257. See Note, *Common Law Crimes in the United States*, 47 COLUM. L. REV. 1332, 1332 (1947) (observing in 1947 that a “majority of the states retains to some degree the common law of crimes received as part of the common law of England” and that those common law concepts and precedents “exert an influence much more pervasive than that found in code states”). To this day, some states still have statutes on the books that expressly recognize the existence of a small number of common-law crimes where parallel statutory provisions have not been enacted. See, e.g., D.C. CODE § 49-301 (2001); FLA. STAT. ANN. § 775.01 (West 2013); N.M. STAT. ANN. § 30-1-3 (West 2013); WASH. REV. CODE ANN. § 9A.04.060 (West 2013). The judicial power to create new crimes in these states, however, is “rarely used.” Kevin C. McMunigal, *A Statutory Approach to Criminal Law*, 48 ST. LOUIS U. L.J. 1285, 1287 (2004).

258. See, e.g., *Schwabacher v. People*, 46 N.E. 809, 810 (Ill. 1897) (noting that the Illinois burglary statute repealed the original common-law nighttime requirement); *Carrier v. State*, 89 N.E.2d 74, 76 (Ind. 1949) (same for Indiana law).

259. Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 AM. J. CRIM. L. 193, 197 (2002); see also, e.g., COMMISSIONERS OF THE CODE, DRAFT OF A PENAL CODE FOR THE STATE OF NEW YORK, at iv (1864) (“As long as the criminality of acts is left to depend upon the uncertain definition or conflicting authorities of the common law, uncertainty must pervade our criminal jurisprudence.”).

260. See Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler’s Predecessors*, 78 COLUM. L. REV. 1098, 1098–99 (1978) (discussing Herbert Wechsler’s role in writing the Model Penal Code as the “latest in a tradition of Anglo-American criminal law codifiers going back to Jeremy Bentham”).

English literature.”²⁶¹ The Code was completed in 1962 and spurred action by some thirty-four states, which adopted revised codes between 1963 and 1982.²⁶² Professor Stuntz cites the Code as the prime example of “shift[ing] crime definition from elected legislators to unelected experts or bureaucrats.”²⁶³

To be sure, this “shifting” of responsibility does not eliminate the role of legislatures entirely; even after an independent body completes its delegated task of drafting a code, the legislature must still adopt it. And in the years since the states first adopted revised codes, many have returned to the familiar approach of legislative primacy where legislatures define and redefine crime and ranges of punishment as part of the ordinary political process.²⁶⁴ This reemergence of a more robust legislative role led Herbert Wechsler to complain that the New York criminal code, “which [he believed] in 1965 . . . was a really quite distinguished integrated code, has been slopped up. That’s going to happen in every state in the union.”²⁶⁵ But the experience with the Model Penal Code teaches that the act of placing the drafting pen in the hands of independent experts is a distinct alternative to pure legislative primacy, as such delegation assertedly has a “depoliticizing” effect that may lead to crimes and punishments different than those lawmakers would otherwise enact.²⁶⁶

Understanding the concept of legislative primacy over criminal law along with its potential alternatives allows us to better appreciate the criticisms levied against it. The critics present two essential charges. First, they argue that state legislatures and Congress have simply enacted too many criminal prohibitions. Commentators decry the “one-way ratchet” towards criminalizing more and more conduct, with one professor likening the overcriminalization problem to “an

261. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 *NEW CRIM. L. REV.* 319, 323 (2007); see also Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 *CALIF. L. REV.* 943, 948 (1999) (“The project got underway at the beginning of our fifty-year period and, assisted by cadres of legal and social science scholars, the Reporters submitted their final product in 1962.”).

262. Kadish, *supra* note 261, at 948.

263. Stuntz, *supra* note 33, at 582.

264. See, e.g., *id.* at 582–84 (arguing that many states did not adopt the Model Penal Code as drafted, but instead made many changes, and that even after the codes were adopted the legislatures simply continued adding more crimes later).

265. *Model Penal Code Conference Banquet Remarks and Responses*, 19 *RUTGERS L.J.* 855, 864 (1988) (remarks of Herbert Wechsler).

266. Stuntz, *supra* note 33, at 583.

opera having too many notes.”²⁶⁷ The result, it is argued, is that we are on the verge of “a world in which the law on the books makes everyone a felon.”²⁶⁸ Such a state of affairs is lamentable not just because it exposes “ordinary people to criminal punishment for innocuous behavior” but also because it “expands the discretion of prosecutors to the point of lawlessness.” That is because, with a myriad of criminal prohibitions to select from, prosecutors can “effectively pick and choose offenders as well as offenses.”²⁶⁹

If the critics’ first complaint is that legislative primacy has led to a problem of overcriminalization, their second is that legislatures are also guilty of overpunishment. That is to say, even where lawmakers have properly proscribed a particular class of harmful conduct, the penalties for such violations are too harsh.²⁷⁰ As Professor Luna describes it, the modern-day system features “grossly disproportionate penalties that bear no relation to the wrongfulness of the underlying crime” and results in “sentences that cannot contribute to the traditional goals of punishment in any meaningful sense.”²⁷¹ Critics contend that much of the problem owes to a lack of individualization in American punishment regimes, due in particular to the prevalence of mandatory minimum sentences.²⁷² Why such individualization is desirable in judicial sentencing, but not in prosecutorial charging, is something the critics may find it useful to explain. It is no answer to say that sentencing and charging are different settings when a degree of individualization would serve the interests of justice in both instances.

If given their druthers, what would the critics have instead of the current regime of alleged overcriminalization and overpunishment? Why, fewer criminal laws and reduced punishments, of course. But the critics contend that such changes are unlikely to

267. Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 713 (2005); see also Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223 (2007) (noting the critique that the “process of criminal law legislation is, as several leading scholars have characterized it, a ‘one way ratchet.’ ”); Stuntz, *supra* note 33, at 509 (noting how criminal law has become “a one-way ratchet that makes an ever larger slice of the population felons”).

268. Stuntz, *supra* note 33, at 511.

269. Brown, *supra* note 267, at 223; see also *supra* Part II.C.

270. See Nancy J. King, *Judicial Oversight of Negotiated Sentences in A World of Bargained Punishment*, 58 STAN. L. REV. 293, 301 (2005) (noting that “legislative adjustments to federal sentencing policy have been a one-way ratchet for twenty years”); Stuntz, *supra* note 33, at 510, 526 (discussing the trend in modern day politics towards harsher punishment).

271. Luna, *supra* note 267, at 716.

272. See, e.g., Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 1 (2010) (“A mandatory minimum deprives judges of the flexibility to tailor punishment to the particular facts of the case and can result in an unduly harsh sentence.”).

occur within the current regime because crime and punishment is the product of democratic processes—and voters are unlikely to demand more lenient policies.²⁷³ Thus, to the critics, the reason that criminal codes are “so broad” and “always getting broader” is a pernicious combination of ordinary political forces (voters demand harsher treatment of criminals and politicians find it easy to oblige) and institutional political incentives (legislators and prosecutors see mutually reinforcing benefits to passing more and harsher criminal laws).²⁷⁴

The critics are thus confronted with something of a means-end conundrum. To achieve their desired ends (decriminalization and lesser punishment), they must change the means through which those ends are thwarted (legislative primacy). Or to put it slightly differently, the critics say we must “end legislators’ monopoly on crime definition” because in order to fix the law governing what is punishable and how it is to be punished, there must first be a change in the matter of *who* gets to decide those questions.²⁷⁵ Doing so, of course, raises the question of who will have the power in lieu of legislators, and here the critics are clear that the palatable alternatives are the very two mentioned above: judges and independent experts.²⁷⁶ With respect to the judge-driven alternative, Professor Stuntz suggests that “courts could create the judicial equivalent of new criminal codes, and insulate them from legislative override by pegging them to due process.”²⁷⁷ And with respect to the independent expert approach, the idea would be to delegate decisions concerning criminalization to unelected experts and bureaucrats who

273. See Stuntz, *supra* note 33, at 509 (noting that voters typically “demand harsh treatment of criminals; politicians respond with tougher sentences (overlapping crimes are one way to make sentences harsher) and more criminal prohibitions”); see also Sara Sun Beale, *What’s Law Got To Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 44–51 (1997) (describing the deeply held public fear of crime).

274. Stuntz, *supra* note 33, at 509–10.

275. *Id.* at 579.

276. See, e.g., *id.* at 582–98 (discussing the dual approaches to pursuing decriminalization and improving sentencing leniency: judicial control and independent experts); Luna, *supra* note 267, at 729, 731 (characterizing the “potential solutions” to overcriminalization as either “imposing the judiciary as a check on the political branches,” or the “non-judicial ‘depoliticization’ of substantive criminal law . . . [by] shifting the authority to define crimes in the first instance from lawmakers to non-political experts in criminal justice”).

277. Stuntz, *supra* note 33, at 588.

would be insulated from popular pressures to overproscribe and overpunish.²⁷⁸

Notwithstanding the critics' arguments, I believe our present approach of placing the ultimate authority over crime and punishment in the hands of the people themselves is much the best one. To begin with, what and how we choose to punish are questions that in some way affect all citizens. Roughly three in ten Americans—some *ninety million* in total—reported in one poll that either they or someone in their household has been a victim of crime *within the past year alone*.²⁷⁹ The crime rate, of course, rises and falls, but even in a down period, the number of people affected remains substantial. It accordingly makes sense to trust legislators to decide what should be unlawful, because they are responsive to the public at large. Placing those decisions in the hands of unelected judges or independent experts, by contrast, could frustrate the legitimate desires and concerns of the people because judges and experts are unlikely to be afflicted by the same problems experienced by ordinary citizens. Judges and independent experts, after all, do not often inhabit areas where the effects of crime and punishment are continually present.²⁸⁰ Elites cannot easily fathom the proper balance between liberty and safety in areas where parents constantly fear their children will be conscripted into a gang or consumed by a drug addiction.²⁸¹

Moreover, even if the critics were to win the day and place judges or experts in charge, there is no guarantee that this would bring about the more lenient criminal law the critics desire. It would instead raise the same questions about the proper scope of crime and degree of punishment at a different level of recursion. Indeed, there is a certain irony to the critics' call for a more judge- and expert-driven model of crime and punishment, since many of the aspects of the

278. See *id.* at 580, 582–83 (discussing the possibility of curbing legislators' power by depoliticizing criminal law).

279. Joseph Carroll, *U.S. Crime Victimization Trends Flat*, <http://perma.cc/SDA5-EJ2D> (gallup.com, archived Mar. 12, 2014).

280. Of course, as many critics note, many of our legislators may not represent these high-crime communities either. See, e.g., William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1998–2010 (2008). But inevitable weaknesses in the democratic process do not warrant the wholesale replacement of our system with an even less democratic one run by unelected judges or unaccountable experts.

281. See Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1182 (1998) (“The complicated interactions between law, norms, and liberty should make judges humble. They can’t legitimately infer, for example, that . . . gang-loitering laws . . . restrict liberty just because they interfere with individual choices. For those laws . . . may in fact be constructing options that individuals value and wouldn’t otherwise have.”).

system that critics find most objectionable are themselves judge and expert made. Judges, for example, are responsible for the supposedly unduly demanding standard for a claim of ineffective assistance of counsel, the application of harmless error doctrine, and recent backtracking on *Miranda* rights.²⁸² And it was an independent body of academics and judges on the U.S. Sentencing Commission who drafted the Federal Sentencing Guidelines that still other experts have condemned as “arbitrary” and “too harsh.”²⁸³ Replacing legislative primacy and its reliance on the will of the people with an unaccountable, elite-driven model may or may not lead to the critics’ desired more lenient system, but at least in the democratically driven approach, the people will get the criminal law they have sought.

In their hurry to denounce our current system, the critics have also ignored its salutary diversity. It is true that there has been a significant expansion in the number of federal crimes in recent decades, an expansion that has trespassed on the traditional role of states. Why this is so remains open to debate. Perhaps members of Congress wish to share the credit in the “war on crime.” Perhaps modern criminal enterprises boast more sophisticated techniques, spreading over many states, creating a situation that calls for a coordinated federal response. Nonetheless, because American criminal law is still shaped to a significant extent by federalism, states and localities possess the ability to tailor sanctions to their particular needs and values. If a state finds that its laws are too onerous or its punishments too expensive, its citizenry can respond accordingly through the democratic process. Limited budgets often force states to pay significant attention to the costs of incarceration.²⁸⁴ This variety of approaches to criminal law benefits not only local communities but our national discourse as a whole.²⁸⁵ Trying to craft a judicially or expert-imposed one-size-fits-all criminal law has its drawbacks. Greater national uniformity may have a certain fairness and evenhandedness to commend it. That was certainly the impetus for the Federal Sentencing Guidelines.²⁸⁶ But it is no guarantee of leniency or

282. See *supra* notes 13–15, 21–24, and accompanying text (explaining the Supreme Court’s alleged weakening of the rights available to criminal defendants).

283. Stuntz, *supra* note 33, at 586.

284. See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1300–12 (2005) (explaining the role of incarceration costs in shifting criminal justice policies).

285. Bilonis, *supra* note 251, at 1304.

286. See *Mistretta v. United States*, 488 U.S. 361, 363–67 (1989) (discussing the background of the Federal Sentencing Guidelines).

correctness, as the Sentencing Guidelines themselves attest. As Justice Black noted in this context, “experience in making local laws by local people is by far the safest guide for a nation like ours to follow.”²⁸⁷

The concept of democratic control over crime and punishment is preferable to a system driven by judges or independent elites for yet another important reason: legislative primacy is most consistent with the Constitution. Although the Constitution does not expressly locate the power to set criminal law in one branch or another, it does contain a useful analog: the war and foreign policy powers. Article I vests in Congress the power to “declare war,”²⁸⁸ and Article II is widely understood to grant the President significant power with respect to foreign policy.²⁸⁹ That power over issues of *external* collective security are placed in the hands of the democratically accountable branches suggests that questions of *internal* collective security—that is, questions of domestic crime and punishment—should also be open to elective input.

There is, of course, an important difference between questions of external and internal security: the latter are irrefutably subject to the safeguards of the Bill of Rights.²⁹⁰ Where the public’s sense of security against domestic criminals is protected by legislative determinations regarding crime and punishment, the rights of individual criminal defendants, whether state or federal, are protected by the Constitution’s many procedural guarantees. But this just underscores the central point: To the extent the Constitution envisions judicial involvement in crime and punishment, it views the judiciary as a check on the *processes* of criminal investigation and adjudication, not a check on the popular definitions of criminal law that commence the adjudicatory process in the first place.²⁹¹

287. *Powell v. Texas*, 392 U.S. 514, 548 (1968) (Black, J., concurring).

288. U.S. CONST. art. I, § 8, cl. 11.

289. See U.S. CONST. art. II, § I, cl. 1 (“The executive Power shall be vested in a President of the United States”); *id.* § II, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States”). See generally Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) (examining the scope of executive power over foreign affairs considered at various stages prior to and just after the ratification of the Constitution).

290. Whether the Bill of Rights imposes limitations on Executive foreign policy powers is a topic of some debate, as evidenced by a recent memo drafted by the Office of Legal Counsel in relation to the United States’ use of an unmanned drone to kill Anwar al-Awlaki, an American citizen and active member of Al Qaeda. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, <http://perma.cc/9JZ-MKVB> (nytimes.com, archived Mar. 12, 2014).

291. See generally Bilonis, *supra* note 251 (examining the role of the Constitution in distinguishing procedural versus substantive criminal law).

Other aspects of the Constitution support the view that legislative primacy is the proper approach to defining crime and punishment. The Supreme Court has long rejected the proposition that federal judges might create a body of federal criminal common law, using reasoning that implicates separation of powers principles. In the 1812 case of *United States v. Hudson & Goodwin*, for example, the Court refused to hold that federal courts possess common-law jurisdiction to adjudicate criminal libel prosecutions because “[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”²⁹² More recently, in *Whalen v. United States*, the Court declared that “within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress.”²⁹³

Relocating the power to define crime and punishment in the judiciary would also present due process concerns. Unlike statutes, which are prospective and worded in generally applicable terms, judicial crime definition through ad hoc, case-by-case decisionmaking may not provide sufficient notice to ordinary citizens on how to comport with the law.²⁹⁴ Relatedly, to punish a person criminally for failure to abide by an unclear common-law duty might lead to ex post facto concerns, since a defendant might argue that none of the prior precedents sufficiently proscribed the charged conduct and that a conviction would thus amount to an unconstitutional, post hoc criminalization.²⁹⁵

Finally, the critics are wrong to demand the curtailment of legislative primacy over criminal law because their very premise—that democratically enacted criminal laws are a “one-way ratchet” towards more and harsher punishment—is itself hugely oversimplified. As Professor Darryl Brown has argued, “State legislatures, in fact, have long and continuing records of repealing or narrowing criminal statutes, reducing offense severity, and converting low-level crimes to civil infractions. Even as criminal law has expanded greatly in some directions, it has contracted—dramatically so—in other spheres of activity.”²⁹⁶ Professor Brown points to

292. 11 U.S. (7 Cranch) 32, 34 (1812).

293. 445 U.S. 684, 689 (1980).

294. Rosenberg, *supra* note 260, at 197.

295. *Id.* at 198.

296. Brown, *supra* note 267, at 225.

consensual sex offenses, statutes criminalizing expressive conduct, gaming regulation, concealed weapons statutes, intrafamily assault and battery, and public drunkenness as examples of areas in which legislatures have been responsible for the contraction of criminal law.²⁹⁷ And even one of the foremost critics of the current system has recognized that some states and jurisdictions are experimenting with more lenient policies, such as imposing shorter jail sentences for probation violations and the proactive use of injunctions to disrupt gang activities rather than relying upon back-end criminal charges.²⁹⁸

Our democratically produced system of crime and punishment is more lenient than the critics would admit for the additional reason that it entails graduated schemes that punish in proportion to the severity of a given offense.²⁹⁹ This feature is hardly unique to a democratic system of crime and punishment, but it is present. For example, federal law punishes bank robberies that do not use force, violence, or intimidation less severely than those that do, and authorizes additional punishment where the crime is committed with a dangerous weapon or results in a death.³⁰⁰ Similarly, the California burglary statute discussed above identifies two distinct subclasses of offense conduct and imposes less severe punishment (one year in county jail as opposed to two, four, or six years in state prison) for less culpable conduct (burglary of a structure other than a dwelling).³⁰¹ Legislative primacy has also produced a graduated juvenile justice system. That system encompasses a host of dispositions and procedures, such as probation, parole, indeterminate sentences, and the juvenile court itself, all of which reflect “open-ended, informal, and highly flexible policies to rehabilitate the deviant.”³⁰² In addition to focusing on rehabilitation, juvenile justice systems also employ proportional sentencing structures based on a juvenile’s present and

297. *Id.* at 235–43; see also Craig S. Lerner, *Legislators as the “American Criminal Class”*: *Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 613–14 (summarizing recent federal legislation protecting the seizure of a criminal defendant’s assets, restricting the investigative tactics of federal prosecutors, and giving defendants the ability to recover legal fees spent defending against frivolous prosecutions).

298. STUNTZ, *supra* note 159, at 295.

299. See Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1687–88 (2009) (“Criminal law embodies proportionality in punishment schemes that impose milder sanctions such as short or suspended sentences for lesser crimes, and harsher sanctions for graver crimes.”).

300. See 18 U.S.C. § 2113 (2012).

301. See CAL. PENAL CODE §§ 459–61 (West 2014).

302. Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 823 (1988).

prior offenses, so that punishment is meted out in relation to an individual offender's circumstances.³⁰³

In short, it is far too simple to declare that crime and punishment in America are overly harsh and only getting harsher. The Supreme Court captured the more nuanced reality when it recognized in the Eighth Amendment context that, despite the "well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime," numerous state legislatures have nonetheless adopted more lenient policies over time regarding certain controversial forms of punishment such as capital punishment for the mentally retarded.³⁰⁴ That crime and punishment is not a one-way street toward an inevitably more draconian state makes sense because lawmakers face competing incentives. Some voters may desire harsher punishments and broader criminal proscriptions, but lawmakers must also respond to the reality that locking up petty criminals consumes a great deal of resources that may be more valuably spent serving other important social functions.³⁰⁵

Faced with these countervailing public policy interests, the notion that lawmakers are always out to put as many people in prison as they can, and for as many years as possible, just does not pass muster. I do not deny, of course, that legislatures can be tough, mandatory minimum sentences being a prime example. While such sentences may help to achieve the goal of equal punishment for those who commit identical offenses, they do so at the sacrifice of the individualization that ought also to be part of so personal a proceeding as sentencing. But where long sentences are handed down, there is often a good reason. Democratic government is not wrong in understanding that the most serious crimes inflict profound personal and social harms, and accordingly merit serious punishment, or that a record of repeated offenses merits progressively stricter sanctions. That the system responds to such popular concerns may build a sense of trust in it and help ward off the spirit of helplessness that too often seizes the victims of horrific crimes. To shift control of the system into more elite and less accountable hands risks further widening the gulf

303. *Id.* at 822.

304. *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (noting a steady and consistent direction of change towards abolition of the death penalty for mentally retarded defendants).

305. *See, e.g.*, Dan Morain, *Changes Ahead for California's Prisons and 'Three Strikes' Law*, <http://perma.cc/Z3HL-FL8N> (modbee.com, archived Mar. 12, 2014) (noting that "the pendulum has swung" and California lawmakers are now recommending paring down the state's harsh Three Strikes law in order to reduce prison costs). *See generally* Barkow, *supra* note 284.

between government and governed. Such a prospect should give critics serious pause in their indictment of our system of democratic control over crime and punishment. The Bill of Rights and many rules and statutes safeguard precious personal liberties, but it is also the people's country, and some measure of popular governance and public safety leads to a liberty and opportunity all its own. To the extent the criminal justice system values democratic input and legislative primacy, that is a virtue.

B. Democratic Input Through the Criminal Jury

Apart from legislative control over crime and punishment, our criminal justice system grants remarkable power to ordinary citizens in the form of the jury. As De Tocqueville long ago understood, "The institution of the jury . . . places the real direction of society in the hands of the governed, . . . and not in that of the government [It] invests the people, or that class of citizens, with the direction of society."³⁰⁶ The importance of the jury's role in our criminal justice system is underscored by the fact that the Constitution mentions it three times, both in the main text and the Bill of Rights.³⁰⁷ Taken together with the civil jury, no other safeguard of freedom is discussed more times in the Constitution.³⁰⁸ Ours is not a system run entirely by juries, of course. Judges and attorneys play, as they should, a crucial role, especially where complex legal questions are involved. We have what can be called a mixed system, but one that, thanks to the role of the criminal jury, has a gentle democratic tilt.

Surely the role that juries play in American criminal justice deserves a paean or two, even from the system's most hardened critics. Simply put, it is cause for celebration that the American system is as democratic as it is. The criminal jury serves four important functions. First, and perhaps most importantly, it protects the people from

306. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 293–94 (Philip Bradley ed., Vintage Books 1945) (1835).

307. U.S. CONST. art. III, § 2 ("The trial of all crimes, except in cases of impeachment, shall be by jury"); U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger"); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed").

308. Meghan J. Ryan, *Juries and the Criminal Constitution* 3 (S. Methodist Univ. Dedman Sch. of Law Legal Studies Research Paper No. 121, 2012), available at <http://perma.cc/6HP5-H9N9>.

governmental abuse. Whether guarding against an overzealous prosecutor or an underwhelming case, the criminal jury is a crucial mechanism for protecting defendants. True autocrats would never trust free juries but would opt for judges whose rulings could be reliably engineered by the state. Jury nullification, the ultimate expression of the jury's unreviewable power to acquit defendants, has admittedly been the subject of abuse, as when white juries in the Jim Crow South acquitted white defendants of crimes against black victims even when their guilt was clear.³⁰⁹ But the solution in such cases is not to eliminate juries but rather to ensure that they are representative. Thus, the Supreme Court has held that the Equal Protection Clause forbids racial discrimination in jury composition.³¹⁰ The ultimate juror power to acquit is a beautiful thing. It predates even the Constitution. The celebrated case of John Peter Zenger, a colonial-era newspaper publisher tried for seditious libel for his outspoken criticism of New York Royal Governor William Cosby,³¹¹ illustrates the vital role the jury plays in checking government tyranny. In acquitting Zenger despite the trial judge's ruling that truth was not a defense to libel,³¹² the jury protected both Zenger's liberty and colonial freedom of the press from royal tyranny.

The criminal jury safeguards liberty not only by checking prosecutors, but also by tempering the power of judges, the quintessential legal insiders. "[J]udges and lawyers, even the most upright, able, and learned, are sometimes too much influenced by technical rules; and . . . those judges who are wholly or chiefly occupied in the administration of criminal justice are apt . . . to decide questions of law too unfavorably to the accused."³¹³ By enabling a cross-section of the community to apply generalized laws to an individual defendant, the jury system allows each criminal case to be seen with fresh eyes.³¹⁴ Ultimately, by ensuring that an individual will

309. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 74 (2003).

310. See *Batson v. Kentucky*, 476 U.S. 79, 85–88 (1986) (holding that racially discriminatory uses of peremptory challenges violate the Equal Protection Clause); *Norris v. Alabama*, 294 U.S. 587, 599 (1935) (holding that discriminating based on the false assumption that members of defendant's race are not qualified to serve violates the Equal Protection Clause).

311. See generally JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER* (Stanley Katz ed., 1963).

312. See David A. Pepper, *Nullifying History: Modern-Day Misuse of the Right to Decide the Law*, 50 CASE W. RES. L. REV. 599, 614–16 (2000) (recounting the Zenger defense attorney's urging of the jury to reject the judge's view of the case law).

313. *Sparf v. United States*, 156 U.S. 51, 174 (1895) (Gray, J., dissenting).

314. Barkow, *supra* note 309, at 61–62.

only be punished for conduct that his community, rather than a faceless or faraway government bureaucracy, disapproves of, the criminal jury injects the prospect of lenity into our criminal laws. In the words of Learned Hand, the presence of the jury “introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions.”³¹⁵

Some commentators accept in the abstract the capacity of the jury to temper the harshness of the criminal law but nevertheless believe the jury’s role to be largely inconsequential in an age dominated by plea bargaining.³¹⁶ But this conclusion is too hasty. For those who despair over the rise of plea bargaining, consider what would happen if defendants did not possess a right to demand a jury trial. The accused would lack the specter of a jury’s scrutiny to ward off an unjust prosecution. Like most deterrents, a panel of one’s peers need not be immediately present to do its job.³¹⁷

The jury’s second role in accurately finding facts has also elicited the critics’ skepticism. Commentators have highlighted the mistakes that lay juries can make—for example, when evaluating complex statistical evidence.³¹⁸ But such observations, even if true,³¹⁹ do not militate in favor of shifting more fact-finding responsibility at trial from juries to judges. In making factual determinations, a group of jurors has qualities that a single judge does not: there are more of them, and with their increased number comes greater diversity in their backgrounds and the perspectives they bring to evaluating the evidence at trial. Indeed, the jury itself reflects a mini-version of democracy, in particular the idea of deliberative democracy: that through reasoned debate and discussion, groups of citizens can come to good decisions.³²⁰ Scientific research tends to confirm this theory: in

315. *United States ex rel. McCann v. Adams*, 126 F.2d 774, 775–76 (2d Cir. 1942), *rev’d on other grounds*, 317 U.S. 269 (1942).

316. *See* Barkow, *supra* note 309, at 34 (“Today, however, the jury’s role as a check on the government’s power has become far more limited. The criminal process in the United States has become largely an administrative one, with the police, prosecutors, and judges overseeing the criminal laws with little intervention by the people.”).

317. *See supra* note 219 and accompanying text.

318. *See generally* William C. Thompson, *Are Juries Competent to Evaluate Statistical Evidence?*, 52 *LAW & CONTEMP. PROBS.* 9 (1989) (noting potential for jurors to overestimate or underestimate probabilistic values of evidence).

319. For a discussion of the challenges in judging juror competence, see Gregory Mitchell, *Asking the Right Questions About Judge and Jury Competence*, 32 *FLA. ST. U. L. REV.* 519 (2005).

320. *See* Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 *CARDOZO L. REV.* 1417, 1420, 1448–54 (1997) (describing the deliberative process as one iteration of democracy in action).

a wide variety of contexts, groups perform better than individuals in making factual judgments and coming to sound conclusions.³²¹

The final two benefits of the criminal jury center less on the individual trial than on our broader democratic system. By anchoring convictions and punishment in the defendant's community, juries help legitimize the criminal justice system.³²² As the Supreme Court has noted, "Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."³²³ And finally, by requiring ordinary citizens to engage in the vital task of adjudicating the guilt or innocence of their peers, criminal jury service educates citizens in their civic roles and responsibilities.³²⁴

And yet, despite the jury's essential role, there exist constant efforts on the part of critics to undermine its position. In Section II.A, I noted the relentless pressures to displace the Constitution's emphasis on a speedy and public trial by jury with repetitive hindsight in the form of collateral review. There are efforts to restrict the jury's role at the time of trial as well.

For example, judge-made rules that exclude highly probative evidence from the eyes of jurors—rules that criminal justice reformers continue to advocate³²⁵—have a soft legal foundation. Although *legislatively* created exclusionary rules also limit the jury's fact-finding, they do not offend its democratic role because the rules themselves are democratically generated. For example, the federal

321. See generally JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004). For a discussion of the implication of Surowiecki's conclusions on criminal juries, including suggested reforms, see Josh Chafetz, Book Note, *It's the Aggregation, Stupid!*, 23 YALE L. & POLY REV. 577, 580–84 (2005) (reviewing SUROWIECKI, *supra*).

322. See Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 361 (1999) (contending representativeness of the jury enhances legitimacy); Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 504 (1986) (asserting that jury composition affects community respect for the verdict).

323. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

324. Here too there is empirical support. For example, engaging in jury deliberations in a criminal trial has been shown to increase voting rates. See JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY* 35–37 (2010).

325. For only a small sampling of recent defenses of judge-made exclusionary rules, see, for example, Robert M. Bloom & David H. Fentin, "A More Majestic Conception": *The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47 (2010); Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1078 (2011); Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1 (2009); Scott E. Sundby, *Everyman's Exclusionary Rule: The Exclusionary Rule and the Rule of Law (or Why Conservatives Should Embrace the Exclusionary Rule)*, 10 OHIO ST. J. CRIM. L. 393 (2013).

“rape shield”³²⁶—which limits the admissibility of evidence of a sexual assault victim’s past sexual behavior, and which has been enacted in some version in virtually all of the states³²⁷—came out of a legislative deliberation that balanced jurors’ access to evidence and the defendant’s right to a full defense against invasion of the private life of the victim.³²⁸ Similarly, the baseline requirements of the Federal Rules of Evidence, that evidence be relevant and not unfairly prejudicial to the defendant,³²⁹ represent a democratically achieved consensus that judges play an important, although limited, screening role in aiding the jury’s fact-finding. On a more general level, legislatures can reform evidentiary practices without mandating the ultimate step of exclusion by, for example, directing improved conduct and recordation of police lineups.

By contrast, *judge-made* exclusionary rules—particularly in the form of implied constitutional remedies that do not have a clear basis in that document’s text—are doubly antidemocratic: they set courts above legislatures as to rules of procedure by mandating the application of certain forms of redress, and they diminish the role of the jury. Although I do not advocate their abolition—they can be appropriate in guarding against plainly unacceptable forms of government abuse—they must be used cautiously and sparingly. Fortunately, the Supreme Court has properly limited the scope of such rules in the past few decades. These decisions have been broadly criticized, but in fact they should be celebrated as striking a sensible balance between procedural protections for defendants and the accurate determination of innocence and guilt.

Judge-made exclusionary rules can be divided into two categories according to their purpose. First, there are rules that are motivated by a lack of faith in the jury to properly evaluate evidence. As I discussed earlier, commentators have argued for, and some courts have even agreed to, broad restrictions on the admissibility of

326. FED. R. EVID. 412.

327. Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 81 (2002).

328. 124 CONG. REC. 34,913 (1978) (statement of Rep. Mann):

The bill before us [adopting Fed. R. Evid. 412] fairly balances the interests involved—the rape victim’s interest in protecting her private life from unwarranted public exposure; the defendant’s interest in being able adequately to present a defense by offering relevant and probative evidence; and society’s interest in a fair trial, one where unduly prejudicial evidence is not permitted to becloud the issues before the jury.

329. See FED. R. EVID. 402, 403.

eyewitness testimony.³³⁰ Given the above discussion of the virtues of criminal juries, we can see even more clearly why such a move is misguided. Not only might it ultimately decrease the accuracy of criminal verdicts—by taking fact-finding away from diverse juries and giving it to singular judges—but it also impinges on the jury's democratically grounded role as fact-finder. Nor are such broad, judicially created rules of exclusion necessary. The Sixth Amendment dictates confrontation rather than exclusion as the appropriate approach to eyewitness testimony. The Confrontation Clause augments the jury's role, and it is hardly up to judges to diminish it. Of course, the Supreme Court recognized in *Crawford v. Washington* that the Confrontation Clause excludes the out-of-court testimonial statements of witnesses who do not testify at trial, unless that witness is "unavailable" and the defendant "had a prior opportunity for cross-examination."³³¹ As a general matter, however, eyewitness testimony should not be subject to a judge's decision as to admissibility but should instead go through the adversary process and be left to the jury's determination of its value and weight.³³²

The exclusionary rules in the second category are those motivated not by mistrust of the jury, but rather by mistrust of law enforcement. For example, the Supreme Court has emphasized multiple times that the sole justification for the Fourth Amendment's exclusionary rule is its deterrent effect against police misconduct.³³³ Similarly, the goal of deterring Fifth Amendment violations plays a role in justifying the exclusion of evidence obtained through non-Mirandized interrogations.³³⁴

Although such deterrence is an important consideration, it must be weighed against other values, including the democratic prerogatives of juries in evaluating evidence and the accurate determination of guilt and innocence. To exclude overbroadly in the interest of deterrence leads criminal trials ever further from their primary purpose: the ascertainment of the truth. Fortunately, the

330. See *supra* notes 69–70 and accompanying text.

331. 541 U.S. 36, 53–54 (2004).

332. The Supreme Court has supported this principle, holding most eyewitness identifications admissible under a "totality of the circumstances" test unless there is a "substantial likelihood of irreparable misidentification." *Manson v. Brathwaite*, 432 U.S. 98, 107–14 (1977).

333. See, e.g., *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011); *Herring v. United States*, 555 U.S. 135, 141 & n.2 (2009); see also *United States v. Leon*, 468 U.S. 897, 909 (1984).

334. See *Michigan v. Tucker*, 417 U.S. 433, 447 (1974) (applying the deterrence rationale of the exclusionary rule to the context of the Fifth Amendment and violations of the *Miranda* rules).

Supreme Court has recognized this all-important tradeoff and declined to eviscerate the democratic pursuit of truth at trial at the heart of the criminal justice system. For instance, in *Hudson v. Michigan*,³³⁵ the Court held that the exclusionary rule does not apply to evidence obtained in violation of the Fourth Amendment's knock-and-announce requirement for searches conducted pursuant to warrants.³³⁶ Testing the potential exclusion against its deterrent effect, the Court concluded that exclusion would not advance the purpose of the knock-and-announce rule: to protect inhabitants' safety and private property interests.³³⁷ The incentive to violate the knock-and-announce rule is generally minor, and the rule may be suspended when the police have a reasonable suspicion that the residents are destroying evidence or are about to engage in violent resistance.³³⁸

Following a similar balancing approach, the Court held in *Davis v. United States*³³⁹ that the exclusionary rule does not apply to searches conducted in reasonable reliance on then-binding appellate precedent.³⁴⁰ Both *Hudson* and *Davis* have been subject to withering criticism,³⁴¹ with some commentators engaging in overheated rhetoric about the "end of the exclusionary rule."³⁴² But these criticisms underestimate the costs to accuracy of exclusion and exaggerate its deterrent effects. Exclusion, especially of trustworthy evidence, makes

335. 547 U.S. 586 (2006).

336. *Id.* at 594.

337. *Id.* at 594–95.

338. *See id.* at 596 (examining the costs and benefits of deterring knock-and-announce violations).

339. 131 S. Ct. 2419 (2011).

340. *Id.* at 2428–29.

341. For criticisms of *Hudson*, see, for example, Mark E. Cammack, *The Rise and Fall of the Constitutional Exclusionary Rule in the United States*, AM. J. COMP. L., Supp. 2010, at 631, 645 (stating that *Hudson* added a "new wrinkle" to the attenuation doctrine by recognizing attenuation between the purposes served by the rule violated and the exclusion of evidence); Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191, 202 (2010) ("At its most fundamental level, *Hudson* called into question the future of the exclusionary rule . . ."). For criticisms of *Davis*, see, for example, George M. Dery III, "This Bitter Pill": *The Supreme Court's Distaste for the Exclusionary Rule in Davis v. United States Makes Evidence Suppression Impossible to Swallow*, 23 GEO. MASON U. C.R. L.J. 1 (2012); Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1189–91 (2012) (contending that the Supreme Court's decision in *Davis* is cause for alarm); James J. Tomkovicz, *Davis v. United States: The Exclusion Revolution Continues*, 9 OHIO ST. J. CRIM. L. 381, 382 (2011) (arguing that *Davis* "confirms the advent of a new era of exclusionary rule development, reflecting the Roberts Court's commitment to a revolutionary, and stifling, revision of the Fourth Amendment bar to illegally obtained evidence").

342. David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283, 283.

it more likely that juries will acquit guilty defendants. In addition to harming society by letting criminals go free, exclusion also risks undermining public confidence in our criminal justice system.³⁴³ And because police frequently have law-enforcement incentives beyond an eventual successful prosecution, the exclusionary rule's ability to alter police behavior is often limited.³⁴⁴

The Court's balancing approach has also properly tempered the reach of the Fifth Amendment's exclusionary rule. Ever since *Harris v. New York*,³⁴⁵ evidence obtained from non-Mirandized interrogations has been admissible to impeach a defendant's testimony.³⁴⁶ *Harris* recognized that the Fifth Amendment's privilege against self-incrimination was meant, among other things, to keep the government from compelling defendants to testify against themselves in court, rather than to prevent it from impeaching their willfully misleading in-court statements.³⁴⁷ I repeat that exclusionary rules have their place. They ensure that trials are not contaminated by lawless government misconduct. That too diminishes public trust in the system. But the aggressive application of exclusions severs a trial from external reality to an unacceptable extent. Exclusions hide truth, rather than seeking to reveal it. That is not a comfortable place for a trial, or any honest instrument of inquiry, to be.

Given my defense here and in Section II.A of the jury's critical role in American criminal justice, it might seem that I am always in favor of expanding its role and limiting that of judges. But the democratic virtues of the criminal justice system are occasionally themselves in tension. Alongside the place of the jury in our criminal justice system are the claims of democracy. Thus, as with the exclusionary provisions in the Federal Rules of Evidence, the jury's fact-finding function may properly be subject to *democratically* enacted limits. For this reason I am troubled by the Supreme Court's decision in *Apprendi v. New Jersey*,³⁴⁸ which held that any fact, other than a prior conviction, that could increase the maximum statutory

343. L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 672 (1998).

344. See Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 588-89 (2011) (noting that other incentives may include, for example, removing weapons and drugs from the street).

345. 401 U.S. 222 (1971).

346. *Id.* at 226.

347. See *id.* at 225 (recognizing that criminal defendants have the right to refuse to testify, but having taken the stand they have an obligation to testify truthfully and accurately).

348. 530 U.S. 466 (2000).

penalty must be found by a jury beyond a reasonable doubt.³⁴⁹ *Apprendi* and its line of cases³⁵⁰ increase the power of the jury, but do so at the command of judges rather than legislatures. The *Apprendi* doctrine baldly diminishes the primacy of the latter, which have traditionally decided how to structure criminal procedure, including choosing which facts about a crime were to be found by judges versus by juries.³⁵¹ To take from democratic bodies their historic power to determine the elements of a crime and the accompanying sentencing factors is a momentous step. Far from making criminal trials more democratic, decisions like *Apprendi* are the legal equivalent of robbing Peter (the legislature) to pay Paul (the jury).

C. Democratic Accountability in State Judiciaries

Another much-criticized aspect of our criminal justice system's democratic tilt is the election of state-court judges. Denunciations are almost universal and rain down from the highest echelons of the American legal establishment. Since retiring from the bench, Justice Sandra Day O'Connor has launched a campaign to persuade states to abandon the direct elections of judges.³⁵² In a 2010 *New York Times* op-ed, she stated that "elected judges are susceptible to influence by political or ideological constituencies" and that, "[w]hen you enter one of these courtrooms, the last thing you want to worry about is whether the judge is more accountable to a campaign contributor or an ideological group than to the law."³⁵³ Justice Ruth Bader Ginsburg also recently criticized the election of state judges: "I will be frank to say that I think [elections are] a dreadful way to choose people for judicial office."³⁵⁴ Legal commentators too have lined up to attack the

349. *Id.* at 490.

350. *See, e.g.,* *Alleyne v. United States*, 133 S. Ct. 2151 (2013) (holding that any fact that increases the mandatory minimum sentence for a crime is an element of the crime, not a sentencing factor, and must be submitted to the jury).

351. *See* 530 U.S. at 564–65 (Breyer, J., dissenting) (discussing how the *Apprendi* doctrine "impedes legislative attempts to provide authoritative guidance as to how courts should respond to the presence of traditional sentencing factors"); *see also* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1542 (2001) (arguing that the *Apprendi* doctrine should be limited to "prohibit[ing] the worst legislative excesses, and this is as far as the Court should intrude upon the supremacy of the legislature in defining substantive criminal law").

352. John Schwartz, *Effort Begun to End Voting for Judges*, <http://perma.cc/SEM2-DXGX> (nytimes.com, archived Mar. 12, 2014).

353. Sandra Day O'Connor, *Take Justice off the Ballot*, <http://perma.cc/8HGC-948U> (nytimes.com, archived Mar. 12, 2014).

354. Jess Miller, *Lawyers and Opera: Supreme Court Edition*, <http://perma.cc/4NW9-62MZ> (chqdaily.com, archived Mar. 12, 2014).

practice of electing state-court judges, on grounds ranging from the possibility of corruption to the lack of protection for minorities to harsher sentences meted out to criminal defendants.³⁵⁵ And high-profile examples, like the recent Supreme Court decision holding that a West Virginia Court of Appeals judge should have recused himself because the president and CEO of a party corporation spent \$3 million dollars to aid the judge's campaign, provide much fodder for these critics.³⁵⁶

These criticisms have force. Impartiality and its appearance in our judicial system should be its bedrock characteristic. We expect judges to maintain independence, not to be participants in the contentious political battles so common to elections. For this reason, campaign contributions in judicial elections can be more insidious than contributions and expenditures in their legislative, gubernatorial, and presidential analogues. But critics who advocate ending the election of state-court judges altogether are throwing the baby out with the bathwater. Their concerns argue for curbing the worst excesses of judicial elections, like those on display in the *Massey Coal* case, not discarding electoral systems altogether. Strict campaign-finance laws in judicial elections ought to generate an approving consensus. But no judicial elections anytime, anywhere? It is a radical proposition, one at odds with a criminal justice system that values its democratic features.

Given that federal judges are constitutionally appointed for life, the presence of some elected state judiciaries introduces a healthy diversity into the American judicial system. There is nothing in natural law or the Constitution that makes the appointment of state judges necessary and no policy imperative that requires state judges to be unaccountable to the people. The diversity of mechanisms by which states choose their judges—partisan elections to be sure, but also nonpartisan elections, gubernatorial appointment followed by

355. See generally, e.g., Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995); Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69 (2011); Gerald F. Uelman, *Crocodiles in the Bathub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133 (1997).

356. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

uncontested retention elections, and lifetime appointment³⁵⁷—should be appreciated as an expression of the experimentalism and decentralization that our federal system permits, rather than condemned for not hewing to a particular, Article III–centric view of judicial authority. Commentators have moved beyond their well-founded concerns about judges too beholden to narrow, partisan, and moneyed influence to maintain that elections by their very nature are a key flaw in our system of justice.

The whole argument is a complicated one, touching civil as well as criminal adjudications. Much, if not most, of the potential for corruption or undue influence lies on the civil side. As to criminal justice, it is far from clear that elected judges are “tougher on crime” than are appointed judges, as critics maintain. As the current examples of state decriminalization and deincarceration initiatives demonstrate,³⁵⁸ especially with regard to drug laws,³⁵⁹ state electorates are fully capable of demanding that their elected officials—and therefore presumably their elected judges too—ameliorate the strictest features of the criminal law. Second, to the extent that individual elected judges are “tougher on crime” than are their appointed counterparts,³⁶⁰ this merely begs the question of whether the tough stance is right or wrong, or whether it is illegitimate for judges to have some appreciation for the views and concerns of the larger public.³⁶¹

Because crime and punishment affects so many Americans, so should criminal law reflect popular, as well as elite, opinion, subject of course to those restrictions and protections enshrined in the

357. See AM. BAR ASS'N, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES (2002), available at <http://perma.cc/E3QL-2FG7> (examining the different methods by which states choose their judges).

358. For example, in November, 2012, California voters approved a referendum relaxing the notoriously harsh “three strikes” law. See Emily Bazelon, *How California's Three-Strikes Law Struck Out*, <http://perma.cc/CRM9-XS5U> (slate.com, archived Mar. 12, 2014).

359. The proliferation of marijuana-decriminalization laws is a prime example of this trend. See Steven B. Duke, *The Future of Marijuana in the United States*, 91 OR. L. REV. 1301, 1302 (2013).

360. See, e.g., Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RES. Q. 5, 24 (1995) (“[W]here judges must face voters to retain their positions, state partisan competition exerts a positive influence on support for the death penalty.”); Gregory A. Huber & Stanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?* 48 AM. J. POL. SCI. 247, 248 (2004) (finding that elected Pennsylvania judges gave longer prison sentences for rape, robbery, and assault convictions the closer the sentence was to the judges’ reelections).

361. See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 288 (2008) (“Beyond crime, other studies have found elected judges to be significantly more likely to rule in ways that are consistent with public opinion and to favor in-state litigants.”).

Constitution. Democratic accountability may help to bridge the chasm between the views of the elite precincts of judicial opinion and those of the public that judges serve. This mechanism of self-government may likewise help to legitimate judgments that otherwise might seem inexplicable in their strictness or in their leniency. These points, while surely open to debate, should serve at least to illustrate that the question of elected state judiciaries has more than one side. How are judicial elections structured? What laws exist to curb the worst abuses? The critics of state judicial elections do not stop for such nuance. They rush headlong into the sweeping proposition that this democratic feature of American criminal justice has no redeeming value. But the fact that some judges are appointed and others are elected reflects a healthy ambivalence about judicial power. We want our judges to be independent, detached, and nonpartisan to be sure, but not so removed from the society of which judges are a part that they have long since ceased to understand it.

V. CONCLUSION

My defense of American criminal justice has centered on two elements. First, the system is engaged in tradeoffs that are not just defensible, but necessary. We must balance liberty and order, and as described above, the tradeoffs we have made manage that difficult exercise in a manner that respects each of these fundamental values. The second virtue of our system is that it includes a healthy measure of democratic input. It maximizes democratic features—namely, the role of the legislature in defining crimes and punishment, electorally accountable prosecutors making charging decisions, and the jury in determining guilt—within reason. Our system is best described as mixed with a democratic lean, given its reliance both on these democratic elements as well as the expertise of the judiciary and the broader legal profession. This design derives its legitimacy by relying heavily on democratic ideals, tempered sufficiently to ensure that democracy promotes and does not trample personal liberty.

One final count in the indictment remains. Can we truly call a system democratic when a very large section of the citizenry—African-Americans—feel oppressed by or excluded from it? Is this a reason to discredit American criminal justice? The reaction to the verdict in the George Zimmerman trial in July 2013—in parts angry, reflective, and resigned—reminded us that many African-Americans feel as though the criminal justice system does not work for them. *Washington Post* columnist Eugene Robinson argued, “Our society considers young

black men to be dangerous, interchangeable, expendable, guilty until proven innocent.”³⁶² Manhattan Institute scholar and *New Republic* contributor John McWhorter argued that, for African-Americans, “the poisonous relationship between young black men and law enforcement is the prime manifestation of racism in modern America.”³⁶³ And President Obama noted that “the African American community is looking at this issue through a set of experiences and history that doesn’t go away,” one wrapped up in “a history of racial disparities in the application of our criminal law.”³⁶⁴

There is something to these criticisms. Americans have tried to address them over the years by requiring objective, race-neutral justifications for government actions within the criminal justice system. We have, for example, required that the jury venire be composed of a fair cross-section of the community,³⁶⁵ and in *Batson v. Kentucky*,³⁶⁶ the Supreme Court outlawed the use of peremptory challenges of jurors based upon their race. We can insist that objective criteria support stop and frisks. And we can focus on racial discrepancies in criminal-law enforcement—which may lead, for example, to four times as many marijuana arrests for black Americans as white Americans, despite similar rates of use.³⁶⁷

But efforts such as these won’t solve our problems altogether. This is because the story is more complicated than simply a criminal justice system that has failed to win the trust and confidence of many in the African-American community. The problem of racial equality and criminal justice is one of “painful complexity.”³⁶⁸ We can acknowledge that we have not yet reached our goal of race neutrality in the dispensation of justice while acknowledging also that this alone does not account for the racial makeup of our prisons and halfway houses. Then—New York Mayor Michael Bloomberg stated, “Ninety percent of all people killed in our city—and 90 percent of all those who commit the murders and other violent crimes—are black and

362. Eugene Robinson, *Black Boys Denied the Right To Be Young*, <http://perma.cc/T933-UMG8> (washingtonpost.com, archived Mar. 12, 2014).

363. John McWhorter, *No More “Conversations,”* <http://perma.cc/GQX6-HUHB> (newrepublic.com, archived Mar. 12, 2014).

364. President Barack Obama, Remarks on the George Zimmerman Verdict (July 18, 2013) (transcript available at <http://perma.cc/8H3X-XE3K>).

365. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

366. 476 U.S. 79 (1986).

367. Ian Urbina, *Blacks Are Singled Out for Marijuana Arrests, Federal Data Suggests*, <http://perma.cc/6D7W-64YU> (nytimes.com, archived Mar. 12, 2014).

368. Richard Cohen, *Racism vs. Reality*, <http://perma.cc/8HD2-6MME> (washingtonpost.com, archived Mar. 12, 2014).

Hispanic.”³⁶⁹ That is the great double-edged sword. It understandably leads to more stops and more arrests in high-crime areas. It understandably leads to more convictions of those of whatever race who commit the crimes. But it also leads to understandable anger and resentment on the part of disadvantaged young black males who want to make a decent go of American life, only to find themselves the object of recurrent false suspicion and repeated frisks.

The solution to the problem of race and criminal justice is not a total overhaul of the system. That just renders the criminal justice system the scapegoat for a much larger set of social problems. The criminal justice system feels the effects of those problems; it does not cause them. Drug and gun crimes are not any less a blight upon society because of the racial makeup of the offenders; indeed, as Robinson noted, “[N]owhere will you find citizens more supportive of tough law-and-order policies than in poor, high-crime neighborhoods.”³⁷⁰ Our criminal justice system rightly aims to reduce dangerous behavior, and the beneficiaries of success in that endeavor may be those less advantaged citizens for whom basic safety will make for greater opportunity, not to mention better prospects for a brighter life.

To cast ceaseless blame on America’s criminal justice system is to ignore the enormity of the problems it has been asked to solve. It only diverts attention from the larger ways in which America has failed its underclass. As Michael Gerson recently noted, “The problem of African American boys and young men is a complex mix of lingering racial prejudice, urban economic dislocation, collapsing family structure, failing schools and sick, atomized communities.”³⁷¹ To chastise criminal justice when many levers of upward mobility are so compromised is an inversion of priorities. A complete “fix” of what the critics allege ails criminal justice will do nothing to restore shattered family structures, improve failing schools, impart necessary job skills, restore religious and community support groups, or provide meaningful alternatives in deprived neighborhoods to the gangs and drug rings that steer young people toward lifelong addictions and lives of crime. Society doesn’t create opportunity by sacrificing the basic social need for order. To the contrary, improvements in communities

369. Michael R. Bloomberg, *‘Stop and Frisk’ is Not Racial Profiling*, WASH. POST, Aug. 19, 2013, at A19.

370. Eugene Robinson, *Obama’s Race Challenge—and Ours*, <http://perma.cc/M8PR-297Y> (washingtonpost.com, archived Mar. 12, 2014).

371. Michael Gerson, *Obama’s Race Speech Offered Few Good Solutions*, <http://perma.cc/6T7G-PG8J> (washingtonpost.com, archived Mar. 12, 2014).

and institutions will only take root in the kind of safe environment that, at its best, a strong criminal justice system can provide. And when we provide opportunity, we in turn reduce the pressure on the criminal justice system and lessen the monumental task that lack of opportunity for the poorest Americans has left it to perform.

How a society chooses to balance justice and safety with rights and liberties will invariably be the subject of vigorous debate. Our criminal justice system is no exception. Many good and intelligent people will disagree passionately about the contours of our criminal law. That is all to the good. We should not grow complacent in the face of particular problems, both for the sake of individual defendants and for the rule of law itself.

But instead of engaging in a constructive debate about the American approach to criminal justice, legal elites largely have condemned the entire enterprise. The system, we are told, is broken, and only sweeping reforms imposed from on high can save it. But the rhetoric that fuels the wholesale assault upon the system not only will fail to achieve any meaningful change, it obscures the many strengths of our institutions. By focusing so much on what is wrong, we inevitably forget what is right.

The terms of engagement must change. My call is not for scholars to whitewash our system's failings but to realize the picture is far more nuanced and complex than they have presented it. Given the volume of matters it is asked to address and immensity of the task it is asked to perform, our criminal justice system functions rather well. It is both unrealistic and uncharitable to portray the system as an engine of oppression and injustice. Ironically, many of the features that critics claim operate one-sidedly against defendants often work to their benefit. The American criminal justice system strikes a valuable front-end note. It strikes difficult balances between protecting the innocent and convicting the guilty, between procedural protections and administrative realities. It rightly allows these contestable choices to be made democratically, but only to a point. Such qualities are hardly the hallmarks of a failed system.

Indeed, those who have been among the most persistent critics of the criminal justice system were among the first to call for its utilization in the aftermath of the September 11th terrorist attacks.³⁷²

372. See, e.g., David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 378 (2003) (arguing that noncitizens should be given the same constitutional due process protections as citizens because, *inter alia*, the "national security interests implicated by the prosecution of Zacarias Moussaoui, indicted as the so-called 'twentieth hijacker,' would not be different were he a citizen").

And since that time, the refrain has often been that acts of terrorism are crimes that should be dealt with in the customary way through enforcement of federal criminal law.³⁷³ I recognize that this plea for criminal trials does not constitute an acknowledgment of the system's perfection, but it does indicate that the system imparts a legitimacy for the deprivation of liberty that other routes of trying suspected terrorists may lack. This is no place to explore the complicated question of whether alleged terrorism is more aptly regarded as a criminal offense or as an act of war. Separation of powers concerns and the need for action to prevent mass casualties make the question an exceptionally complicated one. I note only the irony that many who reject the considerable virtues of the American criminal justice system are at least prepared to look upon it as a preferred solution when the values of liberty and security are in epochal tension.

To be sure, there is plenty of room for reform, and all parts of the legal profession should head for the front lines. But let us not forget our system's virtues as we seek to correct its vices. Otherwise, any legitimate concerns will be lost in the din of diatribe. We have gone too long without a degree of balance or moderation in our assessment of the American criminal justice system. It is time we gave our institutions a fair trial.

373. See, e.g., David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 3-4 (2003) (arguing that, since September 11th, "our government has adopted both substantive and procedural shortcuts" to avoid the "criminal process, with its rights to counsel, confrontation of adverse witnesses, public trial, and the presumption of innocence," and that this approach is "replaying the mistakes of the past").