
Response

Rage Against the Machine: A Reply to Professors Bierschbach and Bibas

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I.

In the course of a 2009 article on prosecuting corporations, Albert Alschuler dropped a footnote mentioning that, “[o]ddly, scholars continue to express hope for rulemaking by prosecutors.”¹ Certainly, Professor Alschuler had good reason to find peculiar the resurgence of academic interest in administrative rulemaking in criminal law enforcement. He had been among a group of eminent scholars who exposed and critiqued the discretionary judgments of various legal actors in the criminal process.² One of the more attractive responses came from a

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1. Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1389 n.167 (2009) [hereinafter Alschuler, *Two Ways*]. The footnote cited recent works by Stephanos Bibas and Rachel Barkow, as well as one of my pieces from a decade earlier. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009); Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515 (2000).

2. See, e.g., MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973); JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* (1966); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Herman Goldstein, *Police Discretion: The Ideal Versus the Real*, 23 PUB. ADMIN. REV. 140 (1963); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1962); John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174 (1965); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972); James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651.

founding father of administrative law, Kenneth Culp Davis, who proposed the tools of his primary field—mostly codified in the Administrative Procedure Act (APA)—as a means to limit and guide the power wielded by criminal justice officials.³

The envisioned mash-up of administrative law and criminal justice never took place, however, and instances of criminal justice rulemaking have received mixed reviews at best. The most prominent example on the prosecutorial side, the *United States Attorneys' Manual*, has been rendered largely ineffective by a combination of “noncommittal pabulum-language,”⁴ the lack of vigorous internal oversight and disciplinary review, and the judiciary’s refusal to bind federal prosecutors to their own rules.⁵ The academic literature did not further develop the idea of a formal administrative law of criminal justice. The leading lights had already moved on to other solutions or entirely different topics.⁶

Today, the criminal justice system is still marked by broad discretion, most of which remains hidden from the public. The decision-making patterns constitute the criminal justice system’s de facto administrative law, which helps account for the many actions that cannot be explained by reference to the penal code alone. Unlike real administrative law, this authority comes without the possibility of public notice and comment or the publication of rules and underlying rationales. For the most part, only the decision makers themselves and their fellow repeat players of criminal justice are able to appreciate the difference between the law on the books and the secret law of en-

3. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); KENNETH CULP DAVIS, *POLICE DISCRETION* (1975); Kenneth Culp Davis, *An Approach to Legal Control of the Police*, 52 *TEX. L. REV.* 703 (1974); see also Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 *UCLA L. REV.* 1, 3–10, 34 n.108 (1971).

4. Alschuler, *Two Ways*, *supra* note 1, at 1389.

5. See *United States v. Caceres*, 440 U.S. 741, 743–44, 749–55 (1979) (holding that law enforcement’s violation of agency regulations was non-litigable in criminal cases); Ellen S. Podgor, *Prosecution Guidelines in the United States*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 9, 16–18 (Erik Luna & Marianne Wade eds., 2012) (describing problems with prosecution guidelines).

6. But see Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 *MICH. L. REV.* 442, 442–51 (1990) (advocating a system of administrative regulation to control discretionary decisions by police); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 *J. LEGAL STUD.* 43, 43–49 (1988) (using an economic analysis to weigh the administrative costs between a system of discretion versus one of rules).

forcement. Those most directly affected by the resulting decisions, criminal suspects and defendants, remain largely oblivious. But so is the entire public.

In their recent article in this volume, *Notice-and-Comment Sentencing*, Richard Bierschbach and Stephanos Bibas describe how opacity in plea bargaining allows the parties to establish sentencing policy favoring their own interests over those of the public at large.⁷ They argue for a new sentencing process that draws upon the APA's provisions for notice-and-comment rule-making,⁸ with their model requiring, inter alia, advance public notice, the opportunity for lay participation, and reasoned and responsive sentencing decisions.⁹ Not only is their proposal provocative in the best sense of the word, but Professors Bierschbach and Bibas have helped demonstrate why criminal justice scholars continue to pursue insights from seemingly disparate legal fields that nonetheless struggle with similar issues. Administrative agencies and criminal law enforcement both "operate under massive statutory delegations of power" and "make thousands of value-laden decisions every day," which "greatly affect regulated parties, communities, and the general public."¹⁰ Indeed, administrative law exists for the very purpose of ensuring that agencies act in the public interest, and toward this end, public participation is considered vital to accountable and legitimate decision making.¹¹ But while discretion in criminal justice raises similar issues of accountability and legitimacy, "criminal law has not kept pace."¹²

Notice-and-Comment Sentencing is commendable on a number of fronts and has inspired me to consider other potentially fertile areas for cross-pollination. Not least of all, Professors Bierschbach and Bibas highlight and seek to realize how the criminal justice system benefits from public participation, including "shedding the light on the composite public interest," bringing "important facts and data to light," and "empowering citizens to air their views and take part in public policy debate."¹³ In this brief Essay, I would like to describe an overarching problem that plagues criminal justice, one that can be ad-

7. Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 3–4 (2012).

8. 5 U.S.C. § 553(c) (2006).

9. See Bierschbach & Bibas, *supra* note 7, at 7–8.

10. *Id.* at 20.

11. *Id.*

12. *Id.*

13. *Id.* at 6.

dressed, if at all, by a large-scale program containing ideas such as notice-and-comment sentencing and the transparency techniques advocated by Ron Wright and Marc Miller.¹⁴ That problem is popular disaffection, and an underlying cause—apropos to a discussion of administrative law—is the perception of the criminal justice system as a bureaucratic machine.

II.

Interestingly, some have argued for more bureaucracy in criminal justice, not less. The backstory goes something like this: The public understands very little about crime and the criminal process, and what it does know can be drastically skewed or distorted. Average citizens tend to be unaware of the character and quantity of crime, substantive criminal law and policy, constitutional and statutory criminal procedure, pre-trial and trial proceedings, and sentencing schemes and severity.¹⁵ Among other things, the public misperceives crime rates as increasing, especially the level of violent crime, when the rates have actually stabilized or declined;¹⁶ people also believe that longer sentences necessarily reduce crime, despite the fact that most scholarship has concluded that increases in punishment do not effectively reduce crime or enhance public safety.¹⁷ Even for those issues of criminal justice that have become part of American culture—such as the obligatory warnings and related rules of *Miranda v. Arizona*,¹⁸ popularized by television police

14. See Marc L. Miller & Ronald F. Wright, *Reporting for Duty: The Universal Prosecutorial Accountability Puzzle and an Experimental Transparency Alternative*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 5, at 392, 392–407; Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587 (2010).

15. See, e.g., JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 23–47 (1997); Deborah W. Denno, *The Perils of Public Opinion*, 28 HOFSTRA L. REV. 741, 753–55 (2000); *Crime, Punishment and Public Opinion: A Summary of Recent Studies and Their Implications for Sentencing Policy*, SENT'G PROJECT (Jan. 2000), http://www.sentencingproject.org/detail/publication.cfm?publication_id=146.

16. See, e.g., ROBERTS & STALANS, *supra* note 15, at 8, 30–33; Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 418–20 (2006) [hereinafter Beale, *News Media's Influence*]; Denno, *supra* note 15, at 754.

17. See, e.g., Erik Luna, *Criminal Justice and the Public Imagination*, 7 OHIO ST. J. CRIM. L. 71, 81–83 (2009) [hereinafter Luna, *Criminal Justice*].

18. 384 U.S. 436, 467–79 (1966); see also *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”).

dramas—there may be an “acoustic separation” between the conduct rules understood by the public through mass media accounts, and the decision rules recognized by professionals and enforced in court.¹⁹

This information gap becomes particularly troubling when its exploitation leads to counterproductive criminal justice policies and contributes to the long-term trend of overcriminalization.²⁰ Opinion polls can reflect the public’s fear of crime and the mistaken belief that crime is on the rise and punitive measures offer the antidote.²¹ To a significant extent, popular views on crime are impacted by its representation in the media, which is the public’s primary source of information on criminal justice issues.²² Although people tend to view the major media outlets as being fair and accurate in their coverage, economic concerns inevitably influence story selection, content, and delivery style, consistent with the old news adage that “if it bleeds, it leads.”²³ Through the media’s depiction, crime becomes more salient to audience members, who then view crime as a more serious problem than indicated by the statistics.²⁴ Even in areas where concern may be unfounded, populist pressures create incentives for lawmakers to enact new crimes and harsher punishments.²⁵

Given the dysfunctional politics of crime and punishment—where elected officials govern through crime,²⁶ often in response

19. See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470–71 (1996).

20. See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719–29 (2005) [hereinafter Luna, *Overcriminalization Phenomenon*].

21. See Beale, *News Media’s Influence*, *supra* note 16, at 418.

22. See *id.* at 441–62; see also Robert Reiner, *Media-Made Criminality: The Representation of Crime in the Mass Media*, in THE OXFORD HANDBOOK OF CRIMINOLOGY 302, 302–29 (Mike Maguire et al. eds., 4th ed. 2007); Sara Sun Beale, *Still Tough on Crime?: Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 425–28; 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).

23. Professor Beale’s work has confirmed that stories of crime and violence are correlated with market share and thus advertising revenues. See Beale, *News Media’s Influence*, *supra* note 16, at 401.

24. See *id.* at 442.

25. See, e.g., Luna, *Overcriminalization Phenomenon*, *supra* note 20, at 719–24; see also Luna, *Criminal Justice*, *supra* note 17, at 81–86; Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 21–28 (2010).

26. See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR

to media-driven public anxieties reflected in opinion polls²⁷—some prominent scholars have argued for the transfer of criminal justice policymaking to non-political expert bodies that could rise above the pressures and ineptitude of pure majoritarian democracy.²⁸ Potential models include the so-called independent regulatory agencies, like the Federal Reserve Board of Governors, the leaders of which are politically appointed but serve comparatively lengthy terms of office and are not beholden to the electorate.²⁹ This might encourage a culture of professionalism in criminal justice as seen in other Western nations. In Canada, for instance, “those most likely to be in charge of criminal justice reforms are nonelected bureaucrats, civil servants, and nongovernmental experts,” who are “less susceptible to public pressure.”³⁰

These proposals are thoughtful,³¹ no doubt, with an ancient pedigree. In the Platonic tradition, the difficult questions of

ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

27. See, e.g., Luna, *Criminal Justice*, *supra* note 17, at 81–86; Luna, *Overcriminalization Phenomenon*, *supra* note 20, at 719–24; Luna & Cassell, *supra* note 25, at 21–28.

28. See, e.g., MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 195–227 (2004); FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 181–215 (2001); Philip Pettit, *Depoliticizing Democracy*, 17 *RATIO JURIS* 52, 58–63 (2004).

29. See 12 U.S.C. § 241 (2006) (establishing that members of the Federal Reserve Board of Governors are appointed by the President, confirmed by the Senate, and serve fourteen year terms).

30. Cheryl Marie Webster & Anthony N. Doob, *Punitive Trends and Stable Imprisonment Rates in Canada*, 36 *CRIME & JUST.* 297, 341–42 (2007).

31. Such proposals would face a number of practical and theoretical impediments. By and large, the United States lacks the tradition of acquiescing to the positions of policy experts and scholars when popular views are to the contrary. In fact, at least some punitive lawmaking has been the result of widespread resentment and distrust of criminal justice experts. See, e.g., STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 43–48 (2012); ZIMRING, HAWKINS & KAMIN, *supra* note 28, at 159–77. Moreover, one type of ostensibly non-political criminal justice agency, the sentencing commission used in the federal and state systems, has generated mixed results at best. See, e.g., TONRY, *supra* note 28, at 211. See generally KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 104–42 (1998) (critiquing federal sentencing guidelines); Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 *J. CRIM. L. & CRIMINOLOGY* 25, 35–48 (2005) [hereinafter Luna, *Gridland*] (same). Political independent agencies also raise questions of constitutional validity, where the agency, in Justice Scalia's famous phrase, acts as “a sort of junior-varsity Congress” that could prove to be a dangerous improvisation of constitutional structure. *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dis-

governance could not be left to majoritarian decision making, where reason may be trumped by the passions of a sufficiently large number.³² Even classical theorists sympathetic to broader participation in government affairs recognized a superior role for elites and experts (sometimes believed to be one and the same).³³ The tyranny of the majority has always haunted democratic bodies, which were seen as not only immoderate and shortsighted but also inefficient and lacking the knowledge and experience necessary to deal with the problems of a specialized field, whether it was preserving public order or protecting the public fisc. For democracy to work, it was argued, the public's unvarnished opinion must be moderated by institutions of good government. Today, those institutions almost invariably take the shape of a bureaucracy, modernity's signal style of authority and the principal structure of organized power, both public and private, in the United States.

For present purposes, the most interesting aspect of this discussion is the very idea of bureaucratization as a means to improve the criminal process in the United States. Truth be told, American criminal justice already *is* a bureaucracy, which can be defined as "a system of government in which most of the important decisions are taken by state officials rather than by elected representatives."³⁴ Many criminal justice actors fit Michael Lipsky's concept of "street-level bureaucrats,"³⁵ who execute overarching public policies through individual case decision-making. This is hardly news. The long-term trend in America has been toward professionalism in criminal justice and an emphasis on bureaucratic desiderata of rationality and efficiency.³⁶ Those officials variously described as "regulars," "insiders," and "repeat players,"—law enforcement agents,

sentencing) (describing the U.S. Sentencing Commission).

32. See generally Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991, 994 (2006) (noting that in the Platonic tradition, judicial review played a non-majoritarian watchdog role).

33. See SUSAN GORDON, MONTESQUIEU: THE FRENCH PHILOSOPHER WHO SHAPED MODERN GOVERNMENT 86–87 (2006); Gregory R. Johnson, *The First Founding Father: Aristotle on Freedom and Popular Government*, in LIBERTY AND DEMOCRACY 29, 49 (Tibor R. Machan ed., 2002) (discussing Aristotle's argument for popular government that excludes the general populace from "the greatest offices").

34. *Bureaucracy*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/english/bureaucracy> (last visited Apr. 23, 2013).

35. See MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 3 (rev. ed. 2010).

36. See, e.g., LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 29, 251, 391 (1993).

prosecutors, defense attorneys, trial judges, probation officers, and others—utterly dominate the criminal process.³⁷

III.

These criminal justice professionals, both individually and collectively, can be examined through the lens of organization theory, the conceptual underpinnings of which trace back to Max Weber and his typology of authority. As one of the “ideal types” of authority,³⁸ bureaucracies are distinguishable by a series of characteristics, including:

- clearly demarcated jurisdiction or areas of competence for a given organization;
- bounded power and division of labor among officials by expertise;
- control and supervision exercised through an organizational hierarchy;
- ability to appeal decisions from lower to higher levels of the hierarchy;
- official conduct limited by generally applicable rules formulated and recorded in writing;
- separation of officials from organizational property, rights, interests, etc.;
- selection of officials based on examinations and qualifications such as higher education and specialized training; and
- official positions not owned but instead held as careers of full-time employment with salaried compensation, tenure protections, and promotion by seniority or merit.³⁹

Weber emphasized that his ideal types did not exist in their “pure” forms.⁴⁰ For example, bureaucracies could still be

37. See BIBAS, *supra* note 31, at 15–20, 30–34.

38. See MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 90 (Edward A. Shils & Henry A. Finch eds. & trans., 4th ed. 1968) [hereinafter WEBER, *METHODOLOGY OF THE SOCIAL SCIENCES*] (“An ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified *analytical* construct.”).

39. See MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 329–41 (Talcott Parsons ed., Talcott Parsons & A.M. Henderson trans., rev. ed. 1964) [hereinafter WEBER, *SOCIAL AND ECONOMIC ORGANIZATION*].

40. See WEBER, *METHODOLOGY OF THE SOCIAL SCIENCES*, *supra* note 38, at 90.

managed by charismatic or class-based leadership.⁴¹ In fact, most government bureaucracies in the United States are headed by elected officials or political appointees.⁴² Nonetheless, “[b]ureaucratic administration means fundamentally the exercise of control on the basis of knowledge. This is the feature of it which makes it specifically rational.”⁴³ By *rational*, Weber is referring to instrumental rationality (rather than substantive or value rationality); that is, the accomplishment of a predetermined goal or set of goals in the most efficient and effective way. So understood, a bureaucracy may be portrayed as objective and methodical in serving the externally selected ends, the means to which can be discerned through the expertise of officialdom.

Pursuant to this account, bureaucracies are marked by impersonal and rule-bound decision making. Weber wrote: “The dominant norms are concepts of straightforward duty without regard to personal considerations. Everyone is subject to formal equality of treatment. . . .”⁴⁴ Such consistency is ensured by laws and regulations promulgated pursuant to those laws, which constrain an official’s scope of decision making, perhaps to the point of leaving him no discretion at all. As such, bureaucracy poses no threat to democracy, or so it is argued. The relevant ends are chosen by the principals—the people via their political representatives—with bureaucratic action taken pursuant to rules oriented toward achieving those ends.

Although considered outdated by organization theorists, Weber’s concepts have had a profound impact on the study of bureaucracy and “still serve as the starting point for most work on the subject.”⁴⁵ Most important for present purposes, the con-

41. See WEBER, SOCIAL AND ECONOMIC ORGANIZATION, *supra* note 39, at 329, 332–33, 335–36.

42. Cf. James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57, 57–58 (1987) (noting the severe increase in political appointees).

43. See WEBER, SOCIAL AND ECONOMIC ORGANIZATION, *supra* note 39, at 339.

44. 1 MAX WEBER, ECONOMY AND SOCIETY 225 (Guenther Roth & Claus Wittich eds., rev. ed. 1978) [hereinafter WEBER, ECONOMY AND SOCIETY].

45. Philip S. Gorski, *The Protestant Ethic and the Bureaucratic Revolution: Ascetic Protestantism and Administrative Rationalization in Early Modern Europe*, in MAX WEBER’S ECONOMY AND SOCIETY: A CRITICAL COMPANION 267, 267 (Charles Camic et al. eds., 2005); see also Talcott Parsons, *Introduction* to WEBER, SOCIAL AND ECONOMIC ORGANIZATION, *supra* note 39, at 3, 77 (ultimately concluding that Weber’s analysis of authority “constitutes the most highly developed and broadly applicable conceptual scheme in any comparable field which is available, not only in the specifically sociological literature, but

cepts often track the bureaucratic reality of modern criminal justice. As noted in one textbook on law enforcement administration, “the management of police agencies reflects Weber’s ideal bureaucracy,” as these “organizations hold sacred the concepts of rationality, hierarchy, specialization and positional authority.”⁴⁶ Every component of criminal justice is bounded by its jurisdiction in terms of political geography and subject matter, such as the city attorney who is limited to prosecuting misdemeanors committed within the borders of his municipality. Criminal justice actors are also constrained by their competence at a given task, typically through the division of labor by specialization and with an emphasis on professionalism through credentialing, examination, training, and so on.

For instance, prosecutor’s offices typically employ a competitive process for selecting new deputies, whose professional profile will include, at a minimum, a law school degree and state bar membership. They will receive some form of initial training, formal or informal, and will participate in continuing legal education throughout their careers. In large offices, each deputy prosecutor will be assigned to a division, unit, or branch, which focuses on a particular type of offense or offender (e.g., domestic violence, gangs, juvenile delinquency, etc.) or a specific stage of the criminal process (e.g., investigations, felony trials, appeals, etc.). In addition, an office may adopt a policy of “horizontal prosecution,” where the same attorney handles a case from beginning to end; “vertical prosecution,” with different attorneys handling different stages of the process; or a combination of vertical and horizontal prosecution depending on the type of offense or offender.

As is true with other bureaucracies, the components of criminal justice tend to be hierarchical in nature, the most obvious example being a pyramidal court structure. In general, the decision making and review within a state judiciary extends upward from trial courts, which may be divided into lower and higher levels (e.g., municipal and superior); to intermediate appellate courts, with a few states creating special criminal appellate courts (e.g., Oklahoma Court of Criminal Appeals); and then to the state supreme court. On issues of federal law, that “hierarchy” would extend further to the U.S. Supreme

in that of social science as a whole”).

46. V.A. LEONARD & HARRY W. MORE, *POLICE ORGANIZATION AND MANAGEMENT* 5 (9th ed. 2000).

Court and, via the writ of habeas corpus, to federal trial and appellate courts.

The insiders of criminal justice possess special knowledge. They are trained in the official law on the books establishing substantive crimes and punishments, as well as the complicated legal rules governing the criminal process from investigation to incarceration. The insiders also have access to the information concerning a particular crime and criminal, including police reports, witness statements, forensic analysis, prior case files, and so on. Most of all, they understand the practical workings of criminal justice in their jurisdiction, especially the norms of case negotiation and plea bargaining.

The decisions in any given case are supposed to be impersonal and rational in the Weberian sense, based on the available information and the relevant law, not personal relationships between criminal justice actors and affected individuals. In some contexts, such as pre-trial detention and corrections, officials are instructed to maintain a social distance from those impacted by their actions. After all, the polestar of criminal justice is not some relational value but the efficient achievement of politically determined ends—such as the utilitarian goals of deterrence, incapacitation, and rehabilitation—all within resource constraints set by external political decisions.

Like other prominent bureaucracies in our high-tech, fast-paced, multifaceted society, criminal justice may appear “completely indispensable.”⁴⁷

[A bureaucracy] is, from a purely technical point of view, capable of attaining the highest degree of efficiency and is in this sense formally the most rational known means of exercising authority over human beings. It is superior to any other form in precision, in stability, in the stringency of its discipline, and in its reliability. It thus makes possible a particularly high degree of calculability of results for the heads of the organization and for those acting in relation to it. It is finally superior both in intensive efficiency and in the scope of its operations and is formally capable of application to all kinds of administrative tasks.⁴⁸

As such, Weber argued, the only choice is between bureaucracy on the one hand and dilettantism on the other.

Weber understood that his account of rational-legal authority depicted bureaucracy as a *machine*. This is a well-known conception of criminal justice. Over the past century, the Supreme Court opinions have referred to “the Federal machinery

47. 1 WEBER, *ECONOMY AND SOCIETY*, *supra* note 44, at 223.

48. *Id.*

for administering criminal justice”⁴⁹ and “the criminal justice machinery of the State”;⁵⁰ “the awful machinery of the criminal law”⁵¹ and the “misuse of the criminal machinery”;⁵² “the movement for increasing social control through criminal machinery”;⁵³ the determination of lawmakers “to turn the screw of the criminal machinery—detection, prosecution and punishment—tighter and tighter”;⁵⁴ arrests, searches, and seizures as the “incidental machinery of the criminal law”⁵⁵ and juries as “part of the machinery of a criminal court”;⁵⁶ and setting in motion “the whole machinery of criminal justice”⁵⁷ and permitting “the intrusion of the whole machinery of the criminal law.”⁵⁸

Legal scholarship has also employed this metaphor, the most recent example being Professor Bibas’s aptly titled book, *The Machinery of Criminal Justice*.⁵⁹ A half-century ago, Herbert Packer famously described two theoretical models—the “crime control” model and the “due process” model—as a means of evaluating opposing values in the criminal process.⁶⁰ The crime control model emphasized public order and crime prevention, and toward these ends, it sought maximum efficiency, defined as “the system’s capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders whose offens-

49. *McElroy v. United States*, 455 U.S. 642, 673 (1982) (Stevens, J., dissenting) (quotation omitted).

50. *H.L. v. Matheson*, 450 U.S. 398, 454 (1981) (Marshall, J., dissenting).

51. *United States v. Kozminski*, 487 U.S. 931, 950 (1988) (quoting *United States v. Schackney*, 33 F.2d 475, 487 (2d Cir. 1964)).

52. *Screws v. United States*, 325 U.S. 91, 149 (1945) (Roberts, J., dissenting); see also *Malinski v. New York*, 324 U.S. 401, 419 (1945) (“Under our form of government the machinery of criminal justice depends for its force and efficiency upon the enlightened moral sense of the individuals to whom the public by their constitution and laws have temporarily entrusted its operation.”).

53. *United States v. Sisson*, 399 U.S. 267, 314 (1970) (Burger, C.J., dissenting).

54. *Albernaz v. United States*, 450 U.S. 333, 343 (1981) (quoting *Gore v. United States*, 357 U.S. 386, 390 (1958)).

55. *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting).

56. *Ex Parte Young*, 209 U.S. 123, 163 (1908); see also *Ex Parte Quirin*, 317 U.S. 1, 39 (1942) (“Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts.”).

57. *Ballard v. United States*, 329 U.S. 187, 201 (1946) (Frankfurter, J., dissenting).

58. *Poe*, 367 U.S. at 553 (Harlan, J., dissenting).

59. See BIBAS, *supra* note 31.

60. See Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964) [hereinafter Packer, *Two Models*].

es become known.”⁶¹ This model was analogized to an “assembly line” with “an endless stream of cases” on a conveyor belt, where each step in the process “involves a series of routinized operations” to screen out the probably innocent and pass along the probably guilty to the next step.⁶²

In essence, Professor Packer was describing criminal justice as a machine. Like Weber, he emphasized that his models were abstractions for comparative analysis. However, he suggested that American criminal justice, as it then operated, “approximates fairly closely the dictates of the Crime Control model.”⁶³ In many ways, the resemblance between model and reality is even closer today. For instance, the crime control model places great confidence in early fact-finding, and for this reason, “the remaining stages of the process can be relatively perfunctory without any loss in operating efficiency.”⁶⁴ In particular, the model’s optimal outcome tends to be a guilty plea, which provides the most efficient means for disposing the vast majority of cases while consuming the least amount of resources.⁶⁵ Likewise, the real-world machinery of criminal justice relies heavily on early fact-finding by law enforcement, especially prosecutors,⁶⁶ with nine out of every ten cases now resolved by plea bargain.⁶⁷

61. *Id.* at 10.

62. *Id.* at 11. In contrast, the “due process” model stressed the importance of individual autonomy and dignity, always recognizing that coercive law enforcement has the potential for abuse and must “be subjected to controls and safeguards that prevent it from operating with maximal efficiency.” *Id.* at 16. *But see, e.g.,* Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 574–77 (1973) (noting that Packer’s “due process” model could be so concerned with protecting individual rights, that it could run the risk of acquitting the guilty); John Griffiths, *Ideology in Criminal Procedure, or a Third “Model” of the Criminal Process*, 79 YALE L.J. 359 (1970) (proposing that Packer’s “two models” actually rest upon the single premise that the nature of criminal process is a battleground, where the only variable is based on which party holds the advantage).

63. Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 238, 239 (1966). Professor Packer did note that the Warren Court was “rapidly providing a view that looks more and more like the Due Process model” through its decisions in cases such as *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Gideon v. Wainwright*, 372 U.S. 335 (1963). Packer, *supra*, at 239. Arguably, however, the pendulum has swung back from due process to crime control through decisions of the Burger, Rehnquist, and Roberts Courts.

64. Packer, *Two Models*, *supra* note 60, at 12.

65. *Id.* at 13.

66. *See, e.g.,* Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1481–86 (2010); Gerard E. Lynch, *Our Adminis-*

IV.

Professor Packer made clear that he was not making value choices, and, as a result, the “models may not be labeled Good and Bad.”⁶⁸ By contrast, Weber has at times been mischaracterized as a proponent of bureaucratization. In fact, however, he harbored a profound skepticism about the “irresistible” “forward progress of bureaucratic mechanization,” which takes “as the highest and only goal” “a purely technical and faultless administration, a precise and objective solution of concrete solutions,” and which it achieves “as objectively, precisely, and ‘soullessly’ as any machine.”⁶⁹ Weber warned against “mechanization in the sphere of government and politics,” where “the performance of each individual is mathematically measured, each man becomes a little cog in the machine and, aware of this, his one preoccupation is whether he can become a bigger cog.”⁷⁰ Weber worried that, rather than setting people free, the cloak of rationality could become “an iron cage” for man, a “mechanized petrification, embellished with a sort of convulsive self-importance.”⁷¹ The perfection of the bureaucratic structure involves it becoming “dehumanized.”⁷²

This account rings true today for many Americans,⁷³ with the common perception being rather negative: bureaucracies are too big, too complex, too inflexible, and too impersonal.⁷⁴ Some commentators consider such criticism unfair, at least when applied indiscriminately to all government agencies.⁷⁵

trative System of Criminal Justice, 66 *FORDHAM L. REV.* 2117, 2136–38 (1998).

67. See LINDSEY DEVERS, *BUREAU OF JUST. ASSISTANCE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 3* (2011), available at <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

68. Packer, *Two Models*, *supra* note 60, at 5–6.

69. J.P. MAYER, *MAX WEBER AND GERMAN POLITICS* 125–31 (2d ed. 1944).

70. *Id.* at 126.

71. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 181–82 (Talcott Parsons trans., rev. ed. 1976) [hereinafter WEBER, *PROTESTANT ETHIC*].

72. 2 WEBER, *ECONOMY AND SOCIETY*, *supra* note 44, at 975.

73. See generally RALPH P. HUMMEL, *THE BUREAUCRATIC EXPERIENCE: THE POST-MODERN CHALLENGE* 165–68 (5th ed. 2008) (noting that bureaucratic “thinking” can be subsumed by the rule, leaving little room for considering reality).

74. See, e.g., Robert L. Sanders, *The Future of Bureaucracy*, 31 *REC. MGMT. Q.* 44 (1997); Claudia Buck, *Maligned, Tedious, but Essential*, *SACRAMENTO BEE*, Sept. 1, 1985, at A1; Patrick T. Murphy, *It’s Granny vs. the Bureaucracy*, *CHI. TRIB.*, June 5, 1990, at 15.

75. See, e.g., Buck, *supra* note 74, at A1 (“People like to complain about bureaucracy, but the alternative—everybody taking care of things for them-

Regardless, most people recognize the machine-like nature of bureaucracy,⁷⁶ where the comparison is more than just a trope. In his book, *The Bureaucratic Experience*, Ralph Hummel offered the following contrast between the traditional expectations of bureaucracy (misunderstandings) and real-world experiences (understandings).⁷⁷

	Misunderstandings	Understandings
<i>Socially</i>	Bureaucrats deal with people.	Bureaucrats deal with cases.
<i>Culturally</i>	Bureaucrats care about the same things we do: justice, freedom, violence, oppression, illness, death, victory, defeat, love, hate, salvation, and damnation.	Bureaucrats aim at control and efficiency.
<i>Psychologically</i>	Bureaucrats are people like us.	Bureaucrats are a new personality type, headless and soulless.
<i>Linguistically</i>	Communication with bureaucrats is possible: we all speak the same language, we think the same way.	Bureaucrats shape and inform rather than communicate.
<i>Cognitively</i>	Bureaucrats think the way we do: logically <i>and</i> sensibly.	Bureaucrats use logic only: they are trained to think the way computers think.
<i>Politically</i>	Bureaucracies are service institutions accountable to society and ruled by politics and government.	Bureaucracies are control institutions increasingly ruling society, politics, and government.

selves—would be far worse. It would be very expensive and we wouldn't want to pay for it,' said Nicole Biggart, a University of California, Davis, professor. Bureaucracy, Biggart said, is 'the best thing we have.'"). See generally CHARLES T. GOODSSELL, *THE CASE FOR BUREAUCRACY: A PUBLIC ADMINISTRATION POLEMIC* (4th ed. 2003) (finding bureaucracies often are subject to discrimination and fears about their size); H. Brinton Milward & Hal G. Rainey, *Don't Blame the Bureaucracy!*, 3 J. PUB. POL'Y 149 (1983) (arguing that public bureaucracy in the United States is effective and undervalued).

76. See, e.g., Buck, *supra* note 74, at A1 ("California's bureaucracy is a clean machine."); Irvin Molotsky, *Bureaucracy Just Another Machine Stalled in Snow at Nation's Capital*, N.Y. TIMES, Jan. 23, 1987, at B2; Murphy, *supra* note 74, at 15 ("After a while, bureaucracies begin to resemble gigantic Rube Goldberg machines . . .").

77. See HUMMEL, *supra* note 73, at 8–9, Exhibit 1.1.

Rational depersonalization can readily become dehumanization in a bureaucracy, giving it “the appearance of an unfamiliar, inhuman machine that is frightening to the customer or citizen.”⁷⁸ Ironically, the modern bureaucratic state makes people more and more interdependent and thus brings them closer together in a physical sense, yet it separates individuals through the impersonal nature of the relationship—official-worker as cog in a bureaucratic machine and citizen-client as input in the form of a case. Instrumentally rational action directed at preset goals thus supplants the usual modes of social interaction that involve personal recognition and orientation toward one another.

For instance, the tools of modernity, particularly high-speed transportation and communication, may provide greater opportunities for criminal justice officials and lay citizens to communicate, and yet the substance of any contact may be formal, if not pro forma, often limited to providing details about the crime or criminal for use by the experts. Despite reform efforts, crime victims can still be marginalized in the criminal process, with any notice and participation rights more honored in the breach than the observance. In Nils Christie’s words, victims can be “reduced to the triggerer-off of the whole thing.”⁷⁹

The objectification is even more obvious for the defendant, who is transformed into a case in court and a number in lock-up. In the guise of a criminal case with certain general characteristics, the defendant can be categorized and his fate quantified by the “going rate” for a given offense in terms of plea bargains and sentences. That professionals view their job as managing objects comes through in the rhetoric—for instance, when prosecutors speak about issues of “witness control” or defense attorneys bemoan problems of “client control.” By and large, these concerns are not raised by professional witnesses such as law enforcement agents and forensic experts.

Officialdom has its own special language, bureaucratese (a.k.a., gobbledegook)—filled with technical terms and jargon, abstractions and circumlocutions, buzzwords and euphemisms, peppered with acronyms and characterized by verbosity—making it virtually unintelligible to those outside the bureaucracy.⁸⁰ Lawyers also use a language foreign to the average in-

78. Sanders, *supra* note 74, at 48.

79. Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 3 (1977).

80. See, e.g., HUMMEL, *supra* note 73, at 132–58; *Bureaucratese*, MERRIAM

dividual: legalese.⁸¹ In particular, an ordinary person may be baffled by the legal idiom of criminal justice, including the definition of substantive crimes,⁸² the phrasing of evidentiary rules,⁸³ and the judicial formulation of criminal sentences.⁸⁴ Even the most fundamental legal terms such as the criminal standard for conviction, “proof beyond a reasonable doubt,” can be problematical if not totally inscrutable.⁸⁵ Worse yet, some appellate courts have admonished prosecutors and trial judges *against* attempting to provide more comprehensible legal instructions.⁸⁶ The use of technical language, so far removed from colloquial speech and ordinary writing, not only demonstrates mechanistic nature of criminal justice but also segregates the professional from the lay citizen, effectively serving as a form of linguistic exclusion.⁸⁷

WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/bureaucratise> (last visited Apr. 23, 2013); *see also* Alfred E. Kahn, *My War Against Bureaucratise, Address at Kendal in Ithaca, N.Y.* (July 21, 1998), *available at* http://www2.owen.vanderbilt.edu/lukefroeb/files/Bureaucratise_tlk.doc.

81. *See, e.g.*, Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325, 328 (noting the following legal jargon in an appellate brief: “LBEs complaint more specifically alleges that NRB failed to make an appropriate determination of RTP and TIP conformity to SIP”).

82. *See, e.g.*, *People v. Mai*, 22 Cal. App. 4th 117, 126 (1994) (noting that the jury instruction on the “provocative act” doctrine of homicide law had “succumbed to legalese, unfortunately”); *Patton v. State*, 34 So. 3d 563, 574 (Miss. 2010) (Kitchens, J., concurring) (“A properly drafted false pretense indictment is replete with essential legalese, long required by this Court, that would be unfamiliar to most attorneys, even law professors, other than those with significant experience as prosecutors, criminal defense attorneys or judges in Mississippi’s criminal courts.”).

83. *See, e.g.*, *Arredondo v. Ortiz*, 365 F.3d 778, 787 (9th Cir. 2004) (Kozinski, J., concurring) (“The prosecution could have introduced this evidence as proof that Hansen had committed a crime of moral turpitude, and did seek to use it to impeach Hansen’s statement to Arredondo’s investigator that Hansen did not know Reed because he did not associate with alcoholics. Or, to dispense with the legalese, the prosecution wanted to tell the jury that Hansen was a thief and a drunk and thus not believable.”).

84. *See, e.g.*, Luna, *Gridland*, *supra* note 31, at 38 & n.74 (providing example of an incomprehensible sentencing statement).

85. *See, e.g.*, Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201, 1212 n.36 (2005) (noting problems with the standard).

86. *See, e.g.*, *State v. Herring*, No. 104,252, 2011 WL 4440392, at *4 (Kan. Ct. App. Sept. 23, 2011) (“Kansas courts have repeatedly admonished prosecutors about explaining the reasonable-doubt standard in their own words since reasonable doubt is best defined by the words themselves. Even trial courts are encouraged not to give more expansive definitions of the term when requested to by the jury.” (internal citations omitted)).

87. *Cf. United States v. Carrion*, 488 F.2d 12, 14–15 (1st Cir. 1973) (discussing defendant’s right to a translator in criminal proceedings).

In the bureaucratic style, the exclusion is also physical. Key decisions such as plea agreements are reached outside of public view, behind the closed doors of a conference room, in hushed conversations in courtroom hallways, or in phone calls between prosecutor and defense attorney. Even public proceedings tend to be sparsely attended affairs, which may only memorialize decisions reached elsewhere by the professionals themselves. The role of the accused in his own case can be quite limited due in large part to the complexity of the criminal process and the (usually correct) belief that the professionals know best. The defendant's in-court participation is often no more than a few scripted words (e.g., not guilty), with any greater involvement regarded as perilous. For the vast majority of proceedings, including those with dispositive case outcomes, there is no participatory part for victims, witnesses, community members, and other citizens. Moreover, the public does not observe the implementation of sentence, with corporal punishments (except death) having been eliminated and deprivations of liberty occurring behind the walls of jails and prisons.⁸⁸

As noted, bureaucratic action is both driven and limited by the externally selected goals, which may, in fact, be well-intentioned and generally humane. The problem is that bureaucracies are not supposed to consider other objectives outside the machinery, including those that may be crucial to an individual or group. The ends and means are defined in the past by statutory or administrative rules (or standards, policies, procedures, etc.); these rules, in turn, determine whether a human will now be transformed into a case for purposes of providing benefits or exercising control. That the rules may not capture the past or fit the present or serve the future is ultimately irrelevant for a system that comprehends life as an inanimate object or set of information rather than an ongoing project of being. Dehumanization is made nearly inevitable by concerns of rationalization, bureaucracy's *raison d'être* (or, per Pierre Schlag, *raison de bureaucracy*),⁸⁹ typically assessed by quantitative measurements. People become cases; cases become statistics; statistics become evidence of performance.

Ironically, then, the operational goals of criminal justice are silently transformed. Rather than values such as accuracy,

88. For the history behind this movement, see, for example, BIBAS, *supra* note 31, at 20–23; FRIEDMAN, *supra* note 36, at 77–82.

89. Pierre J. Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 881 (1991).

deterrence, and retribution, the system is driven by efficiency as measured by, *inter alia*, arrests, prosecutions, convictions, sentences, and, of course, expenditures. Although this might be said to achieve a sort of aggregate justice, Weberian instrumental rationality in the criminal justice process has in a sense become not just a means to an end but an end itself. Unlike Packer's crime control model, where efficiency maximized public order and crime prevention, efficient case management is necessary to keep the machine from grinding to a halt. Recently, my colleague J.D. King encapsulated the impersonal experience of most defendants: "Individually, their cases might command the scrutiny of a police officer for a couple of hours, a prosecutor for a couple of minutes, and a judge for a couple of moments."⁹⁰ With increasingly large caseloads and limited time and resources, the machine must be set for quick, coarse grading of the bulk of cases flowing through the criminal justice system.

Weber famously referenced the modern judge as an "automaton" or "vending machine" into which legal documents and fees are inserted and "which then disgorges the judgment together with the reasons mechanically derived from the Code."⁹¹ Although Weber noted that "this conception is angrily rejected,"⁹² a number of American jurisdictions have espoused this methodology in recent years through the adoption of hyper-determinate sentencing systems. Epitomized by the U.S. Sentencing Guidelines, these schemes pursue the legislated ends—which may include otherwise legitimate goals of punishment⁹³—by dehumanizing the offense and offender, typically allowing consideration of only a limited number of factors and banning all others, thereby reducing the judge's role to "filling in the blanks and applying a rigid, mechanical formula."⁹⁴

90. John D. King, *Procedural Justice, Collateral Consequences, and the Adjudication of Misdemeanors*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 5, at 20, 21.

91. LEWIS A. COSER, MASTERS OF SOCIOLOGICAL THOUGHT: IDEAS IN HISTORICAL AND SOCIAL CONTEXT 231 (1971); 2 WEBER, ECONOMY AND SOCIETY, *supra* note 44, at 979.

92. 2 WEBER, ECONOMY AND SOCIETY, *supra* note 44, at 979.

93. See, e.g., 18 U.S.C. § 3553(a)(2) (2006) (directing courts to impose sentences that "reflect the seriousness of the offense," "afford adequate deterrence," "protect the public from further crimes of the defendant," and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment").

94. *United States v. Russell*, 685 F. Supp. 1245, 1249 (N.D. Ga. 1988). See also Luna, *Gridland*, *supra* note 31, at 39. To some extent, this has changed as a result of the Supreme Court's decisions in *United States v. Booker*, 543 U.S. 220 (2005), and *Blakely v. Washington*, 542 U.S. 296 (2004).

The dehumanization works both ways, such that professionals themselves come to be viewed as part of the machine. Just as Weber spoke of “[s]pecialists without spirit, sensualists without heart,”⁹⁵ today’s bureaucratic officials have been described as “cold,” “unfeeling,” “robotic,” even “headless and soulless.”⁹⁶ Likewise, criminal justice professionals may be perceived as mechanical, with their decisions driven by the routinization of work and their incorporation into the machine requiring a certain relinquishment of individual personality into the job identity. “Who we are socially is replaced by what we are to the organization.”⁹⁷ Many police departments inculcate a military-style chain of authority, strict discipline, and standardized procedures. Moreover, machine-like law enforcement may be “the inevitable product of the drudgery of routine labor that ultimately dulls the brain and saps the spirit,” where officers “chain their brain at the gate coming in, function through their shift, and pick it up again on the way out.”⁹⁸

V.

The entire criminal process represents an exclusionary attitude toward harmful and anti-social acts, which are dealt with by government machinery rather than the affected individuals or the broader community. The approach creates a social distance between ordinary citizens and the legal system operated in their name. Run entirely by professionals, the criminal justice machinery is either non-existent or peripheral to the lives of most Americans, who rarely find themselves in courtrooms, prosecutor’s offices, police departments, correctional facilities, or any other building associated with crime and punishment.

The fact that most people do not frequent these places spares them from having to deal with the complexities of criminal justice. This may be preferable for a populace constantly seeking entertainment and collectively suffering from attention deficit disorder. “Democratic institutions are quarantine ar-

95. WEBER, PROTESTANT ETHIC, *supra* note 71, at 182.

96. HUMMEL, *supra* note 73, at 9. Professor Hummel offered the following note: “The terms ‘headless’ and ‘soulless’ here evoked strong protests from some employees of modern organizations. It may be worthwhile to point out that these terms reflect a tendency that bureaucratic life forces on bureaucrats, rather than the actual characteristics of specific individuals.” *Id.*

97. *Id.* at 53.

98. Chris R. Braiden, *Enriching Traditional Roles*, in POLICE MANAGEMENT: ISSUES AND PERSPECTIVES 87, 96 (Larry T. Hoover ed., 1992).

rangements to combat that ancient pestilence, lust for tyranny,” Nietzsche once wrote.⁹⁹ And “as such they are very useful and very boring.”¹⁰⁰ The same is true of criminal justice. Anyone who has ever witnessed the en masse process of the misdemeanor calendar in metropolitan courthouses would know full well that routine criminal proceedings can be very boring indeed.

With professionals taking on the onerous tasks, the social distance only increases between the criminal justice system and the public. As such, the problem is not just that people harbor misconceptions about crime and punishment, which can have detrimental effects on public policy, or that the average citizen is largely unaware of the actual workings of the criminal justice system.¹⁰¹ The public is not compelled to understand the system, nor, for that matter, is it even provided a good reason to do so.

The social distance also relieves people from having to grapple with the stories and suffering of those embroiled in the system. Average citizens do not observe criminal processes firsthand, leaving to others the tedium of keeping watch for potential abuses and miscarriages of justice. This dissociation makes the public particularly susceptible to crime-related media frenzies and demagogic calls to ban more conduct and impose harsher punishments.¹⁰² These outbursts are not so much a challenge to the criminal justice system as its proliferation, consistent with an acceptance of the machinery as inexorable, if not indispensable—all of which makes it difficult for the public to envision an alternative other than ratcheting up the punitiveness.

Most of all, detachment allows the public to evade responsibility and disclaim any ownership of the machinery. Somewhere, out there, defendants are being fed into the machine, where their cases are processed and the upshot determined. Ordinary people do not pull the levers, they do not monitor the operations, and, for the most part, they avoid any contact. The criminal justice system is out of sight, out of mind, so to speak. The obscurity serves as a mechanism of what Zygmunt Bau-

99. FRIEDRICH NIETZSCHE, *HUMAN, ALL TOO HUMAN: A BOOK FOR FREE SPIRITS* 383 (R.J. Hollingdale trans., 2d ed. 1996).

100. *Id.*

101. See, e.g., Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 339 (2003) (“[C]itizens have lost sense of the day-to-day workings of the criminal justice system.”).

102. See *supra* notes 22–25 and accompanying text.

man described as “adiaphorization,” the process of making certain actions exempt from moral evaluation. This is achieved by, among other things:

social production of distance, which either annuls or weakens the pressure of moral responsibility; substitution of technical for moral responsibility, which effectively conceals the moral significance of the action; and the technology of segregation and separation, which promotes indifference to the plight of [people who] otherwise would be subject to moral evaluation and morally motivated response.¹⁰³

For criminal justice actors, bureaucratization also eliminates the idea of personal responsibility. At times, it may be displaced to someone else higher up the chain of command; in a hierarchy, an official is always bound by the dictates of others, supplanting conscience for his action and purging guilt for any resulting adversity. The need to choose among potential actions may be alleviated by the division of labor, the borders established by job descriptions, and the sense of compulsion from rules. As Professor Schlag suggested, a type of “bureaucratic morality” informs official responses such as the following: “It’s not by job”; “Some other department”; “I don’t make the rules, I just follow them”; “I wish I could, but I simply can’t . . . do that”; and “I’m sorry, your file is not in here.”¹⁰⁴ In the end, however, it is the machine that bears responsibility and not the bureaucracy’s workers, supervisors, and clients or the politicians and citizens in whose name the bureaucracy was created.

VI.

Of course, the foregoing image of criminal justice is an illusion. The system is not a machine but instead an inherently human process, with obvious human effects resulting from human decision-making, which is influenced by the foibles of human cognition, sentiment, and self-interest. The machine metaphor belies the vast discretion exercised by criminal justice actors, particularly on the law enforcement side. This misconception is not costless. As Debra Livingston argued, the “notion that police are ministerial officers—an idea that police have sometimes encouraged—still pervades much of the public discourse about law enforcement in ways detrimental to the rea-

103. ZYGMUNT BAUMAN, MODERNITY AND THE HOLOCAUST 199 (1989).

104. Schlag, *supra* note 89, at 882. For a profoundly disturbing example of such bureaucratic morality, see Barbara Basler, *A Blind and Deaf Infant’s Short Life on the Rolls of New York’s Homeless*, N.Y. TIMES, Dec. 20, 1985, at B1.

sonable restraint of arbitrary and capricious police behavior.”¹⁰⁵ The same is true of prosecutors, who rule the criminal justice system.

[The prosecutor] determines whether to accept or decline a case, what crimes to allege, and the number of counts to charge. He decides whether to participate in plea negotiations and sets the terms of the resulting agreements. He directs pretrial and trial strategy, and frequently sets the convicted defendant’s sentence. These choices and others like them may be made behind closed doors without much in the way of internal supervision or public rationalization, let alone external review. The courts have been loath to interfere with such discretionary decision making, and lawmakers have tended to expand prosecutorial power by enacting new crimes and harsher punishments. Because the American prosecutor exercises unfettered discretion in these judgments, he essentially makes and enforces the law and determines the guilt and resulting punishment of those brought within the criminal process.¹⁰⁶

To be sure, there may be entire categories of cases that receive perfunctory treatment, where one can anticipate with a degree of certainty the terms of resolution based on past practices and courthouse norms. Yet consistency of outcomes should not be confused for the absence of discretion or the elimination of error. Whether good or bad, knowledgeable or uninformed, judgment is always exercised in the enforcement of criminal law. With such authority comes responsibility, which is readily accepted in good times, less so when things go wrong. As they say, success has many fathers, but failure is an orphan. Almost always, the parent is killed in a “machine” accident for which nothing could have been done to prevent it.

At times, law enforcement may revert to, or hide behind, the great chestnut that ours is a government of laws, not men. No regime has ever functioned by this Aristotelian maxim, at least when it is understood as disallowing all discretionary authority. “Every government has always been a *government of laws and of men*,” Professor Davis emphasized in his landmark treatment of official discretion.¹⁰⁷ Most scholars who chafed at Davis’s work did not object to his descriptive account of law enforcement power. Rather, it was the notion that official discretion can and should be confined by administrative rulemaking subject to public notice and comment.

105. Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 193.

106. *Preface to THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE*, *supra* note 5, at xi, xi.

107. DAVIS, *DISCRETIONARY JUSTICE*, *supra* note 3, at 17.

For instance, one of Davis's contemporaries, Louis Jaffe, questioned the value of opening up for scrutiny certain rule-less and at times unsavory law enforcement practices—such as police use of informants and prosecutorial charging decisions—which receive public “approval in a kind of covert, perhaps shame-faced way.”¹⁰⁸

If there is such approval, it involves inevitably the acceptance of the arbitrary discretion embodied in Davis' regulation. Little would be gained by the regulation other than making public what the society prefers not to make public. This under-the-counter approach may offend the Puritan, it may offend the legal theorist, but I am sure that those who are offended are in a rather small minority, and if a society—a democracy if you will—chooses to operate that way, the appeal to general principles of equal protection and formal legality does not seem to me to be sufficient.¹⁰⁹

Professor Jaffee's remarks may contain a grain of truth. Undoubtedly, there are people who accept a sort of “sausage theory” of criminal justice.¹¹⁰ They don't want to know how law enforcement is using its discretion—how the sausage is made, so to speak—they just want low crime and safe streets. But willful ignorance should not be mistaken for legitimation. To reiterate, the criminal justice system has taken on the facade of a bureaucratic machine, which inhibits popular participation or even understanding, and which serves the efficiency interests of the bureaucracy itself and the personal interests of the system's repeat players, who can skate responsibility for the myriad discretionary judgments they make. In this context, the supposed consent of an anesthetized public hardly qualifies as knowing and voluntary. And, needless to say, an officialdom that is practically inaccessible, self-interested, and unaccountable will be difficult to square with decent conceptions of representative democracy.

A good test of the system's legitimacy is the response of an attentive, well-versed community to the ostensibly mechanical decisions of law enforcement. Consider, for instance, the prosecution of Aaron Swartz, the computer wunderkind and Internet activist who helped develop the social news site “Reddit” and the web feed format “RSS.” In 2011, he was charged with various federal crimes for allegedly downloading “an extraordinary volume of articles from JSTOR,”¹¹¹ a subscription digital deposi-

108. Louis L. Jaffe, *Book Review*, 14 VILL. L. REV. 773, 777 (1969) (reviewing DAVIS, *DISCRETIONARY JUSTICE*, *supra* note 3).

109. *Id.*

110. See FRIEDMAN, *supra* note 36, at 362–63.

111. Superseding Indictment ¶ 15, *United States v. Swartz*, No. 11-CR-

tory of scholarly articles. Purportedly, Swartz intended to post the articles on file-sharing networks to make them freely available to the public. The superseding indictment included thirteen felony counts carrying the possible (but not necessarily probable) outcome of a lengthy prison term upon conviction. “Stealing is stealing, whether you use a computer command or a crowbar, and whether you take documents, data or dollars,” said the U.S. Attorney in announcing the charges.¹¹² “It is equally harmful to the victim whether you sell what you have stolen or give it away.”¹¹³ According to defense counsel, the prosecutors maintained this uncompromising line. “They believed they had to seek prison time and multiple felony convictions in this case,” said one defense attorney.¹¹⁴ Another said he had warned the lead prosecutor that Swartz was a suicide risk. The prosecutor’s response was “a standard reaction in that office . . . ‘Fine, we’ll lock him up.’”¹¹⁵ The prosecution stance was seemingly rule-bound, inflexible, emotionless—in other words, machine-like.

In January 2013, Aaron Swartz committed suicide, “the product of a criminal justice system rife with intimidation and prosecutorial overreach,” his family said.¹¹⁶ Many people agreed, and compared the prosecutor to, inter alia, “Javert, the heartless and relentless prosecutor in Victor Hugo’s *Les Misérables*.”¹¹⁷ For present purposes, the validity of these claims is not relevant. What is relevant, however, was the government’s response to the backlash. “The career prosecutors handling this matter took on the difficult task of enforcing a law they had taken an oath to uphold,” the U.S. Attorney claimed.¹¹⁸ “Ultimately, any sentence imposed would have been

10260-NMG, 2012 WL 4341933 (D. Mass. Sept. 12, 2012).

112. John Schwartz, *Open-Access Advocate Is Arrested for Huge Download*, N.Y. TIMES, July 20, 2011, at A17 (quoting U.S. Attorney Carmen Ortiz).

113. *Id.*

114. Michael Daly, *Aaron Swartz’s Unbending Prosecutors Insisted on Prison Time*, DAILY BEAST (Jan. 15, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2013/01/15/aaron-swartz-s-unbending-prosecutors-insisted-on-prison-time.html> (quoting defense attorney Elliot Peters).

115. Kevin Cullen, *On Humanity, a Big Failure in Aaron Swartz Case*, BOS. GLOBE, Jan. 15, 2013, at B1 (quoting defense attorney Andy Good).

116. Noam Cohen, *A Data Crusader, a Defendant and Now, a Cause*, N.Y. TIMES, Jan. 14, 2013, at A1 (quoting family’s statement).

117. Ted Rall, *Murder by Prosecutor*, BOISE WEEKLY, Jan. 23, 2013, at 6, available at <http://www.boiseweekly.com/boise/murder-by-prosecutor/Content?oid=2803044>.

118. *Statement of United States Attorney Carmen M. Ortiz Regarding the Death of Aaron Swartz*, JUSTICE.GOV (Jan. 16, 2013), <http://www.justice.gov/>

up to the judge.”¹¹⁹ In bureaucratic terms, they had no choice and someone else was responsible.

In the wake of this sad story, those who found the prosecutor’s approach reasonable and those who found it reprehensible appeared to agree that it was in line with routine practice. “It works efficiently for the career criminal—even if it may look more like an assembly line than justice,” argued James Boyle.¹²⁰ “But its smoothness conceals many flaws—the lack of match between behavior and charge, the psychological costs to victims when harms are plead down to offenses that were not really committed, the way that the operation of our criminal justice system goes on in private not in open court.”¹²¹ What made the Swartz prosecution different, Orin Kerr noted, was that “it involved a highly charismatic defendant with very powerful friends in a position to object to these common practices.”¹²² I would add that the case also inspired public outrage, with thousands of people signing online petitions asking the President to fire the U.S. Attorney and the lead prosecutor.¹²³

Regardless of the merits, these people took an active interest in what had happened in this case. If only they had the opportunity to do it at an earlier stage in the process; if only they expressed this interest in other cases, too; if only prosecutors and judges were required to respond to their views in a meaningful fashion; if only the insiders and outsiders felt responsible for the outcomes and took ownership of *our* criminal justice system. Professors Bierschbach and Bibas have offered one possi-

usao/ma/news/2013/January/StatementreSwartz.html.

119. *Id.*

120. James Boyle, *The Prosecution of Aaron Swartz: A Reply to Orin Kerr*, HUFFINGTON POST (Jan. 18, 2013, 10:11 PM), http://www.huffingtonpost.com/james-boyle/prosecution-aaron-swartz_b_2508242.html.

121. *Id.*

122. Orin Kerr, *The Criminal Charges Against Aaron Swartz (Part 2: Prosecutorial Discretion)*, VOLOKH CONSPIRACY (Jan. 16, 2013, 11:34 PM), <http://www.volokh.com/2013/01/16/the-criminal-charges-against-aaron-swartz-part-2-prosecutorial-discretion>.

123. See, e.g., *Fire Assistant U.S. Attorney Steve Heymann*, WHITEHOUSE.GOV (Jan. 12, 2013), <https://petitions.whitehouse.gov/petition/fire-assistant-us-attorney-steve-heyman/RJKSY2nb> (petition calling for the removal of Assistant U.S. Attorney Stephen Heymann signed by over 26,000 people as of March 10, 2013); *Remove United States District Attorney Carmen Ortiz from Office for Overreach in the Case of Aaron Swartz*, WHITEHOUSE.GOV (Jan. 12, 2013), <https://petitions.whitehouse.gov/petition/remove-united-states-district-attorney-carmen-ortiz-office-overreach-case-aaron-swartz/RQNrG1Ck> (petition calling for the removal of U.S. Attorney Carmen Ortiz signed by over 54,000 people as of March 10, 2013).

ble means to increase public participation in sentencing and a good example of the potential benefits from drawing upon the tools and experiences of other legal fields. If only their ideas and others like them could be brought to fruition and allow the public to see criminal justice for what it really is: not a machine, but a human system with very human consequences.