

University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law


3-2013

Criminal (In)Justice and Democracy in America

Stephanos Bibas

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship

 Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Law and Politics Commons](#), [Law Enforcement and Corrections Commons](#), and the [Public Law and Legal Theory Commons](#)

Repository Citation

Bibas, Stephanos, "Criminal (In)Justice and Democracy in America" (2013). *Faculty Scholarship at Penn Law*. 463.

https://scholarship.law.upenn.edu/faculty_scholarship/463

This Response or Comment is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

CRIMINAL (IN)JUSTICE AND DEMOCRACY IN AMERICA

*Stephanos Bibas**

Professor Nicola Lacey wishes I had written a different kind of book. True, she graciously praises my careful institutional analyses of plea bargaining and prosecutorial discretion, my emphasis on the perceived legitimacy of the criminal justice system, my concern for respecting victims' and defendants' humanity, and my detailed suggestions for reform.¹ But she objects that my book is not comparative, even though I disclaim that ambition precisely because America's distinctive criminal justice history and responsive political economy (including initiatives, referenda, and traditions of lay jury service) set it apart from Europe.² She faults me for offering a primarily internal critique "relentless[ly] focus[ed] on a particular cluster of criminal justice-specific variables"³ instead of ranging through social science literature to paint an external, broad-brush picture of "power relations and broad institutional dynamics"⁴ such as slavery, Jim Crow laws, welfare policy, and the "catastrophic collapse of Fordist industrial production."⁵ She misdescribes my book as embracing an "apocalyptic vision of professionalization" and "contempt for expertise,"⁶ though I advocate having experts and laymen check and balance one another as part of a broad conversation.⁷ And, in critiquing a book built on hundreds

* Professor of Law and Criminology, University of Pennsylvania. I would like to thank the editors of the *Harvard Law Review* for the opportunity to engage in this dialogue and for their helpful suggestions and Shyamkrishna Balganesh and Richard A. Bierschbach for their advice and comments on an earlier draft.

¹ See Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein's Monster?*, 126 HARV. L. REV. 1299, 1308, 1324 (2013) (reviewing STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012)).

² Compare *id.* at 1311 ("There is only brief comparative analysis of the difference between the American and other contemporary criminal justice systems . . ."), with BIBAS, *supra* note 1, at 1-2, 40, 122-23 ("Descriptively, America is not Europe. . . . Popular pressure is a fact of life in America, and criminal justice ignores it at its peril.").

³ See Lacey, *supra* note 1, at 1311.

⁴ *Id.* at 1300.

⁵ *Id.* at 1319.

⁶ *Id.* at 1324. Note also the hyperbolic comparison of my proposals to "Frankenstein's Monster?" in her title. *Id.* at 1299.

⁷ As Professor Ronald Wright accurately puts it: "Bibas is not a Luddite, determined to smash the machine." Ronald Wright, Review of *The Machinery of Criminal Justice*, CRIM. L. & CRIM. JUST. BOOKS (Sept. 2012), http://cljbooks.rutgers.edu/books/machinery_of_criminal_justice.html. Rather, I seek to adjust "[t]he optimal blend of technical expertise and popular values." *Id.* Another reviewer, Professor Michael O'Hear, sees the fruit of focusing on the legal system as one of interplay and conversation: "Professor Bibas's encompassing, system-wide perspective is a particularly helpful contribution," as the book is "consistently insightful as to the subtle

of authorities and criminal justice episodes, Lacey cites and discusses secondary academic sources but not a single case, a single procedural rule, a single news report, or a single statistical compilation, and mentions only a single statute in passing.⁸

A reader of Lacey's review would barely glimpse two of the three main pillars on which the book rests: retail justice and agency costs. These two pillars, along with democracy, undergird my analyses of retribution and emotion. I address each of these arguments below.

I. WHOLESALE VERSUS RETAIL JUSTICE

Lacey assumes that involving the public in shaping criminal justice ineluctably leads to knee-jerk punitiveness. She entirely overlooks the book's fundamental distinction between making criminal justice policy wholesale and adjudicating deserved punishment at the retail level, in individual cases.⁹ Wholesale policies are tainted by the media's sensationalistic stories, co-opted by politicians, and clouded by cartoonish stereotypes of feared predators. That is especially true when they are adopted at high levels of government, as discussed below.

Retail justice, as applied by juries and the like, involves setting aside stereotypes to consider flesh-and-blood victims and defendants in all their complexity. Professor Paul Robinson and his coauthors have found strong empirical evidence that lay punishment judgments about detailed cases are extremely consistent, nuanced, and sensitive to the facts.¹⁰ The same is not true of abstract hypotheticals, which leave voters free to fill in the blanks with stereotypes and fears.¹¹

Nevertheless, Lacey seems to call for more rules and claims that I want to get rid of "general regulative rules" entirely.¹² That characterization is untrue. I advocate publication of policing, charging, plea-bargaining, and sentencing policies, which should incorporate public input.¹³ And I favor both statutory maximum sentences and advisory

interactions" among "substantive criminal law, . . . criminal procedure, . . . sentencing, . . . corrections, [and] clemency." Michael M. O'Hear, (*The History of Criminal Justice as a Morality Play*, 161 U. PA. L. REV. PENNUMBRA 132, 137 (2013) (book review), <http://www.pennumbra.com/essays/01-2013/OHear.pdf>. For a third review that likewise does not share Lacey's reading of the book, see Andrew Taslitz, *Tinkering with the Machinery of Justice*, JOTWELL: CRIM. L. (Mar. 19, 2012), <http://crim.jotwell.com/tinkering-with-the-machinery-of-justice/>.

⁸ See Lacey, *supra* note 1, at 1301 n.9.

⁹ See BIBAS, *supra* note 1, at xxi, 35–38, 119, 123.

¹⁰ *Id.* at 119 (citing Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1867–73, 1883–87 (2007)).

¹¹ *Id.* at 36.

¹² Lacey, *supra* note 1, at 1342.

¹³ BIBAS, *supra* note 1, at 145–46.

sentencing guidelines with presumptive plea discounts, subject to jury adjustment.¹⁴

I do, however, seek to unlock mandatory minimum penalties and loosen the federal Sentencing Guidelines, so that prosecutors must justify their sentences to juries instead of dictating them unilaterally. Does Lacey mean to defend mandatory minimum sentencing and the gobbledygook of mathematical guidelines on the theory that if some rules are good then more must be better? Does she like letting prosecutors unilaterally set sentences by charge bargaining under binding sentencing guidelines? Her position seems to imply her embrace of those widely condemned policies. But because she cannot conceive of how retail or lower-level justice might be different, she suggests no alternative.

II. DEMOCRACY, LOCALISM, AND EQUALITY

My book advocates placing more faith in voters, the political branches, and decisionmaking at lower levels of government. Lacey disagrees on all counts, proudly identifying herself as one of “the ‘British liberal elites’ who ‘fear untutored public sentiment’ and emotion.”¹⁵ She undervalues America’s deep commitments to federalism, localism, and democratic self-government and overlooks the related problem of agency costs.

A. *Electoral Democracy and Agency Costs*

Lacey entirely ignores my bedrock concern for political theory, reducing my commitment to democracy to a matter of “perceived legitimacy.”¹⁶ As the Declaration of Independence put it, America is founded on the idea that governments “deriv[e] their just powers from the consent of the governed.”¹⁷ While officials may filter momentary passions, they act illegitimately if they slight or distort the public’s long-term desires for procedural and substantive justice.¹⁸ She is so thoroughly Weberian that she cannot address my Tocquevillean arguments for democratic self-government.¹⁹

Lacey thus wants to redouble our efforts to insulate criminal justice policy from politics. She joins the conventional wisdom in “a decisively one-sided debate” that is “distrustful of the crowd” and blames crim-

¹⁴ *Id.* at 158–59.

¹⁵ Lacey, *supra* note 1, at 1311 (quoting BIBAS, *supra* note 1, at 122).

¹⁶ *Id.* at 1308.

¹⁷ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁸ BIBAS, *supra* note 1, at 126.

¹⁹ *Cf. id.* at xxx (comparing my Tocquevillean approach with the Weberian approach of criminal justice insiders).

inal justice's pathologies entirely on the benighted public.²⁰ That leads her to the "expert consensus" in favor of "insulat[ing] crime policy from crime politics."²¹

That strategy has failed.²² At the root of the problem are agency costs, a term that Lacey uses only once though the concept undergirds my book.²³ As the book argues at length, criminal justice insiders have sought to serve their self-interests and squelch outsider (lay) participation. But the result has been a pathological tug-of-war, pitting outsiders against insiders instead of trying to accommodate them constructively.²⁴ As Professor Rachel Barkow has shown, the U.S. Sentencing Commission failed in significant part because it sought to be a secretive, insular, expert agency divorced from politics. Thus, particularly when the Commission has sought to act independently, Congress has taken to disregarding and superseding its recommendations.²⁵ By contrast, state sentencing commissions have fared far better by being more transparent and participatory. They comprise a wide range of stakeholders and often include politically connected figures, so they foster informed dialogue among a range of expert and lay participants.²⁶

Lacey never reflects on the repeated failure of her preferred strategy. Nor does she acknowledge the need for structural checks and balances, including fresh perspectives, to rein in unchecked insider discretion and agency costs. Our political economy is too populist and responsive to let criminal justice policy deviate in the long term from the public's sense of justice.²⁷ If we do not include outsiders constructively, they will force their way in destructively, through initiatives, referenda, legislation, and the like. That is how we wound up with California's draconian, overbroad three-strikes law, for example.²⁸

Instead of engaging with America's political tradition, Lacey oversimplifies the problem to "(loosely speaking) a 'prisoners' dilemma,'" repeatedly using that term to describe any time electoral competition results in suboptimal criminal justice policy.²⁹ Lacey's misuse of the

²⁰ Wright, *supra* note 7.

²¹ *Id.*

²² *Id.*

²³ Lacey, *supra* note 1, at 1303; *cf. id.* at 1301, 1303, 1305, 1307 (referring in passing to agents' self-interests without specifically invoking agency costs).

²⁴ BIBAS, *supra* note 1, at 32–33, 40–53.

²⁵ See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 768–71, 799 (2005).

²⁶ See *id.* at 771–812.

²⁷ BIBAS, *supra* note 1, at 40.

²⁸ *Id.* at 45–46.

²⁹ Lacey, *supra* note 1, at 1300; *see id.* at 1319, 1320, 1321. Her misuse of the language is especially striking given that Lacey has misused the term "prisoners' dilemma" to the same effect in the title of one of her books and the title one of her articles. See NICOLA LACEY, *THE PRISONERS' DILEMMA* (2008); Nicola Lacey, *Political Systems and Criminal Justice: The Prisoners' Dilemma After the Coalition*, 65 CURRENT LEGAL PROBS. 203 (2012).

term inadvertently implies that there is a single high-punishment equilibrium that one can logically abstract from culture, history, and other factors that shape legal and political coordination.³⁰

B. Localism

Lacey puts her trust in higher levels of government, further removed from the *demos*. Hasn't she heard the deafening outcry against the over-federalization of crime and steep federal sentences? It is federal criminal justice that continues to showcase draconian drug sentences and mandatory minimum penalties. Because prisons are only a drop in the ocean of the federal budget, there is little fiscal pushback.

By contrast, corrections expenses typically make up at least the fourth-largest share of states' budgets, giving states better incentives to attend to both the costs and benefits of carceral policies.³¹ That is why many states, but not the federal government, are starting to lower sentences and release nonviolent prisoners: they must trade off the benefits of incarceration against the costs of closing hospitals and schools or raising taxes through the roof. The same is true of counties and cities that must fund police, prosecutors, courts, and jails. Lacey is right to imply that counties and cities can externalize some costs of their penal policies by relying on state prisons.³² But the solution is to align budgets and priorities through more consistent local funding or rationing, not to make matters worse by federalizing everything.

Lacey asserts that I do not discuss realistically how to balance costs and justice because she expects a top-down scientific metric, not a process.³³ She does not trust local democratic deliberation to weigh costs and benefits in light of fiscal constraints. She never addresses my proposals for greater reliance on community policing and community prosecution, for example, to set enforcement priorities and policies.³⁴ Instead of proposing a sweeping, abstract policy such as drug decriminalization, I trust neighborhood-level deliberation to weigh the costs and benefits of low-level drug enforcement. As a result, police and prosecutors might emphasize shutting down dangerous crack houses more than targeting discreet sales in private.³⁵ Police and prosecutors might also shift resources away from racking up easy arrest statistics

³⁰ See Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 213 (2009) (also noting that legal scholars overuse the term prisoners' dilemma, the only game they know, as a shorthand for a variety of other cooperation and coordination games).

³¹ See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1290 & n.70 (2005).

³² See Lacey, *supra* note 1, at 1320.

³³ See *id.* at 1314–15.

³⁴ See BIBAS, *supra* note 1, at 146–48.

³⁵ *Id.* at 147, 153.

in vice cases and toward the violent and property crimes that may worry local residents more.³⁶

C. Equality

Lacey's top-down approach colors her view of how to pursue equality. She does not appear to see the differences between formal and substantive equality. Federal, top-down rules of the sort she favors, such as mandatory minimum sentences, treat unlike cases alike, inflicting ten-year sentences on both substantial drug distributors and minor dealers selling to support their own habits. And this rule-bound approach does not even guarantee equal treatment for similarly situated defendants, as prosecutors routinely bargain away so-called mandatory penalties for defendants who have experienced counsel or agree to cooperate.³⁷ As the late Bill Stuntz noted, even when it appears to be rule-like, "criminal law does not function as law. Rather, the law defines a menu of options for police officers and prosecutors to use as they see fit."³⁸ Lacey fails to address the yawning chasm between the rules she favors on paper and how insiders manipulate those rules in practice.

Substantive equality requires starting with rules and benchmarks, to be sure, but also leaving room to tailor sentences to particular facts and equities, to discern which cases are truly alike. Far from promoting economic equality, as Lacey suggests, the status quo's low-visibility discretion favors the rich and well-connected. They can afford expensive lawyers, game the system, and exercise influence behind the scenes. Racial equality is better served at lower levels, where particular neighborhoods have a say in balancing the harms they suffer from crime against the costs of overly aggressive enforcement. Empowering these neighborhoods through community policing and prosecution and restorative sentencing juries can, as Professor Michael O'Hear acknowledges, "help soften the racial tensions associated with our criminal justice system."³⁹

My book further takes on the conventional wisdom that trusts judges, and not elected officials, to pursue racial and economic equality. Over the past half-century, the Supreme Court's active role in criminal procedure has done little to reduce racial disparities, which continue to plague criminal justice. In several specific areas, courts have failed while legislatures and executives have recently succeeded: While courts have been ineffectual at tackling race disparities and innocence problems in capital punishment, state legislatures and execu-

³⁶ *Id.* at xxvii, 147.

³⁷ *Id.* at 44-48.

³⁸ WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 4 (2011).

³⁹ O'Hear, *supra* note 7, at 147.

tives in Illinois, Maryland, and elsewhere have imposed moratoria, established study commissions, commuted some sentences, and even repealed the death penalty. While courts have done nothing to stop police from pulling over motorists for “Driving While Black,” New Jersey’s executive and legislature have tackled the problem head-on. And while courts have allowed penalties for (mostly black) crack-cocaine defendants to exceed greatly those for (whiter) powder-cocaine defendants, the President and Congress have at last lowered crack penalties on their own.⁴⁰

Lacey rejects reliance on the political branches but cites no contrary evidence apart from a passing reference to the War on Drugs,⁴¹ even though both the reduction of crack-cocaine disparities and the recent legalization of marijuana in Colorado and Washington may belie her assertion. Today, many minorities wield political power, particularly at the local and neighborhood levels, and I advocate devolving more political power to those lower levels. Thus, as Professors Dan Kahan and Tracey Meares have argued, courts should not continue to hobble law enforcement in the name of racial equality. They should instead promote cooperation between police and minority groups, who want measured help in cleaning up their own neighborhoods.⁴² Localism, democracy, and equality can thus go hand in hand.

III. POPULAR JUSTICE, EMOTION, AND RETRIBUTION

Local democracy and retail justice are sensitive to lay moral and retributive judgments. But professionalization generates agency costs, leaving insiders free to slight these needs. Lacey applauds this state of affairs because she denigrates the legitimate roles of emotion and retribution.

A. *Emotion*

Lacey seems to believe that whatever the problems of experts, they remain the bulwarks of reason in a system otherwise susceptible to the mob’s emotions. Because I seek constructive, democratic outlets for retributive emotions, she mistakenly objects that I “dismiss the importance of rational argumentation and general rules.”⁴³

⁴⁰ BIBAS, *supra* note 1, at 92, 125–26, 163–64, 220 n.19.

⁴¹ Lacey, *supra* note 1, at 1309–10.

⁴² See Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1179 (1998); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of City of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 208.

⁴³ Lacey, *supra* note 1, at 1316; see also *id.* at 1306 (suggesting that I pit “emotion” against “rational argumentation and the focus on the efficient pursuit of system goals”).

But Lacey buys into the false dichotomy between reason and emotion, oversimplifying the latter to raw “anger, hatred, and disgust.”⁴⁴ As Aristotle maintained, emotion is in part cognitive; we can reflect upon, evaluate, and educate our emotions.⁴⁵ Reason and emotion must converse constructively about appropriate empathy, for instance, or how to progress from blame through shame to remorse and forgiveness. (Forgiveness and mercy are among the many themes of the book that Lacey slights.) Humans are not Vulcans. When academics and lawyers ignore outsiders’ emotional needs, outsiders chafe and are tempted to rebel.

B. Retribution

Lacey is similarly uncharitable toward retribution. She collapses retribution into vengeance, in part because she cannot see retribution’s cognitive, evaluative component.⁴⁶ The former is a reflective, impartial, proportional moral judgment, while the latter is a hot, unchecked passion.⁴⁷ She also blames retribution for America’s pathological penal policies. But three-strikes laws and mandatory minima diverge wildly from the public’s sense of retribution in many instances.⁴⁸ They are better understood as wholesale incapacitative measures that result from outsiders’ tug-of-war with insiders, in part because outsiders are misled by politicians and the media and misunderstand average penalties.⁴⁹

Indeed, it is retribution’s concern for proportional punishment, and for treating defendants as our fellow humans rather than as wild beasts to be caged, that leads me to share Lacey’s “fears about the long-term stigmatizing and degrading effects of punishment.”⁵⁰ That is why I devote so much attention to educating, training, and employing prisoners and to promoting prisoner reentry.⁵¹

Lacey insists that victims crave vengeance and punishment, which “may lead to vigilantism and rampant inequality.”⁵² But she fails to grapple with the empirical evidence that average victims, like average

⁴⁴ *Id.* at 1317.

⁴⁵ BIBAS, *supra* note 1, at 88, 218 n.12. The cited passages follow Kahan, Nussbaum, and Pillsbury, who in turn follow Aristotle.

⁴⁶ See Lacey, *supra* note 1, at 1315–16.

⁴⁷ ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 366–68 (1981).

⁴⁸ See Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1975–78 (2010) (summarizing previous empirical studies finding divergences between public opinion and statutory sentencing schemes).

⁴⁹ BIBAS, *supra* note 1, at 36–38, 40–48.

⁵⁰ Lacey, *supra* note 1, at 1314.

⁵¹ See, e.g., BIBAS, *supra* note 1, at 26–27, 133–44.

⁵² Lacey, *supra* note 1, at 1316, 1324.

citizens, are not bloodthirsty — they do not reflexively seek maximum sentences and their involvement does not lead to harsher sentences.⁵³

Instead of addressing the contrary empirical sources cited in my book, Lacey claims only that “research suggests that the desire for vengeance and punishment is insatiable, in the sense that while victims may believe that severe punishment of ‘their’ offender will make them feel more satisfied, that often turns out not to be the case.”⁵⁴ The supposed “research” that she cites there, however, is a book chapter written by a philosopher.⁵⁵ And it does not even support Lacey’s point, opposing her claim that blame can or should be sanitized of its negative emotions.⁵⁶ At the very end, the cited chapter speculates that when retributive punishment does not deliver both “punitive payback” and educative, restorative dialogue, punishers will remain dissatisfied and call for ever-higher sentences.⁵⁷ That fear dovetails with the insider-outsider spiral I discuss in chapter II of my book. And, rather than undercutting blame entirely, that concern supports my efforts to marry retributive and restorative justice.

At bottom, Lacey objects not to excessive punishment but to retribution generally. As a result, she mistakenly views her goals as mutually exclusive of mine, failing to see how temporary blame and hard treatment promote reform and discharge a wrongdoer’s debt to society

⁵³ BIBAS, *supra* note 1, at 91, 220 n.17. For examples of such empirical evidence, see LESLIE SEBBA, *THIRD PARTIES: VICTIMS AND THE CRIMINAL JUSTICE SYSTEM* 116–19 (1996) (summarizing various empirical studies concerning both victims and the public from a variety of countries, and suggesting that the public appears more punitive about wholesale policies than it does when confronting individual cases); Jan J.M. van Dijk, *Crime and Victim Surveys*, in *INTERNATIONAL VICTIMOLOGY* 121, 121–22, 130 (Chris Sumner et al. eds., 1996) (“Criminologists have for years tried to redress the image of the victim as a person who seeks reassurance for his fears by demanding severe sentences.”), available at http://aic.gov.au/media_library/publications/proceedings/27/vandijk.pdf.

⁵⁴ Lacey, *supra* note 1, at 1316.

⁵⁵ *Id.* at 1316 n.42 (citing Victoria McGeer, *Civilizing Blame*, in *BLAME* 162, 187–88 & n.21 (D. Justin Coates & Neal A. Tognazzini eds., 2012)). McGeer’s only support for her tentative supposition is a psychological study of university students who played a computer game against machine opponents, some of whom followed a cooperative strategy and some of whom behaved selfishly. Many of the students later chose to punish the selfish players by spending less than a dollar to deprive the selfish players of up to a few dollars. The students predicted that punishing would make them feel better, but ten minutes later they were more likely to be ruminating over the matter if they had personally inflicted revenge, though not if they had witnessed someone else imposing punishment. See Kevin M. Carlsmith et al., *The Paradoxical Consequences of Revenge*, 95 *J. PERSONALITY & SOC. PSYCHOL.* 1316, 1318, 1320, 1322–23 (2008) (cited in McGeer, *supra*, at 188 n.21). A small-stakes, anonymous computer simulation involving university students over the course of ten minutes is hardly generalizable to criminal punishment, let alone to the spiral of inexorably higher punishment that Lacey predicts. But even if it were, it would suggest that having the state impose retribution should not lead to dissatisfaction.

⁵⁶ See McGeer, *supra* note 55, at 163–83.

⁵⁷ *Id.* at 187.

and to his victim.⁵⁸ She merges “doing justice” with “effective clinical treatment” pursuing “rehabilitative and related ends,” but opposes even temporary “affective blame,” “hard treatment[,] and stigma.”⁵⁹ She favors “responsibility without blame” and even suggests that punishment can occasionally be serious and appropriate without being negative at all.⁶⁰ How is that punishment or justice? Even one of Lacey’s own sources recognizes that it is artificial and impossible in practice to separate blame from “anger, resentment, [and] indignation,” as Lacey does.⁶¹ Criminal justice must blame and punish crimes, at least temporarily, to denounce wrongs, vindicate victims, and make wrongdoers pay their debts to society and victims. Denouncing and punishing crimes are preconditions to reforming wrongdoers. If we balk at punishing a moderately serious crime, the criminal verdict’s lesson is merely cheap talk. And in our responsive political economy, voters will not stand for that but will further rebel, making matters worse.

Consider a recent illustration, albeit from a different democracy: In India, a young woman was recently gang-raped and murdered by a group of drunken men. Citizens began protesting the plague of sexual violence and harassment of women that the government has done little to combat. Rather than embracing the protests and promising justice as well as reforms to combat future violence, the government seemed indifferent and tried to suppress the protesters, which only inflamed protesters’ rage.⁶² On Lacey’s logic, the protesters’ calls for retribution are merely window dressing for angry vengeance; they threaten equality and interfere with criminal justice professionals’ freedom to exercise their enlightened expertise in deciding to continue with business as usual. The gang-rapist-murderers should be treated clinically and therapeutically with a minimum of blame or anger. On my view, the protesters’ demands to denounce the wrong, punish the wrongdoers, and vindicate this and other victims are legitimate calls for justice. If the local officials had heeded the citizens instead of shutting them out, they could have fostered a public, democratic conversation about protecting women and sent a strong message condemning sexual violence.

⁵⁸ See BIBAS, *supra* note 1, at 97–98.

⁵⁹ Lacey, *supra* note 1, at 1317–18.

⁶⁰ *Id.* at 1317 (internal quotation marks omitted).

⁶¹ Compare *id.* at 1316–17 (suggesting that we should separate “blameworthiness” from “affective blame” linked to “negative attitudes and emotions such as anger, hatred, and disgust, that are typical human responses to criminal or immoral conduct”), with McGeer, *supra* note 55, at 170 (recognizing “the conceptual point that blame would not be blame absent the characteristic presence (and effect) of certain core emotions: anger, indignation, and resentment”).

⁶² See Jim Yardley, *Shaky Response of India’s Government in Fatal Rape Case Magnifies Outrage*, N.Y. TIMES, Dec. 30, 2012, at A6.

IV. CONCLUSION

On one final issue Lacey has a point. As I acknowledge, America long ago ceased to be a nation of tightly knit colonial villages, homogeneous in race, ethnicity, religion, and moral values.⁶³ Americans do still agree, to a surprising extent, on what fair procedures and substantive criminal law and punishment should look like.⁶⁴ But, as she notes, many Americans no longer live in small towns, and modern cities and suburbs are more anonymous and impersonal. Thus, shame and informal sanctions are less powerful than they once were, and citizens agree less on criminal justice issues, especially on victimless and morals offenses.⁶⁵

That is not, however, a reason to discard the historical ideals of local deliberation and community self-government. Instead, the current American landscape challenges us to build consensus at the neighborhood or local level and to narrow criminal enforcement to those policies that can command broad support. Interactions both in person (in community policing, community prosecution, and the like) and online (through social networking, discussion boards, and chat rooms) may perhaps re-create more community in the modern era. In that regard, my book's vision is somewhat idealistic. But it prompts us to think hard about how to translate democratic self-government into practice, instead of complacently accepting the failed criminal justice machine.

⁶³ BIBAS, *supra* note 1, at 130, 162.

⁶⁴ *Id.* at 119–20.

⁶⁵ Lacey, *supra* note 1, at 1322–23, 1324.