Symposium Articles

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Criminal Justice Through Management: From Police, Prosecutors, Courts, and Prisons to a Modern Administrative Agency

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INTRODUCTION

In 1941, responding to a wide-ranging effort to enact legislation that would constrain the operation of New Deal agencies, Franklin Roosevelt commissioned the Attorney General to produce a report on the role and importance of administrative governance.[1] The report stated, "If administrative agencies did not exist in the Federal Government, Congress would be limited to a technique of legislation primarily designed to correct evils after they have arisen rather than to prevent them from arising. The criminal law, of course, operates in this after-the-event fashion."[2]

This familiar distinction would appear to leave our criminal law system mired in the premodern mindset this Report's casual "of course" implies. It suggests that we continue to conceive of the system by which we combat crime as after-the-fact punishment of individual wrongdoers. Following the quoted language, the Attorney General's Report continued: "Congress declares a given act to be a crime. The mere declaration may act as a deterrent. But if it fails to do so the courts can only punish the wrong-doer; they cannot wipe out or make good the wrong."[3]

Actually, it is generally recognized that punishing people after they have committed crimes is a second-best response. The preferable approach—and here we can add a more convincing "of course"—is to do what the Attorney General said that administrative agencies do in their assigned areas, prevent crime from occurring in the first place. Not only do we know this, but it has generally been the purpose of the Western World's criminal justice systems since their inception. Contrary to the quote, prevention, or more familiarly deterrence, is

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1 ATT'Y GEN.'S COMM. ON ADMIN. PROC., DEP'T OF JUST., COMMITTEE'S REPORT (1941), http://www.regulationwriters.com/downloads/apa1941.pdf [https://perma.cc/L7MA-4XQQ].

2 *Id.* at 13.

3 *Id.*

the norm and not the exception.[4] In England, efforts to address the problem of crime by preventive means can be traced back to the Middle Ages,[5] and readily identified for succeeding centuries as well.[6] England's incipient police forces of the late eighteenth century were established with prevention in mind,[7] as were the first modern forces that followed.[8] The juvenile justice was based on a social work perspective in order to prevent anticipated delinquency.[9] Most of the rationales for punishment, including general deterrence, special deterrence, incapacitation and rehabilitation, are framed in terms of prevention, with only strict retributivists willing to dispense with this consideration.[10]

The feature of our criminal justice system that distinguishes it from regulatory law is not its lack of concern about prevention but its

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4 *See* Markus D Dubber, *Preventive Justice: The Quest for Principle*, *in* PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 47 (Andrew Ashworth et al. eds., 2013).

5 CLIVE EMSLEY, A SHORT HISTORY OF POLICE AND POLICING 39 (2021) (Statute of Winchester, promulgated by King Edward I in 1285, provided that all foliage along the roads between market towns be cut back 200 feet on both sides of road to eliminate hiding places for highway robbers.).

6 Joel B. Samaha, *The Recognizance in Elizabethan Law Enforcement*, 25 AM. J. LEGAL HIST. 189 (1981) (Fifteenth century magistrates routinely imposed sureties in cases of petty crimes to keep the peace or for good behavior in order to deter those charged with criminal violations from further antisocial behavior.). Family or friends, not the accused, would have to post £ 40 bonds, with the possibility of forfeiture acting as a means of deterrence. This practice was imported to the American colonies and used extensively well into the late nineteenth century. *See* JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776) (1944).

7 *See* DAVID J. COX, A CERTAIN SHARE OF LOW CUNNING: A HISTORY OF THE BOW STREET RUNNERS, 1792-1839, at 26–38 (2010) (Novelist Henry Fielding established the Bow Street Runners as a means of reducing crime through their deterrent effect although they were popularly characterized as an efficient group for catching criminals.); P. COLQUHOUN, A TREATISE ON THE COMMERCE AND POLICE OF THE RIVER THAMES (1800) (justifying the creation of the Thames River Marine Police in 1798 on the grounds that for an investment of 4,200 pounds, they prevented the theft of 122,000 pounds worth of cargo from ships docking in London).

8 For an extended discussion of the preventive functions of the first modern police in Britain (the London Metropolitan Police), see ANDREW ASHWORTH & LUCIA ZEDNER, PREVENTIVE JUSTICE 27–44 (2014); CLIVE EMSLEY, THE ENGLISH POLICE 24–42 (1991); W.L. MELVILLE LEE, A HISTORY OF POLICE IN ENGLAND 155–75 (1901).

9 *See* BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE 19–69 (2017); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1969); FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 33–50 (2005).

10 *See* ASHWORTH & ZEDNER, *supra* note 8, at 17–19; Frederick Schauer, *The Ubiquity of Prevention*, *in* PREVENTION AND THE LIMITS OF THE CRIMINAL LAW, *supra* note 4, at 10.

institutional fragmentation. The Weberian administrative agency is a product of the modern era,[11] the Nineteenth Century at the earliest and the Twentieth Century most often.[12] Regulatory regimes designed to protect citizens from threats generated by the industrial and commercial character of modern society almost always rely on such agencies to implement the desired public policies. Hierarchically organized agencies address the dangers that factory and office work pose for citizens in their capacity as employees, the dangers that remotely manufactured and mass marketed products pose for citizens in their capacity as consumers, and the dangers that industrial production and machine-based transportation pose for citizens as denizens of the environment.[13]

Crime is a much older problem, perhaps dating back to the very origins of civilization, and certainly back before the advent of administrative agencies. Its venerability, combined with the visceral emotions it often elicits, produced efforts to address it that were ad hoc, particularized, and sometimes ill-conceived. This was clearly true for England, the country from which our criminal justice system is most directly derived. Communities and businesses organized patrols and hired watchmen to protect particularized locations or assets, a function gradually taken over or displaced by public

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[11] *See* MAX WEBER, ECONOMY AND SOCIETY 215–23, 958–63 (Guenther Roth & Claus Wittich eds., 1978) (classic definition of an administrative or bureaucratic agency).

[12] *See generally* NORMAN CHESTER, THE ENGLISH ADMINISTRATIVE SYSTEM: 1780–1870 (1981); FRITZ MORSTEIN MARX, THE ADMINISTRATIVE STATE: AN INTRODUCTION TO BUREAUCRACY (1957); WOLFGANG J. MOMMSEN, THE AGE OF CAPITALISM AND BUREAUCRACY (Berghahn Books 2021) (1974); HENRY PARRIS, CONSTITUTIONAL BUREAUCRACY (1969).

[13] These were leading regulatory initiatives of the Progressive and the Great Society Eras. *See generally* JOHN WHITECLAY CHAMBERS II, THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA, 1890–1920 (1992); ERIC F. GOLDMAN, RENDEZVOUS WITH DESTINY: A HISTORY OF MODERN AMERICAN REFORM (1952); CHARLES HALVERSON, VALUING CLEAN AIR: THE EPA AND THE ECONOMICS OF ENVIRONMENTAL PROTECTION (2021); RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO FDR (1955); RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW (2004); MICHAEL R. LEMOV, CAR SAFETY WARS: ONE HUNDRED YEARS OF TECHNOLOGY, POLITICS, AND DEATH (2015); JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990); MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA (2003): NELL IRVIN PAINTER, STANDING AT ARMAGEDDON: THE UNITED STATES, 1877-1919 (1987); THOMAS R. WELLOCK, PRESERVING THE NATION: THE CONSERVATION AND ENVIRONMENTAL MOVEMENTS 1870–2000 (2007); ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877–1920 (1967); DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862 – 1928 (2001).

authorities at different levels.[14] Prosecution for crimes remained a private matter in many cases until the eighteenth century, when it was gradually assigned to public officials who were organized into a proto-agency.[15] Courts were established by almost every authority to resolve disputes within their purviews, whether civil or criminal. In medieval England, there were, in addition to the king's court (*curia regis*), honorial courts, manorial courts, shire courts, hundred courts, vill courts, borough courts, and ecclesiastical courts for bishops, archbishops and archdeacons.[16] As time went on, jurisdiction over criminal offenses was concentrated in the royal courts, although still on different levels.[17] Harsh punishments were meted out in highly theatrical public settings to deter potential wrongdoers[18] but gradually abolished due to their tendency to generate disorder and growing distaste for their savagery. They were replaced by transportation (i.e., exile), which was in turn abolished,[19] and confinement in public and private facilities that were casually and often corruptly managed.[20] Prisons were established in the nineteenth century in reaction to the excessive and erratic imposition of the death penalty and the newly developed aversion to torture and mutilation;[21] but in some sense,

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14 EMSLEY, *supra* note 8, at 8–42; LEE, *supra* note 8. *See* EMSLEY, *supra* note 5, at 78–132 (discussing Europe generally).

15 JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 106–47 (2003).

16 RICHARD MORTIMER, ANGEVIN ENGLAND, 1154–1258, at 51–63 (1994); W.L. WARREN, HENRY II, at 317–20 (1973).

17 *See generally* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 44–59 (5th ed. 2019); ALAN HARDING, THE LAW COURTS OF MEDIEVAL ENGLAND (1973); ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 147–65 (1986).

18 MICHEL FOUCAULT, DISCIPLINE & PUNISH 3–69 (Alan Sheridan, trans., 1977); Douglas Hay, *Property, Authority and the Criminal Law*, *in* ALBION'S FATAL TREE 17 (Douglas Hay et al. eds., 1975).

19 *See generally* HILARY M. CAREY, EMPIRE OF HELL: RELIGION AND THE CAMPAIGN TO END CONVICT TRANSPORTATION IN THE BRITISH EMPIRE, 1788–1875 (2019); ROBERT HUGHES, THE FATAL SHORE 158–202 (1987); C.M.H. Clark, *The Origins of the Convicts Transported to Eastern Australia, 1787-1852*, 7 HIST. STUD. AUSTL. & N.Z. 314 (1956).

20 JOHN BENDER, IMAGING THE PENITENTIARY: FICTION AND THE ARCHITECTURE OF MIND IN EIGHTEENTH-CENTURY ENGLAND 43–61 (1987) (describing English jails, emphasizing Defoe's account in *Moll Flanders*); DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 30–78 (Revised ed. 1990) (describing jails and other facilities in Colonial America and the first years of the Republic). *See* PETER SPIERENBURG, THE PRISON EXPERIENCE: DISCIPLINARY INSTITUTIONS AND THEIR INMATES IN EARLY MODERN EUROPE 41–134 (Amsterdam University Press ed. 2007) (describing carceral facilities in Continental Europe and their gradual evolution toward modern prisons).

21 *See* FOUCAULT, *supra* note 18, at 3–131 (describing how prison derived from earlier forms of investigation and punishment, and was used as a means of social control); ADAM

they were lineal descendants of Medieval jails and dungeons and continued to be operated by several different levels of government.[22]

It was this welter of distinct institutions—local police, county police, state police, public prosecutors, public defenders, state courts, local courts, county jails and state prisons—that we inherited from England and then combined with still others, such as specialized police forces, juvenile courts, and hospitals for the criminally insane. The consequences at the time were inefficiency and ineffectiveness. The continued American preference for localism has further exacerbated this problem. In 2016, among the fifty states, there were 12,261 local police departments, ninety-five percent of which had fewer than 100 sworn officers and equivalently few "civilian" employees.[23] While some of our many separate criminal justice institutions, particularly the larger ones, have made various attempts to reform or modernize their functions, most such efforts are poorly conceived and ineffectively implemented. In the last 200 to 1,000 years, there has been virtually no effort to either change this antediluvian structure itself or free ourselves from a set of institutional arrangements that were developed in a foreign country (from which we rebelled).

Our criminal justice system is now widely recognized as one of the most serious problems confronting our nation, perhaps, at this juncture, more deleterious to our well-being than any issue of foreign affairs or even economics. The behavior of police departments has

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JAY HIRSCH, THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA (1992) (arguing prisons were primarily a reaction to social changes in the Early Republic); ROTHMAN, *supra* note 20 (same). These accounts all express skepticism about the idea that penitentiaries developed to end the cruelty and savagery of premodern punishment. Evidence that a desire to find more humane modes of punishment was in fact an important motivation in the creation of penitentiaries comes from the widespread circulation of Cesare Beccaria's book, On Crimes and Punishments. *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS (Richard Bellamy, ed., Richard Davies, trans., 1995). *See also* BENDER, *supra* note 20 (The novel itself indicates a greater concern for the individual actor, and many contemporary novels argue openly for a more humane approach.). It would seem, however, that whatever the desire for more reliable and humane punishment lay behind the creation of the penitentiary, the practical demands on underfunded and under-supervised prison wardens led to serious abuses.

22 FOUCAULT, *supra* note 18, at 135–69; ROTHMAN, *supra* note 20, at 79–108.

23 BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., LOCAL POLICE DEPARTMENTS, 2016: PERSONNEL 2–3 (2019, rev. 2021), https://www.bjs.gov/content/pub/pdf/lpd16p.pdf [https://perma.cc/U5MW-7JBZ]. In addition to local police departments, there were 3,061 other "general purpose" law enforcement agencies in the United States, including sheriffs' offices, state police and highway patrols. This total (15,322) does not include special purpose agencies, such as sheriffs' offices with only jail and court duties. *Id.* at 1–2.

resulted in extensive human rights abuses and alienated inner city communities, conveying to tens of millions of Americans the message that they live in a hostile and ill-governed nation. Our criminal courts, particularly at the lower levels, are a continual refutation of every principle we claim for them—opaque, chaotic places where, as one of us has written, the process is the punishment.[24] Mass incarceration has filled our prisons at a rate, relative to population, five times higher than England and its other settler colonies, and ten times higher than many of our other sister democracies.[25] Racism, classism, capitalism, authoritarianism, social control, political entrepreneurship, public employee unions, the media and a host of other factors have been blamed for the disastrous performance of our police, prosecutors, courts and prisons.[26] There is good evidence in support of each of these hypotheses but underlying them is the incoherence of the system's basic structure—an incoherence that intensifies these other factors to create a truly toxic brew.

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24 MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1992).

25 *One in 31: The Long Reach of American Corrections*, PEW CHARITABLE TR. (Mar. 2, 2009), https://www.pewtrusts.org/en/research-and-analysis/reports/2009/03/02/one-in-31-the-long-reach-of-american-corrections [https://perma.cc/G4JQ-7AYD]; *Criminal Justice Facts*, SENT'G PROJECT (2019), https://www.sentencingproject.org/criminal-justice-facts/ [https://perma.cc/7EPJ-VMNV]. The U.S. incarceration rate (prison and jail) in the United States is (as of 2021) 664 per 100,000 inhabitants, the highest in the world. Only a few small, troubled nations—El Salvador, Ruanda, Turkmenistan and Cuba—are even close, with above 500 per 100,000. Our rate is about twice that of Russia, four times that of Australia, six times that of Canada, and nearly ten times that of Germany. *See States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), https://www.prisonpolicy.org/global/2021.html [https://perma.cc/A8H8-2DZT].

26 *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (racism); RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019) (political entrepreneurship); KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA (2004) (political entrepreneurship); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007) (capitalism and public employee unions); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017) (uncontrolled decisions by public prosecutors); JED S. RAKOFF, WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE (2021) (classism); JEFFREY REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE (7th ed. 2004) (classism); Jonathan Simon, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (discussing social control and authoritarianism); RAY SURETTE, MEDIA, CRIME AND CRIMINAL JUSTICE: IMAGES, REALITIES, AND POLICIES (5th ed. 2015) (media influence).

To some extent, the dysfunctional fragmentation of the system can be attributed to American federalism, whose vestigial character we have both written about at length.[27] But even if we ignore or excuse this particular inheritance, we can observe the same level of institutional incoherence within each of our states. The uncoordinated multiplicity of institutions in the American system of criminal law can be described, as above, without reference to the admittedly ferocious complexities of federal-state relations. Fragmentation is inherent—indeed built-in and celebrated—in the adversary system's animating theory. This is somewhat akin to the theory of the market: separate parties pursue their own interests, and social utility—here, justice—emerges as a by-product.[28] Given the compounding challenges of cost, racism, and the imbalance of resources, one might have expected that a declaration of market failure, at least for the criminal process, would have been issued long ago, and that it would have been replaced by regulatory regime.[29] Roosevelt's Attorney General was not quite correct about the purpose of our criminal justice system, but he was spot on in concluding that this system, so outdated in its origins and slovenly in its continuation, could not implement a modern, administrative policy of crime prevention.

A number of scholars have noted that the criminal justice, despite these antediluvian features, is in a fact a regulatory system, and have recommended that the discipline and restraints of administrative law be applied to its various components.[30] In fact, the observation dates

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[27] *See* MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE (2008); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 149–203 (1998) [hereinafter JUDICIAL POLICY MAKING]; Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994); Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL & SOC. SCI. 37 (2001); Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009 (1997).

[28] *See, e.g.*, EMILIO BARUCCI & CLAUDIO FONTANA, FINANCIAL MARKETS THEORY: EQUILIBRIUM, EFFICIENCY AND INFORMATION 1–12 (2017); ALLEN BUCHANAN, ETHICS, EFFICIENCY, AND THE MARKET 14–19, 54–64 (1985); Richard A. Posner, *Law and Economics Is Moral*, 24 VAL. U. L. REV. 163 (1990).

[29] *See* ANDREI SCHLEIFER, THE FAILURE OF JUDGES AND THE RISE OF REGULATORS (2012) (noting the long-term shift from courts to regulatory agencies because agencies are both more effective and more efficient).

[30] *See, e.g.*, JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION (2002); VINCENT CHIAO, CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE (2019); BARKOW, *supra* note 26; Rachel E. Barkow, *Criminal Law as Regulation*, 8 N.Y.U. J.L. & LIBERTY 316 (2014); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005) [hereinafter *Administering Crime*]; Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996); Gerard E. Lynch, *Our*

at least as far back as the work of Frank Remington in the 1960s.[31] While we agree with this perspective, and see such reforms as generally beneficial, we propose a related but somewhat different solution. Administrative agencies are the way in which our society governs itself in this era of High Modernity. As already noted,[32] they are the basic means by which our society combats the problems that confront us. Instead of viewing the regulatory nature of the criminal justice system as a means of abuse, or an opportunity for imposing external control, we view it as a reality that reveals a blueprint for comprehensive and genuine reform.

We recommend that the criminal justice system of each state be redesigned and restructured as a single administrative agency. That agency should manage the components of the system in accordance with standard administrative practices of planning, resource management, staffing and supervision.[33] It should do so with the usual administrative goals of minimizing coercion and maximizing prevention.[34] Trials should be relegated to the same role that they occupy in other administrative programs, that is, as a last resort for the agency to use in its effort to achieve its goals and for individuals to use if they object to the way the agency has treated them.[35] We are not suggesting that the protections required by the Constitution in a criminal case be in any way diminished. But most criminal defendants either cannot or choose not to avail themselves of these protections; fewer than one in twenty cases go to trial,[36] and the disciplining effect

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Administrative System of Criminal Justice, 66 FORDHAM L. REV. 2117 (1998); Daniel Richman, *Prosecutors and Their Agents, Agents and their Prosecutors*, 103 COLUM. L. REV. 749 (2003); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91 (2016); Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CALIF. L. REV. 1 (1991).

31 Frank J. Remington, *The Role of Police in a Democratic Society*, 56 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 361 (1965).

32 *See supra* pp. 266–67 and note 13.

33 *See infra* pp. 314–23.

34 *See infra* pp. 323–34.

35 *See infra* pp. 330–31.

36 BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2016 –STATISTICAL TABLES 21–22 (2020) (finding ninety-seven percent of charges not dismissed by the government terminated by plea bargain); LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., PLEA AND CHARGE BARGAINING 1 (Jan. 24, 2011); RAM SUBRAMANIAN ET AL., VERA INST. OF JUST., IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING 1 (2020) (stating "most criminal cases that result in conviction—97 percent in large urban state courts in 2009, and 90 percent in federal court in 2014—are adjudicated through guilty pleas. Of these, researchers estimate that more

that trial protections are said to exercise over other elements of the system are more revered than real.[37] More importantly, all regulatory agencies provide due process for anyone they sanction,[38] and the additional features of criminal as opposed to civil process can be provided in the criminal justice system without altering the system's administrative character.

Of course, many criticisms have been leveled against administrative agencies, ranging from gross inefficiency to overzealous bureaucracy, and we address some of them below. A recent "Manifesto," signed by nineteen criminal law scholars, is premised on the notion that administrative government, or bureaucracy, is the basic source of injustice in our criminal justice system and should be replaced with the more "democratic" approach of community control.[39] For the present, we simply reiterate that administrative agencies are our dominant mode of governance, the mechanism that we use for nearly

than 90 percent are a result of plea bargaining. . . .") (footnote omitted). *See* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001) (despite its many defects, plea bargaining cannot be banned from our criminal justice system); Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753 (1998) (same).

37 *See generally* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021); RAKOFF, *supra* note 26; Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183 (2007); Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293 (1975); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

38 There has never been any doubt that criminal punishment cannot be imposed on a private person without criminal procedure protections, even if the impetus and evidence for that punishment is generated by an administrative agency. *See* Estep v. United States, 327 U.S. 114 (1946) (striking down conviction for violation of the Selective Service Act on grounds that the facts supporting the conviction could not be definitively determined by an administrative agency). In *Goldberg v. Kelly*, 397 U.S. 254 (1970), due process protection at the civil level was extended to administrative action generally, based on the principle that statutory or administrative benefits were entitled to the same constitutional status as common law property. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). *See generally* Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044 (1984) (general relevance of due process to all administrative actions).

39 Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367 (2017). "[O]ne dimension of democracy is its character as *an anti-bureaucratic force* or (more modestly) as a *counterweight* to bureaucratic forces. This means that democratizers in the criminal justice context reverse Weber's three core features of all democracy as such." *Id.* at 1383.

all other government functions. They are, as Weber pointed out when this mode of governance was a full century younger, "escape-proof."[40]

We are aware that our recommendation for transformation of criminal justice will not be instituted by any American state in the foreseeable future. We offer this recommendation as a standard for assessment of the present system, a way to highlight its dysfunctions and suggest a direction for much-needed reform. It should be noted, however, that the proposal is not utopian or quixotic. A number of democratic countries have centralized ministries of justice that incorporate many of the practices that we recommend.[41] And the historical trend line suggests that American government in general is moving toward administrative models.[42]

Part I of this Article discusses the premodern attitudes that continue to control crime policy in the United States and have impeded the development of an administrative approach. Part II then describes the dysfunctional features that flow from these attitudes and the consequent fragmentation of the criminal justice system. In Part III, we briefly canvass some of the efforts to effect delimited institutional reforms in that system. Part IV presents the advantages of a comprehensive institutional reform that replaces the existing collection of separate, historically established components of the system with a comprehensive administrative agency. Finally, Part V briefly responds to objections that can be raised against the proposal we advance.

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40 WEBER, *supra* note 11, at 1381. "Bureaucracy is distinguished from other historical agencies of the modern rational order of life in that it is far more persistent and 'escape-proof. . . .' [M]odern bureaucracy has one characteristic which makes its 'escape-proof' nature . . . definite: rational specialization and training." *Id.* at 1401. This essay is a revision of newspaper articles written by Weber in 1917, censored at that time and published in revised form immediately after the War. *See id.* at xxxiii, civ–cv. Weber was no happier about the progress of bureaucratization than many contemporary critics, but with typical intellectual clarity and rigor, he recognized its inevitability. *See* REINHARD BENDIX, MAX WEBER 423–30, 458–59 (1960).

41 Criminal justice in Western European countries has been bureaucratized since the development of the Rechtsstaat and has become even more so following World War II. *See* Martin Krygier, *Rule of Law (and Rechtsstaat)*, *in* THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (RECHTSSTAAT) 45 (James R. Silkenat et al. eds., 2014); Paul Tiedemann, *The Rechtsstaat-Principle in Germany: The Development from the Beginning Until Now*, *supra* THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (RECHTSSTAAT), at 171.

42 In fact, criminal justice administration may be the last area of public administration that has not been rationalized and placed under modern administration. *See supra* notes 12–13 (citing sources).

I
HOW WE GOT HERE

The institutional fragmentation of our criminal justice system is a product of its historical development, as already noted, but this premodern situation has been perpetuated by premodern attitudes that have persisted into the current era. Four such attitudes, or sets of attitudes, are particularly relevant to this discussion. The first is that criminal justice was entwined with the origins of government. Recent studies have confirmed Durkheim's insight that the beginnings of civilization were neither economic nor defensive but sacerdotal.[43] One of its first manifestations, and thus one of the first manifestations of governmental power, was punishment for violations of the sacred.[44] Prohibitions against murder or theft were often consigned to private, retaliatory enforcement,[45] but the ruling authority would punish those who blasphemed against the gods or desecrated a temple. In other words, punishment began as a way to establish social solidarity, to justify the existence of the society itself by reinforcing the principles it regarded as existentially foundational.[46] Such punishment tended to be disproportionate to the actual harm; a minor violation of a religious ritual or precinct was viewed as a potentially catastrophic profanation. Traces of this ancient attitude remain in our willingness to punish people for mere violation of the law, such as recidivism statutes that

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43 ÉMILE DURKHEIM, THE ELEMENTARY FORMS OF RELIGIOUS LIFE (Carol Cosman trans., 2001).

44 ÉMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (Lewis A. Coser trans., 1984).

45 *See* MARC BLOCH, FEUDAL SOCIETY 125–30 (L.A. Manyon trans., 1961); JACOB BLACK-MICHAUD, FEUDING SOCIETIES (1980); WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND (1990); EDWARD L. RUBIN, SOUL, SELF, AND SOCIETY 40–48 (2015); Geoffrey G. Koziol, *Monks, Feuds, and the Making of Peace in Eleventh-Century Flanders*, *in* 14 HIST. REFLECTIONS 531 (1987).

46 Plato discerned this development in the creation of the Greek polis and presents it in the interaction between the Athenian and his questioner in Laws, Book IX. *See* PLATO: COMPLETE WORKS 1318 (John M. Cooper ed., 1997). Plato's speaker, the Athenian, begins his account of punishment by considering theft from a temple and prescribing the harshest penalties for this offense. He then proceeds to prescribe similar penalties for treason. Clinias, whom the Athenian is advising, asks whether the legislator should vary the penalties based on circumstances. At that point, the Athenian says "good question" and continues: "I have been walking in my sleep, and you have bumped into me and woken me up." *Id.* at 1515. He then acknowledges that the "business of establishing a code of law has never been properly thought out." *Id.* The Athenian's analysis of a more refined code of punishment then follows, with Plato's typical emphasis on knowledge of the good. Plato seems to make use of the dialogue form here to rethink his own intuitive understanding of how criminal law evolved, and, as usual, to invite the reader to do the same.

impose major sentence enhancements for relatively minor offenses.[47] Other areas of law that now seem equally important, specifically regulatory law such as worker safety law, consumer protection, and environmental law, are perceived as public policies that an existing society adopts to improve the lives of its citizens, not as constitutive of the society itself. As many observers have noted, violators of these laws are punished more mildly, even if they do more actual harm.[48]

The second primordial belief regarding criminal law is that the harm that the law is trying to prevent is a direct assault on the rulers of society, a violation of the "king's peace."[49] The perpetrators of

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[47] Punishing repeat offenders more severely seems to violate our basic due process principles that a person can be punished only for the specific action that he or she is charged with. *See* Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689 (1995); Robert Weisberg, *Meanings and Measures of Recidivism*, 87 S. CAL. L. REV. 785 (2014). On an instrumental basis, such as deterrence or rehabilitation, one would think that if imprisonment did not work with this particular offender, the state should try something else, rather than more of the same. The fact that the offender is being punished for violation of the law per se has become apparent with the current spate of such statutes, characterized as "three strikes and you're out." This formulation first appeared in Washington State in 1993. *See* Daniel W. Stiller, *Initiative 593: Washington's Voters Go Down Swinging*, 30 GONZ. L. REV. 433 (1994). California's version, CAL. PENAL CODE ANN. § 667 (West 2002), is probably the best known and most severe. *See* FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001). In *Lockyer v. Andrade*, 538 U.S. 63 (2003), the Supreme Court upheld a life sentence for military veteran with three children who was convicted of shoplifting nine videotapes and fell under the California three strikes provision due to two previous, nonviolent offenses. *See infra* pp. 299–305 (discussing failure of constitutionalism as a reform strategy). It is worth noting that the cutesy language of these statutes tends to minimize the brutal reality that they destroy a person's life as punishment for a minor offense. The language is also inaccurate; a player who incurs three strikes is not banned from baseball; instead, he gets to try again no more than four innings later.

[48] *See* MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT (2020); RAKOFF, *supra* note 26; REIMAN, *supra* note 26.

[49] *See* MARCUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 3–46 (2005); EMSLEY, *supra* note 5, at 36–40; FOUCAULT, *supra* note 18, at 32–69. The idea that crime is an offense against the sovereign, rather than merely against the victim, may seem natural to us, but it represents a specific development in Western society. During the Early Middle Ages, crime tended to be regarded as a private offense, to be dealt with by retaliatory violence. *See* RUBIN, *supra* note 45, at 28–54. In England, the shift to treating crime as an offense against the king began at the end of the Anglo-Saxon period. *See* BRUCE R. O'BRIEN, GOD'S PEACE AND KING'S PEACE: THE LAWS OF EDWARD THE CONFESSOR 62–104 (1999); John Braithwaite*, Restorative Justice*, *in* CRIME: CRITICAL CONCEPTS IN SOCIOLOGY 230 (Philip Bean ed., 2002). When the Normans brought trial by combat to England, it became a vehicle for transforming the private feud into a judicially regulated process, with the king or his constable presiding (at least in important cases). *See* GEORGE NEILSON, TRIAL BY COMBAT (1890). The trend reached its fulfillment when King Henry II created the common law of England in the late twelfth century by providing that royal justices would

such violations are thus perceived as virtually insurrectionists, and thus deserving of harsh punishment by virtue of the violation itself. This attitude is closely related to the first, but distinguishable on the ground that it is secular, and thus—incorrectly—regarded as being more rational.[50] It leads to the image of ordinary criminals as "super-predators,"[51] to the treatment of juvenile offenders as adults,[52] and to inordinately harsh sentences for repeat offenders.[53] Again, there is a striking contrast with regulatory law, which is seen as a response to a prevailing condition that produces undesirable consequences. The condition can be wrongful action that overlaps with norm violation, such as maintaining dangerous conditions in a factory, but it can also

take over the shire courts to hear cases initiated by royal writs (*novel disseisin* or *mort d'ancestor*). *See* MORTIMER, *supra* note 16, at 51–63; WARREN, *supra* note 16, at 307–61.

50 *See* JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: VOLUME 1: REASON AND THE RATIONALIZATION OF SOCIETY 8–74 (Thomas McCarthy trans., 1984).

51 WILLIAM BENNETT ET AL., BODY COUNT: MORAL POVERTY. . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 27 (1996) (describing super-predators as "radically impulsive, brutally remorseless youngsters . . . who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders"). *See also* John DiLulio*, The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995. A dismal example of pseudo-scholarship, with language that borders on explicit racism, the theory has been roundly condemned by criminologists. *See* Glenn W. Muschert, *The Columbine Victims and the Myth of the Juvenile Superpredator*, 5 YOUTH VIOLENCE & JUV. JUST. 351 (2007); Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality*, 33 WAKE FOREST L. REV. 727 (1998). In response, DiLulio has repudiated the idea. *See* Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html [https://perma.cc/SVW4-BJVN] (quoting DiLulio as saying: ''If I knew then what I know now, I would have shouted for prevention of crimes.''). The damage, however, has been done.

52 CARA H. DRINAN, THE WAR ON KIDS: HOW AMERICAN JUVENILE JUSTICE LOST ITS WAY (2018); Michelle India Baird & Mina B. Samuels, *Justice for Youth: The Betrayal of Children in the United States*, 5 J.L. & POL'Y 177 (1996); Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681 (1998); Mark H. Moore & Stewart Wakeling, *Juvenile Justice: Shoring Up the Foundations*, 22 CRIME & JUST. 253 (1997). The practice in Texas is that a child being tried as an adult is held, before being judged guilty, in an adult facility. MICHELE DEITCH ET AL., LYNDON B. JOHNSON SCH. OF PUB. AFFS., U. TEX. AT AUSTIN, CONDITIONS FOR CERTIFIED JUVENILES IN TEXAS COUNTY JAILS (2012), https://utw10452.utweb.utexas.edu/sites/default/files/file/news/Conditions%20for%20Certified%20Juveniles%20in%20Texas%20County%20Jails-FINAL4.pdf [https://perma.cc/J8X5-CXLR] (noting that this practice has been partially modified in recent years).

53 *See supra* note 47. In other words, repeat offender statutes have multiple motivations—offense to both the sovereign and the sacred. Both are primordial and, as stated, inconsistent with our modern, democratic notion of due process.

be a more general coordination problem, such as the way steamboats are designed or the discharge of effluents into a river.[54]

Third, in the premodern era when the criminal justice system first emerged, the state was primarily regarded as a means of maintaining order. The essential components of government during this era were the military, which secured the boundaries of the state from external threats and suppressed challenges to the ruling authorities from armed subordinates within those borders, and a taxation system that maintained these forces and the personal household of the ruler.[55] Thus, the criminal law's efforts to prevent harm, or to punish it once it occurred, tended to center around the use of governmental force. Modern law, in contrast, deploys a range of implementation strategies, including positive incentives, institutional restructuring, negotiated agreements, and cooperative interactions.[56] The criminal

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54 On the evolution of the administrative state in the United States see generally BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA (2009); NOGA MORAG-LEVINE, CHASING THE WIND: REGULATING AIR POLLUTION IN THE COMMON LAW STATE (2003); JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 (1982). The example of steamboat regulation comes from Jerry L. Mashaw's 2012 book.

55 *See generally* THOMAS ERTMAN, BIRTH OF THE LEVIATHAN: BUILDING STATES AND REGIMES IN MEDIEVAL AND EARLY MODERN EUROPE (1997); ERNEST GELLNER, NATIONS AND NATIONALISM (1983); CHARLES TILLY, COERCION, CAPITAL, AND EUROPEAN STATES: AD 990–1990 (1992); WEBER, *supra* note 11, at 1158–1210.

56 The process has in fact led to a new subfield of public administration, generally called implementation theory. *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992) (describing means of obtaining compliance from regulated parties); EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (1982) (analyzing strategies for enforcing law through inspection): EUGENE BARDACH, THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW (1977) (general introduction to implementation issues); DANIEL A. MAZMANIAN & PAUL A. SABATIER, IMPLEMENTATION AND PUBLIC POLICY (1989) (analyzing case studies of implementation efforts in disparate policy areas); DEBORAH STONE, THE POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING (1997) (describing the prevalence of political considerations in the implementation process); JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND; OR, WHY IT'S AMAZING THAT FEDERAL PROGRAMS WORK AT ALL (1973) (analyzing the complexities of implementing public policy). It would be fair to say that the central theme of implementation theory is that mere governmental command backed by force is inefficient and often ineffective, and that a wide range of complex techniques is required for the government to achieve its desired results. On the way that institutional actors learn and cooperate in this process, see *infra* note 247.

justice system has gradually adopted some of these more varied, modern strategies, but its underlying inclination to respond with state-sanctioned violence remains in place.

A final set of beliefs is specific to England, from which American law and legal attitudes originate, of course. The Normans, who conquered England in 1066, were the most efficient managers of the Middle Ages.[57] They provided their newly acquired territory with a precociously effective government that included the Exchequer, a genuine administrative agency that collected the money due from the monarch's multiple demesnes.[58] Henry II, an Angevin, built on this foundation to create a group of royal justices, originally attached to the Exchequer, who traveled around the realm resolving property disputes, and thereby created a uniform law—the common law—for the entire realm.[59] These two institutions, soon supported by Parliament[60] and later supplemented by chartered companies such as

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57 CHARLES HOMER HASKINS, THE NORMANS IN EUROPEAN HISTORY (1915).

58 *See* HELEN M. JEWELL, ENGLISH LOCAL ADMINISTRATION IN THE MIDDLE AGES 87–122 (1972); WARREN, *supra* note 16, at 301–16. England was divided into shires and each shire had a royal officer, the shire reeve (sheriff) who was responsible for the management of the king's properties in that shire, as well as various other duties. The reeve did not remit income from these properties directly to the king; instead, he collected them himself, and was responsible for paying a predetermined amount (the "farm") to the Exchequer, an office separate from the king's household. The Exchequer, headed by the Justiciar, received these payments and kept records of them, the pipe rolls. The Exchequer had many of the attributes of a modern agency, so much so that one of its members, during the reign of Henry II, was able to write a remarkably modern-sounding treatise on its operations. RICHARD FITZ NIGEL, DIALOGUS DE SCACCARIO: THE COURSE OF THE EXCHEQUER (Charles Johnson ed. and trans., 1983).

59 ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 34–45, 145–65 (1966); JEWELL, *supra* note 58, at 123–57; MORTIMER, *supra* note 16; WARREN, *supra* note 16, at 317–61. The justices were itinerant, riding circuit among the shires. A litigant could have his case heard by them by obtaining a writ, originally *novel disseisin* or *mort d'ancestor*, later many others. The judgment, based on evidence obtained from a jury (called a jury of recognition) was at first only provisional, with final judgment based on trial by combat or ordeal. The orderliness and evidence-based nature of the proceedings proved so attractive that litigants often agreed to be bound by the justice's decision.

60 *See* J.R. MADDICOTT, THE ORIGINS OF THE ENGLISH PARLIAMENT, 924–1327, at 157–231 (2010); PETER SPUFFORD, ORIGINS OF THE ENGLISH PARLIAMENT (1967). The legislatures in England and on the Continent were established to authorize taxes beyond those that were part of the feudal system. While most of the Continental ones became vestigial during the so-called Age of Absolutism, the English Parliament, for a variety of reasons, became increasingly powerful, actually taking control of the government during the seventeenth century. *See* MICHAEL BRADDICK, GOD'S FURY, ENGLAND'S FIRE: A NEW HISTORY OF THE ENGLISH CIVIL WARS (2008). It determined the royal succession a few decades later, see STEVE PINCUS, 1688: THE FIRST MODERN REVOLUTION (2009), and then gradually displaced the king over the course of the eighteenth century, see BRIAN W. HILL, SIR ROBERT WALPOLE: 'SOLE AND PRIME MINISTER' (1989); WILLIAM HAGUE,

the Bank of England and the East India Company,[61] proved so effective that they prevailed in England until the nineteenth century. On the European Continent, managerial systems developed at a later period, often part of the Renaissance and Reformation Era state-building process, and modeled on the organizational structure of field armies.[62] The English, possessing an adequate managerial system from an earlier era, and spared the need for an army due to their insular location, developed an aversion and contempt for these institutions, and came to regard them as a threat to English liberty.[63] We inherited these attitudes, and they have fueled a pervasive distrust of centralized, hierarchical institutions of government. But what was valid in the sixteenth century and quaint in the nineteenth has become dysfunctional in the administrative era of the twentieth and twenty-first centuries.

These premodern attitudes that continue to influence our approach to criminal law conflict with its recognized purpose. As in other areas, the primary goal of governmental action is prevention, but while the practice of regulatory law is consistent with this purpose, the practice of criminal law conflicts with it. Regulatory law is proactive; the law not only defines the harm to be prevented but also establishes an

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WILLIAM PITT THE YOUNGER (2005). Here again, developments in England, later Britain, provided a substitute for centralized, hierarchical command that functioned adequately until the advent of the administrative state.

61 STEPHEN R. BOWN, MERCHANT KINGS: WHEN COMPANIES RULED THE WORLD, 1600-1900, at 109–54 (2010); ERTMAN, *supra* note 55, at 215–21; DAVID KYNASTON, TILL TIME'S LAST SAND: A HISTORY OF THE BANK OF ENGLAND 1694-2013 (2020); PHILIP LAWSON, THE EAST INDIA COMPANY: A HISTORY (1993). These government-authorized, but privately run, chartered companies exercised enormous power during the eighteenth century, and once again enabled England-Britain to dispense with centralized government control.

62 *See generally* ERTMAN, *supra* note 55 (development of "patrimonial absolutism" on the Continent as opposed to England); DENYS HAY, EUROPE IN THE FOURTEENTH AND FIFTEENTH CENTURIES 81–131 (1966) (development of centralized administration, particularly taxation, in France as opposed to England); DAVID OGG, EUROPE IN THE SEVENTEENTH CENTURY 275–311 (1948) (absolutism of Louis XIV, contrasted with England and the Dutch Republic); GEOFFREY TREASURE, SEVENTEENTH CENTURY FRANCE: A STUDY OF ABSOLUTISM 286–344 (1966) WEBER, *supra* note 11, at 980–82, 1148–56 (bureaucratization of the army and its relation to bureaucracy in general).

63 *See generally* PINCUS, *supra* note 60, at 179–317; J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 56–69 (1987); Robert Zaller, *Parliament and the Crisis of European Liberty*, *in* PARLIAMENT AND LIBERTY: FROM THE REIGN OF ELIZABETH TO THE ENGLISH CIVIL WAR 201 (J.H. Hexter ed., 1992). With respect to attitudes regarding a centralized police force, see EMSLEY, *supra* note 5, at 64–66, 82–83.

agency to implement its policy.[64] That agency, in turn, plans a strategy, promulgates regulations to elaborate and specify the law, and develops a coordinated program of information gathering, inspection, guidance, and education to carry out its deterrent purpose. Criminal law tends to be reactive, not by intent but as a consequence of its premodern origins.[65] Its purpose is obscured by its reactions, which tend to be disproportionate, over-punitive, coercive, and uncoordinated. As the Attorney General's report correctly noted, its tendency is to act after a violation has occurred, to deter by terror rather than by strategy and planning.

The extent to which these premodern attitudes tend to obscure or undermine the deterrent purposes of criminal law, facilitate, and are exacerbated by, the criminal law's institutional fragmentation. They facilitate this fragmentation because they induce each of the institutions that had separately developed to justify its action through disproportionate, over-punitive, and coercive treatment of offenders. They are exacerbated by fragmentation because these institutions have no overarching supervision, no rationale, and no dispassionate coordinating authority to constrain their excessive reactions and coordinate their separate operations.[66] A system that is supposed to

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64 As noted above, Weber provides the classic definition of a bureaucratic or administrative agency. WEBER, *supra* note 11, at 215–23, 958–63. For discussions of the distinctive features of administrative or regulatory law, see Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989).

65 Under the pressure of its preventive purpose and the demands of the modern world, the American criminal justice system has moved away from the adversary process in the vast majority of cases and relies on an administrative-like approach to fact finding, compliance, and deterrence. But it does so on an ad hoc and unsupervised basis, without the coherence, discipline, and oversight that is the essence of a regulatory regime. *See* MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL 3–33, 191–207 (1983) [hereinafter COURT REFORM]; Malcolm M. Feeley, *How to Think About Criminal Court Reform*, 98 B.U. L. REV. 673 (2018); Malcolm M. Feeley, *Criminal Justice as Regulation*, 23 NEW CRIM. L. REV. 113 (2020). *See also* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 73–115 (rev. ed. 2019) (dysfunctional operation of American adversarial approach to criminal justice).

66 Franklin Zimring has identified fragmentation as the single most important explanation for five hundred unnecessary homicides each year by police in the United States, and points to the need for centralized oversight. FRANKLIN E. ZIMRING, WHEN POLICE KILL (2017). Similarly, Sharon Dolovich has observed that the failure of oversight of American prisons has had a devastating impact on prisoner and staff health and safety; she argues that it is both willful and purposeful. Sharon Dolovich, *The Failed Regulation and Oversight of American Prisons*, 5 ANN. REV. CRIMINOLOGY 153 (2022). The failure of governors, legislatures, county commissioners, and judges to take decisive action as the Covid pandemic caused countless numbers of easily preventable deaths in the nation's jails and prisons underscores her argument. Unlike courts, hospitals, and universities, police and corrections are consciously structured hierarchically as quasi-military command

deter crime and protect the citizens becomes a self-sustaining process where police, prosecutors, courts, and prisons prove their worth, both to themselves and to the sources of their authority and funding, by becoming increasingly and purposelessly severe.

II
WHERE WE ARE

As Sarah Mayeaux points out, we have come to describe the various aspects of our nation's response to crime as a system.[67] Despite this verbal concession to modernity, our so-called system functions as a collection of separate, uncoordinated elements[68] that does not deserve the designation.[69] It consists of at least six groups of

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and control organizations, in part because they are in need of oversight and regulation because they deal with extremely vulnerable populations and confront life and death decisions on a daily basis.

67 Sara Mayeux, *The Idea of "The Criminal Justice System,"* 45 AM J. CRIM. L. 55 (2018). A leading example is National Advisory Commission on Criminal Justice Standards and Goals, Report on the Criminal Justice System (1973), one of the reports issued by this Commission. *See* discussion *infra* pp. 304–05 (describing the Commission and its work).

68 The Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90–351, 82 Stat. 197 (codified at 34 U.S.C, § 10101 et seq.), defines criminal justice as follows:

> [A]ctivities pertaining to crime prevention, control, or reduction, or the enforcement of the criminal law, including, but not limited to, police efforts to prevent, control, or reduce crime or to apprehend criminals, including juveniles, activities of courts having criminal jurisdiction, and related agencies (including but not limited to prosecutorial and defender services, juvenile delinquency agencies and pretrial service or release agencies), activities of corrections, probation, or parole authorities and related agencies assisting in the rehabilitation, supervision, and care of criminal offenders, and programs relating to the prevention, control, or reduction of narcotic addiction and juvenile delinquency . . . .

34 U.S.C. § 10251. This provision effectively delineates the scope of the criminal justice system, or what would be the system if the components that are identified were sufficiently coordinated.

69 The term is used widely in social theory and related fields, but almost always in connection with an organized set of interacting elements functioning within a stable boundary. *See, e.g.*, LUDWIG VON BERTALANFFY, GENERAL SYSTEM THEORY: FOUNDATIONS, DEVELOPMENTS, APPLICATIONS (1968) (common features of biological, organizational, social and mechanical systems); NIKLAS LUHMANN, SOCIAL SYSTEMS (John Bednarz Jr. trans., 1995) (systems as bounded, self-producing and essentially discursive); TALCOTT PARSONS, THE SOCIAL SYSTEM (1951) (ways in which social system structures human behavior). *See also* JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: VOLUME 2: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON 204–82 (Thomas McCarthy trans., 1987) (extension of Parsons' theory to incorporate lived experience as social action).

government actors—police, jailers, prosecutors, public defenders, judges, and corrections officials—organized in independent institutions, often dealing with the same individual in partial or total ignorance of what the other institutions have done or will do. As if this was not sufficiently complex and confusing, these institutions typically function (or malfunction) at different levels of government, even ignoring the peculiarities of American federalism. Police are funded and managed by municipalities; jails by counties and occasionally states; prosecutors by counties and, in a few places, states; judges by municipalities, counties, and states; public defender's offices by the county or occasionally state; and corrections largely by the states.[70]

Both leaders and staff members of these disparate groups at their disparate levels have different disciplinary backgrounds, different training, different ideologies, and different institutional loyalties. Cooperation among them ranges from partial to nonexistent, with the most consistent pattern being their complaints about each other. Oversight is weak to absent, even within each of these separate institutions, and wholly absent across them. Incentives tend to be particularized and frequently conflicting. The theory of the adversarial system encourages and validates such conflicts.[71] The predictable result, as briefly canvassed below, is a fragmented, disarticulated set of institutions that is a system only by assertion or aspiration, but not by actual operation.

To be sure, this does not mean that practices are wholly unpredictable or chaotic. Given the fragmentation of the criminal justice system, police departments, courts, and even prisons often function as small communities whose patterns can be discerned and generalized. Social scientists seem to view them as an anthropologist might see a small tribe in a vast rain forest or on an isolated island. They tend to develop distinct cultures, based on their own institutional roles and proclivities, that are an adaptive response to the larger forces that surround them.[72] Like all isolated communities, they

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70 The levels of government that control each institution will be specified in the course of the discussion, *see infra* pp. 353–54.

71 *See, e.g.*, KAGAN, *supra* note 65; Malcolm Feeley, *The Adversary System*, *in* ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM 753 (Robert J. Janosik ed., 1987).

72 *See, e.g.*, THOMAS W. CHURCH, EXAMINING LOCAL LEGAL CULTURE: PRACTITIONER ATTITUDES IN FOUR CRIMINAL COURTS (1982); JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES (1968); Thomas W. Church, Jr, *Examining Local Legal Culture*, 10 AM. BAR FOUND. RSCH. J. 449 (1985); Randy Corcoran, *Changing Prison Culture*, 67 CORRECTIONS TODAY 24 (2005)

view outsiders with suspicion and resist provocative inquiries or oversight, and they tend to return to their natural equilibrium once the disruption has been abated.[73] Occasionally the community is thoroughly shaken up in ways that lead to significant change, but even these changes often follow a pattern; when they are imposed from the outside, for example, they tend to become unstable over time because there is no one to institutionalize and oversee them.[74]

A. Detection: Police

The balkanized, fragmented nature of our so-called criminal justice system can be illustrated by tracing the path of the typical offender through its component institutions. The process begins with an arrest by the police. Typically, this institution is operated by the locality where the incident leading to the arrest has occurred; given American localism, this leads to the extreme fragmentation of policing services.[75] Police departments tend to be nominally organized in a hierarchical structure, but individual police officers usually work alone or in pairs in ways that insulate them from effective supervision.[76] Moreover, nearly half the local police departments in the nation consist of fewer than ten sworn officers, which virtually precludes an effective supervisory structure within the department.[77]

(government-sponsored research specifying change strategies for prisons that strongly implies a high level of resistance to change).

73 *See* Martha L. Shockey-Eckles, *Police Culture and the Perpetuation of the Officer Shuffle: The Paradox of Life Behind "The Blue Wall,"* 35 HUMAN. & SOC'Y 290 (2011) (confirming resistance of police to outside criticism and the tendency of departments to "shuffle" misbehaving officers to less visible positions, but noting dissatisfaction of officers who must work with the miscreant).

74 *See, e.g.*, CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 1–30, 215–32 (2009); STEPHEN RUSHIN, FEDERAL INTERVENTION IN AMERICAN POLICE DEPARTMENTS 160–208 (2017).

75 *See supra* note 23. To reiterate, there are 18,000 separate police departments (including sheriff's departments, state high patrol agencies, and the like) in the United States. The degree of supervision at the state level varies from state to state, but it is generally low, and no federal agency has supervisory authority over local police. *See, e.g.*, SAMUEL WALKER & CHARLES M. KATZ, THE POLICE IN AMERICA (7th ed. 2009). The main way in which our national government exercises any control is by attaching conditions to monetary grants.

76 MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980).

77 BUREAU OF JUST. STATS., *supra* note 36, at 3 (47.7% of local police departments have fewer than ten sworn officers, with part-time officers counted as 0.5). Moreover, 88% of local police departments have fewer than 50 sworn officers. Of course, these small or diminutive departments account for a much lower percentage of the total number of local

Because the police are almost invariably organized as a separate institution, and often along quasi-military lines,[78] they have failed to evolve very far from the armed patrols of the early modern era, when offenses were still seen as frontal assaults on the ruler and state authority was closely associated with the use of force. Congress' decision that the best way to assist local police departments was to provide them with surplus military equipment, from night vision goggles to grenade launchers to armored vehicles, reflects the persistence of this perspective.[79] Clearly, their equipment and general comportment are designed and organized around the role of detaining and arresting dangerous wrongdoers.[80] This generates a generally

police officers, but that figure is nonetheless about one quarter (26.2%)—some 123,000 individuals. According to a leading school text on police supervision, "[a] first-line manager must communicate constantly with each officer supervised—allaying rumors; interpreting policy; and coaching, mentoring, or utilizing persuasion when the situation dictates." LARRY S. MILLER ET AL., EFFECTIVE POLICE SUPERVISION 8 (Routledge 9th ed. 2021). Supervision depends upon accountability, according to the authors, and there are five identifiable levels—"personal, individual, team, organizational, and stakeholders . . . ." *Id.* at 16. It is difficult to imagine these requirements being effectuated in an independent organization that has fewer than ten full-status members, or even in the 88% of local police departments with fewer than 50.

78 Even prior to recent developments, observers have noted that police uniforms and equipment are based on a false or mythological concept of military force. *See* Thomas J. Cowper, *The Myth of the "Military Model" of Leadership in Law Enforcement*, 3 POLICE Q. 228 (2000); Scott W. Phillips, *Myths, Militarism and the Police Patrol Rifle*, 26 POLICING & SOC'Y 185 (2016). The mythological character of police militarization is underscored by the historical record, which is that police in the Western World evolved largely from civilian security forces, not from the use of the military for domestic purposes. *See* EMSLEY, *supra* note 5, at 51–77. In fact, it was resistance to the use of the military for domestic crime control that led to the development of professional police forces.

79 The Law Enforcement Support Program, or 1033 Program was created by the National Defense Authorization Act for Fiscal Years 1990 and 1991. H.R. 2461, 101st Cong. (1989). It was later codified by the National Defense Authorization Act for Fiscal Year 1997. 10 U.S.C. § 2576(a) (authorizing Secretary of Defense to sell or transfer excess military equipment to local police departments). The equipment has included airplanes, helicopters, mine-resistant ambush-protected vehicles, grenade launchers, assault rifles, bayonets, and camouflage gear. *See* RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES 177–307 (2013); Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, 4 POLICING 501 (2007).

80 Some researchers have concluded that providing military equipment to police is cost effective and reduces crime. *See* Vincenzo Bove & Evelina Gavrilova, *Police Officer on the Frontline or a Soldier? The Effect of Police Militarization on Crime*, 9 AM. ECON. J. ECON. POL'Y 1 (2017). This conclusion has been challenged by more carefully done studies. *See, e.g.*, Anna Gunderson et al., *Counterevidence of Crime-Reduction Effects from Federal Grants of Military Equipment to Local Police*, 5 NATURE HUM. BEHAV. 194 (2021).

combative, adversarial attitude and encourages them, or perhaps incites them, to view the people they are policing as the enemy.[81] Such a stance may be counteracted by their respect for middle-class people of their own race, but it is bound to exacerbate the underlying racial and class antagonisms that are so prevalent in our society when police deal with minority or otherwise disadvantaged populations.[82] Combined with the poor level of training and supervision that all but the largest American police departments are able to provide, the resulting mix of intentional brutality and accidental mayhem is virtually inevitable.[83]

However problematic current police practices, equipment, and training may be for arresting potentially dangerous suspects, they are still more inappropriate in the great majority of cases when some other intervention is desired or preferable.[84] In some cases, the situation is a fluid one that might be interpreted in a variety of different ways. Worse still, a uniformed officer with a gun might be entirely unable to perform a deterrent function, eliciting hostility or

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81 *See* Casey Delehanty et al., *Militarization and Police Violence: The Case of the 1033 Program*, 4 RSCH. & POL. 1 (2017) (transfer of military equipment to police leads to higher rate at which police kill civilians); Edward Lawson Jr., *Trends: Police Militarization and the Use of Lethal Force*, 72 POL. RSCH. Q. 177 (2019) (same).

82 *See, e.g.*, ALEXANDER, *supra* note 26, at 97–139; PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017); Joshua Correll, et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006 (2007); Renée McDonald Hutchins, *Racial Profiling: The Law, the Policy and the Practice*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION AND IMPRISONMENT 95 (Angela J. Davis ed., 2017); E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects*, 16 AM. PSYCH. SOC'Y 180 (2005). *See* I. Bennett Capers, Afrofuturism, *Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1 (2019) (critiquing current police practices by imagining the difference that will occur once people of color are in the majority in the United States.).

83 *See* John Paul & Michael L. Birzer, *Images of Power: An Analysis of the Militarization of Police Uniforms and Messages of Service*, 32 FREE INQUIRY CREATIVE SOCIO. 121 (2004) (increasingly military appearance of police designed to emphasize violence and discourage supervision). "The modern militarized police uniform (with its emphasis on camouflage and/or black colors) is a force of symbolic violence used primarily to distance community inquiries of police action." *Id.* at 122.

84 *See* Ben Bradford et al., *Police Futures and Legitimacy: Redefining 'Good Policing,' in* THE FUTURE OF POLICING 79 (Jennifer M. Brown ed., 2014); Andrew Millie, *What Are the Police For? Re-Thinking Policy Post-Austerity*, *in* THE FUTURE OF POLICING, *supra*, at 52; Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 987–91 (2021) (recommending alternatives to uniformed officers as mode of law enforcement and community peacekeeping).

avoidance instead of a request for help.[85] The same is true for the investigative function. When a homeowner reports a burglary, the last thing that the responding officer needs is a gun and a uniform. When a female victim reports a rape, the last thing she needs is a male officer with a gun and a uniform.[86] The calls to defund the police that have proved to be such an attractive target for law-and-order conservatives can be understood as a demand that the independent, militaristic police department be replaced with an administrative structure that assigns appropriate staff to the wide variety of different tasks that are needed to improve the safety of American communities.[87]

B. Disposition: Sheriffs, Prosecutors, and Judges

In cases where the police arrest a suspect, they quickly transfer the person to a jail, an entirely separate institution.[88] Jails, typically run

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[85] *See* EMSLEY, *supra* note 5, at 9 (study of Staffordshire police, 2007-2014 showed that only one fifth of all calls to the police concerned crime as opposed to other issues of individual concern or public order).

[86] *See* Joanna Belknap, *Rape: Too Hard to Report and Too Easy to Discredit Victims*, 16 VIOLENCE AGAINST WOMEN 1335 (2010) (ninety percent of rapes unreported); Karen Rich & Patrick Seffrin, *Police Interviews of Sexual Assault Reporters: Do Attitudes Matter?*, 27 VIOLENCE & VICTIMS 263 (2012) (attitudes of responding officer critical to continuation of case); Rachel M Venema, *Making Judgments: How Blame Mediates the Influence of Rape Myth Acceptance in Police Response to Sexual Assault*, 34 J. INTERPERSONAL VIOLENCE 2697 (2019). *See also* Shirley Feldman-Summers & Gayle C. Palmer, *Rape as Viewed by Judges, Prosecutors, and Police Officers*, 7 CRIM. JUST. & BEHAV. 19 (1980) (discussing general attitudes toward rape in criminal justice institutions). Due to the obvious nature of the problem, and the activism of the feminist community, a number of jurisdictions have implemented Sexual Assault Nurse Examiner (SANE) programs beginning in the 1990s. *See* Kristin Littell, *Sexual Assault Nurse Examiner (SANE) Programs: Improving the Community Response to Sexual Assault Victims*, *in* OVC BULLETIN, U.S. DEP'T OF JUST. (2001) (finding these programs effective); A.C. Ciancone et al., *Sexual Assault Nurse Examiner Programs in the United States*, 35 ANNALS OF EMERGENCY MED. 353 (2000) (describing programs and calling for further research).

[87] For a similar recommendation regarding policing, see Leah A. Jacobs et al., *Defund the Police: Moving Towards an Anti-Carceral Social Work*, 32 J. PROGRESSIVE HUM. SERVS. 37 (2021). *Cf.* Jessica M. Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120 (2021) (the defunding movement is a discursive strategy that emphasizes the way that current police practices marginalize minority communities); Friedman, *supra* note 84 (many functions now performed by police are better performed by other types of government staff).

[88] *See* J.M. MOYNAHAN & EARLE K. STEWART, THE AMERICAN JAIL: ITS DEVELOPMENT AND GROWTH (1980) (development of jails as separate institutions). The jail, as a mode of detention, is much older than the prison as a mode of punishment, tracing its beginnings to the High Middle Ages. When the United States was founded, there were, in effect, no prisons but numerous jails. *See* ROTHMAN, *supra* note 20, at 52–

by gun-toting sheriffs who are elected on promises to keep the peace, and staffed by deputies who would prefer to be police officers, contain over 700,000 Americans at any one time, and cycle some 10 million through their facilities in the course of a year.[89] Although they are in total control of the inmates whom they incarcerate, they are structured as temporary holding places that generally have only rudimentary knowledge of the offending behavior or the mental and physical status of the inmates, and no means for taking these matters into account.[90] The jails themselves are generally funded and supervised by counties, which generally means that they are underfunded and under-supervised, with conditions ranging from Spartan to horrific.[91] Inmates either prey on weaker people or are

56. For an account of modern jails, see JOHN IRWIN, THE JAIL: MANAGING THE UNDERCLASS IN AMERICAN SOCIETY (2nd ed. 2013).

89 For descriptions of management in contemporary jails, see IRWIN, *supra* note 88, at 42–45, 67–73; MICHAEL L. WALKER, INDEFINITE: DOING TIME IN JAIL 26–46, 110–26 (2022). For population statistics, see DEP'T OF JUST., OFF. OF JUST. PROGRAMS, JAIL INCARCERATION RATE DECREASED BY 12% FROM 2008 TO 2018 (2020), https://bjs.ojp.gov/content/pub/press/ji18pr.pdf [https://perma.cc/QMP4-QVLJ] (738,400 in 2018); Zhen Zang, *Jail Inmates in 2018*, *in* BULLETIN, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. (2020). The decrease in jail populations indicates some concern about the impact of these institutions, but the number of people who pass through them, nearly three percent of the American population every year, remains astronomical. African Americans are jailed at 3.5 times the rate of non-Hispanic whites. *Id.* at 3.

90 *See, e.g.*, Doris J. James & Lauren Glaze, *Mental Health Problems of Jail and Prison Inmates*, *in* SPECIAL REPORT, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. 1, 9 (2006) (although 60% of jail inmates exhibited mental health problems in the year prior to arrest, only 17% receive mental health care); Kevin Fiscella et al., *Alcohol and Opiate Withdrawal in U.S. Jails*, 94 AM. J. PUB. HEALTH 1522 (2004) (only 28% of jails sampled had any processes for detoxifying arrestees, despite the prevalence of drug and alcohol dependence in the inmate population); Molly S. Parece, et al., *STD Testing Policies and Practices in U.S. City and County Jails*, 26 SEXUALLY TRANSMITTED DISEASES 431 (1999) (most jails only test 0.2% to 6% of inmates for STD's, and only on the basis of observed symptoms or inmate request); Bonita M. Vesyey, et al., *In Search of the Missing Linkages: Continuity of Care in U.S. Jails*, 15 BEHAV. SCIS. & L. 383 (1997) (longitudinal study indicating that jails lack the capacity to track and respond to inmates with mental illness). These findings are hardly surprising given the lack of administrative capacity in most U.S. counties and the lack of coordinating structure that might provide them with support and training.

91 *See* JUDICIAL POLICY MAKING, *supra* note 27, at 104–23 (describing conditions in the Santa Clara County jails that led to a comprehensive court order); IRWIN, *supra* note 88 (conditions in contemporary jails lead to the degradation, disorientation and disintegration of inmates); HOMER VENTERS, LIFE AND DEATH IN RIKERS ISLAND (2019) (miserable health and safety conditions in New York City's largest jail); Nicholas Freudenberg, *Jails, Prisons, and the Health of Urban Populations: A Review of the Impact of the Correctional System on Community Health*, 78 J. URB. HEALTH 214 (2001) (jails, like prisons, are breeding grounds of communicable diseases). This data regarding

preyed upon by stronger ones.[92] The small-time drug dealer sleeps in the same room as the hired assassin; the mentally unstable shoplifter watches TV next to the violent gang member.[93] Although a number of states have experimented with release pending trial based on calculated risk factors,[94] and a few have implemented this approach, the majority still determine whether arrestees remain in these miserable facilities on a basis that discriminates against the poor[95]

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conditions in jail is confirmed by anecdotal accounts. *See* SHAUN ATTWOOD, HARD TIME: LOCKED UP ABROAD (2014).

92 *See* ALLEN J. BECK ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12: NATIONAL INMATE SURVEY, 2011–12 (2013) (high frequency of sexual victimization in both settings); Jessica Grosholz & Daniel C. Semenza, *Health Conditions and Victimization Among Incarcerated Individuals in U.S. Jails*, 74 J. Crim. Just. 1 (2021) (vulnerable prisoners, such as those with physical or mental disabilities, are frequently victimized in prison).

93 The unsurprising result is that suicide is the single largest cause of death in local jails, accounting for about thirty percent of roughly one thousand deaths in jails each year. *See* E. ANN CARSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., MORTALITY IN LOCAL JAILS, 2000-2018–STATISTICAL TABLES 3–6 (2021) (in 2018, there were roughly 335 suicides in American local jails).

94 *See* John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725 (2018); Richard F. Lowden, *Risk Assessment Algorithms: The Answer to an Inequitable Bail System?*, 19 N.C. J.L. & TECH. 221 (2018); ARTHUR W. PEPIN, CONF. OF STATE CT. ADM'RS, 2012-2013 POLICY PAPER: EVIDENCE-BASED PRETRIAL RELEASE (2013), https://www.ncsc.org/__data/assets/pdf_file/0015/23802/Evidence-Based-Pre-Trial-Release-Final.pdf [https://perma.cc/Z7CJ-6WDT].

95 This obvious injustice has been long recognized. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

> It is evident that such legislation is directed against the poor and favors only the rich.
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> The poor man does not always find bail, even in civil matters, and if he is constrained to go await justice in prison, his forced inaction soon reduces him to misery. The rich man, on the contrary, always succeeds in escaping imprisonment in civil matters; even more, should he have committed a punishable offense, he easily escapes the punishment that ought to reach him: after having furnished bail, he disappears. One can therefore say that for him, all penalties that the law inflicts are reduced to fines. What is more aristocratic than legislation like this?

Id. at 44–45. That something written nearly two centuries ago (by a French aristocrat, no less) is so relevant to current conditions is a real condemnation. The reference to imprisonment for civil matters, generally for debt, might seem to be the only part of the quotation that sounds outdated. *See* PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900 (1999) (describing the widespread use of the criminal justice system as a means of debt collection in colonial and United States history before 1900). But even this abuse is now prevalent in the American criminal justice system. *See* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 113–47 (2018); Neil L. Sobol,

and combines with other circumstances to discriminate against racial minorities as well.[96]

With the arrested suspect moldering or smoldering in jail, his case goes to a prosecutor, again a member of an entirely different institution, and again funded by the county.[97] In fact, most prosecutors in the United States are elected,[98] which places them entirely outside the state's administrative hierarchy.[99] Even apart from that source of independence, the doctrine of prosecutorial discretion insulates most prosecutors from supervision in all but the most serious or high profile cases.[100] Instead, the electoral connection subjects them to external pressures that tend to make them more punitive and undermines the discretion that insulates them from more valid supervision.[101]

If the prosecutor decides to proceed, she must—in theory—obtain an indictment and then bring the case before another separate institution, the criminal court, sometimes administered by the locality or county, but often by the state government. Here, also in theory, the

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Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons, 75 MD. L. REV. 486 (2016); Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor*, 21 THEORETICAL CRIMINOLOGY 247 (2017). *See also infra* note 335 (court fees and judicial independence).

96 Tina L. Frieburger & Carly M. Hilinski, *The Impact of Race, Gender, and Age on the Pretrial Decision*, 35 CRIM. JUST. REV. 318 (2010) (because African American men are incarcerated at above-average rates, they are less likely to have the resources to post bail, and thus more likely to succumb to disadvantageous plea bargains, leading to further incarceration and thus a self-reinforcing cycle).

97 *See* JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY (1980); PFAFF, *supra* note 26, at 128–46.

98 This peculiar feature of American government, a reaction to Jacksonian patronage, see Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528 (2012), creates obvious opportunities for the application of external pressure and further impedes coherent policy making.

99 PFAFF, *supra* note 26, at 134–45.

100 ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007); *see* NATAPOFF, *supra* note 95, at 66–71; PFAFF, *supra* note 26, at 52–61; I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1567–70 (2020); Siddhartha Bandyopadhyay & Bryan C. McCannon, *The Effect of the Election of Prosecutors on Criminal Trials*, 161 Pub. Choice 141 (2014).

101 *See* PFAFF, *supra* note 26, at 140–42; Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334 (2002); David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451 (2018). The general conclusion is that these are low visibility elections that are determined by the nomination of the dominant political party in the district or are influenced by a small number of committed citizens, generally those with overly punitive attitudes.

accused will benefit from an elaborate and much-celebrated set of rights. In the states, however, judges are typically elected rather than appointed, which again has the dual, non-administrative effect of placing them outside the administrative hierarchy[102] and subjecting them to political pressures.[103] To take advantage of these rights, moreover, the accused person must have a lawyer, and that person, unless the accused is atypically prosperous, will need to be provided by the public defenders' office, still another separate institution with often inadequate funding sources.[104] Overall, the theory of the adversary system holds that each of these institutions is independent of the other,[105] and the ideals of professionalism accord enormous deference to individual decisions and impose weak oversight within the separate offices. By design, no one is in charge.

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102 There are a variety of managerial issues that do not affect the substance of decision but affect the general efficiency of the decision-making process. These include case assignment, case management (availability of record-keeping or videoconferencing), staffing, and physical facilities. For a discussion of how judicial independence is preserved within an administrative structure, see *infra* pp. 315–17.

103 *See* Charles H. Franklin, *Behavioral Factors Affecting Judicial Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 148 (Stephen B. Burbank & Barry Friedman eds., 2002) (in low visibility elections such as those for judges, small groups of highly committed individuals often control the result); Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367 (2002) (impact of state elections on Oregon Supreme Court); Michael J. Nelson, *Responsive Justice? Retention Elections, Prosecutors, and Public Opinion*, 2 J.L. & COURTS 117 (2014) (judges respond to a strong, issue-specific, constituency-level opinion signals); Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169 (2009) (elections and retention elections have significant effects on judicial decisions). There can be arguments about whether electoral influence on judges is invariably undesirable, *see, e.g.*, Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 541–43 (1999), but there seems little doubt that it adds an element of unpredictability and institutional complexity to the criminal justice system. *See* Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003) (because majority of people oppose the election of judges, elections undermine the legitimacy of the judiciary).

104 *See* AM. BAR ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004); Stephen B. Bright, *Gideon's Reality: After Four Decades, Where Are We?*, 18 CRIM. JUST. 5 (2003); Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169 (2003); Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1386–88 (2004); Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219 (1994); Deborah L. Rhode, *Presumed Guilty: Class Injustice in Criminal Justice*, *in* DEBORAH L. RHODE, ACCESS TO JUSTICE 122 (2004).

105 *See* KAGAN, *supra* note 65.

If the defendant is found guilty, he will then be sentenced by the judge, whose discretion, after having supervised the trial and learned all the information that it provides, will typically be limited to sending the now-convicted individual to one of two other separate institutions, each one being the sixth one in the process. These are, of course, prison, generally operated by the state government, or the probation office, which may be state, county, or local. In making these dispositions, the judge will typically be limited to stating a length of time or, if just deserts reign supreme in the jurisdiction, will be obligated to impose a minimum sentence that is often well beyond the maximum that could be justified by either our democratic norms or a rational strategy for decreasing crime.[106]

Even this process, fractured and disorganized as it appears, is in fact an idealized account. A great many defendants, particularly in larger jurisdictions, face a bewildering segmentation of labor. Several different prosecutors will likely prepare their case with minimal consultation among them and several different public defenders will do so as well.[107] In addition, one or more judges may preside over the

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[106] One egregious example is the federal provision that manufacturing and dispensing, or possessing with intent to dispense, often small and sometimes tiny amounts of specified narcotics, shall be punished by no less than 10 years in prison or 20 years "if death or serious bodily injury" results from the use of the substance. 21 U.S.C. § 841. Other examples are the state "three strikes and you're out" statutes. *See supra* note 47. Regarding crime control, see Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103 (1998) (three-strikes laws unlikely to reduce crime through incapacitation, even if proponents are correct that a small number of individuals commit a large portion of serious crimes); Thomislav V. Kovandzic et al., *"Striking Out" as Crime Reduction Policy: The Impact of "Three Strikes" Laws on Crime Rates in U.S. Cities*, 21 JUST. Q. 207 (2004) (three-strikes laws do not decrease crime but are positively correlated with homicide rates); Thomas B. Marvell & Carlisle E. Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. LEGAL STUD. 89 (2001) (three-strikes laws are positively correlated with homicide rate). One author offers, as the best defense of mandatory minimum sentences at the federal level, that they often do not increase prison time beyond the excessively long sentences prescribed by other statutes. *See* David Bjerk, *Mandatory Minimums and the Sentencing of Federal Drug Crimes*, 46 J. LEGAL STUD. 93 (2017).

[107] *See* David L. Weimer, *Vertical Prosecution and Career Criminal Bureaus: How Many and Who?*, 8 J. CRIM. JUST. 369 (1980) (prosecutors and public defender offices handle cases horizontally as well as vertically). In vertical prosecution and defense, one lawyer deals with the case from near the beginning to the end. In horizontal systems, the case is passed on to different lawyers who specialize in different stages of the process. David M. Engel, *Vertical and Horizontal Perspectives on Rights Consciousness*, 19 IND. J. GLOB. LEGAL STUD. 423 (2012).

early parts of the process and still a different one at sentencing.[108] The fragmentation of the judiciary and the public defender's office amplifies the power of the prosecutor, who is the moving party in the case,[109] while the fragmentation of the prosecutor's office means that this overwhelming power will be exercised in an undisciplined and incoherent manner.

As is well known and already noted, however,[110] the vast majority of cases do not go to trial but are either dropped or plea bargained by the prosecutor. This reduces, although does not eliminate, the role of the separate institutions of the trial court and public defender. It also risks reduction of the protections that we celebrate as so essential to our freedom.[111] The prosecutors' principal motivation, even apart from the political pressure resulting from their status as elected officials, is to obtain convictions as expeditiously as possible.[112] The public defenders' motivations will range from getting the accused person the shortest sentence possible to getting home for dinner.[113]

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[108] Judges, too, may be organized vertically and horizontally. Larger and busier courts are more likely to be organized horizontally since this method provides for a more efficient division of labor. Judicial assignments vary, but large courts commonly have specially assigned judges at arraignment, motions, trial, and sentencing. *See* FEELEY, *supra* notes 24, 65.

[109] For a critical assessment of the expanding power of prosecutors in federal criminal cases, see Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691 (2010); Allison D. Redlich et al., *The Influence of Confessions on Guilty Pleas and Plea Discounts*, 24 PSYCH. PUB. POL'Y & L. 147 (2018). For the impact of plea bargaining on possible sentencing in capital cases, see Susan Ehrhard, *Plea Bargaining and the Death Penalty: An Exploratory Study*, 29 JUST. SYS. J. 313 (2008); Ilyana Kuziemko, *Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence from New York's 1995 Reinstatement of Capital Punishment*, 8 AM. L. & ECON. REV. 116 (2006).

[110] *See supra* p. 269.

[111] *See, e.g.*, Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183 (2007) (allows invalid and dysfunctional attitudes by prosecutor to dominate); Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407 (2008) (denies defendants opportunity to explain themselves and gain a sense of fairness from the process); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992) (violates due process and is ineffective for crime control).

[112] PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 114–20 (2009) (adversarial attitudes of prosecutors); PFAFF, *supra* note 26, at 127–60 (prosecutors respond to political pressure); Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutor Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261 (2011) (large caseloads encourage overly aggressive prosecutorial behavior).

[113] Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1987) (empirical study finding that New York's court-appointed attorneys failed to provide effective assistance of counsel); John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old*

Neither prosecutors nor public defenders will have any direct knowledge of the treatment afforded by institution number six (prison or probation), and the staff of those institutions will not have any communication with either of them.

Opinions about the fairness of plea bargaining vary; while many condemn it as a denial of justice,[114] others regard it as reasonably fair and efficient,[115] while still others accept it as a necessary concession to the realities of crushing caseloads and limited resources.[116] For present purposes, the essential point is that plea bargaining is unsupervised and under-proceduralized when compared to the trial process it supposedly displaces. In fact, that trial process—the extensively prepared, elaborately scripted, vociferously argued confrontation structured by well-defined formal procedures—is largely a myth, based on a few widely publicized cases involving famous or notorious defendants. Historical studies reveal that the jury trial of the past, itself an ad hoc accommodation to crisis conditions,[117] was nasty brutish and short[118] and was replaced by plea

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Questions, 32 STAN. L. REV. 293, 319–21 (1980) (public defenders ration their efforts by necessity, providing effective defense to some clients and not to others).

114 *See* Burke, *supra* note 111; O'Hear, *supra* note 111; Schulhofer, *supra* note 111 (condemnations of plea bargaining).

115 *See* Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CALIF. L. REV. 1573 (2012) (plea bargaining reaches results consistent with substantive law); Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing and Prosecutor Power*, 84 N.C. L. REV. 1935 (2006) (same).

116 *See* Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055 (2016) (plea bargaining can become fair if it is conceived on its own terms); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) (plea bargaining should not be abolished but improved through use of contract law principles).

117 The crisis was that Pope Innocent III, in the Fourth Lateran Council (1215), banned priests from officiating at trial by ordeal. *See* Finbarr McAuley, *Canon Law and the End of the Ordeal*, 26 OXFORD J. LEGAL STUD. 473 (2006). On trial by ordeal generally, see ROBERT BARTLETT, TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL (1988). King John had to conform English trial practice to this papal command immediately because he had declared himself the personal vassal of the Pope in an effort to obtain support in the dispute with the English barons that produced the Magna Carta. *See* W.L. WARREN, KING JOHN 206–17 (2nd ed. 1978). In response, the grand juries of freemen that were being used to bring indictments were adapted to resolve the case by making findings of fact, thus initiating the petty jury. *See* FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 578–673 (2nd ed. 1898); Sanjeev Anand, *The Origins, Early History and Evolution of the English Criminal Trial Jury*, 43 ALTA. L. REV. 407 (2005).

bargaining well before the modern era.[119] Our premodern attitudes about crime and punishment, discussed above, have kept the myth of the adversarial trial alive and blocked us from asserting supervisory control over plea bargaining and integrating it into the larger system of criminal justice.

C. Punishment: Prisons, Probation, and Parole

The standard way we deal with serious offenders in our society, and an alarmingly common way that we deal with minor offenders, is to imprison them, often for periods that range from long to extremely long to outrageously long.[120] Prisons are administered by still another institution, typically through a state-level department of corrections.[121] Indeed, offenders are often sentenced to prisons by county judges, who are mindful of the fact that the state, rather than the county, will pay for their incarceration.[122] If the sentence is short by American standards (which sometimes means less than two and a half years), the offender may be sent to the local, county-run jail rather than

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118 John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV 263 (1978). *See* THOMAS WONTNER, OLD BAILEY EXPERIENCE: CRIMINAL JURISPRUDENCE AND THE ACTUAL WORKING OF OUR PENAL CODE OF LAWS 39 (1833) (average trial at Old Bailey lasted eight minutes).

119 Malcolm M. Feeley, *Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining*, 31 ISR. L. REV. 183 (1997); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 L. & SOC'Y. REV. 261 (1979).

120 *See supra* note 25.

121 *See* PRISON AND JAIL ADMINISTRATION: PRACTICE AND THEORY (Peter M. Carlson ed., 3rd ed. 2015); KENNETH J. PEAK & ANDREW L. GIACOMAZZI, JUSTICE ADMINISTRATION: POLICE, COURTS, & CORRECTIONS MANAGEMENT 244–81 (9th ed. 2018). The extent to which control of actual operations is decentralized from the state level to the level of the individual prison varies from state to state, further complicating the situation. Of course, decentralization is a feature of most administrative systems and would be a feature of the one proposed here as well. But with a comprehensive administrative agency, the level of decentralization could be calibrated on the basis of the overall needs of the criminal justice system, instead of being determined solely by the demands on prison management. For example, the extent to which prisons attempted to rehabilitate the inmates might be more fully and uniformly prescribed if the prisons were part of an integrated system, rather than separate institutions. *See* Francis T. Cullen et al., *The Correctional Orientation of Prison Wardens: Is the Rehabilitative Ideal Supported?*, 31 CRIMINOLOGY 69 (1993) (the extent to which the prison follows a rehabilitative model is often a matter for the individual wardens to decide).

122 *See, e.g.*, Malcolm M. Feeley, *How to Think about Criminal Court Reform*, 98 B.U. L. REV. 673 (2018).

prison, adding another element of institutional complexity and lack of coordination.[123]

Prison administrators are responsible for the time established by the legislature, prescribed by the judge within boundaries set by the legislature, or agreed to by the prosecutor and the defense attorney. The correctional system itself has no control over this initial designation. It can sometimes reduce the length of the sentence on the basis of good behavior,[124] but early release is typically in the hands of the parole board, either a component of the correctional system or another separate institution.[125] If the prisoner is paroled, he will then be supervised by that institution.[126] If he is not paroled—or after his parole period is completed—he will be sent back into society, but, with a sudden surge of efficiency, the criminal justice system rarely provides a seventh follow-up institution. The typical offender, having been through this process, will have little or no institutional support as he tries to recover from his previous behavior pattern and the mistreatment that the criminal justice system has inflicted on him.[127]

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123 *See, e.g.*, Brittnie L. Aiello, *"We Incarcerate to Set Free:" Negotiating Punishment and Rehabilitation in Jail*, 1 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 292, 297 (2013) (study of county jail where those serving sentences of less than two and half years were held); Harold D. Delaney et al., *Variations in Jail Sentences and the Probability of Re-Arrest for Driving While Intoxicated*, 6 TRAFFIC INJ. PREVENTION 105 (2005) (study of jail sentences for drunk-driving offenses); Mark Pogrebin et al., *Collateral Costs of Short-Term Jail Incarceration: The Long-Term Social and Economic Disruptions*, 5 CORR. MGMT. Q. 64 (2001) (study of effects of using jails to incarcerate those with short sentences).

124 *See* James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217 (1982) (conflict between good time and determinate sentencing and rationales for its use); Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1, 40–42 (2013) (good time, unlike parole, is controlled by the prison itself); Michael M. O'Hear, *Solving the Good-Time Puzzle: Why Following the Rules Should Get You Out of Prison Early*, 2012 WIS. L. REV. 195, 200–06 (allowing prison officials to control length of sentence raises serious questions).

125 HOWARD ABADINSKY, PROBATION AND PAROLE: CORRECTIONS IN THE COMMUNITY 159–79 (13th ed. 2018).

126 *See, e.g.*, JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990, at 205–29 (1993); JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 55–92 (2003); Dhammika Dharmapala et al., *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing*, 62 FLA. L. REV. 1037 (2010); Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567 (1994).

127 *See* Doreen Anderson-Facile, *Basic Challenges to Prisoner Reentry*, 3 SOCIO. COMPASS 183 (2009) (about 700,000 prisoners are released each year, with most receiving only minimal assistance for reentry).

Whatever one's theory of punishment, prison is supposed to be a remedy—a response to the wrongful behavior that other parts of the criminal justice system have determined that the inmate has committed. One would imagine that an effective remedy would need to be tailored to the circumstances presented by the particular offender, whether the goal of the remedy is to administer just deserts to the offender, rehabilitate him, deter him from future crime, or hold him until he is no longer likely to commit a crime. But the basic features of a prison are so oppressive, and the management problems so demanding, that they overwhelm any effort to deal with the offender's individual characteristics.[128] One dreary exception, resulting from the pervasive management problems this institution suffers, is the supermax prison where the inmates are isolated in small cells twenty-three hours a day.[129] We have known, ever since the birth of American penitentiaries two centuries ago, that this is literally torture;[130] current studies indicate that it produces catastrophic and permanent psychological damage.[131]

Even if the prison had the capability to tailor its treatments to the individual characteristics of the prisoner, it would lack the necessary information. The criminal justice system is not designed to elicit the

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[128] *See* Erving Goffman, *On the Characteristics of Total Institutions*, *in* ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 1, 14–35 (1961) (describing "total institutions" where the inmates are stripped of their former identities and placed in a setting entirely discontinuous with the outside world). *See also* Derek A. Kreager & Candace Kruttschnitt, *Inmate Society in the Era of Mass Incarceration*, 1 ANN. REV. CRIMINOLOGY 261 (2018) (distinctive inmate social organization created by isolation from society).

[129] *See* Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385 (2001); Daniel P. Mears & Michael D. Reisig, *The Theory and Practice of Supermax Prisons*, 8 PUNISHMENT & SOC'Y 33 (2006); Jesenia Pizarro & Vanja M.K. Stenius, *Supermax Prisons: Their Rise, Current Practices, and Effect on Inmates*, 84 PRISON J. 248 (2004).

[130] ROTHMAN, *supra* note 20, at 95–101. *See* CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 233–68 (1850) (describing the mental deterioration of inmates in Pennsylvania's solitary-confinement system).

[131] KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT 23–29, 179–82 (2016) (general description of solitary confinement and its effects on inmates); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325 (2006) (serious psychosis induced by conditions of solitary confinement); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (1983) (same); Lisa Guenther, *Subjects Without a World? A Husserlian Analysis of Solitary Confinement*, 34 HUM. STUD. 257 (2011) (frustration of essential human need for interpersonal contact resulting from solitary); Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285 (2018) (assessing recent findings on the psychological effects on inmates confined to long-term solitary confinement).

sort of information that would be useful for this purpose. The prison will typically perform its own medical, mental health, education, and substance abuse assessments, but it will not receive the information already generated in the earlier stages of the process, to say nothing of a complete case file from the time of initial arrest or arraignment.[132] An even more serious problem than the ineffectiveness of imprisonment can be attributed to this impaired flow of information—the excessive scale of imprisonment in the United States. Decisions made at each stage of the process are not coordinated with the subsequent stages, nor do they even take cognizance of those stages. This one-way flow of information through the system has allowed its other features to create the pile up of people in the end point of prisons. Whether it is the political decisions of policy makers, as James Forman argues;[133] the racist practices of the police, per Michelle Alexander;[134] the classist bias of our criminal justice system, per Jeffrey Reiman;[135] the self-serving motivations of prosecutors, per John Pfaff;[136] or—more likely—a combination of these elements, the result has been a steady increase in the number of people whom the criminal justice system deems worthy of imprisonment. None of these actors likely wanted to create a situation where expensive prisons are proliferating and becoming filled so quickly that the recreation facilities must be converted into makeshift dormitories. But that is the sort of result that will transpire when no overarching coordination or control exists and the single function of dealing with the offender is subdivided among separate institutions.

The problem of incoherence and fragmentation remains more or less the same whether a popular turn to retribution or rehabilitation, or some mix of the two, occurs. The concerted War on Crime from the 1990s into the 2000s unquestionably deepened fragmentation and returned us to a coercive policy of the premodern era. The vast popular support to get tough rigidified each of the separate components of the system and encouraged them to increase the

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132 PATRICIA L. HARDYMAN ET AL., U.S. DEP'T OF JUST., NAT'L INST. OF CORR., PRISONER INTAKE SYSTEMS: ASSESSING NEEDS AND CLASSIFYING PRISONERS (2004) (survey of fifty state prison intake systems, followed by intensive analysis of four state systems).

133 JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017).

134 ALEXANDER, *supra* note 26.

135 REIMAN, *supra* note 26.

136 PFAFF, *supra* note 26.

severity with which they carried out their particular tasks. The police get credit for arrests, even if they overload the courts. Prosecutors and courts get credit for convictions, even if they overload the prisons.[137] County judges get credit at election time for being tough on crime.[138] Prisons get credit for maintaining harsh conditions, even if this produces hostile, addicted, and uneducated inmates who overload the police upon their release.[139]

But such adjustments are not restricted to the harshest periods. During recent years, alternatives to incarceration and rehabilitative programs have gained considerable public and professional support.[140] But without coordination, these efforts are likely to be undermined by other components of the system. Alternatives to incarceration such as supervised release, boot camps, and treatment programs often become means of managing arrestees who otherwise would have had charges dropped or received probation without

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137 *Id.* at 69–77 (prosecutors responsible for large proportion of mass incarceration and prison overcrowding).

138 *See* Franklin, *supra* note 103; De Muniz, *supra* note 103; Shepherd, *supra* note 103. They also get credit for sending offenders to state prison rather than the county jail—not with the voters, who are unlikely to notice, but with the county commissioners who are thereby spared the expense of housing the offender. *See* PFAFF, *supra* note 26, at 142–43.

139 For example, grants for higher-education expenses, popularly known as Pell Grants after Senator Claiborne Pell, authorized by the Higher Education Act of 1965, Pub. L. No. 89–329, 79 Stat. 1219 (codified in scattered sections of 20 U.S.C. § 1001 et seq.) were available to incarcerated persons and regularly used by them until 1994, when the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796 (codified at 42 U.S.C. ch. 136), precluded incarcerated persons from obtaining these grants. *Id.*, § 401(b)(8), 20 U.S.C. § 1070a(b)(8). "No basic grant shall be awarded under this subpart to any individual who is incarcerated in any Federal or State penal institution." *Id.* This title of the Act is Orwellian, at least with regard to this provision. Whatever punitive or vindictive inclination it satisfies, it clearly does not control crime.

140 *See, e.g.*, First Step Act of 2018, Pub. L. No. 115–391, 132 Stat. 5194 (codified in scattered sections of 8, 18, 34, & 42 U.S.C.) (increasing services to federal prisoners, reducing mandatory minimum sentences for narcotics violations, and prohibiting use of restraints on prisoners during pregnancy and labor); CHARLES W. COLSON, JUSTICE THAT RESTORES (2001) (somewhat garbled recommendation for religion-based restorative justice by conservative convicted in connection with Watergate scandal); Mark Oppenheimer, *With Prison Ministry, Colson Linked Religion and Reform*, N.Y. TIMES (Apr. 27, 2012), https://www.nytimes.com/2012/04/28/us/with-prison-ministry-colson-linked-religion-and-reform-beliefs.html [https://perma.cc/3EGS-UHT2] (description of Colson's founding of Prison Fellowship, a religion-based outreach program for prisoners); JAMES AUSTIN & MICHAEL JACOBSON, BRENNAN CTR. FOR JUST., HOW NEW YORK CITY REDUCED MASS INCARCERATION: A MODEL FOR CHANGE? (2013) (describing New York City program that led to a seventeen percent reduction in New York State's prison population).

conditions.[141] Juvenile justice programs designed to prevent delinquency by moving toward a social work model are counteracted by community policing initiatives, like the "broken windows" idea that minor offenses, often committed by minors, should be fully prosecuted to convey the sense that the law must be taken seriously.[142] To go back to the very beginning of the criminal justice system in the Early Republic, the prison itself was initially intended as a humane and rehabilitative way to deal with crime;[143] two centuries later, it has morphed into the monster of mass incarceration.

III
WHAT WE HAVE TRIED

A number of nations in Western Europe have addressed the inherited fragmentation of the criminal justice system, and, following the tradition of the Rechtsstaat, constructed a formal, professional criminal justice system, hierarchical within each of its components and subject to system-wide bureaucratic oversight. Germany has been particularly notable in moving toward a modernized administrative approach to criminal justice.[144] In the United States, a promising start

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141 *See* Joan Petersilia & Susan Turner, *Intensive Probation and Parole*, 17 CRIME & JUST. 281 (1993); Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 L. & POL'Y 51 (2013); Michelle S. Phelps, *Mass Probation from Micro to Macro: Tracing the Expansion and Consequences of Community Supervision*, 3 ANN. REV. CRIMINOLOGY 261 (2020).

142 JAMES Q. WILSON, THINKING ABOUT CRIME 63–77 (rev. ed. 2013). The idea was originally advanced in George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982. It has been disproved by empirical evidence. *See* BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006). A further problem with this approach is that it occupies a great deal of time that could be better spent on other, more useful tasks. One estimate is that an arrest for a minor (non-index, part II) offense occupies between two and four hours of an officer's time and that there were over nine million such arrests in the United States in 2013. Cynthia Lum & Daniel S. Nagin, *Reinventing American Policing*, 46 CRIME & JUST. 339, 344–45 (2017).

143 *See* BENDER, *supra* note 20, at 43–61; FOUCAULT, *supra* note 18, at 73–131; ROTHMAN, *supra* note 20, at 79–101.

144 *See generally* CRIME AND CRIMINAL JUSTICE IN MODERN GERMANY (Richard F. Wetzell ed., 2014); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 69–149 (2003); Bernd Dieter-Meier, *Alternatives to Imprisonment in the German Criminal Justice System*, 16 FED. SENT'G REP. 222 (2004); Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMPAR. L. REV. 317 (1995). Although retributivist in certain ways, the German system of criminal justice is forward looking and prevention oriented. Diversion and suspended

occurred when Frank Remington, a faculty member at the University of Wisconsin Law School, directed a massive American Bar Association survey of the system and concluded that it could be analogized to a regulatory regime.[145] This focused attention on the criminal law in action led to a more fact-based assessment of criminal justice institutions. The concept of criminal justice as a system emerged from this survey and from the follow-up task force reports of the Katzenbach Commission of 1967.[146] While contributing some analytic clarity to the study of the criminal process, these early works generally produced two dysfunctional responses, one being close empirical studies that accepted the disjointed parts of the system as given[147] and the other being the false impression that the system, as such, was coherent and rational.[148] They did little to foster a comprehensive administrative or regulatory orientation to the study of practices in the criminal process. Describing our way of dealing with

sentences are the norm, few offenders receive sentences of two years or more, and those serving sentences in and out of prisons can avail themselves of various rehabilitative programs. Although German law mandates "full prosecution" of all offenses, numerous alternatives exist to mitigate this apparent harshness. Furthermore, disparities occasioned by discretion are minimized due to shared norms that arise from well-trained, highly professionalized prosecutors and judges and from hierarchical oversight within both institutions. Although the judiciary and the prosecution systems are autonomous from the executive branch, they are, along with the police and prison system, subject to oversight and coordination from within the state ministries of justice and at times from the federal ministry of justice. Substantial changes in policing, sentencing, and prosecutorial priorities cannot occur without extensive planning and coordination, nor without opportunities to challenge the proposals. Needless to say, judges and chief prosecutors are not elected, and their offices—as well as the police and corrections—are organized at the level of the states (*Länder*), not local government.

145 Remington, *supra* note 31. Specifically, Remington drew an analogy between the Federal Trade Commission, an administrative agency with the responsibility to develop enforcement policy regarding consumer fraud, and local criminal justice agencies, which have a similar responsibility. *See also* Malcolm M. Feeley, *Reflections on Frank Remington, the ABF Survey, and the Wisconsin Law School*, *in* LEGAL REALISM TO LAW IN ACTION (William Clune ed., 2021); Wayne R. LaFave, *Frank Remington: The Man and His Work*, 1992 WIS. L. REV. 570 (1992).

146 PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 8–9 (1967) [hereinafter KATZENBACH COMMISSION].

147 The model for the avalanche of empirical research reports produced under the auspices of the Katzenbach Commission is the six volumes of empirical studies of each stage of the criminal process from policing to corrections produced by the ABA's Survey of the Administration of Justice conducted under Remington's direction. The follow up were the many Task Force Reports and auxiliary studies produced by the staff and contract researchers that the Commission supported.

148 The widespread use of the term "criminal justice system" probably best illustrates this. *See* Mayeux, *supra* note 67.

crime as a system highlighted the system's failures but did nothing to remedy its lack of systematization.

In place of a comprehensive approach, a swelling chorus of critics identified any number of pathologies and suggested a great many ways to try to ameliorate the problems they identified.[149] The cacophony of proposed solutions is too great to fully catalogue, but some of its most significant, or perhaps most loudly trumpeted components, are constitutionalism, professionalization, and rationalization. For the most part, however, these reforms have approached the challenge through the conventional frameworks of criminal law, criminal procedure, and sentencing, leaving the institutional structures of that system unaddressed.

A. Constitutionalism

After civil rights, and perhaps voting rights, criminal law and procedure were probably the Warren Court's most significant areas of action. Gerald Rosenberg's conclusion that relying on the courts for major reforms is a "hollow hope" may seem overstated,[150] but criminal justice provides strong confirmation of his claim. *Miranda v.*

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[149] The critical literature is voluminous. For some of the most incisive commentary on contemporary American criminal justice by leading scholars, practitioners, and judges, see STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); NICOLE GONZALES VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST COURT (2016); ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018); NATAPOFF, *supra* note 95; PFAFF, *supra* note 26; RAKOFF, *supra* note 26; JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE (2021); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); John Paul Stevens, *Our 'Broken System' of Criminal Justice*, N.Y. REV. BOOKS (Nov. 10, 2011); *Democratizing Criminal Justice Symposium*, 111 NW. U. L. REV. 1367 (2017).

[150] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2nd ed. 2008). For other well-known statements of this same theme, see DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS (1974); Nathan Glazer, *Towards an Imperial Judiciary?*, 50 Pub. Int. 104 (1975). Our response, see JUDICIAL POLICY MAKING, *supra* note 27, at 316–23, is that success in social-policy cases cannot be measured in the simpler terms that apply to resolving a dispute between private parties and that it is rare for any social institution to resolve major problems by itself, rather than as part of a larger effort involving other institutions.

Arizona[151] declared that information obtained by egregious interrogation practices is inadmissible[152] but did not prevent the police from using those practices or coercing confessions by more subtle means.[153] *Mapp v. Ohio*[154] gave defense attorneys in state cases grounds for excluding evidence obtained when police smashed through the door of a suspect's home, trashed the interior, and terrorized the residents, but it did not stop police from smashing through the door, trashing the interior, and terrorizing the residents.[155]

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[151] Miranda v. Arizona, 384 U.S. 436 (1966) (declaring evidence from confession inadmissible unless accused voluntarily waived right against self-incrimination).

[152] *See* Steven D. Clymer, *Are Police Free to Disregard* Miranda*?*, 112 YALE L.J. 447 (2002) (*Miranda* does not prohibit coerced confessions, only the use of the evidence obtained by those means); Yale Kamisar, *On the Fortieth Anniversary of the* Miranda *Case: Why We Needed It, How We Got It–and What Happened to It*, 5 OHIO ST. J. CRIM. L. 163 (2007).

[153] For discussions of the way that police can induce suspects to confess despite the warnings provided by the *Miranda* decision, see ERWIN CHEMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS 122–24, 168–73 (2021); GEOFFREY R. STONE & DAVID A. STRAUSS, DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT 111–13 (2020); Linda A. Henkel & Kimberly J. Coofman, *Memory Distortions in Coerced False Confessions: A Source Monitoring Framework Analysis*, 18 APPLIED COGNITIVE PSYCH. 567 (2004); Tonja Jacobi, *Miranda 2.0*, 50 U.C. DAVIS L. REV. 1 (2016); Hollida Wakefield & Ralph Underwager, *Coerced or Nonvoluntary Confessions*, 16 BEHAV. SCI. & L. 423 (1998). *See also* George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959 (2004) (police regularly use loopholes in the Miranda doctrine that have been created or expanded by the post-Warren court to obtain admissible evidence from confessions).

[154] Mapp v. Ohio, 367 U.S. 643 (1961) (extending the prohibition against admissibility of evidence obtained through violation of Fourth Amendment search and seizure requirements to state cases).

[155] *See* BALKO, *supra* note 79, at xii–xiv, 192–98, 262–66 (militarization of the police has led to excessively intrusive and confrontational police searches of private homes); RADLEY BALKO, CATO INST., OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA (2006), https://www.ojp.gov/ncjrs/virtual-library/abstracts/overkill-rise-paramilitary-police-raids-america [https://perma.cc/9A7J-HG49]; BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 117–209 (2017) (police regularly violate Fourth Amendment limitations in conducting searches); Elsa Y. Ransom, *Home: No Place for "Law Enforcement Theatricals"—The Outlawing of Police/Media Home Invasions in* Ayeni v. Mottola, 16 LOY. L.A. ENT. L.J. 325 (1995) (police regularly enter people's homes while being filmed for reality television shows). In 2010, a heavily armed police SWAT team in Columbia, Missouri, conducted a nighttime, forced entry raid of a family home for suspected marijuana possession. Although possession of small amounts of marijuana had been decriminalized in Missouri, the police stormed into the home, forced the residents to lie down on the ground, fired their weapons, and intentionally shot and killed the family dog. *See* Radley Balko, *A Drug Raid Goes Viral*, REASON (May 11, 2010, 4:30 PM), https://reason.com/2010/05/11/a-drug-raid-goes-viral-2/ [https://perma.cc/7D46-G5LL] (describing police recording of the raid obtained by local newspaper under state open-records law). As the article notes, the original recording of the raid has been

Gideon v. Wainwright and its successors provided those accused of serious crimes with legal representation,[156] which is essential in a criminal trial, but they did not decrease the overwhelming proportion of cases that are plea bargained, nor did they place any significant limitations on this dominant process.[157] *Robinson v. California* held that imprisoning people on the basis of their status as addicts was cruel and unusual punishment,[158] but the Court never followed up with limitations on the length of sentences, thus allowing absurdities such as imprisoning people for twenty-five years in the effort to stop them from impairing their quality of life with narcotics or to prevent them from committing minor offenses with limited economic impact such as petty shoplifting.[159] In any case, as Michelle Alexander, Erwin Chemerinsky, and others have documented, the conservative Court of the past five decades has eroded even the inadequate protections that the Warren Court established.[160]

If the Court had been more consistent and conscientious about enforcing constitutional limits on the criminal justice system, it could have resolved a number of problems. However, our current conception

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removed from the internet. Having obtained a warrant, the police were acting within the letter of the law, and they were able to impose a $300 fine on the residents for illegal possession of drug paraphernalia (a pipe). *See* BALKO, *supra* note 79, at xii–xiv.

156 Gideon v. Wainwright, 372 U.S. 335 (1963). *See, e.g.*, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (erroneous deprivation of defendant's attorney of choice is a structural error requiring reversal of conviction); Argersinger v. Hamlin, 407 U.S. 25 (1972) (person accused of a misdemeanor that can lead to incarceration has a right to counsel); *see* Alabama v. Shelton, 535 U.S. 654 (2002) (*Argersinger* holding applies even if defendant received a suspended sentence).

157 *See* sources cited *supra* note 111.

158 Robinson v. California, 370 U.S. 660 (1962). In addition to its pathbreaking holding that it is cruel and unusual punishment to sentence a person to even one day in prison for a health condition, *see id.* at 667, the case was significant in holding that the Eighth Amendment was incorporated into the Fourteenth Amendment's Due Process Clause, and thus applicable to the states.

159 *See* Harmelin v. Michigan, 501 U.S. 957 (1991) (upholding life sentence without possibility of parole for possession of twenty-four ounces of cocaine); Lockyer v. Andrade, 538 U.S. 63 (2003) (upholding twenty-five years to life sentence for military veteran and father of three who shoplifted nine videotapes); Ewing v. California, 538 U.S. 11 (2003) (upholding twenty-five years to life sentence for habitual thief who shoplifted three golf clubs). Even apart from the obviously cruel and unusual nature of these laws, they seem to at least raise questions about their minimum rationality. At current costs for incarceration in California, see *The Price of Prisons*, VERA INST., https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending [https://perma.cc/4MSN-EGTY], imprisoning a petty thief for the minimum twenty-five years will cost society $1,600,000.

160 ALEXANDER, *supra* note 26; CHEMERINSKY, *supra* note 153.

of the judicial role, derived from the still-dominant legal process theory,[161] suggests that constitutionalism would not be able to reach the problems of institutional structure noted here. It is possible that the Court could have ordered improvements within the institutional ambit of the trial courts and the police, but unimaginable that it would actually order administrative coordination among police, prosecutors, courts, and prisons. Even within a single institution (or what is generally regarded as such), the federal judiciary was generally unable to confront and remedy abuses that resulted from the design of the institution itself, as opposed to specific practices.

The notable exception is the group of prison reform decisions of the 1960s though 1980s by the lower federal courts. The most far-reaching held that many practices prevalent in southern prisons, or entire southern state correctional systems, constituted cruel and unusual punishment in violation of the Eighth Amendment.[162] In addition to these decisions, often motivated by a sense that southern prison systems were violating national norms by operating their prisons on the model of the quondam slave plantations,[163] the courts have issued similar declarations against individual prisons in other

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[161] For characteristic works, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (written and circulated in 1957–59); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *The Making of The Legal Process*, 107 Harv. L. Rev. 2031 (1994) (description of Hart and Sachs teaching materials). Regarding the continuing influence of this approach, see Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996); Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213 (1983).

[162] *See, e.g.*, Ruiz v. Estelle, 503 F. Supp. 1295 (S.D. Tex. 1980) (entire Texas prison system); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974) (many specific practices at Parchman Farm, Mississippi); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (entire Arkansas prison system). *See* JUDICIAL POLICY MAKING, *supra* note 27, at 51–95 (same).

[163] *See* JUDICIAL POLICY MAKING, *supra* note 27, at 149–77; DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

states,[164] or found that particular practices in these states were unconstitutional on other grounds.[165]

These decisions, which often made use of special masters to redesign the operations of the state's entire prison system, represent the extreme limits of active judicial intervention within the legal process framework.[166] The effort, however, was far from complete. The courts did not reach the problem of mass incarceration, which is not only an abuse in itself but also undermined the reforms that had been achieved, much like a developing nation whose economic gains are negated by uncontrolled population growth. Moreover, they failed to follow through with the reforms they originally instituted. There was, for example, no word from any federal court when California complied with a Supreme Court order to reduce its prison population by redirecting many prison-bound and prison-housed felons to local jails, which generally feature worse conditions and fewer recreational, vocational, and educational programs.[167]

Courts have been even more reluctant to address the institutionalized brutality and racism of state and local police departments.[168] While doing so would also have fallen short of a comprehensive solution,[169] it might have eliminated some of the

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164 *See, e.g.*, Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995) (declaring conditions at Secured Housing Unit at Pelican Bay Prison unconstitutional); Ramos v. Lamm, 485 F. Supp. 122 (D. Colo. 1980) (declaring conditions at the maximum-security unit of Colorado State Penitentiary unconstitutional).

165 *See, e.g.*, Hewitt v. Helms, 459 U.S. 460 (1983) (constitution requires state to follow state statutes that provided prisoner rights to a hearing before being sent to solitary confinement); Vitek v. Jones, 445 U.S. 480 (1980) (prisoner cannot be transferred to a mental institution without notice and a hearing).

166 JUDICIAL POLICY MAKING, *supra* note 27, at 204–96.

167 *See* Brown v. Plata, 563 U.S. 493 (2011) (ordering California to reduce prison population); Jonathan Simon, *Mass Incarceration on Trial*, 13 PUNISHMENT & SOC'Y 251 (2011); Margo Schlanger, Plata v. Brown *and Realignment: Jails, Prisons, Courts, and Politics*, 48 Harv. C.R.-C.L. L. Rev. 165 (2013) (describing transfer to jails).

168 *See* Rizzo v. Goode, 423 U.S. 362 (1976) (reversing lower court decisions finding a pattern of unconstitutional discrimination and abuse by Philadelphia police officials). The case relied on what Alexander Bickel, in one of the classic works of the legal process school, called the "passive virtues." *See* BICKEL, *supra* note 161 (recommending that courts use technical legal doctrines such as standing, justiciability, political questions, and federalism to avoid deciding controversial cases so that the controversy can be resolved by the political process). For a leading critique of this proposal, see Gerald Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

169 For a relatively optimistic account of the role of lower courts in fostering more modern and tighter bureaucratic administration of police departments, see EPP, *supra* note

worst practices, practices which were instead allowed to fester and explode into situations like the murder of George Floyd.[170] Congress attempted to encourage judicial supervision by enacting the Law Enforcement Misconduct Statute authorizing the Department of Justice to bring civil rights suits against police departments,[171] but the department has been reluctant to make use of this provision.[172] In contrast, the one area where the courts were willing to promote genuine institutional reforms proved unpalatable for Congress, which enacted the Prison Litigation Reform Act for the sole purpose of making prisoner suits regarding conditions of confinement more difficult for prisoners to file and easier for corrections officials to oppose.[173]

A less visible, but nonetheless significant, effort to use constitutional principles to reform criminal law was the development of a code of criminal procedure that could be administered and overseen by appellate court judges. The American Bar Foundation's (ABA) Criminal Justice Standards project, which produced twenty-four volumes of standards between 1964 and the early 2000s for virtually every phase of the criminal process, was designed to foster professional standards internal to the many and separate criminal

74 (arguing large payouts in constitutional torts awards and settlements force mayors and city councils to adopt better bureaucratic oversight and management).

170 *See* FRANKLIN E. ZIMRING, WHEN POLICE KILL (2017) (hyper-fragmentation of police departments all but precludes meaningful oversight). In his study, completed before the Floyd murder, he estimates that of the 1000 killings by police every year, about fifty could be characterized as murder but are never prosecuted. Less than a decade after the *Rizzo* decision, the Philadelphia police demonstrated the decision's abnegation of responsibility when they dropped a military-grade bomb on the home of some radical environmentalists in an African American neighborhood, incinerating eleven people and destroying sixty-five homes in the community. *See* MICHAEL BOYETTE & RANDI BOYETTE, LET IT BURN: MOVE, THE PHILADELPHIA POLICE DEPARTMENT, AND THE CONFRONTATION THAT CHANGED A CITY (1989); ROBIN WAGNER-PACIFICI, DISCOURSE AND DESTRUCTION: THE CITY OF PHILADELPHIA VERSUS MOVE (1994).

171 34 U.S.C. § 12601.

172 *See* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2009).

173 Prison Litigation Reform Act of 1996, 42 U.S.C. § 1997e (requiring exhaustion of grievance procedures and payment of fees for suits by prisoners, and providing that a motion to terminate prospective relief shall automatically stay such relief). With respect to the purpose and effect of the Act, see John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429 (2001); Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You're Out of Court—It May Be Effective, But Is It Constitutional?*, 70 TEMP. L. REV. 471 (1997); Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771 (2003).

justice agencies, and to assist the courts in overseeing the administration of criminal justice.[174] Similarly, in 1971, the Department of Justice established the National Advisory Commission on Criminal Justice Standards and Goals to advise on how to improve state criminal justice agencies. The group of twenty-two members conducted multiple studies over two years and published over 400 recommendations in a series of final reports issued in 1973.[175] The Department of Justice also financed the establishment of state commissions, convened to consider the Commission's recommendations, and to adapt them to the distinctive features of their states.[176] Significantly, as one close observer of the Commission observed, "the Commission seemed to envision no structural or hierarchical linkages between system components, relying on cross system planning and improved information and communication capabilities to achieve coordination within the 'nonsystem.'"[177] It is not clear if any of these and similar efforts have made any difference. They were directed at fragmented institutions and did little or nothing to overcome the discontinuities and pathologies that flow from their fragmentation. The standards were no doubt good ideas, but put simply, there was no one to implement them.

B. Professionalism

Professionalization of the various actors in the criminal justice system was a second reform strategy.[178] Indeed, the standards projects

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174 For a review of the history and scope of this enterprise, see Kenneth J. Hodson, *The American Bar Association Standards for Criminal Justice: Their Development, Evolution and Future*, 59 DENV. L.J. 3 (1981); Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111 (2010).

175 NAT' ADVISORY COMM'N ON CRIM. JUST. STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME (1973) (overall report and recommendations); NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS AND GOALS, REPORT ON POLICE (1973); NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS AND GOALS, REPORT ON COURTS (1973); NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS AND GOALS, REPORT ON CORRECTIONS (1973); NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS AND GOALS, REPORT ON COMMUNITY CRIME PREVENTION (1973). As is apparent from the titles, this was a far-reaching, comprehensive effort.

176 ISIDORE SILVER, NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME ii–xv (1975).

177 Daniel L. Skoler, *Standards for Criminal Justice Structures and Organization: The Impact of the National Advisory Commission*, 2 CRIM. JUST. REV. 1 (1977).

178 *See generally* ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR (1988); ELIOT FREIDSON, PROFESSIONALISM REBORN:

discussed above were directed to a sense of professionalism as well as to constitutional concerns. Efforts to professionalize the police helped root out some of the worst forms of corruption and led to command and control structure, which was beneficial in some ways but also undermined preventive problem-solving approaches to policing.[179] The push to eliminate the fee system to finance the courts was largely successful and had salutary results,[180] though there has been considerable backsliding in recent years.[181] Campaigns to get rid of elected judges have failed, though the worst abuses of patronage and rank bias have been abated, at least in most places.[182] Jails and prisons have been dragged out of the feudal or antebellum patterns that were common into the 1970s by the federal courts,[183] but the treatment and therapeutic staff that have been added remain on the periphery in terms of policy making and budget. Little has been done to counter the propensity of county-based officials to ship offenders off to state prisons to decrease county expenses.[184]

Professionalism is generally an overrated form of self-regulation and ill-suited to foster coordination and cooperation in a fragmented

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THEORY, PROPHECY AND POLICY (1994); MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977). With respect to the role of professionalism in the legal profession, see ROBERT FELDMAN, PROFESSIONALISM AND VALUES IN LAW PRACTICE (2021).

179 *See* HERMAN GOLDSTEIN, PROBLEM-ORIENTED POLICING (1990); LAWRENCE W. SHERMAN, POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS (1992); ROBERT E. WORDEN & SARAH J. MCLEAN, MIRAGE OF POLICE REFORM: PROCEDURAL JUSTICE AND POLICE LEGITIMACY (2017). Police reform can be fairly described as a perpetual issue, *see* SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM (1977) (documenting successive police reform efforts from the nineteenth century to 1940), and thus produces a sense of pointless repetition.

180 Ward v. Village of Monroeville, 409 U.S. 57 (1972) (due process clause is violated when fines for traffic offenses that a village judge adjudicates provide a significant portion of the village's revenue). *See* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 51–79 (2013).

181 *See, e.g.*, Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161, 209 (2017); MATTHEW MENENDEZ ET AL., BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES (2019). *See also supra* note 95 (citing sources on prevalence of court fees).

182 *See* Franklin, *supra* note 103; Geyh, *supra* note 103; Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397 (2003). In fact, the Supreme Court made matters worse with its decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (First Amendment forbids state from limiting issues on which candidates for judicial office campaign).

183 *See supra* pp. 277–78.

184 PFAFF, *supra* note 26, at 142–43. Pfaff refers to this as the moral hazard problem.

system.[185] One example of its intrinsic limitations involves the police. It is certainly desirable to demand that recruits have more credentials, that supervision becomes more extensive, and that corruption is eliminated. These efforts, however, do not effectively combat underlying problems such as endemic racism or an adversarial stance toward the community.[186] At least one version of professionalism encourages a facially neutral and emotionally distant relationship with citizens, as opposed to racial awareness training, community engagement, and the inclusion of civilian representatives into decision-making settings.[187]

A second example of professionalization is the United States Sentencing Commission, an independent agency within the judicial branch of the federal government.[188] It was established in the wake of attacks on indeterminate sentencing,[189] concerns about lawlessness in

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185 *See* SARFATTI LARSON, *supra* note 178 (failure of professions to engage in effective self-regulation); Richard L. Abel, *Lawyer Self-Regulation and the Public Interest: A Reflection*, 20 LEGAL ETHICS 115 (2017) (same).

186 *See* ALEXANDER, *supra* note 26, at 97–139; Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 115 (2007); Renée McDonald Hutchins, *Racial Profiling: The Law, the Policy, and the Practice*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 95 (Angela J. Davis ed., 2017); E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects*, 16 PSYCH. SCI. 180 (2005); L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961 (2015); Katherine Russell-Brown, *Making Implicit Bias Explicit: Black Men and the Police*, *in* POLICING THE BLACK MAN, *supra* at 135. Compstat is a program that purports to displace implicit attitudes with rational, evidence-based decisions. *See infra* note 200. But the cover illustration of the U.S. Department of Justice's Bureau of Justice Assistance publication describing the program, see *id.*, shows what appears to be a Compstat meeting of about twenty-five people and nearly all the participants are white, and in fact white males.

187 One era's reform often becomes the next era's problem. Quasi-military command and control police departments were thought to be the solution to police corruption and abuse in the 1920s, and vigorously advanced by August Vollmer, one of America's leading police reformers at the time. *See* AUGUST VOLLMER, THE POLICE AND MODERN SOCIETY (1936); WILLARD M. OLIVER, AUGUST VOLLMER: THE FATHER OF AMERICAN POLICING (2017). His success in reforming the police led to an invitation to found and then direct UC Berkeley's School of Criminology, which then produced a series of graduates who distinguished themselves in this form of police professionalism. *See* Julian Go, *The Imperial Origins of American Policing: Militarization and Imperial Feedback in the Early 20th Century*, 125 AM. J. SOCIO. 1193 (2020). The problems with this approach have now become apparent.

188 Created by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, 98 Stat. 2017 (codified in scattered sections of 18 U.S.C.).

189 *See, e.g.*, AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971).

sentencing,[190] and experiments that showed judges giving widely varying sentences to the same offender for the same offense.[191] The Commission, as originally created, had all the hallmarks of professionalism: a clear mission, highly credentialed leadership, a large and competent staff, and generous resources.[192] Within a year or two, it had developed a grid that took into account both the seriousness of offense and the prior record of the offender.[193] What it did not take into account was that its grid would have the effect of increasing the lengths of sentences and would empower prosecutors to drive harder plea bargains.[194] Here again, professionalization of one component of the criminal justice system unexpectedly elicited barbarity in others as a result of a culture whose equilibrium has been achieved through ad hoc or traditionalist responses.[195]

But the problem with professionalization runs still deeper. As a general strategy, it encourages each group within the criminal justice system to elaborate and intensify its own particular practices, without coordinating or creating linkages with other groups. In fact, it might

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190 *See, e.g.*, Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CINCINNATI L. REV. 1 (1972).

191 ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, FED. JUD. CTR., THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT (1974).

192 *See* Paula J. Desio, *Introduction to Organizational Sentencing and the U.S. Sentencing Commission*, 39 WAKE FOREST L. REV. 559 (2004); Andrew von Hirsch, *The Sentencing Commission's Functions*, *in* ANDREW VON HIRSCH ET AL., THE SENTENCING COMMISSION AND ITS GUIDELINES 3 (1987); Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167 (2017).

193 *See* Andrew von Hirsch, *Numerical Grids or Guiding Principles?*, *in* THE SENTENCING COMMISSION AND ITS GUIDELINES, *supra* note 192, at 47; Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557 (2003).

194 *See* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 926 (1991); Richard S. Frase, *Forty Years of American Sentencing Guidelines: What Have We Learned?*, *in* AMERICAN SENTENCING—WHAT HAPPENS AND WHY? 79 (Michael Tonry ed., 2019); Michael Tonry, *The Failure of the U.S. Sentencing Commission's Guidelines*, 39 CRIME & DELINQUENCY 131, 146–48 (1993).

195 Perhaps it is too charitable to the Commission to describe it as unable to see these consequences. Other provisions of the statute that created the Commission, see *supra* note 188, increased penalties for growing, possessing, and selling marijuana; abolished parole for federal prisoners; and enhanced penalties for firearm possession in language so vague that it was struck down by the Supreme Court in *Johnson v. United States*, 576 U.S. 591 (2015). Given the mood that these other provisions of the statute reflected, it might have been entirely predictable that the Commission's efforts would provide an excuse for unreasonably harsher punishments.

be argued that creating a unified, coherent criminal justice system requires a decrease in professionalism, not in the sense of returning to the patronage-based, amateurish approach of the premodern era, but in the sense that we need new norms that relate to people's performance in the system as a whole. For example, the adversarial behavior that is associated with the professionalism of trial attorneys such as prosecutors needs to be modified so that they can consider issues external to the determination of guilt or innocence, such as the carrying capacity of the system or the availability of alternative treatments.[196] Such considerations should not be shunned or disparaged as a departure from a professional norm, but encouraged as effective administrative behavior within a comprehensively managed system.

C. Rationalization

A third reform effort that seeks to impose systemic control over the criminal process is rationalization. This is a complex term, of course. A widely used analysis, which comes from Weber, is that it can refer to either instrumental or normative action.[197] Instrumentally rational action is directed to effective achievement of an identified goal, which itself can be either instrumental or normative.[198] In the context of this discussion, rationality would consist of actions that resolve the previously discussed conflict between the deterrent goal of criminal

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[196] The prosecutor's knowledge of available resources is one of the principal reasons given for prosecutorial discretion. *See* United States v. Lovasco, 431 U.S. 783 (1977) (declining to exercise judicial oversight on prosecutorial discretion because it would impose an impractical administrative burden); Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1354 (2008); Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369 (2010); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1664–66 (2010). But the political and adversarial pressures on prosecutors often leads to the opposite result. Prosecutors may be attuned to the limits on their own resources, but their other motivations lead them to ignore the resource limitations in the subsequent stages of the criminal process, such as trials, corrections, and probation services. *See id.* at 1666–69; BUTLER, *supra* note 112, at 114–20; PFAFF, *supra* note 26, at 127–60; Gordon & Huber, *supra* note 101.

[197] For present purposes, the term "action" can be used in its ordinary language sense. For more extended discussions of this concept in the social science context, *see* HABERMAS, *supra* note 50, at 84–101; WEBER, *supra* note 11, at 22–24.

[198] WEBER, *supra* note 11, at 24–26. For an extended discussion, see HABERMAS, *supra* note 50, at 143–271 (analysis of Weber's theory of rationality, and application of that theory to provide the basis of the conceptual integration of society fractured by modernity).

law and the current practices that are so heavily influenced by premodern attitudes and render criminal law disproportionate, overly punitive, and coercive.

One effort to rationalize criminal law in this sense is based on concepts developed in operations research, insurance, and risk management, often through the use of computer programs.[199] With respect to policing, an example is the deployment of officers on the basis of a formula that identifies high-crime areas and predicts the preventative effect of assigning police officers to those areas, rather than basing their assignments on intuition, opportunities for handing out traffic tickets, or other considerations.[200] More generally, the concept of evidence-based policing that has become prominent in recent decades can be seen as an effort to rationalize police practices.[201] With respect to jails, Congress passed the 1984 Bail Reform Act,[202] which included concern for the risk of crime in addition to the risk of flight when setting conditions of pretrial release. Since then, virtually every state has embraced the concept,[203] again using computer programs and "big data" bases as the means of prediction.[204] For judges, algorithms have been developed that use

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199 For a general explication of this approach, see Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992); Malcolm M. Feeley, *Actuarial Justice and the Modern State*, *in* PUNISHMENT, PLACES AND PERPETRATORS: DEVELOPMENTS IN CRIMINOLOGY AND CRIMINAL JUSTICE RESEARCH 62 (Gerben Bruinsma et al. eds., 2011).

200 *See* BUREAU OF JUST. ASSISTANCE, COMPSTAT: ITS ORIGINS, EVOLUTION, AND FUTURE IN LAW ENFORCEMENT AGENCIES (2013). Compstat is a performance management system developed by the New York City Police Department that is focused on information sharing. According to the publication, "[t]he most widely recognized element of Compstat is its regularly occurring meetings where department executives and officers discuss and analyze crime problems and the strategies used to address those problems." *Id.* at 2. *See* FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL 173–95 (2012).

201 *See generally* EVIDENCE BASED POLICING: AN INTRODUCTION (Renée J. Mitchell & Laura Huey eds., 2019); EVIDENCE-BASED CRIME PREVENTION (Lawrence W. Sherman et al. eds., 2002); Lawrence W. Sherman, *The Rise of Evidence-Based Policing: Targeting, Testing, and Tracking*, 42 CRIME & JUST. 377 (2013).

202 Bail Reform Act of 1984 18 U.S.C. §§ 3141–3156. For a summary of the Act and an analysis of its provisions, *see* FED. JUD. CTR., THE BAIL REFORM ACT OF 1984 (2nd ed. 1993).

203 *See* Koepke & Robinson, *supra* note 94, at 1740–42. In *United States v. Salerno*, 481 U.S. 739 (1987), the Supreme Court upheld the preventive detention provision in the 1984 Bail Act, and by extension, equivalent state provisions.

204 *See* ANDREW GUTHRIE FERGUSON, THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT (2017); Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1112–14 (2017);

empirical data to predict the likelihood of reoffending, and these can be used to replace guesswork or prejudice in sentencing determinations.[205] The standards of the American Correctional Association (ACA), a private nonprofit trade organization founded some 150 years ago, can be regarded as an ongoing effort to rationalize prisons.[206] They consistently oppose vestiges of the medieval dungeon and the American slave plantation such as corporal punishment, food deprivation, and the use of prisoners as guards. They favor regularity, fairness, education, vocational training, and other features directed toward turning the inmates into law abiding citizens. To a significant extent, the extensive prison reform cases of the 1960s, 70s and 80s represented an effort by federal judges to impose the ACA standards on southern prisons that were still being run as slave plantations.[207]

These efforts achieved some successes. Franklin Zimring argues that New York's computerized system for assigning police is responsible for the dramatic decline in its crime rate compared to other large cities.[208] The egregious abuses of the southern prison systems have been curbed, and their premodern savagery replaced by practices largely similar to those in other regions of the nation.[209] The successes, however, are counterbalanced by troublesome failures. The police continue their racist and excessively violent behavior when they reach their computer-assigned destination. Sentencing algorithms have often failed to predict recidivism accurately but succeeded in preserving racial bias.[210] The abuses derived from the premodern modes of incarceration have been eliminated, only to be replaced by modern ones, most notably the horrific overcrowding that results from

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Elizabeth E. Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 WASH. L. REV. 35 (2014).

205 For a comprehensive analysis, see CHRISTOPHER SLOBOGIN, JUST ALGORITHMS: USING SCIENCE TO REDUCE INCARCERATION AND INFORM A JURISPRUDENCE OF RISK (2021).

206 JUDICIAL POLICY MAKING, *supra* note 27, at 162–63, 369–74.

207 *Id.* at 103–05, 162–66, 370–72.

208 ZIMRING, *supra* note 200, at 103–49.

209 JUDICIAL POLICY MAKING, *supra* note 27.

210 *See* KATHERINE B. FORREST, WHEN MACHINES CAN BE JUDGE, JURY, AND EXECUTIONER: JUSTICE IN THE AGE OF ARTIFICIAL INTELLIGENCE (2021); Jed. S. Rakoff, *Sentenced by Algorithm*, N.Y. REV., June 10, 2021 (reviewing Forrest, *supra*). This is not to suggest, of course, that algorithms are the only, or even the most serious, source of bias. *See* Nick Petersen & Marisa Omori, *Is the Process the Only Punishment?: Racial–Ethnic Disparities in Lower-Level Courts*, 42 L. & POL'Y 56 (2020).

mass incarceration, with the vocational and recreational facilities courts demanded in the prison reform cases now converted into makeshift dormitories.

There are, undoubtedly, many reasons for this spotty record on what should be an effective approach to criminal justice reform, but a main one seems to be a lack of monitoring and supervision. An institution that decides on a particular instrumentality will often try to justify that approach even when it fails to achieve its intended result. Thus, what began as an attempt to rationalize its operations becomes an irrational, politically motivated policy of avoiding criticism or disruption for its failure. Failure itself is not a sign of irrationality. Crime prevention is a challenging task, and we are far from having all the answers that we need. What is truly irrational is to perpetuate an ineffective approach, rather than admitting failure and trying something different. The remedy is a supervisory structure with the authority to insist on real rationality, that is, instrumental strategies that actually work.

A promising start in this direction came from another rationalization effort, the Law Enforcement Assistance Administration (LEAA) created by Congress in 1968.[211] It established State Planning Agencies (SPAs), which in turn could improve coordination and cooperation by offering grants to state and local criminal justice agencies. Had the federal effort been substantial enough, perhaps the SPAs might have evolved into true ministries of justice, which either administered the entire criminal justice system in the state or at least guided and coordinated it by awarding (or denying) special funding.[212] However, funding remained limited and the SPAs quickly came to be dominated by existing criminal justice agencies, which did not want to be told how to do business and only sought their share of the pie.[213] As the federal War on Poverty morphed into the War on Crime, an increasingly conservative Congress withdrew funding from this potentially transformative agency and in 1982 abolished the agency itself by eliminating its funding from the federal budget.[214] In

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211 Created by the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90–351, 82 Stat. 197 (codified at 34 U.S. § 10101 et seq.).

212 *See* MALCOLM M. FEELEY & AUSTIN D. SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, 1968-1978 (1980).

213 *See* Milton G. Rector & Joan Wolfle, *The Law Enforcement Assistance Administration in Perspective*, 5 COLUM. HUM. RTS. L. REV. 55, 58–59 (1973).

214 *See Records of the Law Enforcement Assistance Administration [LEAA]*, NAT'L ARCHIVES (Aug. 15, 2016), https://www.archives.gov/research/guide-fed-records/groups

some jurisdictions, the residue of the LEAA-fostered planning agencies continue to function as "criminal justice coordinating councils," but they serve largely as reminders of how fragmented and incoherent the criminal justice system is.[215] They do, however, suggest a path forward, which we will discuss in the following section.

IV
WHERE WE SHOULD GO

As mentioned above, the idea of reconceiving criminal justice as an administrative program was proposed by Frank Remington more than half a century ago. Since then, several scholars, notably Rachel Barkow and Gerard Lynch, have written about criminal law as regulation,"[216] and "our administrative system of criminal justice."[217] Despite these insightful discussions, we believe that the idea requires further development. The "administrative system" that Judge Lynch writes about is basically an organizational analysis of the U.S. Attorney's Office in the Southern District of New York, which has developed policies and priorities modeled after the Securities and Exchange Commission's (SEC) investigative division. This isomorphism is not surprising since most of the important work of prosecutors in the Southern District deals with the same issues and often the same cases that the SEC does. This office is the most distinctive prosecutor's office in the country, and we are not sure it serves as much of a model for "our criminal justice system." Professor Barkow advances a number of recommendations that would be highly beneficial; she urges judges to reassert themselves in order to counter the dominance of prosecutors, admonishes sentencing commissions to be more aggressive in addressing racial disparities in

/423.html#423.1 [https://perma.cc/J6DF-2F84]. The LEAA was replaced, within the Department of Justice, by the Office of Justice Assistance, Research, and Statistics, which became the Office of Justice Programs.

215 One partial exception is the Criminal Justice Agency in New York City. With the backing of the mayor, it has spoken authoritatively about some of the crises that have plagued the city's criminal courts, and at times has made a difference. *See* STEVEN BELENKO, PRETRIAL SERVICES IN CRIMINAL COURT: AN EVALUATION OF THE NEW YORK CITY CRIMINAL JUSTICE AGENCY (1980). One is hard pressed to find another such agency in the United States.

216 *See* Barkow, *Criminal Law as Regulation*, *supra* note 30; *Administering Crime*, *supra* note 30. *See also* CHIAO, *supra* note 30; Kahan, *supra* note 30; Richman, *supra* note 30; Slobogin, *supra* note 30; Wright, *supra* note 30.

217 *See* Lynch, *supra* note 30.

sentences, criticizes funders for not providing public defenders with enough resources, and asks the public to be more deferential to the expertise of criminal justice professionals.[218] But these discussions generally fit into the category of rationalization described above; they move the system in the right direction, but do not address the pathological qualities that hyper-fragmentation has institutionalized, nor do they envision the structural means for imposing bureaucratic control over currently fragmented and autonomous institutions. In effect, both Lynch and Barkow apply administrative principles to units within the system as presently structured, rather than applying administrative and organization theory to restructure the entire system as an administrative agency.

John Braithwaite provides a more thorough account of an administrative approach to criminal justice.[219] Conceptually, it is coherent,[220] but in practice it is in fact an argument for only one possible form of criminal justice as administration. His adaptation of the responsive regulation model[221] to the criminal justice system is largely designed to implement a restorative justice approach. As developed, it too does not offer an institutionally focused analysis. It presents the substance of a particular form of regulatory justice without describing the shell into which it fits. The structural proposal we advance certainly accommodates, and potentially encourages, this rather controversial reform,[222] but does not depend on it. Furthermore, our concern is with developing the shell or structure into which particular substantive forms of regulatory criminal justice can be inserted. Substance is important, but without an effective and integrated structure for production and delivery, it can easily be abused and distorted beyond recognition.

A. Creating an Agency

What we propose is simply that criminal justice be treated as another form of government regulation. It should no longer be regarded as a

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218 BARKOW, *supra* note 26, at 139–201.

219 Braithwaite, *supra* note 49.

220 *See* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989); John Braithwaite & Heather Strang, *Introduction: Restorative Justice and Civil Society*, *in* RESTORATIVE JUSTICE AND CIVIL SOCIETY 1 (Heather Strang & John Braithwaite eds., 2001); Braithwaite, *supra* note 49; John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1 (1999).

221 AYRES & BRAITHWAITE, *supra* note 56.

222 *See infra* pp. 346–48.

central or defining function of a modern state, but rather as another service that an administrative government provides to the populace.[223] It thus takes its place alongside domestic functions such as public health, education, housing environmental protection, consumer protection, and the regulation of financial markets. These other functions are almost always carried out by a single, hierarchical agency with comprehensive responsibility and at least an expectation that it will develop a unified strategy with internal coordination. The same should be the case for crime control. Conceding the complexities of federalism and the limits on developing the national approach used in most other advanced nations, each American state needs a comprehensive administrative agency to manage criminal justice and justify its designation as a system. The agency's organizing mission should be to prevent crime, rather than mixing this goal with older ones such as imposing moral judgments or expressing public anger.

The structure of an administrative agency is familiar. Its defining features, according to Weber's classic formulation, are possessing a specified jurisdiction; employing a full-time staff who are chosen based on credentials or experience; having a hierarchical organizational structure; and maintaining permanent files or records.[224] In fact, the familiarity of this institution serves as a separate argument for its use in criminal justice—it is our society's standard response to problems of governance, and thus constitutes a structure that has been tested by experience and that modern people understand and know how to operate.

More specifically, a criminal justice agency could be either an executive department with a single politically appointed and politically accountable chief administrator, or an independent agency with a politically appointed board or collegium whose members serve for fixed terms and are removable only for cause. The agency should have comprehensive authority over all stages of the criminal law process, including functions now assigned to police, prosecutors, public defenders, judges, correctional officials, parole officers, and

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223 *See* DAVID GARLAND, PUNISHMENT AND WELFARE (1985) (model of criminal justice in late nineteenth and early twentieth century England was nested in and part of the more general architecture of the then-modern welfare state). That approach failed in general because it was not sufficiently developed and institutionalized, and its criminal justice component failed to an even greater degree because it was not supported by the type of structural arrangements this Article deems critical for success.

224 WEBER, *supra* note 11, at 215–23, 958–63. *See* BENDIX, *supra* note 40, at 423–30.

related government employees. All its functions would be carried out by groups of staff whose strategies are planned, whose actions are coordinated, and whose behaviors are supervised. The result would be a large agency relative to each state, but large in absolute terms only for the most populous states, and in no state as large as some of the federal agencies that are centrally administered, such as the Departments of Veterans Affairs or Homeland Security, to say nothing of the Department of Defense.[225]

Because the agency would have power to deprive citizens of liberty as well as property, the laws that it administers—that is, the criminal laws—should be precisely prescribed by the legislature, as should the maximum liberty deprivation, that is, the maximum sentence length. But the agency should possess broad rulemaking authority in other areas. It should be able to prescribe hiring criteria for all employees, protocols for all investigatory and complaint response functions in the community, strategies for dealing with all persons detained and accused, both before and after a determination of guilt, and resource allocation at all levels of the system. The right to go to trial and compel the government to prove one's guilt according to the criminal law standard of proof would remain the same, of course. It would probably be best to leave the judges who preside over these trials in an organizationally separate structure, but this would be largely a matter of optics.[226] There is no reason why they could not function as

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225 As of 2020, California had the largest number of sworn police officers, about 78,000. *See* Ben Loudermilk, *Which State Has the Most Police Officers?*, WORLD ATLAS (Apr. 25, 2017), https://www.worldatlas.com/articles/u-s-states-with-the-most-police-and-law-enforcement-personnel.htm [https://perma.cc/9ZD6-M6YH]. It has the second most corrections officials, about 38,000 (Texas had 47,000). *See Occupational Employment and Wages, May 2020*, U.S. BUREAU OF LAB. STAT. (Mar. 31, 2020), https://www.bls.gov/oes/current/oes333012.htm [https://perma.cc/KG7E-WTVM]. For a middle-sized state, such as Virginia, these figures (from the same sources) are 19,000 and 14,000. With all other employees of the criminal justice system, even California's agency would be smaller than the Department of Veterans Affairs (383,000) or Homeland Security (202,000). *See List of Federal Departments*, FEDERALPAY.ORG, https://www.federalpay.org/departments [https://perma.cc/J4LR-HQEH]. Virginia's agency would be smaller than Justice (115,000), Treasury (87,000), Health and Human Services (85,000), or Agriculture (84,000). In all states, the number of employees in a criminal justice agency would be smaller than the number of employees in the state's K–12 schools. California has 354,000, Virginia 123,000. *See* NEA RESEARCH, RANKINGS OF THE STATES 2019 AND ESTIMATES OF SCHOOL STATISTICS 2020, at 22 (2020), https://www.nea.org/sites/default/files/2020-07/2020%20Rankings%20and%20Estimates%20Report%20FINAL_0.pdf [https://perma.cc/VND3-NC9F]. Of course, education is as localized and thus as fragmented as police in most states.

226 Juries are of course set up to be independent, since they are composed of private citizens, and they are in fact guaranteed in the Constitution for certain types of cases. U.S.

specialized criminal law adjudicators within the overarching framework of the agency and retain the independence that is essential for due process requirements.[227]

Beyond its familiarity, an administrative criminal law agency would include a number of features whose importance for addressing the issue of crime is readily demonstrated. They can be divided into the areas of planning, resource management, staffing, and supervision. To begin with planning, an administrative agency would be able assess the capacities of each component of the system, preventing policies developed by one component from overwhelming the capacities of another. This would alleviate the pile-up problem in the

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CONST., amend. VII ("Suits at common law, where the value in controversy shall exceed twenty dollars"). But juries are not essential features of a fair adjudication. The right to a jury can be waived by the private parties, and juries are not required in statutory cases, in which case the decision maker is a professional judge or panel of judges. What is essential is the independence of the decision maker, secured for federal judges by the Article III protections. *See generally* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012) (Populist movement for the election of state court judges, and general attitudes toward judicial independence); G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES (2012) (election of state judges and tension between independence and accountability); Edward L. Rubin, *Independence as a Governance Mechanism*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 56, *supra* note 103 (general discussion of issue from various perspectives). Whether federal judges are truly independent of politics is a matter of extensive debate, of course. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999). The question here is whether judges within an administrative hierarchy would achieve the level of independence that we as a society find acceptable, which is that of an Article III judge, not whether they can achieve some abstract or theoretical ideal of independence.

227 Placing judges within an administrative hierarchy would present no problems for their independence. We have extensive experience with Administrative Law Judges (ALJs), who must preside in formal adjudications under 5 U.S.C. §§ 554, 556 and 557. Numbering nearly 2,000, they are nearly all organizationally located within a single agency, and decide issues limited to the agency's jurisdiction (the largest number being in the Social Security Administration). They do not have life tenure, but they are appointed for long terms, can be dismissed only for cause, and have salary protection. These features have proven sufficient to ensure their independence, and the constitutional validity of decisions by ALJs is well established. *See* AM. BAR ASS'N, A GUIDE TO FEDERAL AGENCY ADJUDICATION (Michael Asimow ed., 2003) (American Bar Association); Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109 (1981). *See also* Lucia v. Sec. & Exch. Comm'n, 138 S. Ct. 2044 (2018) (holding that ALJs are officers of the United States, rather than lower-level employees). There is thus no reason to think that the independence of an Article III judge, or state court judge, whether appointed under similar rules or separately elected and provided similar protections, would be compromised if the judge was organizationally located within an administrative agency.

prisons that was discussed above.[228] Diversionary programs, such as supervised release, treatment programs, and house arrest with electronic monitoring can be justified on their own terms, but in a fragmented system they often lead to increased restrictions on offenders who would otherwise be released on probation or parole. Connecting them with correctional facilities would encourage their use as genuine alternatives. Prosecutors and judges would be continuously informed about the capacity of prisons to deal effectively with their inmates, and thus understand that a diversion program would be both more effective and more humane than sending offenders to prison, where they would be sleeping on the floor of a converted gym, crowded into confined spaces with more serious offenders, and denied any vocational, educational, or treatment services.[229]

More generally, coordinated planning would allow many of the existing boundaries between institutions to be effaced and coherent approaches to particular types of offenders developed in their stead. Rather than moving an offender from one institution to another, arrest could be followed by a team approach that developed a comprehensive plan that served the purposes of special deterrence, incapacitation rehabilitation, and possibly others as well, such as compensation of the victim. An arrestee could be offered a coordinated program of addiction treatment and house arrest immediately after detention by the police, and then be monitored by the staff who ran this program. In other words, instead of processing all offenders through the same set of separate institutions, an individualized strategy—deploying the most appropriate institutional responses—could be designed at the outset. This would certainly save money and might well save the offender.[230]

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228 *See supra* notes 133–36.

229 These services have been demonstrated to be an effective means of preventing recidivism and are certainly more effective than harsh treatment or sensory deprivation. *See, e.g.*, Jeffrey A. Bouffard et al., *Effectiveness of Vocational Education and Employment Programs for Adult Offenders: A Methodology-Based Analysis of the Literature*, 31 J. OFFENDER REHAB. 1 (2000) (evidence suggests programs are effective, but more careful evaluation is required); Brady Duke, *A Meta-Analysis Comparing Educational Attainment Prior to Incarceration and Recidivism Rates in Relation to Correctional Education*, 69 J. CORR. EDUC. 44 (2018) (educational and vocational training particularly effective for African American males with only high school education); James S. Vacca, *Educated Prisoners Are Less Likely to Return to Prison*, 55 J. CORR. EDUC. 297 (2004).

230 *See* David Weisburd & Anthony A. Braga, *Advocate: Hot Spots Policing as a Model for Police Innovation*, *in* POLICE INNOVATION: CONTRASTING PERSPECTIVES 225, 225 (David Weisburd & Anthony Braga eds., 2006). "Looking at the major police

Coordinated planning would also enable the criminal justice system to benefit from information. Enormous amounts of research have been carried out on the causes and patterns of criminal activity.[231] Due to the present balkanization of institutions, however, there is no decision-making body that is positioned to make use of this information. The police can use some of it, but only for purposes of detection, not disposition. Police departments, moreover, are the most fractionated component of the criminal justice system. It seems unlikely that these institutions, generally ranging from moderate size to truly diminutive,[232] have the capacity to absorb, analyze, and apply the massive amount of data made available by academic and governmental research, to say nothing of carrying out more area-specific research on their own.[233]

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innovations of the last few decades, what is most striking from a criminologist's perspective is the extent to which new programs and practices have been developed without reference to either criminological theory or research evidence." *Id.* It is indeed striking, but not at all surprising, given the small size, limited training, and ineffective supervision of most American police forces.

231 *See generally* FRANK E. HAGAN & LEAH E. DAIGLE, INTRODUCTION TO CRIMINOLOGY (10th ed. 2020); FRANK SHMALLEGER, CRIMINOLOGY TODAY: AN INTEGRATIVE INTRODUCTION (9th ed. 2018); David P. Farrington, *Longitudinal and Experimental Research in Criminology*, 42 CRIME & JUST. 453 (2013).

232 Only one police department in the United States, New York City's, with 36,000 sworn officers, would count as reasonably large by administrative agency standards. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 14 (2011) (listing fifty largest law enforcement agencies in the United States.). Three others are in the 10,000-person range (Chicago, Los Angeles, and Los Angeles County). Only forty-five local police departments, 0.4% of the total, have more than 1,000 sworn officers. *See* BUREAU OF JUST. STAT., *supra* note 36, at 3. As previously stated, *supra* note 77, nearly half of the local police departments in the United States have fewer than ten sworn officers, which probably precludes them from having the basic features that would qualify them as an agency at all. *Id.*

233 *E.g.*, James J. Willis et al., *Compstat and Bureaucracy: A Case of Study of Challenges and Opportunities for Change*, 21 JUST. Q. 463 (2004) (difficulty of a small police department making use of Compstat). *See* BUREAU OF JUST. ASSISTANCE, *supra* note 200. It is significant that Compstat, as a systematic effort by police to make use of relevant data, was initiated by the New York City Police Department. *See id.* at 2–6. As note 232, *supra*, documents, the New York City force is by far the largest in the nation; in fact, it has more officers than the total number in every American state other than New York itself, California, Texas, or Florida. Erin Duffin, *Number of Full-Time Equivalent State and Local Police Officers in the United States in 2020, by State*, STATISTA (July 19, 2021), https://www.statista.com/statistics/750805/number-of-state-and-local-police-in-the-us-by-state/ [https://perma.cc/F63C-M29P]. The point is that strategies for generating relevant information, and the ability to use such information, are likely to be found in large administrative agencies. It is hard to imagine the modal police department of fewer than 50 officers doing so.

Second, and closely related, an administrative agency would be able to manage its resources much more effectively than the currently fragmented system. In place of separate institutions seeking their own appropriations from the legislature, naturally attempting to maximize these appropriations, and then obtaining nontransferable funds, resources would be granted to the criminal justice agency in its entirety. The agency would be in a much better position than the legislature to determine where expenses could be reduced or where additional funding would be most effective, assuming the legislature thinks in these instrumental terms at all. Incarceration, for example, is notoriously expensive. While many people favor compassionate release programs that would remove elderly individuals with high medical costs from prison, the actual rate of release has been little more than a trickle.[234] This is perhaps due to prison officials' fear of seeming overly lenient, or of the occasional sex crime committed by a released sexagenarian. The problem is that these counterproductive fears are not counteracted by any opposing motivation. If compassionate release of one elderly prisoner could be readily translated into funding for treating ten addicted teenage offenders, the pace of compassionate release might be considerably accelerated.

A third feature of an administrative agency is coordinated staffing. Of course, each area of criminal justice would be staffed by people with training and experience in the function that they were performing, but they would be treated as a body of hierarchically organized employees. The criminal justice system, as it exists at present, resembles a medieval city, with its separate groups of priests, deacons, monks, friars, magistrates, night watchmen, and members of the various guilds dressed in distinctive uniforms and celebrating their particularized identities. Large urban police departments currently have a range of staff, but continue to deploy armed, uniformed officers in many situations where they are unnecessary or counterproductive and could be replaced with other kinds of employees; in smaller departments, another product of the system's

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234 *See* John A. Beck, *Compassionate Release from New York State Prisons: Why Are So Few Getting Out?*, 27 J.L. MED. & ETHICS 216 (1999); William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850 (2009) (reluctance of the Bureau of Prisons to use authority to release older prisons for any reason other than medical treatment); Casey N. Ferri, *A Stuck Safety Valve: The Inadequacy of Compassionate Release for Elderly Inmates*, 43 STETSON L. REV. 197 (2013); Jason S. Ornduff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 ELDER L.J. 173 (1996) (pragmatic reasons supporting compassionate release).

institutional balkanization, an armed officer is often the only professional staff member.[235] Contested cases are resolved by a robed official sitting on a podium in a ceremonial setting, or by ad hoc procedures crafted to avoid the need for such formalities. Prisons and jails continue to employ uniformed officers who have weapons training. They usually do not carry firearms inside the prison these days, but prisons continue to rely on them for day-to-day management functions that do not require use of force.

Instead of these separate categories, an administrative agency could treat its employees as members of a unified staff that is assigned to perform the full range of functions that fall within the agency's jurisdiction. There would continue to be situations where a uniformed police officer, judge, or prison guard would be needed, but they would be regarded as specialized staff, to be deployed in extreme situations. They would not be the modal employee in any division of the agency. For many offenders, it might be preferable to assign a case worker at the beginning of the process and have that person deal with the entire process for that particular offender, from detention to disposition to punishment. Again, this does not mean that we would abandon criminal procedure protections or stop incarcerating truly dangerous offenders. The idea is that formal and traditional approaches would not be used by reflex or habit, but only when their particularized features could be justified.

Finally, it is difficult to find any area of governmental operations where supervision is as important as it is for criminal justice, nor any area where such supervision is so lacking. By its nature, maintaining order and preventing crime in a community must be carried out by government employees working by themselves, or in pairs. These relatively isolated persons are often confronted by a range of situations, from trivial to truly dangerous, that must be distinguished from each other and resolved on an immediate basis. The extreme balkanization of police departments means that many of the 12,000 institutions are too small to maintain any effective supervision of their "street-level bureaucrats."[236] Criminal trials are highly regulated and readily monitored, but all this procedure and ceremony can be regarded as a façade that conceals the reality of plea bargaining, where the prosecutor and defense attorney sit alone, with no

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235 *See supra* note 77.

236 LIPSKY, *supra* note 76.

observers, no recordings, and few governing rules.[237] Prisons are large, bureaucratically managed institutions; but the need to maintain some semblance of order in a setting designed to produce conflict, chaos, and corruption leads to individualized actions by the guards that reproduce the isolation and momentary challenges of police patrols in the community.

The two components of effective supervision that are so badly needed in the criminal justice system are training and monitoring. Administrative agencies do not always perform these functions well, of course, but they are the only structure where any level of effective performance is possible. An agency can design and implement training and retraining programs, relying on specialized staff who are specifically qualified to perform this function. It can devote resources to second-level officials whose expertise and full-time assignment is to monitor the performance of the operations-level employees. It can achieve economies of scale by training and monitoring across different components of the system. It can frame systematic responses to problems that pervade the system but manifest themselves in different ways, such as racism or class antagonism. It can involve external participants, such as community members and academics, in ways that are oriented to their potential contributions, rather than specific, institutionally embedded issues.

Perhaps most basically, a comprehensive agency can create an ethos where being trained and monitored are seen as an intrinsic feature of every employee's job performance, not unwelcome intrusions into their independent, insular operations. A specific example is Christopher Slobogin's argument that police actions should be subjected to the same constraints that apply to other governmental agencies.[238] When the police institute a "panvasive" search and seizure program, such as a residential or business inspection, an automobile checkpoint, or a drug testing program,[239] Professor Slobogin argues that they should be required to follow the

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237 *See* PFAFF, *supra* note 26, at 161–84 (independence of prosecutors from governmental hierarchy because they are separately elected officials); Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. 395 (2017) (supervision of prosecutors is particularly important in the United States because of the breadth of its criminal justice codes); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 725–50 (2001) (many professional rules are inapplicable to prosecutors, and those that are applicable tend not to be enforced).

238 Slobogin, *supra* note 30.

239 *Id.* at 98–109. Professor Slobogin's other examples are DNA sampling and surveillance programs.

same procedures of notice and comment, and the same standards prohibiting arbitrary and capricious decision making, that apply to agencies regulating air pollution, pesticide usage, securities sales, and other potentially harmful actions.[240] The reason this perfectly plausible proposal may sound jarring, or even needs to be argued for in the first place, is that the existing culture of American police forces and our general concept of policing is so resistant to the modes of supervision that apply to other governmental functions. Locating the police within an overarching administrative structure would counteract this divergent culture and concept.

B. Reducing Coercion

In recent years, the harshest criticisms of our criminal justice system have focused on its initial and its final stages. Following George Floyd's murder, there was widespread condemnation of police practices, often under the banner of "defund the police."[241] And for many years, there has been condemnation of prisons as essentially inhume institutions that should be abolished.[242] Extreme proposals of

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240 These standards are prescribed by the Administrative Procedure Act (APA). *See* 5 U.S.C. § 553 (prescribing notice and comment procedures for promulgating regulations with the force of law); 5 U.S.C. § 706 (prescribing judicial review to overturn agency action found to be "arbitrary, capricious, [and] an abuse of discretion"). They are, of course, federal standards and the panvasive searches under discussion are often carried out by municipal police forces. But, Professor Slobogin points out, "they are carrying out panvasive actions in service of state or federal criminal law rather than a purely local statute; under those circumstances they are functioning like an agency of those entities." Slobogin, *supra* note 30, at 135.

241 *See* Annie Lowrey, *Defund the Police*, ATLANTIC (June 5, 2020), https://www.theatlantic.com/ideas/archive/2020/06/defund-police/612682/ [https://perma.cc/5XQE-6PEV]; Rashawn Ray, *What Does 'Defund the Police' Mean and Does It Have Merit?*, BROOKINGS INST. (June 19, 2020), https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/ [https://perma.cc/9AHC-VXLR]; Lissandra Villa, *Why Protesters Want to Defund Police Departments*, TIME (June 7, 2020, 11:17 AM), https://time.com/5849495/black-lives-matter-defund-police-departments/ [https://perma.cc/YZ3K-U3YT].

242 *See* ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE (2005); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003) [hereinafter DAVIS, PRISONS]; JACQUES LESAGE DE LA HAYE, THE ABOLITION OF PRISON (Scott Branson trans., 2021); Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684 (2019); Dorothy E. Roberts, *The Supreme Court 2018 Term: Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575 (2019); Angel E. Sanchez, *In Spite of Prison*, 132

this sort have provided ammunition for proponents of our present system, or of even more bellicose approaches. Translated into the context of an administrative system, however, these proposals can be framed in ways that are eminently practical and that would, in fact, achieve the purpose of reducing crime far more effectively than the supposedly realistic strategies that traditionalists and retributivists favor.

A feature of administrative governance is that coercive force is the last alternative that a government agency deploys, not its first or most commonly used response. Coercive force is expensive for the agency in our system, in part because of the due process guarantee that reaches back to the Magna Carta and is enshrined in our Constitution.[243] Few if any administrative agencies have the resources to deploy coercive force against every violation of the laws and, in fact, this resource limitation is a leading rationale for granting agencies the equivalent of prosecutorial discretion in their implementation efforts.[244] In addition, the use of coercive force often generates resistance and resentment, and is thus counterproductive.[245]

At a deeper level, coercion generally forecloses the development of a collaborative relationship between an agency and those it regulates, one in which each party adjusts its behavior to produce more beneficial outcomes.[246] The initial inclination of regulatory statutes to rely on coercive force, so-called command and control, has been replaced in recent years with a panoply of more sophisticated and effective mechanisms, sometimes identified as New Public

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HARV. L. REV. 1650 (2019). An organization formed in 1997, Critical Resistance, has become a leading voice in the prison abolition movement. *See* Roberts, *supra*, at 5–8.

243 U.S. CONST., amends. XIV, V. This guarantee is commonly traced back to Magna Carta, ch. 39. *See generally* J.C. HOLT, MAGNA CARTA 9–14, 297–346 (1965).

244 *See* Charles J. Babbitt et al., *Discretion and the Criminalization of Environmental Law*, 15 DUKE ENV'T L. & POL'Y F. 1, 4; Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1330–33 (1999); Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31 (2017). *Cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Corp., 463 U.S. 29 (1983) (agency rescission of a promulgated regulation held to a higher standard of review than decision not to act, which is a matter of discretion).

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

246 In the context of policing, see Kimberly Belvedere et al., *Explaining Suspect Resistance in Police-Citizen Encounters*, 30 CRIM. JUST. REV. 30 (2005); Remi Boivin, *Correlates of Subject(ive) Resistance in Police Use-of-Force Situations*, 40 POLICING 719 (2017); Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307 (2009).

Governance.[247] Properly conducted, a regulatory regime can be regarded as a learning process for both the agency and the regulated parties, one in which they calibrate their actions to develop strategies that satisfy the needs of both parties in a cost-effective manner[248]—not out of some lion-lies-down-with-the-lamb idealism,[249] but out of their own self-interest. A standard case is where the agency trades regulatory indulgences for voluntary compliance.[250] In the Maine 200 program, for example,[251] the Occupational Safety and Health Administration (OSHA) identified the 200 employers in the state with the highest volume of worker injury claims and offered them the opportunity to develop their own safety plans in exchange for an exemption from regular inspections.[252]

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247 *See, e.g.*, AYRES & BRAITHWAITE, *supra* note 56; Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003); Daniel A. Farber, *Revitalizing Regulation*, 91 MICH. L. REV. 1278 (1993); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995); Charles F. Sabel &William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). For an overview, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89. MINN. L. REV. 342 (2004).

248 This insight is part of implementation theory and is associated with New Public Governance. On the specific aspect of implementation theory discussed here, see KIRK EMERSON & TINA NABATCHI, COLLABORATIVE GOVERNANCE REGIMES (2015); Chris Ansell & Allison Gash, *Collaborative Governance in Theory and Practice*, 18 J. PUB. ADMIN. RES. & THEORY 543 (2007); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Janet Newman et al., *Public Participation and Collaborative Governance*, 33 J. SOC. POL'Y 203 (2004); John T. Scholz, *Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness*, 85 AM. POL. SCI. REV. 115 (1991). *See also* CHRIS ARGYRIS & DONALD A. SCHON, ORGANIZATIONAL LEARNING II: THEORY, METHOD, AND PRACTICE (1995) (social learning approach to organizational decision-making).

249 *See Isaiah* 11:6–9.

250 One way to analyze this interaction is as a repeat prisoner's dilemma game. Viewed that way, the optimal strategy turns out to be Tit for Tat: cooperate (be "nice") as long as the other party cooperates, defect in response to a defection by the other party, then return to the cooperative stance. *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984) (confirming optimal results of Tit for Tat by computer-run simulations). For the application of this principle to regulatory enforcement, see Scholz, *supra* note 248; John T. Scholz, *Voluntary Compliance and Regulatory Enforcement*, 6 L. & POL'Y 385 (1984); John T. Scholz, *Cooperation, Deterrence, and the Ecology of Regulatory Enforcement*, 18 L. & SOC'Y REV. 179 (1984).

251 *Maine Top 200 Experimental Targeting Program*, HARV. KENNEDY SCH. (Jan. 1, 1995), http://www.innovations.harvard.edu/awards.html?id=3693 [https://perma.cc/GAY5-CLFS].

252 These firms were among the largest in Maine; although representing only 1% of Maine employers, they accounted for 30% of the employees and, significantly, 45% of the

The demand of the Black Lives Matter movement to defund the police can be understood and instantiated in terms of these administrative principles. It would draw upon the approach to staffing and preventative policing described above. From an administrative perspective, armed, uniformed officers with quasi-military training are a predictably bad way to maintain order in a community,[253] and providing actual military equipment to them only makes matters worse.[254] A preferable strategy, as Barry Friedman argues, is to disaggregate the police into the various functions that they perform and staff each function with appropriate personnel.[255] While this is a general approach applicable in many nations, it is essential if the United States is to overcome the racist antagonism inherent in the prevailing quasi-military design of police forces.[256] In its place would be a service-oriented administrative staff that community people would feel comfortable consulting or complaining to, who could defuse potentially threatening situations such as domestic violence or youth confrontations, who could obtain voluntary compliance with reasonable rules,[257] who could organize meetings with community leaders to craft long-term strategies, who could participate in restorative justice processes[258] or meet with prosecutors, judges or other staff authorized to propose dispositions, and who could follow a

documented workplace injuries. *See id.* Although never fully evaluated, the Maine 200 program seems to have been a notable success. Worker injuries at the 200 identified firms decreased markedly, and OSHA was able to devote its resources to pursuing claims at other firms, more than quadrupling the number of violations it detected on an annual basis.

253 David Weisburd & John E. Eck, *What Can Police Do to Reduce Crime, Disorder and Fear?*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 44 (2004) observe that the standard model of policing

> relies generally on a "one-size-fits-all" application of reactive strategies to suppress crime and continues to be the dominant form of police practices in the United States. The standard model is based on the assumption that generic strategies for crime reduction can be applied throughout a jurisdiction regardless of the level of crime, the nature of crime, or other variations.

254 *See* Delehanty et al., *supra* note 81 (transfer of military equipment to police leads to higher rate at which police kill civilians); Lawson, Jr., *supra* note 81 (same).

255 Friedman, *supra* note 84.

256 *See supra* note 82 (citing sources on police bias).

257 *See* JOHN D. MCCLUSKEY, POLICE REQUESTS FOR COMPLIANCE: COERCIVE AND PROCEDURALLY JUST TACTICS (2003); Stephen D. Mastrofski et al., *Compliance on Demand: The Public's Response to Specific Police Requests*, 33 J. RES. CRIME & DELINQ. 269 (1996); Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84 (2004).

258 *See infra* pp. 330–31 (defining restorative justice and citing sources).

convicted person through some alternative punishment process and assist his or her reentry into society.[259]

Beyond this revised and expanded set of roles, police reconceived as a community-service force would be able to include community members in goal-setting and general decision-making. As Jocelyn Simonson has argued, this sort of power sharing empowers previously disempowered populations and embodies democratic values.[260] While administrative agencies can certainly engage in practices that oppress private parties or ignore their views,[261] real administrative expertise in a service area, whether it involves regulation or benefit provision, depends on an understanding of the relevant population.[262] An overarching administrative structure would be more likely to demand and encourage such expertise than the ingrown, self-protective, quasi-military ethos of current police forces. Armed, uniformed officers would still be needed as a last resort in highly dangerous situations, and might possibly be acceptable or desired in wealthy suburbs. But clearly, their numbers would be significantly reduced (by attrition if no other means were viable) and in that sense the "police" would be partially defunded. Contrary to the alarmist, incendiary rhetoric of Donald Trump and his allies, such an administrative program is not an invitation to anarchy, but an administrative approach that would

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259 *See* Lum & Nagin, *supra* note 142.

260 Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778 (2021). *See* K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679 (2020) (role of social movements in advancing power sharing between community and police); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609 (2017) (role of community activism in advancing power sharing). For a similar approach in a different social context, see Martin Innes, *Reinventing the Office of Constable: Progressive Policing in an Age of Austerity*, *in* THE FUTURE OF POLICING, *supra* note 84, at 64 (describing the South Wales experiment which used community engagement to define policing practices that responded to community priorities, rather than relying on policies established by the police department).

261 *See* THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 105–13 (2nd ed. 1979) (exercise of arbitrary authority); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989) (mismatched incentives and institutional pathologies); Edward L. Rubin, *Bureaucratic Oppression: Its Causes and Cures*, 90 WASH. U. L. REV. 291 (2012) (status differences, stranger relations, institutional pathologies and mismatched incentives).

262 *See* MICHAEL BARZELAY, BREAKING THROUGH BUREAUCRACY: A NEW VISION OF MANAGING IN GOVERNMENT 102–14 (1992); Rubin, *supra* note 261, at 332–40, 346–54; David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393 (2008).

simultaneously be more effective and more consistent with our democratic and human rights beliefs.

At the opposite end of the criminal justice system, prison serves as our default form of punishment for what we regard as serious offenses. Mass incarceration in the United States is such an obvious abuse that we tend to view nations that imprison people at one-fifth or one-tenth of our rate as enlightened.[263] Moreover, we view the prison itself as a modern institution, a humane alternative to the horrific tortures and mutilations that prevailed prior to its introduction at the beginning of the nineteenth century.[264] This was in fact the view of people at that time; the American penitentiaries that first established prison as the standard form of punishment were world famous, attracting visitors such as Alexis de Tocqueville from France and Charles Dickens from Britain.[265] But prison is neither modern in conception nor humane in its use, as Angela Davis points out in her book on prison abolition.[266] It is actually a lineal descendant of the jails that housed accused persons, debtors, vagrants, and other "undesirables" throughout the premodern era.[267]

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263 PEW CHARITABLE TR., *supra* note 25 (U.S. incarceration rate about twice that of Russia, four times that of Australia, five times that of Canada, and nearly ten times that of Germany).

264 *See, e.g.*, BENDER, *supra* note 20 (penitentiary as part of a cultural transformation that viewed people's lives as narratives that could be altered by circumstances, thus encouraging rehabilitation); FOUCAULT, *supra* note 18, at 104–31 (penitentiary as an alternative to public displays of brutal torture); ROTHMAN, *supra* note 20, at 79–108 (penitentiary as part of a general effort in the Early Republic to address social problems).

265 *See generally* ROTHMAN, *supra* note 20, at 81–88. For accounts by these visitors, see DICKENS, *supra* note 130; G. DE BEAUMONT & A. DE TOQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION TO FRANCE (Francis Lieber trans., 1833). Tocqueville, of course, went on to write a more general and famous book about the United States, TOCQUEVILLE, *supra* note 95, which barely addresses the issue of criminal justice other than the language in note 95.

266 DAVIS, PRISONS, *supra* note 242. She points out that prisons embed premodern attitudes, not only toward punishment but more generally regarding race, class and gender.

267 Another possible predecessor is the monastery. In both the Pennsylvania and New York models, prisoners were confined in a narrow cell, often with access to no book other than the Bible, and expected to commune with God and beg forgiveness for their sins. *See* ROTHMAN, *supra* note 20, at 81–104. While monasteries were not without their cruelties, it is worth noting that few of them were as restrictive as either the Pennsylvania or the New York penitentiaries, that entry into them was often (although not always) voluntary, that punishments for misbehavior were restrained, the most serious being expulsion, and that the residents, far from being condemned or scorned, were always regarded with respect, and sometimes with true reverence by society at large. *See* C.H. LAWRENCE, MEDIEVAL MONASTICISM: FORMS OF RELIGIOUS LIFE IN WESTERN EUROPE IN THE MIDDLE AGES 100–33 (1984).

The familiarity of prison at the present time, in moderate Europe as well as punitive America,[268] tends to obscure its irrationalities. In essence, prison is a place where young men are confined in chaotic institutions, denied sexual gratification at a time of their lives when their drives are at their maximum and their need to define their sexual identity most insistent, subjected to humiliating and oppressive treatment by hostile guards, forced to use violence for their own protection because those guards cannot control the other prisoners, and separated from their families and other support systems. None of this is part of the sentence—no law explicitly sentences an offender to sexual deprivation or the need to fight for survival—but it is an inevitable consequence of our modal form of serious punishment. Women inmates, whose numbers are rapidly increasing, are spared some of these harsher features of incarceration, but regularly subject to sexual abuse by prison staff.[269] We can hardly be surprised when people who have been deprived, mistreated, and brutalized in this manner return to crime upon their release.

An administrative approach to the offender would be an effort to find the proper disposition for his or her case, perhaps beginning immediately after arrest or arraignment. Our theory of criminal law demands individualization; a person can be convicted only after a specific determination that he or she has in fact committed the actions that comprise the elements of the offense. Our practice demands that the criminal justice system operates under resource constraints, and prison is an expensive disposition for the convicted person, with an

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[268] For a contrast between the two, see WHITMAN, *supra* note 144 (American approach to punishment strives to abase the offender and imposes unnecessarily harsh conditions as a result).

[269] *See* Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993) (due to history of sexual abuse in prison, physical searches of women's bodies by male guards constitutes cruel and unusual punishment); Torres v. Wisconsin Dep't of Health and Soc. Serv., 859 F.2d 1523 (7th Cir. 1988), *cert. denied*, 489 U.S. 1017 (1989) (due to history of sexual abuse, gender is a bona fide occupational qualification for guards in women's housing units); HUM. RTS. WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996) (general discussion and reports on five states and District of Columbia); INSIDE THIS PLACE, NOT OF IT: NARRATIVES FROM WOMEN'S PRISONS (Robin Levi & Ayelet Waldman eds., 2017) (accounts of prison experiences by various women); CRISTINA RATHBONE, A WORLD APART: WOMEN, PRISON, AND LIFE BEHIND BARS (2006) (accounts of women's experiences at a Massachusetts prison); Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45 (2007); Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 FORDHAM URB. L.J. 571 (2006).

average cost of over $30,000 per year,[270] or $150,000 for a five-year sentence. Yet despite our theory and our practice, we devote few resources to individualizing the way we deal with offending individuals. Under an administrative approach, an individualized determination of the optimal disposition would occur at an early point in the process, funded at an adequate level that would be a fraction of the cost now devoted to the ineffective and inhumane reliance on imprisonment.

We have already developed a fairly wide range of alternatives to imprisonment that avoid its obvious abuses and at least promise greater likelihood of success. These include house arrest with electronic monitoring, addiction treatment or vocational training in a quasi-residential setting, and community service or victim restitution.[271] Restorative justice should be regarded as another alternative, because its central feature is to design an individualized response to the offense that is acceptable to all parties—offender, victims, community members, and others.[272] Robert Martinson's

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270 *Prison Spending in 2015*, VERA INST., https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending [https://perma.cc/QDB3-STN7]. The average cost in 2015 ranged from $14,780 in Alabama to $69,355 in New York. *Id.*

271 RICHARD A. BALL ET AL., OFF. OF JUST. PROGRAMS, HOUSE ARREST AND CORRECTIONAL POLICY: DOING TIME AT HOME (1988) (reporting generally positive results for offenders, and general acceptance by community, but raising concerns about surveillance); Randy R. Gainey & Brian K. Payne, *Understanding the Experience of House Arrest with Electronic Monitoring: An Analysis of Quantitative and Qualitative Data*, 44 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 84 (2000) (offenders do not perceive house arrest as excessively punitive); Christina E. Grella et al., *Program Variation in Treatment Outcomes Among Women in Residential Drug Treatment*, 24 EVALUATION REV. 364 (2000) (success in treatment program depends on range of supplemental services); Joe Hudson et al., *When Criminals Repay Their Victims: A Survey of Restitution Programs*, 60 JUDICATURE 313 (1977) (surveying existing programs and calling for further research); DOUGLAS CORRY MCDONALD, PUNISHMENT WITHOUT WALLS: COMMUNITY SERVICE SENTENCES IN NEW YORK CITY (1986) (after initial failures, community service programs achieved acceptable success rates with offenders and provided benefit to the community); Bernadette Pelissier et al., *Federal Prison Residential Drug Treatment Reduces Substance Use and Arrests After Release*, 27 AM. J. DRUG & ALCOHOL ABUSE 315 (2001) (successful outcomes for residential programs in prison); Joan Petersilia, *Exploring the Option of House Arrest*, 50 FED. PROB. 142 (1986) (house arrest is a promising strategy that may be the best means of making probation acceptable to the public).

272 *See* DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR (2019) (reporting on a restorative justice program in Brooklyn, N.Y. that has achieved successful resolutions with violent offenders); HOWARD ZEHR, CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES (2015) (discussing reactions to criminal justice for victims and offenders and proposing restorative justice as an alternative).

notorious declaration that "nothing works"[273] has justified a thoughtless reversion to premodern attitudes and pseudo-modern prisons.[274] We would not accept such despairing fatalism in other areas of social concern, such as environmental protection, securities regulation, or national defense, and we should not accept it in this case.[275] Instead, we should have a unified administrative agency that would carry out research about the most effective dispositions, conduct controlled experiments to determine which ones are the most effective in particular situations, and then implement those solutions in a coordinated fashion.[276] There are of course, homicidal maniacs from whom society must be protected, although they are probably more common in fiction than reality. But we should not be designing a system involving the lives of millions of Americans with Hannibal Lecter in mind. Long-term incarceration should be a last resort, after we have made a conscientious effort to find more effective and humane dispositions through administrative means.

A further advantage of an administrative approach is that it can achieve greater levels of crime prevention by systematizing decisions about release and prosecution, and then by effacing the boundary between criminal penalties and voluntary treatment. By both intention and necessity, the police, prosecutors, courts, and correctional institutions all focus on maintaining order and deterring potential wrongdoers. They continually adjust their strategy in recognition of

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273 Robert Martinson, *What Works? – Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974). For the origin and subsequent impact of this article, see Rick Sarre, *Beyond 'What Works?': A 25-Year Jubilee Retrospective of Robert Martinson's Famous Article*, 34 AUSTL. & N.Z. J. CRIMINOLOGY 38 (2001).

274 Martinson himself retracted some of his conclusions in a later work. *See* Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979). Soon after writing this, he committed suicide.

275 *See* Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299 (2013).

276 For example, militaristic boot camps for juvenile offenders, which were enthusiastically instituted in a number of jurisdictions, have not produced favorable outcomes. *See* Angela R. Gover et al., *Boot Camps and Traditional Correctional Facilities for Juveniles: A Comparison of the Participants, Daily Activities, and Environments*, 28 J. CRIM. JUST. 53 (2000) (boot camps provided more activity but less education); Doris Layton MacKenzie et al., *Effects of Correctional Boot Camps on Offending*, 578 ANNALS AM. ACAD. POL. & SOC. SCI. 126 (2001) (meta-analysis revealing that boot camps had no significant effect on recidivism). The conclusion to be drawn, of course, is not that we should stop seeking alternatives to the failed carceral institutions, but rather that we need an administrative agency that can systematically explore alternatives and evaluate the results.

their available resources.[277] Police arrest only a fraction of those known to violate the law. More often, they warn known offenders, shut down illegal activities without arrest and orchestrate arrests without follow-through. Police-citizen encounters typically end with a verbal warning, even though the facts might have warranted an arrest. Even after arrest, police release a great proportion of suspects at the station house, again not for want of evidence but because they believe that the encounter has served its purpose and instilled a lesson. Carried out to excess, this can be a mode of abuse,[278] or a problem of under enforcement of serious offenses, such as the mistreatment of women by their partners. Whatever the motivation, far more cases are shunted out of the criminal process than are drawn into it. Prosecutors and judges adopt a similar approach. About half of all felony arrests in the United States brought to court for first appearance or arraignments are dropped by prosecutors or dismissed by judges.[279] Here too, the assumption is that the parties have learned their lesson and are sufficiently deterred by the initial stages of the process. After such cases have been dropped, almost all the remaining ones are resolved by pleas of guilty, with many of the pleas leading to probation rather than imprisonment.

This basic feature of the criminal process is illustrated by the famous funnel of justice, developed for the Katzenbach Commission in 1967.[280] The Commission's funnel moves from patrol to police stop, warning arrest, booking, initial appearance, preliminary hearing, arraignment, diversion, adjudication, sentence, probation and imprisonment, with the bulk of subjects shunted out of the early outlets of the funnel, and only a fraction reaching its end (see Figure 1).

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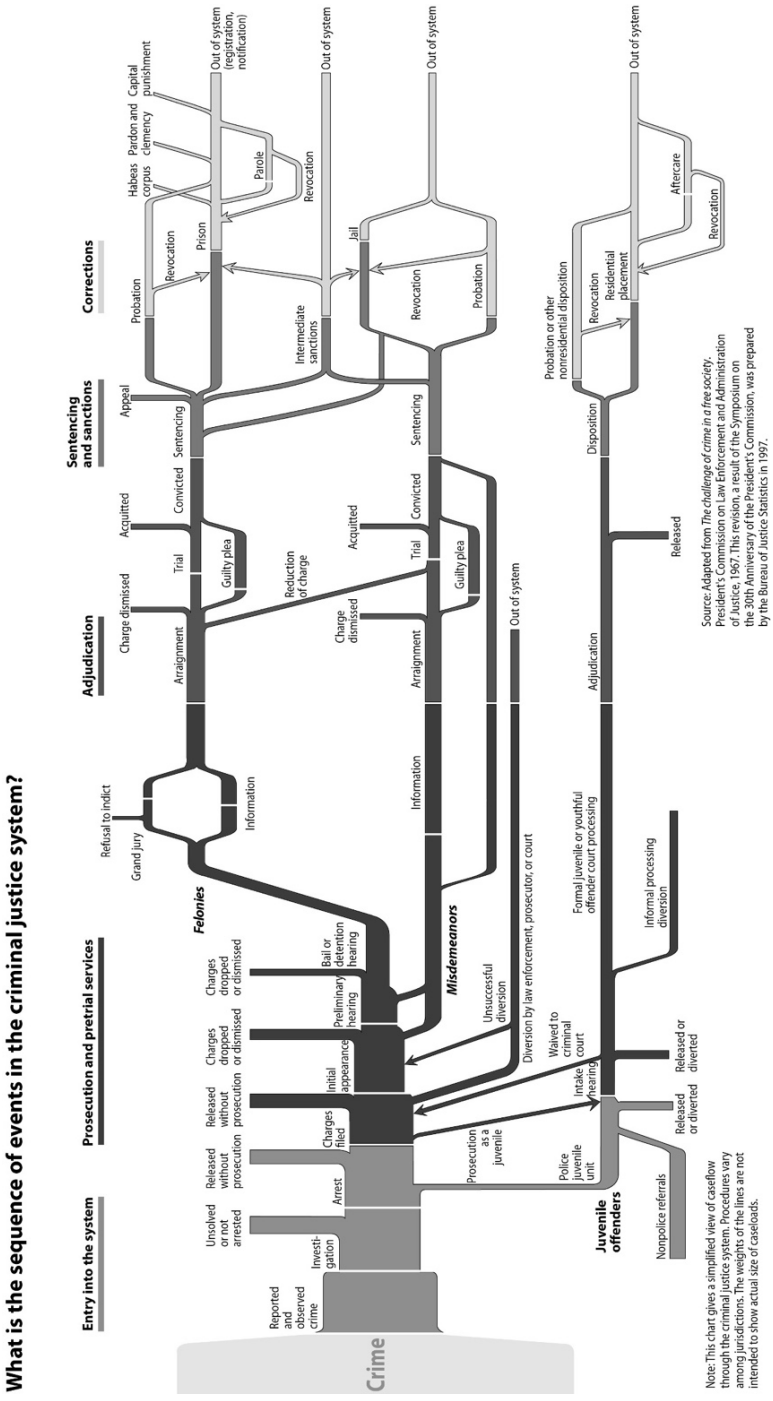
277 *See, e.g.*, Jessica Huff, *Understanding Police Decisions to Arrest: The Impact of Situational, Officer, and Neighborhood Characteristics on Police Discretion*, 75 J. CRIM. JUST. (2021).

278 *See infra* pp. 351–54 (discussing functionalist critique of criminal justice system).

279 *See, e.g.*, VERA INST., FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY (1981).

280 KATZENBACH COMMISSION, *supra* note 146, at 8–9.

Figure 1. *Funnel of Justice* (source: https://bjs.ojp.gov/justice-system).



All these practices might appear to contradict the previously stated observation that the fragmentation of this system and its lack of institutional coordination lead to a pileup of convicts at the endpoint of the system, that is, in prisons. In fact, it provides the explanation for this pileup effect. Because the system relies so heavily at each stage on selecting only a portion (often a minority) of those who could legally be prosecuted or convicted, any alteration in the selection rate is likely to have a major impact on the numbers involved at future stages.

Relying on the Katzenbach Commission's image, it is easy to picture how quickly—and disastrously—the system would be overloaded if one or more of the pathways by which people are siphoned off were to be eliminated or even significantly narrowed.

The basic principle of selectivity, of prosecuting and convicting only a subset of those who could legally be pursued, seems quite reasonable. The problem is that the selection process is notably casual, often random, and sometimes openly racist. An administrative approach would monitor these exercises of discretion at the various stages of the system. It would establish protocols for determining who should be released with a warning, who should be treated mildly, and who should be subject to the law's coercive force. Moreover, it would allow for a prevention-oriented continuity among these various responses. The same drug treatment program that a potential detainee might be compelled to attend by force of law could be offered to a relatively inoffensive shoplifter or small-time drug dealer on a voluntary basis. An administrative agency that conceived its responses in terms of treatment rather than punishment would be able to design each element of the criminal justice system as part of a coordinated response to crime, rather than relying on the discretion of operations level, relatively untrained officials to decide between casual indulgence and life-destroying punishment.

C. Focusing on Prevention

As stated at the outset, prevention has always been a central concern, and often the primary concern, of governmental efforts to combat crime, the reason being well summarized in the Attorney General's report. But the fragmentation of our current criminal justice system serves to diffuse and attenuate this function, rather than facilitating it, and the previously discussed emphasis on coercive strategies amplifies this effect. An administrative agency with a comprehensive mission to address the problem of crime would be

able to shift its focus to prevention by expanding functions that are now recognized as within the scope of criminal justice but ignored or underemphasized because we are imprisoned in approaches that we inherited from the state-building process of the Medieval and Early Modern Eras. Three prevention-based functions will be briefly summarized here as examples: early intervention, proactive targeting of police forces, and ex-prisoner reentry programs.

Early intervention is the most obvious, so much so that it is our failure to pursue it, rather than its advantages, that require explanation. We can identify children who are at risk of engaging in criminal activity, often because they are unsupervised and exposed to older children who are already criminals.[281] Several decades ago, some funding was provided for drug prevention through the DARE program,[282] and the features of this program, which subjected children to sanctimonious preaching by the same uniformed police officers who were arresting their parents, provide valuable information about the wrong way to proceed.[283] At present, the most

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281 *See* DAVID P. FARRINGTON & BRANDON C. WELSH, SAVING CHILDREN FROM A LIFE OF CRIME: EARLY RISK FACTORS AND EFFECTIVE INTERVENTIONS 17–91 (2006); John B. Reid & J. Mark Eddy, *Comment: Can We Afford to Prevent Violence? Can We Afford Not To?*, *in* MINIMIZING HARM: A NEW CRIME POLICY FOR MODERN AMERICA 101 (Edward L. Rubin ed., 1999). In fact, researchers have found that young people accurately self-report delinquency. *See* Rachele C. Espiritu, et al., *Epidemiology of Self-Reported Delinquency*, *in* ROLF LOEBER & DAVID P. FARRINGTON, CHILD DELINQUENTS: DEVELOPMENT, INTERVENTION AND SERVICE NEEDS 47 (2000); David P. Farrington et al., *Self-Reported Delinquency and a Combined Delinquency Seriousness Scale Based on Boys, Mothers, and Teachers: Concurrent and Predictive Validity for African-Americans and Caucasians*, 34 CRIMINOLOGY 493 (1996). The accuracy of early reporting has been questioned by one researcher, but only to the extent of recommending that standard quantitative measures should be supplemented by qualitative ones. *See* Stephen Case, *Young People 'At Risk' of What?: Challenging Risk–Focused Early Intervention as Crime Prevention*, 7 YOUTH JUST. 171 (2006).

282 An acronym for Drug Abuse Resistance Education, it was originated in the Los Angeles Unified School District by then-LAPD chief Daryl Gates in 1983. It became national as part of Nancy Reagan's "Just Say No to Drugs" initiative. *See* Christopher Ingraham, *A Brief History of DARE, the Anti-Drug Program Jeff Sessions Wants to Revive*, WASH. POST (July 12, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/12/a-brief-history-of-d-a-r-e-the-anti-drug-program-jeff-sessions-wants-to-revive/ [https://perma.cc/EX4V-BC2W].

283 Researchers are close to unanimous in concluding that the DARE program had no significant impact on drug use and was generally ineffective. *See* Donald R. Lynam et al., *Project DARE: No Effects at 10-Year Follow-Up*, 67 J. CONSULTING & CLINICAL PSYCH. 590 (1999); Dennis P. Rosenbaum, *Just Say No to D.A.R.E.*, 6 CRIMINOLOGY & PUB. POL'Y 815 (2007); Steven L. West & Keri K. O'Neal, *Project D.A.R.E Outcome Effectiveness Revisited*, 94 AM. J. PUB. HEALTH 1027 (2004).

prevalent response involves placing uniformed officers in public schools and enlisting them to enforce "zero-tolerance" policies for minor offenses.[284] This resort to age-old coercive practices—perhaps equivalent to stationing royal troops in a rebellious province—inevitably leads to further increases in our already astronomical incarceration rates.[285]

A prevention-based approach to at-risk youngsters would involve after-school and weekend activities that get children off the streets, engage parents and other people in the community, and provide a range of supportive services that can produce substantial reductions in the crime rate.[286] At present, no institution in our criminal justice system has an incentive to devote resources to a program that lies beyond its immediate mission and will only produce clear benefits a decade later. Opponents argue that such programs will inevitably include children who would never have committed a crime, and they will not prevent all their enrollees from doing so. State legislators frequently add the further objection that these programs are rewarding

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284 *See* Aaron Kupchik & Geoff Ward, *Race, Poverty, and Exclusionary School Security: An Empirical Analysis of U.S. Elementary, Middle, and High Schools*, 12 YOUTH VIOLENCE & JUV. JUST. 332 (2014); Allison Ann Payne & Kelly Welch, *Modeling the Effects of Racial Threat on Punitive and Restorative School Discipline Practices*, 48 CRIMINOLOGY 1019 (2010).

285 *See* FELD, *supra* note 9, at 173–93; NANCY A. HEITZEG, THE SCHOOL-TO-PRISON PIPELINE: EDUCATION, DISCIPLINE, AND RACIALIZED DOUBLE STANDARDS (2016); CHRISTOPHER A. MALLETT, THE SCHOOL-TO-PRISON PIPELINE: A COMPREHENSIVE ASSESSMENT (2015); MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS (2016).

286 *See* FARRINGTON & WELSH, *supra* note 281, at 105–57; CHILD DELINQUENTS: DEVELOPMENT, INTERVENTION, AND SERVICE NEEDS (Rolf Loeber & David P. Farrington eds., 2001); Steve Aos et al., *The Comparative Costs and Benefits of Programs to Reduce Crime: A Review of Research Findings with Implications for Washington State*, *in* BRANDON C. WELSH ET AL., COSTS AND BENEFITS OF PREVENTING CRIME 149 (Routlege 2018); Adrian Bell et al., *Diverting Children and Young People from Crime and the Criminal Justice System*, *in* YOUTH JUSTICE: CONTEMPORARY POLICY AND PRACTICE 91 (Barry Goldson ed., 1999); Kenneth A. Dodge et al., *Impact of Early Intervention on Psychopathology, Crime, and Well-Being at Age 25*, 172 AM. J. PSYCHIATRY 59 (2015); Denise C. Gottfredson et al., *School-Based Crime Prevention*, *in* EVIDENCE-BASED CRIME PREVENTION, *supra* note 201, at 56; Peter W. Greenwood et al., *Estimating the Costs and Benefits of Early Childhood Intervention: Nurse Home Visits and the Perry Preschool*, *in* EVIDENCE-BASED CRIME PREVENTION, *supra*, at 123; Peter W. Greenwood, *Prevention: The Cost-Effectiveness of Early Intervention as a Strategy for Reducing Violent Crime*, *in* MINIMIZING HARM: A NEW CRIME POLICY FOR MODERN AMERICA, *supra* note 281, at 67. "We now know what works to prevent delinquency and how to intervene effectively when it occurs. And we have the right prescription for the diagnosis: The approach must be comprehensive and balanced, combining accountability with treatment and a heavy dose of prevention." CHILD DELINQUENTS: DEVELOPMENT, INTERVENTION, AND SERVICE NEEDS, *supra,* at x.

children for bad behavior.[287] But preventing a single offense followed by a ten-year prison sentence would save society about half a million dollars, and if we add another half million for the teenager who did not get knifed or the storekeeper who did not get shot, we would have enough money to fund a yearlong after school and weekend program for one hundred children. That is exactly the reason why criminal justice should be delegated to a prevention-oriented administrative agency.

A second preventive strategy, at a different stage in the criminal justice process, is proactive targeting of police forces. Sometimes described, either in part or in its entirety, as "hot spots" policing, it draws on advances in criminological theory to turn attention away from both supposedly crime-prone individuals and supposedly crime-infested communities, and toward the microgeography of locations where crimes are documented as occurring.[288] The idea is that crime can be reduced by concentrating police resources in these locations, changing their lighting, traffic flow and spatial structure, and working cooperatively with enterprises, institutions, and informal groups that are active in the area.[289] Evidence suggests that this is an effective way to prevent crime from occurring, not only in the specific hot spots but throughout the relevant jurisdiction.[290] Implementing it, however, requires continual supervision of police to ensure that they

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287 *See* Barry Anderson, *Youth Crime and the Politics of Prevention*, *in* YOUTH JUSTICE: CONTEMPORARY POLICY AND PRACTICE, *supra* note 286, at 75.

288 *See generally* Anthony A. Braga et al., *Can Policing Disorder Reduce Crime? A Systematic Review and Meta-Analysis*, 52 J. RSCH. CRIME & DELINQ. 569 (2015); Lawrence W. Sherman, *Policing for Crime Prevention*, *in* EVIDENCE-BASED CRIME PREVENTION, *supra* note 201; David Weisburd, *From Criminals to Criminal Contexts: Reorienting Criminal Justice Research and Policy*, 10 ADVANCES CRIMINOLOGICAL THEORY 197 (2002); Weisburd & Eck, *supra* note 253.

289 New York City's Compstat is an example of targeted policing, although it does not use the full panoply of techniques and resources that characterizes this approach. *See* BUREAU OF JUST. ASSISTANCE, *supra* note 200; ZIMRING, *supra* note 200, at 100–51; Willis et al., *supra* note 233.

290 *See, e.g.*, Anthony A. Braga, *The Effects of Hot Spots Policing on Crime*, 578 ANNALS AM. ACAD. POL. & SOC. SCI. 104 (2001) (seven of nine settings where hot spot policing was used showed a decrease in both crime and disorder); Richard Rosenfeld et al., *The Effects of Directed Patrol and Self-Initiated Enforcement on Firearm Violence: A Randomized Controlled Study of Hot Spot Policing*, 52 CRIMINOLOGY 428 (2014) (targeting policing reduced non-domestic firearm assaults without displacement to other areas, but did not reduce firearm robberies); Lawrence W. Sherman & David Weisburd, *General Deterrent Effects of Police Patrol in Crime "Hot Spots": A Randomized, Controlled Trial*, 12 JUST. Q. 625 (1995) (over a one-year period, hot spot policing in Minneapolis produced reductions in crime and disorder).

deploy to the areas in question, generally an alteration of existing culture that allows police to spend much of their time in more benign locations or to circulate within relatively extensive areas at their own discretion. It requires extensive information about crime patterns that can be obtained only by staff skilled in data collection and analysis.[291] Moreover, the staff deployed to the identified hot spots should include social service workers, architects, and urban planners as well as uniformed officers.[292] All this will be possible only if police are part of an administrative structure that can supervise individual officers, change their cultural patterns, and supplement their efforts with a large number of other staff members with entirely different skills.[293]

A third locus of prevention occurs at the end of the criminal justice process, when the offender is released from prison. Given our incarceration rates, this involves hundreds of thousands of people every year. The motion picture cliché, where the inmate is given a shoebox with his paltry possessions and a $10 or $100 bill (depending on when the movie was made) is unfortunately realistic, and while it can lead to good drama, it is bad public policy.[294] By what rational calculation could we decide to spend $500,000 to imprison a person for ten years and then release him with no resources, no support and no training except the increased experience in criminal activity that

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291 *See* Jerry. H. Ratliffe, *Crime Mapping and the Training Needs of Law Enforcement*, 10 EUR. J. CRIM. POL'Y & RES. 65 (2004) (describing computer programs needed for techniques of spatial modeling and statistical spatial analysis that generate the data needed for targeted policing).

292 If proactive targeting is limited to redirecting the patrol patterns of uniformed officers, as in the Minneapolis trial, see Sherman & Weisburd, *supra* note 290, it will produce only limited effects, and fail to prevent the general attitudes that led to the George Floyd murder.

293 *See* Capers, *supra* note 100, at 40–48. Although the technology used for proactive targeting can be deployed in a way that deprives citizens of basic civil liberties, *see* Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327 (2015), Professor Capers strongly endorses it for a future when people of color will constitute the majority of the American population on grounds that the police will be adequately supervised in this new political environment.

294 The simple device of providing the released ex-felon more funding would probably decrease recidivism. *See* Malcolm M. Feeley, The Effects of Increased Gate Money: Final Report on the Parolee Reintegration Project for the Department of Correction (Dec. 10, 1974) (unpublished study for the Connecticut Department of Corrections) (on file with author); Charles D. Mallar & Craig V.D. Thornton, *Transitional Aid for Released Prisoners: Evidence from the Life Experiment*, 13 J. HUM. RES. 208, 219–21 (1978); PETER ROSSI ET AL., INTER-UNIV. CONSORTIUM FOR POL. & SOC. RSCH., TRANSITIONAL AID RESEARCH PROJECT (TARP), 1976-1977 (1992), https://doi.org/10.3886/ICPSR07874.v1 [https://perma.cc/74WZ-FMWC].

he learned from his fellow prisoners, rather than spending $450,000 to imprison him for nine years and then providing $50,000 worth of housing assistance, postprison counseling and job-placement services?[295] The allocation of costs once again demonstrates the system's medieval preference for after-the-fact punishment over a modern, administratively oriented effort to prevent future crimes. Perhaps it is unfair to call the current system medieval; perhaps it is based on the belief that prison itself will transform the person into a law-abiding citizen, a belief that has been proven false only over the previous two centuries. In any event, a prevention-oriented administrative agency would devote substantial resources and staff to prisoner reentry.

The argument that criminal law should focus on prevention has been subject to criticism on at least two grounds: first, that it shifts blame away from the individual wrongdoer, and second, that it demands long-term and wide-ranging solutions that leave us without adequate remedies for criminal behavior in the present time. The first of these criticisms is readily answered.[296] No administrative agency

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[295] For discussions of the criteria for approaches that would give the released inmate the best chance of succeeding, see PETERSILIA, *supra* note 126, at 171–220; DANIEL P. MEARS & JOSHUA C. COCHRAN, PRISONER REENTRY IN THE ERA OF MASS INCARCERATION 125–251 (2015); Richard P. Seiter & Karen R. Kadela, *Prisoner Reentry: What Works, What Does Not, and What Is Promising*, 49 CRIME & DELINQ. 360 (2003).

[296] This argument is generally associated with retributivism. *See* MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 104–87 (1997); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); Christopher Bennett, *The Varieties of Retributive Experience*, 52 PHIL. Q. 145 (2002); Joel Feinberg, *The Expressive Function of Punishment*, *in* WHY PUNISH? HOW MUCH?: A READER ON PUNISHMENT 111 (Michael Tonry ed., 2011). One striking feature of these arguments is its institutional obliviousness; there is little mention of police, prosecutors or prisons (as opposed to sentences) nor any discussion of the realities of the criminal justice system. It is certainly worth noting that political conservatives, who are generally so skeptical about the government and its capacities, are willing to treat it as an inerrant and impartial dispenser of justice when they are championing retributive punishment. The more basic point, however, is that the entire approach ignores the way in which criminal justice is part of the overall system by which people in our society live together and carry out their collective purposes. *See, e.g.*, ALAIN TOURAINE, WHAT IS DEMOCRACY? (David Macey trans., 1997). For an illustration of this point, see Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCH. 284 (2002) (measuring people's views on appropriate sentences for various offenders). Framing the question in a sentencing context places the experimental subjects in a fixed, and perhaps authoritarian context. An approach more consistent with democracy would be to ask people what general strategy they want government to adopt regarding crime. The essential role of individuals in a democracy, after all, is as voters, not jurors. It is entirely possible to have a functioning democracy without citizen juries, and that is in

has any difficulty combining ex ante preventative strategies and ex post sanctions. The two approaches are complementary, not conflicting, and the relationship between them is straightforward. Concerted efforts should be made to prevent harm, but no such effort is likely to be entirely successful and thereby obviate the need to sanction those who nonetheless commit the undesired behavior.[297] Promulgating rules to limit pollution or avoid industrial accidents and inspecting factories to ensure those rules are followed, does not preclude the imposition of penalties on those who disobey despite the agency's best efforts. The perception that there is any conflict between these strategies seems to originate with the pre-administrative mentality that law is exclusively coercive, that it can act only by being punitive, or disproportionate and over-punitive. Administrative thinking focuses on compliance rates, recognizing that the rate will vary based on the nature of the rules, the resources devoted to enforcement, and the underlying economic and social realities of the regulated parties.[298] Implicit in this mode of thought is that compliance will never be complete and that sanctions will be needed to supplement preventive efforts.

The argument that preventive approaches involve long-term and wide-ranging solutions is equally inapplicable to an administrative approach.[299] Going back to Weber, the most basic element in his classic definition of a bureaucratic agency is that it has a defined subject matter jurisdiction.[300] A criminal justice agency would be limited to criminal justice, as this term is generally understood in our

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fact what is done in most European nations, but impossible to have a democracy without voters.

297 *See generally* Babbitt et al., *supra*, note 244; Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036 (1971).

298 *See* BARDACH, *supra* note 56; BARDACH & KAGAN, *supra* note 56; MAZMANIAN, *supra* note 56; EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 144–78 (2005).

299 *See* WILSON, *supra* note 72. Wilson acknowledges that many people who commit crimes are poor, but points out that most poor people do not commit crimes. The criminal process, he insists, should focus on holding people responsible for their actions. But this argument, like the previous one, seems unconvincing. There is nothing inconsistent about addressing the causes of crime and holding those who commit crimes responsible, any more than there is an inconsistency in abating the causes of malaria and treating people who succumb to it. Of course, resources are limited, but money is fungible. We could get the money we need to capture and punish criminals by taking it away from education and housing assistance, but we could also get it by building one fewer 12-billion-dollar aircraft carrier.

300 WEBER, *supra* note 11, at 215–23.

society,[301] and any preventative strategy that it developed would need to remain within the ambit of that definition. Better housing, better education, increased welfare benefits, and other social programs may well have beneficial effects on the crime rate, but that is a matter for policy decisions that would lie outside the ambit of a criminal justice agency. On the other hand, the fact that this agency would not be primarily responsible for these other policy areas does not mean that the agency should ignore them. Another advantage of an administrative approach, as will be described in the following section, is that it will facilitate cooperation between the criminal justice agency and the agencies responsible for social policy in these other areas. There are good reasons for jurisdictional specificity regarding the agencies of government, but none for lack of coordination among them.[302]

D. Decentering Criminal Trials

Between the beginning and endpoint of the criminal process discussed in previous sections—the police patrol and the penitentiary—lies the criminal trial. It continues to be emblematic, and close to definitional, of American criminal justice, with investigation, arrest, indictment, and punishment leading up to it or flowing from it. In most law schools, the standard criminal law course, a required first year subject, focuses on the elements of the crime that must be alleged at trial and underemphasizes or ignores policing, plea bargaining practice, and punishment.[303] The trial is

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301 *See supra* note 68 (Omnibus Crime Control and Safe Streets Act definition).

302 A final argument that should be briefly noted is that the focus on prevention might lead to punishing people before they have done anything wrong. This possibility is depicted in science fiction terms in a story by PHILLIP K. DICK, *The Minority Report*, *in* SELECTED STORIES OF PHILLIP K. DICK 223 (Houghton Mifflin Harcourt 2013) (made into film, MINORITY REPORT, directed by Stephen Spielberg). In the real, or perhaps merely the contemporary world, it can arise in connection with nonconsummate offenses such as attempts. *See* Peter Asp, *Prevention and Criminalization of Nonconsummate Offenses*, *in* PREVENTION AND THE LIMITS OF THE CRIMINAL LAW, *supra* note 4, at 23. But of all the problems that might arise in the criminal justice system, whether in its present form or in the administrative reformulation suggested here, this one seems to be fully addressed by established principles of due process. Difficult questions might of course arise; the point is that we already have the conceptual framework for dealing with them.

303 *See, e.g.*, SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS (10th ed. 2017) (chapter headings are: Institutions and Processes; The Justification of Punishment; Defining Criminal Conduct; The Elements of Punishment; Rape; Homicide; The Significance of Resulting Harm; Group Criminality; Exculpation; Theft Offenses; Discretion); PAUL MARCUS ET AL., CRIMINAL LAW (9th ed. 2021)

much beloved by authors of movies and television shows because of its obviously theatrical character. This owes its origin, at least in part, to medieval trial by combat,[304] a major source of entertainment at the time; in fact, many of the famous romances of this era use such trials as their climactic scene.[305]

This emphasis on criminal trials creates a distorted image of reality. As a practical matter, it is well known that relatively few criminal convictions are obtained through trial. Most cases, generally more than ninety-five percent, are resolved by plea bargaining, as noted previously.[306] Trials are a relatively insignificant channel in the Katzenbach Commission's funnel.[307] It might be argued that plea bargaining takes place "in the shadow of the law,"[308] that its dynamics are ultimately governed by the threat of trial and the protections that criminal procedures provide. But when trials occur so rarely, that shadow becomes attenuated to the point of near invisibility.[309] Plea bargaining has developed dynamics of its own, an interplay of the prosecutors' desire to achieve high conviction rates, the defense attorneys' efforts to salvage some reasonable opportunities for their clients, and the insistent need to deal quickly

(chapter headings are: The Province and Limits of the Criminal Law; The Decision to Punish; The Act Requirement; The Mental State; Parties to Crimes; Principal Offenses; The Inchoate Offenses; Defenses); JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS (9th ed. 2021) (chapter headings are: The Purposes and Limits of Punishment; The Criminal Act; The Guilty Mind; Causation; Intentional Homicide; Unintentional Homicide; Capital Murder and the Death Penalty; Defensive Force, Necessity, and Duress; Mental Illness as a Defense; Attempt: Complicity; Conspiracy; Rape; Theft Offenses; Perjury, False Statements, and Obstruction of Justice). This is not to suggest that these books entirely ignore issues such as policing, prisons, alternative punishment, or the organization of public defender services and certainly not that the various authors are unaware of these issues. Rather, the topics covered reflect the long-established and deeply ensconced curriculum of the first-year criminal law course.

304 GEORGE NEILSON, TRIAL BY COMBAT (1890); Edward L. Rubin, *Trial by Battle. Trial by Argument.*, 56 ARK. L. REV. 261 (2003).

305 *E.g.*, THE SONG OF THE CID 180–88 (Burton Raffel trans., 2009) (verses 126–30); THE SONG OF ROLAND 37–38 (Glyn Burgess trans., 1990) (verses 278–86); CHRÉTIEN DE TROYES, LANCELOT, THE KNIGHT OF THE CART 82 (W.W. Comfort trans., 1996) (vv. 7005–7119).

306 *See supra* note 111, 119.

307 *See supra* p. 333 (Figure 1).

308 The phrase comes from Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

309 William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

and inexpensively with potentially overwhelming numbers.[310] No approach to criminal justice is realistic if it fails to recognize plea bargaining, rather than trial, as the modal means of disposition once the arrestee has been arraigned.

On a more conceptual level, areas of government regulation that are managed by modern administrative agencies enable us to place courtroom trials in their proper perspective. They are in fact an element of many regulatory systems, such as financial services or environmental protection,[311] but it would be bizarre to treat them as the central or defining element of governmental regulation in these areas. Instead, the agency's primary concerns are the overall statutory framework, the rules it promulgates to implement the statute, its strategy to obtain compliance with those rules, and the entire range of sanctions that it can deploy in cases of noncompliance. Resort to criminal indictment is a delimited response when other means of obtaining compliance have failed. Moreover, a criminal trial is only one possible consequence of the indictment, and the procedures associated with a criminal trial are thus only a small corner of the much more extensive system.[312]

In fact, there is an irony embodied in the conceptual centrality of criminal trials. We see the trial as the primary means of protecting the rights of the accused, and we debate the intricate details of criminal procedure on the basis of this apparent commitment. But the trial is in fact the area where an accused person is least likely to escape the state's desire to inflict severe punishment. As the Katzenbach Commission's funnel indicates, police release a significant proportion of those they detain without charging them and prosecutors or judges dismiss many of the remaining cases before trial. But an accused person who goes to trial, for one reason or another, is almost always found guilty. Of the defendants who went to trial in the federal system

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310 *See* HESSICK, *supra* note 37; RAKOFF, *supra* note 26; Robert M. Bohm, *"McJustice": On the McDonaldization of Criminal Justice*, 23 JUST. Q. 127 (2006); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008); Burke, *supra* note 111; Finkelstein, *supra* note 37; Wright, *supra* note 30.

311 *See, e.g.*, 18 U.S.C. § 1348 (prescribing fines and prison sentences up to twenty-five years for securities and commodities fraud); 42 U.S.C. § 6928 (prescribing fines and prison sentences up to two years for improper transportation or handling of hazardous waste).

312 Perhaps these other modes of obtaining compliance, such as a cease-and-desist order, can be analogized to plea bargaining, with trials being no more frequent in criminal law than in these administrative settings.

in 2016, eighty-four percent were found guilty.[313] This figure, striking on its own terms, exaggerates the chances of acquittal because of the high percentage of defendants who plead guilty, in some cases because they conclude, or are told by their appointed attorney, that they cannot win. The percentage of total defendants who were acquitted at trial was 0.4%; most of those who escaped conviction did so because the government dismissed their case.[314] In 2019, there were twenty judicial districts where not a single defendant was acquitted at trial and another twenty where there was only one.[315] Thus, the criminal trial, with its highly touted protections, is the stage where the defendant is least likely to evade punishment.[316] A detainee would be better advised to know how to appeal to the sympathies of the grizzled officer manning the operations desk at a local police station than to learn the elements of a crime that law schools so assiduously teach. This is not to disparage the value of criminal procedure protections but only to note that, as a practical matter, they should not be regarded as the central features of our criminal justice system. They should of course remain available to any defendant who wishes to invoke them, but we must not delude ourselves into thinking that they have the determinative effects that law school courses or television shows suggest.

Implementing an administrative approach to criminal justice would put the trial in its proper perspective, the perspective adopted by administrative agencies in other areas. The trial is a mechanism for extreme and unusual situations, not one that should serve as the organizing principle for the system in its entirety. Decentering the trial in this way focuses attention on the aspects of that system that determine its basic structure, its effect on the majority of people that it

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313 BUREAU OF JUST. STAT., *supra* note 36 at 21–22 (Table 4.2; 1,550 out of 1,854 found guilty).

314 *Id.* (304 acquitted at trial out of 76,639 whose cases were terminated). Overall, 9% of those charged were not convicted, but the vast majority of these, 96%, went free because their case was dismissed. *See also* U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2019, at 5–7, https://www.justice.gov/usao/page/file/1285951/download [https://perma.cc/RKQ2-34ML] (Table 2A; 0.4% overall acquittal rate for 2019). Using slightly different categories than the Bureau of Justice Statistics, the Attorneys' Report indicates that 7% of these charged were not convicted, with 95% of this total resulting from government dismissal of the case.

315 U.S. DEP'T OF JUST., *supra* note 314, at 5–7 (Table 2A; No district had more than twelve acquittals).

316 *See* BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS – 1991, at 547 (1991) (Table 5.55; in a study of 14 states, the acquittal rate was 1%).

deals with, and its success in preventing crime. Instead of viewing police practices and prosecutorial policies as antecedents to trials, and probation, prison, and other modes of punishment as the consequences of trials, we can see a continuous flow of interactions between those who enter the system and the various elements of state authority. The value of a single administrative agency for dealing with this process and coordinating those authorities then becomes apparent.

A second advantage of decentering the criminal trial is that it facilitates coordination of the criminal justice system with other elements of the modern administrative state, such as public health, education, welfare, housing, and mental health.[317] Prevention efforts, even when located within the jurisdictional boundaries of the criminal justice system, benefit greatly from coordination among governmental programs, and an administrative approach to maintaining pubic order would facilitate such coordination. Primary and secondary school teachers can help identify children who are subject to criminogenic influences and would benefit from interventions.[318] Conversely, order within schools is best maintained by specially trained staff who share the goals and perspective of the teachers, not by an armed, uniformed invader. Instead of excluding ex-felons trying to live law-abiding lives from public housing and responding to the disruptions that will nonetheless occur by arrest, particularized determinations should be made on an individualized basis by trained specialists who work with housing authorities and can impose administrative remedies such as temporary or permanent exclusion that will be more fair and less expensive.

Similarly, jails have currently become repositories for people with mental health problems.[319] This is understandable, since these problems often produce the sort disruptive and annoying, but not truly

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317 *See* LORRAINE MAZEROLLE & JANET RANSLEY, THIRD PARTY POLICING (2005); Lorraine Mazerolle & Janet Ransley, *Advocate: The Case for Third-Party Policing*, *in* POLICE INNOVATION: CONTRASTING PERSPECTIVES, *supra* note 230, at 191; Friedman, *supra* note 84, at 985–91 (coordination of police with other government services, and reliance on these services in place of police in certain situations).

318 *See* sources cited *supra* note 281.

319 *See* James & Glaze, *supra* note 90, at 1 (Sixty percent of jail inmates exhibited symptoms of mental health disorder in the year prior to arrest); ALISA ROTH, INSANE: AMERICA'S CRIMINAL TREATMENT OF MENTAL ILLNESS (2018); John R. Belcher, *Are Jails Replacing the Mental Health System for the Homeless Mentally Ill?*, 24 COMMUNITY MENTAL HEALTH J. 185 (1988); Douglas Shenson et al., *Jails and Prisons: The New Asylums?*, 80 AM. J. PUB. HEALTH 655 (1990).

dangerous behavior that will lead to the person being arrested, held in custody, and then released through the operation of the Katzenbach Commission's funnel, only to be arrested later on.[320] Admittedly, there is a serious dearth of mental health facilities in our society, but they are certainly not nonexistent.[321] A comprehensive criminal justice agency would be able to coordinate with those facilities that exist, and perhaps encourage the development of new ones to deal more effectively and humanely with people who cause disorder as a result of disordered thought processes, rather than any conscious decision to break the law.

V
RESPONSE TO OBJECTIONS

Administrative governance is far from popular these days; it has been roundly attacked by scholars for many decades, and anti-administrative rhetoric has become something of a fixture in American politics.[322] Proposing a new administrative agency that would combine and control a wide range of preexisting, traditionally structured institutions might seem contrary to current sensibilities. Proposing a new agency in an area where the government's existing performance has been notoriously oppressive might seem outright perverse. In this final Section, we consider three specific objections to a unified agency for criminal justice: that it would be anti-democratic, that it would be an instrumentality of excessive and counterproductive government control, and that it would be ineffective in this context.

The idea that an administrative or bureaucratic approach to criminal justice is anti-democratic features prominently in a recent law review symposium that calls for community control of criminal justice functions.[323] The symposium is accompanied by a White Paper stating thirty specific proposals to implement this idea, and

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320 *See* KOHLER-HAUSMANN, *supra* note 149.

321 *See* RICHARD G. FRANK & SHERRY A. GLIED, BETTER BUT NOT WELL: MENTAL HEALTH POLICY IN THE UNITED STATES SINCE 1950 (2006); Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s* (Univ. of Chi. Pub. L.& Legal Theory, Working Paper No. 335, 2011).

322 *See* EDWARD L. RUBIN, MAKING REGULATION WORK: POLICIES, TECHNIQUES AND THE ABOLITION OF PROPERTY RESTRICTIONS ix–xvi, 181–206 (2021); Gillian E. Metzger, *The Supreme Court 2016 Term: Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

323 Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693 (2017) (introduction to the symposium). This approach draws its inspiration from the work of William Stuntz. *See, e.g.*, STUNTZ, *supra* note 149.

signed by nineteen prominent criminal justice scholars and opinion leaders who identify themselves as "democratizers."[324] Joshua Kleinfeld, in his introduction to the Symposium, specifically identifies a democratic approach to criminal justice as opposed to the Weberian, bureaucratic model.[325]

Some of the proposals in the White Paper in fact overlap with the administratively based reforms that we recommend in this Article, such as treating citizens equally, using criminal punishment as a last resort, eliminating "racialized" policing, increasing funding for public defenders, improving the training for both public defenders and prosecutors, imposing fairness constraints on plea bargaining, shifting toward rehabilitative responses, and relying on restorative justice techniques.[326] But the organizing principle of the White Paper and the Symposium is that criminal justice is and should be a local, community-based institution, democratically organized and operated, and administered to the extent possible by lay-leaders selected from within the affected community.

There are several fairly obvious empirical arguments against this proposal. One argument is that it suffers from the pastoral nostalgia that Oliver Goldsmith captured when he wrote "The Deserted Village" in 1770.[327] It draws its inspiration from images of small, rustic towns—often fantasy images of ingrown societies that were in fact seething with misery, inequality, and petty hatreds. Such nostalgia, whether justified or not, is inapplicable and thus dysfunctional in this era of High Modernity.[328] Today's big cities are not comprised of a multiplicity of urban villages, each with its own cultural coherence and accepted norms, but rather are interconnected sprawls of residential properties whose inhabitants travel long

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324 Kleinfeld et al., *supra* note 323.

325 *Id.*

326 *Id.* at 1697–1705.

327 Oliver Goldsmith, *The Deserted Village*, *in* ENGLISH PROSE AND POETRY: 1660-1800, at 306 (Frank Brady & Martin Price eds.,1961) ("Sweet Auburn! loveliest village of the plain, Where health and plenty cheer'd the laboring swain, . . . Dear lovely bowers of innocence and ease, Seats of my youth, when every sport could please . . ."). *See* RAYMOND WILLIAMS, THE COUNTRY AND THE CITY 35–45 (1973) (prevalence of nostalgia for rural village life throughout all eras of English literature).

328 *See* RUBIN, *supra* note 298, at 1–6, 46–48, 115–20 (2005) (discussing role of social nostalgia in our attitudes toward administrative state and the theoretical basis of democracy).

distances to work or shop and socialize in cyberspace.[329] Second, managing any basic function of modern society, whether it is education, public health, environmental protection, or criminal justice is a complex task, requiring specialized knowledge and full-time attention. Untrained volunteers can certainly provide valuable advice and information, but they are not likely to function effectively in a managerial role. The chaos caused by the decentralization of the New York City public school system in the 1960s, which one informed observer characterized as "the great school wars,"[330] indicates the difficulties of delegating modern governance to amateurs.[331] Third, delegating authority to small communities does not necessarily solve the abiding problem of democracy, which is the tyranny of the majority.[332] The majority within that community, even if it is a minority within the nation as a whole, is fully capable of mistreating those in its midst whom it regards as Other.[333]

But proposing democratization as an argument against an administrative approach to criminal justice raises a more basic problem, one that is conceptual rather than empirical. Democracy and administration are simply not opposing forces. A clue is that they developed in the Western World simultaneously; the advent of modern administrative states occurred at the end of the eighteenth century, at the same time as the American Revolution, the French Revolution, and the development of the British Cabinet, which took

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329 *See, e.g.*, MARK HUTTER, EXPERIENCING CITIES (3rd ed. 2016); ZACHARY P. NEAL, THE CONNECTED CITY: HOW NETWORKS ARE SHAPING THE MODERN METROPOLIS (2013). *See also* GEORGE A. GONZALEZ, URBAN SPRAWL, GLOBAL WARMING, AND THE EMPIRE OF CAPITAL (2009) (dispersed, low-density, and disorganized character of modern residential areas due to economic forces).

330 *See, e.g.*, DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805–1973: A HISTORY OF THE PUBLIC SCHOOLS AS BATTLEFIELD OF SOCIAL CHANGE (1974).

331 The idea that ordinary citizens can function as government officials is another example of social nostalgia, in this case for Ancient Athens. *See* RUBIN, *supra* note 298, at 3, 5, 42, 115–16. Even in Athens, only a minority of citizens (perhaps one-sixth) attended the Assembly, *see* PAUL CARTLEDGE, DEMOCRACY 112–13 (2016), and these were probably the wealthier city dwellers. Moreover, the military leaders (*strategoi*) were elected and could serve an unlimited number of terms. *See* JOINT ASS'N OF CLASSICAL TCHRS., THE WORLD OF ATHENS 210 (1984) ("The Athenians had the sense not to sacrifice efficiency to democratic principle in an era when they were at war three years in every four.").

332 *See* THE FEDERALIST NO. 10 (James Madison); JOHN STUART MILL, ON LIBERTY 69–85 (Batoche Books 2001) (1859).

333 *See* John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711 (2020).

executive authority away from the king.[334] Further inquiry reveals that it was these emerging democratic regimes that instituted administrative government. Professor Kleinfeld's account of Weber's theory is generally accurate, but he identifies one element of it as "the displacement of the laity by an officialdom."[335] It was not the laity, or the "community," that administrative government displaced at the end of the eighteenth century, however. It was the nobility, ruling through a system of privilege and patronage, and this displacement is in fact the historical process that Weber identifies.[336]

What these developments indicate is that administration or bureaucracy is not the enemy of democracy but the instrument of democracy. When American democracy is confronted with a problem that affects it as a nation, it creates an administrative agency or expands the jurisdiction of an existing agency in order to solve the problem.[337] Sometimes this response is designed well and sometimes

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334 *See* RUBIN, *supra* note 298, at 29–36. The French revolutionaries immediately abolished the ad hoc, patronage-based institutions of the *Ancien Regime* and replaced them with ministries staffed by credentialed employees and defined by subject matter, such as Foreign Affairs, War, Interior, Justice, and Finance. *See* CLIVE H. CHURCH, REVOLUTION AND RED TAPE: THE FRENCH MINISTERIAL BUREAUCRACY 1770–1850 (1981). The American revolutionaries initially created a government with only limited executive authority, but in less than a decade they had enacted a constitution for the express purpose of establishing a strong central authority, and then they passed legislation under its authority to create the departments of State, Treasury, War, and the Post Office, again structured on a modern bureaucratic basis. FERGUS M. BORDEWICH, THE FIRST CONGRESS: HOW JAMES MADISON, GEORGE WASHINGTON, AND A GROUP OF EXTRAORDINARY MEN INVENTED THE GOVERNMENT (2016). The transition in Britain was more gradual, since it occurred without a revolution, but the development of the cabinet, with elected ministers who acted collectively as an executive rather than separately as servants of the king, was a simultaneous transition to democracy and bureaucratic government. *See* JOHN P. MACINTOSH, THE BRITISH CABINET (3rd ed. 1977). In the decades that followed, numerous laws were passed to eliminate offices that drew their income from fees, or to replace those fees with salaries, this being an essential feature of Weberian bureaucracy. *See* ERNEST BAKER, THE DEVELOPMENT OF PUBLIC SERVICES IN WESTERN EUROPE, 1660-1930, at 34–36 (1966).

335 Kleinfeld, *supra* note 39, at 1379.

336 WEBER, *supra* note 11, at 973–1002.

337 The White Paper dodges this issue through the use of the passive voice. It states that "[p]olice practices and a police culture consistent with norms of procedural justice, fairness, and legitimacy should be fostered." Kleinfeld et al., *supra* note 323, at 1699. Who will foster them? It goes on to recommend "selecting and training officers to have a guardian rather than a warrior mentality." *Id.* Who will implement sophisticated training of this sort? We are told, "Public defenders and prosecutors should enjoy commensurate resources, including equal pay, equal workloads, proportional overall funding, and equal conditions of work." *Id.* at 1700. "Restorative justice institutions and proceedings should be established . . . ." *Id.* at 1703. "Conditions in prisons and other correctional facilities

is designed poorly, but it is almost invariably the mode by which democratic government addresses domestic issues. To deal with the problem of traffic safety,[338] Congress established the National Highway Traffic and Safety Administration (NHTSA);[339] to combat the health hazards of pollution,[340] Richard Nixon created the Environmental Protection Agency (EPA) by Executive order;[341] after the World Trade Center attack, Congress established the Department

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should be, to the extent possible, non-criminogenic; oriented to preparing inmates to return to society as full and productive citizens . . . ." *Id.* The question for all these recommendations is: by whom? For examples of the centrality of institutional structures, see generally ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE (1968); PARSONS, *supra* note 69; Kingsley Davis & Wilbert E. Moore, *Some Principles of Stratification*, *in* SOCIAL CLASS AND STRATIFICATION: CLASSIC STATEMENTS AND THEORETICAL DEBATES 93 (Rhonda F. Levine ed., 2nd ed. 2006).

338 *See* LEMOV, *supra* note 13. A decisive event was the publication of RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE (1965).

339 National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (codified as amended at 49 U.S.C. §§ 30101–30183). "The Secretary shall carry out the provisions of this Act through a National Traffic Safety Agency . . . which he shall establish in the Department of Commerce." *Id.* § 115. The Act was quickly followed by the creation of a new cabinet department, the Department of Transportation, to which NHTSA was transferred. *See* Department of Transportation Act, Pub. L. 89-670, 80 Stat. 931 (codified as amended at 49 U.S.C. § 102 et seq.). "There is hereby established at the seat of government an executive department to be known as the Department of Transportation." *Id.* § 3.

340 *See* ELLEN GRIFFITH SPEARS, RETHINKING THE AMERICAN ENVIRONMENTAL MOVEMENT POST-1945 (2020). A decisive event in this case was the publication of RACHEL CARSON, SILENT SPRING (1962).

341 *Reorganization Plan No. 3 of 1970*, U.S. ENV'T PROT. AGENCY (July 9, 1970), https://archive.epa.gov/epa/aboutepa/reorganization-plan-no-3-1970.html [https://perma.cc/VL44-JE3E]. As President Nixon stated, pollution control requires

> pulling together into one agency a variety of research, monitoring, standard-setting and enforcement activities now scattered through several departments and agencies. It also requires that the new agency include sufficient support elements—in research and in aids to State and local anti-pollution programs, for example—to give it the needed strength and potential for carrying out its mission.

Id. After specifying all the federal programs, run by various agencies, that will be transferred to the new agency, Nixon goes on to say:

> As no disjointed array of separate programs can, the EPA would be able—in concert with the States—to set and enforce standards for air and water quality and for individual pollutants. This consolidation of pollution control authorities would help assure that we do not create new environmental problems in the process of controlling existing ones. Industries seeking to minimize the adverse impact of their activities on the environment would be assured of consistent standards covering the full range of their waste disposal problems.

Id.

of Homeland Security.[342] Because criminal justice is such an old issue, we inherited a pre-administrative structure in this one area. The lack of attentiveness to the various communities in our nation that the Symposium and the White Paper decry is not an inevitable feature of administrative government but an unfortunate feature of poorly designed administrative government, in this case because of its outmoded, fragmentary structure.

A second objection to establishing a comprehensive administrative agency for the criminal justice system is derived from sociological functionalism. This is a methodology that adopts an external perspective on social action, as opposed to an internal perspective that would be offered by the participants themselves, and seeks to determine the purpose or function of particular social practices from this perspective.[343] A number of scholars, applying it to American criminal law, conclude that the system is not designed to reduce crime or achieve any other of its declared purposes, but rather to exercise social control. Creating an administrative agency for criminal justice, according to this view, might increase the oppressiveness with which such control is exercised.

There is little doubt that this functionalist approach to American criminal law has significant explanatory value. For example, Issa Kohler-Hausmann, observing that the number of arrests skyrocketed, even as the absolute numbers of convictions plummeted, concludes that the purpose of the arrests was to exercise social control by letting people know that they were being watched and monitored.[344] Each arrest constituted a "mark" in a giant sorting and managerial process, a form of extralegal social control. Similarly, Nicole Gonzales Van Cleeve, observing the treatment of African American defendants, witnesses, and victims by white court officials in Chicago, regards the criminal courts as a means of intimidating the minority population of the city.[345] Other accounts of the American criminal process explicitly

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342 Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (codified in scattered sections of 6 U.S.C.). "There is established a Department of Homeland Security, as an executive department of the United States . . . ." *Id.* § 101.

343 *See* sources cited *supra* note 338.

344 KOHLER-HAUSMANN, *supra* note 149. This "unexpected" pattern was compounded by intentional confusion. Some defendants would be held in jail for weeks or months only to have charges suddenly dropped. Others made repeated treks to court, only to learn that the cases had been continued once again, or to find charges inexplicably dropped, or to be induced to plead guilty and placed on probation.

345 GONZALEZ, *supra* note 329.

present it as system of colonial rule, as their titles indicate: James Baldwin's "A Report from Occupied Territory,"[346] Chris Hayes's *A Colony in a Nation*,[347] and Michael Hardt and Antonio Negri's *Empire*.[348] James M. Doyle recounts his experiences as a public defender in "'It's the Third World Down There': The Colonialist Vocation and American Criminal Justice."[349] For Jonathan Simon, parole agents function as "waste managers," sorting out undesirables from a racial and ethnic underclass in order to maintain a modicum of order for the balance of the population.[350] Michelle Alexander views mass incarceration as *The New Jim Crow*,[351] while Nils Christie and Ruth Wilson Gilmore depict it as a commercialized version of the Soviet gulags.[352]

Functionalism can be challenged on methodological grounds, most basically by returning to Max Weber, who argued that an external approach cannot be fully explanatory for human action; the observer must understand (*verstehen*) social practices from the perspective of the participants in order to achieve a full explanation of them.[353] As generalized, this leads to the view that people's perceived reality is socially constructed,[354] perhaps the prevailing view in modern social theory. But accepting the methodology of the functionalist studies and acknowledging the validity of their conclusions does not undermine the value of an administrative agency for the criminal justice system. Administrative agencies are of course capable of abusive and oppressive behavior, as is every other form of coercive governmental power or, for that matter, every other form of coercive power in

346 James Baldwin & Carrie Mae Weems, *A Report from Occupied Territory*, NATION (Mar. 23, 2015), https://www.thenation.com/article/archive/report-occupied-territory-2/ [https://perma.cc/H8KS-G3RF].

347 CHRIS HAYES, A COLONY IN A NATION (2017).

348 MICHAEL HARDT & ANTONIO NEGRI, EMPIRE (2000).

349 James M. Doyle, *"It's the Third World Down There!": The Colonialist Vocation and American Criminal Justice*, 27 HARV. C.R.-C.L. L. REV. 71 (1992).

350 JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990 (1993).

351 ALEXANDER, *supra* note 26.

352 NILS CHRISTIE, CRIME CONTROL AS INDUSTRY**:** TOWARDS GULAGS, WESTERN STYLE? (1993); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007).

353 WEBER, *supra* note 11, at 2–22.

354 PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1966); HANS-GEORG GADAMER, TRUTH AND METHOD (2nd ed. 1989); HAROLD GARFINKEL, STUDIES IN ETHNOMETHODOLOGY (19867); ANTHONY GIDDENS, NEW RULES OF SOCIOLOGICAL METHOD (1976).

general. But the basic thrust of the administrative approach, as delineated above, is to ameliorate this threat by moving from coercive to cooperative strategies. The virtues of an administrative agency are that it would be oriented toward prevention rather than punishment, toward compliance rather than compulsion, and toward interaction with other agencies and with members of the community it served. Relying on inducement rather than force is not an absolute guarantee against oppressive behavior, but it goes a long way in that direction.

At the macro level, an administrative approach guards against the oppressiveness of social control through the feature of our government that the previous objection incorrectly claims for itself, namely democracy. All administrative agencies must be subject to democratic control in our system of government; they must serve the voting public, rather than the purposes of their rulers or a dominant elite. The egregious abuses that functionalist critics perspicaciously observe are not the product of a unified criminal justice agency, which is something that we do not have at present. Rather, they are the product of a fragmented system, of traditionally structured, excessively numerous and ineffectively managed institutions that elude democratic control. The best way, perhaps the only way that the populace of a democracy can control its criminal justice system is if there is a single, highly visible agency responsible for the entire system and answerable to the public on the basis of its comprehensive responsibility.

A third, more focused objection to a criminal justice agency is that the subject matter of the typical regulatory agency differs from criminal law in important ways. Most regulatory agencies deal with industries dominated by large or relatively large corporations, which enables the agency to enter into individualized negotiations. These firms, moreover, are rational actors with bureaucratized internal structures that can understand and respond to the instructions issued or incentives created by the regulatory agency.[355] These differences are significant, but they are neither invariable nor determinative. To begin with, there are a number of agencies that in fact must deal with large numbers of private persons. The Social Security Administration, for example, processes millions of disability payments, all to individuals, and adjudicates close to a million challenges to its

[355] We are indebted to Robert Kagan for alerting us to this possible objection.

decisions every year.[356] The Occupational Safety and Health Administration (OSHA) deals with firms, to be sure, but because its statute applies to any firm with more than fifty employees, many of the firms are quite small, and there are over two million of them within OSHA's jurisdiction.[357]

More generally, administration is not a particular technique, but an organizational structure that can deploy a wide range of techniques in accordance with the demands of the situation. The operational features of administration, that is, the basis on which it has become our standard approach to collective problems, are expertise, coordination and resource mobilization. That is the reason why all administrative agencies have credentialed hiring, a defined jurisdiction and a hierarchical organization. These features are not specific to any particular type of collective problem; rather they allow the agency to design its approach according to the issues that the problem presents. The issues presented by criminal behavior have been discussed above, and a properly designed administrative agency is the best means for our society to address them.

CONCLUSION

To conclude, we recommend that each American state address the issue of criminal justice by establishing an administrative agency that unifies the functions of the police, prosecutors, courts, and prisons. The existing structure of our criminal justice so-called system is in fact an artifact of its premodern origins, and its persistence in this modern world of administrative governance results from even older attitudes that history has embedded within it—the idea that crime is a direct assault on sacred principles and public authority to which the government must respond with force. As a result of these attitudes, our system consists of at least six different types of institutions, each one further fragmented by jurisdictional boundaries into diminutive units that cannot train or supervise their staffs, generate useful information, assimilate whatever information is available, coordinate

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356 JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983) (description and analysis of the mechanisms established by the Social Security Administration to deal with nearly one million individual actions per year regarding disability payments).

357 BARDACH & KAGAN, *supra* note 56 (description and analysis of mechanisms that OSHA established to facilitate monitoring over two million workplaces, many quite small, that fall under the agency's jurisdiction).

with one another, or reach out effectively to the communities they serve.

We have tried to resolve this glaring problem by means of constitutionalism, professionalization, rationalization, and a variety of other partial strategies. None of these efforts have worked. They have failed in part because they have been half-hearted, if that. But they have failed in large because none of them is anchored in an enhanced state capacity necessary for success. Attempts to ameliorate this crisis will continue to fail unless or until we put these delimited efforts behind us and develop and deploy the basic means of modern governance, the one that we have used to respond to crises such as economic collapse, environmental degradation, and terrorist attacks. The current condition of our criminal justice system is a crisis of equivalent proportions, one that has oppressed our communities, destroyed the lives and livelihoods of tens of millions of our citizens, and set us at savage opposition to each other. We need to adopt an approach that provides comprehensive planning, coherent resource management, coordinated staffing, and effective supervision to all components of the system. We need to effectuate the preventive purposes that have always been our preferred response to crime, to reduce unneeded coercion, and to recognize that the adversarial trial we inherited from medieval combat is more suitable for television than for the reality in which we find ourselves. Not everyone likes idea of administrative governance. For some, it will be bitter medicine, while for others it will be welcome relief. However, all successful modern democratic states rely on it. It is what we have available to us, in a twenty-first-century democracy, and it is time to use it in this area that has been mired down in premodern thinking. Embracing the idea administrative governance is no guarantee of success; but refusing to do so is almost certainly a recipe for continued failure.