
BOOK REVIEW

HUMANIZING THE CRIMINAL JUSTICE MACHINE: RE-ANIMATED JUSTICE OR FRANKENSTEIN'S MONSTER?

THE MACHINERY OF CRIMINAL JUSTICE. By Stephanos Bibas. New York, N.Y.: Oxford University Press. 2012. Pp. xxxii, 285. \$75.00.

*Reviewed by Nicola Lacey**

The American criminal justice system is broken. This claim, in one form or another, commands wide support among those who study criminal justice.¹ But the view that the system is in urgent need of reform marks the limit of scholarly consensus. As soon as one moves to specifics — to analysis of the particular ways in which the system is defective or problematic; to interpretation of why these defects or problems have arisen; and perhaps above all, to elaboration of possible solutions and institutional reforms — one encounters not only the sort of variety that is to be expected in any vibrant field of scholarship, but also fundamental differences of diagnosis and prescription.

Some scholars see the “collapse” of criminal justice in terms of macro forces beyond the criminal justice system itself. Among these scholars, some point to the politically opportunistic “federalization” of criminal policy and counsel a renewed focus on local democratic control.² Other scholars diagnose an excess rather than a deficit of democracy, pointing to the ways in which the diffusion of elected positions in not only the design but also the delivery of criminal justice policy has encouraged pragmatic, unprincipled policymaking and executive decisionmaking in the pursuit of electoral gain.³ These scholars accordingly counsel the construction of policymaking structures that operate at

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¹ See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 1 (2011). The observation that the criminal justice system is “broken” has of course been made not only by scholars but also by politicians and advocacy groups. See, e.g., Michael C. Campbell, *Ornery Alligators and Soap on a Rope: Texas Prosecutors and Punishment Reform in the Lone Star State*, 16 *THEORETICAL CRIMINOLOGY* 289, 297 (2012).

² See generally, e.g., TED GEST, *CRIME & POLITICS* (2001); LISA L. MILLER, *THE PERILS OF FEDERALISM* (2008); STUNTZ, *supra* note 1.

³ See generally, e.g., NICOLA LACEY, *THE PRISONERS' DILEMMA* (2008); Nicola Lacey, *Why Globalisation Doesn't Spell Convergence: Models of Institutional Variation and the Comparative Political Economy of Punishment*, in *INTERNATIONAL AND COMPARATIVE CRIMINAL JUSTICE AND URBAN GOVERNANCE* 214, 214–50 (Adam Crawford ed., 2011).

one remove from the pressures of electoral politics, though subject to nonelectoral forms of accountability, in an effort to escape (loosely speaking) a “prisoners’ dilemma” in which politicians of all complexions become locked into a competition to be “tougher” on law and order.⁴ Some see criminal justice policies as secondary effects of deeper political, social, and economic trends such as the collapse of Fordism in the 1970s and rising crime and social fragmentation. These scholars believe these trends contribute to a “culture of control” that engenders harsher criminal policy and a tendency to “govern through crime,”⁵ or to a “neoliberal politics” in which the punitive wing of the state expands as its welfare wing contracts.⁶ And yet other scholars see the fundamental problems of the criminal justice system primarily in terms of the broader dynamics of race and indeed racism in American history, arguing that the criminal justice system in general, and the prison system in particular, have taken up where slavery and Jim Crow left off in ensuring the perpetual exclusion of a large portion of the African American populace from full citizenship.⁷ Many of the macro-accounts of criminal justice blend aspects of these explanatory strategies.

A second form of analysis sees the problem instead in terms of distinctively criminal justice variables. One important focus here has been scholarly analysis of the unintended consequences of the move toward structured sentencing. This policy was broadly benign in intent, but its aspiration to deliver more equal justice has in some jurisdictions, notably the federal system, led to an upswing in penal severity as a result of unduly rigid guidelines, mandatory sentences, and various perverse effects of the curtailment of sentencing discretion (notably a marked increase in substantially uncontrolled prosecutorial

⁴ See, e.g., JAMES Q. WHITMAN, *HARSH JUSTICE* 3–17 (2003); FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, *PUNISHMENT AND DEMOCRACY* 151–180 (2001); Nicola Lacey, *American Imprisonment in Comparative Perspective*, *DAEDALUS*, Summer 2010, at 102, 102–14.

⁵ See DAVID GARLAND, *THE CULTURE OF CONTROL* 53–73 (2001); MARC MAUER, *RACE TO INCARCERATE* 42–55 (1999); JONATHAN SIMON, *GOVERNING THROUGH CRIME* 3–12 (2007). On variations in policy across states, see generally VANESSA BARKER, *THE POLITICS OF IMPRISONMENT* (2009); on the historical accretion of institutional capacity for these developments, see generally MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS* (2006).

⁶ See Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, in *MASS IMPRISONMENT* 35, 35–47 (David Garland ed., 2001). See generally BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS* (2011); LOÏC WACQUANT, *PUNISHING THE POOR* (2009).

⁷ See MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010); MICHAEL TONRY, *MALIGN NEGLECT* 49–80 (1995); Marcellus Andrews, *Punishment, Markets, and the American Model: An Essay on a New American Dilemma*, in *THE USE OF PUNISHMENT* 116, 116–48 (Seán McConville ed., 2003).

power).⁸ These concerns are most evident in extreme forms of mandatory sentencing such as that enacted by the California “Three Strikes” legislation.⁹ Another important focus in the criminal justice-specific literature has been the impact of the “War on Drugs,” with its severe penalties, distinctively aggressive policing tactics, and racially skewed impact.¹⁰ Other key preoccupations of this literature include the decline in the more effective and consensus-based forms of proactive policing, particularly in inner-city areas,¹¹ and the implications of an increasingly powerful private lobby around the “prison industrial complex” with interests in the delivery of penal hardware and correctional services, and hence in the expansion of punishment.¹² These are simply a few of the most striking themes and fault lines that structure the varied positions taken up in an extensive, fascinating, and dizzyingly diverse literature.¹³

Amid this literature, and belonging to the second, criminal justice-focused group of scholars, Professor Stephanos Bibas has come up with a striking new diagnosis. In a nutshell, his argument is that the real problem with the American criminal justice system is that it has become a “machine” — a dehumanized bureaucracy in which the interests, not to mention the feelings, of victims and defendants alike are ignored, and in which the logic and operation of the system are dictated by the interests of the lawyers and other officials who manage it. Drawing on not only his academic research but also his experience as a high-level practitioner, Bibas argues that criminal justice has become “a zero-sum contest rather than a multi-faceted morality play,” with baleful consequences for all concerned (p. 112). Criminal defendants are pressured into plea bargains that all too often fail to reflect their

⁸ See, e.g., Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 222, 222–44 (Michael Tonry & Richard S. Frase eds., 2001). See generally MICHAEL TONRY, SENTENCING MATTERS (1996) [hereinafter TONRY, SENTENCING MATTERS]; MICHAEL TONRY, THINKING ABOUT CRIME (2004); ZIMRING, HAWKINS & KAMIN, *supra* note 4.

⁹ See CAL. PENAL CODE § 667 (West 2012). The offenses capable of triggering a mandatory sentence under this law were significantly narrowed by a referendum held in November 2012.

¹⁰ See MAUER, *supra* note 5, at 142–61; TONRY, *supra* note 7, at 81–116.

¹¹ See STUART A. SCHEINGOLD, THE POLITICS OF LAW AND ORDER 95–147 (1984); JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW 89–112 (1993).

¹² The term “prison industrial complex” was coined by Angela Davis. ANGELA DAVIS, THE PRISON INDUSTRIAL COMPLEX (AK Press Audio 1999); see also AMY CHEUNG, THE SENTENCING PROJECT, PRISON PRIVATIZATION AND THE USE OF INCARCERATION 1 (2004); GOTTSCHALK, *supra* note 5, at 29–40; JUSTICE POLICY INST., GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES (2011); Marie Gottschalk, *Cell Blocks & Red Ink: Mass Incarceration, the Great Recession & Penal Reform*, DAEDALUS, Summer 2010, at 62, 62–73.

¹³ See Carol S. Steiker, *Capital Punishment and Contingency*, 125 HARV. L. REV. 760, 763–70 (2012) (book review) (reviewing competing explanations of American exceptionalism in criminal justice).

actual culpability, and that routinely deny them the opportunity to take responsibility and express genuine remorse (pp. 49–50). Victims of crime, rarely consulted and often not even informed, feel alienated from the criminal process even in cases where “their” offenders are apprehended and charged (pp. 26–27). The general public responds to the apparent responsibility deficit and to the ever-widening gap that separates the popular, moralized understanding of criminal justice from the practical reality of a demoralized (in both senses) bureaucratic system with ever greater demands for criminalization and punishment.¹⁴ Increased criminalization and punishment impose huge social costs and expand the system, thus increasing the pressure to rely on “machine-style” plea bargaining, creating in turn yet more popular demands for more effective — that is, harsher — justice. The prescription follows from the diagnosis. It is to break the vicious cycle by rehumanizing the machine, “[r]eturning [p]ower to the [p]ublic in a [l]awyer-[d]riven [s]ystem” (p. 129) by giving a voice to juries in the sentencing process (p. 157), and redesigning the system in order to incorporate the best aspects of community justice, restorative justice, and therapeutic jurisprudence (pp. 129–65).

In this Review, I first set out in some detail Bibas’s main claims, relating them to the broad themes in the existing literature on the problems of the American criminal justice system. I then evaluate Bibas’s diagnosis of the system’s ills and his prescription for its cure. Is his diagnosis of the patient as suffering from the disorder of “bipolarity,” indeed of a virtually psychopathic unfeelingness toward its main human players, accurate? Equally importantly, to the extent that the diagnoses of bipolarity and psychopathy are indeed accurate, are these the patient’s most significant pathologies?¹⁵ And finally, is the cure that Bibas prescribes a promising treatment for the system’s ills, or rather a recipe for further and perhaps worse diseases?

I. THE BIBAS DIAGNOSIS AND ITS ACCOMPANYING PRESCRIPTION

A. *Manufacturing the Machine: From the World of the Scarlet Letter to Metropolis*

How, in Bibas’s view, did the criminal justice system — that ultimate expression of the state’s power in relation to its own population — become an impersonal machine that serves the interests of “insiders” while alienating and ignoring “outsiders”? His answer is rooted

¹⁴ See generally DOUGLAS HUSAK, *OVERCRIMINALIZATION* (2008).

¹⁵ See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

in history. Taking Professor John Langbein's justly influential account of the emergence of the adversarial criminal trial in eighteenth-century England¹⁶ as his departure point (p. 4), Bibas argues that the gradual professionalization of the early modern trial into its modern form consisting of a bipolar contest dominated by lawyers — with the voices of both defendant and victim muted and the role of the jury diminished — already sowed the seeds of the criminal justice machine that exists today (pp. 2–6). Those seeds were nurtured from the early nineteenth century by a utilitarian concern with efficiency, which led to an emphasis on effective procedures and to a diminished focus on the substantive evaluation of guilt that is the real heart of criminal justice (pp. 30–34). But it is not, of course, only “lawyerization” of the trial that marks the professionalization of the criminal process. As Bibas emphasizes, an equally important aspect of the modernized criminal process is the professionalization of the investigation and prosecution of crime (pp. 15–18). Here too, the decisionmaking powers that used to lie with laypeople have been steadily transferred to police officers and prosecutors, as “the professional criminal-justice bureaucracy has squeezed laymen out” (p. 1). The dominance of lawyers and other “insider” professionals, along with the lack of effective accountability mechanisms or feedback loops to ensure their responsiveness to “outsider” views of the system, constitutes the first main theme of Bibas’s analysis (pp. 30–31).

The dominance of professional insiders underpins a second pathology of the system in Bibas’s diagnosis: a deep-seated addiction to plea bargaining.¹⁷ This plea bargaining is conducted behind closed doors (pp. 34–35); it operates within a legal framework that does little to ensure that plea bargains reflect actual culpability (pp. 49–50); it involves a risk of innocent defendants’ pleading guilty out of pressure to do so (pp. 63–65); and conversely, it provides no encouragement for the defendant to take real responsibility for the wrongfulness of his or her conduct or for the harms that it has caused (pp. 72–75). The lack of transparency or accountability mechanisms implies substantial “agency costs” because the “insider” agents’ interests lie in pursuing their own goals — notably, career and earnings enhancement and the smooth processing of cases (pp. 30–34) — rather than in pursuing the goals and respecting the values of principals whose interests they supposedly serve. In particular, the preponderance of plea bargaining has reduced the criminal trial to virtual irrelevance, more or less amputating from

¹⁶ See generally JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (A.W. Brian Simpson ed., 2003).

¹⁷ On the historical development of plea bargaining, see generally GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH* (2003); and MIKE MCCONVILLE & CHESTER L. MIRSKY, *JURY TRIALS AND PLEA BARGAINING* (2005).

the system the central institutional mechanism for the unfolding of the “morality play” that purportedly existed in the era before professionalization (pp. 69–72). Whereas the morality play revolved around moral judgment rooted in popular consensus as expressed in the commonsense judgments of juries, today “[c]itizens and victims cannot influence individual cases in the face of prosecutors’ monopoly” over plea bargaining (p. 52). The result is a system in which the insiders collaborate with one another to serve their own professional interests, with legal rules constituting simply one bargaining chip in an insider game. And this game, which has nothing to do with moral judgment and everything to do with maximizing the number of cases that are processed (pp. 32–33), is both hidden from public view and insulated from public judgment by mechanisms such as legal jargon (pp. 30–32). Ironically, the problem is exacerbated by the legal system’s emphasis on procedural justice, which — particularly in the form of the sentencing guideline systems adopted in many states as a result of the just deserts emphasis on evenhandedness and the curtailment of arbitrary discretion¹⁸ — has reinforced the plea bargaining process by strengthening the bargaining power of prosecutors, while displacing the discretionary power that facilitated mercy and compassion (pp. 25–27).

Third, the pathologies engendered by the professionalization and formalization of the prosecution and trial processes are compounded by the modernization of punishment, and in particular by its carceral form. The modern sensibilities that initially required capital and corporal punishment — and that have subsequently required that imprisoned offenders be removed from the public view¹⁹ — have had the unintended effect of blunting public appreciation of the reality of punishment (p. 23). With its denouement taking place increasingly behind walls, barbed wired fences, and locked doors, it is easy for the public, with only a partial grasp of the real deprivations and pains of punishment, to feel that justice is not being done at all — and hence to demand an increase in penal severity (pp. 22–23). Exacerbating this problem, American criminal justice in Bibas’s view suffers from an acute form of bipolar disorder. Swinging between the crime control and due process models distinguished by Professor Herbert Packer,²⁰ the system veers between an emphasis on individual due process rights against the state and the pursuit of “mechanical efficiency” (p. 109) —

¹⁸ See TONRY, SENTENCING MATTERS, *supra* note 8, at 3–4; Reitz, *supra* note 8, at 223–24.

¹⁹ These historical forces, touched on but barely discussed by Bibas, are sensitively analyzed by David Garland in DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY (1990). See also MICHEL FOUCAULT, DISCIPLINE AND PUNISH 73–103 (Alan Sheridan trans., 1977); MICHAEL IGNATIEFF, A JUST MEASURE OF PAIN 11–14 (1978); THE OXFORD HISTORY OF THE PRISON 49–109 (Norval Morris & David J. Rothman eds., 1995).

²⁰ See HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149–73 (1968).

with each pole itself, in Bibas's view, bipolar in pitting the individual defendant against a "faceless, unitary government" (p. 112).

Taken together, these pathological aspects of American criminal justice have led to the dangerous separation of the system's machinery from the moral spirit that animated it. The result is an undue emphasis on procedure and a concomitant lack of concern with the substance of criminal evaluation. No wonder that the public feels distrust and dissatisfaction upon finding that its commonsense intuitions about both criminal judgment and fair process — intuitions about which, as Bibas follows Professor Paul Robinson (p. 37), Professor Tom Tyler (p. 120), and others²¹ in believing, there is a robust consensus — are so poorly reflected in the actual system. The modernization of the criminal justice system — the process of formalization and professionalization — was motivated by admirable concerns: the curtailing of arbitrary power that could be, and often was, used for the ends of injustice, notably racial injustice; the efficient use of public resources; and the delivery of equal justice. But in Bibas's view it has led to baleful consequences, and to a system that is underpinned and stabilized by the powerful and coinciding interests of insider elites. In his excoriating analysis, Bibas characterizes criminal justice today as little more than a game driven by mutually reinforcing dynamics leading to a vortex of overcriminalization and penal severity: the power of insiders (notably prosecutors) to shape criminal enforcement creates a gap between the law and process as declared and the law in action; outsider reaction to the gap takes the form of attempted legal controls on discretion such as sentencing legislation; insiders' avoidance of the regulations undercuts these reforms; outsiders and politicians react by upping the legislative ante through measures like the Rockefeller Drug Laws and mandatory sentencing laws; insider discretion finds further ways to evade the new restrictions, hence widening the gap and creating further outsider dissatisfaction (pp. 40–48). And so it goes on, with ever worse consequences for the quality of American justice. "Squelching the older, healthier outlets for the voice of the people has created hydraulic pressures that erupt in crude policies [such as mandatory sentencing laws]. Popular pressure is a fact of life in America, and criminal justice ignores it at its peril" (p. 123).

²¹ See Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1832 (2007); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 132 (1988). More recently, see Tracey L. Meares, Tom R. Tyler & Jacob Gardener, *The Two Different Worlds We Live in: Lawfulness and Perceived Police Misconduct* 4–7 (Yale Law Sch., Public Law Working Paper No. 255, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116645.

*B. Reconstructing the Machine: Recapturing the “Village Ideal”*²²

Bibas’s prescription for the avoidance of this peril, and for the reconstruction of the dehumanized, cost-benefit-oriented, opaque criminal justice machine, follows directly from his diagnosis. At root, the direction of travel “from [m]orality [p]lay to [m]achine” (p. 1) must be reversed. Instead of the bipolar due process/crime control model, Bibas proposes a model in which “criminal justice ideally should be neither an assembly line nor an obstacle course but an educational public theater” (p. 113), a process in which both the (rather different) left-liberal relativism and right-economistic value skepticism and aversion to moralized judgment give place to a renewed emphasis on the substance of criminal law and on the role of criminal procedure in the delivery of substantive justice (pp. 114–17). The prosecution, trial, and penal processes should accordingly be redesigned to incorporate aspects of the morality play — accusation, judgment, and punishment — that give criminal justice its essential character (pp. 126–27). Ideally, these central components of the morality play would be accompanied by an acceptance of responsibility and an expression of remorse. The institutional arrangements for the charge, trial, and punishment of offenders should accordingly include provisions encouraging and facilitating these things, and feature discretion that may be exercised toward mercy, compassion, and forgiveness (pp. 72–81). Punishment should become more constructive, with imprisonment involving regular useful work and reoriented around the goal of reform (pp. 133–40); the draconian collateral consequences of conviction, notably residency and employment restrictions and disenfranchisement, should be cut back in the interests of reintegration (pp. 140–44); the legitimacy of the system should be enhanced by increased transparency and greater public participation (pp. 144–50); both victims and offenders should be better informed and more regularly consulted (pp. 150–56).

At a yet more fundamental level, a reconstructed criminal process should explicitly recognize that criminal judgment and punishment are not matters of pure reason, but are human processes deeply imbued with powerful emotions that give criminal judgments their full meaning, significance, and efficacy. Indeed, in Bibas’s view, it is the evacuation of emotion from the criminal process in favor of rational argumentation and the focus on the efficient pursuit of system goals that have created the gap between insider and outsider conceptions of criminal justice. In his words, “[t]he state-centered model assumes that cold reason should dominate criminal-justice decisions and exclude human emotions. But the cool logic of state-monopolized justice, to

²² STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 117 (2012).

the exclusion of victims, conflicts with many people's moral intuitions. Why should the right to punish belong *exclusively* to the state?" (p. 85).

It follows in Bibas's view that victims should have a voice in a reconstructed criminal process. While victims should not have the ability to veto plea bargains, prosecutors should at a minimum have to justify to victims any decision to drop a case or to accept a plea (p. 91). Indeed, Bibas goes further and argues for more robust victim participation in the trial as part of a return to local democracy (p. 92). Bibas emphasizes that his agenda for victims is quite distinct from the main tenor of the recent victims' rights movement (pp. 92–94). According to Bibas, this movement has often been confounded with a form of unreflective law and order rhetoric that is driven more by the interests of police and prosecutors than by those of victims themselves (pp. 92–95).²³ Alongside this (somewhat vaguely specified) commitment to greater victim participation designed to create opportunities to "reconcile and heal all the parties" (p. 94), Bibas sees the adoption of measures of restorative justice in the manner advocated by Australian scholar John Braithwaite²⁴ as a promising way beyond the unproductive "zero-sum struggle" of contemporary criminal justice (p. 96). But as with the victims' rights movement, Bibas distinguishes his position from that of the most enthusiastic advocates of restorative justice in that he emphasizes the central role of blame and sees provisions such as victim-offender mediation, community-based reparative boards, family group conferences, and sentencing circles as appropriate primarily for crimes of low or moderate seriousness (pp. 97–101). He also emphasizes the need to avoid naïve sentimentality about offenders and their capacity to change, and he sees denunciation and punishment as key precursors to forgiveness and reintegration, particularly in more serious cases (pp. 98–99). He accordingly follows Professor Howard Zehr in seeing retribution and restoration as twin components in a rehumanized criminal process rather than as alternatives (p. 100).²⁵

Another source of reformist inspiration for Bibas is the therapeutic jurisprudence movement and the drug and problem-solving courts that

²³ Compare the nuanced interpretation of the role of victims in the development of rape and domestic violence laws offered by GOTTSCHALK, *supra* note 5, at 115–64.

²⁴ See generally JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989); JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* (2002).

²⁵ Howard Zehr, Book Review, 43 *BRIT. J. CRIMINOLOGY* 653 (2003) (reviewing *THE SPIRITUAL ROOTS OF RESTORATIVE JUSTICE* (Michael L. Hadley ed., 2001)). Surprisingly, Bibas does not here acknowledge the directly relevant argument developed by John Braithwaite and Philip Pettit, JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS* (1990), which twins reintegration with restoration and reprobation in what is arguably one of the two most sympathetic recent theories of punishment from Bibas's point of view (the other being R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* (2001)).

have been its (indirect) progeny²⁶ — rapidly expanding institutions whose judicial philosophy is one of diversion, pragmatism, and teamwork to engineer a legal process that tailors its responses to the needs of the offender, giving support and opportunities for rehabilitation (pp. 102–06). These institutions resort to formal enforcement only where therapeutic measures such as rehabilitation programs have failed. As with his endorsement of victim participation and restorative justice, however, Bibas’s endorsement of therapeutic jurisprudence is qualified, for he is uncomfortable with the rhetoric’s “clinical ring” (p. 105), which implies an inadequate concern with blame and with proportionality in punishment and which posits an expert role for which the judge is neither trained nor equipped. Here, as in the first two cases, there is a whiff of the would-be reformer who wants to have his cake and eat it. I have more to say about this understandable but unrealistic ambition below.

II. EVALUATING THE DIAGNOSIS: CARICATURE OR ETIOLOGY?

Bibas’s diagnosis of the ills of American criminal justice has many persuasive features and touches on some undeniably important issues. In particular, his nuanced account of the dangers of different forms of plea bargaining and the shortcomings of the legal framework regulating it is compelling. So too is his analysis of the growing scope of prosecutorial discretion and of the often-aligned interests of defense and prosecution lawyers who, according to the theory of the adversarial trial, should in fact be representing different interests. More fundamentally, the insight that the perceived legitimacy of the criminal process is key to its effective operation is an important one that, with a few exceptions,²⁷ features less than it should in criminal justice scholarship. While Bibas gives no real evidence for his claim that widespread distrust has fostered the pathological dynamics that have corroded the quality of American criminal justice, it is plausible that the gap between, on one hand, popular conceptions and political rhetoric about the nature of criminal justice and, on the other hand, its reality has indeed fostered popular support for developments such as “truth in

²⁶ On drug courts, see Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 417–19 (2009).

²⁷ See generally, e.g., LEGITIMACY AND CRIMINAL JUSTICE (Tom R. Tyler ed., 2007). On the ways in which the modernization and professionalization of English criminal law created a similar legitimation gap that was plugged by the extension of the franchise, and the implications of the structure of British democracy for the stability of criminal policy, see Nicola Lacey, *The Way We Lived Then: The Legal Profession and the 19th-Century Novel*, 33 SYDNEY L. REV. 599, 612–18 (2011); and Nicola Lacey, *What Constitutes Criminal Law?*, in THE CONSTITUTION OF THE CRIMINAL LAW (R.A. Duff et al. eds., forthcoming 2013).

sentencing” and the mandatory-sentencing statutes. These developments have contributed to the unique harshness of the contemporary American system.

Yet Bibas’s diagnosis also suffers from serious shortcomings. Among these deficiencies, two related problems call for particular comment. First, Bibas undermines the strengths of his position by indulging in caricature. Second, this tendency to caricature diverts his attention from the crucial etiological question that his critique raises and on which the feasibility of his prescription depends: how did the system come to display the features that are the object of that critique? I consider each of these problems in turn.

In what sense does Bibas’s account caricature the American criminal justice system? Few who have been on the receiving end of a strongly worded criminal sentence would, I suspect, recognize the depiction of a system that is reluctant to judge or condemn; few who have witnessed victim impact statements would recognize the depiction of a system in which emotion has no place. And those who have received sympathetic advice and treatment from lawyers or other criminal justice officials would not recognize the depiction of a dehumanized machine. Bibas’s tendency to veer between broad rhetorical caricature and concrete claims also leads to a number of apparent contradictions. For example, he criticizes the way in which plea bargaining encourages fake acceptance of responsibility and expression of remorse, yet claims that sometimes even insincere expressions of remorse can cultivate the real thing (pp. 66–69).²⁸ Similarly, he decries the lawyerly orientation to efficient case processing as inimical to the moral quality of criminal justice (p. 109), yet paints a picture of a system that is anything but efficient, as judged in broad terms. Indeed, the concept of efficiency itself merits more critical appraisal. One may not want a “market model” to drive criminal justice, but nor should one go to the other extreme; efficiency matters, not least because of the extensive resources devoted to criminal justice. There is too much reliance on anecdote (including reliance on “anecdotal interviews” with judges, the content and method of which are not explained (pp. 67–68)), and assertion sometimes replaces a careful review of the relevant evidence.

Moreover, Bibas’s enthusiasm for his own caricature sometimes appears to cloud his judgment and skew the implicit etiological story that underlies his account. Given a system whose recent history has been so strongly marked by politically manufactured developments such as the “War on Drugs,” his estimation that political actors have

²⁸ Compare Bibas’s argument in chapter four on the “dangers of fakery” (p. 98) with his argument in chapter three that “most defendants who use [guilty-but-not-guilty pleas] are actually guilty but in denial” (p. 62) and with his argument that equality is overemphasized by the machine (p. 104), yet routinely violated (pp. 116–18).

had more success than judges have had in ensuring equality in criminal justice (p. 92) is, to put it mildly, very surprising.²⁹ Indeed, to the extent that judges have been less than effective in defending equality, this failing may have had to do with the political pressure on judges themselves.³⁰ Perhaps most surprising of all, there is virtually no discussion of the expanding scope of the criminal law, and of the ways in which that expansion has fed into the dynamics that Bibas criticizes. That expansion process further undermines the claim that politicians have a creditable track record here. As Professor William Stuntz puts the connection:

When politicians both define crimes and prosecute criminal cases, one might reasonably fear that those two sets of elected officials — state legislators and local district attorneys — will work together to achieve their common political goals. Legislators will define crimes too broadly and sentences too severely in order to make it easy for prosecutors to extract guilty pleas, which in turn permits prosecutors to punish criminal defendants on the cheap, and thereby spares legislators the need to spend more tax dollars on criminal law enforcement.³¹

These failures to consider the impact of legislative and political dynamics on the scope and substance of criminal law are symptomatic of a missed opportunity to get to grips with what we might call the conditions of existence of the modern American criminal process. While *The Machinery of Criminal Justice* does not pretend to provide an interdisciplinary assessment of its subject matter, it is nonetheless disappointing to see its patchy referencing of the copious relevant literature, including literature that is supportive of the broad direction of its analysis.³² A more consistent engagement with a broader literature in the social sciences would have revealed a key shortcoming of the Bibas diagnosis: it is based on analysis of only a small number of the social phenomena that bear on the operation of the criminal process and that have shaped its development to this point. The social realities of crime hover around the edges of the book, and the ways in which both the scale and the scope of recorded crime have changed over the last fifty years and have contributed to the efficiency-obsessed criminal justice

²⁹ On the influence of law-and-order politics, see generally KATHERINE BECKETT, MAKING CRIME PAY (1997); and SCHEINGOLD, *supra* note 11.

³⁰ See Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 174–76 (2009).

³¹ STUNTZ, *supra* note 1, at 68.

³² Two of the most obvious examples are HUSAK, *supra* note 14, which would have added grist to Bibas's mill by expanding the relevance of his argument to the scope of criminal law; and MILLER, *supra* note 2, which makes a nuanced case, based on empirical research, for greater participation in criminal justice decisionmaking at the local level. Of this broader literature, see *supra* notes 1–6, Bibas cites only four items — GARLAND, *supra* note 5; SIMON, *supra* note 5; STUNTZ, *supra* note 1; and WHITMAN, *supra* note 4 — and of these, only Stuntz receives anything more than brief mention in the text.

machine are considered not at all. The political dynamics and the constitutional framework that have allowed the American system to develop to its present shape, let alone broad social and economic changes, are largely outside the frame of the picture that Bibas presents. There is only brief comparative analysis of the differences between the American and other contemporary criminal justice systems — and such information might have shed light on the distinctive dynamics of the American system. Bibas's relentless focus on a particular cluster of criminal justice-specific variables sharpens the contours of his caricature while clouding his view of the power relations and broad institutional dynamics that have put the criminal justice machine in place.

There is also an important question about Bibas's implicit explanatory story and its timeline. Quite apart from its cursory acknowledgment of the powerful arguments about fairness that underpinned the original move to a more rule-based and professionalized system, Bibas's historical account of the emergence of a lawyer-dominated system cannot explain why American criminal justice became so acutely demoralized only in the late twentieth century. After all, the changes that he suggests unleashed this dynamic — the professionalization of criminal justice and the formalization of criminal law — go back at least 150 years.

The diagnosis is, in short, not adequately grounded in an etiology of the disease. This may seem an unfair quibble: after all, the book is quite specifically about the failings of the contemporary criminal process and how it might be redesigned to put them right. But crucially, if we do not fully understand *how* and *why* the American criminal process developed in the way it did, it is unlikely that we will be able to come up with a robust analysis of how to change it and a set of reforms that are at once attractive and feasible. And as appears in the next two Parts, this narrow focus of the Bibas diagnosis has telling consequences for the moral and political attractiveness of his proposed reforms, and for their practicability.

III. EVALUATING THE TREATMENT: KILL OR CURE?

I should preface my assessment of the Bibas cure with a confession. I am almost certainly a member of a group that Bibas derides in the one brief comparative passage of his text: the “British liberal elites” who “fear ‘untutored public sentiment’ and emotion (p. 122).³³ Delighted as I am to be a member of a club whose North American ana-

³³ The author quotes Ian Loader, *Fall of the 'Platonic Guardians': Liberalism, Criminology and Political Responses to Crime in England and Wales*, 46 *BRIT. J. CRIMINOLOGY* 561, 568 (2006).

logue embraces scholars of the stature of Professors David Garland, Michael Tonry, and James Q. Whitman, I hope in this section to convince the reader not only that the consequences of the Bibas cure — even if it could be administered — would be little short of disastrous for the quality of American criminal justice, but also that this view does not proceed from an unreflective liberal elitism. Rather, as I argue in Part IV, Bibas’s critique of Garland, Tonry, Whitman, and other “liberal elites” rests on a number of false assumptions.

A. *Romanticizing the Village Ideal*

The first and possibly the most important point to make about Bibas’s prescriptive vision is that it is deeply pervaded by a sense of nostalgia for the lost world of the “village ideal” (p. 117). Indeed, some parts of his case for reform are more hortatory than analytical. Yet one should be chary of romanticizing a system of justice that had serious disadvantages, ones that were a driving force in the movement for reform from the late eighteenth century. Key among these disadvantages was a pervasive executive and judicial discretion that led in general to wildly unequal justice and in particular to the disproportionate, and sometimes bloodthirsty, criminalization of those regarded as being of bad character or as being otherwise marginal or dangerous.³⁴ In the English system that Langbein describes, lay participation took not only the horizontal form of the jury but also the distinctly hierarchical form of the magistracy, drawn from the propertied classes.³⁵ This system also employed shortcuts to justice equivalent to today’s plea bargaining: criminalization on the basis of assumptions about bad character was pervasive,³⁶ while historiographical research has estimated that the average length of a criminal trial in late-eighteenth-century England was in the region of twenty minutes.³⁷ “Village justice” all too often amounted to scapegoating or “giving a dog a bad name” rather than to a cathartic “morality play” based on

³⁴ See PETER KING, CRIME AND LAW IN ENGLAND, 1750–1840, at 25–27, 31 (2006); PETER KING, CRIME, JUSTICE, AND DISCRETION IN ENGLAND, 1740–1820, at 207–08 (2000) [hereinafter KING, CRIME, JUSTICE, AND DISCRETION]; Douglas Hay, *Property, Authority and the Criminal Law*, in ALBION’S FATAL TREE 17, 19 (Douglas Hay et al. eds., 1975).

³⁵ See KING, CRIME, JUSTICE, AND DISCRETION, *supra* note 34, at 354–56.

³⁶ See NICOLA LACEY, WOMEN, CRIME, AND CHARACTER 14–17 (2008); LANGBEIN, *supra* note 16, at 190–91; Nicola Lacey, *In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory*, 64 MOD. L. REV. 350, 361 (2001); Nicola Lacey, *Responsibility and Modernity in Criminal Law*, 9 J. POL. PHIL. 249, 257 (2001).

³⁷ See J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660–1800, at 378 (1986); J.M. BEATTIE, POLICING AND PUNISHMENT IN LONDON, 1660–1750, at 259–60 (2001); LANGBEIN, *supra* note 16, at 16–18; J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIST. REV. 221, 222 (1991).

shared values. And those who, like Hester Prynne of *The Scarlet Letter*, found themselves beyond the limits of toleration endured brutally stigmatizing and excluding penalties.³⁸ Bibas does acknowledge the dangers of nostalgia, recognizing that both the complexity of contemporary society and our attachment to due process are incompatible with a return to “colonial criminal justice” (p. 130). “Nor,” he writes, “would we want to go back to brutal, often racist whippings in the town square” (p. 130). (That’s a relief.) But without a clear analysis of how the “good things that we have lost” (p. 130) fit into a broader institutional and social framework, Bibas is poorly equipped to convince us of the wisdom and feasibility of his reformist vision of a renewal of those good things.

Bibas’s reformist vision may usefully be broken down into two components: first, its underlying values and the accompanying worldview just described; second, its concrete institutional proposals. The relationship between the two varies, however, and the institutional proposals fall into two groups: first, those that do not fundamentally depend on the larger vision, and second, those that proceed directly from it. I take each of these in turn.

B. Adjusting the Machine

In crafting a number of useful suggestions that can stand independently of that broader normative vision, in the sense that they would fit equally well within other frameworks, Bibas’s understanding as a sophisticated insider serves him well. These suggestions include “micro-level” proposals of providing both victims and offenders with better information about the course of their cases (pp. 150–56). Bibas also suggests a number of “mid-level” reforms relating to greater transparency and information, such as the publication of more complete local statistics on criminal justice in an effort to counter the political sway of misleading anecdotal information about conviction rates, transparency about prosecutorial plea and sentence bargaining policies, mandatory provision of reasons for downgrading or dropping charges, the publication of more complete information about policing practices in local communities, the rolling back of mandatory-sentencing frameworks that rule out any role for leniency as institutionalized forgiveness, and regular provision for consultation with community groups (pp. 144–47). Similarly, Bibas’s proposals for more constructive regimes in prisons, including meaningful work (pp. 133–40); his critique of overextensive collateral consequences of conviction, not-

³⁸ See NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Oxford Univ. Press 2007) (1850).

ably felon disenfranchisement;³⁹ and his argument for better provision to facilitate offender (and particularly prisoner) reentry (pp. 140–44) would command very wide support even among those unconvinced by his broader vision.

Much of this discussion is fundamentally commonsensical. And although it can be frustrating to be led through a series of claims that are immediately qualified by the rather generalized recognition that interests and values will have to be balanced (“this area requires a difficult weighing of interests and the chances we are willing to take” is a typical example (p. 142)), I suspect that most readers will find much to agree with in this part of Bibas’s argument, even if the level of generality at which he sketches his reform proposals sometimes leaves room for doubt about their feasibility or indeed their attractiveness. A notable example here would be the proposal for mandatory work in prisons, in relation to which the echoes of slavery and convict leasing are too lightly dismissed (pp. 135–36). Concessions such as the statement that “there is no denying that the political and practical hurdles [to prison work] are substantial enough to make this proposal a long-term hope rather than a realistic short-term goal” (p. 137) are not an adequate substitute for a close analysis of the political dynamics underpinning those hurdles. The proposal for prison work and reentry programs proceeds without fully discussing the surrounding labor market, a surprising omission in a book written at a time of very high unemployment. Nor is there any reference to the important literatures⁴⁰ on the history, economics, and politics of prison labor in the United States and on the longer-term social consequences of imprisonment — work that tells us all too clearly that fears about the long-term stigmatizing and degrading effects of punishment are far from being a strange obsession of the “liberal elite” or of hopelessly relativistic academics (pp. 121–22, 124). Moreover, *The Machinery of Criminal Justice* includes no real attempt to assess the ways in which the cost pressures within a rapidly expanding system that have encouraged the “mechanized” justice that Bibas decries relate to the political taste for an expanded *scope* for criminal law. And this means that his analysis lacks any basis for a realistic discussion of the complex problem of how costs and justice should be balanced, retreating instead into the comfortable ten-

³⁹ See generally JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT* (2006).

⁴⁰ On the history, politics, and economics of convict leasing and prison labor in the United States, see generally, for example, ASATAR P. BAIR, *PRISON LABOR IN THE UNITED STATES* (2008); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* (2008); and GOTTSCHALK, *supra* note 5, at 48–52. On the social effects of imprisonment, see generally, for example, BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006). See also MAUER, *supra* note 5, at 130–86.

gency to dismiss economic arguments as unprincipled or skeptical about values. Bibas's readers deserve a more nuanced assessment.

The more interesting task, however, is to subject to critical scrutiny the second group of institutional proposals that represent those aspects of Bibas's reform agenda that proceed directly from his distinctive normative vision of the desirability of a return to the "morality play" model of criminal justice. Here two proposals are of particular note: his insistence that the criminal process must acknowledge, work with, and even celebrate the emotions; and his proposals for an infusion of local democracy and popular participation in the criminal process. I take each of these in turn.

*C. The Ghost in the Machine: Reason, Emotion, and
the False Responsibility/Therapy Dichotomy*

As already discussed, in Bibas's view, one of the primary shortcomings of the criminal justice machine as it currently exists is its failure to accommodate and incorporate the strong emotions that tend to accompany criminal victimization, the attribution of criminal responsibility, and the infliction and experience of punishment. "Too often, law comes across as cold, hard, and inhumane in its logic" (p. 104). "The state-centered model assumes that cold reason should dominate criminal-justice decisions and exclude human emotions" (p. 85). Here he sees "therapeutic jurisprudence" as having the distinct advantage of trying to "respect the place of emotions in criminal justice" (p. 104). In Bibas's view restorative justice also enjoys the ability to marshal relevant emotions to constructive ends in the process of reintegrative shaming (pp. 94–96). Yet he decries the idea of judges' acting as untrained therapists and criticizes the reliance of therapeutic jurisprudence on expertise that is divorced from "popular moral judgment. Therapeutic rhetoric has a clinical ring . . . [and] can degenerate into psychobabble" (p. 105). Restorative justice too has flaws, for in Bibas's view, blame is utterly central to an adequate criminal process (p. 98).

It is of course perfectly reasonable for Bibas to draw attention to problems with both therapeutic jurisprudence and restorative justice — notably the extent to which they potentially abandon the values of equality of treatment and procedural legitimacy. It is less clear that the incorporation of only certain aspects of each provides a coherent or desirable basis for reform. Two questions in particular are pressing from both a moral and a practical point of view. First, one needs to ask whether the criminal justice system is the right place in which to

incorporate and deploy emotions deliberately.⁴¹ Nearly forty years after the revival of retributivism, repackaged as “just deserts,” as the dominant public philosophy of American punishment, one might think that considerable evidence has accumulated that the celebration of what we might call the retributive emotions has some quite serious adverse implications for the quality of American justice. In particular, research suggests that the desire for vengeance and punishment is insatiable, in the sense that while victims may believe that severe punishment of “their” offender will make them feel more satisfied, that often turns out not to be the case.⁴² This evidence surely gives strong reason to avoid any institutional celebration or encouragement of the retributive emotions.⁴³

Even if one were not in possession of empirical evidence, a realistic grasp of the practicalities of the criminal process in general and of the trial process in particular would surely give pause for thought about how much the relevant actors are really capable of shaping a process that sets out to draw constructively on emotional dynamics to the ends of justice. While I am sympathetic to the view that certain kinds of restorative justice may have some capacity to “manage” and marshal complex negative emotions, criminal courts are neither suitable nor legitimate places for this task. The ever-present danger of criminalizing power being driven in an arbitrary, unequal, or harsh direction by strong emotive forces should make us very slow to dismiss the importance of rational argumentation and general rules. Unless Bibas can tell us in much more concrete terms what he means by giving “human emotion . . . a seat at the table” (p. 87) or achieving a more “human-focused criminal justice system” (p. 88), the suspicion remains that his goal may be unrealistic or potentially threatening to the rule of law.

The second question that should be raised about this aspect of Bibas’s argument, and one that reinforces the reservations just mentioned, is about the role of blame in the criminal process. As discussed, Bibas sees blame as central to the criminal process. He

⁴¹ See Nicola Lacey & Hanna Pickard, *From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm*, 33 O.J.L.S. (forthcoming Mar. 2013) (manuscript at 19–21) (on file with the Harvard Law School Library).

⁴² See generally Victoria McGeer, *Civilizing Blame*, in *BLAME* (D. Justin Coates & Neal A. Tognazzini eds., forthcoming 2013).

⁴³ For a persuasive appraisal of the literature on reintegrative shaming, including a discussion of the psychological evidence on potential dangers implicit in the institutionalization of shaming, see Nathan Harris & Shadd Maruna, *Shame, Sharing and Restorative Justice: A Critical Appraisal*, in *HANDBOOK OF RESTORATIVE JUSTICE* 452, 452–62 (Dennis Sullivan & Larry Tift eds., 2006). Harris and Maruna argue for an understanding of restorative justice as “management” of the shame that inevitably arises as a by-product of calling an offender to account, a practice that disciplines the negative, exclusionary potential of shame in favor of its remorse-promoting aspects. See *id.* at 459–60.

moreover appears to understand blame in terms one might call “affective blame”: the range of hostile, negative attitudes and emotions such as anger, hatred, and disgust that are typical human responses to criminal or immoral conduct. For Bibas, the attribution of responsibility and the judgment of blameworthiness and wrongdoing necessarily involve blame in this sense. Hence he thinks that there are limits to the extent that a society’s response to crime should be therapeutic or oriented to rehabilitation and reintegration. This is because the therapeutic and rehabilitative goals, in his view, are potentially inconsistent with the principle that offenders should be treated as agents who are expected to take responsibility for their actions and answer to fellow members of society when they act wrongly.

I share the widely held view that punishment can only be justified if the offender is a *moral agent* who is responsible and hence blameworthy for his or her offense. But the recognition that responsibility matters does not imply that affective blame must be part of the process; indeed, quite the reverse. Here one may draw a useful analogy to effective clinical treatment of disorders of agency, which employs a conceptual framework in which ideas of responsibility and blameworthiness are clearly separated from affective blame.⁴⁴ Moreover, this separation is effected for a very good practical reason: the intrusion of affective blame into the clinical process is inimical to effective treatment. But this is not to deny the agent’s responsibility, let alone to descend into “psychobabble.” In fact, far from being inconsistent with responsibility, effective clinical treatment can go forward *only* on the basis of an acceptance of responsibility — an idea that chimes with Bibas’s argument that denial of responsibility is a block to treatment (p. 66). As Hanna Pickard and I have argued elsewhere, taking this clinical model of “responsibility without blame” — a process of holding to account for wrongdoing that avoids the expressions of anger or hostility that are part and parcel of affective blame — into the legal realm allows for the reconciliation of the idea of “just deserts” with a rehabilitative ideal in penal philosophy.⁴⁵ Punishment can be reconceived as consequences — typically negative but occasionally not, so long as they are serious and appropriate to the crime and the context — imposed in response to, by reason of, and in proportion to responsibility and blameworthiness, but without the hard treatment and stigma typical of affective blame. This approach suggests a way in which sentencing and punishment can better avoid affective blame and instead

⁴⁴ See Hanna Pickard, *Responsibility Without Blame: Empathy and the Effective Treatment of Personality Disorder*, 18 PHIL. PSYCHIATRY & PSYCHOL. 209, 210 (2011); Hanna Pickard, *Responsibility Without Blame: Philosophical Reflections on Clinical Practice*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF PSYCHIATRY (B. Fulford et al. eds., forthcoming 2013).

⁴⁵ Lacey & Pickard, *supra* note 41 (manuscript at 2).

further rehabilitative and related ends, while nonetheless serving the demands of justice. Strong emotions are inevitable in many criminal trials. But Bibas has not explained how their institutional incorporation can be made conformable with the training and capabilities of actors in the criminal process and with the primary object of a criminal trial: doing justice.

D. Local Democracy as (In)egalitarian?

The second reformist argument at the core of Bibas's underlying "populist" (p. xxx) vision of a return to the "village ideal" has to do with increasing public participation in criminal justice decisionmaking at a local level, building on America's "decentralized system of government [that] has bred more experimentation at local levels" (p. 132). While the form that this participation would take is not set out in much detail, Bibas envisages not only local consultation on prosecution and policing policy, but also involvement in monitoring plea bargains, groups of citizen advocates rotating through prosecutors' offices and police departments (pp. 147–50), and even "restorative sentencing juries" (pp. 156–64). Underlying all these proposals is a rosy (and misty) view of "local community [that] seeks to draw upon shared culture and experiences, as well as participatory deliberation" (p. 162). And underlying this aspiration is a relatively concrete speculation: "Making criminal justice more local and democratic may make it more egalitarian as well" (p. 126). Citing instances where local pressure has led to backlashes against various forms of injustice in law enforcement, Bibas further makes the surprising claim that politicians, under pressure from voters, have had greater success than have judges in regulating police and prosecutors, and he concludes that direct lay participation would maximize the chance of "equaliz[ing] outcomes" (p. 92).⁴⁶

In what follows, I gloss over both the obvious question of how Bibas envisages defining the limits on popular sway over criminal justice decisionmaking (he states, for example, that chain gangs ought to be ruled out despite their popularity (p. 135)⁴⁷). In addition, I ignore for the most part the ambiguity in his vision of the respective roles of state and lay participants, which veers between high talk of moving away from a "state[] monopoly on criminal justice" (p. 84) — a phrase that seems to imply parallel, lay-run systems without explaining how they would be articulated with the state system — and more modest proposals for lay participation *in* the state system. Rather, I challenge

⁴⁶ Bibas cites Professor William Stuntz's argument about the role of local democracy in improving the quality of justice in the "Gilded Age." See STUNTZ, *supra* note 1, at 129–57.

⁴⁷ Bibas does, however, appear to accept that chain gangs would be justified should there be "near-consensus support" (p. 135).

head-on the proposition that a move to more localized criminal justice would likely have an egalitarian impact.

My argument here takes off from the recognition that, as things stand, the American criminal justice system is not only uniquely harsh, but also more inegalitarian, in its race and class impact, when compared with the criminal justice systems of other relatively punitive liberal market countries.⁴⁸ Why should the United States occupy this unenviably exceptional position? One might argue that this situation arises because the United States exhibits the main institutional characteristics that seem to have promoted harsh penal justice — and arguably, high levels of violent crime — to an even greater degree than other liberal market countries. The highly adversarial majoritarian political system of the United States is particularly susceptible to the “prisoners’ dilemma” dynamic, in which neither major political party can afford to temper its criminal policy because it is impossible to construct a moratorium on the competition to be tougher on law and order. This susceptibility has become highly politicized, and its constitutional controls are oriented to due process rather than to the substance of punishment or criminalization. Moreover, the U.S. economy is marked by particularly low levels of unionization, of employment protections, and of industry-union-government coordination and investment in training; it experienced a particularly catastrophic collapse of Fordist industrial production; and its welfare system is particularly ungenerous, all of which conduces — notwithstanding its reputation as a classless society — to especially high levels of social inequality and polarization, most vividly around the characteristic of race.⁴⁹

In assessing Bibas’s case for greater democratic control, it is important to note the fact — surprisingly underplayed in criminal justice scholarship — that electoral politics and the structure of party systems set up dynamics that are of key importance to criminal justice.⁵⁰ But these dynamics vary significantly across different levels of electoral competition. And crucially, these levels are much more numerous and differentiated in the United States than in any other advanced democracy. Precisely because of the radically extensive and decentralized character of electoral politics, the American criminal justice system is already governed by local decisionmaking to a unique degree, and the

⁴⁸ See Campbell, *supra* note 1, at 293 (pointing out that the more decentralized states and those that “had historically opposed federal intervention in state affairs were among those that embraced mass incarceration most fervently”); Lacey, *supra* note 4, at 103, 107.

⁴⁹ See WESTERN, *supra* note 40; Bruce Western & Becky Pettit, *Incarceration and Racial Inequality in Men’s Employment*, 54 INDUS. & LAB. REL. REV. 3, 3, 7 (2000). This argument is spelled out in more detail in Lacey, *supra* note 4, at 106–08.

⁵⁰ See STUNTZ, *supra* note 1, at 254–57; Nicola Lacey, *Political Systems and Criminal Justice: The Prisoners’ Dilemma After the Coalition*, 65 CURRENT LEGAL PROBS. 203 (2012).

key impact of the electoral “prisoners’ dilemma” dynamic on candidates competing for tough law-and-order credentials seems likely to be at the local level. Two main dynamics are in play here. First, the extraordinarily decentralized quality of American democracy sets up a situation in which the prisoners’ dilemma is reproduced through very frequent elections at the state, county, and municipal levels, significantly increasing its impact.⁵¹ Second, individuals seeking election at the local level have an interest in advocating popular policies, the costs of which do not necessarily fall on their own electoral constituency.⁵²

These points are particularly important in any attempt to explain American criminal justice. Even more than at the national level, the system of local democracy exhibits those features of political systems that are most closely associated with “prisoners’ dilemma” effects: while weak party discipline and leader/personality domination have characterized national and state-level politics, these dynamics are probably yet more powerful in local politics, where many electoral contests are explicitly nonpartisan. Actors with key roles in the criminal process — mayors, judges, district attorneys, and sheriffs, to name only the most obvious — are often elected, and hence subject to direct electoral discipline, and their electoral campaigns tend to depend on an extensive practice of radio and television advertising focused on their individual record or policy commitments rather than on party platforms. Even beyond this aspect of local politics, the American practice of electing officials — county commissioners, school boards, treasurers, and so on — reaches deep into institutions somewhat removed from the criminal justice system, yet in which a median voter orientation will be likely to bring the “governing through crime” agenda into play.

Another important feature of these American electoral dynamics derives from the fact that crime ranks among the most important issues identified in national opinion surveys, and is an especially salient electoral issue when the economy is performing well.⁵³ Local officials such as district attorneys and mayors therefore stand to gain electorally by promising tougher measures on crime. Yet crucially, these local officials may either not have to fund the costs of such measures themselves, or if they do have to fund them, they may not face the full political costs of their economic choices. Mayors, for example, are not responsible for most aspects of a city’s economic performance. Even governors are rarely regarded by voters as importantly responsible for

⁵¹ Lacey, *supra* note 4, at 109–10.

⁵² For a detailed elaboration of this argument, see David Soskice, *American Exceptionalism and Comparative Political Economy*, in *LABOR IN THE ERA OF GLOBALIZATION* 51, 88–90 (Clair Brown, Barry Eichengreen & Michael Reich eds., 2010).

⁵³ Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 87 *AM. ECON. REV.* 270, 274 (1997).

the state of the economy, whose management is seen as lying primarily at a federal level.⁵⁴ In this context, tough law-and-order policies are electorally attractive — and politically costless. This is a powerful recipe for, loosely speaking, a “prisoners’ dilemma” in which competing political actors — including voters — become locked into policy choices that would be in their individual, and the overall social, interest to avoid.

However, this electoral accountability mismatch is not the only difficulty that arises from the decentralized form of American governance. More fundamental dynamics of localized government are even more important in explaining why Bibas and Stuntz are mistaken in assuming that greater local decisionmaking would work in the direction of equality, even granting Professor Lisa Miller’s finding that local politics in Philadelphia evinced a markedly more complex, less straightforwardly punitive attitude toward crime than that which existed at national or state levels.⁵⁵ Miller’s argument is that the explanation lies in the distance of state and national politicians from constituents’ concerns, in which *both* criminal victimization *and* the deleterious social impact of mass imprisonment register rather strongly.⁵⁶ But if we look at the electoral system, we will find that the “truly disadvantaged” groups — who are mainly located in inner-city areas and whose victimization at the hands of both crime and criminal justice underpins their more complex view of crime and punishment — are rarely the median or decisive voters in the electoral contests that shape policy.⁵⁷ Indeed, the history of increasing racial and socioeconomic polarization in both economic and spatial terms in recent years, much of it driven by zoning regulations and median voter concern with property values, belies any thought that greater localization spells more equal criminal justice.⁵⁸ Of course, electoral constituencies could

⁵⁴ John E. Chubb, *Institutions, the Economy, and the Dynamics of State Elections*, 82 AM. POL. SCI. REV. 133, 149 (1988).

⁵⁵ MILLER, *supra* note 2, at 147–66.

⁵⁶ *See id.* at 156–60.

⁵⁷ *See* Zoltan Hajnal & Jessica Trounstein, *Where Turnout Matters: The Consequences of Uneven Turnout in City Politics*, 67 J. POL. 515, 515 (2005) (noting low turnout among racial minorities in city elections); Thomas D. Stucky, *Local Politics and Violent Crime in U.S. Cities*, 41 CRIMINOLOGY 1101, 1104–05 (2003); *see also* Thomas D. Stucky, *Local Politics and Police Strength*, 22 JUST. Q. 139, 156–59 (2005) (discussing the interaction between minority populations, local political structures, and policing).

⁵⁸ On the links between inequality at the local level and criminal justice, *see*, for example, RUTH D. PETERSON & LAUREN J. KRIVO, *DIVERGENT SOCIAL WORLDS* 12–45 (2010); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* 20–38 (1987); and Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, in *CRIME AND INEQUALITY*, 37, 37–54 (John Hagan & Ruth D. Peterson eds., 1995). On the broader dynamics of local governance and inequality, *see generally* IRA KATZNELSON, *CITY TRENCHES* (1981); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* (1993); MARY PAT-

be redrawn to allow the voices of a differently constituted — less advantaged, less white — group of median voters to swing the outcome; but even if it were possible to garner the political support necessary for such a structural change, it would have little effect in enhancing equality in the criminal process. Since good quality criminal justice, like good quality schools and good quality housing, costs money, in the absence of redistributive taxation, the zoning of electoral districts within smaller, more “communitarian” units would simply exacerbate the already powerful polarizing and ghetto-producing dynamics of the American political system. And crucially, issues of redistribution would continue to be decided at levels where median voters are unlikely to be enthusiastic about paying higher taxes to be used on goods that they do not want, do not need, or to which they do not have access. Radical decentralization is, in short, one important source of the ills of American criminal justice, not a recipe for its cure.⁵⁹

IV. FAITH, HOPE, LOVE,⁶⁰ AND . . . POLICY: HISTORY AND ROMANCE IN THE BIBAS VISION

Let us turn finally to the question of practicability. If Bibas could convince us that the adverse consequences of a return to the “village ideal” in criminal justice could be avoided, could he also convince us that such a return is feasible in early-twenty-first-century America? It is, of course, true that in the processes of formalization, systematization, and professionalization that marked the modernization of the criminal process, there were losses as well as gains. A lay-dominated system had advantages, and undoubtedly located the process of criminal judgment closer to the community from which it purportedly derived. But two important points need to be borne in mind when evaluating the “village ideal” as a basis for reformist inspiration in the early twenty-first century. First, and most obviously, most of us no longer live in villages with relatively homogeneous populations and dense networks of geographically based relationships. Furthermore, perhaps the most intractable of our criminal justice problems are located precisely in the anonymized, individualistic cities that have been another

TILLO, BLACK ON THE BLOCK (2007); William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317 (2004); and William A. Fischel, *Politics in a Dynamic View of Land-Use Regulations: Of Interest Groups and Homevoters*, 31 J. REAL EST. FIN. & ECON. 397 (2005).

⁵⁹ See Nicola Lacey & David Soskice, *Why Are the Truly Disadvantaged American, when the UK Is Bad Enough?: Political Economy, Local Autonomy and the Path from Education to Employment 1-4* (Mar. 12, 2012) (unpublished manuscript) (on file with the Harvard Law School Library).

⁶⁰ Bibas argues that “animated by faith, hope, and love, outsiders must relearn how to forgive as they did in the colonial era” (p. 142).

product of modernization. The conditions of existence of the village ideal are no longer with us, and it seems unlikely that those conditions can be recreated in anything other than a patchy way within the large bureaucratic criminal justice system of a huge advanced democracy.

Bibas is not alone in wanting to reconstruct the criminal process as a cathartic morality play. In a number of rigorous books and articles published over the last twenty-five years, British philosopher Antony Duff (cited but not discussed by Bibas) has developed a normative vision of the criminal process as a “calling to account” of offenders, with the trial process constructed to facilitate the acceptance of accountability and the penal process designed to maximize a form of institutional atonement.⁶¹ As is evident from my analysis and critique of Bibas’s argument, Duff’s theory is in my view overambitious in the extent to which it emphasizes the analogy between criminal law and morality. But among moralized visions of criminal justice, Duff’s integrated account has some decisive advantages over Bibas’s more piecemeal approach, which verges on cherry-picking the positive aspects of various institutional arrangements without explaining how they can exist independently of their less desirable components. It is therefore unfortunate that Duff’s work was not a more central object of Bibas’s analysis. However, Bibas’s focus on the role of lawyers in modern criminal justice and his acknowledgement of plea bargaining address important omissions in Duff’s analysis.⁶² Nonetheless, in relation to both of these accounts, and others that share related ambitions, questions must be raised about the feasibility of what may justly be termed the “communitarian” and relational aspects of the underlying political vision (pp. 75–79). In a mobile world dominated by relations between stran-

⁶¹ See generally R.A. DUFF, ANSWERING FOR CRIME (2007); DUFF, *supra* note 25; R.A. DUFF, TRIALS AND PUNISHMENTS (1986); see also 1 THE TRIAL ON TRIAL (Antony Duff et al. eds., 2004); 2 THE TRIAL ON TRIAL (Antony Duff et al. eds., 2006); 3 THE TRIAL ON TRIAL (Antony Duff et al. eds., 2007).

⁶² It is interesting to compare these two moralized versions of criminal justice as a way of highlighting some of the key concerns about the Bibas cure. While Duff’s work undoubtedly provides a more sophisticated vision of what “criminal justice as morality play” should look like, it is significant that that account gives virtually no place to an array of procedural arrangements that are at once commonplace in what we might call everyday criminal law and the central objects of Bibas’s critique: the pervasiveness of plea bargaining, the dominance of summary justice, and the prevalence of nonmoralized regulatory offenses. A strongly moralized overall vision sits somewhat uncomfortably with the reality of these pervasive features of the contemporary criminal process. Hence for Bibas, plea bargaining is at once condemned yet acknowledged to be inevitable, while for Duff, one assumes that these are simply unjustifiable practices that should be discontinued on the basis that they are incompatible with the normative vision of the criminal process as a species of moral communication between citizens. The role of lawyers features hardly at all in Duff’s account, and the regulatory imperatives of state organization are barely addressed. Indeed, Duff’s normative vision in some ways fits more neatly with the older practice of “trial by altercation” and lay justice that forms Bibas’s point of departure, and for which I have argued that Bibas is unreasonably nostalgic.

gers — not to mention one in which more and more extensive regulatory criminalization has given rise to troubling ethical questions — can the ideals of the criminal process as a practice of confrontation and communication between citizens, or as a morality play, be adequately institutionalized?

Standing in the way of Bibas's vision is a large fact: the scale and scope of the American criminal justice system, as well as the realities of power in a large modern polity, are inconsistent with the "village ideal" of criminal justice for which he yearns. And while there are good reasons for scaling back the scope of American criminal law, even in the unlikely event that such a shift could be achieved, the rules and procedures that Bibas decries as "dehumanized" and "calculating" would continue to provide important safeguards for both victims and defendants. Restoring "property" in criminal "conflicts"⁶³ to the parties would mean, as it has always meant, greater justice for those with greater resources, and more power in the hands of the powerful; without general regulative rules, such a practice may lead to vigilantism and to rampant inequality. Mere decades since the demise of the lynch mob, this point cannot bear too much emphasis. We should be grateful to Bibas for many detailed institutional suggestions that have real potential to improve the criminal process as it currently exists, as well as for his deeply felt call for more consistent respect for the dignity and humanity of both victims and offenders. And in evaluating his proposals, we should bear in mind not only that it is easier to diagnose a system's ills than to come up with adequate prescriptions for its cure, but also that the more fundamental the problems, the less likely it is that a politically achievable set of policy prescriptions will truly fix them. But — as anyone who has ever relied on the services of a highly skilled lawyer, or indeed doctor, will agree — we should not endorse Bibas's contempt for expertise and his apocalyptic vision of professionalization as having "stolen conflicts from the parties, muted the clash of interests, and disempowered them . . . leaving [lay people] helpless" (p. 86).⁶⁴ One should decisively reject the romanticized vision of a return to criminal justice based on "bottom-up populism" (p. xxvi) and lay direction of a morality play, and accept instead that the future of a more humane criminal justice is inextricably bound up not just with the quest for democratic legitimacy but also equally with the delivery of better-regulated professional services and an appropriate reliance on professional expertise.

⁶³ As originally proposed by Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1 (1977).

⁶⁴ For a nuanced discussion of the balance between politics and expertise in sentencing regulation, see Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599 (2012).