

The Politics of Penal Expertise

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Benjamin Levin, *Criminal Justice Expertise*, 90 **Fordham L. Rev.** __ (forthcoming 2022).

Much of Benjamin Levin's prolific work in recent years is concerned with what might be called the history of the criminal justice present; understanding the many intellectual and activist currents that are shaping the remarkable current moment when criminal justice reform in many states is happening (although in fits and starts) and claims of abolition not heard in a generation are also being raised. In *Criminal Justice Expertise*, perhaps his most intellectually venturesome work, Levin steps back from the frontlines of emerging law (topics like "wage theft," "mens rea reform," and "progressive prosecutors") to look at the nature of expertise about criminal law and justice as it figures in debates about criminal justice reform. In doing so, I believe Levin helps many of us thinking and acting in this space to locate ourselves in ways more enabling of cooperating and conflict (when necessary).

For a long time, one of the dominant strains in criminal justice reform scholarship from academics has argued for a more administrative law model of criminal law in which the power of police, prosecutors, and prison administrations would be subjected to greater procedural transparency and scrutiny by expert analysis of objective data. This expert reform logic, sometimes referred to today as "evidence based criminal justice reform," relates to an even more seasoned narrative about mass incarceration, that described it as a product of the success of a politicized punitive populism over an earlier consensus behind expert-based rule over criminal justice (David Garland's [The Culture of Control: Crime and Social Order in Contemporary Society](#) 2001 is perhaps the most influential version of this account).

More recently, critics of mass incarceration have offered a second view on expertise, arguing that the problem may not be too much popular say over criminal justice, but too little real democracy. One version of this is the late William Stuntz's influential article, "[The Pathological Politics of Criminal Law](#)," in which he argued that once tolerably effective forms of popular democratic local control over criminal law had broken down due to the racial politics of urban control and the intervention of the federal government through the war on crime and the Warren Court's criminal procedure. Among academics, until recently, it seemed the question of expertise was a debate between these two camps (which I've been on both sides of).

A third account is only now receiving academic attention, the reemergence to academic and public view of dedicated abolitionist discourse among activists and community members. Levin's primary contribution is to flip the debate about expertise v. politics into a discussion of different kinds of expertise and the inevitability of politics as part of that expert role.

One important divide, often surfacing in the administrative law analogy, is the conflict between vocational and scientific or educational expertise. This division within the "expert" camp, goes back to the very birth of the university based social sciences which often positioned themselves as the solution to failed decisions by frontline police, prosecutors, and prison officials. Levin does not question the reality of punitive populism as a historical reality, but he does challenge the strong bifurcation between educational or scientific expertise and the politics of crime control. This administrative law model presumes that there is a values consensus on what we want from criminal law that is not in fact in evidence. Second, it presumes that politics in the conventional sense can be walled off. One of the biggest reasons to support Levin's skepticism about an administrative law solution is the history of reforms by science-based experts. As recent histories of criminal justice have suggested (see Simon Balto, [Occupied Territory: Policing Black Chicago from Red Summer to Black Power](#)), scientific elites have often reaffirmed and hardened lines of racial discrimination.

Levin's other contribution is to set this vocational/scientific expertise into a discussion with the emerging discourses of abolition and activism, not as a new populism (although interestingly it is that as well) but as a new or at least original form of expertise, one based on lived experience and standpoint subjectivity. While some of this new experiential expertise is abolitionist, it cannot be assumed that it will always align with pro-decarceration policies. Indeed, in other ways it strengthens the political authority of crime victims, and crime as a category of meaning. Ultimately, if we are entering a period when criminal justice expertise is associated with power, it will not so much push politics away as transfer it from the point of discretion to the selection of experts. This is a very helpful clarification of conflicts that we can avoid and those we cannot.

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