# Tinkering with the Machinery of Justice

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Stephanos Bibas, **The Machinery of Criminal Justice** (Oxford Univ. Press, 2012).

Ordinarily I would use space in Jotwell to bring attention to up-and-coming scholars. The author whose work I praise here, however – Stephanos Bibas – arrived long ago. But Bibas's new book, *The Machinery of Criminal Justice*, is so humane and thoughtful an analysis of the reforms needed in our criminal justice system that I find myself drawn to giving him still more good press. I do not agree with every jot-and-tittle of his analysis nor every recommendation for reform that he makes. But his vision is a powerful one, he defends it with clarity and grace, and every idea he expresses is capable of starting an important conversation. Bibas's argument turns on three central ideas: (1) the system pretends to a mechanistic efficiency deaf to the emotions and meaningful expressions that undergird any sound system of criminal justice; (2) lawyers and other experts have hijacked the system to serve their own needs, displacing defendants, victims, and even judges; and (3) the political forces at work are skewed toward undue penal harshness and elite control rather than adequately balanced by informed lay participation.

*Emotions*

Bibas argues that our system undervalues positive emotions and distorts negative ones. The positive emotions that are undervalued are remorse, apology, and forgiveness. The negative ones that are distorted are the retributive emotions.

One of the major contributors to undervaluing positive emotions is the guilty plea system. That system permits guilty defendants in denial to avoid confronting their wrongs. In particular no contest pleas (which merely allow the court to treat the defendant as if he were guilty) and Alford pleas (true guilty pleas not requiring the defendant publicly to admit his guilt) free defendants from confessing their deeds before victims. Without such confession, remorse is impossible, and remorse is a necessary prerequisite to apology. Remorse is a first step toward rehabilitation, and apology is an important step toward victim healing. Even feigned remorse and apology, argues Bibas, serve critical functions. On the theory that we partly become what we do, argues Bibas, feigned expressions of remorse and contrition may eventually become heartfelt. Furthermore, public apology itself serves a function in the defendant's being taken down a peg – his admitting, in effect, that he is of no greater value than his victim, having had no entitlement to treating her needs as worth less than his. This same dynamic occurs with grudging guilty pleas, in which a defendant obviously resists admitting to the facts of the crime until prodded by his counsel or admits to some facts but then adds others intended to reduce his responsibility for his actions. These sorts of pleas lead defendants' families to believe an innocent person has been railroaded into pleading by wily prosecutors and incompetent defense counsel. These pleas risk encouraging the innocent to indeed plead guilty, leave victim needs for justice and apology unsatisfied, and foster a vision of machine-like disposition over the morality plays that true justice requires.

Jury trials indeed have meaning solely as morality plays, and guilty plea processes should capture some of the jury trial's virtues. Jury trials provide catharsis and closure to victims and communities. They tell moral tales that, when they result in a conviction, justify temporary condemnation of the defendant.

They provide the opportunity for healing and reintegration of the offender into the community once he has paid his debt to society. Without such plays, the community fails to denounce the message implicit in the defendant's crime that he is of greater worth than his victim. It is the jury's role to be the conscience of the community, not merely the finder of arid fact. Crime is thus a relational concept, punishment's role being restoring offender and victim alike to their rightful place as equal members of a community. The guilty plea process, as currently structured, thus ignores the emotional needs of the community as well as the victim. But the process also ignores emotional needs of defendants, whose recidivism and resentment against the system would likely be lower were they given the opportunity to dialogue with victims and community alike with the understanding that true rehabilitation brings with it true return to the communal fold. While not accepting all their teachings, Bibas's views in this area obviously draw on the teachings of the therapeutic jurisprudence, restorative justice, and victims' rights movements, as he explains.

As for the negative emotions, such as the desire for retribution, Bibas rejects critiques of these emotions as but primitive cries of rage demanding harsh, disproportionate punishments. Critics of the victims' rights movement argue, for example, that greater victim involvement will simply lead to demands for still-harsher punishment in an already absurdly cruel system. But Bibas argues, as is addressed further below, that it is elite control of a system shrouded in secrecy that leaves the public and victims factually and emotionally ill-informed. The public and victims wrongly believe that judges are unduly lenient and punishments too easy. Moreover, not faced with the details of a defendant's life, the burden of judgment, the face-to-face opportunity to see apologies made, the public relies on gut reactions demanding harsh treatment. Yet social science reveals that citizens accurately informed and given the details of a real case generally prefer individualized justice far more lenient than the harsh categorical kind we now administer. The same if often true of victims as well. Even when victims do demand harsh punishments, says Bibas, they at least have a right to be heard and their views seriously weighed. Their testimony also conveys more complete information about the harms a wrongdoer has done. Their views should not control, but they merit respect.

Moreover, insists Bibas, negative emotions serve important purposes. Righteous public indignation at wrongs done reaffirms moral norms essential to communal solidarity. The expression of this indignation is the only way for the community convincingly to express its concern for the victim's plight and respect for her value. Retributive anger is essential to the message of communal disapproval aimed as well at the offender. He must be powerfully impressed with his transgression and ready to make amends for the harm he has done to merit communal embrace. These emotions are, in my terminology, "negative" because no one wants to be subjected to their holders' ire. But they serve positive, important social functions, albeit only when they are informed, individualized, and cabined by safeguards against punishment's being disproportionate to the crime.

*Lawyers' Rule*

Lawyers and other elites, says Bibas, now entirely control the system when laypeople deserve a far greater role. Moreover, lawyers act in effective secrecy, checked neither by an informed public nor even informed victims and defendants. Largely unaccountable for their actions, they operate the system in a way that serves their needs rather than those of lay participants and the community. Moreover, working together daily, underfunded and overworked, and being jaded by what for them is familiar and routine, lawyers' incentives and training are for efficiency over morality. Accordingly, more often than not, defense counsel and prosecutors collaborate to reach efficient results rather than being true adversaries checking and balancing each others' abuses. Justice, rather than being individualized, becomes quantified in the hands of the experts. A standard robbery has a going rate in terms of time in prison. Negotiations are over stereotypical categories in which to place cases rather than over individualized assessments of guilt and deserved punishment. The result is rapid, formal justice over substantive

justice; speed over truth; quantity over quality; bean-counting over moral satisfaction.

Clients are similarly ineffective checks on defense counsel. In a typical case, there is no lawyer-client "relationship." The two meet briefly, during which time the defendant tells little of his own story, counsel's primary role being to persuade his client to plead. Clients then attend hearings spoken in a complex and arcane language of sentencing guidelines calculations, psychiatric reports, and rote, scripted "allocutions." The lawyers do most of the talking, and when defendants do speak, they do so in a ritualized fashion, mere avian puppets parroting as best they can their lawyers' words. Nor are defendants involved in the negotiations between lawyers talking in corridors. Clients are passive receptacles of lawyer-concocted dreams not the clients' own.

The same is true for victims. Although victims' rights legislation may in theory require them to receive notice and have an opportunity to participate, these mandates are often honored in the breach. When they are followed, they frequently smack of empty ritual. Plea bargains proceed to which they were no party, and prosecutors spend but little time, if any, hearing the victims' tale and helping them to reach informed views. They may make brief statements to the court at sentencing, but they are largely passive observers.

The public also fits this ill-informed, passive bill. Plea-dominance means that the community's conscience plays no role in individual cases. What most members of the public learn about criminal justice is from a sensation-seeking media eager to gather eyeballs to its product or elected D.A. politicians vying for office by claims to stand up to supposedly lenient judges. The expertise, ethics, and sensitivity to practical constraints on justice practices of the lawyers are needed. But untempered by lay participation and observation, lawyers generate more dark T.V. comedies than the morality plays that justice requires.

*Politics*

The flip side of lawyer control is lay exclusion. But, as discussed above, that fosters perverse political incentives. Politicians are able to seek harsh, inflexible sentencing options that divorce justice from mercy. Prosecutors have no reminders of what it really means to "do justice," again allowing efficiency to simulate moral balance, severity to replace communal reintegration. Defense lawyers, seeking just to get by in hard circumstances, become complicit, helping grease the wheels of the injustice machine while creating the illusion of fairness. Equally importantly, however, all professional organizations are hierarchical. Laypersons participate most effectively in individual cases at the local level, such as via juries. But hierarchies naturally look to higher levels for guidance. Greater power and resources in modern societies also tend to drift upward, to higher levels of government, absent local political safeguards like the jury. The secretive guilty plea, assembly-line culture thus permits this centralizing process to continue. That definitionally further excludes lay participants, who need to speak at the local level. Higher levels of government are also detached from the local knowledge that local policymaking requires. The most powerful groups get heard in state legislatures, while less powerful groups are denied the voice they can have when localities – such as the neighborhoods where the disempowered are more likely to live – are largely silenced. Yet it is in these neighborhoods where most offenders and victims in the system live. The system is thus designed to operate in ignorance, entrenching the views of the distant and the elite over those of the local communities where the greatest degree of healing is needed.

Perhaps in Europe this relative political exclusion of the lay public has worked well for criminal justice. But we lack the traditions of an apolitical expert civil service and deference to policy experts that characterizes Europe. Informed lay participation better suits our political culture. It also better reflects the political aspirations of our republic. "America is built on the Enlightenment notion of individualism

and tolerance undergirded by virtue," explains Bibas. Too much skepticism of the need to balance individualism with virtue leads the former to devolve "away from self-restraint toward unbridled self-interest." Morality thus sustains freedom, and it is the morality of the community, not of the elites, that does so. But community morality uninformed by true facts and undisciplined by the power of the individual case is but another version of elite rule. Elites manipulate the broader public into serving elite needs while enabling the effective silencing of lay participants in individual cases. As Bibas explains,

Voters vividly imagine predators rather than ordinary wrongdoers in a particular case, and their imaginations lead them astray. Sound bites and stereotypes can play on voters' fears, leading them to push for legislation and referenda. But the calculus changes when jurors look at flesh and blood victims and defendants up close. Good lawyers can humanize their clients so that jurors and others see a real person rather than a racial stereotype. Racial biases appear to be much less powerful when one gets to know people as individuals rather than simply as members of a race.

Political solutions must thus seek informed lay participants individualizing justice in specific cases. But they must also seek an informed public surveying a transparent system, monitoring abuses, and injecting the public's justice sentiments. Political solutions must restore morality and virtue to the justice system. While justice requires the stigmatizing effects of punishment and the catharsis of retribution, both must also be temporary. Permanent punishments, though perhaps unavoidable in rare cases, undermine the overriding goal of healing all, including the defendant, bringing him back to the communal bosom.

*So What Is to be Done?*

Bibas recommends a host of reforms, the details of which are too numerous to recount here. But the broad brushstrokes of his alternative criminal justice universe can be painted as aimed at each of the three causes of our present troubles – though all three are also necessarily inter-related.

At the level of emotions, Bibas would act to give victims and defendants more voice, the opportunity for dialogue, and the insistence on acts of contrition aimed at the defendant's communal reintegration. Perhaps his most controversial suggestion is that defendants be required to work, albeit not on chain gangs or in other ways reminiscent of slavery and for wages. But defendants would have to pay some portion of their wages to the state to offset the costs of prosecution, the victim as restitution, and his family as a mark of responsibility. Non-violent criminals would work outside prison walls. Offenders would also receive an education and job-training in skills useful on the outside. Labor would be hard but not brutalizing, and it would be publicized, even televised. The public would thus see prison time as hard but potentially transformative. Most collateral penalties would be ended so that a defendant who has served his time can live and work like the fully-restored citizen that he now should be.

The emotional needs of lay participants in individual cases would be addressed by greater opportunities for real and informed victim and defendant voice. Victims would not only be notified of events but given plain language summaries after each hearing. Mediation conferences between victims and defendants in many cases would be routine. Victims would be entitled to speak fully at sentencing hearings. They would also have appellate rights, even if only to a sentencing decision's review by a prosecutor's superior. Victims, indeed all lay trial participants, would also be asked to complete detailed satisfaction surveys distributed to lawyers and judges so that they have an opportunity to improve their future performance drawing on the laypersons' comments and vented feelings.

Defense lawyers would be required to have at least fifteen minute private in person meetings with their clients before any felony plea decision. In less serious cases, such consultation could be by video. Defense lawyers must be trained to get their clients' full stories and to encourage them toward remorse

and apology should they plead guilty. Plea hearings would be designed to elicit the defendant's story and permit his apology. Should the defendant choose a trial, whether his prior record can be used against him should not turn on whether he testifies so that he won't have an incentive not to speak.

Political reform would be furthered by greater transparency. Detailed statistics would be gathered on prosecutor practices and publicized. Deceptive plea practices like charge and fact bargaining would be banned. Charge bargaining would be allowed, but only if the choice is publicly explained by the prosecution. Most plea bargaining would openly be over sentencing. Prosecutor civilian review boards would supplement those monitoring the police. Prosecutor charging and bargaining policies would be published and rotating civilian monitors would voice their views within prosecutors' offices and report abuses. Legislation would require police to videotape the entire custodial interrogation process, and vibrant community policing would become the norm. That would include frequent local community meetings to bring all relevant groups together to discuss policing policy.

Elite rule would also be checked by increasing lay participation. Zip-code level grand juries, plea juries to offer input to and perhaps approve or disapprove lawyer bargains, requiring prosecutor written justifications for major decisions to be made publicly available, and restorative sentencing juries would help achieve lay input. Restorative sentencing juries would be large, diverse bodies representative of the neighborhood.  The proceedings would be freed from formalities, require prosecutors to justify their recommendations, and be guided by advisory sentencing guidelines. They would serve after tentative plea deals as well as after trials. They would help, in Bibas's view, to create community where it is lacking.

*Conclusion*

Bibas concedes that many of his reforms may be impractical in the short run. He thus recommends modest, gradual change. Here I do not comment on the practicality of his recommendations or the wisdom of each of them. But Bibas's effort wisely recognizes the continuing power of a central biblical lesson: "Without vision, the people perish."

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