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### Book Review: (The History of) Criminal Justice as a Morality Play

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## BOOK REVIEW

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### (THE HISTORY OF) CRIMINAL JUSTICE AS A MORALITY PLAY

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

*Reviewed by Michael M. O’Hear†*

#### INTRODUCTION

Through a series of articles spanning more than a decade, Professor Stephanos Bibas has proven himself a bold and penetrating critic of America’s system of criminal procedure. His theme has been the gap between the morality embodied in our substantive criminal law and the morality (or, perhaps more accurately, the lack thereof) embodied in our procedural rules and practices. This theme now gets its fullest exposition in his provocative new book, *The Machinery of Criminal Justice*.<sup>1</sup>

*Machinery* operates on both a broad, conceptual level and on the more specific level of concrete reform proposals. At the conceptual level, Professor Bibas argues that our criminal justice system has come to be dominated by amoral efficiency considerations to the exclusion of basic, lay intuitions regarding morality and justice.<sup>2</sup> Professor Bibas looks fondly back to the colonial period, when our criminal processes had the character of a “visible, participatory morality play.”<sup>3</sup> In the hope of restoring some of this character, Professor Bibas proposes a host of

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<sup>1</sup> STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012).

<sup>2</sup> *See, e.g., id.* at 26-27.

<sup>3</sup> *Id.* at 13; *see also id.* at 5.

specific reforms, ranging from the very modest (email notification to crime victims of court dates<sup>4</sup>) to the very costly (“[p]roviding restorative sentencing juries in a million cases a year”<sup>5</sup>). He also offers some proposals that would be quite controversial for reasons other than cost, such as conscripting criminals into military service.<sup>6</sup>

Nonetheless, Professor Bibas’s proposals merit careful attention, and policymakers should not underestimate their potential appeal. Professor Bibas convincingly links his reform agenda to three important contemporary movements in the criminal justice system: victims’ rights, restorative justice, and therapeutic jurisprudence.<sup>7</sup> Although he criticizes aspects of each of these movements, he also demonstrates that they are animated by some of the same basic values as his “morality play” vision.<sup>8</sup> The fact that each of these movements has had an important impact on the American criminal justice system demonstrates that the values embodied in these movements can sometimes overcome the system’s overriding orientation to efficient case processing.

But is it possible for the system to undergo a truly fundamental reorientation? Victims’ rights and restorative justice have been around since the 1970s, while problem-solving courts, the most prominent embodiment of therapeutic jurisprudence, have been in operation since the early 1990s. Although these movements have achieved noteworthy reforms regarding how *some* types of cases are handled in *some* jurisdictions, they have not reconstituted our criminal justice system as a whole. Indeed, the “machinery” Professor Bibas deplors has proven remarkably durable in the face of concerted attacks for decades from both the left and the right.

Perhaps in recognition of this, Professor Bibas attempts to give added rhetorical force to his argument by grounding it in a historical narrative—a sweeping account of the development of the American criminal justice system, from colonial times to the present day. Ironically, this narrative itself takes the form of a morality play. In Professor Bibas’s account, lawyers and intellectual elites are the chief villains.<sup>9</sup> He considers the colonial criminal justice system, which largely dispensed with legal professionals and experts, as an ideal of sorts. Once the system became professionalized, however, the “insiders” (to use Professor Bibas’s shorthand) perverted the system so as to serve their interests and

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<sup>4</sup> See *id.* at 150.

<sup>5</sup> See *id.* at 162.

<sup>6</sup> See *id.* at 137.

<sup>7</sup> See *id.* at 88-107.

<sup>8</sup> See *id.* at 88-89.

<sup>9</sup> See *id.* at 30-34.

reflect their values.<sup>10</sup> “Insiders,” he asserts, “have pulled criminal justice far from its morality-play moorings.”<sup>11</sup> The result is crisis. Still, while “[r]eforming a system so broken seems hopeless,”<sup>12</sup> Professor Bibas urges us not to give up. “[O]utsiders,” he affirms, “can reclaim their role as stakeholders and remain outsiders no longer.”<sup>13</sup> For their part, “[p]rofessionals can live up to their job as public servants. . . . [a]nd victims and defendants alike can once again hope to be treated with respect, as active participants in a cathartic morality play.”<sup>14</sup>

While resonant, this historical narrative glosses over much complexity, as Professor Bibas himself acknowledges at various points.<sup>15</sup> In this review, I will suggest a counter-narrative—one that is no less oversimplified, but that may nonetheless prove illuminating. My narrative is also a story of insiders and outsiders; however, I define these groups not by reference to positions in the criminal justice system, but by reference to socioeconomic status more generally. In my story, insiders use their political power to ensure that the criminal justice system closely supervises outsider groups, especially those outsiders who are deemed threats to public safety or social order. This agenda may have a moral edge to it, but the dynamics are fundamentally different from those of Professor Bibas’s morality play. If there is some truth to my counter-narrative, then it may reveal some significant obstacles in the way of Professor Bibas’s vision.

In Part I, I unpack key aspects of Professor Bibas’s account. In Part II, I develop my own counter-narrative. Finally, in Part III, I consider the implications of my counter-narrative.

## I. CRIMINAL JUSTICE: BACK TO THE FUTURE

Professor Bibas applauds several aspects of the colonial criminal justice system. First, the system was overtly moralistic and served to enforce community norms—the “local sense of right and wrong.”<sup>16</sup> Second, in the days before lawyers became regular participants, the criminal process was transparent and invited lay participation: “There were few legal rules and little legalese to cloud the central issues of

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<sup>10</sup> *See id.*

<sup>11</sup> *Id.* at 164.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 165.

<sup>14</sup> *Id.*

<sup>15</sup> *See, e.g., id.* at 165 (“The reforms I have suggested are just that, suggestions. Some may seem too modest, others too bold and impractical.”).

<sup>16</sup> *Id.* at 2.

factual guilt and moral desert.”<sup>17</sup> Trials were held locally and made open to the public.<sup>18</sup> “Victims and defendants ran the system; they literally had their day in court. . . . And the (white male) public participated actively as jurors. . . . [T]hey shaped the law, monitored government officials, and prevented judicial favoritism and corruption. Trials, in short, empowered the people.”<sup>19</sup> Third, and finally, the system had a reintegrative orientation:

Most wrongdoers . . . were viewed as brothers whom fellow citizens should help up again after their falls. The job of the criminal justice system was to reclaim the errant sheep and reintegrate them into the flock. Society should hate the crime but love and redeem the criminal. Only the worst, most incorrigible wrongdoers were viewed as irredeemable threats who had to be killed or banished.<sup>20</sup>

Consistent with this viewpoint, the colonies had, and regularly employed, a variety of procedural mechanisms for showing mercy to convicted defendants, including executive clemency.<sup>21</sup> Moreover, punishments, while shameful and sometimes intensely physically painful, were generally of quite limited duration. “The point was to teach a swift, memorable lesson and lead errant brethren to submit, repent, and make amends. . . . Once wrongdoers did so, the morality play could conclude with forgiving and welcoming them back into the fold.”<sup>22</sup>

Professor Bibas is quick to acknowledge flaws in the colonial system—such as racial bias—but he plainly regards the system as an attractive model. He explains, “[O]ur history confirms that this vision [of criminal justice as a visible, participatory morality play] was not only possible but actually worked, albeit imperfectly.”<sup>23</sup>

What led us from this system that “actually worked” to our present, “broken”<sup>24</sup> system? First, across the eighteenth and nineteenth centuries, educated opinion turned against moralistic conceptions of criminal justice and embraced utilitarian approaches instead. “Deterrence and incapacitation,” Professor Bibas notes, became in the minds of the proponents of these new rationales, “the key guarantors of low crime

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<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 3.

<sup>21</sup> *See id.* at 6-9.

<sup>22</sup> *Id.* at 11.

<sup>23</sup> *Id.* at 13.

<sup>24</sup> *Id.* at 164.

rates and thus a secure market economy.”<sup>25</sup> Second, in order to enhance these desired deterrence effects, the system was professionalized, with the development of police forces in the nineteenth century and the increasing prominence of lawyers in the criminal trial as prosecutors and defense counsel.<sup>26</sup> Third, responding to caseload pressures, lawyers invented plea bargaining.<sup>27</sup> Fourth, punishment moved out of the public square and into the private sphere of the prison.<sup>28</sup> Finally, in the interest of promoting deterrence, addressing complaints of bias, and facilitating plea-bargaining, executive clemency and other forms of mercy were curtailed.<sup>29</sup> In sum, as Professor Bibas puts it, “criminal justice moved from a common-sense, public moral judgment to a technical, hidden, opaque process. It was no longer about communal expressions of justice and deserved punishment, but about speedy professional triage of threats.”<sup>30</sup>

Professor Bibas convincingly identifies a number of costs to this transition. For one thing, the opacity of criminal procedure and punishment means that “current and prospective wrongdoers, victims, and the public neither see justice done nor hear the law’s message.”<sup>31</sup> The system thus undermines its own proper goals of deterrence, education, vindication of victims, and expression of condemnation.<sup>32</sup> Moreover, public frustration with this system diminishes public respect for the law and legal system, which may ultimately diminish compliance with the law.<sup>33</sup> Professor Bibas reports survey results that show “nearly three-quarters of Americans lack much confidence and trust in the criminal justice system,” while two-thirds object to plea-bargaining as particularly “opaque and insider-dominated.”<sup>34</sup> Finally, because there are no other apparent outlets for the expression of “outsider” frustration with the system, the public resorts to crude and misguided legal reforms, such as three-strikes laws and other mandatory minimum sentences.<sup>35</sup>

Professor Bibas’s argument echoes the work of several other legal scholars and social scientists over the past two decades—Tom Tyler, Bill Stuntz, Dan Kahan, and Tracey Meares, to name a few—and Professor

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<sup>25</sup> *Id.* at 15.

<sup>26</sup> *See id.* at 15-18.

<sup>27</sup> *See id.* at 18-20.

<sup>28</sup> *See id.* at 20-23.

<sup>29</sup> *See id.* at 23-26.

<sup>30</sup> *Id.* at 27.

<sup>31</sup> *Id.* at 50.

<sup>32</sup> *See id.*

<sup>33</sup> *See id.* at 50-51.

<sup>34</sup> *Id.* at 51.

<sup>35</sup> *Id.* at 52-53.

Bibas graciously acknowledges the importance of their contributions.<sup>36</sup> Still, if most of these points are familiar, they are no less compelling for that reason, and Professor Bibas gives them an unusually forceful and effective articulation. Professor Bibas's encompassing, system-wide perspective is a particularly helpful contribution; his book is not just about substantive criminal law, or criminal procedure, or policing, or sentencing, or corrections, or clemency, but about the *entire* system, and he is consistently insightful as to the subtle interactions, and cumulative effect, of each of these elements.

I expect most readers will come away from the book convinced that the system *should* move in the direction Professor Bibas advocates: that it should attend more carefully to lay moral intuitions; should be more localized, transparent, and participatory; should punish more publicly and less harshly; and should provide an easier path to reintegration for the offender. Importantly, though, Professor Bibas is not an absolutist about such matters. He does not contend that we are subject to some moral imperative to recreate colonial criminal justice, or something like it.

For instance, he is able to make peace with plea bargaining. He does not urge a (ruinously expensive) return to the time when nearly every conviction was obtained through a jury trial, but instead proposes reforms to the plea-bargaining system. Still, his account of colonial criminal justice occupies a central place in his argument because it proves that his vision can “actually work[.]”<sup>37</sup> In the morality play that is his history of American criminal justice, the colonial period was America's penological Garden of Eden. While we may not expect a full return, Professor Bibas argues that we must look backward in order to move forward.<sup>38</sup>

## II. CRIMINAL JUSTICE AS OUTSIDER CONTROL

I move now to my counter-narrative. For present purposes, I will accept Professor Bibas's account of the colonial period. There are, to be sure, ample grounds to quibble with any generalizations about the beliefs and practices of a set of culturally distinct and geographically far-flung colonies, over a period that lasted more than a century and a half. For what it's worth, I might particularly question Professor Bibas's characterization of the power of ordinary, lay jurors.<sup>39</sup> But, in any event, let us

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<sup>36</sup> See, e.g., *id.* at 195 n.46, 220 n.19, 240 nn.26-27.

<sup>37</sup> *Id.* at 13.

<sup>38</sup> See *id.* at 164-65.

<sup>39</sup> Colonial society was marked by a level of hierarchy and deference that is difficult for contemporary Americans to appreciate. See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN

assume that the period before the Revolution—and perhaps even in the first few decades thereafter—was a time when criminal justice had much more the character of Professor Bibas’s public morality play than it does now. So what happened?

Professor Bibas says little about what may have been the most important change in American society in the nineteenth century: a massive influx of immigrants, many of whom came from parts of Europe that had not previously played an important role in populating the New World. Immigration to the United States accelerated quickly after the end of the Napoleonic Wars and with the development of improved means of transportation. During the 1820s and 1830s, more than 667,000 immigrants landed on our shores, and the number of new arrivals grew to more than 4.2 million in the 1840s and 1850s.<sup>40</sup> Distressingly (to the native born, at least), a large proportion of these immigrants were Catholics, many from Ireland and Germany. America’s Catholics grew from 150,000 in 1815 to about a million in 1850, and became America’s single largest religious denomination after the Civil War.<sup>41</sup> In the nineteenth century, as today, the sudden appearance of large numbers of culturally distinct immigrants provoked considerable anxiety among the native born.<sup>42</sup>

“[T]he history of criminal justice,” Lawrence Friedman has written, is “a history of power.”<sup>43</sup> Professor Bibas, quite correctly, sees the substantive criminal law as an embodiment of morality. But Friedman invites us to consider *whose* morality the full coercive power of the state backs. In

AMERICAN HISTORY 30 (1993) (arguing that American colonial society “was certainly hierarchical—with a vengeance”). In such a system, ordinary jurors tended to follow the lead of the judge. The fact that judges bothered to comment on evidence certainly suggests as much. See BIBAS, *supra* note 1, at 5 (discussing how colonial judges often gave jurors instructions detailing the judge’s view of the case). Writing about English trials in the late seventeenth and early eighteenth centuries, John Langbein has identified a host of different mechanisms available to common law judges to control juries and documents instances in which judges succeeded in imposing their will upon jurors. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 284-300 (1978). A clear example of this occurred in the New World in the infamous Salem witch trials. See Robert Calef, *More Wonders of the Invisible World* (1700), reprinted in NARRATIVES OF THE WITCHCRAFT CASES, 1648-1706, at 296, 358 (George Lincoln Burr ed., 1914), available at [http://books.google.com/books?id=4hgOAAAAIAAJ&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](http://books.google.com/books?id=4hgOAAAAIAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false). Indeed, juries were rarely used at all in the Puritan colonies in the seventeenth century; local elites serving as magistrates were “in firm control.” FRIEDMAN, *supra*, at 25.

<sup>40</sup> DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT* 526-27 (2007).

<sup>41</sup> *Id.* at 198, 201.

<sup>42</sup> See, e.g., DAVID R. JOHNSON, *POLICING THE URBAN UNDERWORLD* 12 (1979) (describing how Anglo-Saxon Americans in the antebellum period reacted to the arrival of immigrants from diverse religious and ethnic backgrounds by focusing more heavily on crime prevention).

<sup>43</sup> FRIEDMAN, *supra* note 39, at 10.



any society, there are certain dominant groups that normally decide these things, and their preferences about where to draw the lines—what gets criminalized and to what extent, what gets prioritized by police and prosecutors—often have a self-serving character. It is commonly recognized that the moral values served by the criminal justice system of the Jim Crow South began, and practically ended, with the principle of white supremacy. Although the criminal justice of the northern United States has not so blatantly and persistently been built around a “morality” of social domination, the northern criminal justice system (and everywhere else in the United States for that matter) has regularly been used by insiders to control outsiders—to neutralize the threats they pose, and perhaps, more ambitiously, to make them think and act more like the insiders.

Again, what happened to our colonial idyll? Recall Professor Bibas’s account of the colonial desire for reintegration: wrongdoers “were viewed as brothers whom fellow citizens should help up again after their falls. The job of the criminal justice system was to reclaim the errant sheep and reintegrate them into the flock.”<sup>44</sup> This view is, of course, premised on feelings of close kinship between wrongdoers and their “fellow citizens.”<sup>45</sup> The goal of “reintegrating [wrongdoers] into the flock”<sup>46</sup> assumes that the wrongdoer formerly had a place in the fold. But if the wrongdoer is not regarded as a “brother” and never had a place in the fold, what then? That was the question presented in increasingly urgent and disturbing ways to native-born Americans between 1820 and 1860.

It is no accident that this time period coincides precisely with the development of America’s first professional police forces.<sup>47</sup> These police forces were formed to keep order on the streets of America’s largest cities in the wake of mass outbreaks of violence directed against Catholics and blacks.<sup>48</sup> That is, these were specifically *preventive* police forces.<sup>49</sup> Note that preventive policing sits uneasily at the front end of the criminal-justice-as-morality-play vision. The essential orientation of preventive policing is toward monitoring, intimidating, and exercising physical control over those outsiders believed to present the greatest

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<sup>44</sup> BIBAS, *supra* note 1, at 3.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See FRIEDMAN, *supra* note 39, at 68-69.

<sup>48</sup> *Id.*

<sup>49</sup> JOHNSON, *supra* note 42, at 27 (describing how cities like Philadelphia responded to urban violence in the mid-1800s with reforms aimed at creating a preventive police force).

danger to public safety and order.<sup>50</sup> This does not correspond well with the morality-play ideal: in the preventive model, individuals are targeted not so much for things they have done in the past as for what they are believed likely to do in the future. A conviction in this setting, moreover, cannot function merely as a temporary brand for a “brother” who is expected in due course to resume a prior position of respectability in the community, but serves instead as an official—and often permanent—confirmation of outsider status.

Preventive policing goes hand-in-hand with vice regulation. Vice is commonplace at all levels of society—among insiders and outsiders alike—so the criminalization of vice effectively gives preventive police vast discretion to arrest those whom they regard as most threatening. Moreover, while all classes may indulge in vice, it is commonly presumed—perhaps with good reason—that vice gives rise to greater social pathologies among the lower classes than elsewhere. This presumption provides a ready justification for police to focus their vice enforcement efforts against the outsiders. Finally, vice prosecutions normally do not involve messy questions of *mens rea* and can often be built around the testimony of police officers (thus dispensing with the inconvenience of lay witnesses).<sup>51</sup>

Little wonder, then, that public support for vice regulation surged at the same time that immigration surged and America’s police forces were first established. Culminating the antebellum anti-vice crusade, Maine adopted its famous prohibition law in 1851 and was quickly imitated by a dozen other states.<sup>52</sup> Such vice-control statutes were not mere window dressing, either. David Bodenhamer’s study of Indianapolis, for instance, found that more than fifty percent of criminal prosecutions between 1823 and 1860 were for crimes against “Moral Order,” nearly all for gambling

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<sup>50</sup> This orientation is expressed through police decisionmaking at both a macro level (e.g., decisions to concentrate resources in certain neighborhoods) and a micro level (e.g., decisions by individual officers about whether to make an arrest for a minor infraction or let the perpetrator go with a warning).

<sup>51</sup> I assume here that the vice being prosecuted is out in the open: public drunkenness, streetwalking prostitution, open-air drug markets, and the like. It would be a much more complicated matter to prosecute illicit indulgence that takes place discretely behind the walls of private homes. Such indulgence, however, has not typically been the sort of vice on which American police focus their attention. Historians refer to this double standard in its nineteenth century form, as the Victorian Compromise. FRIEDMAN, *supra* note 39, at 127.

<sup>52</sup> *Id.* at 134.

or illegal alcohol sales.<sup>53</sup> He also found evidence of persistent public pressure for even more aggressive enforcement of vice laws.<sup>54</sup>

Chicago provides an especially telling illustration of the close connection between nativism, vice regulation, and policing in antebellum America.<sup>55</sup> By the 1850s, nearly half of Chicago's population was foreign born. The flood of new arrivals was accompanied by perceptions of a crime wave in the city and calls for the creation of a police force. The Irish Catholics were a particular source of concern for their drinking, fighting, and generally rowdy behavior. A small, daytime police force was established in 1853, but the force seemed entirely inadequate for the goal of genuine preventive policing. Then, in 1855, the nativist Know-Nothing party joined forces with the pro-temperance Maine Law Alliance to secure the election of Levi Boone as mayor on a Law and Order ticket. Boone immediately sought to beef up the police force, and, whether intentionally or not, helped to ensure the adoption of his reforms by precipitating a major riot. This violent, armed confrontation between the police and German saloon keepers resulted from Boone's decision to raise the license fee for saloons from \$50 per year to \$300. The city council responded to the riot by creating a new eighty person police force, all of whom had to write, read, and speak English. Boone, in fact, appointed only native-born Americans to the force. In sum, the linked goals of controlling violent, disorderly outsiders and regulating vice plainly drove the development of Chicago's new preventive police force.

A criminal justice system oriented to vice regulation poses difficult challenges for the morality-play model, especially in the increasingly diverse and secular United States that emerged in the nineteenth century. For one thing, in a vice prosecution, there is no victim to vindicate, at least not in any morally clear-cut way.<sup>56</sup> To be sure, there were plenty of

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<sup>53</sup> DAVID J. BODENHAMER, *THE PURSUIT OF JUSTICE* 140 tbl.2 (Harold Hyman & Stuart Bruchey eds., 1986).

<sup>54</sup> *See id.* at 28.

<sup>55</sup> I draw this illustration from JOHNSON, *supra* note 42, at 35-38. Individual citations are omitted.

<sup>56</sup> It is true, of course, that *some* vice crime can be quite harmful, albeit in diffuse or causally complex ways. Today, for instance, it is widely recognized that open air drug markets in America's inner cities harm the neighborhoods in which they operate: they may be associated with violent gang conflict; they are magnets for drug-dependent, crime-prone individuals; they demoralize and drive away the "good people" in the neighborhood; and so forth. For that reason, it is possible to conceive of an entire neighborhood as the victim of a vice offense and to involve neighborhood representatives in the criminal process in some of the ways that conventional victims might be involved in other sorts of cases. I have made a proposal to this effect in Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463, 490-93 (2009). This kind of involvement seems workable in a sentencing hearing or as an alternative to a sentencing hearing, such as a community conference structured on restorative

vice prosecutions in the colonial period—the golden age of the morality play—but those prosecutions were underwritten by intensely felt, widely shared religious beliefs. “The courts acted, in a way, as secular arms of the churches . . . .”<sup>57</sup> But, exemplifying new attitudes toward the role of religion in public life, churches across America were disestablished in the late eighteenth and early nineteenth centuries; religious faith could no longer play the vital role it once had enjoyed in the colonial criminal justice system.<sup>58</sup>

This points to a second, related challenge posed by vice prosecutions: without a religious underpinning, it is not clear on what basis and under what circumstances vice can be regarded as a moral wrong. Some kinds of vice—particularly those involving intoxication—can make a person dangerous, but dangers abound in human society, and the line between *dangerous* and *immoral* is uncertain and contested, to say the least. Likewise, vice may be unpleasant—perhaps revolting—for some people to witness or even to contemplate, but it is not clear at what point such distaste raises a genuine issue of public morality. Similarly uncertain, at least in a society like ours with strong libertarian traditions, is the extent to which public morality may be paternalistic—may take into account the self-injury suffered by the person who indulges in vice. In a society of increasing cultural diversity, we can expect stark social divisions on such questions. If a central function of the morality play is to reinforce shared moral norms, vice prosecutions in the nineteenth century and afterwards may be unable to perform this function effectively; instead, at least in the eyes of some segments of society, vice prosecutions will amount to nothing more than a favored group *imposing* its moral norms on its less-favored counterparts.

Other challenges arise from the ubiquity of vice. If the criminal justice system takes as one of its chief objectives the punishment of vice, caseload pressures are a predictable consequence. It should thus be no

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justice ideals. It does not work very well, though, in a trial on guilt or innocence, where the conventional victim's role is normally limited to eyewitness testimony regarding the specific conduct constituting the offense for which the defendant has been charged. Because harm is not normally an element of vice offenses, there is no apparent role for a proxy or indirect victim in the trial. Moreover, even in sentencing or other proceedings in which neighborhood harms are arguably relevant, the uncertain or indirect causal relationship between the offense and harm may in some cases greatly attenuate the moral force and significance of the confrontation between offender and “victim.”

<sup>57</sup> FRIEDMAN, *supra* note 39, at 34. See also Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1448-1540.

<sup>58</sup> Cf. *id.* at 54-55. (discussing the change during the eighteenth century in the nature of prosecutions because the “tight reins of the theocracy loosened under pressure”).

surprise that plea bargaining—the practice that is at the root of so many of the contemporary problems that Professor Bibas identifies<sup>59</sup>—first established itself in the nineteenth century in liquor prosecutions.<sup>60</sup> Given the ubiquity of vice, full enforcement is a practical impossibility, and vice cases will often be tainted by the odor of selective prosecution. The upper classes indulge in vice no less than the lower classes, but the lower classes—for reasons good or ill<sup>61</sup>—will bear the brunt of the criminal justice system’s war on vice. And perceptions of official hypocrisy and group-based discrimination surely drain the morality play of its full and intended potency.

In sum, during the nineteenth century, the American criminal justice system newly embraced three, critically important, mutually reinforcing objectives: preventive policing, regulation of vice, and control of culturally distinct outsider groups. Each of these objectives put significant pressure on the old, colonial morality-play model. And none of these objectives emerged in any distinctive way from the system’s insiders—that is, the lawyers and repeat players who comprise Professor Bibas’s “insiders.” Rather, these objectives reflected the values and interests of my “insiders”—the social class or classes to whom politically accountable government officials are normally responsive. In nineteenth-century America, this class was native-born, propertied, white, male Protestants.

The subsequent history is messy and complicated, and I could not explore it in any systematic way here. (Indeed, the bit of antebellum history I’ve been focusing on is quite a bit messier than I’ve made it out to be.) Suffice it to say that preventive policing, vice regulation, and control of outsiders remained important aspects of American criminal justice well past the nineteenth century. Indeed, the set of criminal justice priorities that emerged in the decades before the Civil War may have reached their apogee during Prohibition in the 1920s.

But, even with the collapse of Prohibition in 1933, some of the basic impulses that animated antebellum criminal justice remained strong, albeit channeled in different directions. The New Deal permanently realigned “insider” and “outsider” groups in the United States.<sup>62</sup> However, as previously marginalized groups of European descent were

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<sup>59</sup> BIBAS, *supra* note 1, at 18–20.

<sup>60</sup> George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 904–11 (2000) (discussing the history of plea bargaining in liquor cases).

<sup>61</sup> For a discussion of the potential justifications for present-day racial disparities in the so-called “war on drugs,” see O’Hear, *supra* note 56, at 466–72.

<sup>62</sup> See Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 707 (2010).

brought inside the tent, blacks and Latinos were left behind.<sup>63</sup> As this new group of “insiders” grew more tolerant of drinking and some other vices, they became increasingly concerned about drug use, culminating in the so-called “war on drugs” of the late twentieth century.<sup>64</sup>

Today, there is still plenty of evidence that the system is oriented in important and mutually reinforcing ways toward preventive policing, vice regulation, and control of outsider groups. The New York Police Department, for instance, is widely praised and imitated for its particularly aggressive approach to preventive policing.<sup>65</sup> Exemplifying this approach, the NYPD increased its number of citizen stops from about 97,296 in 2002 to a mind-boggling 685,724 in 2011.<sup>66</sup> The NYPD’s “basic methodology,” as Franklin Zimring puts it, “is trying to take control of potentially threatening situations by street stops of suspicious-looking persons, by frisking after stops for weapons or contraband, and by making arrests for minor offenses as a way to remove perceived risks from the street and to identify persons wanted for other crimes.”<sup>67</sup> The enforcement of vice laws plays a crucial role in this strategy. For instance, the number of misdemeanor marijuana arrests in New York City skyrocketed from 774 in 1991 to more than 51,000 in 2000, and has remained in the tens of thousands per year since then.<sup>68</sup>

On a national level, the central role of drug enforcement in the contemporary criminal justice system hardly requires documentation. From 1990 to 2006, more than one-third of felony defendants in the nation’s seventy-five largest counties faced drug charges—a higher proportion than those who were charged with either violent or property offenses.<sup>69</sup> Meanwhile, in the federal system, nearly sixty percent of prison inmates are being incarcerated as a result of drug convictions.<sup>70</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 707-10.

<sup>65</sup> See generally FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE* 100-31 (2012) (describing the changes to the New York City Police Department after 1990 and the subsequent impact on the city’s crime rate).

<sup>66</sup> N.Y. CIVIL LIBERTIES UNION, *STOP-AND-FRISK 2011*, at 3 (2012), available at [www.nyclu.org/files/publications/NYCLU\\_2011\\_Stop-and-Frisk\\_Report.pdf](http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf).

<sup>67</sup> ZIMRING, *supra* note 65, at 118.

<sup>68</sup> *Id.* at 121 fig.5.10.

<sup>69</sup> THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006*, at 2 & fig.2 (2010).

<sup>70</sup> MARK MOTIVANS, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *FEDERAL JUSTICE STATISTICS, 2009*, at 15 fig.8 (2011).

Whether the system still seeks to control socially disfavored outsider groups has been a subject of much debate—debate that has particularly focused on alleged discrimination against blacks and Latinos—but the existence of dramatic disparities in the system cannot be denied. Among those 685,724 stops conducted by the NYPD in 2011, more than half involved blacks,<sup>71</sup> a demographic that constitutes less than one quarter of the city’s population. Likewise, between 2006 and 2009, more than fifty-five percent of the NYPD’s marijuana arrestees were black<sup>72</sup>—a seemingly stark illustration of the confluence of preventive policing, vice regulation, and outsider control. Nationally, the black percentage of the prison population is about three times greater than the black percentage of the overall U.S. population, and the raw number of blacks imprisoned for drug offenses is more than twice the number of whites.<sup>73</sup>

It is not clear whether and to what extent such numbers are driven by group-based animus, as, for instance, criminal justice reforms in the antebellum period were driven by overt animus against Irish Catholics.<sup>74</sup> Even the bare *perception* of unfair discrimination, though, presents a problem for the sort of moral dynamics that Professor Bibas would like to see in our criminal justice system.

I do not mean to be overly reductive. I do not contend that prevention, vice regulation, and outsider control are the only, or even necessarily the predominant, objectives of the contemporary criminal justice system. Our system presents many distinct faces to the world; I have only discussed three of them. But, to whatever extent these remain important aspects of American criminal justice, they seem no less a challenge to the morality-play vision today than they did in the nineteenth century.

### III. PROSPECTS FOR CHANGE

Can these challenges be overcome? The answer likely depends in part on the level of public support for those aspects of the system that are in greatest tension with the morality-play ideal. Professor Bibas points to survey data showing great dissatisfaction with the criminal justice status

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<sup>71</sup> N.Y. CIVIL LIBERTIES UNION, *supra* note 66, at 5.

<sup>72</sup> ZIMRING, *supra* note 65, at 123 tbl.5.1.

<sup>73</sup> O’Hear, *supra* note 56, at 466-67.

<sup>74</sup> See, e.g., JOHNSON, *supra* note 42, at 36 (noting examples of anti-Irish attitudes expressed in Chicago newspapers in the 1850s). If the race story today seems rather uncertain in this regard, it is reasonably clear that our criminal justice system has been marked in recent years by an overt fear and dislike of another outsider group, that is, illegal immigrants. See *Anti-Latino Hate Crimes Rise As Immigration Debate Intensifies*, HUFFINGTON POST: LATINO VOICES (Dec. 17, 2011, 5:12 AM), [http://www.huffingtonpost.com/2011/10/17/anti-latino-hate-crimes-rise-immigration\\_n\\_1015668.html](http://www.huffingtonpost.com/2011/10/17/anti-latino-hate-crimes-rise-immigration_n_1015668.html).

quo,<sup>75</sup> but I am not sure this can be fairly construed as a public rejection of particular aspects of the system like preventive policing, much less as a public endorsement of the morality-play model. Nor is it even clear to me that the survey data really tell us much about attitudes toward the criminal justice system per se. Americans seem generally unhappy with government these days, and responses regarding criminal justice may simply reflect more sweeping attitudes. Certainly, criminal justice has not figured in any prominent way in the recent Presidential race, nor does it otherwise seem to be anywhere near the top of the list of voter concerns. Professor Bibas's survey data regarding plea bargaining are more to the point,<sup>76</sup> but also leave one wondering to what extent negative public attitudes reflect the sorts of concerns Professor Bibas articulates and to what extent they are driven by a desire for more severity pure and simple.

In any event, inquiring about *national* public opinion may not be the most productive way of proceeding. Attitudes toward preventive policing, the war on drugs, and the like seem to implicate fundamental and contested social values, and we should expect different opinions among different social groups. For instance, a recent survey of New Yorkers regarding the NYPD's preventive policing tactics revealed—not surprisingly—different attitudes among whites and blacks. While fifty-five percent of whites said that the aggressive stop-and-frisk policy was acceptable, fifty-six percent of blacks regarded it as unacceptable.<sup>77</sup>

Given the diversity of relevant attitudes, we may better appreciate the significance and value of Professor Bibas's call for more transparency and decentralization in the criminal justice system, and greater empowerment of citizens on the local level.<sup>78</sup> Professor Bibas's proposals would allow for the expression of diverse viewpoints on those objectives and practices in the system that are most at odds with the morality-play ideal. This may be especially valuable in light of racial considerations. If our overriding objective is a criminal justice system that speaks to the defendant as a "brother," that has legitimacy when it attempts to deliver moral condemnation on behalf of the defendant's community, and that can credibly promise eventual reintegration into the community, there may be no greater challenge today than the simple fact that the people

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<sup>75</sup> See BIBAS, *supra* note 1, at 196 n.49.

<sup>76</sup> *Id.* at 178 n.62.

<sup>77</sup> Michael M. Grynbaum & Marjorie Connelly, *Majority of New Yorkers View Police as Biased Toward Whites, Survey Finds*, N.Y. TIMES, Aug. 21, 2012, at A15.

<sup>78</sup> BIBAS, *supra* note 1, at 144-50, 156-64.



who design and enforce our criminal justice system tend to look very different than the bulk of the people who are processed through it.

Greater localization may alleviate these racially charged insider–outsider dynamics. Many of our major cities today are now majority-minority, and others are very nearly so; blacks and Latinos play a vital role in the local politics of these urban centers. Allowing for more decisionmaking at the city level would give these majorities a voice in how criminal justice is conceived and enacted in a way they presently lack. Better still might be decisionmaking, or at least systematic consultation, at the neighborhood level.

To be sure, people of color are not morally united and socially cohesive in the way that we imagine the Puritan villagers of New England to have been. Commonly used phrases like the “black community” mask a diversity of viewpoints and status distinctions. Even within groups traditionally regarded as marginalized, there are insiders and outsiders.

Furthermore, insider–outsider dynamics are probably an inevitable feature of our criminal justice system. It is doubtful that even the colonial period was wholly immune; the Salem witch trials, for instance, are sometimes depicted in these terms.<sup>79</sup> In the idealized moral economy that Professor Bibas envisions, those who punish will probably always feel contempt for the social inferiors within their power, and those who are punished will feel resentment toward the members of the privileged classes who exercise power over them.<sup>80</sup>

But the threat is a question of degree. The insider-outside problem may be a low-grade distraction from the morality play—a nagging, but barely audible whisper from a few rows back. Or it may be a thunderous roar that entirely drowns out the actors’ lines, like the travesties of Jim Crow justice. Or, of course, it may be something in between. The problem is surely amplified when the insider–outsider dynamics are racialized, at least in a country with our sorry history of racial oppression. To the extent that some of Professor Bibas’s proposals can help to soften the racial tensions associated with our criminal justice system, they do offer some hope that the system’s efforts to engage with offenders on a moral level may have greater legitimacy and effectiveness.

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<sup>79</sup> See FRIEDMAN, *supra* note 39, at 46-47 (claiming that the Salem witch trials were motivated at least in part by “[t]own rivalries and factions” and bias against “deviant” women).

<sup>80</sup> For a provocative exploration of the psychology of those who punish, see James Q. Whitman, *Making Happy Punishers*, 118 HARV. L. REV. 2698, 2715-19 (2005) (reviewing MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004)).

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