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Political Versus Administrative Justice

Stephanos Bibas*

Rachel Barkow's essay captures an important and overlooked dimension of the decline of mercy: the administrative ideal of justice as rules and discretion as danger. Though most commentators applaud this trend to equate law with specified, judicially enforceable rules, Barkow rightly finds it worrisome and regrettable.

The problem, as Barkow explains, is that equating justice with rules makes the law judiciocentric. Emphasizing rules does reduce dangers of discrimination and idiosyncratic preferences. But it hardly eliminates them, as shown by prosecutors' manipulation of sentencing guidelines and mandatory minimum penalties. While actors may comply with moderately binding rules, rigid rules simply drive discretion underground. A mandatory death penalty for all thefts of forty shillings, for example, drove colonial jurors to "pious perjury" by downvaluing thefts to thirty-nine shillings.¹

Deferring to government officials makes sense when they possess technocratic expertise. But, as Barkow notes, criminal justice policy is much more about lay moral intuitions than about apolitical expertise. That is the message of *Apprendi* and its progeny: criminal justice policy belongs at least in part in the hands of populist juries because they enjoy democratic legitimacy.

One could imagine a criminal justice system that depended more on political than on doctrinal legal checks and balances. Prosecutors' decisions would be publicized and more open to scrutiny, so that their statistics would become live issues in district attorneys' electoral campaigns. Victims and community members would have greater information and participation in the prosecution of crimes, to check prosecutors' agency costs. Media coverage would give voters

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¹See John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 22, 53-55 (1983).

bigger-picture statistics as well as finer evaluation of police and prosecutorial misconduct. Better data collection and dissemination would promote this media coverage. Trials and clemency proceedings would be thoroughly public, allowing voters to reach their own conclusions about which defendants deserve acquittal, pardon, or mercy. Indeed, that vision harkens back to colonial American criminal justice: victims prosecuted pro se, the public sat in judgment in the jury box, and gossip about trials and punishment spread throughout small communities.²

Moving away from this administrative ideal would weaken the judiciary's strong commitment to policing equal treatment. But judicial regulation has not stamped out racial profiling or race disparities in capital sentencing, whereas state executive branches have recently attacked both problems head-on.³ Judges need not view criminal justice as their exclusive countermajoritarian province, but can trust political branches more.

Barkow is right, then, to question our reverence for administrative models. Procedural reform, expertise, and formality do not always translate into substantive legal and moral justice. On the contrary, popular morality has room for mercy as well as justice, discretion as well as rules. But how far is Barkow willing to go? She is nostalgic for jury discretion, but in an era of plea bargaining,

²I have developed these arguments at greater length elsewhere. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 NYU L. REV. 911 (2006).

³*Compare* *McCleskey v. Kemp*, 481 U.S. 279 (1987) (finding no constitutional infirmity in Georgia's capital sentencing system despite overwhelming statistical race-of-victim disparities) *and* *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001) (finding statistical racial disparity in police traffic stops inadequate to prove requisite discriminatory intent) *with* Francis X. Clines, *Death Penalty Is Suspended in Maryland*, N.Y. TIMES, May 10, 2002, at A20 (reporting Maryland governor's moratorium on executions pending study of racial disparities in capital punishment) *and* David Kocieniewski, *Whitman and State Police: One Answer, Many Questions*, N.Y. TIMES, Mar. 7, 1999, § 14NJ, at 2 (reporting that political furor that erupted in New Jersey over racial profiling led governor to fire state police superintendent).

political justice must rely on other actors. Would she trust prosecutorial elections and legislative oversight hearings to regulate mercy, in the absence of active judicial oversight? Does she trust these majoritarian processes to prevent discrimination? Would she allow victims and community members much larger roles, even at the expense of equal treatment? And can we still trust executive clemency despite the Clinton pardon scandal and the political pressure to act tough so long as one faces re-election?

While Barkow still has to work out these details, her overall message is sound. Lawyers have tried too hard to squelch discretion, as the rule-of-law ideal has hypertrophied. Discretion is necessary, and it should be more transparent and democratically accountable. Politics, reasoned judgment, and empathy deserve overt roles. Legislators and judges must be more humble about the power of rules and trust other actors more. Judges, Barkow rightly suggests, should stop trying to stamp out the political and moral judgments inherent in criminal-justice discretion.