

Northwestern University Law Review



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WHITE PAPER OF DEMOCRATIC CRIMINAL JUSTICE

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ABSTRACT—This white paper is the joint product of nineteen professors of criminal law and procedure who share a common conviction: that the path toward a more just, effective, and reasonable criminal system in the United States is to *democratize* American criminal justice. In the name of the movement to democratize criminal justice, we herein set forth thirty proposals for democratic criminal justice reform.

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INTRODUCTION

In order to act collectively on matters of criminal justice reform and to clarify what it means to democratize criminal justice, the nineteen members of the democratization movement listed above have authored the thirty policy proposals that follow.

Some background is in order about the broader vision underlying these proposals. Although many Americans have come to think that the country's criminal justice system is malfunctioning in ways that do profound damage to the country, views about why the system has unraveled and how it could be set right can seem chaotically varied and conflicting. Yet the views are not as chaotic as they might appear: within the welter of diverse arguments, two distinct *perspectives* can be seen. On one side are those who think the root of the present crisis is the outsized influence of the American public and the solution is to place control over criminal justice in the hands of officials and experts. On the other side are those who think the root of the crisis is a set of bureaucratic attitudes, structures, and incentives divorced from the American public's concerns and sense of justice, and the solution is to make criminal justice more community-focused and responsive to lay influences. In a word, the first group thinks the direction forward is *bureaucratic professionalization*, the second thinks it is *democratization*. Of course, the two positions are not always mutually exclusive, and the dichotomy simplifies the views on both sides to some extent, as any such dichotomy would. But the dichotomy captures a great deal of the relevant variation, and it has the benefit of

bringing larger ideas to bear on what might otherwise be a cacophony of conflicting claims. The two views, democratization and bureaucratic professionalization, represent a conflict of visions.

On November 18 and 19, 2016, a group of democratizers assembled at the Northwestern University Pritzker School of Law in Chicago with four goals: to combine our diverse lines of research in order to establish democratic criminal justice as a school of thought; to identify and critically examine the ideas at the core of that school of thought; to project our ideas and awareness of our movement into the broader world of scholars, lawyers, judges, policymakers, activists, journalists, and the public; and to act publicly and collectively on matters of criminal justice reform. The *Northwestern University Law Review* agreed to publish a cross-section of the contributions to that conference in a Symposium Issue entitled *Democratizing Criminal Justice*. The Symposium begins with a *Manifesto of Democratic Criminal Justice*, which presents the above democratization/bureaucratization distinction in depth, and continues with fourteen essays setting forth the case for democratic criminal justice on constitutional, philosophical, empirical, and racial justice grounds. For the most part, however, those fourteen essays and the *Manifesto* develop large themes, principles, and lines of evidence rather than particular suggestions for legal change or political action. This *White Paper of Democratic Criminal Justice*, which ends the Symposium, translates the larger ideas into specific policy proposals. In so doing, this *White Paper* aims both to clarify what democratic criminal justice means and to equip the democratization movement to have a practical impact on the world.

In order to produce these thirty policy proposals, each of the above authors was invited to submit a few policy proposals to the group, which discussed, negotiated, and rediscussed and renegotiated the proposals in an iterative drafting process. Many proposals did not survive the process; none survived without modification. The thirty policy proposals below are those that won general assent.

Inevitably, given this process, the policy proposals below do not reflect and should not be taken to reflect any individual author's views in full. No participant agrees in all particulars with all proposals on the list, and every participant had to leave proposals in which he or she does believe off the list. Indeed, none of us deny that some worthwhile reforms to criminal justice would be professionalizing rather than democratizing, or that some would fall outside the democratization/bureaucratization dichotomy altogether. To be a member of our movement is only to think that the arrow of reform points in the direction of democratization in essential respects or on the whole; it is not necessary to think

democratization is all that matters. It is also not necessary to live and work in the United States: some of the democratizers listed above live and work internationally but take part in the democratization project because they think the perspective captures something of general significance about how criminal justice should function and that at least some of the policy proposals below have counterparts in their own countries. The proposals below are thus not meant to comprehensively catalogue all the useful changes that might be undertaken in American criminal justice, nor are they meant to apply only to American criminal justice. They are meant to identify a set of policies that would make the American criminal system more just, effective, and reasonable, and to exemplify the vision of a more democratic criminal system.

If the collective process by which these proposals were produced necessitated a measure of compromise, the process also had this great benefit: by collecting many different perspectives on democratization together, the proposals below demonstrate how *diverse* the policies connected to democratizing criminal law can be. Indeed, the proposals demonstrate how multi-faceted the very *concept* of democracy can be. Our policy suggestions focus variously on the place of lay citizens' values and sense of justice in criminal law and procedure; on lay participation in criminal law's administration and enforcement; on equal citizenship and, through equal citizenship, minority rights; on the deliberative links between the people and their government; on transparency and accountability; on localized administration of criminal justice that allows the people most affected by a decision to have a say in it; on putting groups that share a cultural world in a position to substantially direct their collective life; on the need in the criminal justice context to foster functional communities; on the problem of measures that unnecessarily fracture the body politic or exclude people from the social contract; etc. Given this great diversity, one might fear that "democracy" has come to mean everything and therefore nothing, a word that everyone can agree about only because it is so thin. The problem is a familiar one: so many governments and ideologies have claimed democracy's mantle that the term can seem infinitely malleable and therefore infinitely manipulable. But nothing in the proposals below surrenders or distorts the core concept of a self-governing people. If the test of meaningfulness is that some readers will disagree, the proposals below emphatically qualify.

In the course of deliberating about these proposals, one point of variation in our views of democracy arose often enough that it bears mention here: while all of us believe in the merit and importance of public opinion in a just and functional criminal system, some of us are relatively

wary of the direct influence of voters on criminal justice matters and lean toward lay engagement through informed, deliberative mini-publics (for example, juries). Others in the movement are relatively comfortable taking public opinion as we find it, involving larger groups of people with less expert guidance, and trusting to the forms of deliberative engagement that happen naturally in the culture or in the course of political competition. For the most part, we tried to craft the language of the proposals below in ways that would avoid taking sides on this disagreement, although inevitably some of the proposals lean in one direction or the other. In any case, the larger point stands: while of course our views as to democracy's place in criminal justice vary to some degree, they do not vary so much as to undermine the distinctiveness of our identity as a school of thought in criminal law and procedure and a movement in criminal justice reform.

We democratizers thus present these proposals in the hope that they will inspire new ways of thinking and a greater measure of justice in an area of American public life that sorely needs both.

I. REFORMS TO THE CRIMINAL JUSTICE SYSTEM

1. *Community Views of Justice.*—Rules, standards, and institutional practices that violate community views of justice, or are inconsistent with the social norms reflected in ordinary social practices, should be eliminated from criminal law and procedure unless such rules, standards, or institutional practices are the only means of promoting an interest that the community agrees to be more important than community views of justice or the norms reflected in ordinary social practices.

2. *Jury Revival.*—Juries should be included in the criminal justice process whenever reasonably possible, including at the investigative, charging, trial, and sentencing phases of criminal procedure. All juries, including grand, trial, and sentencing juries, should be drawn from within the immediate, local community in which the crime was committed and provided with broad factual, legal, and equitable information and decisional authority. Practices of plea bargaining should be modified to give juries meaningful supervisory authority over the outcome of the plea process, or, to the extent juries are not given such authority, the proportion of cases resolved by plea bargain should be greatly reduced. Practices of excluding citizens from juries based on their attitudes toward or histories with the criminal justice system, both as a matter of law and as a matter of practice, should be reduced in favor of a presumption of random selection and inclusion.

3. *Equal Citizenship*.—Equal citizenship should be a foundational principle of criminal justice. The principle of equal citizenship requires, but is not limited to, fairness and functionally equal rights across lines of race and wealth, and applies to the substance of criminal law, enforcement of criminal law, criminal procedure, and sentencing. Judges should broadly and vigorously interpret and apply the Equal Protection Clause of the United States Constitution, as well as other relevant constitutional and statutory provisions, to uphold and enforce the principle of equal citizenship throughout criminal justice.

4. *Criminal Law as Last Resort*.—Noncriminal approaches to social problems should be favored over the criminal instrument and resources should be directed toward those noncriminal approaches whenever reasonably possible, consistent with community views of justice, and consistent with upholding community values.

II. REFORMS TO SUBSTANTIVE CRIMINAL LAW

5. *Decriminalization*.—There should be a strong presumption in favor of decriminalization and against new forms of criminalization where a substantial proportion of the population engages in the prohibited conduct as a matter of facts on the ground and the conduct is nonviolent; where the prohibited conduct is not wrong in itself given community views of justice; where the criminalization is an instrument or pretext by which to target harms or wrongs downstream or otherwise separate from the prohibited conduct; or where the criminalization is overlapping or redundant with other elements of the penal code.

6. *Blameworthiness*.—All crimes carrying a maximum sentence of more than six months should require a showing of moral blameworthiness, where “moral blameworthiness” entails, at a minimum, disregard for the rights or welfare of others or intent to violate the law. The showing of moral blameworthiness may be framed as a component of *mens rea*, a separate element of the offense, an affirmative defense, or in some other fashion, but it should be construed as a question of fact presumptively in the hands of juries, and it should never be established automatically, mechanically, or as a matter of law.

7. *Delimitation of Offense Categories*.—The use of the legal category of “felony” should be greatly reduced to cover only truly major crime, both in terms of the seriousness of the underlying conduct, threatened result, or actual result, and in terms of the underlying conduct’s moral blameworthiness. The legal category of “violation” or “petty misdemeanor” should be created or expanded to cover all *malum*

prohibitum or otherwise minor offenses. The legal category of “misdemeanor” should be used to cover all remaining crimes and should be the default and presumptive category of new or uncategorized forms of criminalization unless the underlying conduct clearly qualifies as a felony or violation according to the above standards. Delimitations of crimes as major or minor and other grading decisions should reflect community views of justice.

8. *Recodification*.—Penal codes should be recodified to eliminate overlap among offenses; to eliminate internal grading inconsistencies given community views of justice; to take into account information about community impact, including racial and class-based impact; and to require a strong rule of lenity.

9. *Community–Legislature Links*.—Advisory committees to aid legislatures in the process of crafting substantive and procedural criminal law should be established. These advisory committees should include a diverse mixture of lay citizens, community leaders, judges, prosecutors, public defenders, private criminal justice attorneys, police officers, criminal justice scholars, and other stakeholders and experts in criminal justice, and should be formed in such a way that no one group, nor any combination of groups with consistently aligned interests, has sufficient numbers or influence to exercise effective control over the whole. The design of the committees and process by which they participate in advising legislatures should be such as to counter the influence of special interests and lobbies; to empower diffuse and potentially politically passive majorities; to transmit information about criminal justice legislation and related matters to voters; to transmit information about voters’ preferences, particularly voters’ informed preferences, to legislatures; and broadly to enhance the quality, accuracy, and frequency of deliberative communication between legislatures and voters with respect to criminal justice.

III. REFORMS TO POLICING

10. *Procedural Justice and Policing*.—Police practices and a police culture consistent with norms of procedural justice, fairness, and legitimacy should be fostered. This includes recruiting officers with roots in or links to the communities they police; selecting and training officers to have a guardian rather than warrior mentality; training officers to de-escalate situations of confrontation; and evaluating officers and departments based on metrics that reflect community trust.

11. *Racial Justice and Policing.*—Racialized policing should be eliminated, including racialized investigative and traffic activity. Police officers should be selected, trained, and tracked for racial fairness.

12. *Community-Police Links.*—Civilian review boards to advise police departments and liaise between police departments and local communities should be established. The boards should include individuals of diverse backgrounds, at least some of whom live in the neighborhoods in which the majority of police activity takes place. The boards should have the authority to gather information and provide advice regarding police priorities, policies, and informal practices, as well as disciplinary decisions involving individual officers. The boards should disseminate that information and advice to the local community whenever possible in light of confidentiality concerns, taking into account goals of transparency, legitimacy, and ultimate democratic control. The boards should encourage restorative conferencing within the community for excessive force claims and other claims of misconduct involving police. The possibility of making civilian review boards' advice presumptively binding or binding subject to veto should be considered.

IV. REFORMS TO THE ADVERSARIAL PROCESS

13. *Parity of Resources.*—Public defenders and prosecutors should enjoy commensurate resources, including equal pay, equal workloads, proportional overall funding, and equal conditions of work.

14. *Training for Multiple Perspectives.*—Prosecutors and public defenders during their initial training, and at regular intervals thereafter through continuing legal education and other forms of ongoing training, should be put in a position to meet with and discuss the experiences and perspectives of crime victims, incarcerated and formerly incarcerated people, people shown to have been wrongfully convicted, local police officers, and the attorneys on the other side (i.e., prosecutors if those in initial or ongoing training are public defenders and public defenders if those in initial or ongoing training are prosecutors). Prosecutors and public defenders should set up systems whereby prosecutors can shadow public defenders and public defenders can shadow prosecutors to the extent possible given duties of confidentiality and loyalty.

15. *Grand Juries and the Charging Function.*—Grand juries should be given the information, authority, and responsibility necessary to engage in genuine and substantial supervision of prosecutors' charging decisions. This information, authority, and responsibility should include, among other things, empowering the grand jury, prior to any process of plea bargaining,

to diverge from the prosecutor's recommended charge on the basis of substantial information about the facts of the case, other possible charges, and the sentences different charges might carry, and to reject equitably unfounded prosecutions even in circumstances in which probable cause as to legal guilt is manifest. Grand jury proceedings should be modified to achieve these goals, including, if necessary, by making grand jury proceedings adversarial to the extent possible without undermining criminal investigations or endangering witnesses, or by providing the grand jury itself with independent representation.

16. Checks and Balances in Plea Bargaining.—The process of plea bargaining should be meaningfully constrained by a system of checks and balances. Thus judges, magistrates, or juries should be given the information, authority, and responsibility necessary to engage in genuine and substantial supervision over the plea bargaining process and its outcomes. This information, authority, and responsibility includes, among other things, verifying the defendant's factual guilt; reviewing the appropriateness of the charge and sentence in light of the underlying facts of the case, applicable law, equitable considerations, community values, and the overall goals of criminal liability and punishment; and ensuring that the circumstances surrounding the plea bargain were not such as to coerce the defendant's agreement. The circumstances should be construed as coercive where the charge, sentence, or associated consequences threatened if the defendant refuses the plea bargain are sufficiently severe relative to the terms of the plea bargain as to overcome a reasonable person's willingness to undertake the risks of trial. In such a case, the plea bargain should be rejected and remedial actions should be authorized and undertaken sufficient to prevent the coercive threat from being carried out.

17. Equitable Trial Juries.—The trial jury in all criminal cases should be understood to have the right and should be informed of its right to make judgments of both fact and law and to acquit based on an overall equitable judgment regarding the propriety of holding the accused criminally liable.

18. Prosecutorial Transparency and Reason-Giving.—Prosecutorial practices should be transparent and incorporate reason-giving to the extent possible without endangering the prosecutorial function or the safety of witnesses. Barring special circumstances, this includes but is not limited to open-file practices in the discovery stage; open and accessible courtrooms in all criminal proceedings; and substantive hearings in open court before the adjudication of all criminal cases, including low-level misdemeanors and cases resolved by plea bargain. In those substantive hearings, any party or audience member with a specific interest in the case should be given a

meaningful opportunity to comment, and prosecutors should be required to state publicly and on the record, as a condition of the court's or jury's acceptance of the plea or other adjudication of the case, their evidence, theory of the case, reasons for any proposed plea deal, and view of the costs and benefits of criminal liability and punishment given the facts of the case. "Costs and benefits" as that term is used here includes the effects of criminal liability and punishment on third parties and on the overall fabric of the community, both in the individual instance and as a cumulative practice of punishment.

19. *Community-Prosecutor Links*.—The jurisdictional boundaries of prosecutorial offices should be redrawn to make prosecutors, whether appointed or elected, responsive to smaller and more cohesive communities. With respect to elected prosecutors, jurisdictional boundaries should be redrawn to ensure that the neighborhoods in which prosecutions regularly take place are also the neighborhoods determining the outcome of the elections. Candidates in prosecutorial elections, and appointed prosecutors at regular intervals, should be required to provide detailed statements of their enforcement priorities and, where applicable, substantial historical data on their prosecution practices. Collaboration and communication between prosecutors, both appointed and elected, and the communities those prosecutors serve, including the neighborhoods in which prosecutions regularly take place, should be encouraged, supported, and funded.

V. REFORMS TO SENTENCING AND CORRECTIONS

20. *Prosocial Punishment*.—Criminal punishment should be prosocial, and the principle of prosocial punishment should be upheld throughout the criminal justice system as a foundational justification for and purpose of punishment. The principle of prosocial punishment holds that criminal punishment should aim, both expressively and functionally, both in the individual instance and as a cumulative practice, to protect, repair, and reconstruct the normative order violated by a crime while at the same time minimizing the damage to the normative order caused by punishment itself. This includes but is not limited to expressing society's moral condemnation of a crime, affirming the social norms violated by the crime, and affirming the dignity of any victim or victims of the crime, while at the same time rejecting forms of punishment that themselves undermine the community's values. This also includes but is not limited to fostering rehabilitative and opposing criminogenic conditions within jails and prisons, taking into account and trying to minimize punishment's potentially negative impact on families, and taking into account and trying

to optimize punishment's potentially positive and negative effects on local communities.

21. *Sentencing Based on Blameworthiness.*—Consistent with the principle of prosocial punishment, and barring specific, special circumstances, the minimum and maximum limits of punishment should be based on individual blameworthiness, where blameworthiness is determined by community standards of justice and actual social practice within the community in which the crime took place. Sentencing judges and juries should be permitted to consider all aggravating and mitigating aspects of the offense and offender. To the extent sentencing guidelines are used, those sentencing guidelines should be designed to better match the punishments imposed in individual cases to the relative blameworthiness of the offender. Mandatory minimum sentences should be eliminated. Courts should revive and broadly and vigorously interpret and apply the Eighth Amendment to ensure that punishment does not significantly exceed blameworthiness.

22. *Minimizing Imprisonment.*—Imprisonment should not be treated as the default mode of punishment but should be used sparingly, deliberately, and only to the extent the crime in view was a serious one according to community views of justice.

23. *Restorative Justice.*—Restorative justice institutions and proceedings should be established to repair the relationships and social fabric torn by crimes. These restorative justice institutions and proceedings should embrace the participation of immediate stakeholders, local communities more broadly, and networks of care and support for both offenders and victims. These institutions and proceedings should be employed to the extent consistent with the community's views of justice, the goal of upholding the community's values, the principle of prosocial punishment, and the principle of sentencing based on blameworthiness. In addition, there should be a rebuttable presumption in favor of employing these institutions and proceedings whenever the defendant is a juvenile.

24. *Probation and Surveillance.*—For individuals convicted of low-level offenses, reliance on probation and surveillance should be reduced in favor of greater use of day fines, restorative justice proceedings, or other short-term sentencing options.

25. *Prison Conditions.*—Conditions in prisons and other correctional facilities should be, to the extent possible, non-criminogenic; oriented to preparing inmates to return to society as full and productive citizens; and consistent with basic values of legality, equality, humanity, and dignity.

Citizen review boards should be enlisted and empowered to oversee prison conditions. Courts should apply relevant statutory and constitutional provisions, including broad and vigorous interpretation and application of the Eighth Amendment or Due Process Clause, to ensure that prison conditions are consistent with these principles.

26. *Collateral Consequences.*—Absent specific, special justification, all collateral consequences that impair formerly incarcerated people from rejoining society on terms of equal citizenship should be abolished. Without exception, disenfranchisement laws for persons convicted of crimes should be abolished. All collateral consequences imposed by the state should be imposed only on the basis of an individualized, deliberative proceeding or, if imposed automatically, should be subject to reconsideration in an individualized, deliberative proceeding.

27. *Sentencing Information for Trial Juries.*—The trial jury in all criminal cases should be informed of the sentencing implications and related consequences of a finding of guilt and permitted to recommend a sentence or other disposition of the case in connection with a finding of guilt. To the extent judges exercise sentencing authority, judges should consider the trial jury's recommendation under a rebuttable presumption of correctness, and the trial jury's recommendation should authorize judges to sentence offenders below any otherwise-provided guidelines recommendation or statutory minimum. In exercising this function, trial juries should be informed of any facts with a meaningful possibility of affecting a juror's deliberations, including, for the offense or combination of offenses or counts charged: the minimum, average, and maximum possible sentences; periods of probation, parole, or other state supervision outside a detention center, treatment facility, or other correctional facility; sentencing guidelines recommendations or requirements; alternative sentencing options, including mental health treatment or restorative justice proceedings; likely collateral consequences, including those enforced by nonstate actors; evidence-based risk assessment of the defendant; background information about the defendant's circumstances and blameworthiness, including all aggravating and mitigating aspects of the offense and offender; the financial and other costs of punishment for the state and for the defendant; the broader social costs and benefits of punishment; and punishment practices in similar cases, including racial and class-based patterns in related cases. All sentences, whether issued by a judge, a jury, or a judge acting on a jury's recommendation, should be subject to robust appellate review on proportionality grounds.

28. *Sentencing Juries.*—Sentencing juries should be generally established and empowered to decide ultimate sentences or other dispositions of a case, including in plea bargained cases and notwithstanding mandatory minimum sentencing laws that would otherwise restrict their discretion. Trial juries or plea juries may exercise this function in a bifurcated proceeding following a finding of guilt. In exercising this function, sentencing juries or trial or plea juries exercising the sentencing function should be informed of any facts with a meaningful possibility of affecting a juror's deliberations, including, for the offense or combination of offenses or counts charged: the minimum, average, and maximum possible sentences; periods of probation, parole, or other state supervision outside a detention center, treatment facility, or other correctional facility; sentencing guidelines recommendations or requirements; alternative sentencing options, including mental health treatment or restorative justice proceedings; likely collateral consequences, including those enforced by nonstate actors; evidence-based risk assessment of the defendant; background information about the defendant's circumstances and blameworthiness, including all aggravating and mitigating aspects of the offense and offender; the financial and other costs of punishment for the state and for the defendant; the broader social costs and benefits of punishment; and punishment practices in similar cases, including racial and class-based patterns in related cases. All sentences, whether issued by a judge, a jury, or a judge acting on a jury's recommendation, should be subject to robust appellate review on proportionality grounds.

29. *Community Supervision.*—The local community should be involved in determining and administering punishment throughout the criminal justice process, from bail to post-release supervision. This community involvement may take the form, among other possibilities, of bail juries, plea juries, sentencing juries, local community members determining appropriate modes of community service for released offenders, and/or citizen oversight boards for matters of policy and conditions in jails, prisons, and other correctional facilities.

30. *Cost Internalization.*—The county or other political unit with the authority to decide whether and how to prosecute or sentence an individual should also bear the financial costs of prosecuting or carrying out the sentence, subject to safeguards to correct for resource disparities among communities.