Thinking Outside the Cage: A Review of Rachel Barkow's *Prisoners of Politics*

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INTRODUCTION

The images of former Minneapolis police officer Derek Chauvin calmly murdering George Floyd in broad daylight as other officers stand guard; of Buffalo police brutally shoving septuagenarian Martin Gugino backwards onto his head and then marching past as he lies bleeding on the sidewalk; and of Rochester, NY officers pepper-spraying the eyes of a handcuffed nine-year-old girl[1] underscore a disturbing truth: Whether its agents are applying the law or violating it, the essential function of a criminal justice system is to hurt people—by using various acts of physical force, by taking property through fines and forfeitures, by locking people up in cages, and, in some cases, by executing them for capital crimes.

Of course, that's not all a criminal justice system does, and the harms it inflicts are not meant to be gratuitous. Rather, the point is to make society better off by discouraging destructive behavior, incapacitating those who threaten our well-being, and rehabilitating the redeemable. Still, we would do well to remember that when we empower police and other agents of the criminal justice system—whether it be with more equipment, more laws, more prerogatives, or more money—those resources will generally be used to hurt people in some way. So it's imperative that we understand how the system actually works and that we divest ourselves of any comforting illusions about the way it wields power in our names.

Rachel Barkow's *Prisoners of Politics* fills that prescription to perfection.

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[1] Janelle Griffith, *'You Did it to Yourself,' Officer Tells Nine-Year-Old Girl Pepper-Sprayed by Police in Newly Released Video*, NBC NEWS (Feb. 12, 2021, 3:41 PM EST), https://perma.cc/KFV6-48KF.

Indeed, I agree so completely with Prof. Barkow that the prospect of reviewing her book felt daunting at first because it seemed I would have little to do beyond summarizing her thesis, highlighting some especially choice quotes, and concluding with a resounding, "What she said!" Upon further reflection, however, I was able to identify an area of *possible* disagreement—not with anything Prof. Barkow actually says in the book, but rather with something that went unsaid. Simply put, I agree with her that our criminal justice system is profoundly pathological and desperately in need of strong medicine, and I also agree with the prescription she offers, as far as it goes. But I would augment that prescription with an extra dose of nontraditional "medicine" designed to shock the system out of its complacency and make it more receptive to the more conventional reforms that Prof. Barkow suggests.

The medical analogy seems particularly apt given the structure of the book itself. *Prisoners* is divided into three parts that would be familiar to any practicing physician. Part I represents a kind of patient history and assessment in which Barkow catalogues various pathologies of the system, including overcriminalization, excessive incarceration, insufficient accountability, centralization of power among prosecutors, implacable resistance to meaningful change, and the near-total displacement of juries by coercive plea bargaining.

Part II amounts to a diagnosis in which Barkow explains the cause of these pathologies, which she attributes to a combination of "penal populism"[2] and "institutional intransigence"[3]—that is, a populace more intent on doling out harsh punishments than reducing crime, and a class of criminal-justice professionals who exercise their considerable political influence to make the process of arresting, convicting, and incarcerating people as efficient and trouble-free for themselves as possible.

The third and final part of the book is Barkow's prescription—a list of systemic changes that she believes provide the best prospect of rescuing the system from its largely self-inflicted dysfunction. As she explains, "[t]he three key pillars of this new institutional framework" entail better oversight and control of prosecutors, "expert agencies designed to withstand political pressures" to adopt irrational policies such as excessively punitive sentencing, and "a robust role for courts in policing against government excess."[4] In essence, Barkow proposes to place the criminal justice system

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[2] RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 5 (2019) [hereinafter BARKOW, PRISONERS].

[3] *Id.* at 125.

[4] *Id.* at 202.

into a kind of receivership in which key policy decisions will no longer be made by police and prosecutors, but instead by a class of disinterested overseers who will ensure that the system works not for its own parochial interests but for the actual benefit of the public.

As noted, I agree with all of this. I think Barkow's dismal assessment of the system is fundamentally correct in that: (1) the system criminalizes far too much conduct that would be better addressed by the government, if at all, through other means; (2) it frequently doles out excessively harsh punishments that are more likely to cause future crime than to prevent it; and (3) much of this dysfunction may fairly be laid at the feet of a prosecutor class that has managed to "combine legislative, executive, and judicial powers under one roof—the very definition of tyranny that the separation of powers was designed to guard against."[5] Finally—and perhaps most importantly for purposes of this review—I emphatically agree with Barkow that the combination of perverse public-choice dynamics, interest-group politics, and excessively passive judges creates a situation where only incremental change is possible through conventional channels, and "reform proposals remain modest because that is, at best, all the current system is capable of producing."[6]

This brings me to the area of possible disagreement I mentioned above, which is that I think there may be something missing from Barkow's prescription. Yes, it would plainly be salubrious to (a) devolve power from prosecutors and subject their discretionary decisions to greater oversight; (b) install a cohort of experts equipped by training and disposition to blunt the self-interest of the law enforcement lobby and the mindless savagery of "penal populism"; and (c) get judges back in the business of fully enforcing constitutional limits on the government's exercise of its police power. But it is difficult to see how a system that is as broken and captured as the one Barkow describes in *Prisoners* would ever permit the sweeping reforms she suggests—precisely because those reforms are so smart, so essential, and so likely to reconstitute the entire system if successfully implemented.

So here is what I propose. In medicine, some drugs are known to have a synergistic effect and are often prescribed in tandem because of the way they work together. According to my colleague Dr. Jeff Singer, who is both a practicing physician and a policy scholar, common examples include Zofran and dexamethasone (to reduce nausea and vomiting in cancer patients receiving chemotherapy), Percocet and acetaminophen (for pain relief), and

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[5] *Id.* at 130.

[6] *Id.* at 13.

a beta blocker like propranolol along with a calcium channel blocker to control high blood pressure.

What kind of medicine to give a patient—including particularly how potent and how risky—depends in part upon how sick the patient is. We don't prescribe opioids for a paper cut, nor do we try to fix a bleeding ulcer with Tums. So what metaphorical disease best expresses the level of pathology in our criminal justice system?

I suspect most criminal justice reformers would say the level of pathology in our system is akin to high blood pressure or a moderate case of pneumonia—that is, a worrisome condition in serious need of attention, but neither a true emergency nor something that would call for any type of aggressive, unconventional treatment. I strongly disagree with that assessment, and while I would not presume to speak for Prof. Barkow, I think the level of pathology she describes in our current criminal justice system is far worse than a metaphorical case of pneumonia. It's more like metastasizing cancer that calls for an aggressive course of treatment involving public policy "prescriptions" that emphatically *have not* been approved for use by government regulators.

Thus, I would complement Prof. Barkow's prescription with one that involves imposing various changes on the system unilaterally, without the support of policymakers and even in the face of concerted opposition by police, prosecutors, and judges. Before describing this unconventional proposal in more detail, I will offer one caveat and one illustration to explain why I think the time has come to seriously consider it.

The caveat is that I am emphatically not suggesting the system's key pathologies can be cured with the kind of unconventional, unilaterally imposed changes I describe below. To the contrary, a complete and durable fix will certainly require the active support of players within the system. But going back to my point about synergistic medicines, I think the prospects of getting those actors on board with real reforms could be enhanced by delivering a major shock to the system that significantly disrupts the smooth functioning of the industrial-sized conviction machine our system has become.

Next, as a supplemental illustration of the institutional intransigence that Prof. Barkow so ably documents in *Prisoners*, I will briefly describe my own experience working on qualified-immunity reform, which has driven home to me the dismaying accuracy of her assertion that "law enforcement officials stand ready to fight any significant changes that would undermine their almost complete discretion to operate th[e] system to their own

advantage."[7]

Qualified immunity is a judge-made affirmative defense that enables government officials to avoid liability unless their misconduct involves the violation of a "clearly established" right.[8] In order for a right to be "clearly established," there must be a preexisting case in the relevant jurisdiction with nearly identical facts that would (hypothetically, since we know police do not typically read judicial opinions)[9] put a reasonable officer on notice that the particular thing he did—attacking an unarmed and unresisting suspect with a police dog, let's say[10]—was impermissible.

Lack of proper accountability is a persistent theme throughout *Prisoners*, and I have described qualified immunity as the "cornerstone of our near zero accountability policy for law enforcement."[11] Equally troubling are the astonishing injustices that qualified immunity routinely produces by enabling rights-violating police officers to avoid liability for everything from pile-driving a bikini-clad, unarmed woman onto her head at a public swimming pool,[12] to stealing more than $200,000 in cash and gold coins while executing a search warrant at a private residence,[13] to shooting a young boy in the back of the leg while blasting away at a non-threatening family dog.[14] As Justice Sotomayor explained in her dissent from a *per curiam* opinion affirming qualified immunity for an Arizona police officer who shot a woman several times through a fence because she failed to heed his command to drop a kitchen knife:

> [The majority's] decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers . . . . that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just . . . about this, I respectfully dissent.[15]

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[7] *Id.* at 9.

[8] For a thorough and accessible discussion of qualified immunity doctrine and its practical implications, *see* Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. (Sept. 14, 2020), https://perma.cc/QQP2-R7Z2 [hereinafter Schweikert, *Moral Failure*].

[9] *See* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 605 (2021).

[10] *See* Baxter v. Bracey, 751 F. App'x 869, 870 (6th Cir. 2018).

[11] *See, e.g.*, *All Things Considered: 'Qualified Immunity': A Doctrine That Made It Much Harder to Sue Police* (Nat'l Pub. Radio broadcast June 8, 2020) (transcript and audio at https://perma.cc/4D9X-3BFT).

[12] Kelsay v. Ernst, 933 F.3d 975, 977–78, 986 (8th Cir. 2019) (en banc).

[13] Jessop v. City of Fresno, 936 F.3d 937, 940 (9th Cir. 2019).

[14] Corbitt v. Vickers, 929 F.3d 1304, 1308 (11th Cir. 2019).

[15] Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

The timing of that case in April 2018 was serendipitous, as my Cato colleagues and I had just launched a campaign to eliminate qualified immunity earlier that year.[16] The centerpiece of that campaign was the so-called "cross-ideological amicus brief"[17] that Cato designed and recruited more than a dozen public interest organizations across the ideological spectrum to join—from the ACLU and NAACP Legal Defense and Education Fund[18] on one side to Alliance Defending Freedom and the Second Amendment Foundation on the other.[19] However, after a remarkable term in which the Supreme Court synchronized its consideration of 13 different petitions involving qualified immunity, the Court simply denied certiorari in all of those cases, allowing a number of conscience-shocking lower court decisions to stand, including the three described in the preceding paragraph.[20]

In effect, this passed the qualified-immunity hot potato over to Congress and state legislatures to clean up the mess the Supreme Court created when it invented qualified immunity out of whole cloth in a blatant act of judicial policymaking.[21] But despite relentless criticism of the doctrine by judges[22] and academics[23] and ordinary citizens,[24] the concerted effort of virtually the entire criminal justice reform community, and an extraordinary grass-roots movement that includes the founders of Ben & Jerry's ice cream along with

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[16] *Cato Leads the National Campaign to Eliminate Qualified Immunity*, CATO INST. (June 22, 2020), https://perma.cc/6M3C-676R.

[17] *E.g.*, Clark Neily & Jay Schweikert, *Corbitt v. Vickers*, CATO INST. (Dec. 20, 2019), https://perma.cc/H6N6-U2PH (describing and linking to Cato's cross-ideological qualified immunity brief in support of cert. petition in *Corbitt v. Vickers*, No. 19-679).

[18] *LDF Joins Cross-Ideological Coalition in Submitting an Amicus Brief in Case Challenging Qualified Immunity*, NAACP LEGAL DEF. AND EDUC. FUND (Apr. 10, 2019), https://perma.cc/922D-SBSV.

[19] *See, e.g.*, Alan Feuer, *Advocates from Left and Right Ask Supreme Court to Revisit Immunity Defense*, N.Y. TIMES (July 11, 2018), https://perma.cc/Z9GX-E866.

[20] *See* Jay Schweikert, *The Supreme Court's Dereliction of Duty on Qualified Immunity*, CATO INST. (June 15, 2020, 11:27 AM), https://perma.cc/8QSA-4SQW; Jay Schweikert, *Supreme Court Will Soon Decide Whether to Reconsider Qualified Immunity*, CATO INST. (Apr. 28, 2020, 4:26 PM), https://perma.cc/SH2X-7GYH (describing cases).

[21] *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 47–48, 54, 80 (2018).

[22] *E.g.*, Schweikert, *Moral Failure*, *supra* note 8.

[23] *See, e.g.*, Nathaniel Sobel, *What Is Qualified Immunity and What Does It Have to Do with Police Reform?*, LAWFARE (June 6, 2020, 12:16 PM), https://perma.cc/S4W7-QGG6.

[24] *See* Emily Ekins, *Poll: 63% of Americans Favor Eliminating Qualified Immunity for Police*, CATO INST. (July 16, 2020), https://perma.cc/87WK-R3LC.

more than a thousand professional athletes and celebrities like Aloe Blacc and Killer Mike,[25] Congress has done precisely nothing to address qualified immunity since the murder of George Floyd by Minneapolis police in May of 2020. Unfortunately, the reason for Congress's inaction is perfectly clear and a prime example of the intransigence that Prof. Barkow describes. Simply put, the law-enforcement lobby drew a blue line in the sand and made clear that it considers qualified-immunity reform to be a political "third rail."

The takeaway is that if Congress cannot summon the political will to repeal such a palpably illegitimate, unjust, and unpopular legal doctrine as qualified immunity, the question naturally arises—What *can* Congress accomplish in the face of implacable opposition from the criminal justice establishment? And the answer, as Prof. Barkow persuasively argues in *Prisoners*, is not very much.[26]

Turning to unconventional changes that can be imposed on the system unilaterally as a complement to Prof. Barkow's policy prescriptions, I find particularly relevant her observation that "[t]he Framers constructed a constitutional architecture to guard against pathological politics, but their design assumed a world of criminal trials and a simpler body of laws that no longer exists."[27] To elaborate a bit on this trenchant point, the Framers failed to anticipate—indeed, could not reasonably have anticipated—three especially pernicious features of our current system: (1) the rise of a professional criminal-justice class consisting of some three million police, prosecutors and prison guards, many of them organized into extremely potent public-employee unions[28] (and who have come to epitomize the very sort of faction that Madison famously described in Federalist 10 as being "united and actuated by some common impulse . . . *adverse[] to the rights of other citizens, or to the permanent and aggregate interests of the community*"[29]); (2) the government's astonishing success in replacing constitutionally prescribed jury trials with a point-and-convict system of coercive plea bargaining[30] that vastly increases the number of prosecutions the

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[25] *End Qualified Immunity*, CAMPAIGN TO END QUALIFIED IMMUNITY, https://perma.cc/EM62-JCHD (last visited Jan. 16, 2022) (listing coalition partners and supporters).

[26] BARKOW, PRISONERS, *supra* note 2, at 13.

[27] BARKOW, PRISONERS, *supra* note 2, at 126.

[28] *See* CHRIS W. SURPRENANT & JASON BRENNAN, INJUSTICE FOR ALL: HOW FINANCIAL INCENTIVES CORRUPTED AND CAN FIX THE US CRIMINAL JUSTICE SYSTEM 91 (2020).

[29] THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

[30] *See* BARKOW, PRISONERS, *supra* note 2, at 131 (explaining how the "one-two punch" of

government can pursue by delivering convictions cheaply and reliably without the expense, inconvenience, and uncertainty of jury trials;[31] and (3) a judiciary that imposes virtually no restraints on what conduct the other branches may criminalize, or the severity of punishments that can be inflicted on transgressors,[32] thus enabling the government to incarcerate people on a whim and inflict savage trial penalties[33] on those who buck the system by forcing prosecutors to prove their guilt rather than confessing it. Thus, as Prof. Barkow concludes, "[i]t is no surprise . . . that we have the bloated codes and prisons we have today because there is no one keeping an eye on this Leviathan to make sure it makes any sense."[34]

Yet, there is still hope, because while the system may be intransigent, it is not invulnerable. Indeed, as further explained below, in some ways the system's complacency represents more of an opportunity than an obstacle.

I. Pretrial Detention—Bail Funds

Despite the constitutional presumption of innocence and the Eighth Amendment's prohibition against excessive bail, it is widely understood that judges often set bail with an eye towards ensuring that certain defendants remain locked up pending trial, even if it cannot be shown that they represent a threat to public safety.[35] But as Prof. Barkow explains, "excessive use of pretrial detention under [the money bail] model creates public safety risks" because it severely disrupts the lives of detainees and their families and "correlates with longer sentences and higher recidivism rates."[36] In other words, "pretrial detention itself . . . is criminogenic" because "[a] person detained pretrial is, all else being equal, more likely to

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mandatory minimums and charge-stacking by prosecutors "virtually knocked jury trials out of the system"); *see also* Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 GEO. MASON L. REV. 719, 719–20 (2020) (describing various coercive levers American prosecutors use to induce guilty pleas and concluding that coercive plea bargaining has rendered the constitutional right to a jury trial functionally illusory).

[31] *See, e.g.*, Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183 (2014).

[32] *See* BARKOW, PRISONERS, *supra* note 2, at 186–91 (explaining that "[t]he federal courts—led by the Supreme Court—have gutted many constitutional guarantees").

[33] *See* BARKOW, PRISONERS, *supra* note 2, at 131; *see also* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 30, 34–35 (2018), https://perma.cc/DKR5-SFKS [hereinafter THE TRIAL PENALTY].

[34] BARKOW, PRISONERS, *supra* note 2, at 138.

[35] *See* BARKOW, PRISONERS, *supra* note 2, at 58.

[36] BARKOW, PRISONERS, *supra* note 2, at 58.

commit crimes later on."[37]

But in keeping with Prof. Barkow's overarching thesis, we should not be surprised that, while pretrial detention appears to inflict serious costs on individuals and society at large, it does yield short-term benefits to a particular group of people—namely, prosecutors. That's because pretrial detention increases the chances that a defendant will save the government the expense and inconvenience of a trial by agreeing to plead guilty.[38] This is particularly important from the standpoint of mass incarceration because, as discussed above, plea bargaining substantially increases the number of cases prosecutors can pursue by massively decreasing the unit cost-per-conviction. Because trials are so labor-intensive—it is not unusual in the federal system for a single trial to take weeks or months, and some have gone for more than a year—a prosecutor who expects half of her cases to go to trial will not be able to handle nearly the same caseload as one who can count on roughly two percent of her cases going to trial, which is the current figure in the federal system.[39] Thus, prosecutors who know the vast majority of their cases will end in guilty pleas instead of trials can cast their nets more broadly and be less selective about which cases they decline. They can afford, in other words, to process a much higher volume of defendants through the conviction machine. And they do.[40]

Bail funds have proven to be an effective antidote to the pathology of excessive pretrial detention, and their potential remains largely untapped. Simply put, a bail fund is a charitable organization that puts up bail for people who cannot afford it. Bail funds have been around in one form or another since the first ones were created by the ACLU in the 1920s to assist people arrested for sedition during the First Red Scare,[41] but their modern resurgence began about ten years ago in New York City with the advent of

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[37] BARKOW, PRISONERS, *supra* note 2, at 58.

[38] *See* BARKOW, PRISONERS, *supra* note 2, at 58 (citing Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 724–29 (2017)).

[39] John Gramlich, *Only 2% of Federal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RESEARCH CTR. (June 11, 2019), https://perma.cc/KTS6-8XDN.

[40] *See generally* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM (2017) (documenting pronounced increase over time in the likelihood that prosecutors will decide to pursue a given case instead of declining it).

[41] Robin Steinberg et al., *Freedom Should Be Free: A Brief History of Bail Funds in the United States*, 2 UCLA CRIM. JUST. L. REV. 79, 82 (2018).

the Bronx Freedom Fund[42] and the Brooklyn Bail Fund.[43] There is now a national organization called The Bail Project, which grew out of the Bronx Freedom Fund and whose mission statement elegantly summarizes the philosophy of bail funds:

> The Bail Project combats mass incarceration by disrupting the money bail system—one person at a time. We restore the presumption of innocence, reunite families, and challenge a system that criminalizes race and poverty. We're on a mission to end cash bail and create a more just, equitable, and humane pretrial system. Because bail is returned at the end of a case, donations to The Bail Project National Revolving Bail Fund can be recycled and reused to pay bail two to three times per year, maximizing the impact of every dollar.[44]

It is impossible to overstate the potential impact on our system if it suddenly became impossible to incarcerate people pending trial simply because they could not afford bail. To a high degree of certainty, prosecutors would find it more difficult to induce guilty pleas and would therefore pursue fewer cases, resulting in fewer lives derailed by the loss of jobs, housing, custody of children, and other life-shattering disruptions that pretrial detention so often precipitates.[45] True, the system has tried to push back against bail funds—including a pending bill in Texas that would limit which sorts of defendants bail funds are allowed to assist[46]—but those efforts face a steep uphill battle, both in court and in the court of public opinion. Moreover, in the small number of jurisdictions that adopt such measures, they should be fairly easy to circumvent through appropriately discrete acts of civil disobedience.

II. Involuntary Encounters with Police—"Pocket Lawyers"

This one has been a pet project of mine for several years. After watching countless YouTube videos of police cajoling,[47] intimidating, and deceiving[48]

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[42] *The Bronx Freedom Fund*, BRONX FREEDOM FUND, https://perma.cc/NRA8-ZCP2 (last visited Jan. 16, 2022).

[43] *Securing Freedom, Dismantling Injustice, Fighting for Transformative Change*, ENVISION FREEDOM FUND, https://perma.cc/M5Q2-ZN85 (last visited Jan. 16, 2022).

[44] *Mission*, THE BAIL PROJECT, https://perma.cc/99HH-V2KS (last visited Jan. 16, 2022).

[45] *See* BARKOW, PRISONERS, *supra* note 2, at 58.

[46] *See* Jen Rice, *A Texas GOP Bill Would Make It Harder for Nonprofits to Bail People Out of Jail*, NAT'L PUB. RADIO (July 29, 2021, 5:09 AM ET), https://perma.cc/W448-ECX6.

[47] Robby Soave, *Cop Asks Driver: 'Why Is It That Everyone Who Plays Frisbee Golf Smokes Weed?,'* REASON, (Oct. 10, 2014, 1:19 PM), https://perma.cc/BH4Y-82C2.

[48] Peter Holley, *Police Falsely Told a Man He Couldn't Film Them. 'I'm an attorney,' He Said. 'I*

people into waiving valuable rights during traffic stops and other police-initiated encounters, I began asking friends who were criminal defense attorneys to estimate what percentage of their clients said or did something during their initial contact with police that made it virtually impossible to defend them later on. The consensus figure was well above fifty percent. Based on what I was seeing in those videos, I became skeptical that people's inadvisable decisions to answer incriminating questions ("Have you been drinking tonight?"), consent to warrantless searches, or act in other ways contrary to self-interest were simply the result of not understanding their rights. Instead, it became increasingly clear to me that these unfortunate decisions often had less to do with the citizen's ignorance than with the officer's ability to exploit the combination of fear, uncertainty, and hope that so often attend involuntary encounters with armed and largely unaccountable agents of the state.

Consider how helpful it would be to have a lawyer during that incident—not to argue with the officer, but instead to provide some initial advice and then discreetly monitor the ensuing interaction to protect against any exploitative behavior by the officer, such as a suspicionless request to search the vehicle or an improper order to wait for a PCC dog to arrive.[49] Very simply, the concept is to use smartphones and other technology to provide free,[50] live legal counsel to people during involuntary encounters with law enforcement in order to help them make wise decisions and assert their rights with confidence.

There are of course myriad technical challenges to overcome, but I am convinced they are just that—technical challenges. Suffice to say, we all have a First Amendment right to communicate with others that, unlike many other constitutional rights, judges typically will not allow the government to infringe pretextually.[51] Accordingly, it will not be enough for a police officer

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Know What the Law Is.', WASH. POST (Mar. 10, 2017), https://perma.cc/MV5D-UANQ.

[49] *See* Rodriguez v. United States, 575 U.S. 348, 357 (2015) (holding that police may not prolong a traffic stop in order to await the arrival of a police dog). I use the term "probable-cause-creating" (PCC) dog rather than the more conventional "drug-sniffing dog" because I believe the former more accurately describes their actual role in our system.

[50] The cost of this service need not be prohibitive and could be supported through charitable donations of money and professional services. It might even be possible to make the entire operation self-financing.

[51] *Compare* Edenfield v. Fane, 507 U.S. 761, 770–71 (1993) (holding that the harms the government recites for regulating speech must be "real" and that its burden will not be satisfied by "mere speculation or conjecture"), *and* Snyder v. Louisiana, 552 U.S. 472, 479–84 (2008) (rejecting prosecutors' pretextual explanations for striking black jurors), *with* Whren v. United States, 517 U.S. 806, 813, 819 (1996) (holding that police may offer pretextual justifications for

to *assert* that a motorist's access to counsel during the traffic stop was distracting, or that it interfered with the investigation, or presented a safety concern—he will have to *prove* it. With improvements in technology—and as pocket lawyers and their clients optimize their behavior in light of experience—it will become increasingly difficult for police to prevent citizens who want access to real-time legal advice from getting it. Accordingly, it is not fanciful to imagine an alternative reality in which people rarely slip up during encounters with police, leading to fewer arrests, harder prosecutions, and more cases being declined.

III. Inadequate Representation—Public Defenders on Steroids

Most people would agree that public defenders are, on balance, chronically under-resourced. They earn relatively low salaries for the nature of the work they perform, they often carry enormous caseloads, and they have limited access to investigators, experts, paralegals, and other support staff that lawyers depend on to maximize their effectiveness. This can create a dynamic where prosecutors know full well that opposing counsel cannot possibly provide a fully zealous representation to every one of their clients because there are literally not enough hours in the day. Moreover, in many jurisdictions, indigent defense is provided by private lawyers working on a flat fee, which "incentivize[s] attorneys to do as little work as possible on each case . . . . because all costs for a case, such as investigation or consulting expert witnesses, come out of the same fee and thus directly eat away at whatever profit the attorney makes."[52]

The idea here is to stop thinking of indigent defense as something that only the government can or should fund and persuade private individuals and charitable foundations that a key element in addressing mass incarceration is forcing the government to work as hard as the Constitution requires for every single conviction. The more time prosecutors spend on a case with properly resourced defense counsel—responding to motions that might not otherwise have been filed; addressing facts discovered by investigators who might not otherwise have been available; bolstering expert testimony that would otherwise have gone unchallenged—the less time they have to work on other cases and the more selective they will have to be about which ones to pursue.

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constitutionally infirm traffic stops, including those motivated by race).

[52] BRYAN FURST, A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY 6 (2019), https://perma.cc/99Y4-DSQG; *see also* Dru Stevenson, *Monopsony Problems with Court-Appointed Counsel*, 99 IOWA L. REV. 2273, 2284–88 (2014) (describing flat-fee and other perverse financial incentives in greater detail).

It is probably not possible to vastly augment indigent-defense resources simultaneously across the country, but it shouldn't be necessary either. Instead, the idea would be to deploy this strategy (or, even better, all of the unconventional, unilateral strategies proposed in this review and more) one jurisdiction at a time, suddenly making the work of a given prosecutor's office substantially more laborious by virtue of the suddenly level (or at least more nearly level) playing field between prosecutors and defendants. Ideally, this enervating change in working conditions would be sustained until the law-enforcement lobby in that particular jurisdiction finally comes to the bargaining table ready to embrace real changes instead of the usual meaningless window-dressing that so often poses as criminal justice "reform."

IV. Coercive Plea Bargaining—Founding-Era Informed Juries

The final unconventional reform I will propose relates to another interest Prof. Barkow and I share, which is revitalizing the criminal jury as an inherently political institution with the avowed power to check government power by making its own judgments about the application of the law and acquitting factually guilty defendants in order to prevent injustice.[53] As Prof. Barkow and others have observed, the constitutional right to a criminal jury trial ensures (or, more precisely, was meant to ensure) that the government cannot punish people "unless a group of ordinary citizens agreed."[54] Accordingly, it is impossible to have mass incarceration without mass adjudication. And it is impossible to have mass adjudication without coercive plea bargaining. Why is that? The answer is quite simple.

Our system is famously optimized to have a strong preference for producing false acquittals rather than false convictions. This bedrock tenet of post-Enlightenment criminal justice, sometimes referred to as "Blackstone's ratio," is typically expressed as the maxim that "it's better that ten guilty men go free than one innocent man be convicted."[55] The willingness to acquit the guilty in order to minimize the chances of convicting the innocent is manifested in various ways throughout our system, including particularly the requirement that a defendant's guilt be proven beyond a reasonable doubt to the satisfaction of a *unanimous* jury.[56]

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[53] *See* Rachel Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 50–51, 63–65 (2003).

[54] *Id.* at 34.

[55] For an interesting discussion about different ratios that have been proposed by different thinkers over time, *see generally* Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173 (1997).

[56] Ramos v. Louisiana, 140 S. Ct. 1390, 1395 (2020).

Together with various defense-favoring evidentiary standards such as the Confrontation Clause and the exclusionary rule, these standards create an environment in which trials represent a far more attractive adjudicative mechanism to criminal defendants seeking to avoid convictions than to prosecutors seeking to obtain them.

And yet, more than ninety-five percent of criminal convictions in our system are obtained through guilty pleas by defendants who have somehow been persuaded to waive their extraordinarily valuable right to a jury trial and simply condemn themselves instead. What on earth could induce a rational person to exchange the possibility of acquittal and freedom for the certainty of conviction and punishment? The answer is pressure, and lots of it.

Though most prosecutors, judges, and Supreme Court justices continue to embrace the comfortable fiction that American-style plea bargaining is free from undue coercion, we know this to be false. Among other things, there are the hundreds of false guilty pleas uncovered by the Innocence Project[57] and various conviction integrity units, and documented in horrifying detail by the National Registry of Exonerations.[58] Indeed, even some judges have acknowledged how coercive plea bargaining can be, as have certain components of the Department of Justice.[59]

The question naturally arises whether there is any effective antidote to coercive plea bargaining given the fearsome array of levers available to prosecutors—including the infliction of often quite savage "trial penalties" on those recalcitrant defendants who gum up the works by refusing to plead guilty[60]—and the collective indifference of the judiciary.[61] I believe the answer is yes, and that the best place to look is into the hearts of prosecutors to determine which threats to the smooth functioning of the conviction machine scare them the most. As best I can tell the thing prosecutors fear most is this: A jury that understands how the system really works—or what I like to call a "Founding-era-informed jury."

Unlike modern juries, Founding-era juries generally knew what the consequences would be for the defendant if they voted to convict and about

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[57] *See generally* Glinda S. Cooper et al., *Innocents Who Plead Guilty: An Analysis of Patterns in DNA Exoneration Cases*, 31 FED. SENT'G REP. 234 (2019), https://perma.cc/E2KP-DP87.

[58] *See generally The National Registry of Exonerations*, U. MICH. L. SCH., https://perma.cc/QK9K-B7P7 (last visited Jan. 16, 2022).

[59] *See, e.g.*, Neily, *supra* note 30, at 736–39 (documenting examples).

[60] *See* THE TRIAL PENALTY, *supra* note 33, at 6.

[61] *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 361 (1978) (affirming life sentence imposed as trial penalty on defendant who refused five-year plea offer).

their power to acquit against the evidence (or "nullify") in order to prevent injustices.[62] But people who understand their ability to protect criminal defendants from unjust punishments and prosecutorial misconduct—including particularly coercive plea bargaining—by acquitting against the evidence are anathema to modern judges and prosecutors, who assiduously work to purge them from the jury pool.

Ultimately, however, the government's ability to reliably empanel such neutered juries depends on its ability to ensure that most people remain ignorant about the historical role of juries in our system and the key role they have played—and were meant to play—in protecting fellow citizens from unjust prosecutions.[63] In short, the government's ability to effect mass adjudication through coercive plea bargaining depends on its ability to deprive criminal jurors of truthful information about their historical role in the system. It depends, in other words, on censorship.

Now imagine that someone created a video with superb production values and A-list Hollywood talent that explained, in vivid and compelling terms, how people could protect one another from our system's many injustices—including not just coercive plea bargaining but also racial biases, rampant overcriminalization, and mass incarceration, to name a few—by exercising their power as jurors to acquit fellow citizens whenever the government failed to make the moral case both for conviction *and* the punishment it seeks to inflict. The video could remind jurors not just of their right to acquit against the evidence to prevent injustice, but also of their right to ask any questions they have about the case, such as what the consequences will be for the defendant if they convict and the substance of any plea offers made by the prosecution. The video could also suggest some of the reasons why this information might be withheld and remind potential jurors that ultimately it is up to them alone to decide whether they are persuaded that it would be just to convict a particular defendant.

Given modern methods for precisely disseminating particular media to a desired audience, judges and prosecutors might find it difficult to completely eliminate from the jury pool citizens who had seen the video. Prosecutors would also find it difficult to suppress the distribution of the video (though some would doubtless try), and if the campaign were successful, they would eventually have to live with the reality of jurors who understand just how far the government has gone to eliminate citizen

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[62] *See, e.g.*, Aliza Plener Cover, *Supermajoritarian Criminal Justice*, 87 GEO. WASH. L. REV. 875, 886 (2019); Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 94–96 (2006).

[63] *See* Cover, *supra* note 62, at 905.

participation in the administration of criminal justice and how they can push back against that pernicious trend.

CONCLUSION

Strong medicine? Perhaps. But if the metaphorical state of our criminal justice system is closer to a metastasizing cancer than a bad case of the flu—as I am convinced it is (and as I suspect Prof. Barkow may agree)—then, to coin a phrase, the question is not what are we going to prescribe; the question is what *aren't* we going to prescribe?

In sum, *Prisoners of Politics* provides an unflinching look at a criminal justice system that fritters away its moral and political legitimacy with every indefensible new crime it enacts, every excessively harsh punishment it imposes, every innocent defendant it coerces into pleading guilty, and every shortcut it embraces for sidestepping constitutional provisions designed to protect us from the hypercarceral Leviathan that Prof. Barkow so chillingly describes. Whether the patient's pathologies can be cured remains to be seen. But it is clearly time to consider a more aggressive course of treatment. Much more.