CRIMINAL JUSTICE AS REGULATION

*Malcolm M. Feeley**

Problem-solving courts and restorative justice programs provide important new alternatives to cope with recurring problems in the criminal justice process. But they are much more. They are harbingers of a new theory of the criminal justice process that challenges traditional accounts in fundamental ways. Although practices akin to problem-solving courts and restorative justice have long operated outside or below the radar of the theory of criminal law and the adjudicative process, over the past few decades these practices have come to the fore and are now supported with full-blown theories, which threaten to displace traditional accounts of criminal responsibility, criminal liability, and indeed the core features of the criminal justice process. The new theories are based on theories of regulation, where the objective is not so much to enforce the law as it is to secure compliance to the law in order to facilitate harm reduction and restore social order. Nowhere is this new development so clearly seen as in the opening chapters of John Braithwaite's important book, Restorative Justice and Responsive Regulation. *In this book, Braithwaite offers a full-throated theory of the new criminal justice process that is based on recent developments in regulatory theory and, most particularly, responsive regulation, which Braithwaite helped to develop. This model is implicit to varying*

*School of Law, UC Berkeley, Berkeley CA 94720, mfeeley@law.berkeley.edu

This article is a revised version of an address at the plenary session at the Multi-door Criminal Justice Symposium in Haifa, May 29, 2019, and it retains some of the informality of that presentation. I want to thank Hadar Dancig-Rosenberg and Tali Gal for inviting me to share some of my unformed ideas. I also want to acknowledge John Braithwaite, whose pioneering work has transformed thinking on criminal justice and regulation around the world. Finally, I want to acknowledge my debt to the many trial court judges with whom I have worked almost every summer for the past thirty years. Their contributions will be evident as one reads this paper.

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degrees in any number of recent developments in the criminal justice process, and in this paper, I argue it has the potential for displacing the classical theory of criminal law.

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And when courts fail, regulation emerges as the more efficient approach.[1]

INTRODUCTION

This conference addresses the practices of problem-solving courts and restorative justice, and the organizers have suggested we take a step back and explore them in the context of the multi-door courthouse. This is sensible advice as has been demonstrated by the thoughtful papers in the symposium. But, I want to take still one more step back, in order to explore an emerging theory that both describes and justifies these new institutional arrangements. I want to argue that these new theories represent a tectonic shift in the ways we understand the criminal process, away from classical criminal law and toward the idea that the criminal process is a form of regulation. Perhaps this new approach represents the "end of criminal law," as one scholar has put it.[2] For years, observers have pointed to regulatory-like practices and ideas creeping in at the edges of the criminal justice process,[3] but now we see holistic theories proposing to replace criminal justice as we know it. This development is reshaping and will continue to reshape theory of the criminal law and the adversary process in profound ways. Today, I want to discuss some of the theoretical advances that are belatedly catching up with existing practice.

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1. ANDREI SCHLEIFER, THE FAILURE OF JUDGES AND THE RISE OF REGULATION 6 (2012).

2. Markus Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829 (2001).

3. *See, e.g.*, Guy Lurie, Amnon Reichman, & Yair Sagy, *Agencificaton and the Administration of Courts in Israel*, REG. & GOVERNANCE (2019), https://doi.org/10.1111/rego.12236; and SCHLEIFER, *supra* note 1.

One of the major architects of this new theory of criminal justice as regulation is sitting in this room. I'm not sure, but I suspect that John Braithwaite himself is not fully aware of how path-breaking his work is in the development of a unified theory of regulation and criminal justice. However, it should not be surprising, since for the past four decades he has been a global leader in the study of both regulation and criminal justice administration. In 2001, he united these two fields. *Restorative Justice and Responsive Regulation*[4] is important for a great many reasons, but in my view its most significant contribution is that it puts forward a unified theory of criminal justice and regulation. Or, more precisely, it sets out a theory of regulation that he and others have been developing for more than forty years,[5] and shows how this theory incorporates the administration of criminal justice.

I want to expand on this argument. However, first I want to convince you that prosecutors, judges, and others in the common law world and in traditional societies have long employed restorative justice-like practices to cope with the problems of crime. Braithwaite recognizes this, and his major contribution, in my view, is that he has advanced a powerful model or theory for understanding these varied practices, both descriptively and normatively, that have heretofore been regarded as marginal to the process. By focusing on and restructuring these processes, he reveals that they flow from the more general model of responsive regulation. His is a radical thesis, and my self-appointed task this afternoon is to make the argument more explicit, and to expand on its implications.

Ironically, the idea of replacing courts with regulation is not new. The shift is readily apparent to anyone familiar with the rise of the modern administrative state. Everywhere courts, and especially courts in adversary systems, are deemed too slow and expensive to be able to solve the problems put before them. No one calls them shining examples of success, and libraries are filled with volumes that document their failings. Accordingly, the general trend in the modern administrative state has been the move away from courts to regulation. This move has been most apparent in the expansion of the welfare state, where regulatory agencies have been created not only to make policy and administer it, but also to handle disputes in

4. JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION (2001).

5. *See also* EUGENE BARDACH & ROBERT KAGAN, GOING BY THE BOOK (1982).

ways that are more effective and efficient.[6] Consider automobile accidents, workplace accidents, product safety, and the like. Mandatory automobile insurance, disability insurance, and workers' compensation have removed almost all such issues from the courts, and as Guido Calabrese informed us nearly forty years ago, when plaintiffs do get into court, they find that judges are in the business of "managing" accidents.[7] Seen in this evolutionary light, the shift from criminal justice to regulation is a long overdue catch-up. Regulation has already largely supplanted courts in so many other areas of public law.[8]

Braithwaite's responsive regulation is a crucial step in this development. He proposes an especially attractive regulatory model for criminal justice. His model assimilates a great number of disparate forms of restorative justice and problem-solving approaches that exist in contemporary criminal justice, and ties them up in a compelling regulatory bundle. Furthermore, his model has the virtue of making the criminal justice process–regulation relationship explicit in ways that no other discussions of the issues have. That said, his responsive regulation is not the only form of regulation into which existing practices of criminal justice can be assimilated. There are other worthy and not so worthy candidates, which I will touch on shortly. His model does not end the discussion, and in a sense only begins it. His regulatory model seems to stand alone. The core question is, then, how is the regulatory model of criminal justice to be anchored in the larger bureaucracy of the modern administrative state? This said, his contribution is enormous. He has formally bridged the gap and bid others of us to follow him across and explore the new frontier.[9] Indeed, he has helped us along.

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6. This was the theme in a set of materials, Law and Society, put together for teaching purposes by Lloyd Garrison and Willard Hurst in 1941, at the University of Wisconsin Law School, and finally published by KARL AUERBACH, LLOYD GARRISON, WILLARD HURST, & SAMUEL MERMIN, as THE LEGAL PROCESS: AN INTRODUCTION TO DECISION-MAKING BY JUDICIAL, LEGISLATIVE, EXECUTIVE, AND ADMINISTRATIVE AGENCIES (1961), *see esp.* vi–viii, 534–660.

7. GUIDO CALABRESI, THE COST OF ACCIDENTS: AN ECONOMIC AND LEGAL ANALYSIS (1970).

8. SCHLEIFER, *supra* note 1.

9. Some of Braithwaite's early work was on white collar crime, and contrast the way white collar offenders and street crime offenders were treated. Most criminologists criticized the lenient sanctions imposed on white collar offenders and argued that they should be treated as harshly as street criminals. Braithwaite disagreed, arguing instead that street criminals should be treated more leniently, like white collar offenders were. He approved of

Responsive regulation has the attraction of being developed with the criminal justice process in mind, and in particular the idea of restorative justice. This is an important step; now, perhaps for the first time, there is an emerging theoretical literature that explicitly links regulation with criminal justice and sees the former informing the latter.[10]

Let's connect the dots to see how I got here. I am familiar with and have contributed to the huge body of research that describes informal practices in the criminal justice process. However, most have regarded these practices as "extra-legal," or "adaptations," or "necessary evils," "unanticipated consequences," or "dysfunctional," and the like, in contrast to the real business of the court, which never seems to be addressed. Over the past thirty years, with the help from judges I have taught, and writers like Braithwaite, I have slowly come to understand that these side shows or unanticipated consequences and the like are in fact the stuff of the criminal justice process and not its residue. Restorative justice makes this point explicit. It is a form of responsive regulation. I stumbled on this insight by way of teaching a course for American trial court judges over the past thirty years.

I. BACKGROUND

For thirty years, I have regularly taught a two-week course for trial court judges from across the United States, offered in a master's degree program by the University of Nevada at Reno. Many of these judges handle criminal cases. In the course, I have them read theoretical pieces about crime and justice, and empirical, comparative, and historical accounts of criminal courts. My objective is to encourage them to see their experience as judges in historical context and comparative perspective. The course has evolved over the years, and I have added new mischievous elements to it.

In recent years I have begun the course by assigning the introductory chapters from Braithwaite's *Responsive Regulation and Restorative Justice*,[11] as

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the ways white collar offenders were handled by an administrative process, and apparently came to believe that street offenders should be handled in a similar manner.

10. There was a sophisticated literature along these lines in Marxist legal theory in the 1920s and 1930s, but it never made its way into mainstream legal theory in the West. *See, e.g.*, EVGENY PASHUKANIS, SELECTED WRITINGS ON MARXISM AND LAW 32–131 (P. Beirne & R. Sharlet eds., Peter B. Maggs trans. 1980). *See, e.g.*, Dubber, *supra* note 2.

11. BRAITHWAITE, *supra* note 4, 3–44.

well as articles on problem-solving courts written by Greg Berman and his colleagues at the Center for Court Innovation in New York City.[12] I first have them read Braithwaite's account of the nature and function of responsive regulation, and then go on to his chapter on restorative justice. The readings from Berman and colleagues include discussions of the theory of problem-solving courts, as well as accounts of Judge Calabrese's community court in the Red Hook section of Brooklyn, and a drug court in Portland, Oregon. I used to preface my presentation with a discussion of how innovative these programs are, underscoring my belief that they pose a radical challenge to the traditional forms of American criminal courts. For reasons I explain below, I now omit this introduction, and have students dive right in.

When I assign Braithwaite's materials on responsive regulation and restorative justice, I invariably have the same response from my judge-students: a yawn, followed after a moment or two with comments like this: "He dresses things up with fancy words and the restorative circle, but this isn't really all that new. We do it all the time." Once the issue is on the table, they are quick to supply examples.

One judge from a small town in Utah:

> When the police finally caught the young men who were vandalizing the park downtown and brought them into court, I continued the case, and asked the prosecutors to invite the defendants' parents to the next hearing, and then requested some city officials, nearby merchants, and mothers whose children play there to attend the hearing. None of them said a word at the hearing, but in short order it was agreed that the young men should repair and paint the restrooms and maintain the park for the next year. It has never looked better.

Another judge:

> We have three or four families in town whose kids, generation after generation, cause a disproportionate amount of the trouble. We watch them closely. I ask the police to talk to them. I ask the teachers of the young men to encourage them to join the army so that they can learn some discipline. But, mostly we cope and hope they grow out of it sooner than later.

Other judges go on to link a lot of criminal activity to alcohol and drug abuse, and recount that after handling the cases that arose as "crimes," at

12. GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE, ch. 3 (2015).

some point they get discouraged and shift their focus to substance abuse, not the crime that precipitated the arrest. Sometimes they meet with resistance from prosecutors and defense attorneys, but slowly they are drawn in. The result is that they now act a lot like public health authorities or social workers who solve problems rather than adjudicate disputes. Still other cases my judge-students point to involve complainants and defendants who know each other, and while technically there may have been a crime, in fact the incident is better understood as an interpersonal conflict that got out of hand, dealt with as a "social problem" instead of a crime. Many such cases involve petty theft and domestic violence.

As we discuss their experiences, a consensus emerges. Many cases reflect "social problems" more than "crimes," and so an informal examination rather than a trial or even a straightforward plea deal makes sense. One of my follow-up questions is, when was the last time you presided over a criminal trial? The answers vary. Some cannot quite recall because it has been so long ago. Others can recall clearly, for the same reason—it was such a long time ago.

During discussion other issues surface. Some of the judges wonder whether their almost instinctive problem-solving orientation comes from the fact that they live in smaller and perhaps more stable communities in which the local bar is small enough so that most people are familiar with the problems. Courthouses are like villages, everyone knows everyone, and gossip gets around. Moreover, prosecutors and judges may know something about the accused and the victim from prior dealings, reading the local paper, and community gossip. This, some of the judge-students suggest, may allow them to develop a more holistic and less formal approach when handling at least some of their cases. The discussion also leads some to suggest that the recent theories of restorative justice and problem-solving courts are not much more than old wine in new bottles, though it may attract more attention, and funding, because of the new and improved packaging.

Thinking about this, I have readjusted my materials over the years to follow up on the possibility that courts in smaller communities are distinctly different than courts in larger communities. I have my students read a couple of chapters from my book, *The Process is the Punishment*, a study of a misdemeanor court in a medium-sized city.[13] I took a 100-

13. MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

percent sample over three months of all cases filed by the prosecutor in the arraignment court. There was not one trial—bench or jury—in over 1,600 cases. Most of the felony arrests were ultimately disposed of as misdemeanors or dropped; only a few were bound over to felony court. About 60 percent of the misdemeanor arrests were dropped outright, others were "nolled" (i.e., prosecution was suspended), and only about 30 percent led to conviction. The reason was not because police had failed to arrest the right person or that their evidence was weak. It was impossible to tell, but my best guess—often aided by discussions with public defenders and prosecutors—is that in the vast majority of cases, the evidence was sufficient for conviction. However, prosecutors, judges, and defense attorneys were satisfied with a type of substantive or situational justice short of conviction, or if they felt a conviction was called for, without any (more) jail time. For many cases, the arrest itself had avoided escalation of the dispute, and defused tensions, so there was little point in proceeding any further. The process had become the punishment, and family members, social workers, and treatment centers could sort out the aftermath. So, here was some evidence that cases were handled pragmatically and informally by judges in a community larger than the ones most of my judges came from.

Still, this did not satisfy me or them. So I had them read a few chapters from the Vera Institute's famous study, *Felony Arrests*, which traces the fates of felony rests in New York City.[14] How does the criminal justice process respond? Roughly half of all felony arrests were dropped outright; another 30 percent were reduced to and disposed of as misdemeanors and received misdemeanor time or suspended sentences. Of those treated as felonies all the way to the end, only a small handful received "felony time," i.e., sentences longer than one year. Only two or three percent were taken to trial. Note that only felony arrests were included in this study; all misdemeanor arrests—around 90 percent of all arrests—were excluded. Since the Vera study was undertaken in the mid-1970s, felony arrest rates in New York City and elsewhere doubled and then doubled again, and then declined precipitously to 1950s levels, and sentence lengths have skyrocketed. Despite New York's uniqueness and these dramatic shifts, I regularly offer my judges $100 if after taking a sample of felony arrests

14. VERA INSTITUTE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS 6–19 (rev. ed. 1980).

from their communities, they find a markedly different pattern. I don't know how many judges have taken me up on the challenge; I have received emails from some confirming my hunch, and I've never had any one try to collect on my offer.

Interestingly, the Vera study was undertaken because City officials were concerned that so many felony charges were being dropped and being downgraded. They felt that something was amiss; police were making bad arrests or writing up weak reports, or prosecutors and judges were falling down on their jobs. So Vera undertook the project with this question in mind: What accounts for the dramatic drop-off in cases? They considered and rejected two obvious hypotheses: the convenience of plea bargaining, and the press of heavy caseloads. Although important, neither was at the root of the cause. Plea bargaining could not account for the 50 percent of the cases that were dropped entirely. And when they turned to the other 50 percent, they found reasons other than the press of heavy caseloads that accounted for downgrading charges, and imposing misdemeanor sentences even when convicted of felonies. They were surprised to find a near-consensus among arresting officers, prosecutors, defense attorneys, judges, probation officers—nearly everyone they interviewed—that the outcomes were appropriate. A substantial number of arrests involved prior acquaintances with on-going relations: family members, neighbors, co-workers, friends, and the like. In such situations prosecutors, defense attorneys, victims, arresting officers—everyone—thought it made little sense to impose criminal sanctions, or even treat the matter as a problem of criminal law—it was a "social problem" better addressed by a social worker.

The researchers found that officials distinguished between *technical* felonies and *real* felonies. Technical felonies involved interpersonal disputes that went awry. Some were eruptions fueled by too much to drink, or personal issues, and it was often matter of chance who was the complainant and who the defendant. Many "assaults" stemmed from on-going interpersonal disputes among intimates or arguments that "got out of hand." A great many burglaries and robberies were regarded by perpetrators as "debt collection." ("I took his car, because he has not paid me what he owes me, and I'd do it again.") Officials took these actions seriously, but saw them as "social problems" and best disposed of as such. Still, if the injury were serious enough, or the prior record long enough, criminal charges would not be dropped outright. These factors might warrant a reduced charge and time, or a lengthy sentence. Other research reports replicate

what Vera found for New York City in the 1970s.[15] In sum, the New York City study and others revealed a pattern of disposition not unlike what my judge-students reported for their smaller cities.

From here, I take my judge-students back in time. They read courtroom accounts from eighteenth- and nineteenth-century English and American records, and sometimes we push back even earlier. There are certainly vast variations over time, but similarities with contemporary criminal justice are striking. As they read accounts of felony trials from The Old Bailey Sessions Papers[16] from the late seventeenth and eighteenth centuries, they find that cases were typically resolved by trials and not guilty pleas. However, neither the victim-prosecutor nor the accused could by law avail themselves of counsel, and the process, dominated by the judge, was fast and informal. Witnesses were called, and some offered evidence about the offense, but many spoke to the character of the accused or the victim. ("He's a god-fearing man." "He's never gotten into trouble before.") Typically, trials lasted just a few minutes. Juries were empaneled to sit for a week or longer, but typically heard several cases in the morning and early afternoon before adjourning to a local pub to decide the fates of the several accused. But jurors appeared to have paid attention; they often acquitted in the face of overwhelming evidence of guilt, and regularly convicted on lesser offenses, and they had good reason to. Almost all felony offenses were punishable by death. In addition, judges had other means to avoid a death sentence; they could support a petition to the crown for a pardon upon condition that they agree to be transported to the colonies. Furthermore, by the late eighteenth century, judges had expanded the legal fiction of pleading "benefit of clergy," which allowed most first-time offenders to escape from a capital offense with, in effect, an insignificant punishment and a suspended sentence. Taken together, these various devices had a tremendous impact on mitigating the harshness of the criminal law. Of those formally charged with felonies punishable by death, less than half were actually convicted. Of those convicted, the vast majority escaped the gallows.[17]

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15. Donald Black, *Crime as Social Control*, 48 AM. SOC. REV. 34 (1983).

16. These sources are described in my article, *Legal Complexity and the Transformation of the Origins of Plea Bargaining*, 31 ISR. L. REV. 183 (1997). In recent years, the Old Bailey Sessions Papers from the late seventeenth century until the early twentieth century can be accessed on line, at https://www.oldbaileyonline.org.

17. PETER LINEBAUGH, LONDON'S HANGED: CRIME AND CIVIL SOCIETY IN THE EIGHTEENTH CENTURY (2003).

Most historical accounts of felony courts and dispositions, like those my judge-students read, begin and end with the business of the felony courts—in England, the Crown Courts such as the Old Bailey, and in the United States in superior courts. However, such an approach is myopic and misses an important dynamic in the criminal justice process. It reveals only the proverbial tip of the iceberg. In both England and North America well into the twentieth century and even today, those arrested for both felonies and misdemeanors are usually arraigned in lower-level trial courts, like the court in New Haven discussed above.[18] If the seriousness of charges warrants it, they are bound over to crown or superior courts with felony jurisdiction. But as the studies of both New Haven and New York reveal, most felonies are disposed of in misdemeanor court, either by dropping prosecution or pleading to misdemeanor charges.

Reading between the lines of magistrates' diaries and record books for the eighteenth and nineteenth centuries in both England and North America, it is clear that magistrates spent a good deal of time "settling" felony issues at the local level, just as they did in New Haven and New York City in the 1970s.[19] There were a great many reasons for doing so. Apart from problem-solving concerns, in an era of private prosecution, victims were required to pay the cost of prosecution, and binding over a case for indictment was not inexpensive. Victim-prosecutors had to bear the costs of having the charge written up for the indicting court, had to wait for the crown court to convene in its quarterly sessions, and at times had to cover the cost of travel to the location where the court sat. One of the tasks of local magistrates was how to balance these several sets of factors.[20] Many victims, although angry at the accused, were nevertheless squeamish about sending them to the gallows, and as well not keen on paying the escalating costs since they would gain nothing if they won.

So, for these and a host of other reasons, magistrates routinely found alternative ways to dispose of many would-be felonies in their own courts without passing them on for indictment at crown courts where they faced

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18. FEELEY, *supra* note 13.

19. For New Haven, *see* FEELEY, *supra* note 13; for New York City, *see* VERA INSTITUTE, *supra* note 14.

20. One of the few scholars who has focused on the magistrates' role in retaining criminal cases locally to be handled as misdemeanors, or binding them over to crown court for felony indictment, is ROBERT SHOEMAKER, PROSECUTION AND PUNISHMENT: PETTY CRIME AND THE LAW IN LONDON AND RURAL MIDDLESEX, C. 1660–1725 (1991).

the possibility of the gallows. For several centuries in England and in North America until well into the twentieth century, one of the most common responses of magistrates to criminal complaints was to impose recognizances to keep the peace and recognizances for good behavior on the accused.[21] These two near-identical legal forms were powerful and effective regulatory devices. In England, offenders were required to locate two friends or relatives (they could not post the money themselves) to post surety bonds, which were to be forfeited if they violated conditions specified by the court. These conditions were often vague, and the vagueness enhanced the power of the court. As such, it was a much-used and successful regulatory device. Those bound by them had strong incentives to avoid trouble, and were certainly watched closely by their own benefactors as well as the complainant.

Probation is a modern variation on this ancient device. Begun in Boston as a philanthropic enterprise in the middle of the nineteenth century, it rapidly spread across the Anglo-American legal world, and was eventually subsumed by the courts.[22] A suspended sentence coupled with probation is now probably the most frequently imposed sentence in the Anglo-American world. The judges I teach are generally unaware of the ancient recognizances, but when learning about them are not particularly surprised in light of their own experiences with conditional discharge, deferred prosecution, diversion, probation, and the like. In fact, one of my judge-students revealed that he had reluctantly held unconstitutional his state's provision for granting recognizances to keep the peace. Despite its value, it was too vague and subject to abuse. As we see, the courthouse has always had multiple doors, at least of exit if not entry, that have permitted flexibility, problem solving, and restorative justice.

II. SHIFTING GEARS

I do not mean to paint a rosy picture of criminal courts, today or historically. They were terrible places, often brutal and perfunctory. But I want

21. The most detailed account of recognizances in England is JOEL SAMAHA, RECOGNIZANCES IN ELIZABETHAN ENGLAND (1974). For the United States, see JULIUS GOEBEL, CRIMINAL JUSTICE IN COLONIAL NEW YORK (1944).

22. For a brief history of probation, see Joan Petersillia, *Probation in the United States, in* CRIME AND JUSTICE: A REVIEW OF THE RESEARCH, vol. 22, 149–200 (M. Tonry ed., 1977).

to call attention to some of their less appreciated features. Despite horrible conditions and pervasive indifference—and perhaps because of them—there was also a less visible side to these courts, where pragmatic judges and victim-prosecutors could find ways to mitigate the harshness of the law and solve problems short of convictions.

Following the examination of these and similar practices, I abruptly switch gears. I assign my students the classic essay by Lon Fuller, "The Forms and Limits of Adjudication."[23] Here, Fuller explores the concept of adjudication in order to identify its underlying *forms*, which in turn, he maintains, reveal its distinctive social functions and its *limits*—what adjudication can and cannot do. The judges and I spend a happy session working through Fuller's subtle reasoning and arguments. Adjudication, Fuller asserts, is a process by which those parties affected adversely by another's actions have an opportunity to assert their legal claims, offer proofs and principled arguments about how the matter should be resolved, and in turn expect a third party—the judge—to decide the matter in a principled manner, and when doing so offer principled reasons. These conditions impose severe limits on adjudication. Issues must be narrowed, frames of reference focused and agreed upon. Issues dichotomized. Outcomes understood in zero-sum terms, and defended in terms of a single correct answer. Polycentric issues, Fuller instructs us, have no place in adjudication, since by definition they are many-sided and can lead to any number of equally satisfactory outcomes. This does not mean that adjudication is mechanical. Facts can be in dispute or incomplete, rules and principles fuzzy and in competition. Still, the judge in Fuller's model, as with Ronald Dworkin's Hercules, is expected to arrive at the best answer and accompany it with a convincing set of reasons.[24] My judge-students are drawn to Fuller's compelling logic, and perhaps to the elevated role he attributes to adjudication and to judges. I can almost see them bursting with pride.

I let them go on for a while, and then I puncture their balloons of enthusiasm. I remind them of the other materials we had examined the day before, including their descriptions of their own experiences, and how significantly these practices depart from Fuller's account. With this, they grudgingly leave Fuller and return to the grubby details of their own experiences and to the historical studies. I pose this question: Is Fuller's ideal

23. Lon Fuller, *The Forms and Limits of Adjudication*, 52 HARV. L. REV. 353 (1978).

24. RONALD DWORKIN, LAW'S EMPIRE (1986).

correct, or is your intuition about what you do, and what criminal courts have long done, more appropriate? This question precipitates lively discussion. Some judges maintain that Fuller's aspirations constitute the ideal, but that the reality of limited resources requires them to make practical accommodations. Plea bargaining, many of them concede, is unavoidable, a result of the pressure of heavy caseloads. I challenge them. I remind them of the studies we had considered earlier showing that criminal courts in communities with very light caseloads have the same general pattern of dispositions as do courts with heavy caseloads.[25] I also remind them that they had spoken enthusiastically and with a sense of accomplishment when describing the many ways they facilitate restorative justice and problem solving, even if their own courts do not have all the accoutrements of Braithwaite's restorative justice circles or even problem-solving courts. I also acknowledge that the criminal justice system is broken and dysfunctional in so many ways, but I urge them to reflect on the belief that it would be better if every case, or even a high proportion of them, were to proceed according to Fuller. I end my peroration by quoting Reinhold Niebuhr's powerful phrase, suggesting that the best we can often do in public life is to find "proximate solutions to insoluble problems," and suggest this may be their predicament.

I push a bit harder, by posing this choice: Fuller's ideal of adjudication, or Frank Sander's multi-door courthouse.[26] I invite my judge-students to think of these two approaches in terms of architecture. Fuller is a formalist; this is a house and this is its structure—learn to live in it. With his phrase, "Let the forum fit the fuss," Frank Sander reveals himself as a Bauhaus architect whose creed is, "Form follows function." Both problem-solving courts and restorative justice reflect this principle. So too does most of the work of my judge-students.

Then I ask, "If Fuller does not provide a useful model to guide you in your everyday work as a judge, who or what does?" This is followed by a silence. Occasionally, a judge hits on the answer and receives a gold star. However, often I have to bring them around. Eventually we turn to Braithwaite's chapter on responsive regulation. As we reconsider it, the material takes on a new importance. They continue to be attached to Fuller's ideas, but they see Braithwaite's theory in a new light. Among other things, they find polycentric issues everywhere. They now see their

25. *See* Vera Institute, *supra* note 14; and FEELEY, *supra* note 13, ch. 8.

26. Frank Sander, *The Multi-Door Court House*, 70 FED. RULES DECISIONS 111 (1976).

work through the eyes of a regulator trying to solve problems and maintain social control.

For Braithwaite, a good regulator is one who looks over the situation, assesses the problems, and takes steps to mitigate the damage in the immediate situation and to reduce the likelihood of future problems. A responsive regulator brings a holistic approach to the situation, catalogues violations, ranks them, and then suggests ways to reduce or eliminate them, starting with the most serious. Responsive regulation depends upon the assumption that violators are virtuous. It expects that if violators are confronted with the consequences of their behavior—its implications for victims and their families, themselves, their families—they will want to desist. Of course, not all violators are responsive enough to shaming and nudges that they change their behavior. Many deny, procrastinate, or feign ignorance, so that regulators gradually move up the pyramid of social control, from issuing written warnings to threatening sanctions, and ultimately ordering incapacitation. My judge-students are all too familiar with this pyramid of responses in their daily practice of judging. They too take a holistic approach, and up the ante as recidivists and probation violators return to court.

The judges recognize themselves in this description of the responsive regulator. Like the good regulator, they are usually not motivated by an overarching quest to render abstract, impartial, and dispassionate justice and impose sanctions in direct proportion to the harm inflicted. It is not that these issues do not enter into their thinking or are unimportant. Rather, they are part of larger bundle of considerations, and often mitigated by many other factors. As regulators their task is not so much enforcing the law as it is using law as a resource with which to shape social control.

After working through Braithwaite's account of responsive regulation for the second time, the judge-students and I return to consider their initial accounts of what they do in their courts. One general conclusion is that it is a lot like regulation. Another is that they rarely adjudicate in Fuller's sense. They almost never conduct a trial and, in fact, hold very few probable cause and evidentiary hearings. Mostly they manage cases, watching prosecutors drop a great many—at times because the arrest should not have occurred, but more often because the altercation was between prior acquaintances, or the accused had apologized or agreed to some sort of restitution, or social services had intervened. Convictions usually are reached through negotiated pleas involving a host of legal and extra-legal factors, including

threats of longer sentences after trial. And, of course, they dispose of a number of cases through informal problem-solving and restorative justice–like techniques. My judge-students who had earlier regarded these informal social work–like practices as incidental to their main job, now see them in a new light. This activity, they realize, is at the core of their work. They come to see Braithwaite's model of the regulatory process as reflective of their practice—both in a descriptive and a normative sense. (Occasionally I have administrative law judges in the course, and this recognition tends to come earlier and is more fully embraced by them.) Still, their ideas are inchoate; they do not like to think of themselves as regulatory officials. But they come to see that the "multi-door courthouse" is more than a metaphor for back doors though which marginal cases involving marginal people are directed. They come to appreciate that polycentric problems are pervasive, and for good reason—allegations of criminal conduct constitute complicated messes, and as such, they are not easily packaged in a tightly bound form.

However, the judge-students are quick to emphasize that they have not abandoned the ideal of adjudication or a concern with a Kantian sense of justice. They appreciate the pervasiveness of polycentric issues at the center of many criminal cases, but they continue to have a much more circumscribed appreciation for the scope of restorative justice than Braithwaite does. Still, they acknowledge that he is addressing something fundamental about the criminal justice process, and that the regulatory model makes sense to them. Further, they recognize that when they do fall back on a more Fuller-like approach, they do so only after a long history of patience, warnings, and lenience, just as responsive regulators do. Both criminal judges and regulators can respond with force, and incapacitate those who prove to be unwilling, unable, or incorrigible. Fuller's procedures and Kantian justice are something of last resorts, for both types of officials. However, even then, when imposing harsh sanctions, they think instrumentally—the punishment is a last resort when all else fails, and not an inevitable outcome derived from an ontologically driven theory in classical criminal law.

III. BROADENING THE INQUIRY

I still don't let my judge-students off the hook. Now that I have them thinking of themselves as regulators, I expand the discussion. We turn to other important, though less developed models of the criminal justice

process as regulation. I point to Gerard Lynch, a judge on the Second Circuit, and former prosecutor and professor at Columbia Law School, who has written an important piece on criminal justice as administration.[27] I present some of the work of Rachel Barkow, a professor of administrative law and criminal law at NYU, who is currently on the U.S. Sentencing Commission.[28] I cite the work of the late William Stuntz, a professor of law at Harvard, who in his later work maintained that the golden age of American criminal justice was in the late nineteenth and early twentieth centuries, when police magistrates doled out justice in regulatory-like fashion.[29] And I outline the *The Machinery of Misdemeanor Justice*,[30] a book by Stephanos Bibas, a professor of criminal law at the University of Pennsylvania, who in 2017 was appointed to the Third Circuit Court of Appeals. I note that many reformers once viewed the establishment of sentencing commissions and the creation of sentencing guidelines as a much needed step toward greater regulatory oversight of the criminal justice process.[31]

I also direct them to recent work on risk assessment as effective policy, which in recent years has taken off in criminal justice, led in large by funding from the Arnold Foundation.[32] All of these authorities, and still others in quite different ways, advance a regulatory view of criminal justice because of the need for more efficient and effective justice, the pervasiveness of polycentric issues central to so many criminal cases, and the need for better accountability and oversight in the administration of criminal justice. We quickly explore the outlines and the pros and cons of these other administrative approaches to criminal justice.

However, ever the pestering professor, even as I sense increased acceptance and qualified endorsement of criminal justice as regulation, I throw cold water on it. For instance, some are convinced by Judge Gerard Lynch's

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27. Gerard Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

28. *See, e.g.*, Rachel Barkow, *Criminal Law as Regulation*, 8 NYU J.L. & LIBERTY 316 (2014).

29. WILLIAM STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2013).

30. STEPHANOS BIBAS, THE MACHINERY OF MISDEMEANOR JUSTICE (2012).

31. The initiative for this movement was the book by JUDGE MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

32. For descriptions on the risk assessment instrument and to learn of the Foundation's role in developing and promoting it, see the Foundation's website, www.psapretrial.org.

analysis that the U.S. Attorney's Office in the Southern District of New York models itself after a regulatory agency—the Securities and Exchange Commission (SEC). But, I point out, the workload of the U.S. Attorney's Office in Manhattan is dominated by white-collar organizational crime, and thus is unlike any other prosecutor's office in the country.[33] Furthermore, I note that despite the title of Lynch's article, *Our Administrative System of Criminal Justice*, he does not address the roles of judges or defense attorneys except incidentally. It is a robust theory, but a theory about the organization of a prosecutor's office, and a highly atypical one at that.

Turning to the claim that once the police and magistrates' courts afforded us with speedy, effective, and efficient regulatory-like justice, I point out that although the courts had the benefit of a single magistrate-regulator without the complicating features of defense attorneys, prosecutors, and rules of evidence and procedure, not everyone looks back on those days with the same nostalgia that Stuntz and Bibas do.[34] Furthermore, forty years after they came into vogue, neither sentencing commissions nor sentencing guidelines have stood the test of time. Created in large part to solve the problem of racial discrimination and other forms of disparities in sentencing, they are now widely viewed as part of that problem.[35] Some think that they have even exacerbated the problem by spreading the patina of expertise and science over the sentencing process.

I continue in this vein. I have the judges read two articles, which I wrote with my now-colleague Jonathan Simon in the early 1990s.[36] In them we argue that the American criminal justice process, and perhaps others, are starting to coalesce around a new set of principles and practices, which we called "the new penology," or more descriptively, "actuarial justice." The centerpiece of this new focus, we maintain, is that increasingly the criminal

33. For a discussion of the limits of the scope of their ideas, see Malcolm Feeley, *How to Think about Court Reform*, 98 B.U. L. REV. 673 (2018).

34. For a less rosy account of these courts, see LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1993).

35. Discussions of their shortcomings are voluminous. For a good account of their development and their problems, see Richard Frase, *Forty Years of Sentencing Guidelines: What Have We Learned, in* AMERICAN SENTENCING: WHAT HAPPENED AND WHY (M. Tonry ed., 2019).

36. Malcolm M. Feeley & Jonathan Simon, *The New Penology*, 30 CRIMINOLOGY 449 (1992); Malcolm M. Feeley & Jonathan Simon, *Actuarial Justice, in* THE FUTURES OF CRIMINOLOGY 173–201 (D. Nelken ed., 1994).

justice process is organizing to manage the risk of danger.[37] As a consequence, traditional concerns with responsibility, mens rea, guilt, harms, as well as seriousness of offense, strength of evidence, procedural standards, and appropriateness and proportionality in sentencing have diminished.

Principles of risk management hold that people should be subjected to public social control in direct proportion to the risk of dangerousness they pose for society, in much the same way that automobile drivers pay for insurance according to their risk-of-accident profiles. Abstract risk profiles are generated statistically, and then people are fitted into the best-fitting slot regardless of distinctive individual characteristics or even criminal histories. The approach has revolutionary potential. Low-risk subjects, to some extent regardless of their criminal conduct, can be treated with no or low supervision; higher-risk subjects require more oversight and surveillance; and the still higher-risk subjects can be incapacitated. Under such a scheme, current offense, drug use, prior record, along with other factors such as age, sex, level of education, and so forth, are all just bits of data incorporated into the algorithm that identifies appropriate levels of surveillance.

Although concern with risk and danger has always been present in the criminal justice process, we identified two distinct features of this new development. First, we saw evidence of more systematic practices, such as the widespread adoption of statistical models used in recommending pretrial status. Second, we saw evidence of influence in normative theories of the criminal justice process. State and federal laws have been revised to embrace the idea of preventive detention based upon predictions of dangerousness, and respectable criminal law scholars have used this to advance a rationale for a new theory of sentencing.[38]

None of this is entirely new. The criminal law has long relied upon "habitual offender" statutes, criminalized "street walking," "vagrancy," and "loitering," and created non-rebuttable presumptions (e.g., about the amount of drugs) because they are viewed as "indicators" of serious crime

37. We pointed to a great many developments, but perhaps the most dramatic was the rise of preventive pretrial detention, which was adopted by the U.S. Congress in 1984, and most states thereafter. For a discussion of using selective incapacitation based upon risk assessment, see MARK H. MOORE, SUSAN ESTRICH, DANIEL MCGILLIS, & WILLIAM SPELMAN, DANGEROUS OFFENDERS: THE ELUSIVE TARGET OF JUSTICE (1984). Since these pioneering efforts, there has been a sea-change in expectations about setting conditions for pretrial release, sentencing, probation, and parole.

38. *Id.*

and are easy to enforce. Indeed, comparative criminal law scholar Markus Dubber draws on Blackstone to make the distinction between police powers ("the due regulation and domestic order of the kingdom . . . where by the individual [*sic*] are bound to conform to good neighborhood, and propriety . . . "), and "law" ("the maintenance of right and the redress of wrong" according to the principles of justice).[39] He then goes on to argue that, increasingly, American criminal justice is anchored to police power (regulation, emphasizing that a "police regime does not punish [but seeks] to eliminate threats if possible and to minimize them if necessary. Instead of punishing, a police regime disposes. It resembles environmental regulations of hazardous waste more than it does the criminal law of punishment").[40] Actuarial models in criminal law fit nicely with this observation, as do developments in modern tort law, employment discrimination law, and still other areas where law merges with public policy, and statistical reasoning has replaced or at least supplements traditional causation.[41] Indeed, criminal law may be the last form of public administration that has not completely succumbed to the regulatory idea.

In theory, algorithmic risk analysis supplies the key to deciding who should be detained and who should be released and under what conditions prior to trial. As well, it promises to determine the value of evidence, rationales for appropriate sentence type and length, and conditions for probation and parole. In short, it promises a unified theory that would bring the various components of the criminal justice process into harmony. It is the grand metaphor for the criminal justice process as efficient regulation, just as cost-benefit analysis is the unifying principle underlying so many regulatory regimes.

One crude but illuminating experiment with this approach was tried in New York City in the 1990s and early 2000s. Risk analysis contributed to the design of two inter-related criminal justice policies, massive stop-and-frisk campaigns and "broken windows policing." Intensive stop-and-frisk polices are aimed at aggressively identifying a handful of high-risk offenders and cordoning them off before they commit serious offenses. Broken windows policing holds that if officials can keep neighborhoods from running down

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39. Dubber, *supra* note 2.

40. *Id.* at 883.

41. *See, e.g.*, HENRY STEINER, MORAL ARGUMENT AND SOCIAL VISION IN THE COURT: A STUDY OF TORT ACCIDENT LAW (1987).

(i.e., broken windows in empty buildings, and the like), crime will decrease. Hence, the policy to vigorously pursue low-level quality-of-life offenses.

Issa Kohler-Hausmann assessed both these policies in her award winning 2017 book, *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing.*[42] She found that with the institution of these policies, the number of misdemeanor arrests skyrocketed, but the proportions and even the real numbers of convictions dropped precipitously. Prosecutors and judges, with the tacit approval of the police, dropped or dismissed the overwhelming majority of such arrests, or alternatively had arrestees plead guilty with no (additional) jail time, so that as arrests increased, the numbers of charges dropped. The war was far from efficient; it was compounded by confusion, often fostered deliberately. Some defendants would linger in jail for weeks or months on charges that subsequently would be dropped or, in the event of conviction, would not have resulted in any jail time. Huge numbers of arrestees made repeated treks to court, only to learn that the cases had been continued once again, or to find charges inexplicably dropped, or to be induced to plead guilty.

On the surface there appeared no rhyme nor reason for this. It was a paradox: a crackdown leading to massive increases in arrests, but even more massive decreases in convictions. However, Kohler-Hausmann came to see a logic within the seeming chaos: massive arrests let people know they were being watched, deliberate harassment reminded them that they had been marked, and an accumulation of a record with serious consequences let them know the axe could fall at any moment. What counted most was not the nature of the charges, conviction, or prior jail time, but the numbers of prior encounters and markers. Each arrest constituted a "mark" in a giant sorting and managerial process.

This is a perverted version of Braithwaite's model of responsive regulation. Move slowly and flexibly, since after gentle reminders, most people learn their lessons. If some continue to misbehave, they move up the ladder of firmness. If they persist, impose substantial sanctions. Except. Kohler-Hausmann and other researchers have found that the theory underlying stop-and-frisk and quality-of-life policing is not supported by the facts. Little if any evidence suggests that an aggressive arrest policy for petty offenses leads to a decline in crime or to locating the needle in the

42. ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2017).

haystack—the occasional really dangerous offender. What she did find, however, was that at the height of this campaign, in 2010, 87 percent of all those arrested for misdemeanors were Black and Hispanic, and almost all young men—a proportion markedly larger than the racial and ethnic proportions fifteen years earlier, before the campaign began.[43]

Thus the criminal justice process might reasonably be conceived of as a means of managing the underclass or racial and ethnic groups that stray from their neighborhoods. This is certainly how Nicole Gonzales Van Cleeve understands the role of the police and criminal courts in Chicago.[44] She notes that almost all those called to the court—defendants, victims, and witnesses—are black, and the overwhelming numbers of court officials are white. She finds palpable racism at every stage in the process, from lining up to get into the courthouse in the morning to who leaves last in the afternoon. Nonwhites are treated with disdain and hostility. They are the butt of jokes. They are shunted around carelessly, and forced to make repeated appearances in court only to have their cases continued, usually for the convenience of white officials. Her accounts are reminiscent of accounts of the actions of officials in colonial settings. It is a plantation model of justice. Its function is to warn the community: Take care, or you too will be dragged in here and ground up.

In fact, there is a small but powerful literature that views American criminal justice administration in terms of colonial rule. Their titles announce the theses. James Baldwin's first article for the *Nation* magazine was entitled "A Report from Occupied Territory."[45] James M. Doyle recounts his experiences as a public defender in "'It's the Third World Out There!': The Colonialist Vocation and American Criminal Justice."[46]

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43. *Id.*, at 51–59.

44. NICOLE GONZALES VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2017).

45. James Baldwin, *A Report from Occupied Territory*, THE NATION (July 11, 1966), https://www.thenation.com/article/report-occupied-territory/ (describing police presence in Harlem as occupied territory).

46. James M. Doyle, *"It's the Third World Down There!": The Colonialist Vocation and American Criminal Justice*, 27 HARV. C.R.-C.L. L. REV. 71, 79–80 (1992) (characterizing the role of colonial administrator as "holding the native down while the businessmen went through his pockets"). This characterization takes on expanded meaning following the report of the U.S. Civil Rights Commission in the wake of the civil uprising in Ferguson, Missouri, during the late summer and fall of 2014. *See* U.S. COMMISSION ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS

Other and some more recent titles are "The Dialectics of Legal Repression,"[47] "Empire,"[48] "The New Jim Crow,"[49] and "A Colony in a Nation."[50]

When one considers that up to 87 percent of the criminal defendants in Kohler-Hausmann's sample were African American or Hispanic, and that the vast majority of defendants, victims, and witnesses in Gonzales Van Cleve's study were minorities—or whenever one sits in a courtroom in American cities, racial and ethnic minorities dominate the landscape in contrast to white authority—the plantation analogy must cross everyone's mind at one time or another.

Conceptually, the several studies discussed above present a powerful case that the criminal justice process functions as a way to sort out and impose controls on racial and ethnic groups or an underclass in order to maintain a modicum of order. This may be one of the latent functions of the criminal justice process. But if so, it has emerged quietly and is not publically acknowledged by anyone. And, it raises the question: If criminal justice is regulation, is it by design or default? Some thoughtful scholars have argued that criminal justice as described above is regulation by design. Certainly the accounts of the increasing use of fines and fees slapped on poor defendants and probationers goes a long way toward verifying this view. Still, any strong theory of criminal justice as regulation must anchor it in an account of design and structure.

IV. ASSESSMENT

I had brought my judge-students along. Once they discovered that they had been responsive regulators all along, like Molière's bourgeois gentlemen who had been speaking prose for forty years without knowing it, they

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AND CONSTITUTIONAL IMPLICATIONS 12 (2017) (citing numerous communities that collected fines and fees from low-income and minority residents in order to maximize revenue at every stage of the criminal process.)

47. ISAAC BALBUS, THE DIALECTICS OF LEGAL REPRESSION (1973) (showing how officials used the criminal justice system to delegitimize racial revolts in American cities in the late 1960s and early 1970s).

48. MICHAEL HARDT & ANTONIO NEGRI, EMPIRE 193–95 (2000).

49. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

50. CHRIS HAYES, A COLONY IN A NATION (2017).

were most obliged. But having told them so, they asked, how can we construct a more solid foundation on which to act?

It is on this point that I continue to press my judge-students. If, as we have concluded, there is virtue in considering criminal justice as regulation, then we must think about the conditions required to create and maintain an effective system of effective regulation. It is too glib to contrast the grubby reality of crowded big-city courtrooms against an ideal circle of justice advanced by a proponent of restorative justice. We must explore the nature and function of each model on the same level: ideal with ideal and practice with practice. How attractive is criminal justice as regulation in theory? How attractive is it in observed practice? Braithwaite may have cherry-picked his vignettes of restorative justice—we certainly did not confront any hard-headed comparative analysis. It is simply too facile to conjure up a rosy view of yesterday's magistrates' courts or de Tocqueville's account of American jury trials and contrast them with today's criminal courts. Yet, this is largely what Bill Stuntz and Stephonos Bibas have done. As the noted comparativist, David Nelken, reminds us, one needs to make comparisons at the same level of abstraction or reality.[51]

There is also a related challenge. None of the accounts of criminal justice as regulation reviewed above are anchored in the larger framework of the modern administrative state. Nor, so far as I know, are any other accounts of criminal justice as regulation. The models, even the best of them, hang outside time and bureaucratic space, absent an analysis that situates them in time and place. John Braithwaite's restorative circles are compelling, but they too are suspended in time and space, and not presented as a component of the modern administrative state. He convinces us—me, at least—that a more satisfying approach to criminal justice is possible. But he does not locate the restorative circles in public administration. He does not address the obvious questions: Who oversees the restorative circles? How are they set up? Who's in charge? Who pays the rent? What happens when things get out of hand? I am not criticizing Braithwaite for not providing answers for these questions. He has more than earned his keep by showing that they *can* operate, and that they *can* be productive. Someone else can carry the weight down the road and locate them in the architecture of the modern bureaucratic state.

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51. DAVID NELKEN, COMPARATIVE CRIMINAL JUSTICE: MAKING SENSE OF DIFFERENCE 40–55 (2010).

Here is my fear. Perhaps restorative justice is an adjunct of the adversarial criminal justice process. Braithwaite himself seems to suggest this, by emphasizing that the upper limits of the sanctioning authority of the restorative circle should be no more than what a judge could impose. Problem-solving courts are, of course, already part and parcel of the regular court system. Despite their fancy names (and increased effectiveness), they are little more than spiffed up diversion programs overseen by a judge in a spacious court room rather than an probation officer in a cramped basement office. But if these regulatory-like alternatives are nothing more than adjuncts to existing criminal courts, like pretrial service agencies, probation, and the like, then they run the risk of being caught up in the culture of the courthouse, and being put to strategic use by the more powerful players in the process. They will become one more set of chips in an elaborate system of bargaining. Although there are virtually no trials in the contemporary criminal justice process, it would be a mistake to say that the adversary system is moribund. Prosecutors and defense attorneys still do what they can to pursue their interests, and everyone in the process is sensitive to protecting their prerogatives. If they are adjuncts to the criminal justice system, restorative circles and problem-solving courts would be little different than pretrial release officials, probation officers, and social workers attached to the court. They can do good work, but eventually their agencies will be shaped by the more powerful actors in the courthouse ecology.

Consider the appeal of actuarial justice and algorithmic models, their elegance, their promise of moderation, and their appeal to a rational system of regulation. Efficient and effective; less confusion; fewer people behind bars; more people on probation; shorter sentences; safer communities. One can see how this principle could operate effectively in the Environmental Protection Agency or handling disability claims in the Social Security Administration. There it would be a unifying principle that knits various parts of a sprawling but hierarchical organization together. But such an idea does not fit conceptually neatly within an adversarial criminal justice system, where division of labor and fragmentation were designed to foster conflict, differences in values, and contentiousness. Without a strong coordinating structure, criminal justice as regulation will be a more ill-conceived adjunct to a criminal justice process already drowning in hypertrophy.

This is the dilemma of thinking about criminal justice reform. Most such thinking assumes the adversarial nature of the system, and imposes its

good ideas on that system. But the theory of the adversary process is a variation of the theory of the market. It is supposed to operate, and operate efficiently, when each of its parts pursues its own objectives vigorously. It has no center and no oversight. Supposedly, it would be guided by an invisible hand, but there is precious little evidence of this.[52] Consider: the United States does not even have a ministry of justice at the national or state level. At best there are anemic "criminal justice coordinating councils."[53] So when new ideas and institutions emerge, they are grafted on to existing arrangements, so that in the long run they further fragment authority, accountability, and resources.

A meaningful model of criminal justice as regulation must address this problem. It must assess the structure into which the criminal justice process fits. It is clear to me that any meaningful idea of criminal justice as regulation must take the idea of regulation seriously, and seek to anchor criminal justice in a meaningful bureaucratic structure. But this is hard to do, and is rarely undertaken. Despite the fact that virtually everyone acknowledges that our criminal justice system is "broken," many fewer understand that our thinking about criminal justice reform is also broken. Since ideas precede actions, we need ideas. And it is for this reason that I want to close by singling out John Braithwaite for his visionary thinking about criminal justice reform.

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52. Defenders of the adversary process point to professionalism and appeals as two powerful institutions to keep the criminal justice process in line. But scholars of regulation tell us that everywhere it is an overrated form of social control, and appeals work only if there are appeals. In a process in which almost 98 percent of all criminal convictions are obtained through pleas of guilty, opportunity for appeals is severely limited. Indeed, there are surprisingly few pretrial motions filed in American criminal courts. On the low rate of trials, *see* Marc Galanter, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). On the low rate of pretrial motions in New York City, *see* Kohler-Hausmann, *supra* note 42.

53. For more on the lack of administrative support and coordination of the components of the adversary system, *see* Rachel Barkow, *The Criminal Regulatory State*, *in* THE NEW CRIMINAL JUSTICE THINKING 33–52 (S. Dolovich & A. Natapoff eds., 2017); and Feeley, *supra* note 33.