
PUNISHMENT WITHOUT THE STATE

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People are speaking up on social media and in other virtual spaces, sometimes to spur the criminal process, sometimes in response to the criminal system’s perceived failures, and even sometimes completely indifferent to the criminal system. People are expressing moral condemnation. They are shaming, shunning, banishing, and canceling. What are the implications of punishment through virtual spaces, in lieu of the usual—and now seemingly antiquated—space of physical courtrooms? More broadly, when all the world can become a virtual courtroom, a “place” for judgment, what are the implications for how we think about crime itself? And perhaps most importantly, if social media can become the new public square, is state punishment even necessary? These are the questions taken up in this essay, which argues that we should at least open ourselves up to the possibility that punishment without the state might be better. And might get us closer to something all of us can call justice.

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I. INTRODUCTION

Most of us have heard the stories.

Here’s one. On Memorial Day 2020, Christian Cooper, an avid birdwatcher who happens to be Black, was searching for Blackburnian warblers, scarlet tanagers, and other songbirds in Central Park when he noticed Amy Cooper loudly

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calling after her unleashed dog.¹ When he asked her to leash her dog, not only did she refuse, but she called the police on him, falsely claiming that he was threatening her life. Seemingly knowing that she was advantaged by race and gender—she is a white woman—she identified Mr. Cooper as “African-American” repeatedly during her 911 call.² For his part, Mr. Cooper had the advantage that he was recording the entire incident, which his sister promptly posted on Twitter, visual proof that Amy Cooper was lying about Mr. Cooper threatening her, and faking her histrionics.³ Within weeks, the video had been viewed more than 40 million times.⁴ Thanks largely to social media, Amy Cooper was quickly “vilified as the embodiment of racism and white privilege.”⁵ She was immediately fired from her high-level finance job.⁶ At the time, it had already been a year of numerous “Karens”—a term for white women who seem to shamelessly display entitlement, privilege, racism, “and their tendency to call the police when they don’t get what they want.”⁷ Or, as another site puts it, “a Karen is basically any angry, over-dramatic, entitled Gen-X white woman who is known for being extremely nosey and judgmental. Karens are often characterised [sic] by their love for requesting managers for tiny incidents.”⁸ There was “San Francisco Karen,” for example.⁹ Not to mention all the other “Karens” with their own sobriquets, like “Permit Patty” and “BBQ Becky.”¹⁰ Amy Cooper quickly found herself not only with the sobriquet “Central Park Karen” but also at the top of the list as “the worst of the lot.”¹¹

Here’s another. The comedian Chris Rock was hosting the 2022 Oscars and doing what comedians do—entertaining the crowd with jokes—when he made a quip about the actor Will Smith’s wife, Jade Pinkett-Smith. The joke seemed harmless to many, and it seemed that Will Smith initially laughed. But seconds later, Smith got up, mounted the stage, and the result was the “slap seen around

1. Sarah Maslin Nir, *How 2 Lives Collided in Central Park, Rattling the Nation*, N.Y. TIMES (Oct. 14, 2020), <https://www.nytimes.com/2020/06/14/nyregion/central-park-amy-cooper-christian-racism.html> [https://perma.cc/SS75-R9U7].

2. *Id.*

3. As one media outlet noted, on her 911 call, Amy Cooper spoke “with a fake voice that sounded much more distressed and exaggerated [than] the one she [used] during her conversations with [Mr. Cooper].” Michelle Rennex, *A Ranking of the Racist Karens by How Much “Can I Speak to the Manager” Energy They Exude*, JUNKEE (June 22, 2020), <https://junkee.com/racist-karen-ranking/258178> [https://perma.cc/8CCE-LD9Q].

4. Maslin Nir, *supra* note 1.

5. *Id.*

6. Amir Vera & Laura Ly, *White Woman Who Called Police on a Black Man Bird-Watching in Central Park Has Been Fired*, CNN (May 26, 2020, 4:21 PM), <https://www.cnn.com/2020/05/26/us/central-park-video-dog-video-african-american-trnd/index.html> [https://perma.cc/33B5-8QFT].

7. Cady Lang, *How the ‘Karen Meme’ Confronts the Violent History of White Womanhood*, TIME (July 6, 2020, 4:11 PM), <https://time.com/5857023/karen-meme-history-meaning> [https://perma.cc/9PAA-8M6Z].

8. Rennex, *supra* note 3.

9. *Id.*

10. *Id.* Indeed, the name “Karen” plummeted as a baby name, largely because of its association with unearned privilege. Douglas Jones, *The Name ‘Karen’ Keeps Dropping in Popularity Amid Recent Stigma*, ABC10 (June 2, 2021, 10:32 AM), <https://www.abc10.com/article/news/nation-world/karen-baby-name-plummets-popularity/507-93b87091-7c8b-40f3-8f64-91d0db8f1825> [https://perma.cc/ZJ4U-9YM5].

11. Rennex, *supra* note 3.

the world.”¹² As one pundit put it, it was so shocking that “it is pretty much the only thing anyone can remember about the 94th Academy awards now.¹³ That and Smith’s equally surreal acceptance speech for best actor 40 minutes later.”¹⁴ It mattered little that no charges were brought, even though the slap clearly amounted to battery under California law.¹⁵ Smith was banned from the Academy for ten years.¹⁶ Projects involving Smith were canceled or stalled.¹⁷ His Q score—a score that measures celebrities’ star power and appeal—plummeted.¹⁸ And even though Smith has managed to do some projects, he is apparently still worried about being “fully canceled.”¹⁹ His most recent film, *Emancipation*, was supposed to be his “comeback” film. But as one observer has noticed, although in another time and place Smith would be a shoo-in for another Oscar nomination, “it’s hard to see Academy members being willing to forgive and forget so soon.”²⁰ Fans seem to have a similar view and have largely stayed away from the film.²¹

And since we seem to be obsessed with the number three, here’s a third. Or rather a whole category. Matt Lauer. Kevin Spacey. Charlie Rose. Louis C.K. Al Franken. James Levine. Garrison Keillor. Mario Batali. Judge Alex Kozinski. According to an early article in the *New York Times*, before the end of 2018, the #MeToo Movement had already “brought down” 201 powerful men who lost jobs or powerful roles.²²

12. *Slap Seen Around The World: Full Story (and Some History) Behind WILD Will Smith & Chris Rock Oscars Altercation!!*, PEREZHILTON (Mar. 27, 2022, 11:41 PM), <https://perezhilton.com/will-smith-slap-chris-rock-oscars/> [https://perma.cc/245C-GMYA].

13. Steve Rose, *‘That Was a Horrific Night’: How Will Smith Has Tried to Move on After the Infamous Oscars Slap*, GUARDIAN (Dec. 21, 2022, 9:00 AM), <https://www.theguardian.com/lifeandstyle/2022/dec/21/will-smith-chris-rock-oscars-slap-horrific-night> [https://perma.cc/EKT5-9SPD].

14. *Id.*

15. See Cal. Penal Code § 242, defining battery as “any willful and unlawful use of force or violence upon the person of another.”

16. Mandalit Del Barco, *The Academy Bans Will Smith for 10 Years for Chris Rock Slap*, NPR (Apr. 8, 2022, 4:13 PM), <https://www.npr.org/2022/04/08/1091681181/the-academy-bans-will-smith-for-10-years-for-chris-rock-slap> [https://perma.cc/R9RD-LWAS].

17. Adrienne Westenfeld, *Will Smith’s Bright 2 at Netflix is Officially Canceled*, ESQUIRE (Apr. 26, 2022), <https://www.esquire.com/entertainment/movies/a39813075/will-smith-slap-bright-2-canceled/> [https://perma.cc/TB8V-7J3Z].

18. Erin Keller, *Will Smith’s Star Power Dropped Big Time After Infamous Oscars Slap*, N.Y. POST (Aug. 18, 2022, 4:52 PM), <https://nypost.com/2022/08/18/will-smiths-star-power-dropped-big-time-after-oscars-slap/> [https://perma.cc/554E-7D8T].

19. Yana Grebenyuk, *Will Smith’s ‘Biggest Fear’ is Being ‘Fully Canceled’ Following Oscars Slap: ‘Nothing He Can Really Do’*, US MAG. (April 6, 2022), <https://www.usmagazine.com/celebrity-news/news/will-smith-is-worried-about-being-fully-canceled-after-oscars-slap/> [https://perma.cc/656W-KPH2].

20. Anne Thompson & Marcus Jones, *Will Smith and Oscar, Part II? It’ll Be an Uphill Climb for ‘Emancipation’*, INDIEWIRE (Dec. 1, 2022, 2:45 PM), <https://www.indiewire.com/2022/12/will-smith-emancipation-oscar-chances-1234787151/> [https://perma.cc/3RET-Y6ML].

21. *Will Smith Upset New Movie ‘Emancipation’ Is Bombing at Box Office Following Chris Rock Slap*, RADAR (Dec. 20, 2022, 8:30 PM), <https://radaronline.com/p/will-smith-upset-emancipation-box-office-bomb-slap/> [https://perma.cc/J5YT-9GAX].

22. Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements are Women*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [https://perma.cc/UH23-VXMQ].

The reason I begin with these stories is because they seem so indicative of the way we live now. People are speaking up, sometimes to spur the criminal process, sometimes in response to the criminal system's perceived failures, and even sometimes completely indifferent to the criminal system.²³ People are expressing moral condemnation. They are shaming, shunning, banishing, and canceling. To be sure, this phenomenon hasn't gone unnoticed. There have been so many stories about cancel culture—the term has become part of our vernacular; it even has an entry in Merriam Webster²⁴—that it may seem passé. But while cancel culture may have run its course in the popular media, it does seem undertheorized in legal scholarship, or at least criminal legal scholarship. And what interests me is slightly different. What interests me is thinking about the implications of punishment through virtual spaces in lieu of the usual—and now seemingly antiquated—space of physical courtrooms. (Part of my interest in the possibility of virtual spaces is no doubt attributable to my interest in legal futurism, even Afrofuturism.²⁵). More broadly, when all the world can become a virtual courtroom, a “place” for judgment, what are the implications for how we think about crime itself? And perhaps most importantly, if social media can become the new public square, is state punishment even necessary?

These are the issues I explore in this brief essay. I begin, in Part II, by briefly acknowledging a point that is hardly controversial: that our social media platforms have, in many ways, become virtual public squares. While other scholars have examined the implications of this in a host of areas, from First Amendment to antitrust, Part II adds to the literature by noting that these new virtual public squares are also, and already, functioning in ways we normally associate with criminal law administered by the state. While for many, this turn may raise issues of mob justice and cancel culture run amok, I take a different view in Part III. Perhaps most importantly, I argue that using social media to punish offenders—punishing without the State—has the power to return power to us, “we, the people.”

There is one more thing to say before beginning my argument in full. As I have observed in prior work, one of the pleasures “of contributing to symposia—especially symposia where each contribution is brief—is the ability to engage in new explorations, test new ideas, and offer new provocations.”²⁶ That seems

23. In a way, this is an extension of what Ian Loader might call “plural policing,” where there is a fragmentation and diversification of policing responsibilities, such that it includes private policing secured through government, as well as “policing activities engaged in by citizens *below* government.” Loader calls this “a world of plural, networked policing.” See Ian Loader, *Plural Policing and Democratic Governance*, 9 SOC. & LEGAL STUD. 323, 323–24 (2000) (emphasis in original). It is also an extension of what Wayne Logan calls “crowdsourc[ed] crime control.” See Wayne A. Logan, *Crowdsourcing Crime Control*, 99 TEX. L. REV. 137, 137 (2020).

24. *Cancel culture*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cancel%20culture> (last visited July 9, 2023) [<https://perma.cc/WT3G-TCUX>].

25. These are passions of mine. See, e.g., I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1 (2019); Bennett Capers, *Future Sex*, 76 N.Y.U. ANN. SURV. AM. L. 293 (2021); Bennett Capers, *Afrofuturism and the Law*, 9 CRITICAL ANALYSIS L. 1 (2022); Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7 (2021).

26. Bennett Capers, *The Racial Architecture of Criminal Justice*, 74 SMU L. REV. 405, 406 (2021).

especially true here for this symposium on rethinking criminal justice through virtual spaces.

II. THE NEW PUBLIC SQUARE

In 2020, Texas attempted to pass HB20, a bill that, in the words of its Republican sponsor, would “allow Texans to participate on the virtual public square free from Silicon Valley censorship.”²⁷ Specifically, the bill sought to prohibit social media platforms from censoring “a user, a user’s expression, or a user’s ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user’s expression; or (3) a user’s geographic location in this state or any party of this state.”²⁸ The impetus for the bill was no secret. Although on its face the bill seemed viewpoint neutral, it was clear that the main concern, at least as Governor Abbott put it in voicing his support, was the view of Republicans that media companies were leading a “dangerous movement” to “silence conservative ideas [and] religious beliefs.”²⁹ Nor was Texas alone. Florida has passed a similar law.³⁰ Social media providers challenged both the Texas bill and the Florida law on First and Fourteenth Amendment grounds, initially securing injunctions to prevent the bill and law from going into effect.³¹ And while the fate of these efforts to “de-censor” platforms remains uncertain, what is not in dispute, in fact, what is so taken for granted that it barely warranted mention, is that in many ways, Texas’s view of the function of social media platforms is correct. Our social media platforms—think Twitter, Mastodon, Instagram, Facebook—are, in effect, virtual public squares.

And it’s not just lower courts where this claim is understood. In 2017, the Supreme Court recognized as much in *Packingham v. North Carolina*,³² noting that user-generated speech platforms give individuals the ability to “speak[] and listen[]” to “gain access to information and communicate with one another on any subject that might come to mind.”³³ They “provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard” and permit anyone, in theory, to become a “town crier.”³⁴ In short, social media platforms function much like a “modern public square.”³⁵ Evelyn Atkinson adds, “social media platforms are also vital to the formation of new communities. [For

27. Senator Bryan Hughes (@SenBryanHughes), TWITTER (Mar. 5, 2021, 10:48 PM), <https://twitter.com/SenBryanHughes/status/1368061021609463812> [<https://perma.cc/6CKL-8W9F>].

28. Tex. Civ. Prac. & Rem. Code § 143A.002.

29. Shawn Mulcahy, *Texas Senate Approves Bill to Stop Social Media Companies from Banning Texans for Political Views*, TEX. TRIB. (Apr. 1, 2021), <https://www.texastribune.org/2021/03/30/texas-social-media-censorship/> [<https://perma.cc/9JJQ-VSDW>] (quoting Governor Abbott).

30. See S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021).

31. *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1096 (N.D. Fla. 2021); *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1117 (W.D. Tex. 2021).

32. 137 S.Ct. 1730 (2017).

33. *Id.* at 1737.

34. *Id.*

35. *Id.*

example, one of] Facebook’s stated purposes is to allow users to ‘harness the power of groups to build community.’”³⁶ Julie Cohen adds that these platforms are “not simply a new business model, a new social technology, or a new infrastructural formation (although it is also all of those things). . . . [r]ather, it is the core organizational form of the emerging informational economy.”³⁷

To be sure, the predominance of social platforms has not escaped legal scrutiny. The cases this part opens with seek to graft First Amendment concerns onto platforms. Given their monopoly-like status, scholars have explored anti-trust challenges;³⁸ indeed, the Federal Trade Commission currently has an anti-trust suit against Meta.³⁹ Scholars have argued that, given the age in which we live, these platforms essentially provide essential services and, as such, should be regulated like public utilities.⁴⁰ Others focus on how media platforms harvest user data.⁴¹ And, of course, scholars have debated content moderation.⁴² But there is another implication that seems to have gone undertheorized, and that is the implication for criminal justice.

More and more often, victims are turning to social media to identify those who have harmed them.⁴³ And more and more often, the public is using social media to sit in judgment of those offenders. They are using these virtual public squares in a new way—they can voice their opinions by “liking” a tweet on Twitter, boosting on Mastodon, or offering their own take simply by posting their views, for example, all from the comfort of their devices, including smart phones. At the same time, they are participating in a way that is also old, one that harkens back to the days when “[e]veryone could witness punishment in the town

36. Evelyn Atkinson, *Telegraph Torts: The Lost Lineage of the Public Service Corporation*, 121 MICH. L. REV. (forthcoming 2023).

37. *Id.*

38. See Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 1958–69 (2021) (describing identifying two-sided platforms and defining markets and platform power).

39. David McLaughlin, *U.S. Gets ‘Second Time Lucky’ in Reviving Facebook Monopoly Case*, BLOOMBERG NEWS (Jan. 11, 2022, 4:33 PM), <https://www.bloomberg.com/news/articles/2022-01-11/facebook-loses-request-to-throw-out-fit-monopoly-case> [<https://perma.cc/SB2L-EM73>]. There is also a pending Senate bill. See Tom Romanoff, *The American Innovation and Choice Online Act: What it Does and What it Means*, BIPARTISAN POL’Y CTR. (Jan 20, 2022), <https://bipartisanpolicy.org/explainer/s2992/> [<https://perma.cc/6WMB-PH4Z>].

40. Dipayan Ghosh, *Don’t Break Up Facebook—Treat It Like a Utility*, HARV. BUS. REV. (May 30, 2019), <https://hbr.org/2019/05/dont-break-up-facebook-treat-it-like-a-utility> [<https://perma.cc/HYR7-L5E7>]; Josh Simons & Dipayan Ghosh, *Utilities for Democracy: Why and How the Algorithmic Infrastructure of Facebook and Google Must be Regulated*, BROOKINGS INST. (Aug. 2020), <https://www.brookings.edu/research/utilities-for-democracy-why-and-how-the-algorithmic-infrastructure-of-facebook-and-google-must-be-regulated/> [<https://perma.cc/W2KZ-E8EP>]; K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1668–73 (2018).

41. See, e.g., DANIELLE CITRON, *THE FIGHT FOR PRIVACY: PROTECTING DIGNITY, IDENTITY, AND LOVE IN THE DIGITAL AGE* (2022).

42. See, e.g., Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

43. See, e.g., CITRON, *supra* note 41, at 197.

square,” to the days when “laymen participated in most criminal cases and routinely saw criminal justice first-hand.”⁴⁴

And they are filling a need. Consider just a few data points. According to a study of rape reporting between 1995 and 2013, roughly a million reported “forcible vaginal rapes of female victims nationwide disappeared from the official records.”⁴⁵ How was this possible? It was simple. Police officers and prosecutors, both of whom have almost unfettered discretion when it comes to charging cases, simply decided not to prosecute.⁴⁶ Instead, prosecutors culled and chose just a fraction of the cases to pursue, presumably those cases they thought unproblematic. The ones that looked like “real rape,” *i.e.*, a male stranger, preferably Black, wielding a weapon,⁴⁷ involving victims who were “good girls,” or at least would appear as such.⁴⁸ The ones involving defendants who looked like rapists,⁴⁹ or at least had that look in their eyes.⁵⁰ The ones that fit “rape scripts,” including scripts involving race and gender and class and attractiveness.⁵¹

The other cases and victims, to put it bluntly, were dismissed. The victims became nonvictims. Or, to borrow from Susan Estrich, they each became “a ‘not real’ rape victim.”⁵² This is just one reason why social media became a conduit for a different kind of justice. (It’s hard to imagine the #MeToo movement even being possible before the advent of social media. The structure just wasn’t there.) As one article put it:

People have challenged each other’s views for much of human history. But the internet—particularly social media—has changed how, when and where these kinds of interactions occur. The number of people who can go

44. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912 (2006).

45. Corey Rayburn Yung, *How to Lie with Rape Statistics: America’s Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1198, 1204 (2014).

46. As it stands now, prosecutors have full discretion in deciding which rape cases to pursue and what redress to seek. As one scholar recently observed, this approach “concomitantly reifies state power and positions the state as the savior of women,” at least in the few cases the state does prosecute. See Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365, 371 (2016). This discretion also results in prosecutors relying on nonlegal factors in selecting cases to pursue, such as which victims look like “good girls,” a selection process that has class, race, and other status implications. See I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 854–65 (2013).

47. See, e.g., Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1088 (1986) (describing her own victimization and the realization that to the police, she had ‘really’ been raped, unlike a woman who knew her attacker, or say, “women who are ‘asking for it.’”); see also Capers, *supra* note 46, at 829.

48. Capers, *supra* note 46, at 847–54 (describing how rape shields entrench a preference for “good girl” victims).

49. See I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1364–65 (2010) (describing how some men, especially Black men, are prefigured as rapists).

50. See, e.g., *State v. Rusk*, 424 A.2d 720, 722 (Md. Ct. App. 1981) (conviction for rape affirmed in which the victim’s fear was based in part on “the look in his eyes”); see also Jeannie Suk, *‘The Look in His Eyes’: The Story of State v. Rusk and Rape Reform* 179 (Harv. Pub. L., Working Paper No. 10-23).

51. For more on rape scripts, see Capers, *supra* note 46, at 860–71.

52. Estrich, *supra* note 47, at 1088.

online and call out others for their behavior or words is immense, and it's never been easier to summon groups to join the public fray.⁵³

Again, sexual assault and the #MeToo movement are just one example of how the public used social media platforms as a way to judge outside the criminal law and to express moral condemnation, often thought to be the very thing that distinguishes criminal law from civil law.⁵⁴

But the question remains: what are the implications for punishing through social media? For punishing without the state? The part below seeks to answer these questions.

III. BENEFITS

One reason why this symposium on rethinking criminal justice through virtual spaces is so timely and generative is because of the moment we are in. Even before the murder of George Floyd, there was increasing concern about mass incarceration and over-criminalization. There was concern, too, about the failure of police and public prosecutors to keep us safe and to provide redress to victims. In short, state failure was already a topic of conversation. Since then, discussions about abolition and reimagining criminal justice have only grown, such that one can really say, “[W]e are in the midst of a criminal justice ‘moment,’ when extraordinary reform may be possible.”⁵⁵ Given this state of affairs, and the rise of public shaming and other forms of justice through virtual public squares, allow me to sketch out just a few of the benefits such a future of punishment without the state might present.

A. *Empowering Victims*

Some years ago, I wrote an article, “Against Prosecutors,” in which I imagined a world in which victims would (again) be able to prosecute their own cases and seek their own redress.⁵⁶ In short, I argued for an end to the monopoly public prosecutors currently hold on deciding what charges to bring, which defendants to pursue, and how justice should be apportioned. It is not a stretch to say “prosecutors determine almost every aspect of a defendant’s case.”⁵⁷ The prosecutor often functions as the “police, prosecutor, magistrate, grand jury, petit

53. Emily A. Vogels et al., *Americans and ‘Cancel Culture’: Where Some See Calls for Accountability, Others See Censorship, Punishment*, PEW RSCH. CTR. (May 19, 2021), <https://www.pewresearch.org/internet/2021/05/19/americans-and-cancel-culture-where-some-see-calls-for-accountability-others-see-censorship-punishment/> [https://perma.cc/C5JK-JQNW].

54. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 2 (3rd ed. 2001) (“What, then, distinguishes the criminal law from its civil counterpart is, or at least should be, *the societal condemnation and stigma that accompanies the conviction.*”).

55. John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 721 (2020).

56. See I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1564 (2020).

57. John F. Pfaff, *Criminal Punishment and the Politics of Place*, 45 FORDHAM URB. L.J. 571, 575 (2018); see also Angela J. Davis, *Meet the Criminal Justice System’s Most Powerful Actors*, THE APPEAL (May 29, 2018), <https://theappeal.org/meet-the-cj-systems-most-powerful-actors/> [https://perma.cc/4GQR-5RXT].

jury, and judge in one.”⁵⁸ “He is *the* pivotal figure in the justice process.”⁵⁹ Indeed, the law itself “is qualified, and may even be nullified completely, by [a prosecutor’s] discretion.”⁶⁰ And through charges and lobbying, prosecutors play a role in law making, enough to prompt Bill Stuntz to describe prosecutors as “the criminal justice system’s real lawmakers.”⁶¹ It is little wonder that Erik Luna and Marianne Wade have observed that, for all intents and purposes, “the prosecutor is the criminal justice system.”⁶² Or that a U.S. Attorney General acknowledged, “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.”⁶³

The impetus for that article is similar to the impetus here: a frustration with the fact that, contrary to popular understanding, victims are reduced to minor players in criminal prosecutions. The victim is not a “party” to the prosecution.⁶⁴ Nor, absent unusual circumstances, does the crime victim have an attorney in court.⁶⁵ Consider Jack Kress’s observations in this regard:

The American district attorney . . . represents the state and not the victim. This is why he rarely consults a victim with regard to charging or plea negotiations and almost never informs him of the results of the case in which the victim may have been injured or robbed. When the crime victim speaks of the assistant district attorney as being *his* attorney, he is spouting the myth of an adversary process and not the realities of a situation where he may never be informed of his rights to receive compensation or to refuse to testify.⁶⁶

Although for some, this may not seem very troubling—“after all, this is the system we have come to take for granted, and the movement for crime victims’ rights has given victims some role”⁶⁷—as I argued in that prior work, this state of things should prompt, at least, questions. It should prompt us to question why we take for granted a system that reduces victims to mere witnesses. That reduces their agency. That “functions as a type of erasure of the victim, or even as a re-victimization.”⁶⁸ Nils Christie offers another way of thinking about this. In his oft-cited article “Conflict as Property,” Christie observes:

The key element in a criminal proceeding is that the proceeding is converted from something between the concrete parties into a conflict between

58. RAYMOND MOLEY, *POLITICS AND CRIMINAL PROSECUTION* vii (1929).

59. Jack M. Kress, *Progress and Prosecution*, 423 *ANNALS AM. ACAD. POL. & SOC. SCI.* 99, 100 (1976).

60. SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* (10th ed. 2016).

61. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 509 (2001) (“As criminal law expands, both lawmaking and adjudication pass into the hands of the police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long.”).

62. Erik Luna & Marianne Wade, *Prosecutorial Power: A Transnational Symposium—Introduction*, 67 *WASH. & LEE L. REV.* 1285, 1285 (2010).

63. Robert H. Jackson, *The Federal Prosecutor*, 31 *J. CRIM. L. & CRIMINOLOGY* 3, 3 (1940).

64. Capers, *supra* note 56, at 1583.

65. Kress, *supra* note 59, at 107 (“In the American system of criminal justice, the crime victim does *not* have an attorney in court.”).

66. *Id.*

67. Capers, *supra* note 56, at 1583.

68. *Id.* at 1584.

one of the parties and the state. So, in a modern criminal trial, two important things have happened. First, the parties are being *represented*. Secondly, the one party that is represented by the state, namely the victim, is so thoroughly represented that she or he for the most part of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing. She or he is a sort of double loser; first, *vis-à-vis* the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important ritual encounters in life. The victim has lost the case to the state.⁶⁹

Put differently, the right to pursue cases is something that belongs to us, something we have a property interest in.⁷⁰ As such, one question that should haunt us all is how much of our rights have been usurped by prosecutors. And what we can do about it.

Viewed this way, the ability of victims especially to seek redress through virtual squares that do not require the state's blessing—redress that can bypass the state entirely—should be considered a plus, not a minus. Allow me to make one additional argument in favor of victims seeking recourse through the virtual public square rather than through the state. As already mentioned, there are many times the state will exercise its monopoly power and refuse to prosecute. Think of the many sexual assault cases that are never brought. Or the thousands of cases of police abuse. Clearly, one advantage is that victims who want recourse can bypass the state's obstinance and seek recourse through the court of public opinion. But another advantage is this: it provides another avenue for recourse for victims who do not want to involve the state at all. While this may strike some readers as hard to imagine, it shouldn't be. Studies suggest that, increasingly, victims want something less punitive than what the state system and its carceral logics tend to offer. Consider a recent study from the National Survey of Victims' Views. It found that "the overwhelming majority of crime victims believe that the criminal justice system relies too heavily on incarceration, and strongly prefer investments in prevention and treatment to more spending on prisons and jails."⁷¹ By a three to one margin, even victims of violent crime "prefer holding people accountable through options beyond just prison, such as rehabilitation, mental health treatment, drug treatment, community supervision, or community service."⁷² Danielle Sered's work finding that the majority of crime victims prefer restorative justice to incarceration is worth repeating here. The victims she has worked with are:

survivors . . . who participated in the criminal justice system. They are among the less than half of victims who called the police and are part of the even smaller subgroup who continued their engagement through the grand jury process. They are people who initially chose a path that could lead to prison. They are people who have suffered serious violence—

69. Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 3 (1977).

70. *Id.*

71. See *Crime Survivors Speak: The First-Ever National Survey of Victims' Views on Safety and Justice*, ALL FOR SAFETY AND JUST. 1, 13, 16 (2016).

72. *Id.* at 20.

knives to their bodies, guns to their heads, lacerations to their livers, punctured lungs—and have engaged in the criminal justice system in a way likely to result in the incarceration of the person who hurt them. Even among these victims, when another option is offered, *90 percent* choose something other than they very incarceration they were initially pursuing.⁷³

Put simply, more and more often, victims are resisting the notion that incarceration will right the wrong, and insisting on different models of justice, including models that do not rely on the criminal machinery of the state. The turn to the virtual public squares of social media platforms can provide these victims a means to do just that.

B. Empowering the People

There is something else to be said for a world in which punishment through virtual spaces is commonplace and perhaps even displaces state punishment. Public punishment is decidedly more democratic.

Here, some starting points may be useful. First, notwithstanding the fact that we often tell ourselves otherwise, our current reliance on state punishment is anything but democratic. We may say that our criminal laws reflect the will of the people through our elected officials, but we are deceiving ourselves. At most, they reflect the will of a select few. As I have written previously:

[M]any of us—most of us—are low information voters. We may vote based on party affiliation or particular issues (taxes, abortion, climate change, health care, school funding), but we rarely educate ourselves about particular legislation. Even when it comes to voters who cast ballots based on criminal justice issues, their voting tends to be based on criminal justice issues writ large We cede to our elected officials the details about what conduct is actually defined as criminal, and what if any level of mental culpability the defendant must have, and what attendant circumstances must exist, and what the punishment should be. . . . We, the people may be responsible for our criminal codes, but the vast majority of us have little if any knowledge of what the criminal codes actually say.⁷⁴

We must add to this the fact that we disenfranchise individuals. In fact, one could say we make sure that “[we,] the people never includes all the people.”⁷⁵ The larger society seems especially keen on disenfranchising those who have first-hand knowledge of what it means to suffer state punishment: convicted felons. And since we enforce criminal laws unequally—focusing on racial minorities, poor people, and sexual minorities—this means that disenfranchisement is

73. DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* 42 (2019).

74. BENNETT CAPERS, ROGER FAIRFAX, & ERIC MILLER, *CRIMINAL LAW: A CRITICAL APPROACH* 8 (forthcoming 2023).

75. Timothy A. Delaune, *Democratizing the Criminal: Jury Nullification as Exercise of Sovereign Discretion over the Friend-Enemy Distinction* (Sept. 2013) (Ph.D. dissertation, Univ. Mass. Amherst).

unequally distributed.⁷⁶ Indeed, one-third of all Black men have felony convictions, rendering many ineligible to vote.⁷⁷ As Michelle Alexander persuasively argued, unequal criminal laws and enforcement have been a crucial tool in maintaining white political advantage and Black precarity.⁷⁸ And the use of criminal law to hobble the ability of everyone to vote is only part of the story. The fact is, from post-Reconstruction poll taxes to voter ID laws to racial gerrymandering, we have always made voting unequal in a way that benefits those in power at the expense of those for whom power is being denied.⁷⁹ The blueprint for inequality is traceable to the Constitution itself, to its 3/5th clause and the electoral college's racist origins.⁸⁰

Against this backdrop, it is safe to say that the election of chief prosecutors is similarly undemocratic. This is all the more troubling when we recall that prosecutors wield all the power, deciding who to charge, what charges to bring, whether to negotiate a plea or not, and what terms to offer.

Second, the system that has emerged is one in which “we, the people,” have, in fact, become outsiders. Alexis de Tocqueville famously celebrated the power of the people to decide justice through jury trials as a key component of democracy and as part of “the sovereignty of the people.”⁸¹ But that vision of the people wielding power through the jury hardly fits the world we live in now.⁸² Now, nearly 97% of all convictions are the result of pleas. The title of a fairly recent *New York Times* article speaks volumes: “Trial by Jury, a Hallowed American Right, is Vanishing.”⁸³ Indeed, it is safe to say, as the Court finally acknowledged, plea bargaining “is the criminal justice system.”⁸⁴

And for those who think that the people at least exercise power through the grand jury process and thus have the final say in whether probable cause exists to return an indictment, here too, they would be wrong. Simply put:

Right now, public prosecutors control the grand jury system. Public prosecutors decide which cases to bring before the grand jury, and which witnesses to call. The prosecutor does the questioning, tells the jurors what the

76. See, e.g., Chris Uggen, Ryan Larson, Sarah Shannon & Arleth Pulido-Nava, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, SENT’G PROJECT (Oct. 30, 2020), <https://www.sentencingproject.org/reports/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/> [<https://perma.cc/AN7G-UTF2>].

77. *Id.*

78. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

79. See *id.* at 29–30.

80. Wilfred Codrington III, *The Electoral College’s Racist Origins*, ATLANTIC (Nov. 17, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/electoral-college-racist-origins/601918/> [<https://perma.cc/YU5W-6M4C>].

81. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed., 1945) (1835).

82. See *id.* at 282–83.

83. See Benjamin Weiser, *Trial by Jury, a Hallowed American Right, is Vanishing*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html> [<https://perma.cc/J4KC-EAK5>].

84. *Missouri v. Frye*, 566 U.S. 134 (2012) (Plea bargaining “is not some adjunct to the criminal justice system; it is the criminal justice system”) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

law is, and tells the jurors what charges are appropriate. There is a reason it is often said that a prosecutor could indict a ham sandwich, and that reason has everything to do with the power public prosecutors have already taken away from grand juries. As long as public prosecutors enjoy monopoly power, it is hard to imagine them ceding any power to the grand jury.⁸⁵

In sum, we live at a time when the power of the people to play a real role in deciding which cases are prosecuted, indeed whether cases are prosecuted at all, is long gone.

Now, compare the undemocratic nature of our criminal system with how much more democratic punishment in the virtual square could be. Rather than criminal laws and punishment being decided by the rarefied few, such decisions could potentially be made more democratically with everyone's input. Rather than excluding those who have experienced the brunt of the criminal justice system or those who know the defendant or the victim—rather than excluding anyone—the system would be one in which we can all play a role. We can all say that what someone did was a harm that needs redress. We can all say that this person or another must apologize or somehow make amends. We can all say this person should be shunned.⁸⁶ We can all say that, actually, no, the accuser is in the wrong. We can all listen to the accused's side of the story. We can determine who merits "corrections." In short, we can all exercise justice. And do so in a way that does not involve prisons or cages. Or courtrooms.⁸⁷ To be sure, this would be a far cry from what we are used to. It is certainly a far cry from the technocratic approach suggested by scholars such as Rachel Barkow, who argues that more decisions should be left to the so-called experts, not fewer.⁸⁸ But there is something to be said for the "wisdom of crowds."⁸⁹ And at a time when Jocelyn

85. Bennett Capers, *Still Against Prosecutors*, 13 CALIF. L. REV. ONLINE 95, 100 (2022).

86. Consider the Nashville singer who shot a homeless man after he asked her to move her car. As a result, she was "ridiculed and punished via the criticism she received after her mugshot surfaced and spread online." As she put it at sentencing, "Millions of people were making fun of me online. . . . I was convicted by the community before trial." For five years, she lived with "social punishment." Apparently factoring in this "social punishment," the sentencing judge gave her a sentence of probation rather than jail time. See Charmaine Patterson, *Aspiring Nashville Singer Who Shot Homeless Man After He Asked Her to Move Her Car Avoids Jail*, PEOPLE (Nov. 7, 2022, 10:23 PM), <https://people.com/crime/aspiring-nashville-singer-who-shot-homeless-man-in-2017-sentenced-to-nearly-1-year-of-probation/> [<https://perma.cc/S836-ZYDF>].

87. To be sure, there is something about the aura and majesty of courtrooms, as scholars such as Robert Ferguson and Susan Bandes have noted. See ROBERT A. FERGUSON, *THE TRIAL IN AMERICAN LIFE* 68 (2007); Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1281 (2020). At the same time, courtrooms—even in their architecture and design—have also been sites of inequality. See, e.g., Capers, *supra* note 26, at 407–12.

88. See generally RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019). As Barkow puts it:

If we want better outcomes that will improve public safety, we need to change the institutional framework. . . . Instead of policies designed to appeal to the emotions of voters who lack basic information about crime, we need to create an institutional structure that creates a space for experts who look at facts and data to set policies that will improve public safety outcomes, even if they are not easily reduced to sound bites or fail to provide emotional appeal.

Id. at 2.

89. See generally JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2005). Surowiecki demonstrates through numerous examples that "under the right circumstances, groups are remarkably intelligent, and are often smarter than the smartest people in them." *Id.* at xiii. His studies show that, whether it is guessing the weight of

Simonson has underscored the importance of power shifting to those who have historically been denied power,⁹⁰ there is certainly something to be said for expanding decision-making authority to all of us.⁹¹ This is certainly consonant with my own work advocating the return of power to “we, the people.”⁹²

There is one more thing to say about the democratic potential of the punishment through the virtual public square and how it empowers all of us. As was true of victims, it has the potential to make forgiveness,⁹³ acceptance, and what Joshua Kleinfeld might call normative reconstruction easier for the public at large to engage in.⁹⁴ It is significant that, already, people, when surveyed, tend to be less punitive than what the law actually prescribes.⁹⁵ Punishment without the state allows the people to punish without the punitiveness of the state. Beyond this, it vests in the people the power to decide when punishment—say through ostracism or shunning—is no longer necessary. And the power to decide when an apology might suffice. To be sure, we are all familiar with the public apologies offered by those who have offended public norms. They have become so commonplace that when public figures cross the line—think Boris Johnson hosting parties at the same time he was imposing Covid lockdowns on everyone else;⁹⁶ or Virginia Governor Ralph Northam apologizing for appearing in a racist costume when he was in medical school;⁹⁷ or President Bill Clinton’s apology to the country for lying about his affair with a White House intern⁹⁸—we know public relations teams are already at work fashioning a mea culpa, that spin doctors are likely already, well, spinning, that venues and dates are likely being booked for what has come to be known as the apology tour. Like jurors—or like people who are suddenly allowed to use the power we have—we scrutinize the subsequent

an animal in a livestock show, or predicting an election result, or the number of jelly beans in a jar, the average guess of a crowd is more likely to be accurate than any individual guess, and, indeed, is often more accurate than the best guess. *Id.* at xi–xiii, 17–19. A similar understanding exists in economic theory. See generally 1 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* (1973). Under Surowiecki’s analysis, a crowd is likely to have collective wisdom where there are a diversity of views, the members are independent, decisions are reached independently, and aggregating judgments into a collective decision is possible. *Id.* at 10. These conditions would seem to be satisfied in the virtual public sphere.

90. See generally Jocelyn Simonson, *Police Reform through a Power Lens*, 130 *YALE L.J.* 778 (2021).

91. Indeed, given that nearly everyone has access to social media platforms, the turn to criminalization and punishment through the virtual public square has the potential to give everyone a voice.

92. See Capers, *supra* note 56, at 1572–73.

93. For an exploration of the role law can play in facilitating forgiveness, see Martha Minow, *Forgiveness, Law, and Justice*, 103 *CALIF. L. REV.* 1615, 1620–26 (2015).

94. See Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 *HARV. L. REV.* 1485, 1486 (2016) (offering reconstructivism as an alternative theory of punishment and stating that reconstructivism views punishment as “a way of reconstructing a violated social order in the wake of an attack”).

95. Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 *Nw. U. L. REV.* 1565, 1574–80 (2017).

96. Bill Chappell, *Boris Johnson Apologizes for a BYOB Party Held as the U.K. was in COVID Lockdown*, NPR (Jan. 12, 2022, 2:49 PM), <https://www.npr.org/2022/01/12/1072483665/boris-johnson-apologizes-party> [<https://perma.cc/ZDU4-KPB6>].

97. Caroline Kelly, *Virginia Governor Apologizes for ‘Racist and Offensive’ Costume in Photo Showing People in Blackface and KKK Garb*, CNN (Feb. 7, 2019, 10:50 AM), <https://www.cnn.com/2019/02/01/politics/northam-blackface-photo/index.html> [<https://perma.cc/XVQ2-YUJR>].

98. *Presidential Apology*, C-SPAN (Dec. 11, 1998), <https://www.c-span.org/video/?116231-1/presidential-apology> [<https://perma.cc/KRN4-P83X>].

apologies for sincerity, looking for true remorse. I am not suggesting we are good at this.⁹⁹ But we exercise that power. And most importantly, whether we realize it or not, we collectively decide when to forgive and welcome someone back into the fold.

C. *Redefining Criminal Law*

There is yet another benefit to a system in which “we, the people,” reclaim power by effectuating justice via what is essentially the new public square: we can redefine what conduct should be considered criminal and what conduct should not.

One of the first things a student learns in a typical criminal law course is what makes something a crime, though sometimes the answer seems “circular, and useless: a ‘crime’ is anything that law-makers say is a crime.”¹⁰⁰ What we say about lawmakers defining what’s a crime is true, but in a way that should give us pause. Because another way of saying this is that defining crime has always been the province of those in power rather than society as a whole.

If we just consider American history, what this has meant is that we have gone through periods where holding human beings in bondage was not a crime,¹⁰¹ where wife beating was not a crime,¹⁰² and where marital rape was not a crime,¹⁰³ to name just a few of the more egregious examples. At the same time, we have a history of criminalizing same-sex sex,¹⁰⁴ disability,¹⁰⁵ reproductive choices,¹⁰⁶ and even dressing above one’s station¹⁰⁷ or inconsistent with one’s sex.¹⁰⁸ And, of course, none of this captures the innumerable ways we still criminalize poverty.¹⁰⁹ The point is not to give an exhaustive list of what conduct we

99. Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 884 n.92 (2018).

100. DRESSLER, *supra* note 54, at 1.

101. Indeed, slavery was essentially sanctioned in the Constitution. *See* U.S. CONST. art. I, § 2, cl. 3, amended by U.S. CONST. amend. XIV, § 2 (apportioning representatives to the states based on “the whole Number of free Persons” and “three fifths of all other Persons”); U.S. CONST. art. I, § 9, cl. 1 (setting out the states’ ability to import “such Persons as any of the States now existing shall think proper to admit”); U.S. CONST. art. IV, § 2, cl. 3 (obligating all states to return fugitives if they were “Person[s] held to Service or Labour in one State” who escaped); U.S. CONST. art. V (protecting until 1808 the “first . . . Clause[] in the Ninth Section of the first Article”).

102. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118–19 (1996).

103. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1375 (2000).

104. *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

105. *See* Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1408–09 (2021); SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 63–84 (2009).

106. One has only to think of *Buck v. Bell*, 274 U.S. 200 (1927), or the fact that access to contraceptives was criminalized until the Court decided *Griswold v. Connecticut*, 381 U.S. 479 (1965), to say nothing of the criminalization of abortions pre-*Roe v. Wade*, 410 U.S. 113, 116 (1973), a criminalization that is being resurrected with the reversal of *Roe* in *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

107. I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J. L. & HUMANS. 1, 8 (2008).

108. *Id.* at 8–9.

109. *See generally* Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009); Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473 (2020).

have criminalized and what we have not. Rather, it is to emphasize that criminalization has always been tied to power, whether it was the power of the crown, the power of the landed gentry, or even now, the power of the so-called majority. As legal historian Lawrence Friedman puts it, “[a]ll crimes are acts that society, or at least some dominant element in society, see as threats.”¹¹⁰

But an interesting thing happens when we open moral condemnation to the people. To a significant number, what we choose to criminalize and what we do not will seem off-kilter. To many, the punishment the state imposes will seem wrong, even counterproductive. For example, to some, the distinction between sexual harassment (noncriminal) and, say, unwanted sexual touching (criminal) will seem arbitrary, even wrong. The idea that Gary Albert Ewing was sentenced to twenty-five years imprisonment for stealing \$1,200 worth of golf clubs—clearly to feed his drug habit¹¹¹—while at the same time we impose a type of “civil death,” barring people with records from public housing and public assistance,¹¹² will seem wrong. The fact that a woman could be sentenced to jail for using her father’s address to get her a child into a better school district—while at the same time, the state permits school districts to be radically unequal—seems wrong.¹¹³

A world in which all of us can participate in the virtual town square and express our views about what is right and what is wrong—rather than leaving such decisions to those already in power—would be a brave new world indeed. And one I look forward to.

IV. CONCLUSION

Some years ago, before he became a federal appellate judge, Stephanos Bibas wrote the following:

In colonial America, criminal justice was the business of laymen, not lawyers. Lay constables arrested suspects, victims prosecuted their own cases, and defendants defended themselves pro se. Lay juries heard and decided all cases at public trials. Ordinary citizens regularly watched these trials, and gossip about the trials quickly spread through small colonial communities. Everyone could witness punishment in the town square . . . In short, laymen participated in most criminal cases and routinely saw criminal justice first-hand.¹¹⁴

Bibas’s point was not to idealize the past but to call attention to what has been lost. And the way the criminal system operates now:

110. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 8 (1993).

111. *Ewing v. California*, 538 U.S. 11, 30–31 (2003).

112. See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in an Era of Mass Incarceration*, 160 U. PA. L. REV. 1789, 1790, 1799 n.49 (2012); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1291 (2004).

113. Owen Daugherty, *Story of Mother Sentenced to Jail for Enrolling Child in Different District Resurfaced Amid College Scandal*, THE HILL (Mar. 14, 2019, 12:05 PM), <https://thehill.com/blogs/blog-briefing-room/news/434051-story-of-mother-sentenced-to-jail-for-enrolling-child-in/> [<https://perma.cc/PE5H-YPQ4>].

114. Bibas, *supra* note 44.

Insiders control the levers of power, deciding which cases to charge, which crimes and defendants should receive probation, and what prison sentences are appropriate. They reach many of these decisions in private negotiating rooms and conference calls; in-court proceedings are mere formalities that confirm these decisions. In an earlier era, lay juries and the litigants themselves called many of these shots at public trials. In a world in which plea bargaining resolves almost 95% of cases, however, professionals (especially lawyers) run the show.¹¹⁵

The goal of this essay has been to think seriously, and liberally, about what it might mean to reimagine criminal justice through virtual spaces. And as in my prior work, the goal has been to reimagine justice writ large, and in a way that vests more power in the people. And to embrace the notion of radical change. Given the way we live now—each year, our jails cycle through approximately ten million people;¹¹⁶ one in every three adults in America has a criminal record,¹¹⁷ we have by far the highest incarceration rate in the world,¹¹⁸ and none of this is race-neutral or class-neutral—my days of suggesting reforms that merely tinker with the machinery of criminal justice are long over. So, let us consider, seriously and liberally, the advantages of punishment through our new virtual squares. In short, of punishment without the state.

Allow me to end with two final thoughts. The first is a Critical Race Theory observation I return to time and time again when people express skepticism about radical change. “Who benefits from the status quo?”¹¹⁹ Who benefits from allowing insiders to “control the levers of power, deciding which cases to charge, which crimes and defendants should receive probation, and what prison sentences are appropriate?”¹²⁰ Who benefits? And who does not?

The second thought is this: I might be wrong. It may be that the disadvantages to democratizing justice outweigh the advantages. I don’t know. But I do know this. We should at least open ourselves up to the possibility that punishing without the state might be better. And might get us closer to something all of us can call justice.

115. *Id.*

116. ZHEN ZENG, U.S. DEP’T OF JUST., JAIL INMATES IN 2016, at 1 (2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf> [<https://perma.cc/B4W3-U472>] (noting that jails “reported 10.6 million admissions in 2016”).

117. Craig Arnold & Jamie Dimon, *Nearly 70 Million Americans Have Criminal Records. We Must Give Them a Second Chance*, CNN BUS. (Apr. 27, 2021, 10:47 AM), <https://www.cnn.com/2021/04/27/perspectives/second-chance-hiring-dimon/index.html> [<https://perma.cc/NYB8-VZHK>]; THE SENT’G PROJECT, AMERICANS WITH CRIMINAL RECORDS 1, <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> (last visited July 9, 2023) [<https://perma.cc/L4ML-SKBR>].

118. ROY WALMSLEY, INST. FOR CRIM. POL’Y RSCH., WORLD PRISON POPULATION LIST 2 (12th ed. 2018).

119. Capers, *supra* note 99, at 905.

120. Bibas, *supra* note 44, at 912.

