





# AN ASSESSMENT OF DEMOCRACY IN THE CRIMINAL JUSTICE SYSTEM

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I would like to begin by putting each of you on the spot. It won't require anyone to answer a question. Yet I do want to make you think about your personal role in our criminal justice system.

Those of you who do not work as prosecutors, judges, or defense attorneys might think that you do not have a role in the criminal justice system. But that is not true. *Everyone* plays a role because the American criminal justice system is uniquely democratic.

You may not appreciate this because this role of democracy has been eroding, especially since the second half of the 20th century. Unfortunately, at the same time, the criminal justice system has

ballooned in size. Our incarceration rate is five times higher than 50 years ago.

I suspect that these two phenomena are related. As ordinary Americans have played a smaller role in the criminal justice system, the system is no longer subject to the limitations that public opinion might place on the actions of those who work within it. So those who work in the system can expand the footprint of the criminal justice system. The result is a type of bureaucratic creep, with an especially pernicious outcome—specifically, more people in cages.

But I am getting ahead of myself. I should describe the role that democracy is supposed to play in the criminal justice system before explaining the ways in which it is failing. Then I will offer a little bit of hope about what we can do.



This is a lightly edited version of the annual Barrock Lecture on Criminal Law, delivered by **Carissa Byrne Hessick** at Marquette Law School on November 15, 2022. Hessick is the Ransdell Distinguished Professor at the University of North Carolina School of Law, where she also serves as director of the school's Prosecutors and Politics Project. A complete essay version, including footnotes, will appear in this fall's issue of the *Marquette Law Review*.

## Our Uniquely Democratic Criminal Justice System

No country on this planet reserves a bigger role for democracy in criminal justice matters than the United States. Our approach is attributable, in part, to decisions made when our country was founded. Changes in the 19th and 20th centuries made our system even more democratic. The result is important democratic features associated with the role that each of the three branches of government plays in the criminal justice system.

Let's start with the judicial branch and the role of juries. The U.S. Constitution requires that a determination of guilt in criminal trials involve juries. This requirement is designed to ensure that ordinary citizens play a key role in individual criminal cases, something about which the founding generation felt quite strongly. John Adams believed that "the common People should have as compleat a Controul . . . in every judgment of a Court" as in the legislature.

A lack of jury trials was one of the complaints in the Declaration of Independence. Maybe that is why the right to a jury trial appears twice in the Constitution—once in Article III and then again in the Bill of Rights. The jury was seen not only as a right of the accused but also as an important right of participation for the general public. Indeed, Thomas Jefferson said that if he had to choose between democratic participation in the legislature and such involvement in the judicial branch in the form of juries, he would choose juries.

When our country was founded, the jury did not just find facts; it also made law. This view of the jury's role has fallen out of fashion—probably because it is discussed mostly in the context of jury nullification, which is controversial. But even if you are not a fan of jury nullification, it is important to understand that the modern jury does more than simply decide which witnesses are telling the truth. Jurors also have to make judgment calls because many crimes and defenses include elements such as "reasonableness" or "materiality." Every year, when I teach criminal law, I emphasize how these terms require jurors to consult their own sense of right and wrong. Personal judgment is necessary because those elements are not questions of black and white; they are matters of degree.

Several years ago, when I was teaching in Arizona, one of my students got called for jury duty. Her case involved an argument between two men at a public pool. At some point during the argument, one



of the men yelled a curse word, the one beginning with an *F*, at the other. Unfortunately, the other man was an off-duty police officer, and he responded by arresting the first man. Prosecutors brought charges for disorderly conduct and for assaulting a police officer. My student found out later that the arrested man had been willing to plead guilty to disorderly conduct, but the prosecutor refused to drop the assault charge. The case went to trial.

In their deliberations, the jurors quickly agreed to acquit on the assault charge—which seems like the obviously correct decision to me—but seemed inclined to convict on the disorderly-conduct charge. My student spoke up, telling the other jurors that they should use their personal judgment about whether shouting a curse word at a public pool ought to be a crime. The other jurors seemed skeptical of this approach; they did not think that they

had the power to make decisions of that sort. But my student insisted that, because the statute talked about whether the defendant's conduct was "unreasonable," they had to use their judgment about whether something was serious enough that it should be illegal. "That's what I learned in my criminal law class," she told them.

The other jurors were not sure whether to believe her, my student later told me, and so she suggested that the jury send a note to the judge asking for guidance. But when another juror pointed out that it might take a while for the judge to respond, the rest decided to defer to the law student in their midst. They quickly decided that shouting curse words in public should not be illegal—some of them noted that they engaged in that sort of behavior themselves all the time. They acquitted the defendant on both counts.

This is hardly the only example of a jury's needing to make judgment calls in deciding criminal cases. Here in Wisconsin, you are all familiar with the Kyle Rittenhouse case. Rittenhouse shot three men, killing two, during violent protests in Kenosha, Wisconsin, in 2020. He raised self-defense at trial—a defense that under Wisconsin law required jurors to decide whether Rittenhouse's actions were reasonable in light of the circumstances at the time. In other words, the jury had to make not only a factual decision about what Rittenhouse did and what was happening around him but also a sort of moral judgment about whether his actions were reasonable.

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case. But personally I would rather have my fellow citizens making controversial decisions about whether someone's use of force is factually and morally justified than have that decision made only by government actors.

Juries are not the only source of democracy in the criminal justice system. We also elect our criminal justice officials. Forty-five states elect their local prosecutors. Forty-six states elect sheriffs. And many states elect their judges.

These direct elections are largely attributable to Jacksonian populism of the 19th century. In the decades after the Revolutionary War, most judges and prosecutors were appointed. But with people beginning to see appointments as little more than the spoils of patronage politics, reformers began to call for judges and prosecutors to stand for election. Elections were seen as a way to prevent patronage appointments and as a method to ensure local control over important offices.

Today, direct elections allow political outsiders to get elected to important criminal justice offices. For example, in 2017, Larry Krasner ran for election as district attorney in Philadelphia. Krasner was not simply an outsider; he was a legal agitator who had filed dozens of lawsuits against police officers for civil rights violations. He was so unlike the typical candidate for office that the head of Philadelphia's Fraternal Order of

Police called Krasner's candidacy "hilarious." The voters elected Krasner.

Local elections allow communities to adopt different responses to crime. For example, the people in Philadelphia recently decided to reelect Krasner, while the people in San Francisco decided to recall their district attorney, Chesa Boudin. The two prosecutors had taken similar approaches to crime and public safety, but the communities felt differently about whether those approaches were succeeding.

Because these elections are held on the local level, individual voters have more input into who holds these offices, and they are more likely to be heard. For example, just this past year, my local community held an election for district attorney. Because I study prosecutors, I invited the two candidates to come to my law school and participate in a candidate forum—an invitation that both candidates accepted. At the forum, the candidates talked about why they were running and what they planned to do if elected. Students and members of the community were able to ask questions and get specific answers to their specific concerns. Most people are not able to get such answers in a presidential or gubernatorial election. In contrast, most sheriffs and prosecutors, elected on the county level, serve relatively small communities.

Let me turn from the role that democracy plays in the judicial



branch (through juries and judicial elections) and the executive branch (through local elections for sheriff and prosecutors) to talk about the legislative branch. It might seem obvious to say that democracy plays a role in the legislative branch—after all, legislators are elected. But my interest here is a major development of the 20th century, in which the legislative branch asserted more control over the content of criminal law.

For much of the country's history, the law was largely developed through judicial opinions. The major crimes that we learn about in law school—homicide, burglary, arson, rape, kidnapping, robbery, theft, assault, and battery—did not become illegal because state lawmakers passed bills criminalizing that behavior. These acts were illegal, long before any such bills passed, because of the common law transported from England. Judges created that common law.

Beginning in the early 1900s, state legislatures embraced the process of reducing the law to statutes—codification. Legislatures routinely use their power, creating new crimes and new defenses, altering the definitions of existing crimes, and changing the penalties associated with various crimes. And, as we saw most recently in the 2022 elections, a number of people who run for Congress or state legislatures run on platforms about crime. When they take office, these legislators make further changes to the criminal law, bringing that law in line with what their constituents want. This process helps ensure that criminal law is democratic.

In short, some of the democratic features of our criminal

justice system were intentionally designed by those who founded the country, and other features expanding the role of democracy were adopted in subsequent centuries. Taken together, they ensure that criminal justice in the United States is, by its nature, democratic.

## Modern Democratic Deficits

Unfortunately, the jury, criminal justice elections, and criminal law statutes are all failing to deliver on their promise of making our criminal justice system more democratic. In one way or another, these democratic features of the criminal justice system are not working as intended. The result is a system with egregious democratic deficits.

Let's begin with the jury. Juries serve as an opportunity for democracy in the criminal justice system only if we have trials. Unfortunately, trials have all but disappeared in modern America. Some 97–98 percent of all convictions in this country are the result of guilty pleas. In some places, it is not too much to say, there are no trials at all. In 2021, not a single criminal trial was held in federal court in Rhode Island. Every single defendant pleaded guilty or (less likely) had the charges dismissed. There are, of course, other examples. Let me simply note, from an available statistic, that here in Wisconsin during 2002 the two federal districts held only 11 trials in the entire year.

Criminal trials have thus largely disappeared for two reasons. First, for many decades now, judges have imposed a penalty on defendants who insist on going to trial and who then lose, as most do—a “trial tax.” A recent

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report from the National Association of Criminal Defense Lawyers documents that, on average, such defendants receive sentences three times longer than those who plead guilty.

A second way that prosecutors discourage trials is through plea bargaining. A plea bargain, of course, is when a prosecutor offers a defendant something in return for pleading guilty, such as the dismissal of some charges, the opportunity to plead guilty to a less serious offense, or a favorable sentencing recommendation.

In the 19th century, plea bargaining was a disfavored practice. If appellate courts discovered that a defendant had pleaded guilty pursuant to a plea bargain, they would vacate the conviction and refuse to enforce the terms of the bargain. When isolated examples of plea bargaining were discovered by the media or outside officials, those bargains were condemned as corruption. The assumption was that the prosecutor was letting the defendant off too easy.

But once it became clear that plea bargaining was common in urban courts, the practice spread like wildfire. Legislatures got in on the action by passing laws that gave prosecutors leverage to pressure defendants into pleading guilty. In particular, in addition to mandatory minimum sentencing laws, they enacted “overlapping statutes,” which enable prosecu-



tors to bring multiple charges for the same conduct.

Threats to deploy such laws allow prosecutors to pressure defendants into pleading guilty even without having to give the defendant much of a “good deal.” Trials have become “bad deals” because convictions on multiple charges or with applicable mandatory minimums, together with the trial tax imposed by judges, ensure that a defendant will receive a much longer sentence if the jury convicts. Almost all defendants plead guilty because going to trial is too risky.

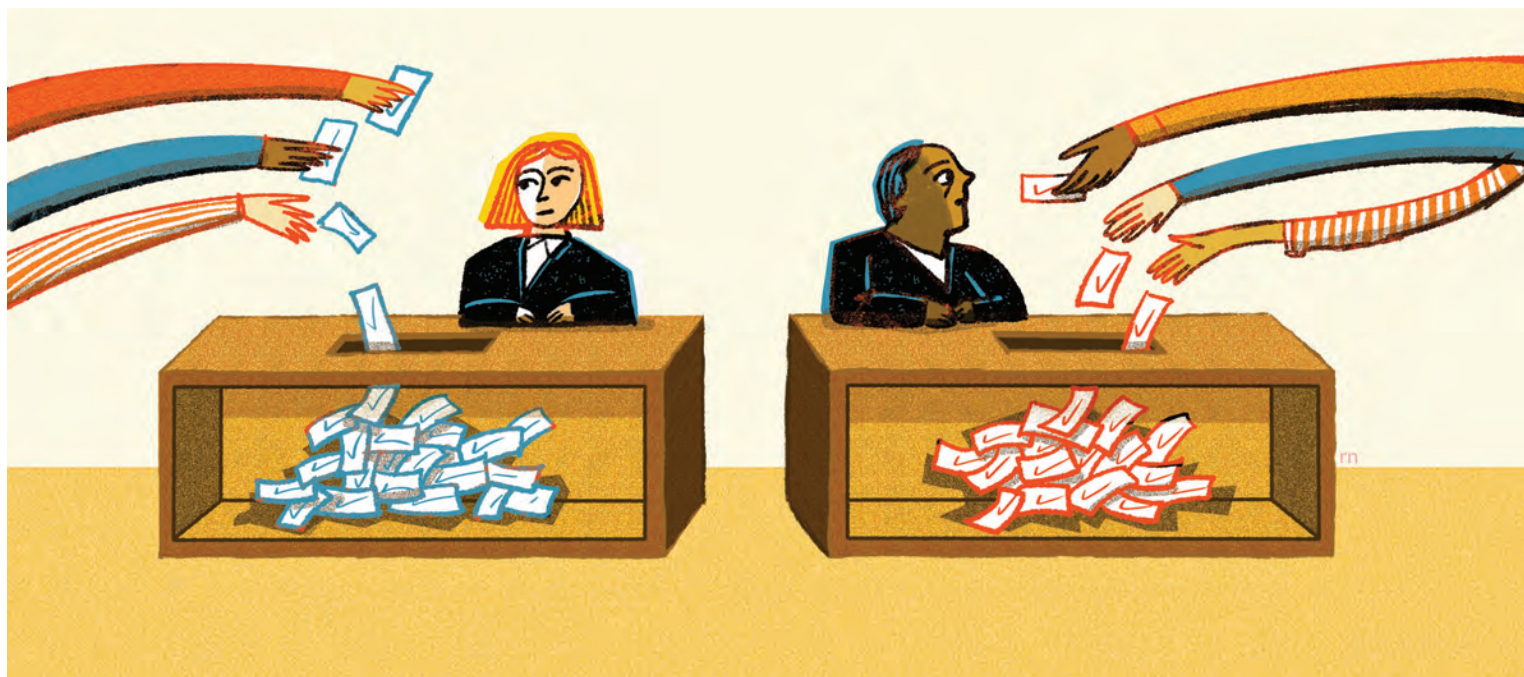
I have written a book about this, *Punishment Without Trial: Why Plea Bargaining Is a Bad Deal*. I explain there that plea bargaining has warped our criminal justice system; it is bad for defendants, for victims, for truth, and for justice. Importantly here, plea bargaining is also bad for democracy. When we stop having trials, juries are no longer standing between a prosecutor and a conviction. In a world without trials—the world of plea bargaining—the prosecutor alone gets to decide whether a defendant is guilty. Whether it is the man in Arizona who cursed at someone at a public pool or Kyle Rittenhouse in Wisconsin, no trials mean that the prosecutor decides.

Remarkably, this state of affairs is seen as a feature, not a bug, by those who work inside the criminal justice system. This attitude is on full display in a well-known 1967 essay by Arlen Specter,

the district attorney in Philadelphia during the 1960s and 1970s (and later a U.S. senator). Specter said that issues such as self-defense should not be decided by juries; the lawyers should just negotiate over the facts and reach some sort of compromise. He preferred a world in which juries were excluded from those decisions—and his wish has largely come true.

To be clear, sometimes I do not like what juries decide. But I have reservations about *a lot* of democratic decisions. After all, plenty of unserious people with dubious morals—and even more questionable policy preferences—get elected to public office. For me, the question about whether to retain a role for democracy in the criminal justice system involves alternatives. As Winston Churchill put it, “democracy is the worst form of government, except for all those other forms that have been tried.”

The modern democratic deficit in the criminal justice system goes beyond the general lack of jury trials. Democracy is also falling short in criminal justice elections. Although those elections are still taking place, they are often uncontested, and (where there is an actual race) voters are often uninformed. Most prosecutors and sheriffs win office without ever facing an opponent. My own study of prosecutor elections documented that only 30 percent of prosecutors face either a primary or a general-election opponent. Research by



others on sheriff elections suggests similar rates—somewhere along the lines of 60 to 70 percent of sheriffs run unopposed. Uncontested elections impede democracy because, if voters do not have a choice in an election, they cannot make a change.

You might say that these elections are uncontested because voters do not want change; they are happy with their current elected sheriff or prosecutor. But I do not think that explanation is correct. Unlike other offices, voters cannot necessarily take matters into their own hands when they do not like what their elected criminal justice officials are doing. Think, for example, about a voter who is not happy with how the local schools are being run. That person is free to stand for election to the school board. The same is not true when it comes to criminal justice elections. All states require bar admission for someone to run for prosecutor, and some states require current or previous law-enforcement experience (or a clean record) to run for sheriff.

Of course, there are good reasons for some restrictions. It is, for example, important that judges be lawyers, given the need to decide legal issues. Yet it is incontestable that these restrictions frequently keep people from being able to challenge incumbents. In fact, some places can't find anyone to run for some offices. When we did our national study of prosecutor elections, we found more than a dozen counties where other government officials

had to appoint someone because no one ran for the position. This is especially a problem in rural areas; there are some counties where no lawyers live, so there is literally no one who is qualified to run for the office.

Even when there are contested elections, there are often democratic deficits. A lot of voters do not know much about the relevant issues. Evidence shows that some appreciable number of voters apparently do not even know that these are elected offices.

One reason for the lack of voter knowledge may be a lack of media coverage. Our Prosecutors and Politics Project at the University of North Carolina School of Law just finished a pilot study of media coverage for prosecutors. In that study, we found that some incumbents and candidates receive almost no media coverage. Others get media coverage, but it does not give voters much information that would support an informed vote. In particular, we found very little coverage of incumbents' policies and candidates' platforms. It is important to know about policies and platforms because prosecutors must make important decisions about how to use their limited resources. Only if voters are knowledgeable will they be able to help determine how those decisions are made.

Media coverage is not the only reason that voters do not know about those decisions. Some of the most important prosecutorial decisions—decisions



about charging, declining to charge, and plea bargaining—are done outside the public view. The same is true about law enforcement’s interaction with the public, although the proliferation of cell phone cameras and police-worn body cameras has improved the situation somewhat.

Sometimes these decisions will come to light in a high-profile case. For example, we now know more about the Department of Justice charging policy for mishandling classified documents because Jim Comey got hauled in front of Congress to explain why the government was not going to charge Hillary Clinton for the classified information found on her private email servers—an explanation that has taken on newfound importance in light of the investigation surrounding classified documents found at the Mar-a-Lago resort in Florida. But more mundane policies—the sorts of policies that affect people’s everyday lives—remain hidden. For example, our recent survey of prosecutors in four states found that 80 percent of incumbents had not publicly announced their enforcement policies on personal possession of marijuana.

That the public does not know what their elected officials are doing (or not doing) can have real-world consequences. In particular, it can make the system more punitive. There is research suggesting that sheriffs and prosecutors are more punitive than their constituents would prefer. Perhaps if voters knew what their elected officials were doing, they would pressure them to be less harsh. Or perhaps they would vote them out of office.

Voters do not simply lack important information: sometimes they are affirmatively misin-

formed. You may already know about the research showing that Americans routinely think crime is going up, even when it is going down. Other research suggests that the misinformation problem runs deeper. Multiple surveys show that people assume that sentences are too lenient because people underestimate how much punishment defendants actually receive. For example, an Illinois survey gave respondents two typical burglary fact patterns and asked them to identify the appropriate punishment. The majority of respondents said that a non-incarceration sentence was appropriate, and fewer than 10 percent said that a sentence of two or more years in prison was appropriate. At the time, Illinois imposed a four-year mandatory sentence for the crime.

That voters are misinformed has important, and unfortunate, consequences. Someone who believes that crime is going up and that sentences are far too short is likely to vote for the legislative candidate promising “law and order.” If elected, that candidate will work to pass harsher laws, even when the existing laws are more punitive than what their constituents think necessary or appropriate. Because they are mistaken about crime rates and about the punishments being imposed, those constituents will not push back on these choices, and the supposedly democratic criminal law will not reflect public opinion.

What makes this situation worse is that politicians often use crime as a wedge issue in elections, sometimes affirmatively trying to mislead voters. Crime was an issue here in Wisconsin during the most recent election for the United States Senate (in 2022). It was also an issue in my home

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state of North Carolina. There, some groups sent photoshopped mailers in statehouse races, falsely putting two Democratic candidates in T-shirts that said “Defund the Police” (which is not what their original T-shirts said) and changing a photo of another candidate who had been cheering and waving at a parade to make it look as though the candidate had cheered and waved at violent protests.

Most people who complain that crime is used as a wedge issue care about how these tactics shape election results. I am more concerned about how these tactics shape crime policy and the criminal justice system. Politicians can easily mislead the public because most people do not know how the criminal justice system works. For example, for the past year, I have been traveling across the country talking to laypeople about plea bargaining. The vast majority of people I speak with are surprised to hear how few trials take place. Most of them are shocked to find out that the vast majority of crimes being processed in American courts are relatively low-level rather than serious crimes.



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How does this lack of knowledge, combined with exploitation of criminal justice issues during elections, affect the laws that get enacted in Congress and state-houses? Legislators wanting to capitalize on voter concern about crime introduce legislation to create new, more severe laws. Other legislators are afraid to vote against these laws because they do not want to be attacked as “soft on crime.” The result is a seemingly never-ending supply of new criminal laws, increasing punishments and criminalizing behavior.

It might not be obvious why new laws that criminalize behavior would be something to worry about. After all, if people think that certain behavior is bad, then perhaps we ought to criminalize it. But the constant passage of new crimes is worrisome when—as often—the bad behavior that people care about is already illegal. If there is some action you believe ought to be a crime, I’ll bet I could find you an existing statute saying that it is.

So what, then, do the new laws that state legislatures and Congress enact every year do? Many of them criminalize behavior that is already illegal. This means overlapping statutes, which, as I mentioned earlier, create pressure for defendants to plead guilty. Other laws addressing conduct that is already illegal are written so broadly that they also crim-

inalize what seems like innocuous behavior. The result is that trivial wrongdoing can end up falling within broad definitions of serious crimes. For example, Congress’s Computer Fraud and Abuse Act of 1986 appears to make using someone else’s Netflix password a federal crime.

Unfortunately, legislators do not have many incentives to change these overly broad laws. Instead, they simply rely on prosecutors not to fully enforce these statutes as written—at least not in high-profile cases. And if a prosecutor does enforce these laws to their full extent, legislators may criticize the prosecutor rather than bothering to revise the statute. My own favorite example is an oldie but goodie: in the 1980s, a North Carolina prosecutor brought criminal charges for illegal gambling against some senior citizens who were playing a “nickel-and-dime card game.” When asked about the prosecution, the chairman of the judiciary committee of the state’s House of Representatives did not think that changing the law to exclude those games from the broad criminal statute was necessary; instead, he hoped that “prosecutors would use better judgment.”

### **Hope for the Future**

Up until now, I have painted a pretty bleak picture of democracy and criminal justice. Some criminal law professors point to

the problems that I have identified and say this is a reason to have less democracy in our criminal justice system; they include such eminent scholars as Rachel Barkow in a previous Barrock Lecture (2016). They think democracy makes our system more punitive, and that in order to reverse mass incarceration, we should insulate criminal law decisions from popular will and elections.

Those other professors are right that turning to experts and elites can lead to a less punitive system. For example, the death penalty continues to be legal in most U.S. states because a majority of Americans support the death penalty. A majority of people living in Europe also support the death penalty, but capital punishment has been prohibited in European countries because their public officials do not think that capital punishment is an issue that should be settled by majoritarian preferences; the experts and the elites think it is wrong, and so it does not exist.

Personally, I am not ready to give up on the idea of using democracy as a tool for criminal justice reform. Indeed, I have seen signs of hope that democracy could serve as a moderating force in criminal law. Let me highlight three of them here.

First, I have seen signs of hope from judges. You might think that judges are not an obvious tool for more democracy. But I think that judges can do things to make the system more democratic. For example, there are judges who are making prosecutors justify their plea-bargaining decisions in open court. They ask the prosecutors about the original charges that were filed and how the prosecutors justify the reduced charges in

the plea bargain. This allows the public a glimpse into how prosecutors are using their power. That transparency creates more informed voters, who can then use that information in the next election. It also lets the public know that law enforcement believes it is acceptable to give out lower punishments than what the statutes prescribe. That may lead people to wonder whether we should change our laws so that the punishments are not simply being used as a way to pressure defendants during plea bargain negotiations.

Another example of judges making the system more democratic is when they push back against overly broad construction of criminal laws, as in the U.S. Supreme Court's decisions in *Skilling v. United States* (2010), interpreting Congress's "honest services" statute, and *Bond v. United States* (2014), involving the less well-known Chemical Weapons Convention Implementation Act of 1998. These judges are not doing this because they champion criminal justice reform or because they identify as politically liberal. But in interpreting these laws narrowly, the judges' decisions make our laws hew closer to what people think is appropriate criminal legislation.

Second, I have seen signs of hope in efforts to create more transparency and accountability. A few states have passed statutes requiring certain information to be reported by prosecutor offices. And some prosecutors, as in Philadelphia, have started sharing information voluntarily. There is a great organization, the Prosecutorial Performance Indicators, which is run by people at Florida International University and Loyola University of Chicago. It helps prosecutor offices identify metrics they can use to measure their performance, and then it helps those offices provide information about those metrics to the public.

Third, there is a lot more interest in criminal justice elections. National media outlets have started covering some elections for sheriff and for prosecutors. My own research has uncovered an increase in the percentage of contested elections in large cities. This media scrutiny and these contested elections can have ripple effects. For example, I recently received a phone call from a newly elected prosecutor. During a contested election, a voter had asked him to promise that he would make the office more transparent if elected—a promise quickly given. Having won the election, the candidate wanted to fulfill it. Because I study prosecutors, he reached out to me in order to ask how he could do that, and



I put him in touch with the people at the Prosecutorial Performance Indicators.

I am not telling that story because it makes me look good. I am not the hero in that story. Neither is the prosecutor who promised to be more transparent. The hero in that story is the voter who stood up and insisted on a promise of increased transparency. That small act brought about real change.

The great thing about democracy is that we can all be that sort of hero. All of us can go to a candidate forum and ask a question or elicit a campaign promise. We can send a letter to the editor in order to prompt more in-depth reporting by media outlets about what happens in the criminal justice system. We can refuse to be misled about crime and criminal punishment. And we can tell the people whom we know and love that they should do these things, too.

I have said that some academics want less democracy in criminal law, but I still have hope that democracy can result in a sensible and a fair criminal justice system. There is a lot of work to be done for that to happen. I hope that you all will join me in doing that work. ■