

What Can Kafka Tell Us About American Criminal Justice?

KAFKA'S LAW: *THE TRIAL* AND AMERICAN CRIMINAL JUSTICE. By Robert P. Burns. Chicago, Illinois: University of Chicago Press, 2014. 192 pages. \$29.00.

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I. Introduction

What, if anything, can Franz Kafka's classic dystopian novel *The Trial* tell us about America's contemporary criminal justice system? A reasonable view could be: "not much." Kafka wrote the manuscript during the first year of World War I, 1914–1915.¹ The unlucky protagonist, Joseph K., is caught in the grip of the legal system in an unnamed jurisdiction presumably based on Kafka's Prague, which was part of the Austro–Hungarian Empire until the Hapsburg regime collapsed at the end of the war in 1918.² The picture is something like a worst case account of an inquisitorial justice system: byzantine bureaucracy, unaccountable functionaries, no juries, no hints of democratic government, not even a trial as the common law world thinks of it. A more literal translation of the German title, *Der Prozess*, would better evoke the procedural regime Joseph K. encounters. Criminal procedure guarantees familiar from the Bill of Rights—a speedy and public jury trial, notice of the "nature and cause of the accusation," confrontation of the state's witnesses,³ pretrial screening of charges before trial⁴—are nowhere to be found. Whatever the flaws of American criminal justice, they would seem to be of a different order than those faced by Joseph K. in the civil law system of a fading European monarchy.

Yet Robert Burns makes a provocative case to the contrary in his book *Kafka's Law: The Trial and American Criminal Justice*. And it turns out he has a lot to work with. It is a rare criminal defendant in any U.S. jurisdiction who will encounter a jury trial. More than nineteen convictions out of every twenty occur by guilty plea, mostly based on plea agreements with

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1. ROBERT P. BURNS, *KAFKA'S LAW: THE TRIAL AND AMERICAN CRIMINAL JUSTICE*, at viii (2014).

2. *Id.* at vii; Paul D. Carrington, *Could and Should America Have Made an Ottoman Republic in 1919?*, 49 WM. & MARY L. REV. 1071, 1081 (2008).

3. U.S. CONST. amend. VI.

4. This is the function of the Grand Jury. *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .").

prosecutors.⁵ For decades now the United States has had by far the world's highest incarceration rate.⁶ No one any longer disputes that hundreds of innocent people have been wrongfully convicted and punished even for the most serious offenses, and none should dispute that the number of undiscovered cases of such miscarriages is much, much higher.⁷ Had Burns finished his book a few months later, he might have argued a further analogy between the regime Kafka depicts and our own: the novel ends with Joseph K.'s execution "like a dog," crudely carried out by barely competent functionaries.⁸ In spirit, if not in its details, the scene brings to mind several botched executions in the last year by officials who opted for the Kafkaesque tactic of trying to keep secret the state's specific mode of execution.⁹

5. 2013 U.S. SENT'G COMMISSION ANN. REP. ch. 5, at A-38, available at http://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/2013_Annual_Report_Chap5_0.pdf, archived at <http://perma.cc/A573-3U9R>; see also 2013 VA. CRIM. SENT'G COMMISSION ANN. REP. 30, available at <http://www.vcsc.virginia.gov/2013AnnualReport.pdf>, archived at <http://perma.cc/D2AP-6ZVC> ("Since FY2000, the percentage of jury convictions has remained less than 2%.")

6. COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 36–37 & fig.2-2 (2014), available at http://www.nap.edu/openbook.php?record_id=18613, archived at <http://perma.cc/PR35-VSD6>; see also *Highest to Lowest - Prison Population Total*, INT'L CENTRE FOR PRISON STUD., http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All, archived at <http://perma.cc/LL97-4PZG> (listing the United States as the country with the highest prison population total—2,228,424—as of 2012).

7. See Samuel Gross, *How Many False Convictions are There? How Many Exonerations Are There?*, in *WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE* 45, 50 (C. Ronald Huff & Martin Killias eds., 2013) (discussing how there have been "at least a couple thousand exonerations in the United States since 1989" and that "there are probably at least as many, and perhaps several times more, that are not generally known"). See generally BRANDON GARRETT, *CONVICTING THE INNOCENT* 1–13 (2011) (describing how DNA testing has led to hundreds of exonerations and explaining this is likely the "tip of the iceberg"); GEORGE C. THOMAS III, *SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS* 8, 10–12 (2008) (referencing how many innocent people have been exonerated through DNA testing and the problems within the criminal process that lead to convicting the innocent).

8. FRANZ KAFKA, *THE TRIAL* 231 (Breton Mitchell trans., Schocken Books 1998) (1925).

9. Megan McCracken & Jennifer Moreno, *Botched Executions Can't Be New Norm*, CNN (July 28, 2014), <http://www.cnn.com/2014/07/26/opinion/mccracken-moreno-botched-executions/>, archived at <http://perma.cc/K96E-TXAX> (recounting four recent "botched" executions and how states have shielded execution method procedures from the public); see also Ben Crair, *Exclusive Emails Show Ohio's Doubts About Lethal Injection*, NEW REPUBLIC, Aug. 17, 2014, <http://www.newrepublic.com/article/119068/exclusive-emails-reveal-states-worries-about-problematic-execution>, archived at <http://perma.cc/JPE7-BPEF> (describing problematic executions and one failed attempt at lethal injection in Ohio). Recent examples are the Oklahoma April 2014 execution of Clayton D. Lockett, whose deathbed suffering was described as writhing in pain and gasping for breath; the Arizona execution of Joseph R. Wood III in July 2014, which took nearly two hours, long enough for Mr. Wood's attorneys, triggered by observing his gasping for an hour, to contact courts with pleas to halt the execution; Oklahoma's January 2014 execution of Michael Wilson; and the Ohio execution of Dennis McGuire in early 2014 that took 24 minutes, during which McGuire "struggled for air." Charlotte Alter, *Oklahoma Convict Who Felt "Body Burning" Executed with Controversial Drug*, TIME, Jan. 10, 2014, <http://nation.time.com/2014/01/10/oklahoma-convict-who-felt-body-burning-executed-with-controversial-drug/>, archived at <http://perma.cc/4VKL-N6N5>; Mark Berman, *Arizona Execution Lasts Nearly Two Hours; Lawyer Says Joseph Wood Was 'Gasping And Struggling To Breathe.'* WASH. POST, July 23, 2014, <http://www.washing>

Kafka's novel has come to stand foremost for the dangers of state bureaucracy. *The Trial* was first published in 1925 (shortly after its author's death),¹⁰ and Burns tells us it did not initially make much of an impression on the reading public, who seemed not to recognize in it a satire of their own legal system sufficiently plausible to be taken as a cautionary tale. Only later, in the wake of the perversion of criminal justice systems by the Nazi and Stalinist regimes, did *The Trial* come to be seen as a prescient jeremiad against the bureaucratic oppression of antidemocratic, totalitarian states.¹¹ It is hard to read *The Trial* now—hard to imagine *how* we would read it, or what we would make of it—without the history of twentieth-century totalitarianism that followed it.

Burns is more than aware of this. He draws on much of the considerable body of interdisciplinary scholarly literature on *The Trial*.¹² He builds in particular on Hannah Arendt's influential accounts of Kafka, totalitarianism, and (to a lesser degree) the "banality" of evil.¹³ At the same time, he is aware that he is looking to *The Trial*—and this dominant reading of *The Trial*—as a comparative reference to our own nontotalitarian, democratic society with very different legal and bureaucratic traditions. Given the contrast, the parallels that Burns convincingly draws between Kafka's criminal justice system and our own are convincing and disturbing. And the possibilities for reform that Burns sketches (the prospects for which he, like most scholarly observers, is not optimistic) are grounded in distinctly liberal democratic and common law traditions, such as antidiscrimination rules and the jury trial.¹⁴

The thorniest question, in my view, is how useful Kafka's work can be in twenty-first-century liberal democracies for diagnosing the causes of dysfunctions in criminal justice. In blaming *bureaucracy* for much of what ails American justice institutions, Burns is in very good company. As he acknowledges, leading scholars, including Stephanos Bibas and William Stuntz, likewise point to bureaucratic excesses and a consequent deficit of democratic practices as the cause for much of what is wrong in U.S. criminal justice.¹⁵ Yet bureaucracies come in many forms, serve many purposes, and

tonpost.com/news/post-nation/wp/2014/07/23/arizona-supreme-court-stays-planned-execution/, archived at <http://perma.cc/X9N4-PH8V>; Josh Levs et al., *Oklahoma's Botched Lethal Injection Marks New Front in Battle Over Executions*, CNN (Sept. 8, 2014, 7:16 AM), <http://www.cnn.com/2014/04/30/us/oklahoma-botched-execution/>, archived at <http://perma.cc/GAQ5-279E>; McCracken & Moreno, *supra*.

10. RONALD GRAY, FRANZ KAFKA 2 (1973); KAFKA, *supra* note 8, at vii.

11. See BURNS, *supra* note 1, at 36 (noting that the "truly awful capacities of bureaucracy" addressed in *The Trial* were not fully appreciated until after the 1930s).

12. See generally *id.* at 35–63 (discussing relevant scholarship in fields such as organizational theory, literary criticism, and legal systems).

13. *Id.* at 35–36, 133–37.

14. *Id.* at 129–32 (discussing, *inter alia*, jury trial and doctrinal changes to facilitate "claims of discrimination in the exercise of prosecutorial discretion").

15. See *id.* at 140 (examining the concrete suggestions of Stuntz and Bibas to improve the criminal justice system by increasing the importance of jury trials, consequently making the system less bureaucratic).

have many causes. What is implied by “bureaucracy,” or what it can be blamed for, is not always straightforward. American criminal justice bureaucracies today are different in important ways from those depicted by Kafka. They differ as well from the real-life heirs of Kafka’s fictional regime—the justice systems in the civil law nations of continental Europe, which have roots in traditions of inquisitorial process. Those differences, in my view, merit careful attention because they suggest that looking to Kafka for insights into our contemporary predicaments can, in some respects, obscure as much as enlighten.

In what follows, I briefly sketch many of the troubling practices and outcomes of American criminal justice that Burns persuasively analogizes to the world Kafka depicts in *The Trial*. I then identify some distinctions among forms and functions of bureaucracy. Those distinctions help to sort out some important differences between America’s and Kafka’s criminal justice institutions. Those differences, in turn, suggest different causes—bureaucratic and democratic—to the practices shared by our justice system and Joseph K.’s. One insight is that *more* bureaucracy, of the right sort, can be part of the solution rather than the problem.

For better or worse, all this does not lead far from Burns’s argument that widespread American exercises of deceitful, coercive, and excessively punitive exercises of state authority are fairly characterized as Kafkaesque. Rather, it reinforces a conclusion that Burns implies throughout his book even if he never states it bluntly: Kafkaesque criminal justice can endure over time and across national systems that differ greatly in their bureaucratic and democratic traditions.

II. Kafkaesque Criminal Justice

“Kafka’s visionary satire of domination,” Burns writes, “applies all too often to our American regime” because “the American criminal process has many of those same characteristics that Kafka satirizes.”¹⁶ Our “liberal democratic nation [has moved] close to the bureaucratized hard power of the Central European empires.”¹⁷ The parallels are indeed disturbing. The legal process that ensnared Joseph K. was, much like our own, entirely a pretrial process. Burns rightly describes our criminal justice system as one of “police interrogation followed by plea bargaining.”¹⁸ Ninety-five percent of convictions in the United States occur through guilty pleas;¹⁹ in about half of all prosecutions, police have obtained a confession from the defendant.²⁰ Nearly all waive their *Miranda* rights not to face police interrogation, and the

16. *Id.* at 64.

17. *Id.*

18. *Id.* at 65.

19. See *supra* note 5 and accompanying text.

20. BURNS, *supra* note 1, at 65.

rules allow state officials to lie to or otherwise deceive defendants.²¹ With those tactics and other harsh practices, police have extracted a disturbing number of detailed *false* confessions of guilt from the innocent.²² Much the same is true in the rules of plea bargaining, which authorize prosecutors to use tactics that by any reasonable definition amount to coercion. Prosecutors can legally threaten to criminally charge a defendant's family members if he doesn't plead guilty²³ or make leniency contingent on a defendant engaging in risky undercover police operations.²⁴ By controlling charges and much about sentencing, prosecutors can present defendants with post-trial sentences that are decades longer than those they receive upon pleading guilty.²⁵

The emphasis on interrogation, dominance of pretrial settlement, and the consequent absence of trials are among the reasons Burns can plausibly conclude that "Kafka's account mirrors the opacity"²⁶ of American criminal procedure. Another reason for contemporary opacity is the arcane complexity of the constitutional doctrine defining police authority to search people and property.²⁷ The rules of criminal investigation are to a large degree incomprehensible to most people, and most investigation practices are not publicly observable. Too many components of those practices are unknown to the defendant and his attorney as well. Burns describes *The Trial's* parody of "the preliminary investigation, which was conducted in secret before formal charges were leveled,"²⁸ but is routine in American criminal justice today (and no doubt elsewhere), for example in secrecy accorded to grand jury investigations.²⁹ In all this, Burns accurately characterizes defense attorneys in many routine state criminal prosecutions

21. *Id.* at 78–79, 101–02.

22. *E.g., id.* at 93–97 (describing the case of Kevin Fox, who was pressured into falsely confessing to the sexual assault and murder of his three-year-old daughter).

23. *See id.* at 70, 163 n.26 (noting case law approving this tactic).

24. *See, e.g.,* Sarah Stillman, *The Throwaways*, NEW YORKER, Sept. 3, 2012, <http://www.newyorker.com/magazine/2012/09/03/the-throwaways>, archived at <http://perma.cc/WN9W-ZMTC> (detailing the death of Rachel Hoffman, who was used as a confidential informant in exchange for leniency in a drug trafficking case, and more broadly examining police use of confidential informants and the efforts to reform the practice).

25. *Bordenkircher v. Hayes*, 434 U.S. 357, 358–59, 364–65 (1978); *United States v. Kupa*, 976 F. Supp. 2d 417, 432–34, 459–60 (E.D.N.Y. 2013).

26. BURNS, *supra* note 1, at 72.

27. *See id.* at 72–78 (surveying the "virtually inaccessible" law of search and seizure).

28. *Id.* at 64.

29. FED. R. CRIM. P. 6(e)(2). Grand jury proceedings, which can include extensive witness testimony and production of documents or other evidence, are secret from the public and the defendant. *Id.* R. 6(d). Likewise, many details of police investigations need not be disclosed to defendants, although if a case goes to trial prosecutors must disclose exculpatory or impeachment evidence in police files that favors the defendant. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (holding that exculpatory evidence must be disclosed to a defendant where there is a "reasonable probability" that disclosure of such evidence would result in a different outcome for the defendant); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that suppression of evidence that is material to a defendant's guilt or punishment is a violation of the defendant's due process rights).

as “marginal[ized]” and merely “tolerated” in ways comparable to Joseph K.’s counsel.³⁰ The familiar saga of inadequate legal representation for poor defendants is too familiar a tale to need recounting here.³¹

Moreover, the problem of opacity extends to substantive criminal law. U.S. criminal codes, unlike Kafka’s, are formally available to the public. But their sprawling complexity and prolix form undermine their practical accessibility. Burns is able to draw on the considerable literature on “overcriminalization” to make the fair point that there are innumerable offenses in state and federal codes that most people don’t realize are crimes. Relatively innocuous or petty conduct is criminalized, and wide use of strict liability authorizes punishment for unknowing conduct or unintended consequences.³² The combination of procedural efficacy and expansive crime definitions have facilitated a troublingly harsh record of state-administered punishment. Despite modest declines in the last few years, the United States continues to have the world’s highest national incarceration rate—four times that of the United Kingdom, six times the rates of Germany or France.³³ Finally, all of this holds aside the even more Kafkaesque regime,

30. BURNS, *supra* note 1, at 57, 105.

31. On the barriers to accessing counsel in state courts, see, for example, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 7–28 (2004), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf, archived at <http://perma.cc/5K8H-JV97>; ROBERT C. BORUCHOWITZ ET AL., NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* 18–19 (2009), available at <https://www.nacdl.org/reports/misdemeanor/>, archived at <http://perma.cc/Y7RJ-T95R>; NAT’L RIGHT TO COUNSEL COMM., *JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* 85–87 (2009), available at <http://www.constitutionproject.org/manage/file/139.pdf>, archived at <http://perma.cc/Y2K5-HYJE>. Misdemeanor defendants face similar barriers. See COLO. REV. STAT. ANN. § 16-7-301(4)(a) (West 2013) (repealed 2014) (requiring defendants in misdemeanor cases to speak to a prosecutor before applying for a public defender); ALISA SMITH & SEAN MADDAN, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS* 23 tbl.13 (2011), available at <http://www.nacdl.org/reports/threeminutejustice>, archived at <http://perma.cc/3KSD-RX6T> (reporting over 60% of misdemeanor defendants entered guilty or no contest pleas in arraignments lasting less than three minutes).

32. BURNS, *supra* note 1, at 79–82; see also DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF CRIMINAL LAW* 20–21 (2008) (arguing that overcriminalization is perpetuated by strict liability statutes). On the other hand, one can argue that the vast numbers of obscure or nonintuitive offenses are rarely enforced, so they matter little as a practical matter to most people. The largest categories of criminal prosecutions, for example, are for immigration offenses, drug- and weapon-related offenses, violence, theft, and fraud, few applications of which will come as a surprise to most people. But this is not to discount other costs of expansive criminalization, including the rare (and thus likely targeted) enforcement of obscure offenses or strict liability crimes that punish offenders (or increase punishment) for unknowing or seemingly innocuous conduct. For a broad survey of strict liability in state criminal law, see generally Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285 (2012) (describing strict liability statutes across different states).

33. BURNS, *supra* note 1, at 66; see E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP’T OF JUSTICE, *NCJ 243920, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012*, at

outside of the criminal justice system, of indefinite detention without charges or trial for U.S. citizens as well as non-citizens.³⁴

The parallels in form and substance between American criminal justice and the regime of Kafka's novel are disturbing. But how similar are their causes? Tracing the faults in each to the dark sides of state bureaucracy is a claim about a common etiology, but on this question the comparisons are more debatable for two reasons. One has to do with the difference in democratic legitimacy between our system and Kafka's because democracy is often taken as the antipode of entrenched, unaccountable state bureaucracy. The other has to do with precision of meaning given to "bureaucracy" as a description of (real or fictional) state practices.

III. Weak, Thin American Bureaucracies

Taking the second point first, we can recognize that the many state agencies and operations described as bureaucratic vary substantially in form and, consequently, effects. The classic Weberian bureaucracy is a hierarchical structure in a state whose central authority is firmly established and comparatively expansive.³⁵ Typically its officials are professional civil servants rather than political appointees or at-will employees (and certainly not independent contractors).³⁶ Weber had in mind the German state, and in many respects this model characterizes the prosecution agencies and judiciaries in many European justice systems.³⁷ Hierarchy has its virtues, which is why American judicial systems are organized that way—appellate courts review trial courts—as is the U.S. Department of Justice, where U.S. attorneys oversee their staff prosecutors but are answerable to the Attorney General and ultimately the President. Supervision allows higher-ups to correct errors of lower-level officials and to enforce some degree of consistency across frontline officers.

26 (2013), available at <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>, archived at <http://perma.cc/Z587-PGRA> (reporting data on the recent decline in U.S. incarceration rates).

34. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011) (codified at 10 U.S.C. § 801 (2012)) (authorizing indefinite military detention without trial of "any person" suspected of aiding terrorist activities). On American military-detention law, policy, and practice more generally, see DAVID D. COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (3d ed. 2006); David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693 (2009).

35. Edward C. Page, *Farewell to the Weberian State? Classical Theory and Modern Bureaucracy*, 1 ZEITSCHRIFT FÜR STAATS- UND EUROPAWISSENSCHAFTEN 485, 488–89 (2003).

36. *Id.*

37. See WOLFGANG J. MOMMSEN, *MAX WEBER AND GERMAN POLITICS, 1890–1920*, at 49 (Michael S. Steinberg trans., Univ. Chi. Press 1984) (1974) ("The decisive factor of Weber's concept of the national state was the existing German state . . ."). *But see* Edward C. Page, *supra* note 35, at 491–94 (suggesting the hierarchical Weberian state may not have characterized even Weber's own experience of the Prussian state, despite the cliché that "Weber's ideal type was based on his experience of Prussian bureaucracy in the late nineteenth and early twentieth centuries, the Imperial German state as Weberian in its Aunt Sally meaning" (emphasis omitted)).

But a hierarchical bureaucracy is not the only possibility. In a classic study, Susan Rose-Ackerman distinguished other bureaucratic forms, notably “fragmented” and “disorganized” bureaucracies.³⁸ Fragmented agencies lack hierarchical (or even sequential) organization, so that each kind of bureaucrat has a distinct kind of (perhaps unsupervised) authority.³⁹ A citizen might have to deal with, or win approval from, several officials operating independently within an agency or in several agencies.⁴⁰ (Think of builders who must get multiple permits before construction can commence; defendants facing the overlapping jurisdictions of federal and state prosecutors plus regulatory agencies; or defendants at the mercy of city police during arrest, county deputies during detention, prosecutors and court personnel during adjudication, and prison guards after conviction.) Fragmented bureaucracies can be more prone to delay or to corruption by individual officials.⁴¹ On the other hand, they prevent centralized corruption or abuse at the top of the hierarchy.⁴²

In a disorganized bureaucracy, by contrast, “the official chain of command is unclear and constantly shifting and the decision-making criteria are similarly arbitrary and unknown.”⁴³ As a result, official actions or outcomes can seem arbitrary or unpredictable (leading citizens to seek greater certainty, such as through bribes), or individual officials may not always have the power they seem (or claim) to have.⁴⁴ In these contrasting models, Rose-Ackerman identified a “reciprocal relation between structure and corruption.”⁴⁵ A bureaucratic form that reduces one problem may increase another. Hierarchical supervision of frontline prosecutors, for example, may reduce their opportunities for an individual prosecutor’s corrupt, biased, or idiosyncratic charging decisions, but it increases the risk that bad policies (due to bias, corruption, or other reasons) can be widely implemented through organizational directives or that policies appropriate for some cases and local conditions will apply also in circumstances for which they are a much poorer fit.⁴⁶

38. SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 167–73 (1978).

39. *Id.* at 169.

40. *Id.* at 170.

41. *Id.* at 170–71.

42. *Cf. id.* at 176–77 (detailing the dangers of corruption among top-level bureaucrats in a centralized bureaucracy).

43. *Id.* at 169.

44. *Id.* at 184–85. Rose-Ackerman describes how disorganization undercuts both the *supply* of and *demand* for official action—the bureaucracy may not be able to supply enough certainty, consistency, or timeliness in its actions, and citizens may demand more through corrupt inducements. *Id.*

45. *Id.* at 188.

46. For Department of Justice policy examples, including charging the most serious offense and cooperation discounts for waiving attorney–client privileges, see Julie R. O’Sullivan, *The Last Straw: The Department of Justice’s Privilege Waiver Policy and the Death of Adversarial Justice in Criminal Investigations of Corporations*, 57 DEPAUL L. REV. 329, 329 (2008); Memorandum

Some details of the bureaucracy in which Joseph K. is caught are unclear, and it seems fair to find in it elements of a disorganized bureaucratic operation. The final execution scene,⁴⁷ for one, suggests disorganization at the operational level. But the system that Kafka depicts is inspired by—and over time, in readings that take as a prescient account of totalitarianism, has come to be understood as—a dystopian version of a classic hierarchical bureaucracy common in advanced European states such as Germany. American criminal justice bureaucracies, however, are much less hierarchical and more fragmented than their European counterparts. That is true of American government (or state) structure generally. In Stephen Skowronek's enduring description, the American state long relied heavily on “courts and parties” to do the work of government rather than strong executive or administrative agencies.⁴⁸ Consistent with American federalism, state and federal criminal justice systems are independent of each other, sharing hierarchical supervision only through the strictures of those federal constitutional doctrines that apply to the states. Further, within the states authority is heavily fragmented. Typically local prosecutors are directly elected at the county level, and state attorneys general usually have little formal authority or informal influence over them. The large majority of state prosecutor offices (those outside major cities) have, on average, one elected chief and three assistant prosecutors;⁴⁹ hardly a byzantine bureaucracy. But police departments tend to be larger. Out of more than 12,000 police agencies, 45% employ fewer than ten officers, yet nearly two-thirds of all officers work in departments of more than 100 officers.⁵⁰ Police chiefs are appointed by city officials, while sheriffs are elected often at the county level and run local jails. In the states, prosecutors usually have no formal authority over their local law enforcement agencies.⁵¹ Courts are hierarchically

from John Ashcroft, Attorney Gen., Dep't of Justice, to all federal prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003), available at http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm, archived at <http://perma.cc/78AZ-SYBX>.

47. KAFKA, *supra* note 8, at 225–31.

48. See STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 24 (1982) (stating that the early version of the American system was successful by relying on courts and parties).

49. STEVEN W. PERRY & DUREN BANKS, U.S. DEP'T OF JUSTICE, NCJ 234211, PROSECUTORS IN STATE COURTS, 2007 - STATISTICAL TABLES 2 (2011), available at <http://www.bjs.gov/content/pub/pdf/psc07st.pdf>, archived at <http://perma.cc/C4YP-DNXX>.

50. MATTHEW J. HICKMAN & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, NCJ 210118, LOCAL POLICE DEPARTMENTS, 2003, at 2 & tbl.2 (2006), available at <http://www.bjs.gov/content/pub/pdf/lpd03.pdf>, archived at <http://perma.cc/9YH-NRU9>.

51. For police, and to a lesser degree for state prosecutors, a fuller picture of bureaucracy would include federal programs, pass-through grants, joint task forces, and other mechanisms that influence state law-enforcement priorities. See, e.g., Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 40 (1998) (describing the importance of grants given to local law enforcement for drug enforcement); *State & Local Task Forces*, DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/ops/taskforces.shtml>, archived at <http://perma.cc/4ZDW-4SHS> (identifying 259 joint DEA task forces and their locations). The

organized (appellate courts review trial courts), but judges are often elected and have no hierarchical career path through the judiciary.

This kind of fragmented, democratic bureaucracy—more accurately, *bureaucracies*—is intended to prevent many of the problems we worry about in European-style Weberian states of the sort from which Kafka took his inspiration. It decentralizes power (and avenues for corrupt influence) even within the executive branch, increases discretion, and reduces inflexible top-down policies that don't fit all conditions equally well. How then do we end up with a justice system that, in process and outcomes, shares so much with Kafka's? That question should be even more puzzling in light of the differences in democratic governance and legitimacy between our world and Kafka's fictional one.

IV. Democratic Accountability in American Criminal Justice Agencies

American criminal justice bureaucracies are not only less hierarchical and more fragmented, they are also much more democratic than Kafka's. One manifestation of this democratic orientation is the dominance of political selection for chief prosecutors and the at-will employment status of their staffs, compared to the civil-service status typical of European prosecutors (as well as those in England and other common law countries).⁵² Line prosecutors are supervised by their politically accountable bosses, and those bosses are supervised, in effect, either by the politicians who appoint them or directly by voters. Formats for judicial elections vary more, but American judges (outside the federal courts) nearly always hold office for limited terms, after which they must win reappointment from voters or elected officials. The different risks and trade-offs of the American political model and the European civil service one are familiar. The civil service agency prioritizes bureaucratic professionalism, expertise, and autonomy from political influence. In a civil service model, bureaucrats should be hierarchically accountable to their superiors but at some risk of an agency's professional culture and discretionary actions departing from democratic sentiments. By contrast, American bureaucracy generally—well beyond criminal justice agencies—is designed to be much more democratically accountable, or more responsive to accountable officials, than is typically the case in Europe.⁵³

federal Office of Justice Programs provides training, grants, and other assistance to state and local law enforcement. See, e.g., Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 32 n.109 (2009) (noting certain federal grants to local agencies are conditioned on data regarding deaths in police custody); *Office of Justice Programs, Law Enforcement*, U.S. DEPARTMENT OF JUSTICE, <http://ojp.gov/programs/lawenforcement.htm>, archived at <http://perma.cc/62NS-P3XL> (overviewing federal grant and training programs).

52. See generally GWLADYS GILLIÉRON, PUBLIC PROSECUTORS IN THE UNITED STATES AND EUROPE (2014) (describing differences between prosecutorial hierarchical structure in the United States and European countries, with a special focus on Switzerland, France, and Germany).

53. See Steven Kelman, *The Prescriptive Message*, 51 PUB. ADMIN. REV. 195, 196 (1991) (book review) (describing American agencies and the belief that they are accountable to elected officials); Francis E. Rourke & Jameson W. Doig, *James Q. Wilson's Bureaucracy: Two Reviews*,

American criminal justice systems reflect this democratic orientation, although not necessarily in the ways that many critics of bureaucracy and advocates of greater democracy would prefer.⁵⁴ United States prosecutors are more politically attuned, in the sense of being responsive to populist or majoritarian sentiments as well as to the preferences of political officials with power over them.⁵⁵ This democratic-governance model for executive agencies reduces risks of bureaucratic action run amuck from lack of accountability—at least, *democratic* accountability.

On top of this, American criminal justice is more democratic in the sense that its policy making at other levels is in the hands of the political branches—or the voters directly—to a greater degree than elsewhere. As Burns notes at various points, the political salience of criminal justice policy, at least in the context of U.S. political institutions, has led legislatures and other policy makers to respond to real or perceived demands of “penal populism” through a wide array of tough-on-crime policies.⁵⁶

Perhaps paradoxically, this politically responsive bureaucracy of American criminal justice, so starkly different from the bureaucratic system Kafka depicts, has given rise to too many practices and outcomes that seem dispiritingly close to the world of *The Trial*. In the system that brings down Joseph K., there is no trace of populist sentiment or democratic accountability. That absence of democracy is what made it so easy for Arendt and others, in the wake of the horrors of 1930s Europe, to read *The Trial* as a parable of antidemocratic totalitarianism.⁵⁷ Again, then, it may be puzzling what has led the radically different structure and traditions of American criminal justice to resemble a Kafkaesque regime—what, as Burns puts it, “has brought a liberal democratic nation close to the bureaucratized hard power of the Central European empires.”⁵⁸

1 J. PUB. ADMIN. RES. & THEORY 90, 92 (1991) (book review) (“Bureaucracy in the United States has developed and operates in very different ways than it does in other societies. It is, . . . more open, more participatory, less prestigious, and less inclined to venerate administrative expertise.”).

54. See generally WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011) (urging greater local democracy in criminal justice).

55. See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 759 (1990) (describing congressional monitoring of federal prosecutors); Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2092–94 (2009) (describing uses and lapses of congressional control over criminal enforcement policy).

56. See, e.g., BURNS, *supra* note 1, at 67–68 (examining the role of death penalty policy in several national elections).

57. See *supra* Part I.

58. BURNS, *supra* note 1, at 64.

V. Different Systems, Comparable Outcomes

A. *Downsides of Democratic Incentives*

One answer is that, while bureaucracies come in many forms and vary greatly in their operation, officials nonetheless can face comparable bureaucratic imperatives or incentives that have huge effects on how officials and agencies behave.⁵⁹ Worse, democratic accountability can abet or aggravate bureaucratic effects. When democratic accountability operates in an era—like the United States since the late 1960s—in which political officials perceive strong popular demand for harsh tough-on-crime policies, accountability translates into stronger *bureaucratic* as well as political incentives. Politically accountable police chiefs and head prosecutors recognize a public demand for tough enforcement.

For police, that translates bureaucratically (even in a small agency) into incentives to meet that demand in *measurable* (or at least visible) ways, such as by making arrests, extracting confessions, confirming eyewitness identifications, and otherwise “clearing” cases with a file on a reported crime that can be handed over to prosecutors.⁶⁰ The easiest tools for monitoring and evaluating officers’ job performance are quantifiable indicators—numbers of drivers or pedestrians stopped, calls responded to, arrests made, citations issued, or cases cleared.⁶¹ Yet these are only proxies—at best rough ones, at worst misleading or counterproductive—for the harder-to-measure issue of effective policing practice that prevents crime or reliably identifies suspects and evidence while respecting individual rights.

59. James Q. Wilson, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 115 (1989); see Christopher H. Foreman, Jr., *Operators*, 51 PUB. ADMIN. REV. 197 (1991) (book review) (acknowledging that shortfalls in an organization’s system of rewards and penalties can influence behavior); Rourke & Doig, *supra* note 53, at 90–92 (summarizing an argument regarding the effect of public pressures on bureaucratic behaviors).

60. See JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 167–68 (1st ed. 1966) (explaining that the “clearance rate” is the most important measure of accomplishment for detectives and is defined as “the percentage of crimes known to the police which the police believe have been ‘solved’”).

61. See DAVID GARLAND, CULTURE OF CONTROL 120 (2001) (emphasizing that these police metrics are not focused on measuring success in terms of “externally defined social purposes”). For accounts of police departments’ use of quotas, see, for example, RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCE 177–238, 325 (2013); Al Baker & Ray Rivera, *Secret Tape Has Police Pressing Ticket Quotas*, N.Y. TIMES, Sept. 10, 2010, <http://www.nytimes.com/2010/09/10/nyregion/10quotas.html>, archived at <http://perma.cc/ZR4F-7AAF>; Tracy Oppenheimer, *Cop Fired for Speaking Out Against Ticket and Arrest Quotas*, REASON, July 24, 2013, <http://reason.com/reasontv/2013/07/24/how-quotas-pervert-police-priorities-fir>, archived at <http://perma.cc/6BMF-85SU>; Graham Rayman, *The NYPD Tapes: Inside Bed-Stuy’s 81st Precinct*, VILLAGE VOICE, May 4, 2010, <http://www.villagevoice.com/2010-05-04/news/the-nypd-tapes-inside-bed-stuy-s-81st-precinct/>, archived at <http://perma.cc/7LNY-3H2B>. On broader use and manipulation of crime statistics by the New York City Police Department, see generally JOHN A. ETERNO & ELI B. SILVERMAN, THE CRIME NUMBERS GAME: MANAGEMENT BY MANIPULATION (2012).

Equivalent political and bureaucratic imperatives can affect prosecutors, leading to increased pressure to charge suspects and win convictions; prosecutors recognize that one's job security and professional advancement depend on meeting such expectations.⁶² In our system as well as Kafka's, it seems, a prosecutor could well conclude that working diligently "for nights on end" to win convictions will "make his career."⁶³ These pressures in part explain the many examples of wrongful convictions to which prosecutor conduct contributed, including those in which prosecutors defended convictions even as weaknesses in the state's trial evidence, or new contrary evidence, subsequently emerged.⁶⁴ The same pressures seem likely as well to lie behind the important findings in recent work by John Pfaff, whose groundbreaking analysis of criminal justice data from the last several decades suggests that much of the incarceration increase since the 1970s is primarily due not to harsher sentencing laws or the "war on drugs" but changes in patterns of prosecutorial charging discretion.⁶⁵ In recent decades, prosecutors seem to have pressed charges in a higher percentage of cases presented to them by police than they formerly did.⁶⁶ Finally, these political and

62. See Jessica Fender, *DA Chambers Offers Bonuses for Prosecutors Who Hit Conviction Targets*, DENVER POST, Mar. 23, 2011, http://www.denverpost.com/ci_17686874, archived at <http://perma.cc/KU7G-QMG5> (describing pay bonuses for felony prosecutors who meet conviction-rate targets). Some prosecution agencies recognize that metrics such as conviction rates are poor instruments for assessing prosecutor performance. M. ELAINE NUGENT-BORAKOVE & LISA M. BUDZILOWICZ, NAT'L DIST. ATTORNEY'S ASS'N, *DO LOWER CONVICTION RATES MEAN PROSECUTOR'S OFFICES ARE PERFORMING POORLY?* 6 (2007).

63. BURNS, *supra* note 1, at 54.

64. Well-publicized examples of such cases include the wrongful convictions of Ronaldo Cruz and Alejandro Hernandez. See SCOTT TUROW, *ULTIMATE PUNISHMENT* 6–9, 35–37 (2003) (discussing how prosecutors dismissed confessions by another individual and continued to pursue Cruz and Hernandez for the crime). In recent years some prosecution agencies have responded by adding "conviction integrity units" to investigate possible wrongful convictions. See Helen Winston, *Wrongful Convictions: Can Prosecutors Reform Themselves?*, CRIME REP. (Mar. 27, 2014, 8:08 AM), <http://www.thecrimereport.org/news/inside-criminal-justice/2014-03-wrongful-convictions-can-prosecutors-reform-themselv>, archived at <http://perma.cc/3EC6-TGW5>. This is not to say political pressure is the whole story for police and prosecutor mistakes in these contexts. Much of it is surely attributable to well-established cognitive tendencies to remain committed to prior beliefs and interpret new evidence in ways that do not undermine earlier conclusions. Part of the story also is probably cognitive biases, "tunnel vision," and good-faith belief in interrogation tactics, eyewitness-identification practices, forensic analyses, and forms of evidence (such as confident eyewitnesses) that have intuitive appeal but which research has shown are much less reliable than most people tend to presume. See, e.g., Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 475–79 (2006) (describing the loyalty prosecutors can develop to a particular version of events and the associated refusal to admit mistakes).

65. John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1267 (2012).

66. *Id.* at 1250–55; see also John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program on Sentencing Practices*, 13 AM. L. & ECON. REV. 491, 493–95 (2011) (arguing that admission practices rather than longer sentences are driving prison growth); John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* 3 (Jan. 23, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=1990508>, ar-

bureaucratic incentives combine with another familiar source of pressure in modern bureaucracies—budget and resource constraints—which can lead law enforcement to compromise the quality of case investigations,⁶⁷ and which drives prosecutors and judges to favor resolving cases through plea bargaining rather than trial.

These interactive effects of democracy and bureaucracy leave one less than sanguine about democratic accountability as an alternative to the “apolitical” civil servant prosecutor that, as Burns recounts, Kafka disparagingly parodied.⁶⁸ Our choice to rely on politically attuned prosecutors—and other officials and policy makers—has been a large part of the problem with American criminal justice since the 1970s. Burns tells us—in characterizations that we have some reason to hope may now be slightly out of date, given recent signs of political support for criminal justice reform—that “[t]he politics of crime and capital punishment have become close to the center of our electoral regime” and “officials themselves are under a constant pressure” from “[f]earful and then angry moods” among the public.⁶⁹

B. Rules Responding to Bureaucratic Distrust

Another part of the answer is that the distinctive American distrust of bureaucracies leads not only to more *political* control of agencies but more *rules* that constrain officials in those agencies—and so it produces agencies that are more *bureaucratic* in that particular sense. A familiar criticism is that the United States relies more heavily than elsewhere on rules to manage public organizations because of fear of bureaucratic power and discretion.⁷⁰

chived at <http://perma.cc/RH7M-CH65> (proposing that prison growth during the 1990s and 2000s has been driven almost entirely by prosecutors’ increased willingness to file felony charges).

67. See BURNS, *supra* note 1, at 106 (implying that falling per-case spending by indigent defense lawyers reflected “assembly-line adjudication,” which “is not known for its accuracy” (quoting WILLIAM J. STUNTZ, *COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 57–58 (2011)); Adam Gershowitz & Laura Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 272–74 (2011) (detailing the extent of severe prosecutorial resource constraints).

68. BURNS, *supra* note 1, at 53–54.

69. *Id.* at 67, 70. For examples that criminal justice reform is an increasingly plausible political position, see, for example, Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (codified at 21 U.S.C. §§ 841(b)(1), 960(b) (2012)); Editorial, *A Rare Opportunity on Criminal Justice*, N.Y. TIMES, Mar. 15, 2014, <http://www.nytimes.com/2014/03/16/opinion/sunday/a-rare-opportunity-on-criminal-justice.html>, archived at <http://perma.cc/ZPX9-B5KU>; Jesse Wegman, *Rand Paul, a Prisoner’s Best Friend?*, TAKING NOTE, N.Y. TIMES (Sept. 19, 2013, 9:58 AM), <http://takingnote.blogs.nytimes.com/2013/09/19/rand-paul-a-prisoners-best-friend/>, archived at <http://perma.cc/LUN4-J5AT>. Further evidence of shifts in crime politics might be inferred from the modest declines in U.S. incarceration rates since 2009 after previously rising dramatically for decades. See CARSON & GOLINELLI, *supra* note 33, at 1. Additionally, six states have abolished capital punishment since 2007: Connecticut, Illinois, Maryland, New Jersey, New Mexico, and New York. *States with and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>, archived at <http://perma.cc/6PDS-S6NY>.

70. Kelman, *supra* note 53, at 196; see also Wilson, *supra* note 59, at 369–70 (describing the lack of trust and delegation reflected in the government’s bureaucracy).

In nations where trust in the expertise and professionalism of agency officials is higher (trust that might be enhanced by hierarchical supervision as well as expertise), bureaucrats can have comparatively more autonomy. One might take this general account to explain features of American criminal justice that Burns emphasizes, such as “the opacity of the procedural law that controls police investigation and interrogation in our system,” which Burns says mirrors the procedural picture created by Kafka.⁷¹ Unlike most bureaucratic settings, the bulk of that law is constitutional doctrine fashioned by courts, but the detailed body of rules governing search, seizure, and interrogation practices nonetheless reflects some distrust both of the discretion and professional judgment of law-enforcement officials (notwithstanding the broad scope of authority that remains) and of the capacity of hierarchical and political supervision to monitor and guide that discretion. To that body of law one could add much statutory law reflecting the same concerns, such as requirements that police record the race of suspects they stop to improve monitoring for racially biased enforcement patterns.⁷²

C. *Not Enough Bureaucracy*

Finally, Burns’s descriptions of some of the worst examples of U.S. criminal justice gone awry, such as police extracting confessions from innocent citizens and “profoundly unreliable” forensic evidence,⁷³ suggest a third contributing explanation for such Kafkaesque developments. Unlike the negative effects of democratic influence, this is not one that Burns emphasizes; I am not sure it is one he agrees with. Particularly with regard to excessive police interrogation practices as well as poor-quality forensic evidence, it is fair to say that the problem in many American jurisdictions is one of *insufficient* bureaucracy. Localized, fragmented bureaucracies not only prevent supervision; they work in some respects against the diffusion of expertise, against formalizing and standardizing best practices. “More bureaucracy” is one way to describe the recommendations of the National Research Council, among others, on how to improve the sorry state of shoddy forensic analysis in criminal courts. The council’s recent report, after all, urged increasing and integrating the regulation and training of forensic analysts and strengthening oversight of forensic lab practices.⁷⁴ The same can be said for policies aimed at improving the accuracy of eyewitness identifications and suspect confessions. Police agencies need to abide by specific practices—needlessly burdensome procedural hoops, perhaps, in the eyes of some officers—to reduce contaminating witness memories and

71. BURNS, *supra* note 1, at 72.

72. *E.g.*, N.C. GEN. STAT. § 114-10.01 (2013).

73. BURNS, *supra* note 1, at 93–97.

74. NAT’L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 19–28 (2009).

inadvertently facilitating unreliable witness testimony.⁷⁵ Comparable best-practice guidelines could reduce police extraction of false confessions.⁷⁶

VI. Conclusion

How much help, then, can Kafka be in diagnosing the continuing deficiencies of American criminal justice? Burns makes a convincing case that *The Trial* remains a valuable cautionary tale, at some level of generality, that transcends the particulars of Kafka's European, inquisitorial-style justice system. His reading of Kafka, together with his critique of contemporary American criminal justice, suggest perils are inherent in any state's coercive penal authority. I remain somewhat skeptical that "bureaucracy" per se provides a singularly valuable analytical rubric through which to examine how those perils arise and recur in particular justice systems. Contemporary French and German criminal justice systems, for example, are surely bureaucratic by any standard, probably shockingly so to Americans. Judges and prosecutors have job security rather than electoral accountability, the judiciary takes an active role in generating evidence as well as finding facts, and lay juries play marginal or nonexistent roles.⁷⁷ Those systems no doubt have their flaws. Nonetheless, those bureaucracies produce incarceration rates that are a small fraction of the American rate, their known cases of wrongful convictions are less numerous than ours, and their legislatures removed the death penalty from criminal codes decades ago. Whatever European systems have done since Kafka's time to leave the United States behind on such defining aspects of criminal justice administration, it did not include expanding the lay jury's role or reducing key components of bureaucratic organization.⁷⁸

75. See, e.g., *New Jersey v. Henderson*, 27 A.3d 872, 920–22 (N.J. 2011) (establishing new standards for eyewitness testimony in state courts that are more rigorous than federal constitutional standards); GEOFFREY GAULKIN, SUPREME COURT OF N.J., REPORT OF THE SPECIAL MASTER 84–86 (2010), available at [http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20\(00621142\).PDF](http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20(00621142).PDF), archived at <http://perma.cc/FU8F-PDUK> (describing and recommending best practices for eyewitness identifications).

76. Cf. RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 78–81 (2008) (summarizing how the professionalization strategy of police reformers resulted in the decline of third-degree interrogation practices in the mid-twentieth century).

77. For basic descriptions of each system, see generally MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL PROCEDURE (2012); JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE (2005).

78. On the other hand, whenever our lay juries get a chance to decide a fraction of criminal prosecutions, they are hardly foolproof bulwarks against government oppression. Wrongful jury verdicts of guilty provide examples, especially in cases where the state's evidence was thin so that we might expect more jury skepticism. Burns's colleague in the Chicago bar, author-lawyer Scott Turow—after serving on a state wrongful-conviction commission—wrote about "the propensity of juries to turn the burden of proof against defendants accused of monstrous crimes," such as child murders. TUROW, *supra* note 64, at 36.

By giving attention to the contribution of American democratic politics to the problems of American criminal justice, Burns juxtaposes Kafka's portrait of an unjust, undemocratic bureaucracy in ways that allow us to draw broader insights—across contrasting systems—about how criminal justice systems can go wrong. Burns's final chapter is a fairly pessimistic account of prospects for American criminal justice reform. An additional, dispiriting insight one can draw from his book is that, despite very different political and bureaucratic contexts, all criminal justice systems have the potential to go wrong in surprisingly similar ways. Criminal justice is (along with military capacity) the state's most direct and forceful mode of sovereign authority and physical coercion. Even when its justice system is characterized by the oppressive practices and tragic effects that Burns identifies in ours, the state—even in a liberal democracy characterized by longstanding skepticism of government power—can nonetheless win the ongoing assent of electoral majorities. Democracy as well as bureaucracy can lead to a criminal justice system with the sorts of problems Kafka depicts, although neither necessarily does. Those of an exceedingly pessimistic bent of mind (which does not include me, nor I think Burns) could hardly be blamed for looking to another work of a twentieth-century European writer for a truth about the nature of criminal justice. From the possibility, at least, of abuse and injustice in state penal authority, one might fear there is *No Exit*.⁷⁹

79. JEAN-PAUL SARTRE, *NO EXIT AND THREE OTHER PLAYS* (L. Abel trans., Vintage Books 1955) (1947).