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Disciplining Criminal Justice: The Peril Amid the Promise of Numbers

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Introduction

When it comes to the opaque domain of criminal justice's inner workings, statistics have a penetrating potential that scholars and officials have deployed in governing discretion, achieving accountability, and revealing systemic faults.[1] The growth of sophisticated scholarship and ideas adapting quantitative technology to unveil the hidden,[2] spur debate,[3] and police bad

1. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 265-66 (2005) (relying on statistical evidence to find invidious intent behind the exclusion of all black jurors in a capital case); McClesky v. Kemp, 481 U.S. 279, 321-22 (1987) (Brennan, J., dissenting) (recognizing, based on a statistical analysis of Georgia death penalty cases, that "there was a significant chance that race would play a prominent role in determining if [a defendant] lived or died"); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 915-16, 955-59 (2006) (arguing that a gulf between "insiders"—judges, police, and prosecutors—and "outsiders"—crime victims and the general public—undercuts the instrumental, moral, and expressive efficacy of criminal law, and arguing that better statistical information, particularly at the local level, could help bridge this gulf); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After* United States v. Armstrong, 34 AM. CRIM. L. REV. 1071, 1119-22 (1997) (emphasizing the importance of statistical information in providing a "rough check" against selective prosecution and urging Congress to mandate the assembly of records reflecting patterns in the exercise of prosecutorial discretion); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600-604, 613-14 (2005) (emphasizing the importance of numerical performance measures in holding local prosecutors publicly accountable and noting the lack of "meaningful performance measures" and correspondingly less accountability on the federal side); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1006-12, 1015-25 (2001) (assessing, with the aid of statistics, the damage done to black communities and families by the high rate of black incarceration).
2. *See, e.g.*, Richard S. Frase, *The Decision To File Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 247 (1980) (using quantitative methods to analyze the decision whether or not to prosecute, which is "one of the least visible stages of criminal justice"); Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439 (2004) (using quantitative methods to analyze the decision to decline prosecution, "one of the great enigmas of the criminal justice system").
3. *See, e.g.*, John Donahue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005) (assessing the statistical evidence regarding the deterrent effect of the death penalty); Theodore Eisenberg, *Death Sentence Rates and County Demographics: An Empirical Study*, 90 CORNELL L. REV. 347 (2005) (suggesting that widespread

behavior[4] is an important movement. Yet this Article sounds a note of caution against the primacy of numbers in disciplining criminal justice practices.

This Article does not take aim at numbers deployed to correct, monitor, and reveal as an adjunct to serving public values. Rather, the Article's concern is about numbers becoming an end or target in criminal justice, *becoming the value* rather than serving as a technology toward higher aims and principles.[5] The concern is about how statistics of people prosecuted and cases won, divorced from qualitative details and isolated from context, are officially deployed as a proxy for performance in criminal justice, in place of substantive aims that have proved difficult to attain or denominate in determinate ways.[6]

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aversion to the death penalty in black communities may explain why black defendant–black victim murder cases receive the lowest rate of death sentences); Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 349, 351 (2006) (concluding, based on statistical models, that there is a "measurable and significantly prejudicial effect" from joining multiple counts in a single trial, and calling for a re-examination of the criminal law doctrine of joinder and severance in light of these findings).

4. *See, e.g.*, David C. Baldus & George Woodworth, *Race Discrimination and the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194 (2003) (reviewing multiple post-1990 statistical studies and reporting widespread race-of-victim disparities "reflecting more punitive treatment of white-victim cases among similarly aggravated cases"); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 83 (2001) (using statistical analysis to analyze peremptory challenges in death penalty cases and discerning evidence "of systematic discrimination . . . at the individual case level"); Poulin, *supra* note 1, at 1119-22; *cf.* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995) (advocating financial incentives to constrain charging behavior so that the offenses of conviction are very similar or identical to the offenses charged).

5. *Cf.* Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 450 (1992) (describing the turn to a systemic objective of "primacy given to the efficient control of internal system processes in place of the traditional objectives of rehabilitation and crime control" and the attenuation of "any external social referent" for goals like reducing recidivism, rehabilitation and crime control).

6. *Cf.* AMERICAN PROSECUTORS RESEARCH INSTITUTE, PROSECUTION IN THE 21ST CENTURY: GOALS, OBJECTIVES, AND PERFORMANCE MEASURES, at v, 1-3 (2004), *available at* http://www.ndaa.org/pdf/prosecution_21st_century.pdf

The Article analyzes how substituting numbers of prosecuted people for the values and goals of criminal law administration, like security or justice, is a mode of coping with pervasive doubt about the efficacy of the nation-state's governance and control. In place of hard-to-achieve, complex, and squishy public values, the production of numbers—with their comforting solidity and relatively easier attainability—is substituted as the goal and standard of performance. When used in this way, statistics obscure rather than illuminate and short-circuit self-scrutiny rather than spur it.[7] This numbers-as-aims discourse effaces values, even as it claims to make performance more visible, and it borrows legitimacy from the bright hopes of reform projects that use numbers as a method rather than an end. The discourse gives official sanction to the flattening of the goals of criminal justice and legitimizes a focus on collecting favorable win statistics rather than considering whether the prosecutor's actions substantively address the public interest in context.

This Article argues that there are two tendencies that lead to the substitution of numbers for substantive values. The first is a tendency to address public doubt in government by making performance visible through "objective" quantified targets and measures and avoiding "soft" measures attentive to qualitative detail. Yet, when it comes to public values like "doing justice" or "protecting the environment," where there is no discrete bottom line, such as private-sector profits or widgets made, qualitative description is particularly necessary. The struggle to conform public values to an ill-fitting idiom where rigidity is taken for rigor may lead to qualitatively impoverished proxies for substantive values.

The second motivation for turning to prosecution numbers is "denial and acting out" over policy failure.[8] David Garland, in his influential study, has shown how policy actors wrestling with a pervasive sense of inefficacy have responded with "denial and acting out" through displays of punitive power "however poorly these gestures are adapted to dealing with the un-

(reporting that numerical indicators like conviction rates do not capture the role of the modern prosecutor, who works toward crime prevention by addressing the underlying factors and problems that contribute to crime).

7. *See* Marilyn Strathern, *The Tyranny of Transparency*, 26 BRIT. EDUC. RES. J. 309, 310, 313, 318 (2000) (arguing that making performance visible through measurement conceals and effaces the unmeasurable real quality of performance); *cf.* MICHEL FOUCAULT, *Two Lectures*, *in* POWER/KNOWLEDGE 78, 105 (Colin Gordon ed., 1980) (arguing "a system of right" may be "superimposed upon the mechanisms of discipline in such a way as to conceal its actual procedures, the element of domination inherent in its techniques").

8. DAVID GARLAND, THE CULTURE OF CONTROL 131 (2001).