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GAINING PUBLIC TRUST IN THE CRIMINAL LEGAL PROCESS

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I. INTRODUCTION

"Dissatisfaction with the administration of justice is as old as law."1 Writing in 1906, Roscoe Pound, the founder of twentieth-century American sociology of law and the progenitor of modern court management, did not imply by this statement that we should ignore or be complacent about popular dissatisfaction. On the contrary, drawing attention to the causes of "the real and serious dissatisfaction with courts and lack of respect for law which exists in the United States today" was the focus of his influential address.2 In this venerable tradition, the Subcommittee on Crime and the Courts has identified popular dissatisfaction as the most significant emerging issue facing California's criminal courts.3

Pound sought to understand the sources of public dissatisfaction, cautioning that we need to distinguish between "innocuous and inevitable discontent with all law" and "real and serious dissatisfaction," before

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Ironically, Pound explicitly excluded criminal justice from his remarks, because he predicted the end of criminal law. "[T]he true interest of the modern community is in the civil administration of justice. Revenge and its modern outgrowth, punishment, belong to the past of legal history." Id. at 730.

2. Id. at 730. Pound's speech is credited with leading to the establishment of California's Administrative Office of the Courts.

introducing reforms in response to public concerns. By extension, we must also be certain that the expressed discontent is not based on faulty premises. Some studies suggest that the public holds the courts responsible for crime in the community and believes solutions lie in limiting procedural protections and increasing penalties. Other studies show that when the public is informed about or experienced with the criminal process, they care deeply about procedural values and do not consider the courts "soft" on crime. The courts must provide leadership in promoting public understanding of their role—in particular, the important role they play in protecting procedural due process values. Thus, although an uninformed public may express its legitimate concern about the amount of crime, by resenting a system that protects the rights of the individual accused and calling for ever harsher penalties, the courts not only must continue to protect those rights and maintain a balanced view of the possibilities of punishment, but they must also reach out to the public to nurture respect for constitutional values and understanding of the limits of punishment.

In a liberal democratic society, legitimate authority is based on fair procedures and on public recognition that governmental procedures are fair. Judges should not abrogate their responsibility to discharge their functions fairly and judiciously, even if doing so may seem to be unpopular. Respect for substantive criminal law cannot be maintained without criminal procedural law that takes seriously the rights of the individual. Even if limiting procedural rights seems to be popular, doing so may undermine the authority of the legal system and lead to more, not less, crime, and thus to spiraling public dissatisfaction. Yet, if the public is not informed about the nature of and principles underlying those procedures, the public cannot assess them fairly.

Recent reforms have taken at face value apparent public dissatisfaction with the leniency and inefficiency of the courts, increased penalties and the use of incarceration, and diminished the traditional protections of criminal due process. As we look ahead, whether to next year or to the year 2020, we can continue in these directions—supposedly satisfying a disgruntled public by further diminishing their individual rights to fair judicial procedures and imprisoning and re-imprisoning more and more people for longer periods of time—or we can, as I try to show in the paper summarized in this Abstract, both better understand public attitudes towards the criminal justice system and reaffirm the criminal courts and the judiciary as the standard bearers of the principles of

4. Pound, supra note 1, at 730.
autonomy and liberty and the procedural guarantees that constitute the Bill of Rights. Then we can forge new directions that can allay public dissatisfaction and re legitimize the criminal judicial process.

Dissecting the literature of popular opinion shows that once people get beyond a symbolic view of crime and punishment by becoming better informed about crime and the legal process, their positions alter significantly. The role of the criminal courts in preserving criminal due process rights can and should be maintained (some would say, restored). The courts can earn public trust by preserving that role and by accepting an additional responsibility to reach out to the public.

II. PUBLIC DISSATISFACTION WITH THE CRIMINAL COURTS

What is the nature and extent of public dissatisfaction with the criminal courts? In this Part, the longer paper examines several bodies of literature that offer significantly divergent answers to these questions. In Section B, I look at public opinion surveys. These are the Gallup-type public opinion polls that have become a familiar part of our cultural landscape. These polls indicate that over the past twenty years the great majority of Americans have consistently felt that judges are too lenient and too concerned with protecting the rights of persons accused of crime. Indeed, polls consistently report that the courts are among the least respected institutions. In Section C, I examine informed opinion studies. These studies either elicit responses before and after providing information intended to produce more educated opinions, or they assess the level of information respondents possess and relate that to respondents' opinions. These studies are remarkably consistent in showing a marked reduction in punitive attitudes as respondents are better informed about the criminal justice system. By implication, an informed populace will make a less negative assessment of the courts, since that assessment seems to be based on a perception that judges are too "soft on crime." In Section D, I move to studies that examine the attitudes of persons who may be even better informed about the criminal justice system, in that they have had personal contact with the system, as defendants, jurors, or victims. Synthesizing a broad range of literature, I find a common conclusion in all this research: People respond positively when they understand the process and perceive that the procedures are fair and neutral, and that officials treat them fairly, honestly, and respectfully. Finally, in Section E, I consider the complex role of the media, which serve as both a reflection of and an influence upon public opinion of the criminal
courts. Reflecting on all this literature leads to the conclusion, in Section F, that by educating judges to appreciate the important role they play in providing procedural justice and promoting procedural values, and through education of the public and the media to appreciate that role, its importance and its limitations, the courts may earn the public trust without which democratic institutions cannot thrive.

III. THE ROLE OF THE CRIMINAL JUDICIAL PROCESS

Almost half of Californians believe in error that "if you are charged with a criminal offense, it is up to you to prove that you did not commit the crime." Less than half of Californians know that the United States Bill of Rights is the first ten amendments to the original Constitution. This Part begins to consider the kinds of information that should be impressed upon judges and through them to the public. It describes and defends the values that underlie the Anglo-American adversarial system of criminal justice, and compares it with other models of the criminal process. It explains how our system is concerned not only with seeking truth and controlling crime but also with protecting and promoting individual autonomy and dignity. It also explains why plea bargaining does not necessarily compromise those values, despite its suspicious characteristic of being carried out, by definition, away from the public forum. It then looks at ways that this system is eroding.

IV. HOW THE COURTS CAN RESPOND

A. INTRODUCTION

A constitutional democratic society must be responsive to the will of the people without compromising the foundational principles and basic structures that define that society. Principles of criminal procedure are of that basic sort. In fact, the Bill of Rights is sometimes referred to as a

5. Of the respondents to a survey commissioned by the State Bar of California and conducted in March 1991, 46.2% believed this. State Bar Report: Bar Survey Reveals Widespread Legal Illiteracy, CAL. LAW., Jun. 1991, at 68. A national poll conducted in 1978 by the National Center for State Courts found that this was believed by 56% of the public. STATE COURTS: A BLUEPRINT FOR THE FUTURE: PROCEEDINGS OF THE SECOND NATIONAL CONFERENCE ON THE JUDICIARY HELD IN WILLIAMSBURG, VIRGINIA 13, Table 1.5. (Theodore J. Fetter, ed., 1978) [hereinafter STATE COURTS].

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miniature code of criminal procedure.\(^7\) But a constitutional democracy cannot function long without public trust. The people must understand those principles and structures and believe that they are operating fairly and honestly. The desirability of gaining public trust may be evident. How to earn it is taken up in this Part.

In its 1992 report, *Reinventing Justice*, the Massachusetts Chief Justice's Commission on the Future of the Courts concentrated on "regaining public trust" as a key issue for the future of Massachusetts' courts. They concluded, as I agree, "Fundamental to regaining public trust is improving the courts' performance. In addition the courts should engage in effective public outreach and do more to hold themselves publicly accountable."\(^8\) Many of the concerns about improvements in court performance in light of future trends are addressed in this subcommittee's broadscan paper.\(^9\) Here I focus on the meaning of public accountability and the role of judges in educating the public and being educated to understand the role of criminal courts in society.

**B. EDUCATIVE FUNCTION OF THE COURTS**

Judges should make public communications a more significant aspect of their professional responsibility, not just informally but formally. Some of the suggestions I make here have been tried in the past, and some continue in operation. What I suggest, however, is an overall organization and plan, a continuing commitment of resources, and a veritable redefinition of the role of the courts to embrace this function. Some specific programs might be developed community by community, others need statewide organization.

The ABA's 1990 Model Code of Judicial Ethics, not yet adopted in California, encourages this kind of role for judges, where the previous code only cautiously approved such activity. Canon 4B of the new Code states, as did the old Code, "A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the

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requirements of the Code.” The Commentary to Canon 4B in the new Code goes on to suggest, “As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice...” The ABA’s recognition of this role for judges signifies that we can expect judges throughout the United States to take a more active public role in the years to come. Nevertheless, the Code labels such activities as “avocational,” while I would go a step further in suggesting that they become part of the judicial vocation itself.

There are many venues in which judges can participate in public education. I consider several areas in this Section, with the hope that these suggestions will stimulate discussion and lead to ideas I have not yet entertained. My suggestions are in the areas of the schools, general public forums, and the media. Clearly, the schools are among the most important of those venues. Closer ties between courts and schools could be used to bring classrooms to the courthouse, or courts to the school. Also, local judges could offer seminars for educators in their communities. At the state level, judges could prepare videotaped lectures for use in the classroom or offer videotapes showing criminal trials or tracking the progress of a criminal case through the court system. Judges can bring their role as public legal educator to public meetings, community groups, radio programs, and so on. They can turn the jury pool into a classroom. Better communication between courts and the media should also be established, and I consider some of the ways this could be attained, including courses, publications, and public information officers attached to the courts. An educational role for judges would be edifying not only for the community, but for the judges themselves.

I endorse the proposal of the Massachusetts Commission on the Future of the Courts to assign one week per year of each judge’s time to public education. I further recommend statewide planning and organization of these efforts.

C. EDUCATING THE COURTS

Municipal and superior court judges live with the responsibility of transforming chaos into order on a daily basis. Performance is commonly measured on the important but short-sighted criterion of the

11. Id.
12. Id.
13. See supra note 8 and accompanying text.
number of cases disposed of in a given time period. Getting through the
docket, decreasing the processing time from arrest to disposition, reduc-
ing the number of court appearances—this is the common language of
concern among local judges. The pressure to process cases more and
more efficiently can be demoralizing, leaving little time to reflect on the
symbolic function of the court, its role in the community or the society at
large, or the values that probably led them into the courtroom initially.

The state of California, through the California Center for Judicial
Education and Research ("CJER"), established under the auspices of the
Judicial Council of California and the California Judges Association,
provides an extensive and ongoing, albeit optional, program of judicial
education for judges at all stages of their careers and in all areas of spe-
cialization. The courses offered by CJER are generally and appropri-
ately very practically oriented. Exciting interdisciplinary work on law
and society has been developing in the academy in recent years, scholar-
ship of real relevance to the judiciary. I suggest that the college incorpo-
rate this broader, more abstract scope into its curriculum, including legal
theory, the function of law and courts in society, legal history, sociology
of law, and so on.

Compulsory and continuing judicial education is an idea whose time
has come. If we take seriously the notion that judges, the judicial system,
and public opinion of both would benefit from making judges aware of
various scholarly perspectives of their role, then we cannot afford to
leave the decision to develop that awareness to the individual judge. If
we believe that judges need to know more about legal theory, history,
and philosophy, then we need to require that they study these areas. I
was encouraged to hear the dean of the California Judicial College state
that he supported the concept of compulsory judicial education and
believed that judges would welcome the suggestion.

14. The National Judicial College, based in Reno, Nevada, also offers courses for judges
throughout the year. "[M]ore than 1,500 judges and other court personnel" attend these courses
each year. National Judicial College, Content analysis of the College's 1993 course catalog yields no
courses that specifically address the subjects of concern here: courts and the public, and the interdis-
ciplinary study of the role of courts in society. Apparently the College did offer a course on Courts
and the Community at one time; see NATIONAL COLLEGE OF THE STATE JUDICIARY, COURTS AND
THE COMMUNITY (1973); COURTS AND THE PUBLIC (1977); COURTS AND THE NEWS MEDIA
(1977). "Courts and the Community has been taught for many years in the regular four-week ses-
sion of the National College." Id. at v. "This is basically a textbook for the National College of the
State Judiciary course on Courts and the Community." COURTS AND THE COMMUNITY, supra, at
iii.

I suggest a required course of instruction taught by various law-and-society scholars, including sociologists, historians, political scientists, and philosophers, which would give judges the opportunity to reflect on their experiences in light of the various perspectives academics can offer them about their role in society.

D. LEGISLATIVE CHANGE

The process of criminal law reform is particularly susceptible to political pressures. Many Western governments have instituted more or less permanent commissions meant to be independent of the elected government, whose function is to develop theoretical frameworks for understanding the relationship between law and society, to review and analyze the current state of the law, and to make regular recommendations to the legislature. Indeed, such commissions themselves serve an important educative function, both in conducting public hearings and in disseminating their research and working papers. Unlike sentencing commissions or California’s Office of Criminal Justice Planning, they do not implement programs. Their scope is broader than California’s current Law Revision Commission, and their members are not legislators. They stand further outside the political fray and largely control their own agendas.

I recommend that the state analyze the feasibility of establishing a permanent (or, say, ten-year, renewable) California Law Reform Commission.

V. CONCLUSION

Our political institutions, and especially the courts, have a responsibility that supersedes transient public opinion—a responsibility to preserve foundational principles like accusatorial justice and the procedural protections constitutionalized in the Bill of Rights.

Courts—perhaps more than any other public institution in our society—must sometimes be consciously resistant to the pressures of public opinion. Indeed, the courts’ duty to withstand popular demands that run counter to fundamental concepts of due process is an integral element of the ideal of government under law. One vital role of courts in the American system of government is to provide a check against majoritarian excesses that could undermine constitutional and statutory guarantees designed to protect sometimes unpopular minorities.16

16. Barry Mahoney et al., Courts and the Public: Some Further Reflections on Data from a National Survey, in STATE COURTS, supra note 5, at 83, 85.
But it is not enough for courts to "consciously resist" public opinion in recognition of a higher duty to protect "fundamental concepts of due process." Courts should seize the opportunity to persuade the public of the value of those principles that they are charged with protecting. Indeed, it should become their duty to do so, since a constitution without the support of its constituents will eventually be devalued and the institutions it constitutes will lose the authority to govern.

Close scrutiny of the nature of public opinion of the criminal courts reveals that the public cares deeply about procedural justice and is much less punitive when it understands the role and functions of the criminal courts. We can expect uninformed public opinion to continue to demand harsher penalties and criticize the courts for inefficiency and leniency. The courts must undertake an educative function to inform the public about their role.

Judges are pressured and demoralized both by public opinion and by caseload demands to measure their worth in terms of the speed of case disposition. Compulsory judicial education in the interdisciplinary analysis of law and legal institutions will revitalize the judiciary and better prepare them for their new role in public education.

Reflection on reform of criminal procedure may best be undertaken by a long-term commission on law reform, independent of elected governments.