THE REFORMATION OF AMERICAN CRIMINAL LAW

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Dick Stewart is such a towering figure in administrative and environmental law that it would take far more than a one-day event to do justice to his contributions in these fields. I hope to show the reach of his influence by explaining how one of his iconic articles holds key insights for a field far outside his own: criminal law. The piece, *The Reformation of American Administrative Law*,[1] is forty-five years old, but its insights are as on-point today as ever.

The Reformation of American Administrative Law brilliantly laid bare the deficiencies of two traditional views of administrative law. The first view conceives of the agency as a "mere transmission belt for implementing legislative directives in particular cases."[2] Thus, in this view, agencies dutifully follow clear statutory commands, and judges hold them in check through judicial review.[3] Stewart explained how vague and ambiguous statutes gave agencies more discretion than this "transmission belt" view of agency decisionmaking recognized.[4] The second traditional view of administrative law is that agencies are neutral experts that devise the best methods to implement legislation. Stewart explained how this "expertise model" was also misleading because it failed to recognize the way in which agencies became captured by powerful organized interests and set policies based on the preferences of those interests instead of maximizing public welfare.[5]

Stewart then documented how judges responded to the breakdown of both the transmission belt and expertise conceptualizations

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1 *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

2 *Id*. at 1675.

3 *See id.* at 1670–75.

4 *See id.* at 1677–78.

5 *See id.* at 1678, 1684–85.

of the administrative process by trying to give more adequate representation to all people affected by agency decisions and not just the most powerful and organized.[6] These judicial responses included developing a strong presumption of judicial review and finding a broader group of people entitled to a hearing before the agency and with standing to sue.[7] Supporters of these public participation reforms believed they would address the democratic deficits associated with having agencies, as opposed to elected legislators, make policy.[8] As Stewart noted, the claim in favor of these reforms is that participation "will not only improve the quality of agency decisions and make them more responsive to the needs of the various participating interests, but is valuable in itself because it gives citizens a sense of involvement in the process of government, and increases confidence in the fairness of government decisions."[9]

Stewart went on, however, to observe the limits to relying on the broader participation model. First, making access available does not mean everyone will take advantage of it. As Stewart noted, there will be real limits on participation:

> where the impact of a decision is widely diffused so that no single individual is harmed sufficiently to have an incentive to undertake litigation, and where high transaction costs and the collective nature of the benefit sought preclude a joint litigating effort, even though the aggregate stake of the affected individuals would justify it.[10]

While public interest groups might be sufficiently organized to represent the interests of such disaggregated individuals, they typically lack the resources to fill all the gaps, and even when they do get involved, there are no mechanisms for ensuring they are broadly representing all the neglected interests.[11] A second shortcoming Stewart noted is that more participation means more process, which can mean delay and expense without necessarily changing outcomes.[12] While more rigorous judicial review of agency decisions could be more protective of ignored interests, it also raises questions

6 *See id.* at 1713, 1715, 1721.
7 *See id* at 1716.
8 *See id.* at 1761.
9 *Id*.
10 *Id.* at 1763.
11 *See id.* at 1764–65.
12 *See id*. at 1770–71.

of judicial legitimacy and capacity to make those calls.[13] As Stewart observed:

> expansion of judicial power would give the courts a degree of across-the-board responsibility for social and economic policy-making that is wholly inconsistent with our received constitutional premises, under which the legislature remains free, subject to the minimal requirements of the doctrine against delegation of legislative power, to delegate a discretionary power of choice to agencies so long as the agencies stay within statutory bounds and observe appropriate procedural safeguards.[14]

Given these key insights, it is no surprise that *The Reformation of American Administrative Law* is one of the most cited law review articles ever written.[15] It has been deemed a "classic statement of the twentieth-century reimagination of American law" and "iconic" and "seminal."[16] It is the must-read piece for understanding how administrative law evolved from the New Deal to the notice-and-comment era of the 1970s.

Perhaps even more remarkable is how the central insights of the piece hold up after forty-five years and can help guide those of us working to improve the administration of criminal law. In many ways, criminal law and its administration have been viewed as operating like the "transmission belt" model Stewart described as the origin story for American administrative law. This is because criminal punishments, like administrative sanctions, must be authorized by the legislature.[17] Thus, just as early defenders of the administrative state claimed that agencies were merely exercising ministerial functions and enforcing legislative pronouncements, it is a common

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[13] *See id.* at 1787.

[14] *Id.*

[15] *See* Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1490 (2012).

[16] Jerry L. Mashaw, *The American Model of Federal Administrative Law: Remembering the First One Hundred Years*, 78 GEO. WASH. L. REV. 975, 981 n.40 (2010); Susan Rose-Ackerman & Thomas Perroud, *Policymaking and Public Law in France: Public Participation, Agency Independence, and Impact Assessment*, 19 COLUM. J. EUR. L. 225, 272 n.220 (describing Stewart's article as a "seminal discussion" on judicial review); Sidney A. Shapiro, *Law Expertise and Rulemaking Legitimacy: Revisiting the Reformation*, 49 ENV'T. L. 661, 661 (2019) (describing Stewart's article as "iconic").

[17] *See* Stewart, *supra* note 1, at 1672.

refrain today for law enforcement officials to say they are just enforcing the law, not making it.[18]

Stewart's observations about the fallacy of that claim for administrative agencies hold just as true when the claim is made by law enforcement officials. Though criminal laws must be clear enough to survive vagueness challenges, they still provide interpretive room for officials.[19] Even more critically, law enforcement officers have enormous discretion in how they exercise their enforcement authority and whom they prioritize for targeting.[20]

The expertise model suffers from the same deficiencies when it applies to agencies engaged in criminal law administration as it does for traditional regulatory agencies. Law enforcement officers are not engaged in neutral, expert-driven decision-making; they are

[18] *See, e.g.*, Lauren Stephenson, *'America's Toughest Sheriff' Could Face Prosecution*, SPRINGFIELD NEWS-SUN (Sept. 14, 2016), https://www.springfieldnewssun.com/news/national/america-toughest-sheriff-could-face-prosecution/1UbLP9VRRBlr83c3ZsEInO/ (reporting that in a 2012 election commercial, Maricopa County Sheriff Joe Arpaio said "I don't make the laws. I enforce them."); Ken Stone, *Sheriff Gore Aims to Issue More Concealed Gun Permits in San Diego County*, TIMES OF SAN DIEGO (Nov. 17, 2017), https://timesofsandiego.com/politics/2017/11/17/sheriff-gore-aims-to-issue-more-concealed-gun-permits-in-san-diego-county/ (defending a concealed carry policy, Sherriff Bill Gore of San Diego said, "I don't make the laws. I don't interpret the laws. I enforce them."); *AUM Grad Becomes 1st Black Female Elected DA in Alabama*, MONTGOMERY ADVERTISER (Jan. 20, 2017), https://www.montgomeryadvertiser.com/story/news/local/alabama/2017/01/20/aum-grad-becomes-1st-black-female-elected-da-alabama/96825808/ (reporting that newly elected District Attorney Lynneice Washington stated, "I don't make the laws. I have to follow the laws," when explaining her openness to seeking the death penalty despite philosophically opposing it).

[19] *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1487–88 (2016) (listing nonserious crimes that contribute to mass criminalization, including vague laws like "loitering for illicit purposes").

[20] *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 4 (2011) ("[C]riminal law does not function as law. Rather, the law defines a menu of options for police officers and prosecutors to use as they see fit."); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 286 (2014) ("It is well known that prosecutors possess nearly unfettered discretion to charge or to decline to charge, and thus are the most powerful actors in the criminal justice system."); David Thacher, *Channeling Police Discretion: The Hidden Potential of Focused Deterrence*, 2016 U. CHI. LEGAL F. 533, 535 (2016) (explaining that the criminal justice system affords police and prosecutors "enormous discretionary power").

making decisions in their own professional self-interest. They support corrections, forensics, and sentencing policies that make their jobs easier.[21] Unlike most agencies, police and prosecutors are not required to consider data or evidence before making decisions, and, in fact, they rarely base their policies on any studies or analysis of data.[22]

Given the similar shortcomings in the transmission belt and expertise models for administrative agencies and agencies that administer criminal laws, it is perhaps not surprising that around the same time administrative law was undergoing its "reformation," scholars were pointing out the need for a similar reformation of at least one aspect of criminal law: policing. Anthony Amsterdam, for example, wrote in 1974 of "the need to direct and confine police discretion by the same process of rulemaking that has worked excellently to hold various other forms of public agencies [accountable] under standards of lawfulness, fairness and efficiency."[23] Kenneth Culp Davis emphasized the need for "the kind of judicial review that is usual for other administrative agencies" to apply to police practices.[24] Scholars were not alone in these requests. The American Bar Association and even some policing organizations agreed that administrative law principles should apply to the police.[25] These pleas went unanswered, however, and unlike traditional administrative law, policing and the rest of criminal law administration continued without much oversight.

It is unsurprising that in this environment of virtually unchecked power, the United States has witnessed the rise of mass incarceration, over-criminalization, and racially biased enforcement. The agencies and officials that administer criminal laws are, to put

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[21] *See* Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 387–88 (2017).

[22] *See* generally RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019).

[23] Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 423 (1974); *see also* Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 672, 690 (1972) (also urging a rulemaking model); Gerald M. Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW & CONTEMP. PROBS. 500, 502 (1971).

[24] Kenneth Culp Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 725 (1974).

[25] *See* Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 123 (2016).

it bluntly, somewhat out of control.[26] That may explain the renewed calls for the reformation of various aspects of criminal law administration today—and the relevance, once again, of Stewart's masterpiece.

For one, there is a new generation of scholars seeking broader community participation in the establishment of policing rules[27] and prosecution practices.[28] Andrew Crespo has labeled this group of

[26] *See* BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 15–16 (2017).

[27] *See, e.g.*, Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 61 (2019); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1827 (2015); Slobogin, *supra* note 25, at 134–40; Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 379 (2010); Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 522–23 (2015); Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 589 (2020) ("Elected and appointed leaders should imagine mechanisms for greater engagement by both career enforcers and the public in setting criminal enforcement priorities and practices."); Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 816–17 (2016); Christopher Slobogin, *Community Control Over Camera Surveillance: A Response to Bennett Capers's* Crime, Surveillance, and Communities, 40 FORDHAM URB. L.J. 993, 997 (2013); Jonathan M. Smith, *Closing the Gap Between What is Lawful and What is Right in Police Use of Force Jurisprudence by Making Police Departments More Democratic Institutions,* 21 MICH. J. RACE & L. 315, 336 (2016). For a broader argument about the need for greater accountability in policing, see generally FRIEDMAN, *supra* note 26.

[28] *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 989–90 (2009) (arguing that releasing district attorney office data to the public would improve accountability); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 444 (2016) (concluding that adversarial forms of public participation, like copwatching, can serve as effective forms of police accountability); Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1413 (2017) (arguing that democratic participation in criminal justice is essential); Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677, 1677 (2017) (advocating for the incorporation of popular participation in criminal justice processes); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1367 (2017) (presenting a "full-throated defense of the democratic criminal justice vision"); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U.L. REV. 1597, 1598 (2017) (identifying her body of scholarly literature on criminal law as a "democratizing project"); Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565, 1594 (2017) (advocating for community participation in the process of criminal justice rulemaking); Jocelyn Simonson, *Community and Racial Justice: Democratizing*

scholars the "new administrativists" because of their "pivot toward agency-centric regulation of law enforcement" and goal of "leveraging valuable insights from administrative law in the hopes of righting [the] criminal justice system."[29] These new administrativists share much in common with the reformationists described in Stewart's article.

Scholars have called for more traditional administrative oversight mechanisms for prosecutors and other actors administering criminal punishment.[30] These, too, are analogous to the reformation Stewart described. For example, just as Stewart documented the extension of due process interests in agency hearings, there is now increasingly a greater recognition of the need for more process protections in the plea bargaining process, which is akin to an agency adjudication.[31] The Supreme Court, for example, recognized that ineffective assistance of counsel during plea bargaining is a cognizable injury that is not automatically remedied by virtue of the fact that the accused can go to trial.[32] Other courts are also recognizing

Criminal Justice Through Contestation and Resistance, 111 NW. U. L. REV. 1609, 1609 (2017) ("Collective forms of participation in criminal justice from members of marginalized groups—for example, when people gather together to engage in participatory defense, organized copwatching, community bail funds, or prison labor strikes—have a profound effect on everyday criminal justice.").

[29] Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2059 (2016).

[30] *See, e.g.*, Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437, 1453 (2017) ("Subjecting wholesale police, prosecutorial, and sentencing policies to some variant of a notice-and-comment process could give more traction to a wider spectrum of stakeholders and yield more balanced interest representation on those policies than currently exists."); Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 36 (2012) ("[P]rosecutors' offices, sentencing commissions, and probably police departments should apply notice-and-comment principles in adopting wholesale policies."); Edward R. Hammock & James F. Steelandt, *New York's Sentencing and Parole Law: An Unanticipated and Unacceptable Distortion of the Parole Boards' Discretion*, 13 ST. JOHN'S J. LEGAL COMMENT. 527, 555 (advocating for increased judicial oversight of New York's Board of Parole); Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 332 (2009) (arguing corrections regulations should be subject to notice-and-comment rulemaking and more judicial scrutiny); RACHEL E. BARKOW, *supra* note 22, at 11 (arguing for an administrative model for criminal justice policymaking).

[31] *See generally* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009).

[32] *See* Lafler v. Cooper, 566 U.S. 156, 166 (2012); Missouri v. Frye, 566 U.S. 134, 149, 151 (2012).

more expansive rights to access exculpatory information before an individual has to decide whether to accept a plea deal offered by the government.[33]

Those of us clamoring for these changes would do well to heed Stewart's words of caution about the limits of these proposals for reform, for his warnings apply in the context of criminal law administration just as trenchantly as they did to the judicial reformation of administrative law.

For those seeking greater participation through notice-and-comment rulemaking, it is important to note that opening up a process to more voices does not mean all voices are equally important to a decisionmaker. As Stewart notes in *The Reformation of American Administrative Law*:

> [A]gencies will continue to be exposed to intensive pressures from regulated or client groups, on whom the agencies must rely for information, political support, and other forms of cooperation if the agency is to survive and prosper. Efforts to secure greater participation rights cannot eliminate these pressures or change the institutional factors that make for agency dependence on such groups.[34]

In the context of policing, for example, overpoliced populations might successfully organize to change practices in police departments that otherwise would have ignored those voices. Yet there is still every reason to believe that the voices in favor of law enforcement preferences will win out. As Christopher Slobogin points out, "law enforcement entities are better organized and their needs more salient . . . than are the needs of the groups that are most directly affected by the police."[35] Marginalized communities have historically been drowned out by the more powerful police unions and those that support them.[36]

Even more critically, in the case of many law enforcement agencies, those same agencies would be in charge of promulgating

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[33] *See, e.g.*, Buffey v. Ballard, 782 S.E.2d 204, 218 (W. Va. 2015) (holding that *Brady* rules apply to plea negotiations).

[34] Stewart, *supra* note 1, at 1777.

[35] Slobogin, *supra* note 25, at 119.

[36] *See, e.g.*, Tom Perkins, *Revealed: Police Unions Spend Millions to Influence Policy in Biggest US Cities*, GUARDIAN (June 23, 2020), https://www.theguardian.com/us-news/2020/jun/23/police-unions-spending-policy-reform-chicago-new-york-la.

the regulations that govern their own behavior. That is obviously quite different from the civil regulatory sphere, where agencies generally regulate private industries, not themselves. So even if these law enforcement agencies solicit comment on their policies, they are always going to give preference to their own interests. Consider efforts made by the NYPD to seek comment on its body camera policy. More than 25,000 people filed comments,[37] and approximately two-thirds of the public supported a policy of mandatory recording of all interactions with the public.[38] But only one-third of police officers supported such a policy. Unsurprisingly, the NYPD sided with the officers' view and adopted a policy to amend mandatory recording rules only where police approval was at least 60 percent.[39] One would have to be blind to incentives to think that an agency could objectively evaluate its own interests. So, while soliciting comment in the context of criminal justice policymaking may allow voices previously silenced to be aired, that change may end up being mere "cosmetic participation" that does not change outcomes.[40]

The danger of professional self-interest dominating decisionmaking is true not only for policing but also for other regulations in criminal law. For example, some scholars advocate for binding guidelines for prosecution practices,[41] but there is a real danger

[37] *See* Miranda Bogen & Harlan Yu, *Good Cop Cameras, Bad Rules: The NYPD Body-Cam Guidelines Need Fixing*, N.Y. DAILY NEWS (Apr. 13, 2017), https://www.nydailynews.com/opinion/good-cameras-bad-rules-article-1.3049436. The Department did make more minor changes in response to other comments. *See* Barry Friedman & Maria Ponomarenko, *Pulling the Public into Police Accountability*, GOTHAM GAZETTE (last visited Feb. 14, 2021), https://www.gothamgazette.com/authors/130-opinion/6869-pulling-the-public-into-police-accountability.

[38] *See* N.Y. POLICE DEP'T (NYPD), NYPD RESPONSE TO PUBLIC AND OFFICER INPUT ON THE DEPARTMENT'S PROPOSED BODY-WORN CAMERA POLICY 10 (2017), available at https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf.

[39] *See id.*

[40] *See* Jaime Alison Lee, *"Can You Hear Me Now?": Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL'Y REV. 405, 413–17 (2013*); see also* Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 362 (2009) (noting how collaborative schemes of governance "may promise meaningful participation for outsider interests but may fail to deliver" thereby "merely confirm[ing] the status of outsider groups").

[41] *See* JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION––AND HOW TO ACHIEVE REAL REFORM 210 (2017) (proposing guidelines to constrain a prosecutor's power to overcharge).

those guidelines will just entrench harsh approaches that are in the interests of prosecutors because of the bargaining leverage it gives them.[42] For example, the New Jersey prosecution guidelines have not resulted in reduced incarceration. Instead, they have increased sentencing severity and racial disparities.[43] As Jeffrey Bellin notes, it is the virtually unreviewable power *not* to bring charges that gives prosecutors their greatest leverage because they can drop or reduce charges in exchange for defendants cooperating or pleading guilty to other charges.[44] So to the extent there is a push to regulate prosecutors, it is a push to regulate this power of leniency. Thus, any guideline will, almost by definition, curb that power and lead to harsher results.

Given the difficulties in getting more voices involved through notice-and-comment rulemaking, Stewart suggests at the end of *The Reformation of American Administrative Law* that "a solution to the problems raised by the transformation of administrative law into a system of interest representation might better be achieved by a more direct and explicitly political scheme for securing the representation of all relevant interests affected by administrative decisionmaking."[45] He thus considers the "popular election of agency members" as a possible solution.

While elections would require a drastic overhaul of how agency regulators are selected, this option already exists in criminal law in many instances. Prosecutors and sheriffs are elected positions in most places in the United States.[46] That is one reason we are seeing

[42] *See* Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L REV. 1010, 1013 (2005) ("[Consistent] rules for prosecutors might only give us more equal injustice for all, hamstringing prosecutors who might occasionally offer more favorable terms to some defendants."); *see also* Barkow *supra* note 31, at 912 ("[T]he problem with making prosecutorial decisions more transparent is that the politics of crime might push those guidelines in a decidedly antidefendant direction.").

[43] *See* Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 854 (2018).

[44] *See id*.

[45] Stewart, *supra* note 1, at 1790.

[46] *See* CAROL J. DEFRANCES, DEP'T OF JUST., BUREAU OF JUST. STAT., PROSECUTORS IN STATE COURTS, 2001, at 2 (2002), available at https://www.bjs.gov/content/pub/pdf/psc01.pdf (reporting that prosecutors are elected in all jurisdictions but Alaska, Connecticut, New Jersey, and the District of Columbia); Jessica Pishko, *The Power of Sheriffs: Explained*, APPEAL (Jan. 4,

such a dramatic shift in some prosecutors' offices in the country.[47] As voters in these communities are becoming aware of the power of their local prosecutor and dissatisfied with mass incarceration, racial bias, and the overall health and safety of their communities, they are seeking a new leadership model.

But there are limits to how much this model can accomplish. As Stewart observed in thinking about the possibility of elections of agency members, one issue is voter information:

> [D]irect popular election is predicated on some minimal understanding by most voters of how the choices presented relate to their interests. Given the specialized functions of many agencies and the special knowledge required for intelligent appraisal of agency policies, it is most doubtful whether these conditions would be satisfied in a system for popular election of agency members. There might instead be considerable voter apathy; many of those who did vote might be largely ignorant of issues and candidates.[48]

While one might think voters have a better understanding of issues related to criminal law because they are less complicated than, say, environmental policy, in fact voters have many misconceptions about what works to reduce crime. Many may assume that the toughest punishments are the best, ignoring how that approach hinders the ability of people to successfully reenter a community after a term of confinement. Many of the harsh sanctions and deprivations voters support undermine public safety.[49]

Moreover, elections do not necessary reflect all the interests in a community. In some communities, those concerned with the disproportionate effect of law enforcement on people of color do not make up a sufficient proportion of the electorate to sway the choices of their district attorneys. That may help explain why the progressive prosecutor movement is largely limited to cities with more diverse populations.[50]

With elections holding limited promise, another possible avenue for improving the consideration of various interests lies with

2019), https://theappeal.org/the-power-of-sheriffs-an-explainer/ (stating that sheriffs are elected in at least forty states).

47 *See* BARKOW, *supra* note 22, at 155.

48 Stewart, *supra* note 1, at 1792.

49 *See generally* BARKOW, *supra* note 22 (cataloguing many of these policies).

50 *See* Maybell Romero, *Rural Spaces, Communities of Color, and the 'Progressive' Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803 (2020).

institutional design. Just as Stewart considered different mechanisms for selecting agency officials in the civil regulatory context as a possible path for improving outcomes, policymakers should consider this issue in criminal law administration as well. The bodies that set policies for police departments, prosecutors' offices, corrections departments, and other arms of criminal justice administration need to be comprised of interests other than law enforcement and include people who work in criminal defense, formerly incarcerated people, experts in criminology and social work, and people from communities most impacted by crime. The experience of the most successful state sentencing commissions shows that the ones that work best are those with a diverse membership.[51] Similarly, more balanced policing policies emerge when developed by more independent police commissions led by non-police officers than by police departments themselves. For example, while the NYPD did not listen to comments seeking more accessibility to body camera footage, the more independent Los Angeles Board of Police Commissioners did.[52]

Agencies responsible for criminal justice administration are also likely to be more successful at pursuing the public's interest in safety, instead of catering to emotional political forces, when they have a mandate to take resource limitations and racially disparate outcomes into account.[53] As previously discussed, unlike most regulatory agencies, criminal justice agencies are not required to do any kind of cost-benefit analysis. Moreover, local prosecutors and police departments do not pay for the cost of imprisonment out of their budgets; prison are borne by the state budget.[54] The result is that local actors view imprisonment as a free resource and overuse it without thinking about more cost-effective means to achieve the same ends. Similarly, the law on selective enforcement and

[51] *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 802–04 (2005).

[52] *See* Frank Stoltze, *LAPD Will Make Body Camera Videos Public Under New Policy*, KPCC (Mar. 20, 2018), https://archive.kpcc.org/news/2018/03/20/81795/lapd-set-to-release-body-camera-videos-what-will-w/. The Los Angeles Board of Police Commissioners "is comprised of five civilians who donate their time to the City . . . [and] are appointed by the Mayor and confirmed by the City Council." *The Board of Police Commissioners*, OFF. OF THE INSPECTOR GEN. (last visited Feb. 14, 2021), https://www.oig.lacity.org/police-commission.

[53] *See* BARKOW, *supra* note 22, at 172–73, 180–83.

[54] *See id.* at 166–67.

prosecution makes a charge of discrimination almost impossible to bring, so these local actors tend not to pay sufficient attention to racial disparities in how they are administering their policies. But political overseers do care about costs and racial disparities because their constituents do. Requiring agencies to consider costs and prepare racial impact statements can thus help those policies become more attuned to those concerns.

Institutional design will only go so far, however. It is also necessary to have an outside check on agency behavior—something else Stewart emphasizes in *The Reformation of American Administrative Law*. Under the searching review that is one of the hallmarks of administrative law's reformation, agencies have to give adequate consideration to valid arguments raised by commenters in their proceedings.[55] Moreover, agencies have to explain why their decisions are justified based on the evidence.[56] For agencies pursuing crime reduction or safety goals, that means showing that a given practice or policy furthers those ends. In many cases, prosecutors and police departments might have a tough time justifying existing policies on that basis.[57] Moreover, if enforcement is arbitrary, that might be another ground for a successful challenge.[58]

In criminal law, judicial review is particularly vital because the politics around criminal law lead to dysfunctional outcomes that are costly, fail to promote public safety and often undermine it, and produce gross racial disparities.[59] More searching judicial review could act as a needed check against those political pressures, just as it

[55] *See* Stewart, *supra* note 1, at 1756–58.

[56] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43–44 (1983).

[57] *See, e,g*., Slobogin, *supra* note 25, at 141–42 (explaining why a drug testing regime would fail hard look review because there was virtually no evidence of its necessity).

[58] *See id.* at 145–46 (arguing that "hard look doctrine requires that, when carrying out panvasive searches and seizures, police agencies provide a rationale for any distinctions they make between places or groups of people" and therefore some practices might not survive such scrutiny). While more robust judicial review could be more effective at achieving certain ends, such as making sure that policies actually are reducing crime, judges are not equipped to weigh retributive ends versus utilitarian ones. As Stewart notes, this kind of judicial involvement goes beyond the role for the judiciary that "our traditions would readily countenance." Stewart, *supra* note 1, at 1789–90.

[59] *See generally* BARKOW, *supra* note 22 (providing numerous examples of dysfunctional policies that undermine public safety).

provides such a check when applied to administrative agencies. Judges could make sure policies are grounded in evidence and not arbitrarily selected to serve political whims. As Stewart observes in *The Reformation of American Administrative Law*, "[i]n many cases, the courts must exercise a check or it will not be exercised at all."[60] That is certainly true when it comes to criminal law.

The administration of criminal law has not yet seen the expansion of judicial review in the way administrative law did. Even in the case of criminal law agencies that look the most similar to civil regulatory agencies—such as sentencing commissions and corrections departments—judicial review falls far short. There is often great deference to these criminal agencies' decisions or no judicial review at all. For example, while the United States Sentencing Commission gives notice and receives comment on its proposed guidelines, there is no judicial review of its ultimate decisions.[61] Corrections agencies are likewise often exempt from state administrative procedure act requirements,[62] and when they do face judicial review, courts give a heightened standard of deference to their policies—the reverse of the hard look that was a hallmark of the reformation of administrative law.[63]

Criminal law could look much different if these agencies, not to mention others like prosecutors' offices, instead faced the kind of judicial review that other agencies face. If criminal law agencies had to explain the evidentiary basis for their policy calls and how they are consistent with public safety goals, many policies would be struck down. This reform would also help these agencies resist political pressures to take superficially tough actions when those pressures lack an empirical basis.[64]

Whatever the precise course should be for agencies that administer criminal law—whether greater public participation or accountability, institutional design changes, or robust judicial review—Stewart's legendary article offers a wise blueprint to follow. It shows the pitfalls of some roads already traveled and points the way to more promising avenues. Just like its author, it is as relevant and

60 Stewart, *supra* note 1, at 1808.

61 *See* BARKOW, *supra* note 22, at 178.

62 *See id.*

63 *See* Turner v. Safley, 482 U.S. 78, 81 (1987); Shay*, supra* note 30, at 333–34, 339–44.

64 *See* BARKOW, *supra* note 22, at 178–79.

insightful today as it was decades ago, and we are lucky to be able to continue learning from it.